COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP577 Cir. Ct. No. 2001CV1324

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

HARBORVIEW OFFICE CENTER, LLC,

PLAINTIFF-APPELLANT,

V.

CAMOSY INCORPORATED, PARTNERS IN DESIGN ARCHITECTS, INC., BOLLIG LATH & PLASTER COMPANY, INC. AND KLEIN-DICKERT MILWAUKEE, INC.,

DEFENDANTS-RESPONDENTS,

GENERAL INSURANCE COMPANY OF AMERICA D/B/A SAFECO,

DEFENDANT,

CITIZENS INSURANCE COMPANY OF AMERICA,

INTERVENOR-RESPONDENT.

APPEAL from judgments of the circuit court for Kenosha County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Harborview Office Center, LLC appeals from trial court judgments dismissing its causes of action against Camosy Incorporated, Partners in Design Architects, Inc. (PID), Bollig Lath & Plaster Company, Inc. and Klein-Dickert Milwaukee, Inc (collectively, the "respondents"). The trial court dismissed Harborview's claims as a sanction for its spoliation of evidence. Because the trial court properly applied the correct legal standard for egregiousness to the essential facts of record and reasonably concluded that dismissal was an appropriate sanction, we affirm the judgments against Harborview.

BACKGROUND

¶2 As the trial court noted, the record in this case is voluminous. In our background section, we will recite only the facts necessary to provide the context for Harborview's appeal. We will provide further details in our analysis of Harborview's specific appellate arguments.

¶3 In early 1997, Harborview entered into an agreement with Camosy whereby Camosy agreed to serve as general contractor on a project to construct a three-story office building in Kenosha, known as the Harborview Office Center. Each of the remaining respondents provided services that contributed to the construction of the Center. Camosy constructed the building based upon the plans and specifications PID, the architectural firm, prepared. Klein-Dickert installed the aluminum windows used in the exterior skin of the building. Bollig installed

the Exterior Insulation and Finishing System (EIFS). Dryvit Systems, Inc., which is not a party to this action, supplied the EIFS used in the construction of the building.

¶4 The EIFS consists of several layers of materials designed to enclose, insulate and waterproof a building. The first EIFS component that is installed is a water resistant gypsum sheathing called Dens-Glass Gold. The Dens-Glass is screwed directly to the metal studs of the building. After installation, the joints of the Dens-Glass are sealed with a fiberglass tape. The next component is a water resistant coating called Backstop, which is applied to the surface of the Dens-Glass. If this water resistant coating is applied properly, it is virtually impossible for water to penetrate the Dens-Glass. The third component is the waterproof adhesive, which is troweled on to the Backstop membrane. The fourth component is the expanded polystyrene layer (EPS), which is plastic foam board insulation approximately one and one-half inches thick. The EPS is pressed into the waterproof adhesive. Next, of particular interest in this case, three-quarter inch deep horizontal and vertical V-shaped grooves are cut into the EPS to add architectural interest. Then, a waterproof base coat and embedded fiberglass mesh are simultaneously applied to the entire face of the EPS boards and over the V-grooves. Finally, for appearance purposes, a stucco-like finish coat is applied over the base coat.

¶5 Construction of the Center was completed in late 1997. The first signs of water infiltration were discovered in late 1997 or early 1998, prior to tenant occupancy. Harborview discovered additional water leaks with each new rainstorm. Each of the respondents participated in varying degrees in the early efforts to identify the causes of the leaks and to remedy the problems. While these efforts reduced the water infiltration, they did not eliminate it completely.

¶6 On December 14, 2001, Harborview filed suit against Camosy, PID, Bollig and Klein-Dickert Co., Inc.,[1] arguing negligence and breach of contract. The initial complaint and the two amended complaints that follow alleged:

> [Harborview] has experienced significant and recurring water infiltration problems at the office building since construction was completed in early 1998. With nearly every rain, windows leak, and over time ceiling tiles and carpet have become stained, window sills have separated and drywall has cracked and softened, and other inconveniences and problems have occurred.

Harborview claimed that it would be necessary to remove and replace all of the office windows to resolve the water infiltration problems. The respondents filed several cross-claims against each other seeking contribution and/or indemnification.

¶7 Over the next two years the parties retained experts to comment on the validity of the allegations pertaining to water infiltration, to identify the design and construction deficiencies that were the causes of the water infiltration and to evaluate the process required to correct those deficiencies. In August 2002, Harborview retained an architect and engineer, Brian Fischer. Fischer would later oversee the remediation project. In his March 2003 report, Fischer listed several

[1] It was later discovered that Klein-Dickert Co., Inc., had not performed any work on the Center and had not entered into any contracts relating to the construction of the Center. Harborview filed an amended complaint on June 10, 2002, that properly named Klein-Dickert Milwaukee, Inc., as a defendant. Harborview filed a second amended complaint on November 12, 2002, naming General Insurance Company of America, d/b/a Safeco, as a party. General had issued an insurance policy to PID. Citizens Insurance Company of America, who had paid Harborview under an insurance policy, later intervened in the action.

deficiencies he thought contributed to the water infiltration.[2] Fischer concluded that in order to correct these deficiencies it would be necessary to reinstall and/or replace parts of the window system. Fischer later testified that at this point he did not consider that cracks in the V-grooves were the cause of the water infiltration.

¶8 On May 16, 2003, Harborview filed a motion requesting "an order to establish a protocol for evidence discovery and retention relating to mold remediation and removal and replacement of windows." The motion indicated that Harborview would photograph and videotape the remediation process and actually retain specific items removed during the process for evidentiary purposes.[3] The respondents filed written objections and each preserved their defense of spoliation of evidence. Harborview's motion was removed from the calendar due to a family emergency of the court. At that time, Harborview

[2] Fischer listed the following six deficiencies: (1) the installed sill flashings which were not the specified sill flashings, (2) the sill flashings had no "end dams," (3) the upturned legs on some of the sill flashings were bent or crushed by window installation, (4) the head flashings did not have "vertical legs," (5) the sealant around the windows was improperly applied on the EIFS finish coat instead of the recommended base coat, and (6) the sealant joints around the windows were improperly constructed.

[3] The motion states:

> The owners of Harborview have made arrangements, at substantial expense, to retain all of the removed flashing. It is possible that removing the flashing will damage it. Photographs and video will be taken during the removal process. The flashing will be removed, labeled with an indication of the window from which it came, and stored pending the conclusion of this lawsuit. It is further anticipated that representative samples of the mold would be bagged and retained. In the mold remediation process substantial portions of the drywall and carpeting will be removed. Under ordinary circumstances, those items would be bagged and discarded. [Harborview] proposes that some of those items be discarded but that some be retained. Test results, in addition to those that have already been provided to the [respondents], will be made available to the [respondents].

informed the court that it might withdraw its motion. Ultimately, Harborview did not reschedule the motion hearing.

¶9 On May 22, Harborview, by way of letter, invited the respondents to be present at an inspection and demonstration of the work to be performed during the remediation project. The letter states that the primary purpose of the demonstration was

> to inspect the condition of the [EIFS] at the window opening and attempt to identify the most appropriate and efficient means to remove the existing sealant and finish coat of the [EIFS.] We also anticipate that we will remove a portion of the [EIFS] at its interface with the pre-cast concrete element at the base of the building in order to determine how the [EIFS] was terminated. This will permit us to identify appropriate and effective repair procedures. In the process of removing the window, we anticipate that we will inspect the head jamb and sill flashing.

Harborview conducted the demonstration on May 28, 2003, with the respondents, several of the experts and counsel in attendance.

¶10 According to the respondents' trial briefs and arguments, the remediation project would proceed as follows: After the windows were replaced, the EIFS would be ground down inside the window jambs so that the area could be primed and sealant applied between the smoothed surface of the EIFS and the aluminum frame of the window. A five-inch high section of the EIFS around the entire perimeter of the Center would be removed for the purpose of correcting the metal flashing that lay between the lower edge of the EIFS and the top of the concrete apron surrounding the building. Fischer later explained in his deposition that the original remediation project contemplated some work on the V-grooves, but it would be primarily for cosmetic purposes, "in some of those areas … they would grind out some of this finish coat material to try to improve some of the

workmanship, some places where it was too thick, some places when it was troweled that was pulled over. They were primarily going to do that for aesthetic purposes."

¶11 Thomas Bychowski, the project manager for the company involved in the reglazing of the Center during the remediation project, testified that when he initially went out to the site to measure the windows, he noticed that there were cracks in the V-grooves. Given the work that had already been done on the windows, he was concerned that other conditions like the cracks in the V-grooves were contributing to the water infiltration. As a result, he thought that window replacement would not completely cure the leaks. He apparently brought the concerns up to Harborview's ownership and suggested water testing as a remedy. Harborview's ownership informed him that they had done enough water testing and wanted to move forward with remediation. He was told that the cracks were "superficial" and an EIFS installer and expert had analyzed the cracks.

¶12 The remediation project commenced with job site preparations in early July. On July 17, 18 and 21, Fischer and other contractors involved in the remediation process surveyed the EIFS on the exterior of the building. At the conclusion of the survey, Fischer had not concluded that the cracks noted in the EIFS were a source of water infiltration. He testified that

> when we did that survey that all of the places where there were cracks, we had not concluded that those were necessarily sources of water entry, that they might simply be hairline cracks in that finish coat, so that if they ground those down and cleaned them up, that would take care of that situation.

¶13 The first windows were removed on July 24. The first new windows were installed on August 4. Following the installation of the windows, Fischer

conducted water tests to ensure that there was no further water infiltration into the Center.

¶14 The water tests were conducted in areas of twelve windows each. The areas were designated as Area I through Area XIV. The first water test was conducted on Area I on August 19. Area I passed the test. On August 20, Area II was water tested and it failed. It was determined that there was a "slight leak through [a] crack" in the EIFS in Area II. At this point, Fischer suspected that the cracks in the V-grooves were a potential source of water infiltration. The Area was patched and following retesting, the Area passed. On August 25, Area III was water tested and failed. Further investigation revealed water behind the underlying foam insulation. Some of the V-grooves in that Area were reworked and on August 26 another water test was conducted. For the second day in a row, Area III failed the water test.

¶15 By this point, given the results of the water testing, Fischer concluded that the defects in the V-grooves were a possible source of water infiltration in the building. He reported this to Harborview ownership. Fischer then gave the orders to rework all of the horizontal and vertical V-grooves, in part, because of the possibility that water was intruding through the cracks in the V-grooves. The rework of the V-grooves included grinding off the finish coat, placing new mesh and base coat into the area and then refinishing. On August 28, after its V-grooves had been reworked, Area III passed the water testing.

¶16 From that point forward, all V-grooves in a given area were reworked and new windows put in place prior to water testing that area. By September 12, sixty to seventy percent of the grinding work on the V-grooves was complete. By September 18, the reworking of the V-grooves on the building was

"substantially completed," with ninety-eight percent of the V-grooves ground down.

¶17 On September 17 and 18, the parties conducted the depositions of Debra Hertzberg, Neil Guttormsen and Charles Gierl, each of whom is a Harborview principal. Hertzberg, Guttormsen and Gierl testified that somewhere between two and three weeks prior to their depositions, Fischer recommended that the exterior of the EIFS be repaired. Both Guttormsen and Gierl testified that the contractors had indicated that there were cracks in the EIFS and that these defects potentially were a source of water infiltration. Hertzberg, Guttormsen and Gierl authorized Fischer to go ahead with the additional work.

¶18 On September 19, Bollig sent Harborview a letter stating that during the depositions on September 17 and 18, it was disclosed that more extensive work was being performed upon the EIFS than originally proposed, demonstrated and disclosed. On September 30, Harborview wrote to Bollig asserting that Harborview's "recent letter contained several misunderstandings." Harborview alleged that the parties had long known that cracks in the EIFS were a source of water infiltration and that repair work was going to be done on those cracks.

¶19 On November 5, Bollig forwarded to Harborview a set of interrogatories and a request for the production of documents. Bollig specifically asked Harborview for information pertaining to defects in the EIFS. Harborview failed to answer the discovery requests or seek an extension; therefore, on January 7, 2004, Bollig filed a motion to compel. That same day Bollig received Harborview's responses to the discovery requests. Bollig alleged that these responses were "purposefully vague." The court heard the motion to compel on January 16, 2004. The court rejected as untrue Harborview's claim that no new

defects were discovered during the remediation project. The court granted Bollig's motion to compel and, among other things, ordered Harborview to respond to Bollig's discovery requests and pushed back the date of trial.

¶20 In September 2004, after months of further discovery, the respondents filed motions to dismiss for spoliation of evidence. Following oral arguments by the parties, the court granted the respondents' motions. The court acknowledged that pursuant to ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App. 1999), the sanction of dismissal is warranted only upon a finding of egregiousness. The court found that Harborview's conduct was egregious. The court determined the second amended complaint, filed in November 2002, focused on the windows as the source of the water infiltration problem. The court explained that as of the May 28, 2003 demonstration, no work on the V-grooves was planned and any concerns about the V-grooves were purely cosmetic. The court found that Harborview knew, at least as of August 21, 2003, that the V-grooves were a source of a water problem and did not notify the respondents. The court held that Harborview had an obligation to stop work and notify the respondents once it realized that leaking in V-grooves was occurring. The court explained that the case was in litigation and that Fischer, an expert, was aware of the risks of destroying evidence. The court concluded that the first time the respondents had notice that the V-grooves were a source of the water problems was at the September 17 and 18 depositions. The court found that by this point, ninety-eight percent of the V-grooves had been reworked and therefore the respondents' ability to gather evidence concerning the sources of water infiltration and to allocate responsibility amongst themselves was compromised.

¶21 In late December 23, 2004, Harborview filed a motion for an evidentiary hearing. Harborview argued that there were numerous disputed issues

of material fact. The court denied Harborview's motion for an evidentiary hearing and issued judgments granting the respondents' motions to dismiss.

DISCUSSION

¶22 Harborview challenges the circuit court's dismissal of its claims against the respondents on several grounds. Harborview alleges that the record does not support the court's finding of egregiousness, the court's imputation to Harborview of the conduct of its expert, and the court's determination that the destruction of the evidence impaired the respondents' ability to defend against its claims. Harborview maintains that disputed issues of material fact exist concerning all of those issues and therefore an evidentiary hearing addressing the issues is warranted. We will analyze each of Harborview's claims after setting forth the well-settled law governing sanctions for spoliation of evidence.

Spoliation Law

¶23 "There is a duty on a party to preserve evidence essential to the claim being litigated." ***Sentry Ins. v. Royal Ins. Co. of Am.***, 196 Wis. 2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995). As both parties recognize, the decision whether to impose the sanction of dismissal for a violation of that duty is committed to the trial court's discretion. *See* ***Garfoot***, 228 Wis. 2d at 717. The question is not whether this court as an original matter would have dismissed the action; rather, it is whether the trial court erroneously exercised its discretion in doing so. *See* ***id.*** We affirm discretionary rulings if the trial court examined the relevant facts, applied a proper standard of law, and utilizing a demonstrably rational process, reached a reasonable conclusion. ***Id.*** On a motion for sanctions, if there are factual disputes or conflicting reasonable inferences from undisputed

facts, an evidentiary hearing, rather than simply oral argument based on briefs, affidavits and depositions, is necessary to resolve those disputes. ***Id.*** at 725.

¶24 The sanction of dismissal should rarely be granted. ***Id.*** at 719. In ***Garfoot***, we reaffirmed the proposition that dismissal as 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. ***Id.*** at 724. We arrived at this reaffirmation after reconciling ***Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District***, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993), in which we had applied this standard, with a later decision, ***Sentry***, which could arguably be read as requiring only negligence for the sanction of dismissal. ***Garfoot***, 228 Wis. 2d at 722-24. The trial court does have the discretion to impose a sanction of dismissal even though the destruction of evidence has not impaired the opposing party's ability to present a claim or defense. ***Id.*** at 731.

¶25 In this case, the trial court observed these legal standards, examined the relevant facts and reached a reasonable conclusion. The court explicitly acknowledged the ***Garfoot*** standard for dismissal as a sanction. The court carefully applied that standard to the circumstances of the case. As the court stated, "I have a box full of files in my office. I didn't read things just once. I read them several times. I have read every brief, every deposition excerpt that was provided, every affidavit, and this is truly a case that I have agonized over."

Finding of Egregiousness

¶26 The record supports the conclusion that Harborview's conduct was egregious because it was a flagrant, knowing disregard of the judicial process. Simply stated, Harborview filed its complaint against the respondents in

December 2001; from at least that point forward, Harborview had a duty to preserve evidence essential to the claims being litigated and it knowingly failed to do so. *See* ***Sentry***, 196 Wis. 2d at 918.

¶27 As of December 2001, the parties had yet to determine the exact cause of the water infiltration. The source of the problems was therefore a key issue in the litigation. The respondents concede that early in the litigation the parties discovered the cracks in the V-grooves and that as a general matter they knew those cracks can cause water leaks. Indeed, the respondents must make such a concession. Camosy's expert, Robert Kudder, testified that when he inspected the building in August of 2002, he observed cracks in the V-grooves. Kudder also indicated that such cracks, depending on the circumstances, can lead to water infiltration. However, the record demonstrates that prior to the start of the remediation project, the parties focused on the windows and window perimeters as the sources of the water infiltration at the Center.

¶28 The complaints fail to mention the cracks in the V-grooves as defects contributing to the water problem. Harborview's consultant, John Lampe, determined that water was passing into the building as a result of the defects in window flashing and window perimeter caulking. After attending a September 21, 2001 window removal, Lampe determined that the EIFS field was stable and showed no signs of distress. In his March 2003 report, Fischer, Harborview's expert, reported six deficiencies relating to the windows and window perimeters and recommended removing and possibly replacing all of the windows. He acknowledged that going into the remediation project he did not suspect that the cracks in the V-grooves were the cause of the water infiltration. Bychowski, the project manager for the remediation project's reglazing company, testified that he was informed that the cracks in the EIFS had been analyzed and

were only "superficial." Robert Nikolai, Camosy's senior project manager, testified in April 2003 that while cracks in the V-grooves can cause leaks, he believed that the windows were the most likely cause of the leaks at the Center.

¶29 Fischer's testimony shows that the remediation project, as originally planned, did not contemplate the extensive work that was eventually done to the V-grooves. Even after Fischer had surveyed the building in late July 2003, he thought that the cracks were not necessarily sources of water entry and "that if they ground those down and cleaned them up, that would take care of that situation."

¶30 Fischer admitted that the water tests he chose to conduct in August 2003 had a diagnostic purpose. They gave him the opportunity to ascertain that there were sources of water infiltration other than the windows themselves. It was based upon the results of those tests that he was able to conclude that water was infiltrating the building through the cracks in the V-grooves and that the V-grooves needed more extensive repair work. Fischer testified that he knew when he gave the orders he was permanently altering the physical condition of the V-grooves and was precluding others from water testing them in their original state.

¶31 The record shows Harborview was aware of the need to carefully preserve evidence during the remediation project that concerned the sources of the water infiltration. In May 2003, Harborview filed a motion to establish a protocol for evidence discovery and retention. Harborview also invited the respondents to a demonstration of the work to be performed during remediation.

¶32 The record further reveals that Fischer informed Harborview ownership of his discovery that cracks in the V-grooves were potentially a source of water infiltration and recommended to Harborview ownership that the V-

grooves be substantially reworked. With Harborview's approval, Fischer gave the orders to rework all of the V-grooves.

¶33 The record shows that Fischer also was well aware of the contentious litigation surrounding the source of the water infiltration when he discovered that the V-grooves were leaking. At the July 24 job progress meeting, the contractors were advised that the "building is the subject of litigation; therefore, any comments that must be made regarding existing conditions should be discussed in the job trailer with no bystanders present." On July 31 they were advised that "no one is to discuss the project with anyone that is not part of the construction crew/personnel." Furthermore, for the purposes of preserving evidence for litigation, Fischer had documented the remediation project by photograph and had put some physical evidence removed from the site into storage.

¶34 However, the record demonstrates that neither Harborview ownership nor its experts or counsel notified the respondents before September 12 at the earliest[4] that water testing had identified the cracks in the V-grooves as a source of water infiltration and the cracks were being reworked for that reason. Furthermore, the trial court had to issue an order in January 2004 requiring Harborview to turn over the information pertaining to the cracks in the V-grooves,

[4] Harborview maintains that Fischer notified one of the respondents' experts on September 12 about his discovery that water was seeping into the building through cracks in the V-grooves and the repair work being done on the V-grooves as a result of that discovery. The trial court accepted the respondents' representations that they did not learn about Fischer's discovery until the September 17 and 18 depositions. For purposes of this appeal, we will assume without deciding that Fischer notified the respondents on September 12. Fischer had a duty to stop work and notify the respondents once he discovered that the V-grooves were a new source of water infiltration in late August. He did not and by September 12 a majority of the V-grooves already had been reworked.

which it considered to be newly discovered defects. Given all of these circumstances, we comfortably conclude that Harborview's conduct was, at a minimum, in flagrant, knowing disregard of the judicial process.

¶35 Harborview maintains that its conduct was not egregious. Harborview concedes that "Fischer's decision to repair the cracks in the V-grooves was volitional and that the cracks in the V-grooves could not be tested in their original condition after they had been repaired." Harborview, however, likens its case to ***Milwaukee Constructors II***. Harborview states that ***Milwaukee Constructors II*** stands for the proposition that the intentional destruction of evidence known to be relevant to pending litigation does not alone support a finding of egregiousness. Harborview asserts that it did not intend to gain an advantage in the litigation or otherwise impair the respondents' ability to present a case by destroying evidence.

¶36 Harborview's arguments fail to persuade us for several compelling reasons. First, ***Milwaukee Constructors II*** did not establish a blanket rule that the intentional destruction of evidence known to be relevant to pending litigation will not support a finding of egregiousness. Rather, we held only that the record before us *in that particular case* did not support the trial court's finding of egregiousness. *See* ***Milwaukee Constructors II***, 177 Wis. 2d at 534-35.

¶37 Second, the facts of ***Milwaukee Constructors II*** differ significantly from the facts in this case. There, we specifically concluded that an inference that the plaintiff's destruction of documents was a deliberate, willful and contumacious disregard of the judicial process simply could not have been drawn from the record. ***Id.*** at 535. The record consisted of affidavits from the document custodians stating they had not intended to destroy original documents relevant to

the litigation and, to the best of their knowledge, those documents relevant to the litigation that had been destroyed were copies of documents maintained elsewhere. ***Id.*** at 533. Here, on the other hand, the record demonstrates that when Fischer, with Harborview's approval, gave the go ahead to rework the V-grooves he knew that the case was in litigation, that he was altering the physical condition of the V-grooves and that he was depriving others of the opportunity to test the V-grooves in their original state. The photographs and videotape taken during the remediation process and the physical evidence stored do not replace actual analysis and testing of the original evidence. Thus, unlike ***Milwaukee Constructors II***, the record in this case supports the trial court's determination that Harborview's destruction of evidence relevant to the litigation was in flagrant, knowing disregard of the judicial process.

¶38 Third, Harborview seems to suggest that the trial court erred in finding that it acted egregiously because Fischer expressly denied an intent to destroy or alter evidence or to prejudice the respondents' ability to discover information about the remediation process. However, a court need not determine that evidence was destroyed for the purpose of gaining an advantage in the litigation or otherwise impairing the opposing party's case. There is a presumption against the despoiler to that effect. ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶81, 242 Wis. 2d 205, 626 N.W. 2d 821. In any event, a despoiler need not expressly admit to such an intent. When making a finding of egregiousness, a trial court may rely upon reasonable inferences drawn from evidence proved. *See* ***Garfoot***, 228 Wis. 2d at 724-25.

¶39 Finally, Harborview mistakenly directs us to several facts of record that it claims show that it did not act egregiously. Harborview points out, among other things, that it performed the work in public, it was open to questions from

respondents, the respondents had Fischer's cell phone number and several of the respondents and their experts and attorneys witnessed the work being done. While all of this may have been true, there is no evidence in the record that either Harborview or its experts notified the respondents before September 12 that water testing had identified the cracks in the V-grooves as a source of water infiltration and were being more extensively repaired for that reason. The respondents, therefore, would not have had any reason to ask questions or suspect anything was amiss. Further, it was Harborview's duty to stop the work on the V-grooves and notify the respondents of the discovery that the V-grooves may have contributed to the water problems. *See* ***Sentry***, 196 Wis. 2d at 918.

Finding of Prejudice

¶40 Harborview argues that the trial court erred in finding that the destruction of evidence impaired the respondents' ability to present a defense and as a result dismissal was an inappropriate sanction. Harborview suggests that an action may be dismissed only where the plaintiffs knowingly took steps to destroy material evidence before the defendants had the opportunity to physically inspect it. Harborview alleges that the respondents can still determine the amount of water that passed through the cracks in the V-grooves, the respondents "pass[ed] on opportunities to test and inspect the cracks in the V-grooves," and the respondents' own initial repair work impaired their ability to conduct tests.

¶41 We are not persuaded. First, we remind Harborview that a court may impose a sanction of dismissal even if the destruction of evidence has not impaired the opposing party's ability to present a defense. ***Garfoot***, 228 Wis. 2d at 731. Second, Harborview misses the point. As Fischer admitted, water testing the building permitted him to discover a new source of water infiltration other than

the windows: the cracks in the V-grooves. Harborview's reworking or repairing of the V-grooves permanently altered their physical condition. Because of Harborview's actions, the respondents can no longer test or analyze the V-grooves in their original state and we will never be able to know the extent to which this damaged the respondents' ability to present a defense.

Imputation of Fischer's actions

¶42 Harborview maintains that the trial court erred in imputing to it Fischer's actions. Harborview contends that Fischer's conduct should not be imputed to it because it reasonably relied upon him and it was unaware that the respondents had not been notified of the destruction of evidence. We are not persuaded.

¶43 Harborview hired Fischer as its expert in the remediation project. As noted, Fischer was well aware of the litigation between the parties. Fischer notified Harborview ownership that he had discovered that the cracks in the V-grooves were a potential source of water infiltration and recommended a different course of action than originally planned. Harborview authorized Fischer to go ahead with the proposed course of action on the V-grooves. No one chose to notify the respondents. Further, we have imputed the conduct of an expert to a party. *See* ***Garfoot***, 228 Wis. 2d at 728 (holding that the distinction between independent contractor and master/servant for liability purposes does not determine the outcome on a motion for sanctions and imputing the conduct of an independent contractor and a technician who were retained to further the offending party's interest and who were acting in furtherance of those interests).

Evidentiary Hearing

¶44 We are similarly unpersuaded by Harborview's claims that the trial court erred in refusing to conduct an evidentiary hearing before dismissing the action. Harborview correctly points out that the trial court made several credibility determinations that resolved disputed issues of fact based upon the written materials that had been submitted to her. However, an evidentiary hearing is not necessary in every case where there are factual disputes. In this case, the trial court's credibility determinations were not highly relevant or important to the court's ultimate decision to dismiss the action.

¶45 The facts essential to the court's decision to dismiss the case are not in dispute. Of critical concern to the parties in the case was the source of the water infiltration. While both parties were aware of the cracks in the V-grooves and may have known that such cracks can cause leaks, Harborview's experts attributed the water infiltration at the Center to defects in the windows and window perimeters. The remediation project as originally planned was based upon these opinions. The discovery of water entering the building through the cracks in the V-grooves called into question the credibility of the determination that the windows and window perimeters were the problem. Harborview, however, did not notify the respondents of this new discovery until well after it had begun reworking the V-grooves. Harborview's reworking of the V-grooves permanently altered their physical condition. Harborview knew that once it replaced all of the windows and reworked all of the V-grooves, the respondents would not have the opportunity to water test the cracks in V-grooves in their original state. Harborview had a duty to preserve this evidence, which was clearly essential to a key issue, and it knowingly failed to do so. Because these facts are not in dispute, the trial court properly refused to hold an evidentiary hearing.

CONCLUSION

¶46 We are sensitive to the fact that Harborview has spent over 1,700,000 dollars in remediation and now may not be able to recover its expenses. However, when the trial court dismissed this case as a sanction for spoliation of evidence, the court articulated the proper legal standard for dismissal announced in ***Garfoot***, applied the standard to the essential facts of record and reached a reasonable conclusion. The record supports the findings of egregiousness and prejudice and the imputation to Harborview of the experts' conduct. The record also demonstrates that an evidentiary hearing is unnecessary. The judgments of dismissal are affirmed.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.