Appeal No. 2006AP3003 **Cir. Ct. No. 2003CV112**

WISCONSIN COURT OF APPEALS
DISTRICT IV

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.

FILED

Apr 10, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Bridge, JJ.

We certify the following questions in this case involving the spoliation of evidence: (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 the evidence is destroyed.

This case arises from a fire on February 13, 2000, that destroyed a home insured by American Family Mutual Insurance Company. After

investigating the fire, American Family notified roofers David, Charles and Joseph Golke that it had concluded that their negligent repair of the roof had caused the fire. American Family sent two identical letters dated March 13, 2000, one copy to David Golke and another copy to Charles and Joseph Golke, which stated:

> This letter is to put you and your roofing company on notice for the fire damage that occurred on the above date of loss. Our investigation determined that you were negligent for work performed on our insured's property at the above loss location.
>
> If you have a liability insurance carrier, please forward this letter to them and we will handle these matters directly with them. If you do not have a liability insurance carrier, we will expect you to pay for the repairs/replacement. The amount of repairs/replacement at this time is pending.
>
> To provide adequate time for yourself or your liability carrier to conduct a proper investigation, any destruction measures of the fire damaged building will not take place until April 1, 2000.

David Golke acknowledged receiving the letter, but Charles and Joseph Golke testified that they did not remember receiving the letter.

American Family sent a second letter by certified mail dated April 6, 2000, one to David Golke and the other to Charles and Joseph Golke, which stated:

> This is our second request for insurance information concerning your liability regarding the above loss.
>
> All losses must be reported to your insurance company on a timely basis. Failure to do so may result in denial of your coverages due to your failure to meet policy conditions.
>
> You will need to contact your current insurance carrier and have them contact us as soon as possible.

The trial court found that Joseph Golke received the letter sent jointly to both Charles and Joseph because Joseph signed for it. David also received the second letter. Sometime after April 11, 2000, the home was razed and rebuilt. American Family took pictures of the fire scene, but none of the physical evidence from the fire was preserved. After the trial to the court, the circuit court dismissed the action for spoliation of evidence.

We have held that there is a duty to preserve evidence essential to a claim that will likely be litigated. *See* ***Sentry Ins. v. Royal Ins. Co. of Am.***, 196 Wis. 2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995). In ***Sentry***, the investigator for Sentry Insurance removed component parts from a refrigerator in the course of his investigation of a house fire. ***Id.*** at 911-12. The refrigerator was then destroyed. ***Id.*** at 912. The trial court excluded evidence concerning the condition of the refrigerator as a sanction for improperly engaging in destructive testing of the refrigerator and subsequently allowing its disposal. ***Id.*** at 911. We affirmed the trial court's decision excluding the evidence, which had resulted in dismissal of the case. ***Id.*** at 918-19.

We have also held that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct. *See* ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993). We explained that "[a] finding of … egregious conduct in the context of [an evidence] destruction case involves more than negligence; rather, it consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process." ***Id.***

In ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 722-24, 599 N.W.2d 411 (Ct. App. 1999), we addressed an apparent conflict between

Sentry, in which no explicit finding of egregious conduct was made, and ***Milwaukee Constructors II***, which held that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct. We explained that ***Sentry*** did not create a lower standard for dismissal than ***Milwaukee Constructors II*** because Sentry's investigator acted intentionally in removing the wiring and component parts in the refrigerator. *See* ***Garfoot***, 228 Wis. 2d at 721-22. We stated:

> [Here] the trial court discussed and carefully analyzed … prior case law and arrived at the conclusion that ***Sentry*** modifies the standard established in ***Milwaukee Counstructors II***, and permits the sanction of dismissal without a finding that a party, or the party's agents, engaged in egregious conduct or intended to destroy evidence and affect the litigation. We acknowledge that this reading of ***Sentry*** is a reasonable one. However, this court does not have the power to overrule, modify or withdraw language from a published opinion of this court. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 256 (1997). In view of this limitation on our authority, when we are presented with a published decision of our court that arguably overrules, modifies or withdraws language from a prior published decision of this court, we must first attempt to harmonize the two cases. That is, if there is a reasonable reading of the two cases that avoids the second case overruling, modifying or withdrawing language from the first, that is the reading we must adopt.
>
> We conclude that ***Sentry*** may be reasonably read as adhering to, rather than modifying, the standard established in ***Milwaukee Constructors II***. We therefore adopt that reading…. In rejecting Sentry's arguments based on … ***Milwaukee Constructors II***, we did not state that we were establishing a lower standard, but rather referred to the trial court's finding that Sentry's removal of the component parts was intentional rather than negligent, thus indicating that the trial court's decision was consistent with [that case]. We also summarized Sentry's conduct as: "intentional and negligent conduct in failing to properly preserve the refrigerator, which it knew was essential to its claim against Royal … [and which] was totally within Sentry's control…." (Footnotes omitted.)

Garfoot, 228 Wis. 2d at 722-24.

These cases lead us to the following questions: under what circumstances may evidence crucial to a potential legal claim be destroyed and what notice must be given to a civil litigant before evidence is destroyed? These questions also give rise to additional considerations. When a party allows or causes evidence to be destroyed, what factors should a court consider in evaluating whether the party's conduct constitutes a flagrant and knowing disregard of the judicial process? Should a court weigh the cost and effort to preserve the evidence? Should a court evaluate only the conduct of the party who allows or causes the evidence to be destroyed because dismissal for spoliation is a sanction, or should a court also consider whether the other parties acted reasonably and whether the other parties did, in fact, receive notice?

Pursuant to WIS. STAT. RULE 809.61 (2005-06), we certify the appeal in this case to the Wisconsin Supreme Court for its review and determination.