COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1143 **Cir. Ct. No. 2007CV7644**

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

SHERRY OLSON,

PLAINTIFF-APPELLANT,

V.

JEFFREY BAUER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Affirmed*.

Before Vergeront, Lundsten and Storck,[1] JJ.

[1] Circuit Judge John R. Storck is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Sherry Olson appeals a judgment dismissing her complaint against Jeffrey Bauer. The trial court dismissed the action as a sanction for Olson's spoliation of evidence. We conclude that the trial court properly exercised its discretion in the matter, and therefore affirm.

¶2 Olson purchased a home from Bauer. Her complaint, filed in July 2007, claimed breach of contract and misrepresentation based on Bauer's alleged failure to disclose defects in the home that caused flooding in the basement.

¶3 In September 2007 Olson's attorney notified Bauer's attorney that Olson "is having some repair work done to the property," and offered Bauer the opportunity to inspect the property. Bauer's attorney responded that Bauer would like to inspect the property and asked for some dates. Bauer's counsel noted that the September letter did not specify the repairs and stated "but we assume there will be no spoliation of evidence that would somehow affect our ability to defend this case." Bauer's inspection was subsequently scheduled for December 14, 2007. Just before the scheduled inspection Olson's attorney reported that Olson had completed a substantial list of plumbing and basement repairs, including replacing the inside drain tile system.

¶4 Bauer called off the inspection and brought a motion to exclude all damages evidence pertaining to the repaired areas of Olson's home. The trial court and the parties agreed that the motion was effectively a motion to dismiss because without the evidence Bauer sought to exclude, Olson could not prove her case. After hearing the matter the trial court found that the repairs done while the litigation was pending amounted to an egregious, extreme, and substantial destruction of evidence without a clear and justifiable excuse. The court concluded that the appropriate remedy was dismissal. The court stated that: "If

ever there was a case where the truth seeking function has been completely thwarted, this is it. And a message has to be sent to parties. You don't destroy evidence, which is – it's not part of the case, it is the case."

¶5 A trial court exercises its discretion when sanctioning a party for the destruction or spoliation of evidence. ***City of Stoughton v. Thomasson Lumber Co.***, 2004 WI App 6, ¶38, 269 Wis. 2d 339, 675 N.W.2d 487 (Ct. App. 2003) (citations omitted). We affirm discretionary rulings if the trial court has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrably rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

¶6 Olson first contends that the trial court applied the wrong legal standard because dismissal requires a finding of egregious conduct and, under ***Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District***, 177 Wis. 2d 523, 532-33, 502 N.W.2d 881 (Ct. App. 1993), egregious conduct consists of a conscious attempt to affect the outcome of litigation or flagrant and knowing disregard of the judicial process. In her view the court did not make the necessary finding of egregiousness under this definition, nor could it without evidence that Olson acted deliberately to sabotage Bauer's case. However, the egregious conduct standard contains an objective component as well, such that it also applies to one who should have known that the destroyed evidence was relevant to pending litigation. ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI App 15, ¶15, 269 Wis. 2d 286, 674 N.W.2d 886 (Ct. App. 2003), *aff'd*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462 (citing ***Struthers Patent Corp. v. Nestle Co.***, 558 F. Supp. 747, 756, 765 (D.N.J. 1981)). Here the court correctly applied the "should have known" standard when it based its conclusion of egregious conduct on its finding that Olson should have known that her repairs would "gut the defense."

¶7 Olson next contends that the court dismissed the case without sufficient evidence that Olson destroyed relevant evidence or that the destruction materially affected Bauer's ability to defend himself. We disagree. Olson's complaint alleged that Bauer concealed or failed to disclose plumbing problems in the purchased house, and the extent of the resulting basement leakage and other damage. It was undisputed that after litigation commenced Olson demolished a substantial part of the basement and then replaced the inside drain tile and also replaced the pipes leading to the kitchen and a bathroom. She replaced several faucets and drains as well. In other words, the evidence destroyed before Bauer could examine it went to the very essence of the allegations against him. Under those circumstances, the trial court reasonably concluded that Bauer's ability to defend the lawsuit was substantially compromised.

¶8 Olson also contends that the court did not have sufficient evidence as to Olson's state of mind when she authorized the repairs. As noted, proof of intent is not necessary to meet the objective "should have known" standard recognized in ***Cease Electric***.

¶9 Olson next contends that the spoliation was attributable to the conduct of her attorneys and that the trial court erred by imputing that conduct to her. The issue is waived because Olson never raised the issue of attribution and she presented no evidence that her attorneys were responsible for the spoliation. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed waived).

¶10 Finally, Olson contends that the court erred by making its findings without holding an evidentiary hearing. Olson did not request an evidentiary hearing and did not object when the trial court chose to rely on affidavits for its

findings. She has therefore waived the issue. *See* ***Kavanaugh Rest. Supply v. M.C.M. Stainless Fabricating***, 2006 WI App 236, ¶14, 297 Wis. 2d 532, 724 N.W.2d 893.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).