COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2011AP2831 **Cir. Ct. No. 2009CV6168**

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

CHERYL CODY, GEORGE CODY, COREY CODY, A MINOR, ALESHA CODY, A MINOR, LUCILLE PLANTS AND PHYLLIS GOERKS,

PLAINTIFFS-RESPONDENTS,

BLUE CROSS BLUE SHIELD OF WISCONSIN AND WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

TARGET CORPORATION,

DEFENDANT-APPELLANT,

TARGET MADISON WEST, OLD REPUBLIC RISK MANAGEMENT, INC., ABC COMPANIES AND DEF COMPANIES,

DEFENDANTS,

AMERICAN RECREATION PRODUCTS, INC., KELLWOOD COMPANY AND SENTRY INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed and cause remanded with directions*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Target Corporation appeals a nonfinal order of the circuit court imposing sanctions on Target for spoliation.[1] Target argues: (1) the circuit court erroneously exercised its discretion in determining that Target's actions rose to the level of spoliation of evidence; (2) the sanctions imposed by the circuit court were not supported by the record because Target's actions did not amount to egregious conduct, and the sanctions were excessive; and (3) the circuit court erred in dismissing other named defendants, American Recreation Products, Inc., Kellwood Company and Sentry Insurance (collectively Kellwood) as part of the sanctions against it. We affirm.

BACKGROUND

¶2 In 2009, Cheryl Cody, George Cody, Corey Cody, Alesha Cody, Lucille Plants, and Phyllis Goerks (collectively the Codys) brought suit against Target Corporation, Target Madison West, Old Republic Risk Management, Inc., American Recreation Products, Inc., Kellwood Company, and Sentry Insurance, to recover for personal injuries the Codys claimed they sustained from exposure to

[1] Target petitioned this court for leave to appeal the nonfinal order pursuant to WIS. STAT. §§ 808.03 and 809.50 (2011-12), and we granted the petition. The circuit court's order, to the extent that it dismissed the other defendants, was a final order for purposes of appeal as to those defendants. However, we determined that it was not necessary to separate the case into two separate appeals.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

unidentified chemicals which they found in a box for an inflatable mattress, which they purchased from the Target Madison West store. The box and its contents had been destroyed by Target, and the Codys moved the court for sanctions against Target for spoliation. In particular, the Codys requested that the circuit court find, as a matter of law, that the damages they alleged to have suffered from exposure to the contents of the air mattress box, were in fact caused by that exposure.

¶3 The circuit court granted the Codys' motion. The circuit court found that in December 2006, Cheryl purchased from Target what she believed to be an Eddie Bauer air mattress, and that she left the box that she thought contained the air mattress in her vehicle for nine days before taking it into her house. The court found that Cheryl opened the box for the first time on December 29, 2006, at which point it was discovered that the box did not contain an air mattress as advertised. The court found that instead of the expected air mattress, Cheryl found:

> what looked like kind of noxious stuff that had a tee-shirt wrapped around some deodorant thing with a plastic hose or tubing wrapped around it and then this jar of Ortho Ant and Roach Killer with a tube coming out of the top of it.

The court found that Cheryl returned the box and its contents to Target the next day, December 30, and that on December 31, Cheryl's family members, the plaintiffs in this case, "began becoming ill." The court found that on December 31, 2006, and January 1, 2007, Cheryl called Target, but was unable to get through to anyone. On January 2, Cody spoke with a customer service person at Target, Rosie Warren, who wrote the following note documenting the call:

> [Cody] says she purchased a mattress and put it in the back of her car. Says New Year's Eve she returned [12/30], when she opened the item there was folded inside the air mattress a spray bottle, large green Ortho bottle with insecticide and a tee-shirt [(]large green Ortho one-half

> empty[)], another container that was white solid that appeared to be deodorant but no labeling on the item was clear white and a tee-shirt. [Cody] is now having allergic reaction and her aunt is 80 years experiencing reaction from items and son all have severe puffiness of the eyes. Called store to speak to Sarah to see if claim was filed and if she still has items. [Cody] says it could have been terrorist[] attack. [Cody] is very upset. Called store with Todd not aware of items.

¶4 The court found that when the air mattress box and its contents were returned to the Target Madison West store on December 30, 2006, they were placed on a bench in the office of Johnnie Milton, the store's loss prevention manager. The court found that Milton was not at work that day and that Milton did not know how long the items remained in his office, but that he estimated that they remained there from three to seven days (which would indicate that they remained in his office until between January 2 and January 6). After that, Milton took the box and its contents to the store's "chargebacks" department for processing as a return that cannot be just placed back on the shelves. Thereafter, Target disposed of the items.

¶5 Based upon its findings, the circuit court imputed Rosie Warren's knowledge of the Codys' complaint regarding the items found in the Eddie Bauer air mattress box to Target. The court then found Target's actions constituted spoliation. In support of that finding, the court stated: "Target knew people were sick. Target elected to dispose of the only evidence plaintiffs could look to [in order] to explain, to explore causation." The court further stated that Target's disposal of the box was egregious and in "flagrant disregard of the process," based upon the circumstances, which were that the Codys were claiming they were sick from their exposure to the contents of the box.

¶6 The circuit court imposed sanctions based upon Target's conduct. Without specifically deciding what form the verdict would take, the circuit court found causation, thereby "denying Target the causation defense." The court also dismissed from the suit the other defendants, reasoning that they had "been denied the ability to present a cause defense through no fault of [their] own." As a result, Target would be responsible for "any damages attributed to [the dismissed defendants] on the verdict form."

¶7 Target sought, and we granted, leave to appeal this nonfinal order.

DISCUSSION

¶8 Target contends that the circuit court erroneously exercised its discretion in determining that its destruction of the air mattress box and its contents constituted spoliation, and in sanctioning Target in the manner in which it did. We address these arguments in turn below.

A. Circuit Court Concluded that Target Engaged in Spoliation

¶9 "Every party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely 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, mutilation, alteration, or concealment of evidence'" is known as "spoliation." ***Id.*** (quoted source omitted).

¶10 However, "[n]ot all destruction, alteration, or loss of evidence qualifies as spoliation." ***Insurance Co. of N. Am. v. Cease Elec. Inc.,*** 2004 WI App 15, ¶15, 269 Wis. 2d 286, 674 N.W.2d 886. We have explained that 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 the evidence was destroyed 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. ***Id.***

¶11 A circuit court's determination that spoliation has or has not 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* ***Sentry Ins. v. Royal Ins. Co. of Am.***, 196 Wis. 2d 907, 917, 539 N.W.2d 911 (Ct. App. 1995). A circuit court's findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).

¶12 Target does not explicitly argue that the circuit court's findings as to either parts of the ***Cease Electric*** test are clearly erroneous. Its arguments are difficult to follow, but we will assume without deciding that Target has challenged the findings as clearly erroneous and determine whether there is an adequate factual basis for the findings. In our review of a circuit court's factual findings, "factual determinations must be accepted as true unless they are contrary to the great weight and clear preponderance of the evidence." ***Sentry Ins.,*** 196 Wis. 2d at 917.

¶13 As stated above, the circuit court imputed to Target knowledge of Cody's claim based upon Warren's documentation of Cheryl's call to Target on January 2, 2007. Target has not argued that this assumption by the circuit court is erroneous, but instead has focused its argument on the content of that imputed knowledge. Relying entirely on cases from other jurisdictions and contexts other than spoliation, Target asserts that mere notice of the injury, which Target refers to as "generalized concern about litigation," is not enough to give notice that

litigation is a distinct possibility. Target's argument is misplaced given the factual findings of the circuit court, which Target has not challenged.

¶14 Warren's note documents that Cody provided Target with substantial information beyond the mere fact of injury (or a "generalized concern about litigation"). Her note identified the peculiar and unexpected contents of the air mattress box, including the fact that part of those contents was a substantial quantity of poison, which was in an Ortho Ant and Roach Killer bottle that was half empty. The note indicated that three members of the Cody family were exhibiting symptoms. The note indicated that Cheryl was very upset. Finally, the note indicated that Warren called the Target Madison West store to discuss the problem with someone named Sarah, and that she spoke with someone named Todd. The court's finding that Target knew or should have known that litigation was a distinct possibility can be reasonably inferred from the information contained in Warren's documentation. These facts go far beyond mere notification of injury or any "generalized concern about litigation."

¶15 Under the second part of the test, which involves knowledge or potential knowledge that the destroyed material would be relevant to potential litigation, the circuit court found that Target should have known this. The court observed that "Target knew people were sick" but nevertheless "elected to dispose of the only evidence [the Codys] could look to to explain … causation." The court further stated: "There was no lawsuit filed. As far as I know, there was no mention of a lawsuit. But, the circumstances were that she said, 'We're sick. We're sick because of what was in that box.' And Target's response was to dispose of that box."

¶16 It is unclear, but Target apparently means to argue that the court failed to sufficiently take into account the proposition that Target destroyed the evidence "during the course of everyday business." However, the court made a specific determination that Target knew that the Codys were ill and that the box and its contents were being blamed by them for their illness. This provides a sufficient factual basis for the circuit court to find that Target should have known that the box was relevant evidence, irrespective of whether the destruction occurred as part of a business practice. As the court said, it was the only evidence of causation.

¶17 Because the circuit court's finding that Target knew, or should have known, when the air mattress box and its contents were destroyed that litigation was a distinct possibility and that the evidence would be relevant to any pending litigation, we cannot say that the circuit court's finding that Target's destruction of the evidence constituted spoliation was clearly erroneous. Accordingly, we affirm that determination.

B. Circuit Court Properly Exercised Discretion in Ordering that the Issue of Cause was Established as a Sanction for Spoliation

¶18 In ***Cease Electric***, we explained that "[s]poliation remedies advance truth by assuming that the destroyed evidence would have hurt the party responsible for the destruction of evidence and act as a deterrent by eliminating the benefits of destroying evidence." ***Cease Elec.***, 269 Wis. 2d 286, ¶16. Whether to impose sanctions for spoliation of evidence relevant to pending or future litigation is an exercise of the circuit court's discretion. ***Golke***, 319 Wis. 2d 397, ¶39. A discretionary decision will be upheld if the circuit court 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. ***Id.***, ¶43.

¶19 Target contends that the sanction imposed by the circuit court in this case was an erroneous exercise of its discretion. Target claims that the court could impose such a sanction only if Target's conduct was egregious. Target argues that its conduct was not egregious and that the circuit court erred in concluding that it was. Therefore, Target argues that the sanction was excessive because it was based upon an erroneous conclusion that Target's conduct was egregious.

¶20 We begin with the fundamental question of whether a finding of egregiousness was necessary to support the sanction imposed here. Both Cody and Target operate from the assumption that a sanction for spoliation that exceeds the severity of a discovery sanction requires a finding of "egregious conduct." We are not convinced. Neither party provides authority that this is the case. The authority on which both Cody and Target rely actually holds that "dismissal is a sanction that should rarely be granted and is appropriate only in cases of 'egregious conduct.'" ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993). Since this case does not involve dismissal, ***Milwaukee Constructors II*** is neither controlling nor persuasive authority for the proposition that any sanction more severe than a discovery sanction requires a finding of "egregious conduct."

¶21 Target argues that the sanction imposed by the circuit court is the equivalent of dismissal. However, the circuit court's comments make clear that it did not intend for the sanction to be the equivalent of dismissal:

> I don't want to say—I don't want the question to be, "Did the stuff in the box cause the injuries suffered by the Codys," because I think there is a question before that that

> the jury has to wrestle with. And that is did the Codys suffer an injury."

We agree with the court's analysis on this point.

¶22 Target cites ***Jagmin v. Simonds Abrasive Co.***, 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973), for the proposition that "[e]ven the remedial jury instruction with the spoliation inference requires a showing of egregious conduct." We do not find that claim consistent with the actual holding in ***Jagmin.*** What ***Jagmin*** appears to hold is that the remedial jury instruction is only allowed where there is intentional, deliberate conduct.[2] ***Id.*** at 81. Deliberate conduct and egregiousness are not the same thing. *See* ***Milwaukee Constructors II***, 177 Wis. 2d at 533 ("A finding of 'bad faith' or egregious conduct ... consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process."). Even if application of the jury instruction did require a finding of egregiousness, the jury instruction is not a discovery sanction listed in the statute. *See* WIS. STAT. § 804.12(2)(a). Whether or not the jury instruction requires a finding of egregiousness is irrelevant in this case, where the

[2] The supreme court stated in ***Jagmin v. Simonds Abrasive Co.***, 61 Wis. 2d 60, 81, 211 N.W.2d 810 (1973) (footnotes omitted):

> In Wisconsin the operation of the maxim *omnia praesumuntur contra spoliatorem* is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence. Even if the conduct of the defendant would give rise to an adverse inference, the trial court was correct in concluding that this inference could not carry the plaintiff's burden of proof. It has been held that the fabrication of evidence is not itself evidence of the truth of the facts at issue and does not warrant an inference that the true facts are the opposite of those shown by the fabricated evidence.

remedy employed is listed in the statute as a discovery sanction. *See* § 804.12(2)(a)1.

¶23 Thus, even if this court accepts Target's assertion that sanctions exceeding a discovery sanction require a finding of egregiousness, the remedy in this case did not exceed the severity of a discovery sanction. On the contrary, the remedy adopted by the circuit court in this case *is* a discovery sanction. *See* ***id.***

¶24 In ***Sentry Ins. v. Royal Ins. Co. of America***, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995), this court distinguished ***Jagmin*** in affirming a sanction similar to that imposed by the circuit court in this case. The facts in ***Sentry Insurance*** are strikingly similar to those here. A fire was allegedly caused by a malfunction in a refrigerator. The refrigerator was disposed of and the defendant's experts were unable to test its components to prepare a defense. The circuit court determined that because the disposal of the refrigerator precluded essential testing by defense experts, the appropriate sanction was to preclude evidence of the condition of the refrigerator. ***Id.*** at 918. As Target argues here, Sentry argued that ***Jagmin*** and ***Milwaukee Constructors II*** precluded the sanction. ***Id.*** We disagreed, concluding "[t]here 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.

¶25 While we conclude that it was not necessary for the court to find that Target's conduct was egregious in order to apply this statutory discovery sanction, we also conclude that the circuit court properly exercised its discretion in

imposing the sanction.[3] The circuit court's reasoning is very similar to that in ***Sentry Ins***.: "Target elected to dispose of the only evidence plaintiffs could look to to explain, to explore causation." In other words, since the spoliation made it impossible for Cody to prove causation, then the court will deprive Target of the benefit of this inability. This reasoning reflected its previous factual findings. We conclude that the circuit court appropriately exercised its discretion in finding cause as a sanction for spoliation.

C. Dismissal of the Kellwood Defendants

¶26 Target offers three arguments in opposing dismissal of the Kellwood defendants.[4]

¶27 Target first argues that:

> The issue of Kellwood's dismissal is based entirely on the Trial Court's finding of spoliation against Target and its sanction. The Trial Court did not cite to any other reason or finding to support its dismissal of Kellwood. Because the dismissal of Kellwood is part of the Trial Court's spoliation ruling, the same reasons why the Trial Court's decision regarding spoliation should be reversed apply to its decision dismissing Kellwood. Thus, if the Trial Court's decision on its sanctions for spoliation is reviewed and overturned, the Trial Court's decision to dismiss Kellwood would also need to be overturned.

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[3] *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (an appellate court is concerned with whether the circuit court decision being reviewed is correct, rather than with the reasoning employed by the court. If the holding is correct, it should be sustained, and we will do so on a theory or on reasoning not presented to the circuit court).

[4] Kellwood argues that Target's challenge to dismissal of the Kellwood defendants is forfeited because Target did not raise the issue before the circuit court. Target disputes this in its reply brief. We do not decide whether Kellwood is correct because we dispose of Target's challenge on other grounds. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not address other issues raised).

¶28 The problem with this argument is that, if we do not overturn the circuit court's decision on sanctions, then this argument offers no reason why we should overturn the circuit court's decision to dismiss the Kellwood defendants. Because we have already affirmed the circuit court's decision on spoliation and its sanction against Target, this argument offers no reason why we should now overturn the circuit court on this issue.

¶29 Target also appears to challenge the court's authority to hold it entirely responsible, arguing: "neither the Trial Court nor the parties [have] cited any legal authority that supports one defendant assuming the liability of another as a sanction for spoliation." Target, however, offers no authority for the proposition that the circuit court lacks this authority. We conclude that this argument, not supported by any authority, is insufficiently developed to warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-647, 492 N.W.2d 633 (Ct. App 1992).

¶30 Finally, Target argues that the circuit court's dismissal of Kellwood does not comply with the standard for summary judgment. Target does not explain how the circuit court has not applied the correct standard for summary judgment. This argument is also totally undeveloped, lacking both authority and rationale, and will not be addressed. ***Id.***

CONCLUSION

¶31 For the above reasons, we affirm the circuit court. As this was an interlocutory appeal, we remand to the circuit court for continuation of the proceedings.

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

Recommended for publication in the official reports.