IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,209



SPONCO MANUFACTURING, INC.,
a Kansas corporation,

Petitioner,

vs.

EDWARD ALCOVER and SUSAN ALCOVER, his wife; et al,

Respondents.
_____/

# ANSWER BRIEF OF RESPONDENTS ON JURISDICTION

G. William Bissett, Esq.
Hardy, Bissett & Lipton, P.A.
501 Northeast First Avenue
Miami, FL 33132
(305) 358-6200

Attorneys for Respondents

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## INTRODUCTION

Petitioner, Sponco Manufacturing, Inc. ("Sponco"), asks this Court to exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution[1] to review the decision of the District Court of Appeal, Third District, in Sponco Manufacturing, Inc. v. Alcover, 656 So.2d 629 (Fla. 3d DCA 1995). Sponco seeks to predicate "conflict jurisdiction" on the basis of the unfounded assertion that the district court "announced" a "new rule of law" which expressly and directly conflicts with the rule of law established by the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987). To support its jurisdictional argument, Sponco cavalierly, and in blatant disregard of the record, asserts that the Third District announced a "per se rule that destruction of evidence, even if inadvertent, carries a mandatory default sanction and no lesser sanction can be imposed." (Sponco's jurisdictional brief ["IB"] at i, 2-10).

By reviewing the Third District's decision and opinion, this Court will readily see what this case is all about - Sponco is displeased with the result reached by the district court and is simply seeking a prohibited second appeal in this Court. The determination reached by the district court was entirely appropriate under the applicable law and the facts, and no "express

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[1] Article V, Section 3(b)(3), as amended in 1980, provides that this Court "[m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Although Sponco additionally appears to seek review on the basis that this case "presents a question of great public importance," its alternative jurisdictional argument should be summarily rejected since the district court itself never certified this case as presenting a question of great public importance, an indispensable requirement under Article V, Section 3(b)(4). Indeed, prior to filing its notice invoking this Court's discretionary jurisdiction, Sponco never even presented a request to the district court asking it to certify this case as being one presenting a question of great public importance.

and direct conflict ... [of decisions] ... on the same question of law" has been demonstrated. To grant discretionary review on the basis of a party's mere disagreement with an appellate court's application of established law to a unique and essentially undisputed set of facts would only serve to open the flood gates to parties who desire a prohibited second appeal after an adverse result in the district courts.

## STATEMENT OF THE CASE AND FACTS

The "facts" upon which this Court must predicate its initial jurisdictional determination are those set forth in the district court's opinion - Sponco Manufacturing, Inc. v. Alcover, 656 So.2d 629 (Fla. 3d DCA 1995). Those facts are as follows:

> In September 1990, Edward Alcover, an employee of Claude Neon Signs, was using an aerial ladder attached to a truck to install an overhead sign. While the ladder was in an extended position, a cable wire snapped and Alcover was thrown and injured. Alcover sued Sponco Manufacturing Inc., which in 1980 had manufactured the wire. As to Sponco, Alcover alleged that the company defectively or negligently designed, manufactured, assembled, or produced the ladder. Thereafter, Alcover was notified that Sponco had possession of the ladder. As the time of trial approached, when Alcover requested an inspection of the ladder, it was discovered that the ladder had been discarded. Thereafter, on Alcover's motion, a default on the issue of liability was entered against Sponco. We affirm.
>
> * * *
>
> A determination of willful destruction was not imperative where the testimony of plaintiff's expert convinced the trial court that, in the absence of the crucial evidence, the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies. Having proved his inability to proceed, Alcover's motion was properly granted and Sponco was held accountable for the ramifications of its actions. Here, Alcover's ability to establish his civil suit was cut off by Sponco's destruction of the evidence. [656 So.2d at 630] (all emphasis supplied by counsel unless noted otherwise).



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In addition to presenting the Court with these, the controlling operative facts, we feel compelled to register our vigorous disagreement with the following improper and unsupported factual assertions which are repeated in several places in Sponco's brief: (1) that the plaintiffs were themselves partially to blame for the loss of the ladder due to their delay in requesting an inspection of it (brief at 1, 4, and 7); (2) that it was "undisputed" that the ladder and cable had been "inadvertently" disposed of during a routine inventory at Sponco's stockyard (Id. at 1, 3, and 7); and (3) that "there are alternative methods of proof available to the Plaintiff." (Id. at 4). We have characterized these factual assertions as being "improper", since they are in no way supported by the facts recited in the district court's opinion. See, Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988) (conflict must be established from facts stated within four corners of opinion itself; reference to record proper or materials in appendix is not proper); Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) (same). Moreover, the factual assertions are "unfounded", having never been supported by any competent proof offered by Sponco at any stage of the proceedings below.

## SUMMARY OF ARGUMENT

Apparently recognizing that the actual decision and opinion it has brought up for review does not expressly and directly conflict with any decision of this Court or of another district court of appeal, Sponco has adopted a strategy under which it blatantly mischaracterizes the nature of the decision of the court below and then asserts that the fictional decision it has created establishes a basis for this Court to exercise its discretionary "conflict" jurisdiction. This Court should not allow itself to be fooled by Sponco's strategy.

Contrary to Sponco's assertion, the Third District did not "announce" a new "per se rule



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that destruction of evidence carries a mandatory default sanction and no lesser sanction can be imposed." Instead, the Third District simply stated the existing, established rules applicable to factual situations such as the one presented, and then it appropriately applied those established principles of law to the undisputed facts. The rules of law applied by the Third District were not stated to be inflexible, per se rules. By their very nature, the rules discussed by the Third District in its opinion represent a flexible, balancing approach:

> What sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice. [cits.]
>
> Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence. ...[T]he testimony of plaintiff's expert convinced the trial court that, in the absence of the crucial evidence, the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies. Having proved his inability to proceed, Alcover's motion was properly granted and Sponco was held accountable for the ramifications of its actions. Here, Alcover's ability to establish his civil suit was cut off by Sponco's destruction of the evidence. [656 So.2d at 631].

It is clear that the decision brought up for review and the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) are not in "direct" conflict - the decisions are not "based practically on the same state of facts and announce antagonistic conclusions." The decision in Tubero arose in the context of a party's failure to provide certain unspecified discovery in response to the adverse party's interrogatories and request for production. The case was not concerned with the extent, if any, to which the failure to provide discovery actually prejudiced the party seeking the discovery.

In contrast, as the Third District correctly recognized, "this is a case of spoliation of



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evidence rather than dilatory discovery production." Sponco, 656 So.2d at 630. Unlike here, Tubero did not involve a situation where a party's "ability to establish his civil suit was cut off by ... destruction of evidence." For the same reason the Valcin case, although somewhat closer factually than Tubero, is nonetheless readily distinguishable, since it only involved a situation where the "absence of surgical operative notes impair[ed] the plaintiff's ability to establish his case." Valcin, 507 So.2d at 596. In clear contrast, it was affirmatively demonstrated in the instant case that "in the absence of the crucial evidence [destroyed by Sponco], the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies." Sponco, 656 So.2d at 631. Plaintiff's ability to proceed with his suit was "cut off by Sponco's destruction of the evidence." Id.

Once this Court discerns Sponco's mischaracterization of the decisions it discusses in its brief, it will be readily seen that Sponco is attempting to obtain discretionary conflict review by comparing apples with oranges. The limited discretionary jurisdiction granted to this Court by Florida's Constitution was never intended to encompass such situations.

## ARGUMENT

**THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN EITHER Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990), or Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) ON THE SAME QUESTION OF LAW, NOR DOES THE DECISION PASS UPON A QUESTION CERTIFIED BY THE DISTRICT COURT TO BE OF GREAT PUBLIC IMPORTANCE**

### (A) Applicable Jurisdictional Principles

Before discussing the two decisions upon which Sponco primarily relies to support its claim of "conflict jurisdiction," a short recap of the principles this Court has established to



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govern that limited jurisdiction is in order. First and foremost is the principle that jurisdiction based upon a purported conflict of decisions is, under our constitution, an extremely limited grant of jurisdiction. It is a grant of discretionary jurisdiction which must be sparingly exercised with strict regard for its singular, underlying purpose: the maintenance of uniformity in the decisions of the appellate courts of Florida on a specific point of law.

A restricted view of the "conflict jurisdiction" conferred upon this Court by Article V of the Florida Constitution is essential to maintaining the basic concept under our constitution that the district courts of appeal are courts of final appellate jurisdiction in the vast majority of cases. See, Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Lake v. Lake, 103 So.2d 639 (Fla. 1958); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Secondly, an extremely conservative approach to determinations regarding the existence of a "conflict of decisions" is imperative, since the district courts of appeal in this State were never intended to be intermediate appellate courts, "merely intermediate resting places along an arduous and expensive pathway in the appellate process." Karlin v. City of Miami Beach, 113 So.2d 551, 553 (Fla. 1959); Lake v. Lake, 103 So.2d at 642.

The limited jurisdiction conferred upon this Court by the existence of a "direct and express" conflict of decisions has as its purpose the stabilizing of the law by correcting "real, live and vital" conflicts in the case law "by a review of decisions which form patently irreconcilable precedents." See, Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Ansin v. Thurston, supra. Accordingly, the critical inquiry is whether the decision under review, if left to stand as legal precedent, will cause confusion in the body of law in this State. N. & L. Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960).



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Finally, by passing the 1980 amendment to Article V, the citizens of this State have charged this Court with the responsibility of finding the existence of an "express and direct" conflict of decisions as an indispensable predicate to the exercise of its discretionary review jurisdiction.[2] Since the 1980 amendment to Article V, "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority opinion." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). A "direct" conflict only exists in those limited circumstances where "the **decisions** [are] based practically on the **same state of facts** and **announce antagonistic conclusions**." Ansin v. Thurston, 101 So.2d at 811. Similarly, a conflict which is only "inherent" in or "implied" from the decision and opinion at issue is no longer sufficient. Department of Health and Rehabilitative Services v. National Adoption Counselling Services, Inc., 498 So.2d 888 (Fla. 1986).

If these controlling principles are applied, then it becomes readily apparent that there exists no "express and direct conflict" between the Third District's decision and any of the decisions cited by Sponco. Purely and simply, the instant decision and the various decisions cited by Sponco do not "expressly" reach "antagonistic conclusions" on "the same question of

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[2] This Court recently discussed the significance of the 1980 amendment to article V in Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988):

> . . . [A]rticle V, section 3(b)(3) creates and defines two separate concepts. The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida. While our subject-matter jurisdiction in conflict cases necessarily is very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded. (All emphasis supplied unless noted otherwise).

law."

**(B) The District Court Did Not "Announce" A New "Per Se Rule That Destruction Of Evidence Carries A Mandatory Default Sanction And No Lesser Sanction Can Be Imposed."**

Apparently recognizing that the actual decision and opinion it has brought up for review does not expressly and directly conflict with any decision of this Court or of another district court of appeal, Sponco has adopted a strategy under which it blatantly mischaracterizes the nature of the decision of the court below and then asserts that the fictional decision it has created establishes a basis for this Court to exercise its discretionary "conflict" jurisdiction. This Court should not allow itself to be fooled by Sponco's strategy.

Contrary to Sponco's assertion, the Third District did not "announce" a new "per se rule that destruction of evidence carries a mandatory default sanction and no lesser sanction can be imposed." Instead, the Third District simply stated the existing, established rules applicable to factual situations such as the one presented, and then it appropriately applied those established principles of law to the undisputed facts. The rules of law applied by the Third District were not stated to be inflexible, per se rules. By their very nature, the rules discussed by the Third District in its opinion represent a flexible, balancing approach:

> What sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice. [cits.]
>
> Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence. [cits.] As this is a case of spoliation of evidence rather than dilatory discovery production, we find those cases relied on by [Sponco] unpersuasive. A determination of willful destruction was not imperative where the testimony of plaintiff's expert convinced the trial court that, in the absence of the crucial evidence, the plaintiff was no longer able to proceed



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against Sponco or either of the other two defendant companies. Having proved his inability to proceed, Alcover's motion was properly granted and Sponco was held accountable for the ramifications of its actions. Here, Alcover's ability to establish his civil suit was cut off by Sponco's destruction of the evidence. [656 So.2d at 631].

**(C) The Third District's Decision Does Not Create A Patently Irreconcilable Conflict With Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) And Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) On The Same Question Of Law.**

It is clear that the decision brought up for review and the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) are not in "direct" conflict - the decisions are not "based practically on the same state of facts and announce antagonistic conclusions." Ansin v. Thurston, 101 So.2d at 811. The decision in Tubero arose in the context of a party's failure to provide certain unspecified discovery in response to the adverse party's interrogatories and request for production. The case was not concerned with the extent, if any, to which the failure to provide discovery actually prejudiced the party seeking the discovery. The case was only concerned with discovery sanctions and the narrow legal issue of whether "an express written finding of willful or deliberate refusal to comply with discovery under Florida Rule of Civil Procedure 1.380 [is] necessary to sustain the severe sanctions of dismissal or default against a noncomplying plaintiff or defendant." 569 So.2d at 1271.

In contrast, as the Third District correctly recognized, "this is a case of spoliation of evidence rather than dilatory discovery production." Sponco, 656 So.2d at 630. Unlike here, Tubero did not involve a situation where a party's "ability to establish his civil suit was cut off by ... destruction of evidence." Although somewhat closer factually than Tubero, the Valcin

case is nonetheless readily distinguishable, since it only involved a situation where the "absence of surgical operative notes impair[ed] the plaintiff's ability to establish his case." Valcin, 507 So.2d at 596. In clear contrast, it was affirmatively demonstrated in the instant case that "in the absence of the crucial evidence [destroyed by Sponco], the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies." Sponco, 656 So.2d at 631.

Purely and simply, Sponco is attempting to obtain discretionary conflict review in this Court by comparing apples with oranges. The limited discretionary jurisdiction granted to this Court by Florida's Constitution was never intended to encompass such situations.

## CONCLUSION

The decision reached by the district court in this case does not expressly and directly conflict with any other decision on the same question of law. The instant decision was reached after application of the appropriate principles of law and is entirely correct under the facts presented. The Third District did not depart from established principles of law and justice in concluding that the trial court properly held Sponco "accountable for the ramifications of its actions." Sponco should not be allowed a prohibited second appeal, and therefore its request for discretionary review in this Court should be denied.

HARDY, BISSETT & LIPTON, P.A.
Attorneys for Respondents
Edward Alcover and Susan Alcover
P.O. Box 9700
Miami, Florida 33101-9700
(305) 358-6200

By: for G. William Bissett
Florida Bar No. 297127

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Richard A. Sherman, Esq., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, FL 33316; Gordon J. Evans, Esq., Ligman, Martin & Evans, 230 Catalonia Avenue, Coral Gables, Florida 33134; Donald Edward Mason, Esq., Sparkman, Robb, Nelson & Mason, P.A., 19 West Flagler Street, Suite 1003, Miami, FL 33130; Thomas W. Risavy, Esq., 6101 S.W. 76 Street, South Miami, Florida 33143; Alan R. Hochman, Esq., 7101 S.W. 102nd Avenue, Miami, FL 33173; and Lauri Waldman Ross, Esq., Maland & Ross, Two Datran Center, 9130 South Dadeland Blvd., #1209, Miami, FL 33156 this 29th day of August, 1995.

for G. William Bissett



HARDY, BISSETT & LIPTON, P.A. • MAILING ADDRESS, P.O. BOX 9700, MIAMI, FLORIDA 33101-9700
501 NORTHEAST FIRST AVENUE, MIAMI, FLORIDA 33132-1998 • MIAMI (305) 358-6200 • BROWARD (305) 462-6377