Rel: September 20, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1171133

Imperial Aluminum-Scottsboro, LLC

v.

Tyler D. Taylor

Appeal from Jackson Circuit Court
(CV-13-900106)

STEWART, Justice.

This case requires us to consider whether a defendant engaged in third-party spoliation of evidence that would have been essential to the plaintiff's products-liability claim against a manufacturer. For the reasons stated below, we

affirm the judgment entered by the Jackson Circuit Court ("the trial court") following a bench trial insofar as it found Imperial Aluminum-Scottsboro, LLC ("Imperial"), culpable for negligent spoliation of evidence and awarded compensatory damages to Tyler D. Taylor. We reverse the trial court's judgment insofar as it awarded punitive damages against Imperial based on a finding of wanton conduct.

Facts and Procedural History

On October 10, 2010, Taylor injured his right index finger while in the line and scope of employment with Imperial. In its judgment, the trial court provided a summary of the facts leading up to and relating to Taylor's injury:

> "In early October of 2010, [Taylor] was hired by Imperial to paint some of the structures on its property; he was given a used paint sprayer with which to complete his task. After starting his task, [Taylor] realized that the used paint sprayer was malfunctioning, which he reported to Imperial. On October 5, 2010, Imperial purchased a new paint sprayer, a Tradeworks 170, from Sherwin-Williams. The new paint sprayer included the 'spray gun' component, which is used to distribute the paint, and the compressor, which compresses air and is used to send paint to the spray gun.
>
> "After unboxing the paint sprayer, [Taylor] assembled the components and began painting Imperial's structures. On October 10, 2010, [Taylor] had finished his work for the day and was cleaning paint from the spray gun component, when the paint

> sprayer activated and injected paint and mineral spirits into his right index finger.
>
> "[Taylor] was transported to Highlands Medical Center and underwent a series of painful procedures in an attempt to save his finger. Despite the best efforts of his physicians, they were unable to save his finger, and the decision was made by [Taylor] and his physicians to completely amputate his right index finger, all the way down to his hand.[3] Subsequent to this amputation, [Taylor] had to undergo another procedure to remove a painful neuroma at the amputation site.
>
> "[Taylor's] doctors have discussed with him the possibility that he may need to, at least, have carpal tunnel surgery, and [Taylor] is also at risk of developing arthritis and other degenerative conditions as a result of his injury.
>
> _____
>
> "[3]This type of amputation is called a ray resection."

(Citations to record omitted.)

In preparation for potential litigation stemming from his injury, Taylor retained legal counsel.[1] On January 3, 2011, Taylor's attorney sent Imperial a letter stating:

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[1]The record indicates that Taylor sought worker's compensation benefits from Imperial. Furthermore, according to the trial court's judgment, a Jackson County jury awarded Taylor $5,000 in compensatory damages and $25,000 in punitive damages on claim of retaliatory discharge against Imperial for terminating Taylor's employment in retaliation for his seeking worker's compensation benefits. See Imperial Aluminum-Scottsboro, LLC v. Taylor, 189 So. 3d 59 (Ala. Civ. App. 2015).

> "We represent [Taylor,] who was injured while working at your company on or about October 1 [sic], 2010.
>
> "We understand that a paint gun was the cause of his injury, which resulted in the loss of his index finger. We anticipate making a claim for damages arising from this injury. In this regard, it will be necessary for us to inspect the paint gun and any equipment utilized with it at the time of the injury, along with any and all paperwork, documents, bill of sale, etc., pertaining to its purchase, manufacture and maintenance. Please preserve the gun along with any and all paperwork and do not allow anyone to change, modify, or destroy or otherwise dispose of the paint gun and other requested items."

The letter did not include an offer by Taylor to bear any cost or other burden of preserving the requested evidence.

In its judgment, the trial court summarized the efforts employees of Imperial took to preserve the Tradeworks 170 paint sprayer after receiving the January 3, 2011, letter:

> "In response [to the letter], the general manager of Imperial's Scottsboro facility, Mike Peebles, instructed Randy Stalnaker to put the paint sprayer up. Imperial was aware, no later than its receipt of [the] January 3, 2011, letter, that [Taylor] intended to pursue a claim for damages arising out of [Taylor's] injury. Randy Stalnaker was the maintenance supervisor and/or manager at Imperial's Scottsboro location. Mr. Stalnaker instructed Amanda King to put the paint sprayer in the finished-goods portion of the warehouse and to cover it with a bag. After putting the paint sprayer up, Amanda King confirmed to Mr. Stalnaker that the 'spray gun part' of the paint sprayer was also preserved."

(Citations to the record omitted.)

On October 10, 2012, Taylor filed a complaint in the Madison Circuit Court asserting claims of products liability under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD"), negligence, wantonness, failure to warn, and breach of warranty against Graco, Inc. ("Graco"), and Sherwin-Williams Scottsboro Store Number 2126 ("Sherwin-Williams"). Taylor also alleged in the complaint that Graco was the manufacturer of the Tradeworks 170 and that Imperial had purchased the unit from Sherwin-Williams. Although it is not clear from the record, the trial court's judgment indicates that Taylor's case against Graco and Sherwin-Williams was removed to the United States District Court for the Northern District of Alabama. On January 18, 2013, Imperial's attorney sent a letter to Taylor's attorney stating:

> "I went to the Imperial Aluminum plant in Scottsboro, Alabama[,] to obtain the spray gun involved in this matter. I was advised at that time that immediately following this accident which occurred on October 10, 2010, they stopped using the spray guns of the type involved in the accident made the basis of this suit. According to the information I was able to obtain this occurred in December of 2010. Unfortunately, the spray gun was deposed [sic] of at or near that time and is no longer available."

On May 8, 2013, after receiving the letter from Imperial's counsel, Taylor dismissed his complaint against Graco and Sherwin-Williams.

On the same day, Taylor filed a complaint in the trial court naming as defendants Imperial, Mike Peebles, and various fictitiously named defendants and asserting a claim alleging third-party spoliation of evidence arising from Imperial's failure to preserve the spray-gun portion of the Tradeworks 170 unit. Taylor demanded a trial by a jury. Imperial filed an answer on June 10, 2013, in which it stated, in pertinent part:

> "5. The Defendant, Imperial Aluminum-Scottsboro, LLC, would state that [Taylor], through his counsel of record, did not contacted [sic] it about preserving the 'paint sprayer' until January 3, 2011, which was not actually received until a later date.
>
> "6. Prior to January 3, 2011 the 'paint sprayer' in question was disposed of as it was not longer in use at the plant."

The trial court conducted a bench trial on March 12, 2018, during which it received the testimony of Peebles, Taylor, Amanda King, and Mike Chenoweth, who was vice president of operations for Imperial and who had been

designated as Imperial's corporate representative.[2] The deposition testimony of Randy Stalnaker, the maintenance supervisor at Imperial's Scottsboro facility, and of Taylor's treating physicians was read into the record. Chenoweth testified that he was aware of the January 3, 2011, letter from Taylor's attorney to Imperial in which Imperial was asked to preserve the spray gun, as well as other items related to the Tradeworks 170 unit. Chenoweth testified that, after Imperial received the letter, Imperial management instructed maintenance workers to preserve the unit. Under direct examination by Taylor's counsel, Chenoweth testified as follows:

> "Q. All right. And in this letter, [counsel for Taylor] also notified Imperial Aluminum that he believed the paint gun was the cause of Tyler Taylor's injury, correct?
>
> "A. Correct.
>
> "Q. That--that he anticipated making a claim for damages arising from this injury, correct?
>
> "A. Correct.
>
> "Q. And that it would be necessary for him to be able to inspect the paint gun and any equipment utilized with it at the time of injury, along with

[2]Before the start of the trial, the parties consented to a bench trial, and Taylor withdrew his jury demand.

any and all paperwork, documents, bill of sale, et cetera, pertaining to its purchase, manufacture, and maintenance. Do you remember that?

"A. Yes.

"Q. All right. That was not done, correct? That paint gun, along with all of the equipment and the warnings and the literature was not preserved by Imperial Aluminum, correct?

"A. No. It's not correct.

"Q. All right. Part of it was preserved, the compressor.

"A. As far as we know, it was all preserved, but ....

"Q. It was all preserved at one time?

"A. At one time.

"Q. Okay. Well, would you agree that as we sit here today, we don't know where the paint gun is?

"A. Correct.

"Q. We don't know where the box that it came in is, correct?

"A. Correct.

"Q. We don't know where any of the literature or warnings are, relative to the paint sprayer or the paint gun, correct?

"A. Correct.

"....

> "Q. Have you seen any of the testimony [in] this case that would indicate ... that the paint gun was with the sprayer when it was initially put up?
>
> "A. No, I have not.
>
> "....
>
> "Q. When was the last time that you know of that the paint gun was still at the plant?
>
> "A. If it was with the sprayer at the time it was put up, that's the last time [Imperial management] knew it was there."

When asked by Taylor's attorney whether the spray gun was stored with the compressor, Chenoweth replied:

> "We're not sure ... if the maintenance person--when we say the sprayer, he saw the sprayer unit. Most people think the unit is the sprayer. So at that time, we assumed the gun was with it. We're not sure. Nobody inspected it, just the maintenance person that put it up."

Chenoweth testified that Imperial did not incur any cost for storing the Tradeworks 170 in its warehouse, other than being deprived of using the unit.

Peebles, who was the plant manager for Imperial on the date of Taylor's injury and who left his employment with Imperial in August 2012, testified that he was not a witness to Taylor's injury but that he understood the injury occurred when Taylor was attempting to clean paint off of his hands using the spray gun. Peebles testified that, after receiving

the January 3, 2011, letter from Taylor's counsel, he notified Imperial's corporate office of the letter and also instructed Stalnaker to preserve the Tradeworks 170 unit by putting it on a pallet and into the finished-goods area of the plant. Peebles testified that when he left his employment with Imperial, the Tradeworks 170 was still in the finished-goods area of the plant. Under direct examination from Taylor's attorney, Peebles testified:

> "Q. All right. So [when] you instructed Mr. Stalnaker to take the paint gun, did you instruct him to take all the documents and the--any equipment that went with it?
>
> "A. Well, the paint gun would have been--when I asked him to take the sprayer, I assumed that he would have took the whole paint gun. There was--there was only two--really only two pieces to it. So I would assume that--as far as the paperwork, that would have kept--we would have kept that in the office."

Peebles further testified under direct examination:

> "Q. Okay. The answer that Imperial Aluminum filed in this case says, in Paragraph [6], 'That prior to January 3, 2011, the "paint sprayer," in question was [disposed] of, as it was not longer in use at the plant.' Is that true?
>
> "A. No, it's not."

Under cross-examination by Imperial's attorney, Peebles testified:

> "Q. Did you ever see this spray-paint handle after this accident?
>
> "A. No, I did not.
>
> "Q. So you don't know when this equipment was put away whether or not the spray-paint handle was included?
>
> "A. No. I did not personally check."

Peebles also testified that he had no reason to believe that the spray gun was not included with the rest of the Tradeworks 170 unit when he instructed Stalnaker to place it in storage but that he did not know for sure whether the spray gun was preserved with the rest of the unit.

Stalnaker, whose deposition was read into the record, testified that, when the Tradeworks 170 unit was stored, it was not secured in such a way that no one had access to it. Stalnaker testified:

> "Q. Was the spray gun part of what you took to the finished-goods portion of the warehouse?
>
> "A. I was told it was.
>
> "Q. You were told that it was?
>
> "A. Yes.
>
> "Q. Okay. By whom?
>
> "A. By Amanda King.
>
> "Q. What did Amanda King tell you?

"A. That she put everything in the back of the warehouse.

"Q. Including the sprayer?

"A. I'm assuming so.

"....

"Q. Okay. Well, you testified earlier that you assumed that the whole thing was together when you took it to the finished-goods portion of the warehouse, correct?

"A. Assumed, yes.

"Q. All right. Do you have any reason to believe that the paint gun was not part of the sprayer that you took back to the warehouse at that time?

"A. No."

King, a maintenance worker at Imperial's Scottsboro facility, testified that Stalnaker instructed her to store the Tradeworks 170. She stated that she moved the unit with the help of another maintenance worker and that it was covered in plastic when they moved it. Under direct examination by Imperial's attorney, King testified:

"Q. Did you ever check to see if the handle, the spray handle, was with this equipment?

"A. No.

"Q. All right. Do you know if it was at that time?

"A. No.

> "Q. Do you know if the spray handle was with the equipment when you were instructed by [Stalnaker] to get it put somewhere?
>
> "A. No."

After Taylor rested his case, Peebles moved for a judgment as a matter of law, which Taylor did not oppose. The trial court entered an order on March 12, 2018, granting Peebles's motion and dismissing all claims asserted by Taylor against Peebles with prejudice.

On August 3, 2018, the trial court entered a detailed judgment that included specific findings of fact and conclusions of law. The trial court determined that Imperial voluntarily undertook a duty to preserve the Tradeworks 170 after receiving the January 3, 2011, letter from Taylor's attorney. The trial court found that the January 3, 2011, letter placed Imperial on notice that Taylor intended to pursue litigation. The trial court also concluded that Imperial's efforts to preserve the paint sprayer by storing the Tradeworks 170 unit in a warehouse constituted the voluntary undertaking of a duty to preserve the entire unit, including the spray gun; that the evidence established that the spray gun initially had been stored along with the compressor; and that Imperial had a continuing duty to use due

care to preserve the spray gun. The trial court concluded that the spray gun was vital to Taylor's products-liability and other claims against Graco and Sherwin-Williams and that Taylor was unable to pursue those claims unless he could present the spray gun as evidence. The trial court determined that Imperial failed to meet its burden of showing that Taylor would not have prevailed on his products-liability claim against Graco and Sherwin-Williams even with the spray gun. The trial court concluded that, instead, Imperial lost, destroyed, or disposed of the spray gun after undertaking a duty to preserve it along with the rest of the paint-sprayer unit. The trial court further found that Taylor will experience daily pain and that he will require additional surgeries in the future. The trial court awarded Taylor $250,000 in compensatory damages.

In its judgment, the trial court also determined that Imperial's employees engaged in wanton behavior that justified an award of $150,000 in punitive damages against Imperial. The trial court stated:

> "The evidence in this case is clear and convincing that Imperial acted wantonly with respect to its repeated effort to mislead and to deceive [Taylor] relative to the whereabouts of the paint sprayer. Imperial did more than just breach the duty it owed

> to [Taylor] to preserve the paint sprayer; it deceived him, his lawyer and his father relative to the single piece of evidence it was charged with preserving and protecting."

The trial court summarized the actions taken by employees of Imperial during the course of the litigation to mislead Taylor concerning the whereabouts of the spray gun. The trial court concluded:

> "The record is clear that Imperial, by and through its employees, its representatives and its counsel, lost, destroyed or disposed of the paint sprayer when it knew that to do so would likely destroy [Taylor's] ability to seek legal redress against the manufacturer of the paint sprayer and that it wantonly and repeatedly outright lied to and misled [Taylor] as to the whereabouts of the paint sprayer. The evidence is also clear that Imperial made no effort to locate the paint sprayer pursuant to [Taylor's] counsel's request to inspect it. The evidence is undisputed that Imperial did not lock up or secure the paint sprayer and that the Imperial employees who had knowledge of the whereabouts of the paint sprayer were never asked by Imperial or its counsel to locate or to produce the paint sprayer after the paint sprayer was placed in the finished goods area of the plant. Instead, Imperial told [Taylor] and his counsel that the paint sprayer had been disposed of prior to the receipt of [the] January 3, 2011, letter. Imperial's conduct is the embodiment of wantonness, and such conduct should be punished, and the imposition of punitive damages is justified and warranted."

Imperial appealed.

Standard of Review

> "Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. '"When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error."' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).
>
> "'....'
>
> "... However, 'that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)."

Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67–68 (Ala. 2010).

Analysis

On appeal, Imperial contends (1) that the evidence presented at trial was not sufficient to support a finding that it engaged in negligent spoliation of evidence; (2) that Imperial satisfied its burden of proof showing that Taylor could not have been successful with regard to his claims against Graco and Sherwin-Williams, namely arguing that Taylor was contributorily negligent, that he assumed the risk, and that he would not have prevailed on the merits in that case;

and (3) that Taylor failed to present substantial evidence that Imperial engaged in wanton conduct.

I. Spoliation

This Court has long recognized "the doctrine that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith." Dailey v. City of Birmingham, 378 So. 2d 728, 729 (Ala. 1979)(citing Robinson v. Harris, 370 So. 2d 961 (Ala. 1979); United States Fid. & Guar. Co. v. Jones, 356 So. 2d 596 (Ala. 1978); and Beasley v. MacDonald Eng'g Co., 287 Ala. 189, 249 So. 2d 844 (1971)). This doctrine served as the foundation for this Court's recognition of a cause of action for third-party spoliation of evidence in Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000).

> "In [Smith], this Court recognized that general principles of negligence law afford an Alabama plaintiff a remedy when evidence crucial to that plaintiff's case is lost or destroyed through the acts of a third party. We further explained how a claim of spoliation of evidence against a third party fit within the negligence framework:
>
> > "'As in all negligence actions, the plaintiff in a third-party spoliation case must show a duty to a foreseeable plaintiff, a breach of that duty, proximate

> causation, and damage. Crowne Invs., Inc. v. Bryant, 638 So. 2d 873, 878 (Ala. 1994). We announce today a three-part test for determining when a third party can be held liable for negligent spoliation of evidence. In addition to proving a duty, a breach, proximate cause, and damage, the plaintiff in a third-party spoliation case must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action. Once all three of these elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages.'
>
> "Smith, 771 So. 2d at 432-33."

Killings v. Enterprise Leasing Co., 9 So. 3d 1216, 1220-21 (Ala. 2008)(footnotes omitted).

In this case, Imperial concedes that the spray gun would have been essential to proving Taylor's products-liability case against Graco and Sherwin-Williams, thus satisfying the third element necessary to establish a third-party spoliation claim under Smith. Imperial contends, however, that Taylor failed to present sufficient evidence to support a finding

that Imperial was aware of the potential for litigation when it disposed of the evidence. Imperial further contends that Taylor failed to present sufficient evidence to support a finding that it was in possession of the spray gun when it received the January 3, 2011, letter from Taylor's counsel requesting that the "paint gun" and other pertinent evidence be preserved. Imperial argues that Taylor failed to establish that Imperial had the spray gun in its possession when it undertook the duty of preservation of the Tradeworks 170 unit.

Based on our review of the record, we conclude that the trial court's factual findings, made after the trial court conducted a bench trial, are substantiated by the evidence.

> "A trial court's factual findings premised on an ore tenus hearing are presumed correct. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994). '"This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility."' Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007)(quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). On appeal, a judgment entered on factual findings based on ore tenus evidence will not be overturned '"unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow."' Perkins, 646 So. 2d at 47 (quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993))."

Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008).

In the January 3, 2011, letter, Taylor's attorney specifically requested that the spray gun be preserved, and it is undisputed that Imperial responded to the request by setting about to preserve it. Accordingly, Imperial undertook a duty to preserve evidence in response to the letter. Imperial contends that it could not have had a duty to preserve the spray gun, because there was no evidence showing that the spray gun was in its possession when it received the letter and when it acted to preserve the Tradeworks 170 unit. Stated otherwise, Imperial suggests that the spray-gun portion of the unit must have been disposed of, lost, or destroyed before it received the letter. Imperial points to ambiguity in the testimony of Peebles, King, and Stalnaker concerning whether the spray gun was included in the equipment and materials that were preserved after Imperial received the January 3, 2011, letter. Those witnesses testified that they had no specific recollection of seeing the spray gun when they moved the Tradeworks 170 unit to the finished-goods area of the plant. Those witnesses, however, also testified that they were under the impression that the spray gun was stored with

the rest of the unit when it was moved. Further, contrary to Imperial's assertions, Peebles specifically testified that the spray gun had not been disposed of before Imperial received the January 3, 2011, letter. In fact, the trial court was not presented with any testimony or evidence supporting Imperial's assertion that the spray gun was lost or disposed of before it received the January 3, 2011, letter. Peebles also testified that Imperial had incorrectly asserted during the litigation that Imperial had stopped using the spray gun in question after Taylor's injury on October 10, 2010. The evidence also showed that the Tradeworks 170 unit had not been stored in a secure manner where it could not be accessed by other workers at the facility.

The trial court judge was in the unique position to observe the testimony of Imperial's management, supervisors, and employees who had knowledge of or were involved directly with the efforts to preserve the Tradeworks 170 unit. It was within the province of the trial court judge as the fact-finder to resolve any conflicts in the testimony and to judge the credibility of the witnesses. Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986)("The ore tenus rule is grounded upon the

principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses."). The trial court's judgment contains detailed findings of fact and analysis, reflecting careful consideration of the evidence and application of the evidence to the law. Imperial has not demonstrated that the trial court exceeded its discretion in reaching its conclusions. Accordingly, we conclude that the trial court could have correctly concluded that Taylor established the three elements required by Smith, along with the traditional elements of negligence, to prove his third-party spoliation-of-evidence claim against Imperial. Taylor's establishment of those elements created a rebuttable presumption that he would have recovered in his products-liability case against Graco and Sherwin-Williams but for the fact of Imperial's spoliation of the spray gun.

II. Success Against the Manufacturer

A defendant in a third-party spoliation case may overcome the rebuttable presumption that the plaintiff would have prevailed on the underlying action. Smith, 771 So. 2d at 433. This Court stated in Smith:

> "The rebuttable presumption we adopt for use in third-party spoliation cases is '[a] presumption affecting the burden of proof by imposing upon the party against whom it operates the burden of proving the nonexistence of the presumed fact.' Rule 301(b)(2), Ala. R. Evid.; see Charles W. Gamble, McElroy's Alabama Evidence § 451.05(a) (5th ed. 1996). The presumed fact is that the plaintiff would have prevailed in the underlying action but for the loss or destruction of the evidence by the third-party spoliator. The third party can overcome the presumption by producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available."

Smith, 771 So. 2d at 435.

In the present case, the trial court concluded that "Imperial did not offer any credible evidence that would support a finding that [Taylor] would not have prevailed in his products-liability case. Therefore, Imperial did not meet its burden, and [Taylor] is entitled to prevail in his spoliation case." (Emphasis in original.) Imperial contends that the trial court incorrectly concluded that Taylor would have been successful on his claim against the manufacturer of the spray gun because, it contends, sufficient evidence was presented establishing that Taylor was contributorily negligent, that he assumed the risk, and that he would not have prevailed on the merits against the manufacturer.

A. Contributory Negligence

This Court has stated:

> "Contributory negligence is an affirmative and complete defense to a claim based on negligence. In order to establish contributory negligence, the defendant bears the burden of proving that the plaintiff 1) had knowledge of the dangerous condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger."

Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 606 (Ala. 1998).

> "'[I]t must be demonstrated that the plaintiff's appreciation of the danger was a conscious appreciation at the moment the incident occurred. [Citations omitted.] Mere "heedlessness" is insufficient to warrant a finding of contributory negligence as a matter of law. [Citations omitted.]' Central Alabama Elec. Co-op. v. Tapley, 546 So. 2d 371, 381 (Ala. 1989)."

John R. Cowley & Bros., Inc. v. Brown, 569 So. 2d 375, 382 (Ala. 1990). This Court has further held that "[d]irect evidence of such an appreciation of danger is not required if the evidence admits of no conclusion except that the plaintiff must have appreciated the hazard involved. It is enough if the plaintiff understood, or should have understood, the danger posed." Serio v. Merrell, Inc., 941 So. 2d 960, 965 (Ala. 2006).

Imperial argues that testimony and other evidence presented at trial demonstrated that Taylor's negligence caused his injury. Imperial contends that the evidence showed that Taylor pulled the trigger on the spray gun while his index finger was over the gun, resulting in the injection of paint and mineral spirits into his finger. Imperial directs this Court to the following evidence in support of its argument: portions of a post-accident report prepared by Taylor's father, who was also employed by Imperial, stating that Taylor said he shot himself in the index finger; the testimony of Dr. Joseph Clark, one of Taylor's treating physicians, stating that Taylor told him that he injected mineral spirits into his finger while checking the tip of the gun with that finger; and Taylor's testimony that he understood the dangers of using the Tradeworks 170. Furthermore, Imperial cites Taylor's purportedly inconsistent testimony regarding whether his finger was actually on the trigger at the time of the incident. Under questioning from Imperial's counsel about previous testimony he had given about the incident, Taylor testified as follows at trial:

"Q. Do you remember giving a deposition back in

2012?

"A. Yes.

"Q. All right. I wasn't there. There was a different gentleman there for me. And you were asked, 'Can you say for absolute certainty that you didn't have your finger on the trigger at the time this accident happened?' And your answer was, 'no.' Do you remember saying that?

"A. Not offhand.

"....

"Q. ... Well, that was five and a half years ago. Do you think your memory was better five and a half years ago than it is today?

"A. Possibly.

"Q. All right. So you don't know, as we sit here today, whether or not you had your hand on the trigger, correct?

"A. Correct."

Taylor also testified, however, that the spray gun accidentally discharged and that he did not pull on the trigger. He testified that he did not tell anyone, including Dr. Clark and his father, that he pulled the trigger on the spray gun. Although there is evidence indicating that Taylor was aware of the dangers associated with the Tradeworks 170, the trial court also received evidence indicating that at the

time of the accident Taylor did not have his hand on the trigger and that the spray gun accidently discharged. Further, although Imperial produced evidence that was of probative value supporting its assertion that Taylor pulled the trigger to the spray gun while his finger was over the nozzle, Taylor testified orally that he did not do so.

The evidence concerning Taylor's purported negligence was disputed. The trial court was in the unique position to observe Taylor as he testified and to determine his credibility as a witness.

> "The fact remains that the trial court, having heard the testimony of one witness, is in a better position to resolve conflicting evidence than are we who must rely solely on written documents. Therefore, we accord the trial court's finding a presumption of accuracy, and we examine the record only to determine if that finding was clearly erroneous."

Hall, 486 So. 2d at 411. See Friedman v. Friedman, 971 So. 2d 23, 28 (Ala. 2007) ("'"'Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court....'" ... "[I]t is not within the province of the appellate court to reweigh the testimony and substitute its own judgment for that of the trier of fact."

... "[A]n appellate court may not substitute its judgment for that of the trial court. To do so would be to reweigh the evidence, which Alabama law does not allow."'"(quoting Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004), quoting in turn other cases)). See also Weeks v. Herlong, 951 So. 2d 670, 679 (Ala. 2006) ("When the trial court receives evidence ore tenus and resolves a conflict of fact in favor of one party, this Court will not substitute its judgment for that of the trial court unless the trial court's decision is palpably erroneous or manifestly unjust. Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002).") Accordingly, we affirm the trial court's determination that Imperial did not meet its burden of proving that Taylor was contributorily negligent.

B. Assumption of the Risk

Imperial contends that Taylor assumed the risk of injury by placing his index finger over the spray gun. Under Alabama law,

> "[t]he affirmative defense of assumption of risk requires that the defendant prove (1) that the plaintiff had knowledge of, and an appreciation of, the danger the plaintiff faced; and (2) that the plaintiff voluntarily consented to bear the risk posed by that danger. Gulf Shores Marine Indus., Inc. v. Eastburn, 719 So. 2d 238, 240 (Ala. Civ.

> App. 1998). Assumption of the risk is described as 'a form of contributory negligence applicable to factual situations in which it is alleged that the plaintiff failed to exercise due care by placing himself or herself into a dangerous position with appreciation of a known risk.' Cooper v. Bishop Freeman Co., 495 So. 2d 559, 563 (Ala. 1986), overruled on other grounds, Burlington Northern R.R. v. Whitt, 575 So. 2d 1011 (Ala. 1990). This Court has held that '[a]ssumption of the risk proceeds from the injured person's actual awareness of the risk.' McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991) (emphasis added)."

Ex parte Potmesil, 785 So. 2d 340, 343 (Ala. 2000). "With regard to assumption of the risk, 'the plaintiff's state of mind is determined by [a] subjective standard.'" H.R.H. Metals, Inc. v. Miller ex rel. Miller, 833 So. 2d 18, 27 (Ala. 2002)(quoting McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991)).

This Court, however, has defined assumption of the risk in the context of an AEMLD action as follows:

> "'"If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."'
>
> "[Atkins v. American Motors Corp.,] 335 So. 2d [134] at 143 [(Ala. 1976)](quoting Restatement (Second) of Torts § 402A, comment n (1965)). In an AEMLD action, whether the injured person assumed the risk of

> injury or death is ordinarily a question of fact for the jury. Atkins, 335 So. 2d at 143."

Hicks v. Commercial Union Ins. Co., 652 So. 2d 211, 220 (Ala. 1994). In this case, the evidence was disputed regarding whether Taylor had his hand on the trigger, but, as noted above, the trial court resolved that factual dispute in Taylor's favor. Imperial produced no evidence indicating that Taylor was aware of any defect in the Tradeworks 170 that would cause it to discharge spontaneously, without pulling the trigger, that he discovered such a defect, that he was aware of any danger caused by that defect, and that he continued to use the spray gun in light of the defect. Thus, the trial court correctly rejected Imperial's affirmative defense of assumption of the risk.

C. Merits

Imperial next contends that Taylor would not have been able to establish an AEMLD claim against Graco and Sherwin-Williams because, it contends, the evidence showed that Taylor's hand might have been on the trigger of the spray gun when it discharged and that the discharge of the paint and mineral spirits might not have been caused by a defect in the Tradeworks 170. As noted above, however, the evidence

pertaining to whether Taylor pulled the trigger to the spray gun was disputed, and the trial court resolved that dispute in favor of Taylor.

III. Wantonness and Punitive Damages

Imperial challenges the trial court's award of punitive damages on the ground that Taylor failed to present substantial evidence to support a finding that it engaged in wanton conduct in relation to spoliation of the spray gun. Wantonness is defined as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." § 6-11-20, Ala. Code 1975. In Alfa Mutual Insurance Co. v. Roush, 723 So. 2d 1250 (Ala. 1998), this Court stated:

> "'Wantonness' has been defined by this Court as the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result. Bozeman v. Central Bank of the South, 646 So. 2d 601 (Ala. 1994). To prove wantonness, it is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff. Joseph v. Staggs, 519 So. 2d 952 (Ala. 1988). ..."

723 So. 2d at 1256.

Regarding the application of a wantonness claim in a third-party spoliation case, this Court stated in Smith:

> "Any punitive damages that would have been rendered against the original tortfeasor in the

> underlying litigation should not be included in the plaintiff's recovery for negligent spoliation. It would be wholly unjust to punish a merely negligent party by imposing punitive damages for which the tortfeasor in the underlying claim would have been liable. 'Punitive damages are not awarded because the injured party is entitled to them as a matter of right; they are awarded as a punishment to the wrongdoer and to deter him and others in the same or similar situation from such wrongdoing in the future.' City Bank of Alabama v. Eskridge, 521 So. 2d 931, 933 (Ala. 1988). However, if the spoliator is found to have acted willfully or wantonly in the destruction of the evidence, then punitive damages can be levied against the spoliator in an amount adequate to punish the spoliator for its misconduct and to deter others in similar situations."

771 So. 2d at 438.

In its judgment, the trial court stated:

> "The evidence in this case is clear and convincing that Imperial acted wantonly with respect to its repeated effort to mislead and to deceive [Taylor] relative to the whereabouts of the paint sprayer. Imperial did more than just breach the duty it owed to [Taylor] to preserve the paint sprayer; it deceived him, his lawyer and his father relative to the single piece of evidence it was charged with preserving and protecting."

Although evidence presented at trial would support a finding that Imperial's employees and its attorney were not forthright with Taylor and his attorney regarding the location of the spray gun after litigation commenced, there is no evidence indicating that Imperial engaged in any intentional, willful, or wanton conduct in destroying, losing, or disposing of the

spray gun. The evidence that Imperial did not securely store the Tradeworks 170 unit would have supported a finding that it acted negligently, but the trial court's finding that Imperial engaged in wanton conduct is not supported by the record. We must accordingly reverse that portion of the judgment.

Conclusion

For the aforementioned reasons, we affirm the trial court's judgment insofar as it found in favor of Taylor on his third-party spoliation claim against Imperial and insofar as it awarded Taylor compensatory damages. We reverse the judgment on Taylor's wantonness claim against Imperial, and we remand the case with instructions to the trial court to vacate the award of punitive damages.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Sellers, J., concurs in the result.