COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP559 **Cir. Ct. No. 2009CV5138**

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

WAGNER DAIRY FARMS, LLC, JEROME WAGNER, MARK WAGNER AND CHARLES WAGNER,

PLAINTIFFS-APPELLANTS,

V.

TRI-COUNTY DAIRY SUPPLY, INC. AND GEA WESTFALIASURGE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed and cause remanded.*

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

¶1 PER CURIAM. Wagner Dairy Farms, LLC and its owners, Jerome, Mark, and Charles Wagner, appeal an order that dismissed their multiclaim lawsuit against Tri-County Dairy Supply, Inc. and GEA WestfaliaSurge, Inc.

Broadly speaking, the lawsuit sought damages for harm to the Wagners' dairy herd that they alleged had been caused by milking equipment manufactured by WestfaliaSurge and sold and installed by Tri-County Dairy Supply. The circuit court dismissed the lawsuit as a sanction for the spoliation of evidence, and made alternative rulings based upon the summary judgment materials concluding that each of the Wagners' causes of action would also fail on its merits. The respondents move for an award of attorney fees on the grounds that the appeal is frivolous. We affirm the circuit court's spoliation decision, and therefore do not reach the alternate bases for dismissal.

BACKGROUND

¶2 The circuit court's decision includes the following findings relevant to its spoliation decision. The Wagners run a dairy operation that utilizes an automated milking system. The system includes pulsators that manipulate the air flow in a partial vacuum between shells and liners attached to the cows teats to produce a milking action. The milk then flows by gravity through milk lines into a bulk tank.

¶3 The Wagners expanded their dairy operation in 2004, utilizing much of their existing equipment but adding new WestfaliaSurge pulsators among other items. Tri-County sold and installed all of the new equipment.

¶4 In April 2007, Tri-County installed an additional twenty WestfaliaSurge pulsators for the Wagners. Following the 2007 installation, the pulsators began making a buzzing sound that had not previously existed, and the cows began experiencing health problems. Tri-County representatives visited the farm several times before they were finally able to hear the buzzing in October

2007. When they increased the voltage output to the pulsators, the buzzing stopped.

¶5 In April 2009, the Wagners' legal counsel hired two experts to test the milking system. They were unable to recreate the buzzing sound during their initial tests.

¶6 In July 2009, the Wagners replaced the WestfaliaSurge pulsators with another system. The wiring for the old pulsators was disconnected, but the pulsators, wiring, and control box were left in place.

¶7 In August 2009, the Wagners' experts rewired the old pulsators and again tested the system. This time they were able to recreate the buzzing sound using a dimmer switch to manipulate the voltage flow.

¶8 The Wagners filed this lawsuit in October 2009. Meanwhile, in October and November, they made extensive changes to the milking parlor. Among other things, they restructured the milk line at a different height and slope with new brackets, raised the milk pumps and receivers, changed the location of air injectors, removed milk flow sensors from the milk line, discontinued automatic take-offs, reduced the vacuum system, and added a third pulsator airline. In addition to altering the set-up of the milking equipment, the Wagners discarded some of the wiring that had been used during the August testing.

¶9 No representatives of Tri-County or WestfaliaSurge were advised about or present for any of the testing done by the Wagners' experts prior to the initiation of this lawsuit. Nor was the respondents' expert given any opportunity to examine, measure, or test the performance of the vacuum system or milk line as it existed from 2004 to 2009, or the pulsation equipment as it existed from 2007 to

2009, after being notified of the claim but before the milk line was restructured and some of the components were discarded.

STANDARD OF REVIEW

¶10 The appellants discuss the circuit court's decision to dismiss the appeal as a sanction for spoliation within the context of summary judgment methodology, arguing that we should consider *de novo* whether there were material facts in dispute about the importance of the altered and destroyed evidence that should have entitled them to go to trial. That is not the correct standard of review, however. Although the circuit court did address the spoliation question in the same opinion in which it ruled upon the respondents' summary judgment motion—and apparently relied upon the summary judgment materials for the dual purpose of providing a factual background for the respondents' claim of destruction of evidence—the court's dismissal of the appellants' entire lawsuit as a sanction for the destruction of evidence was a distinct decision from its determination that there were no material facts in dispute on the issues joined by the parties' pleadings, and it is subject to a different standard of review.

¶11 A circuit court's initial determination as to whether spoliation has occurred will typically depend upon a series of factual findings about what, if any, steps were taken to preserve or destroy the evidence, and what effect the loss of evidence had upon the opposing party's ability to litigate the claim. *See, e.g.*, ***Sentry Ins. v. Royal Ins. Co. of America***, 196 Wis. 2d 907, 917, 539 N.W.2d 911 (Ct. App. 1995). We will not set aside such factual findings unless they are clearly erroneous based upon the record before the circuit court. ***Id.***

¶12 Once the circuit court has made a spoliation determination, it has broad discretion to decide whether a sanction is warranted and, if so, what

sanction to impose. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). We will uphold the circuit court's decision to impose a particular sanction so long as the court has rationally applied a proper standard of law to the established facts to reach a reasonable result. ***Id.*** We will, however, independently determine whether the circuit court applied a proper legal standard. ***Id.***

DISCUSSION

¶13 A party or potential litigant has a duty to preserve evidence essential to a claim that is being or likely will be litigated. ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶21, 319 Wis. 2d 397, 768 N.W.2d 729. The intentional destruction, alteration, or concealment of such evidence is known as "spoliation." ***Id.*** In making a spoliation determination, the circuit court should consider whether the party responsible for the destruction of evidence knew, or should have known, at the time of the evidence's destruction that: (1) litigation was already pending or was a distinct possibility; and (2) the destroyed material would be relevant to that pending or potential litigation. ***Morrison v. Rankin***, 2007 WI App 186, ¶16, 305 Wis. 2d 240, 738 N.W.2d 588.

¶14 A party or potential litigant with a legitimate reason to destroy relevant evidence within his or her control may discharge the duty to preserve that evidence after providing the opposing party or potential litigant with: "(1) reasonable notice of a possible claim; (2) the basis for that claim; (3) the existence of evidence relevant to the claim; and (4) reasonable opportunity to inspect that evidence." ***Golke***, 319 Wis. 2d 397, ¶28. In considering the sufficiency of any notice given, a circuit court should consider the totality of the circumstances, which could include such factors as the nature of the evidence and

burden involved in preserving it; the potential prejudice posed by the destruction of the evidence; and the sophistication of the parties. ***Id.***, ¶29.

¶15 There are a wide range of options available to deal with the spoliation of evidence, including through discovery, with jury instructions, or by the dismissal of claims. ***Id.***,¶42. The purpose of imposing sanctions in such cases is to advance the judicial system's truth-seeking function by assuming that the destroyed evidence would have hurt the party responsible for destroying it, and to act as a deterrent by eliminating the benefits of destroying evidence. ***Insurance Co. of North America v. Cease Elec., Inc.***, 2004 WI App 15, ¶16, 269 Wis. 2d 286, 674 N.W.2d 886. Dismissal is an appropriate sanction for spoliation only when the party in control of the evidence acted egregiously in destroying it. ***Golke***, 319 Wis. 2d 397, ¶42. Egregious behavior means a "conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process." ***Id.*** (citation omitted).

¶16 Here, the circuit court determined that the milking line, pulsators, and other electrical components were all potential evidence in this case because the complaint alleged damages resulting from their negligent construction, installation, and maintenance. The court noted it was undisputed that the Wagners intentionally altered the milking system and disposed of the wiring. The court reasoned that the evidence demonstrated the Wagners were anticipating litigation when they altered and disposed of evidence because they had already hired counsel, and that they should have known that the evidence would be relevant to the pending litigation because they had hired their own experts to examine it. One of those experts had identified problems with the slope and layout of the milking line, while the other opined that various problems with the wiring created a potential for voltage drop in the system. The circuit court further determined that

the Wagners had not provided the respondents with any reasonable opportunity to inspect the evidence after giving them notice of their claims, and that it would not be feasible to accurately recreate the entire system, given the complex arrangement of the component parts. Therefore, the circuit court concluded, spoliation had occurred. The circuit court decided that dismissal was an appropriate sanction because the Wagners' conduct in intentionally destroying and altering evidence both before and after filing suit, without any notice to the opposing parties, represented a flagrant disregard for the judicial process.

¶17 The Wagners challenge the circuit court's factual findings revolving around the importance of the original configuration of the milking equipment and the wiring and to the case, and the respondents' ability to defend against the action without access to that evidence. The Wagners contend both that it was improper for the circuit court to draw inferences in the respondents' favor and make factual findings in the context of summary judgment, and that the court's findings did not adequately take into account the Wagners' evolving theory of the case, based largely upon discovery materials provided to the court on a motion for reconsideration, that the wiring was not the central problem. The Wagners' arguments are misplaced in several regards.

¶18 First, as we have already explained in our discussion of the standard of review, the circuit court's decision on spoliation was distinct from its decision on whether there were material facts in dispute on the causes of action set forth in the complaint. In short, the circuit court was not only permitted, but required, to make factual findings in order to decide whether spoliation had occurred. The Wagners have not developed any argument to explain why the circuit court's factual findings—which were all supported by citations to depositions or other

materials in the record or based upon inferences made therefrom—were clearly erroneous.

¶19 Second, the subject of this appeal is the circuit court's initial decision to dismiss the action. The notice of appeal from that decision does not give us authority to review subsequent events, including the Wagners' reconsideration motion. *See generally* WIS. STAT. RULE 809.10(4) (2009-10)[1] (providing that an appeal from a final judgment or order brings before this court all *prior* rulings). Since the materials submitted with the Wagners' reconsideration motion were not before the circuit court when it made its initial spoliation determination, they are not relevant to our review of whether the circuit court properly exercised its discretion in dismissing the lawsuit as a sanction. Again, the Wagners have failed to develop an argument to explain why the circuit court could not properly determine that the altered and destroyed evidence was essential to the original claims and theories advanced by the Wagners.

¶20 Third, even to the extent that the circuit court may have been able to discern from the summary judgment materials before it that the Wagners were attempting to shift or narrow their theories of recovery to focus on the pulsators and switches, rather than the wiring or configuration of the milk line, it does not follow that all of the Wagners' original theories suddenly became irrelevant. The respondents were entitled to explore the original theories as well, and the Wagners' have not explained why the circuit court was not applying a proper legal standard to the facts when it determined that the alteration and destruction of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

evidence prevented them from doing so. In sum, we see no basis to set aside the circuit court's exercise of discretion in dismissing the Wagners' lawsuit as a sanction for spoliation.

¶21 That brings us to the respondents' motion for attorney fees. The rules of appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction for a frivolous appeal, when the appeal was "filed used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another," or when the party or the party's attorney knew or should have known that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c).

¶22 We award costs and attorney fees only when we deem an appeal frivolous in its entirety. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. Although it is well established that a single frivolous claim or argument will not automatically render an entire appeal frivolous, it does not follow that an arguably meritorious argument on any issue will necessarily preclude a finding that an entire appeal is frivolous. Rather, the test is whether "under all the circumstances," the appeal is "so indefensible that the party or his attorney should have known it to be frivolous." ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1 (citation omitted).

¶23 In ***Baumeister***, the court found that an appeal was not frivolous in its entirety where an arguably meritorious argument had been made on the question whether a duty had been breached on a negligence claim, even though there was no arguably meritorious argument made on the issue of causation. ***Id.***, ¶27. We

believe there is a distinction to be made, however, between multiple arguments being made upon different elements of a claim or alternate theories of recovery, and a threshold issue that would bar relief entirely. For instance, if it is plain that a defendant is entitled to immunity or that an action is barred by claim preclusion or the statute of limitations, we believe that an appeal raising an argument about an underlying claim could properly be deemed frivolous in its entirety regardless of the merits of that claim if there is no reasonable basis in law or fact to challenge this bar.

¶24 Here, the appellants contend that they had a good faith basis to argue that the circuit court had failed to follow summary judgment procedures when it made factual findings. We are persuaded that a reasonable attorney should be aware, however, that a sanction for spoliation is separate from a summary judgment determination on the merits of the claims set forth in the complaint, and is subject to a different standard of review. Furthermore, the appellants should have known that they had no grounds to challenge the factual basis for the circuit court's spoliation decision. Their attempt to retroactively expand the record with materials submitted on a motion for reconsideration supports our conclusion that they had no good faith argument for reversal based upon the materials that were before the circuit court when it rendered its decision.

¶25 We conclude that the appeal is frivolous in its entirety because the appellants advanced no arguably meritorious argument on the dispositive, threshold issue of whether the circuit court properly dismissed the appeal as a sanction for spoliation. We therefore affirm the order of the circuit court and award the respondents their costs and attorney fees pursuant to WIS. STAT. RULE 809.25(3). Because this court is not authorized to make factual findings, we

remand for an additional determination of the amount of the attorney fees reasonably incurred in defending this appeal.

By the Court.—Order affirmed and cause remanded.

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