COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1855 **Cir. Ct. No. 2012CV561**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RICHARD ANGRIST AND CYNTHIA ANGRIST,

PLAINTIFFS-APPELLANTS,

V.

4520 CORP., INC., LEXINGTON INSURANCE COMPANY, SMALL ENGINE REPAIR, LLC AND AUTO-OWNERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

CENTERS FOR MEDICARE AND MEDICAID SERVICES AND TRICARE,

SUBROGATED-DEFENDANTS.

APPEAL from a judgment of the circuit court for Polk County: JEFFERY ANDERSON, Judge. *Affirmed*.

Before Blanchard P.J., Lundsten, and Higginbotham, JJ.

¶1 PER CURIAM. This product liability and negligence case arose out of a riding lawn mower accident in which Richard Angrist was injured. Richard and his wife, Cynthia, argue that the circuit court erred in (1) excluding certain evidence as a sanction for spoliation of evidence by an investigator hired by their attorney and then (2) granting summary judgment dismissing the claims on the ground that, without the excluded evidence, no triable issues remain. For the following reasons, we affirm the circuit court's decisions.

¶2 Richard Angrist purchased a used riding lawn mower from a business called Small Engine Repair. The mower had been manufactured by a company that has since transferred pertinent liabilities to 4520 Corporation.

¶3 As manufactured, the mower was designed to include a safety feature called an "operator presence system" (the safety system). The safety system is designed to kill the engine and stop powering the rotating mower blades whenever the weight of the operator is not pushing down on the operator's seat. The engine dies and the blades are no longer under power when the operator's weight is removed from the seat because the safety system closes an electrical circuit. The circuit only closes, however, if a "connector" that is located underneath the driver's seat is plugged in. Thus, unplugging the connector under the seat keeps the electrical circuit open and allows the engine to continue to run and the blades to rotate, even when no one is sitting on the seat.

¶4 On the day of the accident, Richard Angrist was operating the mower when it began to slide down a hill. He alleges that he tried to leap clear of the mower, but one of his feet went under the mower and connected with the rotating blade, injuring him. Angrist testified that he was able to summon help. A neighbor testified during a deposition that, upon arriving on the scene, the

neighbor approached the riderless mower, which was then sitting upright on all four wheels, and noted that its engine was still running. In addition, the neighbor testified that he heard the mower blades rotating.

¶5 Approximately one year after the accident, an attorney retained by the Angrists hired an investigator to examine the mower. However, neither 4520 Corporation nor Small Engine Repair were notified of this examination.

¶6 As part of his examination, the Angrists' investigator unplugged and plugged in (or, perhaps, plugged in and unplugged) the connector multiple times. Richard Angrist was present during the inspector's examination, but Angrist testified that he does not recall whether the connector was plugged in or unplugged when the investigator began his examination. This investigator passed away after examining the mower, and the Angrists do not argue that the investigator created an admissible record showing how he manipulated the connector.[1]

¶7 The Angrists subsequently filed this action, alleging that 4520 Corporation and Small Engine Repair were negligent in "designing, constructing, manufacturing, installing, maintaining, servicing and inspecting" the mower. The Angrists' theory was that, had the connector been plugged in and, thus, the safety system functioning, then the blades would have stopped rotating between the time Richard Angrist leapt from the seat and the time the blades hit his foot, reducing the severity of or eliminating the chance of injury. In briefing before the circuit

[1] About six months after the first investigation, the Angrists' attorney had the mower tested by a different set of investigators, also without giving notice to the defendants. However, no party develops an argument that this second investigation is pertinent to any issue raised on appeal.

court, the Angrists argued that Small Engine Repair was negligent in failing to inspect the mower to insure that the connector was plugged in at the time it sold the mower to Angrist. The Angrists argued that 4520 Corporation was negligent by designing a safety system that an operator of the mower could not see and that permitted the mower to function even when the connector was unplugged.

¶8 Each defendant filed a motion for spoliation sanctions, based on the investigator's manipulations of the connector without prior notice to the defendants, seeking sanctions that included exclusion of evidence relating to the condition of the mower at the time of the accident. The defendants' shared central argument was that, because the investigator altered the condition of the mower in unknown ways, the defendants were unnecessarily and unfairly deprived of an opportunity to show that the connector was plugged in at the time of the accident, in order to rebut the Angrists' theory of liability that the connector was unplugged and not functioning when Angrist purchased the mower and remained that way when he used it. Separately, both defendants filed motions for summary judgment, arguing that if the court excluded evidence regarding the condition of the mower at the time of the accident as a sanction for spoliation, no triable issues would remain.

¶9 After a hearing on the motions for sanctions, the circuit court made the following findings. The Angrists' investigator, by manipulating the connector, "altered the condition of the lawnmower," thereby eliminating evidence bearing on the question of whether the connector was plugged in at the time of his inspection by the investigator, and by implication whether the connector was plugged in at the time of the accident and at the time Angrist purchased the mower. At the time of the inspection, counsel for the Angrists knew there was "a very good possibility[] of litigation," and that the evidence regarding whether the

connector was plugged in at the time of the accident was relevant to their potential claims. Further, the connector was "intentionally" altered, and this alteration "substantially prejudiced" 4520 Corporation and Small Engine Repair. However, the court found that the alteration did not constitute egregious spoliation, in that there was no "intent to change the outcome of the case."

¶10 The circuit court ordered as a sanction for the spoliation that no evidence could be introduced at trial on the topic of whether the mower blades were rotating at the time of the accident, including the neighbor's testimony that the blades continued to rotate immediately following the accident. After ordering this sanction, the court addressed 4520 Corporation and Small Engine Repair's motions for summary judgment and determined that, given the exclusion of the evidence as a sanction for spoliation, the Angrists "would not be able to meet [their] burden at trial." On this ground, the circuit court granted summary judgment dismissing the claims.

¶11 The Angrists now appeal the circuit court's sanctions and summary judgment decisions.

¶12 A circuit court's decisions "whether to impose sanctions for the destruction or spoliation of evidence, and what sanction to impose, [are] committed to the [circuit] court's discretion." ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). We affirm discretionary rulings if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstratively rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

¶13 We review a circuit court's grant of summary judgment de novo, independently of the circuit court, applying the same methodology. ***AccuWeb,***

Inc. v. Foley & Lardner, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447. Summary judgment is appropriate only "if there are no genuine issues of material fact, and the moving party, having established a prima facie case, is entitled to judgment as a matter of law." ***Id.***; WIS. STAT. § 802.08(2) (2013-14).[2] "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." ***AccuWeb, Inc.***, 308 Wis. 2d 258, ¶16.

¶14 Before turning to the Angrists' arguments, we begin by identifying an argument that they do not properly raise on appeal, namely, that they were not responsible for an act of spoliation. The Angrists suggest as part of their argument challenging the circuit court's imposition of the sanction that the investigator's conduct was merely "appropriate due diligence." However, they do not develop an argument in their principal brief that the circuit court erred on a legal point or erroneously exercised its discretion in determining that the actions of the investigator in manipulating the connector, without notice to the defendants, altered evidence in a manner that constitutes spoliation. *See* ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶21, 319 Wis. 2d 397, 768 N.W.2d 729 (spoliation is the "'intentional destruction, mutilation, alteration, or concealment of evidence.'" (quoted source omitted)). In their reply brief, the Angrists assert that they "do not concede that their investigator's act of unplugging and plugging the [connector] constituted spoliation." However, even in the reply brief the Angrists merely make the assertion that there was no spoliation; they do not develop an argument supporting this assertion, *see* ***State v. Pettit***, 171 Wis. 2d 627,

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court need not address arguments that are not fully developed), and, in any event, we conclude that it is too late to raise this as an argument for the first time in the reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) ("We will not, as a general rule, consider issues raised by appellants for the first time in a reply brief.").

¶15 Turning to arguments the Angrists do make, they appear to intend to offer three arguments in support of their contention that the circuit court erroneously exercised its discretion in its sanctions decision and in determining that their claims must be dismissed: (1) a lesser sanction, such as a negative inference jury instruction, would have been more appropriate, given the nature of the spoliation and the proof available to the parties; (2) the court "effectively" dismissed the case "as the sanction" for spoliation, which was improper because this conflicts with the court's finding that the spoliation was not egregious; and (3) by excluding evidence that the neighbor heard the blades rotating immediately following the accident, the court acted "contrary to one of the primary purposes behind the spoliation doctrine: to uphold the judicial system's truth-seeking function." We address and reject each of these arguments in turn.

¶16 The Angrists' argument for a lesser sanction as a remedy for spoliation is difficult to follow or even to summarize, but we reject it on the grounds that they failed to preserve this argument by presenting it to the circuit court.

¶17 The Angrists state that the court "did not just exclude evidence related to the spoliation," namely, whether the connector was plugged in, "but it also excluded evidence of other theories of liability." As best we understand the

argument, it begins with the assumption that the connector was plugged in at the time of the accident. The Angrists argue that, even with this assumption, at least Small Engine Repair could have been found negligent, based on the neighbor's testimony that the blades were still rotating following the accident, under the theory that Small Engine Repair failed to examine the mower to make sure that the safety system as a whole worked properly, beyond the narrower question of whether Small Engine Repair checked to ensure that the connector was plugged in at the time it sold the mower to Angrist.[3] On this ground, the Angrists assert that a lesser sanction, such as a negative inference jury instruction explaining that the jury could infer that the connector was plugged in, would have been "more appropriate" and would have allowed the Angrists to pursue their other theories of liability against Small Engine Repair.

¶18 Without taking a position on any other aspect of this argument, we reject it on the ground that the Angrists fail to point to any place in the record where they raised to the circuit court with prominence and clarity their "other theories of liability," and therefore they forfeited this causation-related argument. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (arguments not raised before the circuit court may be deemed forfeited on appeal). Our review of the record shows that, throughout the proceedings, the Angrists consistently represented to the circuit court that their theory of liability was that the connector was unplugged and for this reason the safety system did not function. For example, the Angrists' brief in opposition to motions for spoliation

[3] In making this argument, the Angrists refer only to Small Engine Repair's potential liability, and not that of 4520 Corporation. We treat this as a concession that this theory of liability would not apply to 4520 Corporation.

sanctions and summary judgment stated in pertinent part, "No party has argued that the blades [of the mower] would continue to spin after weight is removed from the seat, unless the [connector] was unplugged." And, during the hearing on the motion for spoliation sanctions, counsel for the Angrists stated that "all we really have in this case is a material question of fact concerning whether or not the [connector] was connected or disconnected at the time of the accident." For these reasons, we decline to address this other-theories-of-liability argument, which the Angrists did not give the circuit court an opportunity to evaluate.

¶19 The next argument of the Angrists that we address is based on a misreading of case law and fails to acknowledge that the circuit court took two separate steps in first addressing spoliation and then addressing summary judgment. The Angrists contend that we should "treat the combination of" the circuit court's sanctions and summary judgment decisions "as effectively being a dismissal of the case as the sanction for the purported spoliation." As part of this argument, the Angrists rely on ***American Family*** for the proposition that "dismissal as a sanction for spoliation is appropriate only when the party in control of the evidence acted egregiously in destroying the evidence." *See* ***American Family***, 319 Wis. 2d 397, ¶42. According to the Angrists, the sanction of dismissal here was an erroneous exercise of discretion because the circuit court explicitly found that the Angrists' conduct was not egregious and the defendants do not argue that the court was wrong in making this finding.

¶20 This argument is flawed. The rule articulated in ***American Family*** is only that "dismissal *as a sanction for spoliation*" is an available remedy only when there is a finding of egregious conduct. ***Id.***, ¶42 (emphasis added). That rule is not determinative of the issue presented here, where the sanction for spoliation was not dismissal, but, rather, exclusion of evidence. ***American Family***

does not stand for the proposition, as the Angrists suggest, that a court erroneously exercises its discretion when, as here, it orders exclusion of evidence as a sanction for spoliation and then, in a separate decision, evaluates whether any triable issues remain after the exclusion of evidence. For this reason, we have no basis to interpret the circuit court's spoliation decision as ordering dismissal as a spoliation sanction.

¶21 Turning to the third argument made by the Angrists, the sanctions a court may impose for spoliation "serve two main purposes: '(1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence.'" ***Id.***, ¶21 (quoted source omitted). The Angrists argue that the remedy the circuit court selected for spoliation here "hinders the judicial system's truth-seeking function." As best we can tell, the Angrists intend to argue that the circuit court erroneously exercised its discretion in excluding evidence that includes the neighbor's testimony that he heard the mower blades rotating immediately post-accident because this deprived the Angrists of their ability to reveal the truth about whether the connector was plugged in at the time of the accident.

¶22 This argument is premised on the mistaken assumption that evidence favoring the Angrists' positions is the only evidence that could matter to the fact finder. The Angrists do not explain why the court was obligated to allow them to present their version of the "truth," in the form of evidence offered to show that the connector was unplugged and that as a result the mower blades continued to rotate at the time of the accident, even though, due to their investigator's actions, the defendants could not effectively attempt to rebut the neighbor's testimony by presenting evidence tending to show that the connector was plugged in at the time of the accident.

¶23 The circuit court may well have been able to exercise its discretion in adopting alternative sanctions for the spoliation that would also have upheld the truth seeking function of trials. However, the Angrists fail to provide us with a basis to conclude that the court's sanctions decision was not a rational one, based on relevant facts, applying a proper standard of law, which a reasonable judge could reach, consistent with the truth-seeking goal of the spoliation doctrine.

¶24 For these reasons, we affirm both the decision of the circuit court to grant the above described sanction against the Angrists for spoliation and its decision to grant summary judgment dismissing the Angrists' claims.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Because we affirm the circuit court for the reasons explained above, we need not and do not address additional arguments made by 4520 Corporation regarding the Angrists' failure to present expert testimony.