COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 2008AP1964
2008AP1988

Cir. Ct. No. 2006CV1823

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

HARBORVIEW OFFICE CENTER, L.L.C.,

PLAINTIFF-APPELLANT,

V.

RANDALL L. NASH, INDIVIDUALLY AND D/B/A O'NEIL, CANNON, HOLLMAN, DEJONG, S.C., GREAT AMERICAN INSURANCE COMPANY, BRIAN FISCHER, INDIVIDUALLY AND D/B/A FISCHER-FISCHER-THEIS, INC., AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEALS from a judgment of the circuit court for Kenosha County: STEPHEN A. SIMANEK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Harborview Office Center, L.L.C., appeals[1] a summary judgment dismissing its professional malpractice claims against its former attorney, Randall Nash, and former engineer, Brian Fischer. Harborview argues the circuit court erroneously applied the doctrine of in pari delicto to dismiss the case. We disagree and affirm the judgment.

BACKGROUND

¶2 The present case has its origins in an earlier case decided by this court, ***Harborview Office Center, LLC, v. Camosy Inc.***, No. 2005AP577, unpublished slip op. (WI App Feb. 15, 2006). In that case, we affirmed the circuit court's dismissal of Harborview's claims due to spoliation of evidence. In this case, Harborview alleges Nash and Fischer caused the dismissal of its initial case against the companies that constructed Harborview's office building.

¶3 Harborview is owned in part by several attorneys with a law firm located in the building. Harborview commenced the underlying suit due to water repeatedly leaking into the newly constructed building. The building's exterior walls were constructed of a layered system consisting of several interior components and then foam board insulation. Horizontal and vertical V-shaped grooves were cut into the exterior of the foam to add architectural interest. The foam was then coated with a waterproofing layer and a stucco-like finish.

¶4 Harborview claimed the water was infiltrating around the windows and that all of the building's windows had to be removed and replaced. Fischer was retained to oversee the remediation project. Prior to commencing the repairs,

[1] This court granted leave to appeal September 2, 2008.

Harborview filed a motion requesting an order to establish a protocol for evidence discovery and retention, indicating steps Harborview would undertake to document and preserve evidence.[2]

¶5 The window replacement was to proceed in steps, replacing windows in one section of the building at a time. Harborview would then conduct water tests to confirm whether the repairs were successful. After two of the first three sections failed the water tests, Fischer suspected cracks in the V-grooves were a potential leak source. Fischer then reported his suspicion to Harborview ownership. The three Harborview representatives, one of whom was an attorney with the firm in the building, authorized Fischer to grind out and fill all of the cracks for the entire building surface.

¶6 Fischer knew his repairs would destroy the evidence as to which cracks leaked and the amount of leakage from the cracks. Fischer contends he informed attorney Nash relatively soon after commencing the work, but Nash asserts he did not learn of the leaks or repairs until later. Regardless, the construction defendants were not notified of the leaking cracks or destructive repairs until the repairs were nearly completed. The court ultimately dismissed the case on this basis.

¶7 In this case, Fischer and Nash each moved for summary judgment, arguing, among other things, Harborview's claims were precluded by the doctrine of in pari delicto. The circuit court agreed, dismissing Harborview's claims in an

[2] The court, however, cancelled the motion hearing due to a family emergency and Harborview never rescheduled the hearing.

oral decision. Following the denial of its motion for reconsideration, Harborview now appeals.

DISCUSSION

¶8 The doctrine of in pari delicto states that in a case of equal fault the position of the defendant is stronger. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). The doctrine is an application of the principle of public policy that no court will lend its aid to a party whose claim is based upon an immoral or illegal act. ***Id.*** at 427. By way of example, in ***Evans*** our supreme court applied the doctrine to hold that a client could not recover from her attorney for damages allegedly suffered as a result of following the attorney's advice to lie under oath. ***Id.*** at 427-28. Applying the doctrine in ***Abbott v. Marker***, 2006 WI App 174, 295 Wis. 2d 636, 722 N.W.2d 162, we refused to enforce an illegal client referral agreement between a lawyer and a non-lawyer.

¶9 Here, the circuit court explained its rationale why Harborview was in pari delicto with its engineer and attorney, and therefore could not proceed against them for malpractice, as follows:

> Now, normally that would be an okay situation if we had a plaintiff who was relying on professionals. For example, someone injured in a car accident hires a lawyer, and the lawyer ... [m]isses a deadline, fails to do discovery, whatever the case may be. Normally that injured party is not an active participant in what that lawyer does.
>
> That's entirely different in this case. The affidavits, the deposition testimony all indicate that the principals in this case, who are all professionals, were involved, intimately involved in the ongoing discussions about what to do because this building leaks and when are we going to do it and how are we going to do it. They were the ultimate decision maker, Harborview, through its principals, to go ahead and make the repairs. .... They've got to get it fixed, and so they ordered or authorized the remediation to go

> forward. They weren't just a bystander who turned everything over to their engineer or to their lawyer. As the owners of Harborview, the principals, they were not only involved, but they made the ultimate decision.

¶10 On appeal, Harborview argues the circuit court's decision is "unclear in stating exactly which 'illegal or immoral acts' the Harborview principals committed…." Harborview further contends it was not the decision to repair the cracks in the V-grooves that led to the dismissal sanction, but the destruction of evidence without notifying the defense of the newly discovered leaks or the repairs.

¶11 As the circuit court noted, a dismissal sanction for spoliation of evidence is only permitted where there is egregious conduct. Egregiousness consists of a conscious attempt to affect the outcome of litigation or a flagrant and knowing disregard of the judicial process. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 708, 724, 599 N.W.2d 411 (Ct. App. 1999). In the appeal of the underlying case, we concluded Harborview's conduct constituted at least the latter. However, we recognize we referred to Harborview in that decision, as we often do, generally as a party without specificity. Thus, it is sometimes unclear whether we were referring exclusively to Harborview as an entity or to Harborview in a broader sense, inclusive of its engineer and attorney. In fact, we specifically noted we were imputing Fischer's conduct to Harborview.

¶12 Nonetheless, Harborview's own conduct in authorizing the evidence-destroying repairs was contrary to its duty to preserve evidence, a duty of which it was aware. Not only had Harborview's attorney filed a motion outlining Harborview's proposed methods of evidence preservation, but

Harborview had already incurred substantial expense storing evidence.[3] Moreover, Harborview does not assert it was unaware of its duty to preserve evidence. And while Harborview emphasizes Nash recommended the repairs, that is no different than the attorney in ***Evans*** who allegedly advised his client to testify untruthfully.

¶13 Further, we reject Harborview's position that the critical conduct in the underlying case was Fischer's and/or Nash's failure to notify the construction defendants. At that point, Harborview had already "broken the rules." Had the defendants been notified, the result would simply have been that the repairs Harborview authorized would have ceased. Thus, notice would have merely mitigated the harm caused by Harborview's order to grind and fill the cracks. As the circuit court held in the underlying case: "[T]he experts all agree that leaking in the V-grooves through the [wall system] was a very rare condition, so when it happened, it was a significant occurrence, and work should have stopped immediately, *and* the defendants should have been notified." (Emphasis added).

¶14 Harborview also asserts—without citation to the record—it is "undisputed" that its principals "had no reason to believe that their expert and/or their attorney would not notify the construction defendants." To put this assertion in context, we note what Harborview does not claim. First, the Harborview principals do not claim they did not know they had a duty to preserve evidence or that the repairs would destroy evidence. Second, they do not claim Fischer told them he had notified the construction defendants, had informed Nash, would tell

[3] Harborview represents it incurred nearly $40,000 in storage expenses prior to the reworking of the V-grooves.

Nash, or would wait for Nash's approval before commencing the work. Finally, the Harborview principals do not claim they asked whether the defendants knew of the leaking cracks or repair plan, whether Nash knew, or whether Nash had approved.

¶15 In sum, Harborview's owners, aware of their duty to preserve evidence, ordered evidence-destroying repairs without consulting their attorney or inquiring whether the defense was aware of the newly discovered evidence or repair plan. As a matter of public policy, a party, alert of its duty, cannot authorize the destruction of evidence, sit idly by as the destruction proceeds, and then bring a claim against its expert or attorney after the underlying case is dismissed due to spoliation. In this situation, the party is in pari delicto with both its expert and attorney.

¶16 Finally, we address Harborview's assertion that there is a material issue of disputed fact barring summary judgment. Harborview focuses on the dispute between Fischer and Nash regarding how long Fischer waited to notify Nash after the repairs had commenced. While perhaps material to the apportionment of negligence between Fischer and Nash were the malpractice case to proceed, the dispute is immaterial to our application of the in pari delicto doctrine. For purposes of our analysis, we may assume Fischer and Nash were both negligent. However, Harborview was also at fault and the in pari delicto doctrine precludes Harborview from benefitting from its illegal or immoral conduct.

By the Court.—Judgment affirmed.

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