COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2000

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

No. 99-1678

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

MAURICES INCORPORATED, ST. PAUL FIRE & MARINE INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

EMPEROR'S KITCHEN, INC., AND SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS,

SECURITY INSURANCE COMPANY OF HARTFORD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KEIFFER, Judge. *Reversed and cause remanded with directions.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 BROWN, P.J. Maurices Incorporated is a men's clothing store located in a mall. Emperor's Kitchen, Inc. (Emperor's) is a Chinese restaurant located next door to Maurices. A fire occurred at the restaurant and Maurices claimed that soot and odor from the fire damaged its merchandise. Emperor's claimed before the trial court that Maurices intentionally liquidated its stock soon after the fire, thus fatally damaging Emperor's ability to test the merchandise for fire-related damage. Emperor's sought dismissal as a sanction. Maurices protested that its act was not intentional, not egregious and that, in any event, testing was not essential. The trial court granted Emperor's its requested relief. Before doing so, the trial court explored existing case law and concluded that so long as the destruction of essential evidence was intentional, the sanction of dismissal was appropriate. The trial court concluded that a finding of egregiousness need not be made. ***Garfoot v. Fireman's Fund Insurance Co.***, 228 Wis. 2d 707, 724, 599 N.W.2d 411 (Ct. App. 1999), decided after the trial court's judgment, clearly holds that dismissal is only an appropriate sanction if a party intentionally *and* egregiously destroys evidence essential to the case. *See* ***id***. at 717-24. We reverse and remand with directions that we set forth below. We also address other issues pertinent to the judgment.

¶2 The facts of this case are as follows. On March 7, 1997, a fire occurred on the property leased by Emperor's. Maurices leased property adjacent to Emperor's. Maurices believed that the fire damaged its merchandise and liquidated its entire inventory on or after March 11, 1997. None of Maurices' merchandise was kept to determine if odor or soot from the fire had damaged it.

¶3 Emperor's brought its sanction motion by way of a motion for summary judgment. Before the trial court, the parties disputed certain facts about the events occurring between the time of the fire on March 7 and the time that

Maurices shipped the merchandise out on March 11. While it was undisputed that Emperor's' insurance agent was on the premises of Maurices on March 7, 10 and 11 of 1997, Emperor's claims that on March 11, 1997, a Maurices manager informed Emperor's' insurance agent on the phone that liquidation would occur without the agent's inspection. However, Maurices denies its manager made this statement. Furthermore, Maurices contends that on March 11, 1997, Emperor's' insurance agent had an opportunity to inspect Maurices' merchandise and was told he could take samples, but he did not do so.

¶4 Before reaching the merits, we must address our standard of review, which the parties dispute. Maurices claims that our review is de novo, as the trial court granted Emperor's' motion for summary judgment. *See* ***Green Spring Farms v. Kersten,*** 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987) (court of appeals reviews grant of summary judgment using same methodology as circuit court and without deference to circuit court's decision). Emperor's asserts that the issue before the trial court was whether to impose sanctions, and such a decision is within the sound discretion of the trial court. Thus, Emperor's contends, our review is limited to whether the trial court erroneously exercised its discretion.

¶5 We are not bound by the title the parties give a motion. *Cf.* ***Thomas/Van Dyken Joint Venture v. Van Dyken***, 90 Wis. 2d 236, 241, 279 N.W.2d 459 (1979) ("[T]he label given the document by the circuit court or the parties is not binding on this court in deciding the question of appealability. We will look beyond the form and the label of the document to the substance and nature of the determination."). Emperor's' motion for summary judgment is more properly characterized as a motion for sanctions and dismissal. As such, the appropriate standard of review is the erroneous exercise of discretion standard. *See* ***Garfoot***, 228 Wis. 2d at 717. Thus, we will affirm the trial court's ruling as

long as the trial court "examined the relevant facts, applied a proper standard of law, and, utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶6 ***Garfoot*** held that a party's destruction of essential evidence is only grounds for dismissal when the party's conduct was intentional and egregious. *See* ***id.*** at 717-24. The law is that a party to a lawsuit has a duty to preserve evidence essential to the case. *See* ***id.*** The law also holds that a sanction of dismissal for destroying evidence essential to the case is not appropriate unless the destruction was intentional as opposed to a product of negligence. *See* ***id.*** at 722-24. The trial court found that Maurices intentionally destroyed essential evidence. Maurices liquidated its entire inventory, knowing the merchandise would be the subject of a potential legal dispute, before any tests were performed on the merchandise.

¶7 The trial court also concluded that a finding of egregious conduct on the part of the party destroying the evidence was not a prerequisite to dismissal of a case. The trial court arrived at this conclusion after analyzing two published cases of the court of appeals: ***Sentry Ins. v. Royal Ins. Co.***, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995), and ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993). The trial court perceived a conflict between the two cases. The trial court acknowledged that ***Milwaukee Constructors II***, 177 Wis. 2d at 534-35, held that dismissal is only an appropriate sanction when evidence has been destroyed intentionally and egregiously. But the trial court determined that in ***Sentry***, 196 Wis. 2d at 918, the court held that dismissal is appropriate so long as the evidence was destroyed intentionally and never so much as mentioned the need for a finding of egregious conduct. The trial court resolved the perceived conflict between

Sentry and ***Milwaukee Constructors II*** by concluding that the language in ***Milwaukee Constructors II*** was dicta because the destruction of evidence in ***Milwaukee Constructors II*** was negligent and not intentional. Therefore, the ***Milwaukee Contractors II*** court never needed to get to the egregiousness issue.

¶8 As we have already stated, the trial court did not have the benefit of ***Garfoot*** at the time of its decision. The ***Garfoot*** court acknowledged how it could be reasonably concluded that there existed a conflict between ***Sentry*** and ***Milwaukee Constructors II***. *See* ***Garfoot***, 228 Wis. 2d at 722-23. But the ***Garfoot*** court announced that when two court of appeals cases seemingly conflict, it is the duty of a court of appeals panel to try to construe the two cases so that they do not conflict. Armed with its understanding of its duty, the court proceeded to read ***Sentry*** as "adhering to, rather than modifying, the standard established in ***Milwaukee Constructors II.***" ***Garfoot***, 228 Wis.2d at 723. In sum, the ***Garfoot*** court read the ***Sentry*** decision as holding sub silentio that egregious conduct was present because the ***Sentry*** court relied heavily on the trial court's language and the trial court's language could be construed as finding that egregious conduct existed. The ***Garfoot*** court then wrote: "We now reaffirm our holding in ***Milwaukee Constructors II*** that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct, which, in this context, consists of a conscious attempt to affect the outcome of litigation or flagrant knowing disregard of the judicial process." ***Garfoot***, 228 Wis. 2d at 724 (citing ***Milwaukee Contractors II***, 177 Wis. 2d at 532-33). We are bound by the language in ***Garfoot***. Since the trial court made no finding regarding egregiousness in this case, we must reverse and remand to determine if Maurices' conduct was egregious.

¶9 Because the remaining issues affect the scope of our remand, we will address them. Maurices contends that, in addition to the lack of a finding of egregious conduct, the trial court was also wrong to find that the evidence destroyed was essential to Emperor's' ability to conduct tests so as to adequately defend the case. Again, as we have previously stated, ***Sentry*** holds that when one side intentionally destroys evidence, dismissal is only proper if the other side was deprived of an opportunity to "conduct tests essential to its adequate defense of the claim." ***Sentry***, 196 Wis. 2d at 918. Maurices contends that conducting tests on the allegedly damaged merchandise is not essential to Emperor's' defense because Emperor's might still be able to prove how the merchandise was not damaged by using eyewitness testimony and photographs.

¶10 Alternatively, Maurices claims that even if the tests had shown that there was no odor or soot on them, Maurices would still have a cause of action. This is because a reasonable jury could find that no consumer would want to buy clothes that had been exposed to smoke. Therefore, even if the tests had produced a negative finding for smoke and soot, Emperor's would still be exposed to paying damages to Maurices due to the fire.

¶11 The trial court rejected these same two arguments and we cannot say that the decision constituted an erroneous exercise of discretion. Keeping samples of the merchandise was essential to prove at trial whether the merchandise was in fact damaged. The presentation of merchandise would have been the most effective way to show damage or lack thereof. Maurices claims that Emperor's could have put on eyewitnesses and photographs. But Maurices should not be able to intentionally destroy evidence that nullifies a defense strategy without sanction merely because other, probably less desirable, defense strategies are still available.

The trial court's finding that the evidence was essential does not represent an erroneous exercise of discretion.

¶12 We also agree with the trial court in its rejection of the idea that Maurices could still win the day even if the clothes did not smell and had no soot thus rendering any testing irrelevant. Maurices has cited no authority for the proposition that, even without actual damages to its inventory, it may still collect damages if it can prove that its customers would not have bought clothes that were in the store at the time of the fire. Nor did Maurices submit any evidence showing that customers would not buy clothes due to a fire in a neighboring establishment. In other words, Maurices' theory of damages is just that—a theory with no support.

¶13 Another issue raised by Maurices needs to be addressed. According to Maurices, ***Sentry*** holds that the duty to preserve evidence is limited to situations in which the destroyer has exclusive control of the evidence. "There is a duty on a party to preserve evidence essential to the claim being litigated. The failure to take adequate steps to preserve evidence that was *totally within Sentry's control* is sufficient to justify the imposition of sanctions." ***Id***. at 918-19 (emphasis added). Maurices claims it did not have exclusive control of the merchandise because Emperor's had numerous opportunities to inspect the merchandise and take samples.

¶14 This issue is a nonstarter. Whether Emperor's had numerous opportunities to inspect the merchandise and take samples has nothing whatsoever to do with whether Maurices retained control over the merchandise. Emperor's certainly had no control over the merchandise. If anything, Emperor's was given permission to take samples—a grant which, by the way, Maurices contends was

never exercised by Emperor's. The record is undisputed that Maurices maintained exclusive control over the merchandise from March 7 until it liquidated its inventory on March 11.

¶15 One last issue raised by Maurices must be addressed. According to Maurices, Emperor's should be estopped from claiming that Maurices *intentionally* destroyed evidence because it is undisputed that Maurices sold the merchandise quickly to mitigate damages. Maurices contends that clothes must be sold promptly because they lose value rapidly as color combinations and styles change quickly.

¶16 We agree with the trial court, however, that according to ***Sentry***, the holder of evidence has a duty to preserve the evidence and that no estoppel defense is available. Whether Maurices felt compelled to liquidate or not, the undisputed evidence is that Maurices intentionally liquidated the stock. No negligence was involved. Maurices did an intentional act because it believed it made good business sense to do it. But it is still an intentional act. So, we agree with the trial court that the element of intent has been satisfied and that there is no dispute in the record about it.

¶17 That being said, the fact that Maurices claims it sold merchandise quickly to mitigate damages should be considered by the fact-finder when determining egregiousness. Moreover, if the finder-of-fact determines that Maurices in fact told Emperor's on numerous occasions that Emperor's was free to take samples for laboratory testing and Emperor's failed to do so, and also told Emperor's that it needed to liquidate merchandise quickly to mitigate damages but Emperor's did not act, then that also goes to the egregiousness determination. The parties dispute how much opportunity Emperor had to inspect and take samples of

Maurices' merchandise. The finder of fact must resolve this factual dispute as part of the egregiousness determination.

¶18 This case is reversed and remanded to the trial court to determine if Maurices destroyed evidence egregiously. If the trial court finds egregious conduct, it may reaffirm its earlier decision. If the trial court finds no egregious conduct, it has an option according to the ***Garfoot*** court. It may decide not to sanction Maurices at all. Or, it may consider an alternative, but less drastic, sanction. *See* ***Garfoot***, 228 Wis. 2d 725. Whether to craft a sanction and what kind of sanction the trial court might wish to craft are matters within the discretion of the trial court.

By the Court.—Order reversed and cause remanded with directions.

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