

STATE OF WISCONSIN
IN SUPREME COURT

No. 2007AP3003

American Family Mutual Insurance Company,

Plaintiff-Appellant,

David Ronaldson,

Involuntary Plaintiff,

v.

David Golke, Joseph Golke, Charles Golke, Golke Brothers
Roofing and Siding, LLC and Indiana Insurance Company,

Defendants-Respondents,

Ellington Mutual Insurance Company,

Intervenor-Defendant.

**NON-PARTY BRIEF OF NATIONAL ASSOCIATION OF
SUBROGATION PROFESSIONALS**

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INTRODUCTION

The National Association of Subrogation Professionals (“NASP”) by its attorneys, Matthiesen, Wickert & Lehrer, S.C., submit this non-party brief, pursuant to Wis. Stat. § (Rule) 809.19(7) and this Court’s October 1, 2008 Order.

The facts are straightforward following a spoliation trial. On February 12, 2000, a fire destroyed a home owned by David Ronaldson. As a result of the fire, his property insurer, American Family Mutual Insurance Company (“American Family”), incurred at least \$165,000.00 in costs to rebuild the home. However, prior to rebuilding, American Family retained two cause and origin experts to investigate the loss, who documented their inspection with photographs. The experts were able to determine that the fire was caused by faulty roofing work of Golke Brothers Roofing and Siding, LLC (“Golke Brothers”). American Family provided actual notice of the loss to Golke Brothers and its insurer, Indiana Insurance Company, and afforded each the opportunity to inspect the scene. Neither Indiana Insurance nor Golke Brothers objected or otherwise sought an opportunity to inspect the site before it was razed. American Family then filed a subrogation lawsuit against Indiana Insurance and Golke Brothers alleging that their negligence was the cause of the fire. However, the trial court dismissed the action as a spoliation sanction after finding that American Family should have preserved more evidence from the fire scene. This appeal followed.

The Court of Appeals certified the case to this Court to answer two questions: (1) under what circumstances may evidence crucial to a potential legal claim be destroyed; and (2) what notice must be given to a civil litigant before evidence is destroyed?

Amicus asks this Court to hold that when potentially responsible parties are put on notice and given an opportunity to inspect a loss, yet fail to do so, that party cannot pursue a defense of spoliation. Such a rule is supported not only by existing Wisconsin and foreign case law but also by sound public policy that provides incentive for all parties to investigate losses when notice

is received.

ARGUMENT

I. Wisconsin Law Requires a Finding of Egregious Conduct Before Spoliation Sanctions Can Be Imposed.

Spoliation refers to the destruction of evidence for the purpose of depriving the opposition of its use. The effect of spoliation is to undermine the “judicial system’s truth-seeking function,” and thus, courts have fashioned remedies to deter parties from destroying evidence. Insurance Co. of North American v. Cease Elec. Inc., 2004 WI App 15, ¶16, 269 Wis.2d 286, 674 N.W.2d 886. However, “[n]ot all destruction, alteration, or loss of evidence qualifies as spoliation.” Id. at ¶15.

Although Wisconsin law allows for dismissal as a spoliation sanction, it is a drastic remedy that is rarely granted. Garfoot v. Firemans Fund Ins. Co., 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App.1999). Not surprisingly then, there are no Wisconsin cases that hold that the sanction of dismissal is permissible absent egregious conduct or bad faith.

In Milwaukee Constructors II v. MMSD, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993), the Court of Appeals confronted a spoliation claim involving the destruction of relevant documents by a plaintiff without notice to the defendant. In reversing, the court concluded that the defendants had failed to present evidence that the plaintiff “had acted to affect the outcome of the litigation, in knowing disregard of the judicial process”. Id. at p. 534. Therefore, the Court concluded as a matter of law that although the plaintiff’s conduct was “volitional and negligent, [it did] not rise to the level of egregiousness that warrants dismissal of the lawsuit”. Id. 535. As such, Milw. Constructors demonstrates that sanctions for spoliation are only permitted upon a showing of intentional and egregious conduct with the intent to flagrantly, and knowingly disregard the judicial process.

The case of Sentry Ins. v. Royal Ins. Co. of America, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995), is also instructive as it was the primary basis for the trial court's decision. In Sentry, the Court of Appeals addressed the issue of a dismissal sanction in the context of the intentional destruction of evidence involving a product liability claim. The property damage resulted from a fire which was allegedly caused by a defective refrigerator. Sentry Insurance, the subrogated plaintiff, hired a cause and origin expert who intentionally performed *ex parte* destructive testing and removal of a number of parts from the refrigerator, making it impossible for the defendant to determine the cause and origin of the fire, and further, to defend the case. Ultimately, the refrigerator was disposed of in a landfill. Although the Court of Appeals upheld the trial court, it did so only after noting that, "the trial court found as a fact that the removal of the component parts was an intentional act that deprived Royal of the opportunity to conduct tests essential to its adequate defense of the claim made against it." Id. at page 918. As such, the court concluded it was "not dealing with negligent conduct, but what the [trial] court found to be intentional conduct, at least as to the removal of the wiring and the component parts". Id. at 918.

The Court of Appeals had the opportunity to further clarify the holdings in Milw. Constructors and Sentry in the case of Garfoot v. Firemans Fund Ins. Co., 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App.1999). In Garfoot, the Court of Appeals unequivocally held that dismissal as a sanction for the destruction of evidence "requires the finding of egregious conduct, which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." Garfoot, 228 Wis. 2d at 724.

Since Garfoot the "egregious" standard has been consistently affirmed by the Court of Appeals. See Estate of Neumann v. Neumann, 2001 WI App. 61 ¶¶83-84, 242 Wis. 2d 205, 626 N.W.2d 821; City of Stoughton v. Thomasson Lumber Co., 2004 WI App 6, ¶¶38 269 Wis.2d 339, 675 N.W.2d 487 ("a sanction for destruction of evidence requires a finding of egregious conduct, which means a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process"); and Morrison v. Rankin, 2007 WI 186 ¶19, 305 Wis. 2d 240, 738 N.W.2d 588 (Because

dismissal is such a harsh sanction, however, the Supreme Court has held that dismissal is proper only when the plaintiff has acted egregiously or in bad faith.”)

In this case, the trial court sanctioned American Family by dismissing its action without making the requisite finding of egregious conduct or bad faith. The trial court merely suggested that American Family could have done more to preserve the evidence than it did. Relying upon an erroneous reading of Sentry, the trial court rejected the “egregious” standard set forth by the Court of Appeals in Garfoot and its progeny.

II. Under What Circumstances May Evidence Crucial to a Potential Legal Claim Be Destroyed.

Amicus maintains that this case can be decided within the framework of existing Wisconsin law by simply allowing a party to rebut the allegation of egregious conduct with a showing that it provided its opponent with written or actual notice and a reasonable opportunity to inspect the loss. While the reported cases in Wisconsin do not squarely address a situation where the alleged spoliation victim was given notice and opportunity to inspect the scene, both legal scholars and foreign authority agree that a claim for spoliation is undermined by a victim’s receipt of notice and opportunity to inspect the evidence.

For example, Arnold Anderson, a leading Wisconsin authority on insurance law, recommends in his treatise that “[a]ll potential defendants that can be identified and located must be given notice of a potential subrogation claim before the site is destroyed.” Anderson, Wisconsin Insurance Law §10.96, p.67 (Fifth Ed. 2004).

Additionally, a set of Illinois legal scholars advise that if notice is provided to all potentially responsible parties the plaintiff is relieved from its burden to indefinitely preserve such evidence. Spoliation of Evidence: Responding To Fire Scene Destruction, 93 Illinois Bar Journal 358 (July, 2005). They suggest:

Once potential defendants are given a reasonable opportunity to inspect evidence, it becomes the defendant's responsibility to inspect the evidence before it is destroyed or altered rather than the plaintiff's responsibility to preserve the evidence indefinitely.

Id. at p.5; Accord Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?, 27 William Mitchell Law Review 687, 704 (2000) (The doctrine of laches applies to a party who "had a reasonable opportunity to independently examine such evidence before it was lost or destroyed").

Even leading defense lawyers agree that the plaintiff discharges its burden once notice and an opportunity to inspect is provided. Touchstone For Insurers Pursuing Subrogation: Save The Evidence, 70 Defense Counsel Journal 365 (July, 2003). The article states in relevant part:

As long as potentially responsible parties are put on notice and given an opportunity to inspect, they cannot effectively pursue a claim that they were prejudiced. In analyzing whether to impose sanctions following the destruction of evidence, courts will look at the efforts taken by the defendant in attempting to investigate the claim. If it is determined that the defendant did not make a reasonable effort, sanctions will not be imposed against the plaintiff.

Id. at p.6.

The proposition that notice and opportunity to inspect discharges a party's burden to preserve evidence can also be found in a Wisconsin federal case. Cooper v. United Vaccines, Inc., 117 F.Supp.2d 864 (E.D.Wis.2000) involved a products liability claim over allegedly defective animal vaccine. The defendant, UVI, a vaccine manufacturer, alleged spoliation after the plaintiff's expert conducted destructive *ex parte* testing on the single

remaining vaccine sample. Id. at 874. Upon finding that the plaintiff's expert's conduct was egregious, District Judge Rudolph Randa imposed a sanction of dismissal. However, Judge Randa observed that the plaintiff could have avoided such a harsh outcome if only the plaintiff had "informed UVI of its intention to engage in destructive testing, so that UVI could either participate in those tests or conduct its own". Id. at 875.

Other federal courts have reached identical conclusions. See Howell v. Maytag, 168 F.R.D. 502, 506 (M.D.Pa. 1996) ("plaintiffs could reasonably have given Maytag notice of the potential claim, and provided it with an opportunity to conduct an independent investigation before the demolition of the fire scene."); Lafayette Ins. Co. v. CMA Dishmachines, 2005 WL 1038495, *4 (E.D.La. 2005) (Notice by a subrogated insurer "is inconsistent with an attempt to destroy evidence and rebuts defendants' assertion that Lafayette acted in bad faith".); Thiele v. Oddy's Auto and Marine, Inc., 906 F.Supp. 158, 162 (W.D.N.Y. 1995) ("In none of the cases where spoliation sanctions were imposed did the defendant have the opportunity that [the defendant] had to inspect the evidence at the same time it was inspected by the plaintiffs."); and Baliotis v. McNeil, 870 F.Supp. 1285 (M.D.Pa. 1994) ("Requiring an insurer or property owner to maintain the scene of a fire until all potential defendants have been notified and afforded an opportunity to conduct independent inspections would, at minimum, be inefficient and wasteful.")

Based on the foregoing, this Court should hold that upon written or actual notice and reasonable opportunity to inspect a fire scene, a party's obligation to maintain all relevant evidence dissipates. Once notified, an opposing party has a duty to investigate a claim, and any party failing to exercise that duty cannot maintain a complaint that evidence was not preserved to its liking. American Family's actions of providing actual notice and a reasonable opportunity to inspect the fire scene lead to the conclusions: (1) that it acted in good faith; and (2) that the subsequent destruction of the fire scene was not "a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." Garfoot, 228 Wis. 2d at 724.

III. What Factors Should a Court Consider in Evaluating Whether the Party's Conduct Constitutes a Flagrant and Knowing Disregard of the Judicial Process?

Should this Court decide to go beyond the existing framework of Wisconsin spoliation law, it should be able to weigh all the relevant factors on a case-by-case basis to determine whether spoliation has occurred and the appropriate remedy, if any. Other courts consider a variety of factors to determine whether to impose sanctions for spoliation. See Schmid v. Milwaukee Tool Corp., 13 F.3d 76, 79 (3rd Cir. 1994) (applying a three-factor test); Tracy v. Cottrell, 206 W.Va. 363, 374, 524 S.E.2d 879, 890 (W.Va. 1999) (collecting cases and applying a five-factor test); and Stubli v. Big D Intern. Trucks, Inc., 107 Nev. 309, 313, 810 P.2d 785, 787 (Nev. 1991) (setting forth a nonexhaustive list of factors).

Amicus asserts that key factors to consider include the context of the destruction of evidence, the costs associated with preserving the evidence, and whether there is any prejudice to the potential victim, which would necessarily inquire whether the victim acted reasonably under the circumstances.

A. Context and Costs

The context of the case and the type of claims asserted are relevant considerations in determining whether spoliation has occurred. See Spoliation of Evidence: A New Defense In Products Liability Cases, 70 Wisconsin Lawyer 18 (May 1997). In a products liability case the burden of proof can turn on whether the plaintiff has alleged a manufacturing or design defect or a failure to warn claim. While retention of the defective product is paramount in a manufacturing defect claim, it is less relevant in a design defect case. At the same time, costs of preserving the evidence in a product liability can vary widely. For example, in Sentry as with many product liability cases, the cost of retaining the product itself is generally negligible. But, costs can significantly escalate if physical evidence of all possible alternate causes or theories must be retained.

Similarly, in cases involving the preservation of documents, retaining all relevant documents, electronic or otherwise, may be simple in one context and virtually impossible in another. Compare Milw. Constructors II, 177 Wis. 2d 523, 530 (storage costs for paper documents amounted to \$12,000 a year) with Wiginton v. Ellis, 2003 WL 22439865 (N.D.Ill. 2003) (explaining that the cost to company to retain all e-mail backup tapes would cost \$12,500 per day).

Meanwhile, a residential or commercial fire loss, as is the case here, poses significantly different challenges that make retaining all possible relevant evidence a Herculean task. Although the costs associated with photographing and/or videotaping the defective construction is minimal, the costs of retaining part or all of the structure can be prohibitive. See e.g. Hendricks v. Great Plains Supply Company, 609 N.W.2d 486, 491 (Iowa 2000) (victim argued that entire fire scene needed to be preserved intact indefinitely). But preservation of the entire fire scene is uncommon, in part due to the need to timely mitigate damages and eliminate environmental contamination, but also, because an insurer owes a contractual obligation to its insured to process the claim and rebuild in a timely fashion. Accordingly, a court must be free to consider both the context and the costs involved in the destruction of evidence.

B. Prejudice

Whether the spoliation victim suffered any actual prejudice as a result of the loss of evidence is an essential inquiry. Prejudice refers to the victim's ability to form a defense or establish an essential proof to its case. The widely-accepted Schmid test balances the conduct of the spoliator with the prejudice to the victim. 13 F.3d at 79. Requiring a moving party to demonstrate actual prejudice as a result of the missing evidence strikes a balance between a plaintiff's right to recover and a spoliation victim's ability to defend the case. However, where there is no actual prejudice to the victim, neither the court's truth-seeking function nor the adversarial system is impaired. In those cases the plaintiff's right to recover must prevail.

It is said that, you can lead a horse to water but you can't make him drink. Similarly, the spoliation victim's failure to act reasonably after receiving notice of a loss undermines its claim that it is prejudiced by the destruction. In determining whether there is actual prejudice many courts require that the spoliation victim must have acted with due diligence with respect to the evidence before seeking a spoliation instruction. See Beers v. Bayliner Marine Corp., 236 Conn. 769, 778, 675 A.2d 829, 833 (Conn. 1996); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2nd Cir. 2001) (denying spoliation request where victim could have but did not ask to inspect the evidence); Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 458 (2nd Cir. 2007) (no spoliation where victim previously disclaimed any interest in the evidence); In re Wechsler, 121 F.Supp.2d 404, 416-18 (D.Del.2000) (no spoliation where defendants could have stepped in to recover vessel as they saw fit but did not); Castillo v. Chief Alternative, LLC, 140 P.3d 234, 237 (Colo.App.2006) (no sanction for spoliation where defendant retained evidence for a year during which time victim never requested to inspect it).

In this case neither Golke Brothers nor Indiana Insurance can claim prejudice where both parties had actual notice and the opportunity to inspect but failed to do so.

CONCLUSION

Dismissal of the underlying action was a drastic remedy in light of the fact that the defendants had a reasonable opportunity to inspect all of the relevant evidence. The trial court's decision creates a disturbing "do-nothing" defense. By ignoring the notices sent by the insurer and the invitations to inspect, the defendants have benefited by their inaction. Wisconsin should not create a judicial rule that rewards inaction to the benefit of potential tortfeasors. Instead a party, who, with notice and opportunity to inspect, fails to do so, should be prohibited from later objecting to the quantum of evidence retained.

Dated this 13th day of October, 2008

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. The length of this brief is 2,998 words.

Dated this 13th day of October, 2008.

Ryan L. Woody