OA 4-1-96

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,209

Florida Bar No. 184170

SPONCO MANUFACTURING, INC., a Kansas corporation,

Petitioner,

vs.

EDWARD ALCOVER and SUSAN ALCOVER, his wife; HYDRAULIC MAINTENANCE, INC., a Florida corporation; and FLORIDA WIRE AND RIGGING, INC., a Florida corporation,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS

SPONCO MANUFACTURING, INC.,
A Kansas corporation

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TABLE OF CITATIONS

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REPLY ARGUMENT

The Plaintiff, a neon sign electrician, was installing a sign, when the wire broke on a hydraulic ladder and it partially retracted, injuring the Plaintiff. The Plaintiff still refuses to acknowledge that the ladder and rope were held by Sponco in its yard in Kansas for three years, during which time the Plaintiff made absolutely no attempt to inspect the ladder or preserve it in any manner. In fact, the Plaintiff did not even hire an expert until January of 1994. In March of 1994, two years after defense counsel notified the Plaintiff with the location of the ladder, three years after suit was filed, and almost four years after the accident, the Plaintiff made his first attempt to examine it. At that time, it was discovered that the ladder had been inadvertently discarded, during a routine yard inventory in June of 1993. As the first and only sanction a Default was entered against Sponco, without any finding of willful disobedience, bad faith, etc. The Default and its affirmance by the Third District are in direct conflict with Florida law and the Opinion below must be quashed and the Default reversed.

It is interesting that the Plaintiff is now arguing that the Third District does not have a per se default rule on lost evidence, when that is exactly what he argued and won on below. In his Motion for Default, Alcover never asserted that the ladder was intentionally or willfully destroyed (A 14-25). Rather, he stated it was disposed of by mistake which was undisputed and he

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argued the following:

> Based upon the authority of the Rockwell and DePuy decisions, this Court should strike the defendant Sponco's pleadings, enter a default against it on liability, and prohibit it from relying upon the affirmative defenses of comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under § 768.81(3), Florida Statutes. The record in this case affirmatively demonstrates: (1) that the aerial ladder and cable which are the focus of this litigation were in the actual possession of defendant Sponco for an extended period of time both before and after the commencement of this litigation; (2) that the defendant Sponco or its agents or employees were responsible for the loss or destruction of the aerial ladder and cable, which occurred at a point in time when Sponco was in possession of them and after suit had been filed; and (3) that due to the loss of the ladder and cable, plaintiffs are simply without the ability to proceed with the discovery necessary to present the legally required expert opinion testimony supporting their allegations of design, manufacturing, and informational defects in the ladder or cable, their allegations of causation, or their allegations of negligence in the pre-accident repairs performed on the ladder. Moreover, due to the loss of the ladder and cable, plaintiffs are unable to prepare an appropriate response to counter the defendant Sponco's assertions of comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes.
>
> (A 22-23).

On appeal, he tried to argue that the ladder was intentionally destroyed, to get around this Court's law that there has to be a finding by the judge of a willful and deliberate refusal to obey a court order, or bad faith before a

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default can be entered. Commonwealth Federal Savings and Loan Association v. Tubero, 569 So. 2d 1271 (Fla. 1990) and Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987). The Third District while paying lip service to these principles used for sanctions and defaults, stuck to its per se rule of entering a default, regardless of whether the evidence was inadvertently destroyed or not. It refused to even address the possibility of rebuttable presumptions as a lesser sanction, even though it also refused to find that the ladder was intentionally destroyed. There is direct and express conflict in the per se rule argued successfully by Alcover and used by the Appellate Court.

In direct violation of Florida Supreme Court law, the trial judge in this case entered a blanket Order holding that the Defendant had an absolute duty to preserve the ladder; and the inadvertent disposal of it mandated a Default against Sponco. The judge did not find any willful or deliberate refusal to obey a court order, which are the prerequisites before entering a default as a discovery sanction. It was undisputed that the disposal of the ladder was totally inadvertent and accidental, and there was no court order requiring preservation of the ladder. The Plaintiff did virtually nothing to either inspect the ladder or preserve it for nearly four years after the accident. Under totally established Florida law, the Default must be reversed and if a sanction is to be imposed, a lesser sanction such as a rebuttable presumption of negligence would be

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appropriate, as properly suggested by defense counsel below. The trial court had the ability and duty to fashion a lesser sanction than Default.

If the Plaintiff was able to file suit without anyone examining the ladder to see if it was defective, and was able to litigate the case for three years contending the ladder was defective, without having anyone examine it to see if it was defective, it is difficult to see how the Plaintiff can say he was prejudiced because it was discarded four years after the accident, much less so prejudiced that a Default had to be entered.

This Court has mandated to lower courts the rule that when a default is to be entered, for failure to comply with a court order to compel discovery, or failure to comply with discovery requirements, the order **must** contain an explicit finding of willful noncompliance. In Sponco, the Third District announced a new rule of law that is in direct conflict; as it adopts a per se rule that the severest sanction of default must be entered, as the first and only sanction, without a showing and finding of willful noncompliance, if the Plaintiff says he cannot go forward. Sponco Manufacturing, Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995).

The Third District held the Default was required because this was a spoilation of evidence case and not a delayed discovery matter. This is a distinction without difference. The bottom line is that there was no willful or intentional acts

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involved, and neither the trial court nor the Appellate Court found any. No new law has to be created, as even the federal cases the Plaintiff relies on do not allow a default under these circumstances, let alone require one.

Sponco cannot be squared with this Court's decisions. This Court must resolve the conflict; affirm the law as stated in Commonwealth and Valcin; and reverse the Default against Sponco.

In order to distract this Court from the fact that the Plaintiff did not even make his first attempt to examine the rope and ladder at issue until almost four years after the accident, three years after he had filed suit, and two years after defense counsel notified Plaintiff of the location of the ladder, the Plaintiff continues to rely on red herrings. The first one was his claim below that there are no "sworn" facts in the Record to support reversal. In this Court, he recasts this same argument as a lack of "competent" evidence. As the Plaintiff is well aware, the facts relied on by Sponco in its Memorandum in Response to the Plaintiff's Motion for Default and restated to the trial court at the hearing, were based on its sworn Answers to Interrogatories filed by Sponco to the Plaintiff's inquiries about the inadvertent disposal of the ladder and rope. The Plaintiff continues to either forget or still has chosen to overlook this. He made no claim below that these facts were untrue; rather he restated in his Motion that the ladder was disposed of by mistake, accepted this and raised no challenge to it.

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Alcover repeatedly told the trial judge below that it made absolutely no difference in the Third District whether Sponco had inadvertently or intentionally destroyed the ladder and rope. Rather, he argued to the trial court that Sponco had an absolute duty to preserve the ladder and rope, even in the absence of any court order to do so, and that in the Third District it was completely irrelevant whether the evidence was negligently or intentionally destroyed, the only appropriate sanction in the District was a default. This is the exact per se rule Sponco vigorously and continually objected to. At no point did Alcover ever challenge the fact that the ladder and the rope were inadvertently disposed of, nor did he challenge any of the sworn Answers to Interrogatories. At best, Alcover waived any argument that the ladder was not inadvertently disposed of at the time of inventory at Sponco, or there was a lack of competent evidence of inadvertent disposal. Again, this was and is just another red herring to lead this Court away from the fact that Alcover had four years to inspect the ladder and rope after the accident, had three years to inspect the ladder and rope after the Plaintiff filed his Complaint, and had two years after the Plaintiff was on notice that Sponco was holding the ladder, but the Plaintiff did absolutely nothing.

The next red herring below and in this Court is Alcover's assertion that the legal theories, like rebuttable presumptions and cases raised on appeal were never raised below. Alcover continues to object to the fact that this appeal and the review

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of the judge's Order should be controlled by this Court's case of Commonwealth, supra. To begin with all the legal issues were properly raised in the trial Memorandum and argued to the trial court; specifically including the fact that a default was too severe a sanction; that a proper sanction would be a rebuttable presumption; that there was no prejudice to the Plaintiff; that a default is a remedy of last resort used in cases far more severe than this one; that there were photographs sent to the Plaintiff which verified the fact that the ladder was in the possession of Sponco until at least June of 1993, three years after the accident, during which time the Plaintiff did absolutely nothing whatsoever to examine the ladder, and that any delay and prejudice were attributable to the Plaintiff (A 44-52).

Furthermore, the theory for which Commonwealth was cited on appeal below, was not triggered until the trial court signed the Order drafted by the Plaintiff, entering the Default, which Order contained no finding of any willful or overt refusal to obey a court order, which is necessary to sustain a default against a non-complying party. While there is no question that the trial court has discretion to impose sanctions for failure to comply with the discovery requirements, it is this very broad discretion of the court to impose the severe sanction such as default, that requires the concomitant duty that the default order contain an explicit finding of willful noncompliance to be valid. Commonwealth, 1273. Because this principle is so well settled, Alcover attempted to avoid it, by simply telling the Third

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District that this law should not be considered and by telling this Court that the case is distinguishable and no conflict exists. Commonwealth is directly on point, provides the standard to be used by this Court in reviewing the Order entered by the trial court and mandates reversal.

In direct violation of this Florida Supreme Court law, the trial judge in this case entered a blanket Order holding that the Defendant had an absolute duty to preserve the ladder; and the inadvertent disposal of it mandated a Default against Sponco. The judge did **not** find any willful or deliberate refusal to obey a court order, which is a prerequisite to entering a default as a discovery sanction. It was undisputed that the disposal of the ladder was totally inadvertent and accidental, and there was no court order requiring preservation of the ladder. The Plaintiff did virtually nothing to either inspect the ladder or preserve it for nearly four years after the accident. The Plaintiff's objection below was not that the ladder and rope were not inadvertently disposed of, but only that the Defendant's factual attentions were not "sworn" to. However, the sworn Answers to Interrogatories were in the Record, and the Plaintiff even appendixed some of them to his Brief. There is no dispute that the photographs taken in 1993, which were given to the Plaintiff's expert, established that Sponco maintained the ladder and the rope for at least three years after the accident. What was not supported by any facts in the Record was Sponco's accusation in the Third District that the ladder and rope were

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intentionally destroyed because they proved the Plaintiff's case and even the Third District did not accept this.

Under totally established Florida law, the Default must be reversed and if a sanction is to be imposed, a lessor sanction such as a rebuttable presumption of negligence would be appropriate, as properly suggested by defense counsel below. The trial court had the ability and duty to fashion a lessor sanction than Default. The court's blanket imposition of liability on Sponco, for inadvertently disposing of the ladder, is contrary to established Supreme Court law and constituted a gross abuse of judicial discretion. The Default on liability must be reversed and the trial allowed to proceed on the merits.

The Per Se Rule in the Third District is that the loss for destruction of evidence, inadvertent or not, requires a default to be entered if the Plaintiff says he cannot go forward without it. There is no balancing test in the Third District and Alcover cannot explain how this rule can be enforced, without the express finding of willfulness or bad faith. Rather, he says that the finding of bad faith and willful disobedience rule only applies to dilatory discovery and not spoilation of evidence, parroting the opinion in Sponco. However, even federal law cited by Alcover requires such an express finding in spoilation cases.

The Default entered and approved by the Third District was clearly erroneous, as both Florida and federal case law require a finding by the trial court that the Defendant acted intentionally and in bad faith and willfully destroyed evidence to prevent the

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other side from using it in the lawsuit. This is the first prong of a three part test for the imposition of a default in both federal and Florida law. This prong cannot be met, where there was absolutely no evidence whatsoever that the loss of the ladder by Sponco was anything other than inadvertent. Where there <u>are</u> other available sanctions, such as the imposition of fees and costs, or the use of a rebuttable presumption or shifting the burden of proof, the use of a Default as the first and only sanction was in clear violation of established Florida law, and the Opinion below must be quashed.

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CONCLUSION

The trial court erred as a matter of law in entering a Default in the absence of any evidence that the Defendant acted intentionally and with willful flagrant disregard of a court order, and the Default must be reversed.

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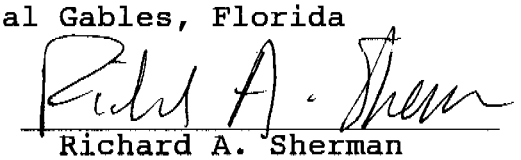
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of March, 1996 to:

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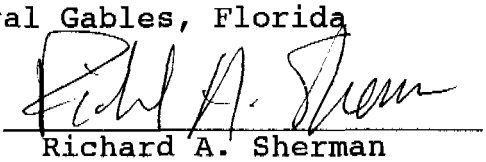
By: 
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