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May 1, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1155 Thomas Duwe v. Jason Dahl (L.C. #2017CV206)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas and Jessica Duwe appeal from an order dismissing their action in its entirety as a sanction for spoliation of evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Because the Duwes improperly destroyed key evidence in flagrant disregard of the

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

judicial process, the circuit court did not erroneously exercise its discretion when it dismissed their action. We affirm.

The facts of the case are largely undisputed. In October 2016, the Duwes purchased a house from Jason Dahl with an indoor swimming pool. The pool had two drain lines running to the basement; the main line ran underground and the skimmer line ran from a side wall. The Duwes discovered both lines had been blocked, allegedly to conceal leaks. The Duwes hired "The Pool and Mosquito Guys" (PMG) to assess the problem. PMG performed an air pressure test, concluding both lines were defective and estimated a repair cost of $22,500. The Duwes filed this suit against Dahl on February 3, 2017, asserting breach of contract and multiple misrepresentation claims.

Dahl retained American Leak Detection (ALD) to perform an air pressure test similar to the one performed by PMG. ALD detected a pressure drop in the skimmer drain line, suspecting the leak was caused by a defect below the skimmer basket. ALD also detected a pressure drop in the main drain line, indicating that air was leaking from a valve in the basement connected to the main line, but that this could not be determined until the valve was replaced. Dahl retained Swimming Pool Services (SPS), which estimated that repairing the skimmer line would cost $4204.

On October 31, 2017, the case proceeded to mediation. At mediation, Dahl advised the Duwes that, if the matter could not be settled, Dahl would seek permission from the court to replace the valve and perform an air pressure test of the main drain line. The case did not settle.

On November 3, 2017, the following e-mail exchanges by counsel took place: Dahl requested permission to replace the valve and retest the main line. No demolition would be

needed. Dahl would pay for replacing the valves. The Duwes denied permission, suggesting there was no legal authority that would allow Dahl to undertake its proposed repairs or testing. It was the Duwes' position that Dahl was entitled to only one inspection, which he did. They planned to proceed with their proposed repairs and would let Dahl know what they found. Dahl warned that "[i]f you destroy the line without allowing us to do an effective test, that would be spoliation." In reply, the Duwes stated that "[s]poliation doesn't apply if you give the other side a chance to look at it first."

On November 10, 2017, Dahl moved to replace the valve and retest the main line, supported by a brief and an affidavit attaching the above e-mails. A hearing was scheduled for January 5, 2018.

The Duwes had asked their counsel, at mediation, if they could begin repairs, and counsel told them he believed Dahl's request for testing or repairs had no basis under what he considered to be the governing case, ***American Family Mutual Insurance Co. v. Golke***, 2009 WI 81, 319 Wis. 2d 397, 768 N.W.2d 729. On November 15, 2017, unknown to the court or Dahl, the Duwes contracted with PMG to perform repairs during the week of November 20. PMG replaced the entire skimmer line, disconnected and plugged the main drain line, replaced and discarded the valve, and installed a new main line.

On December 6, Dahl observed images on PMG's website of these repairs, notified the court, on the same date, of this activity, despite his requests for retesting on November 3 and 10, and suggested that now the court would need to address spoliation of evidence. By this time, all repairs had been completed. At the January 5, 2018 hearing, the court allowed additional discovery.

On February 26, 2018, Dahl moved for sanctions against the Duwes for spoliation of evidence. The court granted the motion and dismissed the action, pointing out that, after the motion to seek testing and replace the key valve, "the plaintiffs performed repairs on the pool. Those repairs occurred without notice to the defendants. The defendants were deprived of any opportunity to observe the repairs …. [And] [t]he [key] valve has been discarded." The court concluded that "[t]his is not a close call for this Court to find that the [Duwes'] repairs [were] being done after a motion for testing" was filed by Dahl and "that is as flagrant as it comes…. This Court was deprived of the ability to resolve the dispute between the parties. That is a flagrant disregard of the judicial process. We are not in a society where parties, especially during litigation, simply take matters into their own hands." The Duwes appeal.

Whether to impose sanctions, and what type of sanctions, for the spoliation of evidence is within the circuit court's sound discretion. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). If the court has reviewed the relevant facts, used a proper standard of law, and, while showing a rational process, "reached a conclusion that a reasonable judge could reach," we will affirm its ruling. ***Id.***

A party with evidence in its control that is essential to a claim or defense in litigation has a duty to preserve it. ***Sentry Ins. v. Royal Ins. Co. of Am.***, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995). The doctrine of spoliation has two main goals: (1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence. ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI App 15, ¶16, 269 Wis. 2d 286, 674 N.W.2d 886 (2003), *aff'd*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462. When a party deliberately destroys evidence, spoliation may be found by applying a two-part analysis. ***Morrison v. Rankin***, 2007 WI App 186, ¶16, 305 Wis. 2d 240, 738 N.W.2d 588.

> 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." Second, the court should consider "whether the offending party destroyed documents [or other items] which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation."

Id. (citation omitted).

We conclude that the circuit court did not err when it determined that the Duwes' conduct caused spoliation of evidence. The first part of the ***Morrison*** test is clearly established here as the Duwes had already commenced litigation. As for the second part of the ***Morrison*** test, the Duwes' actions serve as an apt illustration of spoliation, as they altered, removed, and discarded the core of the mechanical components at issue—the lines and valves as they were configured, which not only were relevant evidence for their own case but, in particular, evidence that Dahl had expressly stated he wanted to further inspect and test as a possible defense for his case.[2]

When a party intentionally breaches their duty to preserve evidence and spoliation results, the variety of sanctions within the discretion of the circuit court include full dismissal. ***Id.***, ¶20. Given the harshness of a dismissal, however, such a sanction is appropriate only when the party has acted egregiously or in bad faith. ***Id.*** "Egregious conduct means a conscious attempt to affect the outcome of litigation or a flagrant, knowing disregard of the judicial process." ***Id.***

[2] The Duwes did keep some pieces of pipe and some photos were taken. But the circuit court found that other parts, such as a critical valve, had been discarded and that extensive repairs had been undertaken by the Duwes. The Duwes do not dispute these findings.

As noted, the Duwes assert that their conduct is supported, and even protected, by ***Golke***. In that case, a house burned down allegedly due to negligent roof repairs. The homeowners' insurer notified the roofers via letter dated March 13, 2000, that the building would be destroyed on April 1, 2000, and that any and all inspections must be completed before then. Follow-up letters were sent on March 23 and again on April 6. After April 11, 2000, the building was destroyed. The insurer did not sue the roofers until 2003, at which time the defendants moved for and were granted dismissal on grounds of spoliation. The Wisconsin Supreme Court reversed, setting forth what the Duwes suggest is a "bright-line" test for all spoliation cases: if a party has a legitimate need to destroy evidence, it can do so provided it (1) gives reasonable notice of a possible claim, (2) explains the basis for that claim, (3) points out that relevant evidence exists, and (4) provides a reasonable opportunity to inspect the evidence. ***Golke***, 319 Wis. 2d 397, ¶45. The ***Golke*** court concluded that the insurer complied with each of these steps but was met largely with nonresponsiveness. ***Id.***, ¶¶44-45, 57-58. Therefore, no sanction was warranted.

The Duwes believe that they complied with the steps of ***Golke*** and that therefore they should have been spared any sanction for repairing their pool. Although the principles of ***Golke*** certainly relate, that case does not address the circumstances presented here, which are distinct. To start, the four steps listed in ***Golke*** are founded on the premise that the party must have "a legitimate reason to destroy the evidence." ***Id.***, ¶5. In ***Golke***, the insureds had no home. The burnt house had to be demolished and rebuilt. Here, the Duwes had no indoor pool, the dysfunction of which was unclear, requiring experts from both sides to inspect and test. Although the Duwes are of course entitled to enjoy the house they purchased, including all of its

amenities, their alleged legitimate reason to destroy key evidence—fixing their indoor pool—suffers greatly by comparison with ***Golke***, where the need for shelter is both keen and urgent.

Even had the Duwes, for the sake of argument, had a legitimate reason to destroy the evidence, they faltered with the process by fixating on the four steps of ***Golke*** without considering critical differences. In ***Golke***, the house had just burned down and litigation would not commence for a few years, leaving no tribunal to address disputes regarding inspections, evidence, and demolition. Neither party could turn to a court for a ruling.

Although the Duwes argue their conduct is insulated because they took the four steps listed in ***Golke***, those steps are virtually always taken—if not required—when one commences a lawsuit, as the pleadings and discovery provide notice about the claim and the evidence, and WIS. STAT. § 804.09 in particular permits an opportunity to inspect. But no one should believe that by commencing a lawsuit and allowing an inspection under § 804.09, that party is then free to unilaterally determine that a reasonable opportunity for inspection has been provided and then destroy key evidence.

Rather, once the Duwes commenced litigation, they triggered the process of, among other things, schedules, orders, expert reports, deadlines, and an overseeing judge tailor-made to resolve evidentiary and discovery disputes. Specifically here, Dahl informally requested the Duwes to allow some retesting, which the Duwes denied.[3] Dahl then filed a formal motion to

[3] Courts generally prefer that parties first attempt to resolve discovery disputes before running into court with a discovery motion. Beyond it being a better practice, many courts have local rules on the subject. *See* WAUKESHA COUNTY CIRCUIT COURT, CIVIL COURT DIVISION, Local Court Rule 2.3 (before a discovery motion is filed, "reasonable attempts to consult with the opposing party to resolve differences" should be made) (July 1, 2015). Here, Dahl properly attempted to avoid going into court with a motion.

replace the valve and for retesting, which the court planned to hear in early January. Despite Dahl's motion and the court placing the matter on its calendar, the Duwes unilaterally decided to make their repairs, deliberately destroying the evidence.[4]

So the question is, did the Duwes flagrantly and knowingly disregard the judicial process? Quite clearly, they did. A party's attempt to preserve the evidence, first informally and then formally, for testing via a motion set for hearing by the court, at which time both sides will be heard, is an integral part of the "judicial process," and the Duwes' decision to repair their pool before the hearing and destroy evidence "flagrant[ly]" and "knowing[ly]" disregarded the judicial process. *See* ***Golke***, 319 Wis. 2d 397, ¶42.

We do not address the remainder of the Duwes' arguments as they are either underdeveloped (e.g., the Duwes, as lay people, do not understand the judicial process and therefore could not have flagrantly disregarded it) or are variations of simply overlooking the critical distinctions between this case and ***Golke.*** *See* ***State v. Culver***, 2018 WI App 55, ¶27 n.15, 384 Wis. 2d 222, 918 N.W.2d 103 (we need not address undeveloped arguments).

[4] Throughout their briefing, the Duwes suggest that a party should not be permitted multiple opportunities to inspect and test, requesting at the end of their reply brief: "This Court must find that once you are given reasonable notice, you have one opportunity to get the testing and inspections correct." Such a hard and fast rule is impractical, unnecessary, and unsupported by the law. The issue is whether a party had a "reasonable opportunity" to inspect the evidence. Every case is different, and some may reasonably require multiple inspections or tests. The discovery statutes provide a comprehensive process, ultimately overseen by the circuit court when problems or disputes arise. The statute allowing inspections and testing does not place an express limit on such requests. WIS. STAT. § 804.09(1). The party served with the request is obligated to respond, but may also assert objections. Sec. 804.09(2)(b). The general discovery statute actually states, in reference to the various discovery methods (e.g., depositions, interrogatories, inspections, etc.), "the frequency of use of these methods is not limited." WIS. STAT. § 804.01(1). The statutes goes on, however, to state that discovery can be limited, upon motion of a party, for various reasons, such as convenience, expense, and burden. Sec. 804.01(2)(am).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals