COURT OF APPEALS DECISION DATED AND FILED

March 1, 2011

A. John Voelker
Acting 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. 2010AP1252 **Cir. Ct. No. 2009CV3037**

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

AMERICAN FAMILY MUTUAL INS. CO., DANIEL DYKES AND LINDA DYKES,

PLAINTIFFS,

V.

GOODMAN MANUFACTURING COMPANY,

DEFENDANT-RESPONDENT,

DONOVAN & JORGENSON, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. At issue in this appeal is whether the trial court erroneously dismissed Goodman Manufacturing Company (Goodman) from a subrogated claim brought by American Family Mutual Insurance Company (American Family) as a sanction against Donovan & Jorgenson, Inc. (Donovan) for the spoliation of evidence. Because we conclude that the trial court did not make a finding of egregious conduct against Donovan, it did not have the authority to impose dismissal as a sanction. We reverse and remand.

BACKGROUND

¶2 This appeal arises from a subrogation claim by American Family and its insureds, Daniel and Linda Dykes (the Dykes), against Goodman and Donovan for damages caused to the Dykes' home as a result of a fire from a furnace manufactured by Goodman and sold and installed by Donovan.

¶3 In the winter of 2006, the Dykes purchased a furnace from Donovan. On January 21, 2006, Donovan was installing the furnace in the Dykes' home when the furnace started on fire, causing damages to the home. American Family paid the Dykes $17,621.87 for the fire and smoke damages incurred as a result of the furnace fire. A replacement furnace was installed by Donovan on January 23, 2006.

¶4 On April 6, 2006, an examination and inspection of the original furnace was conducted at Donovan with representatives of all interested parties present, including two representatives from Goodman, two representatives from Donovan, and an American Family representative. American Family also hired an expert, Tim Roth, who was present at the inspection, as was Todd Lavieri, an expert hired by Donovan. Both experts provided reports after the inspection. Roth's report suggested that an excessive temperature buildup, caused by the

blower motor not starting, led the air condition pan to melt and in turn, led to the fire. Roth's report concluded that either the furnace manufacturer or the motor manufacturer (General Electric) was responsible for the malfunction, but mentioned the possibility that the installing contractor may have been able to prevent the fire. Lavieri's report stated that the examination and testing of the furnace revealed that the supply air blower failed to operate "on a demand for heat following the ignition of the furnace burners." Lavieri determined that the cause of the blower's failure to operate was the failure of the blower motor, manufactured by General Electric. Lavieri's report indicated that the tested furnace was being retained by Donovan and that Donovan had been instructed to retain the furnace until otherwise directed.

¶5 Approximately three years later, in February 2009, American Family filed suit against Goodman and Donovan. Donovan denied liability in its answer and filed a cross-complaint against Goodman. The tested furnace, however, was no longer being retained by Donovan, as it had been discarded approximately two months prior to the filing of the complaint. Donovan's vice-president, Robb Krahn, stated in an affidavit that he made the decision to discard the furnace because he had not heard from any of the interested parties after the examination and inspection. Krahn also stated that the furnace had been sitting at his facility since April 2006, and he believed the matter to be closed when he discarded the furnace. Goodman moved to dismiss Donovan's claim as a sanction for spoliation of evidence. The trial court granted Goodman's motion, holding that regardless of Donovan's intentions for discarding the furnace, it failed to give notice of its intent to discard, resulting in Goodman's inability to properly prepare a defense. The trial court then ordered Donovan to take Goodman's place with respect to any allocation of negligence to Goodman. Donovan appeals.

DISCUSSION

¶6 Donovan argues that the trial court erred in dismissing Goodman as a spoliation sanction because the trial court did not make a finding that Donovan acted egregiously and because Donovan did not, in fact, act egregiously. We agree.

¶7 The decision to impose sanctions for the spoliation of evidence is generally within the trial court's discretion. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). Whether the trial court applied the proper legal standard when determining whether dismissal is an appropriate sanction is a question of law that we review *de novo*. ***Id.***

¶8 Dismissal based on spoliation of evidence requires a finding of egregious conduct, defined as "a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process." ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993). "Because dismissal is such a harsh sanction … [it] is proper only when [a party] has acted egregiously or in bad faith." ***Morrison v. Rankin***, 2007 WI App 186, ¶20, 305 Wis. 2d 240, 738 N.W.2d 588.

¶9 In the case at bar, the trial court did not make a finding that Donovan's conduct was egregious. Rather, the trial court acknowledged that it could not determine Donovan's intent for destroying the furnace and focused instead on the difficulty posed to Goodman's defense. Specifically, the trial court stated:

> The only issue becomes … whether or not it was egregious, and even if it was only a mistake, whether or not their acts or failure to act under the circumstances prejudiced another person's position in the case.

….

> But the bottom line is … whether or not Donovan did it purposefully, precariously, mistakenly, the result is the same, isn't it?
>
> Goodman doesn't have a chance to do any defense work on the case at this juncture because of what one party did.
>
> They should not be put in that position because really there was nothing they did and Donovan had a list of people that they certainly could have given notice to … that when you're going to go ahead and say, hey, I've got this piece of evidence here … but no one has done anything, unless you do so by the next date, I'm going to discard the evidence.
>
> That never happened here.
>
> Was it intentionally not done that way or was that just a furtherance as far as the nonfeasance, if you will, on the part of Donovan & Jorgenson in terms of the issue.
>
> It's hard to determine that.

¶10 Although the trial court could not determine whether Donovan's conduct was egregious, it found that Donovan did not meet the requirement that notice be given to relevant parties prior to the destruction of evidence, as recently explained by our supreme court in ***American Family Mutual Insurance Co. v. Golke***, 2009 WI 81, 319 Wis. 2d 397, 768 N.W.2d 729. Although ***Golke*** did explain the notice requirement, it also clarified that dismissal is an appropriate sanction for spoliation of evidence *only* if there is a finding of egregious conduct by the party that possessed and destroyed the evidence. ***Id.***, ¶¶42, 44. Based on ***Golke***, we conclude that the trial court erred in dismissing Goodman as a sanction for Donovan's destruction of the furnace.

¶11 In ***Golke***, American Family, as a subrogated party, brought a cause of action against the Golkes[1] for negligent roof repairs that were alleged to have caused a fire to the home of American Family's insured. ***Id.***, ¶2. American Family sent notice to the Golkes, informing them as to the existence of relevant evidence and alerting them of the opportunity to inspect the evidence prior to its destruction. ***Id.***, ¶9. The Golkes did not inspect the home, and the home was demolished. ***Id.***, ¶¶14-15. At trial, all of the defendants moved for dismissal on the grounds that American Family failed to preserve any pertinent portions of the roof. ***Id.***, ¶16. The trial court dismissed American Family's claims as a sanction for spoliation of evidence. ***Id.*** American Family appealed, and we certified the case to our supreme court. ***Id.***, ¶17.

¶12 In reversing the trial court, our supreme court determined that the trial court applied an "incorrect standard of law in dismissing American Family's claim because it did not make a finding of egregiousness before doing so." ***Id.***, ¶44.

¶13 Similarly, the trial court here did not make a finding that Donovan made "'a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.'" ***Id.***, ¶42 (citation omitted). There is no evidence in the record to support a finding of egregiousness. The record indicates that Krahn retained the furnace for close to three years, during which time he did not hear from any party with a potential interest in the matter. In addition, Goodman had representatives at the examination and inspection on April

[1] In ***American Family Mutual Insurance Co. v. Golke***, 2009 WI 81, 319 Wis. 2d 397, 768 N.W.2d 729, our supreme court referred to three brothers, David, Joseph and Charles Golke and their business, Golke Brothers Roofing and Siding LLC, collectively as "the Golkes" when not referring to the individual brothers. *See* ***id.***, ¶2 n.2.

6, 2006, knew that American Family and Donovan both had experts present that day, and presumably was aware that the experts would write reports. However, Goodman did nothing with respect to the defective furnace for nearly three years. There is also no evidence in the record that Krahn knew litigation was going to commence when he disposed of the furnace. All of these factors led Krahn to believe that the matter was closed.

¶14 Because our supreme court has explained that "dismissal as a sanction for spoliation is appropriate only when the party in control of the evidence acted egregiously in destroying that evidence," and because the trial court did not and could not make a finding of egregiousness, we conclude that the trial court erroneously exercised its discretion in dismissing Goodman. *See* ***id.*** Lesser spoliation sanctions, such as a negative inference instruction, would have been more appropriate. *See* ***id.***

CONCLUSION

¶15 For all the forgoing reasons, we conclude that the trial court erroneously exercised its discretion in dismissing Goodman as a sanction against Donovan for spoliation of evidence. We reverse and remand.

By the Court.—Order reversed and cause remanded.

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