

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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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.

No. 98-2200

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MELVIN REED AND PAMELA SHAW-REED,

PLAINTIFFS-APPELLANTS,

V.

ANDREW AUTOMOTIVE GROUP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Melvin Reed and Pamela Shaw-Reed, *pro se*, appeal from the circuit court order dismissing their action against Andrew Automotive Group. The Reeds argue that the court “erred, misapplied the law or

abused its discretion by granting summary judgment, dismissing appellants['] case on the merits.” We affirm.

¶2 The Reeds brought their 1986 Nissan (with 190,000 miles on it) to Andrew Automotive following notification of a fuel injector voluntary recall. Andrew informed the Reeds that, unrelated to the recall repair, the car needed a new engine. The Reeds declined to have the engine replaced and claimed that after picking up the car, it was “popping and running roughly, emitting thick blue smoke.” The Reeds brought a small claims action alleging that Andrew had damaged the car by introducing some foreign object into the engine.

¶3 At the small claims court hearing, Andrew asked the court commissioner to preclude the mechanic the Reeds had hired from giving any opinion testimony based on his inspection of the vehicle the day before the hearing. Andrew maintained that because the Reeds had not permitted it to inspect the vehicle, the Reeds’ mechanic should not be allowed to testify. The court commissioner denied Andrew’s request. The mechanic testified, and the court commissioner decided in favor of the Reeds. Andrew filed a demand for trial and the case was transferred to the circuit court.

¶4 Concluding that the Reeds had caused “spoliation of evidence” preventing Andrew from defending against the Reeds’ claim, the circuit court granted Andrew’s motion for summary judgment and dismissed the action. In an oral decision, the court detailed the facts leading to its conclusion. The Reeds do not challenge any of the circuit court’s factual findings.

¶5 While somewhat complicated, a summary of the essential facts on which the court based its conclusion is as follows: The Reeds corresponded with Andrew and Andrew’s attorney at length prior to the small claims hearing. They

advised Andrew of their intention to have a mechanic inspect the cylinder head, and of their intention to sell the car for salvage. Andrew, in turn, advised the Reeds of its desire to inspect the cylinder head. As things developed, however, the parties disagreed on the timing and financial arrangements for Andrew's inspection. Ultimately, after 5:00 p.m. on the Friday preceding the Tuesday scheduled for the small claims hearing, the Reeds faxed Andrew's attorney a letter indicating that the mechanic they had hired would be removing the cylinder head that very Friday. On the following Monday, Melvin Reed called Andrew's attorney and advised him that Andrew would be allowed to inspect the vehicle only by towing it to Andrew and back to the mechanic that same afternoon. In response, Andrew's attorney advised Mr. Reed that it was unreasonable to require Andrew to inspect the car that very day, under those circumstances. Following the small claims hearing, and while the matter was pending trial in the circuit court, the Reeds sold the car, including the cylinder head, for salvage.

¶6 As the circuit court noted in its colloquy with Mr. Reed, the Reeds easily could have retained the cylinder head:

THE COURT: Okay. So if the [cylinder] head was pulled [off the car for inspection by the Reeds' mechanic], and it was, right?

MR. REED: That's correct.

THE COURT: Why not maintain that? That you can store in a garage. Why not save that at least if you're going to be in suit over that, and dispose of the body of the vehicle? That's the only relevant portion of the vehicle to this litigation.

MR. REED: Your Honor, the head was brought to [small claims] court, was viewed by the plaintiffs' expert witness, it was viewed by Commissioner Machi, and the opportunity for the head to be inspected was there with that expert witness from the defendant.

THE COURT: But that's not what the statute provides. Just because—plaintiff can't control the terms and

conditions. A person's expert is going to take a look at something and is going to subject it to whatever tests they want to subject it to.

If the head had been pulled, why wasn't that at least saved? Who cares about the car? There was really no reason to dispose of that portion of the vehicle.

MR. REED: It was just part of the car. The head was placed in the trunk. We had no way to move the car. The car was disposed of in total.

THE COURT: Think about this. Somebody actually had to put that back in the car.

MR. REED: No. They don't. They don't put the car back together. We paid three hundred dollars for the heads to be removed. There is an additional charge for them to put the car together.

We couldn't afford it. We simply had the head removed for our expert to inspect it. The engine was all taken [apart] and that car engine, that we had was also in tow to the junk yard.

THE COURT: But why not keep it if it's not that hard to keep?

MR. REED: I[t] may have been small enough to take to court in a box, but it wasn't the kind of thing you keep in your living room.

THE COURT: It is when you're in litigation.

¶7 The Reeds' attempt, in the circuit court, to justify the disposal of the cylinder head was unconvincing and, on appeal, the Reeds offer nothing to counter the court's conclusion that the cylinder head easily could have been retained for Andrew's inspection. Although the Reeds explain that Andrew had opportunities to inspect the cylinder head, they fail to offer any authority to suggest that Andrew was required to do so, except in conformity with the rules of pretrial discovery and inspection.

¶8 As we have explained:

A trial court's decision to dismiss a cause of action as a sanction [for destruction of evidence] is discretionary and will not be disturbed unless the party claiming to be

aggrieved by the decision establishes that the trial court has erroneously exercised its discretion. A discretionary decision will be upheld if the trial court has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist., 177 Wis. 2d 523, 529-30, 502 N.W.2d 881 (Ct. App. 1993) (citation omitted). “There is a duty on a party to preserve evidence essential to the claim being litigated,” and the “failure to take adequate steps to preserve evidence that was totally within [a party’s] control is sufficient to justify the imposition of sanctions” leading to dismissal. *Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis. 2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995).

¶9 Acting unilaterally, the Reeds attempted to determine the timing, circumstances, and financial arrangements governing their mechanic’s work and Andrew’s opportunity for inspection. Then, despite Andrew’s statutory right under WIS. STAT. § 799.207(3)(a) (1997-98)¹ to have the matter heard before the circuit court, the Reeds allowed the essential evidence to be destroyed. The circuit court observed, “the fact is that it is the rules of civil procedure which control how discovery is conducted, not a lay person[’]s idea of how it’s supposed to be conducted.” As Andrew correctly argues:

Here, the Reeds intentionally destroyed the fundamental evidence in this case while a circuit court action was pending. The discovery process, in fact the circuit court action, had hardly begun when they unilaterally disposed of the only essential evidence in the case. They destroyed the entire automobile, including the cylinders and the cylinder head, before Andrew Automotive had inspected it, and in spite of Andrew Automotive’s obvious need to do so.

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

The Reeds offer no reply. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶10 We conclude that the circuit court properly exercised discretion in determining that, because the Reeds' disposal of essential evidence precluded Andrew from defending the case, dismissal of the Reeds' action was appropriate.

By the Court.—Order affirmed.

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

