COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1167 **Cir. Ct. No. 2008CV17554**

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

PAUL CARTTER,

PLAINTIFF-APPELLANT,

DEPARTMENT OF VETERAN AFFAIRS,

INVOLUNTARY-PLAINTIFF,

V.

MARCUS HOTELS, INC. AND MILWAUKEE CITY CENTER, LLC, D/B/A HILTON MILWAUKEE CITY CENTER,

DEFENDANTS-RESPONDENTS,

ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 BRENNAN, J. Paul Cartter appeals from the trial court's judgment, entered following entry of an order partially granting summary judgment and a bench trial, which together dismissed Cartter's claims against Marcus Hotels, Inc. ("Marcus"), Milwaukee City Center, LLC (d/b/a Hilton Milwaukee City Center) ("the Hotel"), and Zurich American Insurance Company. Cartter argues that: (1) the trial court failed to make all reasonable inferences in his favor on summary judgment and, as a result, erroneously dismissed his safe-place claim; and (2) the trial court applied the wrong standard of care to his negligence claim at trial and erroneously dismissed that claim as well. For the reasons set forth below, we affirm the trial court.

BACKGROUND[1]

¶2 On June 18 through June 23, 2007, the Paralyzed Veterans of America held its annual National Veterans Wheelchair Games in Milwaukee. The Hotel knew that a large contingent of paralyzed veterans would be staying at the Hotel. In anticipation of their arrival, the Hotel circulated to its staff a document entitled "Pre-Convention Release." Jill Schneider, the Hotel's convention service manager, testified at her deposition that she authored the Pre-Convention Release and that it was intended "to put the different department heads on notice that there was going to be a high number of disabled veterans staying at the hotel" and to help the Hotel staff "service the guests properly." Among other things, the Pre-

[1] The facts in the background section concerning the particulars of Cartter's claims are those that were set forth by the parties on summary judgment.

Convention Release informed the Hotel staff that "[the Paralyzed Veterans] Group will have Durable Medical Equipment (shower chairs, slide boards, toilet seats[,] etc.) brought in…. Guests may call down requesting equipment. Please let guests know that there is a Durable Medical Equipment room on-site and they can go down and sign out equipment." Furthermore, Policy 220 in the operations manual distributed by Marcus, the company who operated the Hotel, directed staff at the Hotel to "[b]e very sensitive to the needs of an individual with a disability."

¶3 On June 18, 2007, Cartter, who lives in Arizona, came to Milwaukee to take part in the National Veterans Wheelchair Games. Cartter was in a helicopter crash while serving in the United States Air Force. As a result, he suffered a spinal cord injury, which left him with permanent paralysis of and significant loss of sensation in his right leg. He has limited ability to walk, but when he does so, he has a pronounced limp and a dropped foot. While in Milwaukee, Cartter stayed at the Hotel in room 625. On June 22, 2007, his fifth day at the Hotel, Cartter slipped and fell in the bathtub while taking a shower. He fell through the shower curtain onto the bathroom floor suffering injury.[2]

¶4 Shortly after his fall, Cartter contacted the front desk of the Hotel. Yves Behrens, the Hotel's assistant general manager, went to speak with Cartter in his room. Behrens testified at his deposition that after Cartter's fall, room 625 was cleaned and Cartter was given a rubber bathmat. Behrens also testified that there was no bathmat in Cartter's room prior to his fall and that a bathtub without a

[2] On appeal, the parties do not elaborate on the particulars of the injury Cartter sustained in the fall. However, the fact that he was injured as a result of the fall does not appear to be in dispute.

bathmat is less safe than a bathtub that has a bathmat. However, Behrens believed that "the bathtub [was] safe" at the time Cartter fell.

¶5 Cartter testified at his deposition that he had showered in room 625 several times prior to his fall. He had no problems using the shower before his fall and had not previously noticed that the bathtub was slippery. Annie Fang, the director of housekeeping, and Teresa Cardine, the housekeeper assigned to clean room 625, both stated by affidavit that the bathtub had a slip-resistant bottom. Cartter testified at his deposition that he did not recall whether the bathtub had a smooth or textured bottom.

¶6 Stephen and Juana Jelen occupied room 625 from June 6 through June 11, 2007, a few days prior to Cartter's stay. Because Juana had physical problems with her hip, Stephen and Juana checked the bathtub's bottom prior to use to ensure that it was not unusually slippery and found no problems.[3]

¶7 Michael and Bernadette Stewart were guests in room 625 immediately prior to Cartter's stay, from June 11 through June 13, 2007. The Stewarts did not note any problems with the bathtub and did not find that it was unusually slippery.

[3] The facts concerning the Jelens's stay in room 625 are found in an affidavit submitted by the Hotel on summary judgment. The affidavit was not signed by the Jelens. However, because the defendants rely on the facts in the affidavit in their brief, and those facts are not challenged by Cartter, we accept them as true for purposes of this decision. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted).

¶8 In the three and one-half months prior to Cartter's stay at the Hotel, three Hotel guests reported falling in Hotel bathtubs in rooms other than room 625. One of the guests reported to the Hotel that she "slipped on the rubber bathmat lo[]sing her balance." Another guest reported that he slipped in the bathtub as he was standing up after turning off the water. And the third guest, on whom the Hotel staff smelled alcohol, reported slipping "because there was extra water in the tub from the drain not working properly."

¶9 On May 18, 2007, Hilton generated a Property Improvement Report.[4] The Property Improvement Report listed the renovations that the Hotel was required to institute to be relicensed with the Hilton brand name. Requirement 102 stated: "Bathrooms – Replace all tubs. King guestrooms must have a shower in lieu of bathtub/shower. Pre-fabricated shower stalls are not allowed." The reason for replacement was listed as "condition." (Capitalization omitted.)

¶10 In December 2008, Cartter filed a complaint against the defendants,[5] which he later amended. Both his original complaint and the amended complaint alleged negligence, violation of Wisconsin's safe-place statute, and violation of the Americans with Disabilities Act ("ADA"). Cartter voluntarily dismissed his ADA claim.

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[4] The document itself is labeled "Product Improvement Report." (Some capitalization omitted.) However, the witnesses and the parties all refer to the document as the "Property Improvement Report." To be consistent, we too refer to the document as the "Property Improvement Report."

[5] Hilton Hotels Corporation was also named as a defendant in the amended complaint but was later dismissed. Hilton Hotels Corporation's rights are not at issue on appeal.

¶11 In January 2009, shortly after the original complaint was filed, in response to the Property Improvement Report, the Hotel relined 555 bathtubs, including the bathtub in room 625. Cartter had not yet inspected the bathtub in room 625 for litigation purposes.

¶12 The defendants filed a motion for summary judgment to which Cartter responded. Following a hearing on the motion, the trial court dismissed Cartter's safe-place claim on the grounds that Cartter had not produced any evidence of an unsafe condition or evidence that the Hotel had notice of an unsafe condition. However, the trial court found questions of fact existed with respect to Cartter's negligence claim, and that claim proceeded to trial. Following a bench trial, the court dismissed Cartter's negligence claim. The court concluded that there was no evidence that the bathtub was defective, and consequently, no evidence that the Hotel breached its ordinary duty of care. Furthermore, the trial court concluded that there was no evidence demonstrating that the Hotel voluntarily took on additional duties in anticipation of the arrival of the Paralyzed Veterans of America. Judgment was entered accordingly and Cartter appeals.

¶13 Additional facts are included in the discussion as necessary.

DISCUSSION

I. The trial court properly dismissed Cartter's safe-place claim on summary judgment.

¶14 Cartter first argues that the trial court erred in dismissing his safe-place claim on summary judgment because the trial court allegedly did not make all reasonable inferences in his favor. He contends that if the trial court had properly considered the facts in the light most favorable to him, as the court was required to do on summary judgment, it would have found genuine issues of

material fact existed and permitted Cartter's safe-place claim to proceed to trial. Furthermore, he contends that the trial court erred in failing to "assume" that the bathtub was unsafe on summary judgment as a sanction against the defendants for relining the bathtub before Cartter was able to inspect it for purposes of litigation. We disagree.

A. Cartter set forth no evidence on summary judgment from which it is reasonable to infer that the slip-resistant bottom in the room 625 bathtub was worn and unsafe.

¶15 Wisconsin's safe-place statute imposes a burden on an owner of a public building to "construct, repair or maintain such place … as to render the same safe." WIS. STAT. § 101.11(1) (2009-10).[6] The statute imposes a higher standard of care than is imposed by common-law negligence. ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. "However, the safe-place statute addresses unsafe conditions, not negligent acts." ***Id.***

¶16 The word "safe" as used in the safe-place statute "does not mean completely free of any hazards." ***Id.***, ¶10. The statute does not guarantee a plaintiff's safety. ***DeMarco v. Braund***, 30 Wis. 2d 675, 680, 142 N.W.2d 165 (1966). Owners do not breach their safe-place duty simply because their property could have been made safer. ***Megal***, 274 Wis. 2d 162, ¶10. "Rather, the duty set forth by the statute requires an … owner to make the place 'as safe as the nature of the premises reasonably permits.'" ***Id.*** (citation omitted).

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

¶17 To succeed in a claim under the safe-place statute, a plaintiff bears the burden of showing that (1) there was an unsafe condition; (2) the unsafe condition caused the plaintiff's injury;[7] and (3) the owner of the public building had either actual or constructive notice of the unsafe condition before the plaintiff's injury. ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶89, 262 Wis. 2d 539, 664 N.W.2d 545. A plaintiff must prove all three elements to recover under the statute. ***Id.***

¶18 The trial court considered four facts in evidence that Cartter alleged supported his safe-place claim: (1) the Property Improvement Report, in which Hilton told the Hotel that it needed to "replace all tubs" because of their "condition" (capitalization omitted); (2) three instances over the previous three and one-half months where guests had fallen in the Hotel bathtubs other than the one in room 625; (3) the expiration of the bathtub liner warranty; and (4) the absence of a bathmat. The trial court concluded that it could not reasonably infer from that evidence that the slip-resistant bottom in the room 625 bathtub was worn and unsafe or that the defendants had notice of any unsafe condition. As such, the trial court partially granted the defendants' motion for summary judgment and dismissed Cartter's safe-place claim.

¶19 "We review a grant of summary judgment independently, using the same method as the [trial] court." ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is

[7] Whether the fall caused Cartter injury does not appear to be in dispute on appeal.

entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In deciding whether there are factual disputes, the trial court and the reviewing court consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). We draw all reasonable inferences from the evidence in favor of the nonmoving party. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Meyers v. Bayer AG, Bayer Corp.***, 2007 WI 99, ¶28, 303 Wis. 2d 295, 735 N.W.2d 448. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law that we review *de novo*. ***Hennekens***, 160 Wis. 2d at 162.

¶20 Cartter first alleges on appeal that the trial court erred in not making all reasonable inferences in his favor on summary judgment. He argues that if it had, the trial court would have concluded that there was evidence presented demonstrating that the room 625 bathtub's slip-resistant bottom was worn and unsafe and that the Hotel had notice of the condition. Because we conclude that Cartter did not present evidence from which it can be reasonably inferred that the room 625 bathtub was worn and unsafe, we need not address whether he presented evidence that the Hotel had notice of any alleged unsafe condition. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues needs to be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

¶21 Cartter contends that it can be reasonably inferred from the following evidence submitted at summary judgment that the slip-resistant bottom of the room 625 bathtub was worn and unsafe: (1) the fact that three guests had fallen in other Hotel bathtubs over the three and one-half months prior to Cartter's

fall; (2) the Property Improvement Report's requirement that the Hotel replace the bathtubs due to their "condition"; (3) Behrens's testimony that the bathtub in room 625 would be safer with a bathmat; (4) the fact that the Hotel put a bathmat in the room 625 bathtub after Cartter's fall and one and one-half years later relined all the Hotel's bathtubs; (5) the bathtub's age and the expiration of its warranty; and (6) the fall itself. We address each piece of evidence in turn.

¶22 First, Cartter argues that it can be reasonably inferred that the slip-resistant surface of the room 625 bathtub was worn and unsafe from the fact that three previous guests at the Hotel had fallen in other bathtubs at the Hotel in the three and one-half months prior to Cartter's fall. However, none of the previous guests who fell were staying in room 625, and Cartter presented no evidence demonstrating a link between the bathtubs in which the previous guests had fallen and the bathtub in room 625. There is no evidence that the other bathtubs were the same make or model as the one in room 625, that they were installed at the same time, or that they were maintained in the same manner. Furthermore, at least two of the guests who fell attributed their fall to something other than a worn slip-resistant bottom: one guest tripped on the bathmat and the other reported slipping due to standing water in the bathtub because of a faulty drain. Additionally, none of the guests who stayed in room 625 immediately prior to Cartter slipped and fell in the bathtub or otherwise noticed that it was unusually slippery, and at least two of those guests, the Jelens, intentionally examined the bathtub to ensure that it was not slippery. In short, it is not reasonable to infer that the bathtub in room 625 was unsafe because Hotel guests fell in other bathtubs in other rooms without any evidence tying the bathtubs in which the other guests fell to the bathtub in room 625.

¶23 Second, Cartter contends that it is reasonable to infer from the Property Improvement Report's requirement that the Hotel "replace all tubs" because of their "condition" that the slip-resistant surface in the room 625 bathtub was worn and unsafe. (Capitalization omitted.) We agree with the trial court that there is no indication that the reference to the bathtubs' "condition" refers to the slip-resistant surface, "[it] could have referred to discoloration, which it did with respect to the gift shop carpeting, which was also replaced, could've related to the type or style of the tub as it did with respect to bathrooms in the king guest rooms which were to have showers instead of bathtub/shower combinations." In fact, John Archibald, the Hotel's general manager, filed an affidavit stating that "employees were having trouble removing … discoloration around the drain and it was not aesthetically pleasing.… The bathtubs and drains were *not* replaced to address a safety problem.… This relining of the bathtubs and replacement of the drains was done to improve the aesthetic appearance." (Emphasis added.) Cartter has submitted no evidence rebutting Archibald's assertions. As such, it is unreasonable to infer that the Property Improvement Report's reference to "condition" meant the room 625 bathtub had a worn and unsafe slip-resistant bottom.

¶24 Third, Cartter argues that the trial court should have inferred that the room 625 bathtub's slip-resistant bottom was worn and unsafe from the following deposition testimony elicited from Behrens, the Hotel's assistant general manager:[8]

[8] There were some communication difficulties during Behrens's deposition because English was not Behrens's first language. The parties do not argue, however, that Behrens's language difficulties led to inaccurate testimony.

Q … Well, why do you think bath mats are placed in bathtubs?

A For providing better anti-slip functionality.

Q Functionality?

A Yeah.

Q Anti-slip protection for the guests, correct?

A Yes.

Q *You would agree that a bathtub in the Hilton Hotel in Milwaukee that doesn't have the anti-slip mat is not as safe as a bathtub with the anti-slip mat, correct?*

….

A *No, it's not.*

Q A bathtub without a pad is less safe than a bathtub that has the non-slip pad, correct?

….

A No, the bathtub is safe. The bathroom is safe -- the bathtub is safe.[9]

….

Q Would there be any reason not to place a bathmat in Mr. Cartter's tub during his stay with the Paralyzed Veterans Association?

….

A No, there would be no reason.

Q Can you tell me why there was no bathmat in Mr. Cartter's tub on the day that he fell?

[9] In his brief, Cartter conveniently omits that portion of Behrens's testimony where he testifies that he believes the Hotel's bathtubs are safe without a bathmat.

> ….
>
> A I don't know, sir.
>
> Q … [I]s it fair to say that you would have preferred a bathmat be in his tub as opposed to a tub without a bathmat?
>
> ….
>
> A Should be the bathmat.
>
> ….
>
> Q And so the record is clear, you agree that there should have been a bathmat in Mr. Cartter's tub, correct?
>
> A Yes, sir.

(Emphasis added.)

¶25 Cartter argues that it can reasonably be inferred from Behrens's testimony that because it would have been easy to provide Cartter with a bathmat and because a bathmat would have made the bathtub safer, the Hotel's failure to put a bathmat in room 625 prior to Cartter's fall meant that the bathtub was not "'as safe as the nature of the premises reasonably permit[ed].'" *See* ***Megal***, 274 Wis. 2d 162, ¶10 (citation omitted). However, the fact that the bathmat may have made the bathtub *safer*, does not logically lead to the conclusion that the bathtub was *unsafe* without the bathmat or that the bottom of the bathtub was worn, necessitating a bathmat. *See* ***id.*** (Owners do not breach their safe-place duty simply because their property could have been made safer.). Behrens's testimony only shows that a bathmat would have provided a slip-resistant surface in the bathtub, not that there was not a slip-resistant surface simply because a bathmat was not present.

¶26 Fourth, Cartter argues that the trial court should have inferred from the Hotel's "subsequent remedial measures" that the slip-resistant surface of the room 625 bathtub was worn and unsafe at the time of Cartter's fall. (Citing ***Sweitzer v. Fox***, 226 Wis. 26, 35, 275 N.W.2d 546 (1937).) Specifically, Cartter refers to the fact that the Hotel provided Cartter with a bathmat after his fall and that in early 2009, one and one-half years after Cartter's fall, the Hotel relined 555 bathtubs in the Hotel, including the bathtub in room 625, at the direction of the Property Improvement Report. However, we conclude that it is unreasonable to infer from the mere act of providing a bathmat to a guest after a fall in a bathtub that the reason for the fall was a worn slip-resistant surface; the parties all agree that the bathmat made the bathtub safer, that does not reasonably lead to the inference that the bathtub was previously unsafe. Furthermore, we have already noted that it is unreasonable to infer from the Property Improvement Report's requirement that the 555 bathtub liners be replaced that the slip-resistant bottom of the room 625 bathtub was worn and unsafe, as Cartter has not rebutted the Hotel's evidence that the bathtub liners were replaced because of rust, which made them aesthetically unpleasing.

¶27 Fifth, Cartter argues that the trial court should have inferred that the slip-resistant surface of the bathtub was worn and unsafe because the room 625 bathtub was at least nine years old and, allegedly, the bathtub's five-year warranty had expired. We conclude that it is not reasonable to infer from age alone that the bathtub's slip-resistant surface was worn and unsafe, particularly because bathtubs are usually fixtures intended to withstand daily wear and tear over several years' time. Furthermore, Cartter does not point to any evidence submitted to the court

on summary judgment which demonstrates that the manufacturer's warranty had expired.[10] And even if he had, warranties are not typically issued for the lifespan of a product and it is unreasonable to infer that a product is unsafe simply because it is no longer under warranty.

¶28 Sixth, Cartter contends that "the trial court should have granted [him] the inference that the fall itself was evidence that the antislip surface was not effective" because Cartter had "never slipped or fell in a shower prior to the incident that is the subject of this suit." It is reasonable to infer that something out of the ordinary may have caused Cartter to fall; however, the more narrow inference, that the something out of the ordinary was a worn slip-resistant surface is not reasonable. Any number of things could have led to Cartter's unfortunate fall. It is his burden as the plaintiff to present some evidence on summary judgment to support his assertion that it was a worn slip-resistant surface. He did not do so.

[10] In support of his factual assertion that the bathtub's five-year warranty had expired, Cartter's counsel cites to the trial court's comment that Cartter "assert[ed]" that fact on summary judgment. The trial court did not make an express finding that the fact was true, and Cartter's counsel does not cite to the evidence in the record allegedly relied on by the trial court. Throughout his brief, Cartter's counsel makes several other citation errors, citing to hearing argument and to summary judgment briefs as "evidence." While those arguments and briefs may rely on evidence in the record, they are not evidence themselves, *see* ***Merco Distrib. Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976), and it is not this court's responsibility to sift through the record to find the evidence on which Cartter relies, *see* ***Jensen v. McPherson***, 2004 WI App 145, ¶6 n.4, 275 Wis. 2d 604, 685 N.W.2d 603. We urge counsel to use more care in the future.

B. The trial court properly exercised its discretion when it did not sanction the Hotel for spoliation.

¶29 We also reject Cartter's argument that the trial court erred when it did not "assume" that the bathtub was unsafe on summary judgment as a sanction against the defendants for relining the room 625 bathtub in 2009, after the complaint was filed, but before Cartter was able to inspect the bathtub for purposes of litigation. Not sanctioning the Hotel was a proper exercise of the trial court's discretion.

¶30 Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence." BLACK'S LAW DICTIONARY 1437 (8th ed. 2004). 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 (Ct. App. 2003). The trial court may find spoliation after applying a two-part analysis. ***Id.*** First, the court should "consider ... whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility." ***Id.*** Second, the court should consider "whether the offending party destroyed [evidence] which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation." ***Id.*** "Spoliation 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." ***Id.***, ¶16.

¶31 Whether to impose sanctions for improper spoliation of relevant evidence is generally a decision within the trial court's discretion. ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶39, 319 Wis. 2d 397, 768 N.W.2d 729. "A [trial] court properly exercises its discretion when it examines the

relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach." ***Id.***, ¶43. We generally look for reasons to sustain the trial court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). "Although the proper exercise of discretion contemplates that the [trial] court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶32 While the Hotel contends that Cartter failed to properly raise his spoliation argument at summary judgment, we conclude that he raised it, but only in the barest of terms, apparently asking for "sanctions," but never mentioning the word spoliation. In the argument section of his summary judgment brief, he conclusorily stated: "Given that the defendants knowingly destroyed the liner despite receiving repeated prior notice of Cartter's possible, then probable, then actual claim involving the liner, the defendants should not now be heard to complain otherwise." During the summary judgment hearing, Cartter expanded on his claim, stating:

> There's no evidence [of the bathtub's condition] because they destroyed it. After Mr. Cartter put 'em on notice, after we put 'em on notice, after we filed the lawsuit, they destroyed the evidence. It's gone. And there are -- there is case law indicating that that in and of itself could result in sanctions against the party destroying evidence in this case.
>
> Clearly they knew when Mr. Cartter fell that he submitted an incident report. Clearly they knew when Cartter followed up with a letter saying what are you going to do about this, otherwise I'm going to hire an attorney. Clearly when I sent them my notice of retainer and my demand letter in 2008, they were on notice that a lawsuit was coming. Then we filed the lawsuit, and subsequent to that they replaced 550 liners and destroyed the tub at issue.

> So when the Court says there's no evidence that there was not an effective antislip surface, it's gone.

¶33 The trial court noted that Cartter was making a spoliation-of-evidence argument and then went on to issue its decision on the merits of the summary judgment motion, implicitly denying Cartter's request for sanctions. The trial court's decision to do so was not erroneous.

¶34 On appeal, in a poorly developed argument, Cartter frames this issue as whether the trial court properly exercised its discretion in failing to sanction the Hotel for spoliation of evidence.[11] To the extent we understand his argument, Cartter contends that at summary judgment the trial court was required to infer from the fact that the Hotel destroyed the bathtub after notice of his claim, that the Hotel intentionally destroyed the bathtub to frustrate his claim. But the trial court's decision as to whether to impose sanctions for spoliation of evidence is a discretionary one. *See* ***Golke***, 319 Wis. 2d 397, ¶39. And on review, we look to affirm the trial court's decision. *See* ***Loomans***, 38 Wis. 2d at 662. Here, the record shows support for the trial court's decision not to impose sanctions against the Hotel.

¶35 First, it is undisputed that before Cartter's fall, the Hotel had issued a Property Improvement Report calling for the replacement of the bathtubs because of their "condition." Based on this fact, the trial court could have reasonably

[11] As the Dissent notes, sanctioning a party for spoliation is a more severe result than simply letting the jury assess spoliation in conjunction with all of the other evidence. *See* Dissent, ¶3 n.1. But here, Cartter has framed this issue as whether sanctions—in the form of an inference to be applied at summary judgment—are appropriate and has not requested that the issue of spoliation be left for the factfinder to assess at trial.

found that the Hotel did not intentionally destroy the bathtub to frustrate Cartter's claim. Rather, the trial court could have deduced from the evidence that relining the room 625 bathtub was an oversight and part of the Hotel's regular maintenance and upkeep.

¶36 Furthermore, in January 2009, when the Hotel relined the room 625 bathtub, one and one-half years had passed since Cartter's fall. Presumably, the Hotel continued to rent out room 625 and numerous guests had since used the room 625 bathtub. Cartter has not presented any evidence suggesting that the bathtub was in the same condition as it was at the time of his fall or that its condition in 2009 would have assisted in the resolution of his claims.

¶37 In short, the record supports the trial court's discretionary decision not to sanction for spoliation.[12] Because we conclude that Cartter did not present evidence on summary judgment from which a reasonable person could infer that the slip-resistant bottom of the room 625 bathtub was worn and unsafe, or that a spoliation sanction should have issued, we affirm.[13]

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[12] Contrary to the Dissent's contention in ¶3, we have not concluded that the Hotel destroyed the bathtub in good faith, but rather that Cartter did not present evidence showing that the Hotel intentionally relined the bathtub to frustrate Cartter's claims such that sanctions would be warranted, much less the particular sanction Cartter seeks.

[13] To the extent that Cartter raises other arguments in his appellate brief with respect to the trial court's dismissal of his safe-place claim, we deem those issues inadequately briefed and decline to address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

II. As a matter of law, Cartter has not established that the Hotel gratuitously undertook additional duties and was negligent in the performance of those duties.

¶38 Cartter argues that the Hotel was negligent in that it "gratuitously undertook a duty to be very sensitive to Cartter's needs[, to] inform[] him of the durable equipment room[,] and [to] provid[e] a rubber mat for safety while showering," and then breached that duty. On appeal, Cartter relies on the following evidence in support of his claim: the Pre-Convention Release issued to the Hotel staff; Policy 220; the deposition testimony of Schneider, the Hotel's convention service manager; and the deposition of Behrens, the Hotel's assistant general manager. Cartter contends that the trial court misunderstood his negligence claim at trial and, rather than finding that the Hotel gratuitously undertook additional duties and holding the Hotel responsible for those duties under an *ordinary* standard of care, the trial court erroneously determined that the Pre-Convention Release and Policy 220 did not bind the Hotel to a *higher* than ordinary standard of care. We need not address the substance of the trial court's decision because, as a matter of law, Cartter has not established a gratuitous undertaking by the Hotel.

¶39 In order to recover under his negligence theory, Cartter was required to prove four elements: "(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the injury." *See* ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. Wisconsin recognizes, however, that liability may be imposed on one who, having no duty to act, gratuitously undertakes to act, and does so negligently. *See* ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96, 114, 522 N.W.2d 542 (Ct. App. 1994). Whether

Cartter sets forth sufficient facts to meet this legal standard is a question of law we review *de novo*. *See* ***Waage v. Borer***, 188 Wis. 2d 324, 328, 525 N.W.2d 96 (Ct. App. 1994).

¶40 On appeal, Cartter argues that the Hotel gratuitously undertook three additional duties with respect to Cartter's stay at the Hotel: (1) to be very sensitive to Cartter's needs; (2) to inform Cartter of the durable equipment room; and (3) to provide Cartter a rubber mat for safety while showering. We turn to each alleged duty in turn.

¶41 First, Cartter argues that the Hotel gratuitously undertook to be "very sensitive" to Cartter's needs. In support of that argument, Cartter points to Policy 220's directive that Hotel staff be "very sensitive" to individuals with a disability and to Schneider's deposition testimony that she believed that the Pre-Convention Release informed Hotel staff "to be very sensitive to the needs of an individual with a disability." We conclude that such a general directive hardly demonstrates that the Hotel gratuitously undertook an additional duty. Such generic statements, do not provide parameters in which a duty to perform can be found. Moreover, even if the Hotel did gratuitously undertake to be "very sensitive" to Cartter's needs, Cartter does not explain how the Hotel breached that duty. As a matter of law, Cartter has failed to present evidence that the Hotel undertook and breached a duty to be "very sensitive" to Cartter's needs.

¶42 Second, Cartter argues that the Hotel gratuitously undertook the duty of informing Cartter about the durable equipment room and failed to do so. However, he sets forth no evidence in the argument section of his appellate brief to support this argument. We decline to address the issue because it is inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633

(Ct. App. 1992); *see also* ***Jensen v. McPherson***, 2004 WI App 145, ¶6 n.4, 275 Wis. 2d 604, 685 N.W.2d 603 (it is not this court's responsibility to sift through the record and make a party's argument for him).

¶43 Third, Cartter argues that Behrens's testimony "that there should have been a bathmat in Mr. Cartter's tub" demonstrates that the Hotel undertook a duty to provide Cartter with a bathmat. We conclude, as matter of law, that Behrens's testimony alone is insufficient for that purpose. Behrens's testimony does not rely on any written Hotel policy establishing that the Hotel's rooms should be provided with bathmats, regardless of the condition of the bathtub's slip-resistant bottom, or that it was even standard Hotel practice to provide bathmats in each guest's room. Rather, Behrens just generally asserts that there *should* have been a bathmat in Cartter's room. Such a generic statement, without more, is not enough to establish that the Hotel gratuitously undertook the additional duty of providing Cartter with a bathmat.

¶44 Because Cartter presents no evidence on appeal demonstrating, as a matter of law, that the Hotel gratuitously undertook any additional duties, we affirm the trial court. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 ("We may affirm a trial court's decision on other grounds even if we do not agree with its reasoning."). As such, we need not address his argument that the trial court applied the wrong standard of care to his claim. *See* ***Blalock***, 150 Wis. 2d at 703 ("cases should be decided on the narrowest possible ground").

CONCLUSION

¶45 In sum, Cartter carried the burden on summary judgment to put forth some evidence from which a reasonable person could infer that the surface of the

bathtub in room 625 was slippery and unsafe. He did not do so. Furthermore, he did not present sufficient evidence on appeal to demonstrate that the Hotel gratuitously undertook any additional duties and then negligently performed them. Consequently, we affirm the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶46 FINE, J. (*dissenting*). The nub of this appeal is whether the circuit court properly dismissed on summary judgment Paul Cartter's safe-place claim.

¶47 Summary judgment is not a short-circuit trial; it merely determines if there are any evidentiary facts that warrant a trial. In making that assessment, a court *must* view the proffered evidence in a light most favorable to the party against whom summary judgment is sought, giving the opposing party all reasonable inferences. ***Novell v. Migliaccio***, 2010 WI App 67, ¶9, 325 Wis .2d 230, 235–236, 783 N.W.2d 897, 899. Thus, "[c]ourts do not weigh the evidence when determining summary judgment motions." ***Petzel v. Valley Orthopedics Ltd.***, 2009 WI App 106, ¶9, 320 Wis. 2d 621, 629, 770 N.W.2d 787, 790. In my view, the circuit court and the Majority, on its *de novo* review, have done precisely that, as paragraphs 18 to 35 of the Majority opinion show. Not only that, but as I read the Majority opinion, it gives the *hotel* the benefit of *every* inference.

¶48 Further, the Majority decides that the hotel destroyed the tub in good faith by upholding what it calls the circuit court's exercise of discretion. This, too, in my view, improperly weighs the evidence, especially because the circuit court largely ignored what I see as a large elephant in the room. Simply stated, destruction of evidence a party knows or should know is material to an issue in litigation, thus preventing knowledge of what that evidence would reveal, warrants, at the very least, a jury instruction that lets the jury assess whether the evidence, if not destroyed, "would have been harmful" to the spoliating party. *See* ***S.C. Johnson & Son, Inc. v. Morris***, 2010 WI App 6, ¶45, 322 Wis. 2d 766, 795, 779 N.W.2d 19, 33. *See also* ***American Family Mut. Ins. Co. v. Golke***, 2009

WI 81, ¶42, 319 Wis. 2d 397, 421, 768 N.W.2d 729, 740. In my view, there is sufficient evidence of spoliation here, especially combined with the disputed issues of material fact on the safe-place claim to warrant: (1) a trial on the safe-place claim, and (2) a jury instruction so the jury could draw an adverse inference from the hotel's destruction of the tub.[1]

¶49 Based on the foregoing, I respectfully dissent, and would reverse and remand for a trial of Cartter's safe-place claim.

[1] The Majority focuses on "sanctions." But, as I understand the law, sanctioning a party for spoliation is different and more severe than letting the jury assess spoliation in conjunction with all the other evidence. *See* ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶42, 319 Wis. 2d 397, 421, 768 N.W.2d 729, 740.