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2016 IL App (3d) 140824-U

Order filed August 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

JULIE ANN MILBY, as Agent and Guardian for the Estate of SUSAN K. BONDI,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois.
Plaintiff-Appellant,)	
v.)	Appeal No. 3-14-0824 Circuit No. 13-L-18
MOTORCYCLE TOUR CONVERSIONS, INC.,)	
Defendant-Appellee.)	The Honorable John L. Hauptman, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* In a design defect products liability case where the motorcycle conversion kit at issue and the motorcycle to which it was attached were deliberately and intentionally disposed of long before the case was filed to the severe prejudice of the defendant, the trial court properly dismissed the case as a discovery sanction pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). The Appellate Court, therefore, affirmed the trial court's judgment.

¶ 2 Plaintiff, Julie Ann Milby, as the agent of her disabled mother, Susan Bondi, and the guardian of her mother's estate, filed a products liability case against defendant, Motorcycle

Tour Conversions, Inc., relating to a motorcycle crash that severely injured Bondi and rendered her incapacitated. Plaintiff alleged that a motorcycle conversion kit, which had been manufactured by defendant and had been installed on Bondi's motorcycle, was defective in design and was the cause of the crash. Both the motorcycle and the conversion kit had been deliberately and intentionally disposed of by Bondi's husband, Larry Janssen, long before the case was filed at a time when Janssen was serving as Bondi's agent under a power of attorney. Janssen had since passed away. After the case was filed, during the pretrial proceedings, defendant moved for dismissal of the case as a discovery sanction pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) based upon the disposal of the motorcycle and the conversion kit. Following a hearing, the trial court granted the motion and dismissed the case with prejudice. Plaintiff appeals. We affirm the trial court's judgment.

¶ 3

FACTS

¶ 4

Plaintiff's mother, Susan Bondi, owned a motorcycle. Prior to or during April or May 2009, Bondi or her husband, Larry Janssen, purchased the motorcycle conversion kit at issue second hand in response to a newspaper advertisement. The conversion kit was manufactured by defendant and added two extra wheels to the rear of the motorcycle, one on each side of the rear wheel. Janssen installed the kit onto the back of Bondi's motorcycle in April or May 2009. It is unknown whether Janssen had any skills or experience in doing so or whether he was provided with any type of installation instructions with the conversion kit. Bondi drove the motorcycle for several months over the course of the next two years.

¶ 5

In May 2011, Bondi was driving her motorcycle on a road in Prophetstown, Whiteside County, Illinois. As she traveled over an area where there was a hump or impression that ran across the road at an angle due to a culvert under the road, the motorcycle allegedly became

unstable and bounced uncontrollably. Bondi was thrown from the motorcycle onto the road and suffered a severe and permanently debilitating brain injury. Bondi had previously executed a statutory short-form power of attorney for property, which named her husband, Larry Janssen, as her initial agent and her daughter, the plaintiff, as her successor agent. The power of attorney authorized the agent to bring claims and litigation on Bondi's behalf.

¶ 6 The day after the accident occurred, plaintiff took photographs of the motorcycle, the conversion kit, and the road area where the accident took place. About a week later, at a time when Janssen was serving as Bondi's agent under the power of attorney, Janssen sold the motorcycle and the conversion kit, along with his own motorcycle. The conversion kit was removed from Bondi's motorcycle, and the purchaser sold the conversion kit as scrap metal to be shredded. The purchaser allegedly repaired Bondi's motorcycle and later sold it as well.

¶ 7 In October 2011, Janssen resigned as Bondi's agent. He later passed away in December 2012. After Janssen resigned, plaintiff became Bondi's acting agent under the power of attorney. Plaintiff was also appointed as the guardian of Bondi's estate. After becoming Bondi's agent, plaintiff contacted an attorney to see if there was a possible claim that could be filed against the city's road commission due to the condition of the road at the time of the accident.

¶ 8 In May 2013, plaintiff, acting on her mother's behalf, filed the instant lawsuit against defendant. Plaintiff alleged both theories of strict liability and negligence. Defendant subsequently filed a motion to dismiss the case pursuant to Rule 219(c) as a discovery sanction because of the disposal of the motorcycle and the conversion kit. Defendant alleged in the motion that without the motorcycle and conversion kit, it was highly prejudiced in its ability to prepare a proper defense.

¶ 9 The parties fully briefed the matter before the trial court. Attached to some of the responsive pleadings were the affidavits of plaintiff's expert witness, Don Kueny, an engineer. In the affidavits, Kueny stated that he was able to determine with certainty from the reports and photographs that the conversion kit at issue suffered from a design defect, rather than a manufacturing defect, and that it was not necessary for him to physically touch, manipulate, or analyze the actual conversion kit involved to make that determination. Kueny specifically identified what he believed to be the defects in the design of the conversion kit in question. In addition, Kueny indicated the manner in which the conversion kit could have been modified to fit Bondi's motorcycle and stated that such a modification would not have affected the operation of the motorcycle or the conversion kit.

¶ 10 A hearing was held on the motion to dismiss in August 2014. After listening to the oral arguments of the attorneys, the trial court took the case under advisement. The trial court later issued a detailed and thorough written ruling. In the written ruling, the trial court found that all of the factors to be considered under Rule 219(c) weighed in favor of imposing a discovery sanction and that the appropriate sanction to be imposed in this case, based upon the evidence presented and the severe prejudice to defendant, was to grant a dismissal. The trial court, therefore, granted defendant's motion to dismiss the case with prejudice. Plaintiff appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff argues that the trial court erred in granting defendant's motion to dismiss. Plaintiff asserts that dismissal was an inappropriate sanction for several reasons. First, plaintiff contends, dismissal was too harsh of a sanction because defendant was not substantially prejudiced by the disposal of the evidence in this case. According to plaintiff, because a design defect was alleged, rather than a manufacturing defect, any exemplar of the conversion kit was

sufficient, along with the photographs that were taken, to allow defendant to investigate and prepare a defense. Plaintiff posits that defendant's claim to the contrary is based upon conclusory statements and unsupported allegations and is not based upon any type of expert review of the matter. Second, plaintiff contends, dismissal was an inappropriate sanction because the disposal of the evidence in this case was not deliberate, contumacious, or an unwarranted disregard of a discovery order of the trial court. In making that contention, plaintiff points out that the evidence was disposed of by Janssen without plaintiff's knowledge long before a products liability action was contemplated or filed in this case and long before plaintiff became Bondi's agent or had any authority to act on Bondi's behalf. Plaintiff also notes that neither she nor Janssen had any type of expertise in legal matters. For the reasons stated, plaintiff asks that we reverse the trial court's dismissal order and that we remand this case for further proceedings.

¶ 13 Defendant argues that the trial court's ruling was proper and should be upheld. Defendant asserts that dismissal was an appropriate sanction to impose in this case because: (1) the motorcycle and conversion kit were the key evidence; (2) the motorcycle and conversion kit were voluntarily, deliberately, and intentionally disposed of by the person who was serving as Bondi's agent at the time; (3) without the actual motorcycle and conversion kit, defendant had no way of knowing such things as whether the kit had been altered prior to or during installation, whether the kit was correctly installed, whether the proper parts were used in the installation of the kit, whether the motorcycle and the kit were properly maintained, or whether there were any mechanical defects in the motorcycle or the kit; (4) the disposal of the evidence deprived defendant of being able to present its most important defense—that the actual cause of the accident was not the design of the conversion kit; and (5) as a result of the disposal of the

evidence, defendant was severely prejudiced. Defendant asks, therefore, that we affirm the trial court's judgment, dismissing plaintiff's case with prejudice as a Rule 219(c) discovery sanction.

¶ 14 Illinois Supreme Court Rule 219(c) authorizes a trial court to impose a sanction, including the dismissal of the cause of action, upon any party who unreasonably refuses to comply with any provision of the supreme court's discovery rules or any order entered pursuant to those rules. See Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The determination of whether to impose a sanction under Rule 219(c) and the particular sanction to be imposed rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Shimanovsky*, 181 Ill. 2d at 120. The threshold for finding an abuse of discretion is high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009); *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 15 Prior to the filing of a lawsuit, a potential litigant has a duty to take reasonable measures to preserve the integrity of relevant and material evidence. *Shimanovsky*, 181 Ill. 2d at 121-22. That duty exists because if a court were unable to sanction a party for the presuit destruction of evidence, a potential litigant could avoid discovery rules or escape liability merely by destroying the proof prior to filing a lawsuit. *Id.* Illinois courts have held, therefore, that a party's failure to produce evidence because it was destroyed prior to the filing of a lawsuit and prior to the entry of a protective order may constitute sanctionable conduct (unreasonable noncompliance) under Rule 219(c). See, e.g., *id.* at 121-23; *Graves v. Daley*, 172 Ill. App. 3d 35, 38 (1988) (a plaintiff is not free to destroy crucial evidence merely because an order was not issued by the trial court to preserve that evidence); *American Family Insurance Co. v. Village Pontiac-GMC, Inc.*, 223 Ill.

App. 3d 624, 627-28 (1992) (as a matter of sound public policy, an expert should not be allowed to intentionally or negligently destroy evidence and then to substitute his own description of that evidence for the evidence itself).

¶ 16 When imposing sanctions under Rule 219(c), the trial court's purpose is to coerce compliance with discovery rules and orders and not necessarily to punish the dilatory party. *Shimanovsky*, 181 Ill. 2d at 123. An order of dismissal with prejudice is a drastic sanction and should be invoked only in those cases where the party's actions show a deliberate, contumacious, or unwarranted disregard of the trial court's authority. *Id.* Because dismissal with prejudice is such a drastic sanction, it should be employed only as a last resort and only after all the court's other enforcement powers have failed to advance the litigation. *Id.* In determining whether to impose a sanction upon a party under Rule 219(c) and the appropriate sanction to be imposed, the trial court should consider the following factors: (1) the surprise to the adverse party (the party moving for sanctions); (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Id.* at 124. No single factor, however, is determinative in the analysis. *Id.*

¶ 17 In the present case, the only factors listed above that are in dispute are factors one through three and factor six. Plaintiff does not contest that factors four and five weigh in favor of imposing sanctions (that defendant was diligent in seeking discovery and made a timely objection based upon the destruction of the evidence). As for the remaining factors, we agree with the trial court's assessment. Defendant was indeed surprised by the destruction of the evidence, despite plaintiff's candor. The evidence had been disposed of long before suit was

filed and, by the time that defendant learned of the destruction, any chance of saving or finding the evidence had long since passed. The importance of the evidence at issue—the motorcycle and the conversion kit—cannot be overstated in this case, nor can the prejudice to the defendant that was caused by the destruction of that evidence. As other courts have recognized, preservation of the allegedly defective product in a products liability case is of the utmost importance to both the proof of, and defense of, the case. See, e.g., *Shimanovsky*, 181 Ill. 2d at 126; *Graves*, 172 Ill. App. 3d at 38; *American Family Insurance Co.*, 223 Ill. App. 3d at 627; *Shelbyville Mutual Insurance Co. v. Sunbeam Leisure Products Co.*, 262 Ill. App. 3d 636, 641-42 (1994). “The allegedly defective product, in the condition it was in at the time of the occurrence, is often important in determining how, why, and if the product is actually defective and is usually far more instructive to a fact-finder than photographs or oral descriptions.” *Shelbyville Mutual Insurance Co.*, 262 Ill. App. 3d at 642. By the destruction of the motorcycle and conversion kit in this case, plaintiff foreclosed defendant from raising as a possible affirmative defense that something other than the alleged design defect caused the accident and limited the defense options available to defendant to merely rebutting the testimony of plaintiff’s expert witness. See *id.* at 643 (the mere rebuttal of the plaintiff’s expert witness in a products liability case may not be as nearly as an effective defense as a presentation of evidence that the injury or damage was caused by something other than the defective product). Finally, regarding the good faith of the plaintiff, although the instant plaintiff was not involved in the destruction of the evidence and had no prior notice thereof, the evidence was nevertheless destroyed or disposed of by the person (Janssen) who was serving as Bondi’s agent at the time. When the destruction occurred, both plaintiff and Janssen were aware of, or should have been aware of, the possibility of filing a lawsuit for Bondi’s injuries and the importance of preserving the motorcycle

and conversion kit for that purpose. Indeed, the record indicates that the day following the accident, plaintiff took pictures of the motorcycle, the conversion kit, and the road area where the accident occurred. Even if at that time, plaintiff was only contemplating a possible suit against the city for the condition of the roadway, the motorcycle and conversion kit would still have been very important evidence to keep for that purpose. While there is no indication that Janssen was acting maliciously when he disposed of the evidence, it cannot be denied that he did so deliberately, intentionally, and while serving as Bondi's agent.

¶ 18 In sum, our review of the record in this case indicates that all of the *Shimanovsky* factors weigh in favor of imposing a sanction upon the plaintiff and in favor of the actual sanction that was imposed. See *Shimanovsky*, 181 Ill. 2d at 124. Based upon the importance of the evidence at issue and the severity of the prejudice to defendant caused by the destruction of that evidence, we find that the trial court did not commit an abuse of discretion in granting defendant's motion for dismissal of the case with prejudice as a Rule 219(c) sanction. See *id.* Although the sanction was severe, it was a just response to the deliberate and intentional conduct of Bondi's agent. See *id.* at 123-24. There was no other sanction that the trial court could have imposed in this case to advance the litigation in a manner that was fair to defendant. See *id.*

¶ 19 In reaching that conclusion, we must take a moment to comment upon the decision in *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387 (2005), a case which is heavily relied upon by plaintiff on appeal in the instant case. In *Adams*, a case which involved a house fire, the trial court dismissed plaintiff's products liability case as a Rule 219(c) sanction because crucial evidence in the case had been destroyed by the plaintiff's landlord before the suit was filed. See *Adams*, 358 Ill. App. 3d at 389-92. After considering the applicable legal principles, including the *Shimanovsky* factors, the appellate court reversed the decision, noting that the plaintiff was

only a tenant of the premises where the fire occurred, played no role in the destruction of the evidence at issue, had no knowledge that the evidence was relevant and material, and had no ability to stop the landlord from destroying the evidence. See *id.* at 392-96. In the present case, however, although plaintiff tries to distance herself from the disposal of the evidence, it cannot be denied that the evidence was intentionally, deliberately, and voluntarily disposed of by the person who was serving as Bondi's agent at the time. Thus, while the court in *Adams* cited and applied the same legal principles that we do in the instant case, the facts of the *Adams* case are distinguishable. See *id.* The decision in *Adams*, therefore, does not persuade us that the trial court in the present case committed an abuse of discretion by dismissing the instant plaintiff's suit with prejudice.

¶ 20

CONCLUSION

¶ 21

For the foregoing reasons, we affirm the judgment of the circuit court of Whiteside County.

¶ 22

Affirmed.