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SUPREME COURT OF ARKANSAS

No. 10-125

BUNN BUILDERS, INC.; EMPLOYERS MUTUAL CASUALTY COMPANY, APPELLANTS, VS. RICHARD WOMACK AND ROY TURNER, D/B/A R & R ENTERPRISES, APPELLEES,	**Opinion Delivered** May 26, 2011 APPEAL FROM THE CIRCUIT COURT OF CLARK COUNTY, NO. CV-07-46, HONORABLE ROBERT E. MCCALLUM, JUDGE AFFIRMED.

ROBERT L. BROWN, Associate Justice

This appeal involves the propriety of instructing the jury with our model jury instruction on spoliation, AMI 106. We hold that the circuit court did not abuse its discretion in giving the instruction without a prior determination of bad faith, and we affirm.

The facts are these. Bunn Builders, Inc. (Bunn) hired appellees, Richard Womack and Roy Turner d/b/a R & R Enterprises (Womack and Turner), to paint the ground floor office of the Bunn building located at 902 Highway 67 South in Arkadelphia. On the night of August 18, 2004, Womack and Turner used lacquer to cover oak wall paneling in the office area of the building. On August 19, 2004, shortly before 6:00 a.m., a fire was reported at the Bunn building. As a result of the fire, the building sustained structural and property damage. Bunn had coverage for the building and personal property under a commercial insurance

policy issued by Employers Mutual Casualty Company (EMC). EMC paid Bunn a sum in excess of $305,000.00 for the damages sustained as a result of the August 19, 2004 fire.

Within a few days of the fire, EMC retained fire investigators Don Davis and Vernon Wade to investigate the cause and origin of the fire. On August 27, 2004, a representative from Farm Bureau Mutual Insurance Company of Arkansas, Inc. (Farm Bureau), which was Womack and Turner's liability insurer, sent a letter to EMC in which he recognized that certain items, including a halogen lamp and receptacle, had been retained by EMC for preservation and testing. In that letter, the Farm Bureau representative stated that it was his understanding that no destructive testing would be performed on the items removed from the scene and requested that Farm Bureau be informed prior to and present for any examination or inspection of those items. On September 14, 2004, an EMC representative sent a letter to Farm Bureau in which he said that he planned no destructive testing on the items and that "it is my understanding that the electrical components from the building and the electrical tools have been eliminated as a possible cause for ignition." Testimony was later presented by Womack and Turner at trial that this statement was interpreted by Farm Bureau to mean that the halogen lamp had been eliminated as a possible cause. EMC also stated in this letter that if Farm Bureau wanted to do a more thorough examination of the components, it should contact either Don Davis or Vernon Wade.

On September 17, 2004, Don Davis and Vernon Wade both prepared and submitted reports to EMC, which identified the halogen lamp as a possible source of ignition. Don

Davis said in his report that the "first and most probable ignition source is the heat that was produced by a halogen work light that was left 'on' not equipped with an on or off switch and found to have been plugged into a duplex electric receptacle." Vernon Wade said in his report that the cause of the fire "is most likely due to ignition of flammable thinner vapors from paint by a halogen work light located on the south wall of the back office area. Additionally, ignition of wood materials located next to the halogen light at the fire scene remains a consideration of first materials to be ignited by the light."

On November 8, 2004, an attorney for EMC sent a letter to Farm Bureau declaring EMC's intent to pursue subrogation and saying that "the investigation of EMC indicates the fire was caused as a result of the negligence of your insured." This letter does not mention the halogen lamp as a possible source of ignition, and neither Don Davis's report nor Vernon Wade's report was attached. On December 6, 2004, Lee Valdez, an EMC employee, authorized the destruction of the evidence retained in this case. Although authorized for destruction on December 6, 2004, Vernon Wade did not destroy the evidence, including the halogen lamp and receptacle, until March 23, 2005. Farm Bureau was not informed that the evidence had been destroyed at that time.

On June 22, 2005, three months after the evidence had been destroyed, an attorney for EMC sent a demand letter to Farm Bureau and identified for the first time that the heat produced by the halogen lamp that was left plugged in was identified by Don Davis and Vernon Wade as the most probable ignition source of the fire. On August 18, 2005, an

attorney for EMC sent a follow-up letter to Farm Bureau concerning the demand letter of June 22, 2005, setting out the subrogation claim. On October 6, 2005, an attorney for Farm Bureau requested to see the results and photographs of any tests performed on the items taken from the fire scene. An attorney for EMC responded to this letter on October 19, 2005, and stated that no testing had been performed on the items and attached for the first time the reports of Don Davis and Vernon Wade. On or around March 20, 2006, EMC admitted that it no longer had the evidence in this case.

Bunn and EMC brought suit against Womack and Turner for negligence, alleging that the defendants failed to exercise reasonable care in the performance of the work they contracted to complete at the Bunn building. In their amended and substituted complaint filed on March 16, 2009, Bunn and EMC alleged that upon leaving the office building in the early hours of August 19, 2004, Womack and Turner left the halogen lamp on in close proximity to the freshly lacquered paneling. They further alleged that the halogen lamp was the proximate cause of the fire.

In their answer to Bunn and EMC's amended and substituted complaint, Womack and Turner first raised the issue of spoliation of evidence. In response to the allegation of spoliation, Bunn and EMC filed a motion in limine or for partial summary judgment requesting that Womack and Turner be prevented from contending that Bunn and EMC spoliated evidence. Womack and Turner responded to Bunn and EMC's motion in limine or for partial summary judgment and moved to dismiss Bunn and EMC's case against them

based on spoliation of evidence, or in the alternative, requested that a spoliation instruction be read to the jury. In an order dated September 28, 2009, after finding that the parties had a duty and an agreement to preserve the evidence in the case and that the motive behind EMC's destruction of the evidence was unclear, the circuit court denied Womack and Turner's motion to dismiss but granted their request for a spoliation instruction.[1] A jury trial was held on October 19 through 21, 2009, and the jury was given the spoliation instruction (Arkansas Model Instruction 106) at the close of the evidence. The jury returned a verdict in favor of Womack and Turner.

I. *Standard of Review*

Although Bunn and EMC attempt to argue for a less deferential standard of review in this appeal, our law concerning the standard of review of a circuit court's decision to give or reject jury instructions is well settled. This court has decided that a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Vidos v. State*, 367 Ark. 296, 308, 239 S.W.3d 467, 476 (2006). This court will not reverse a circuit court's decision to give or reject an instruction unless the court abused its discretion. *See, e.g.*, *Decay v. State*, 2009 Ark. 566, ___ S.W.3d ___.

[1]In the September 28, 2009 order, the circuit court also denied Bunn and EMC's motion in limine or for partial summary judgment. Other pretrial motions not relevant to this appeal were ruled upon by the court in this order.

II. *Spoliation Instruction*

Bunn and EMC's primary point on appeal is that the circuit court erred in instructing the jury on the spoliation of evidence with AMI 106. They argue that the instruction was given in error because (a) there was no initial finding by the circuit judge that the destruction was done in bad faith, (b) Womack and Turner were not prejudiced by the destruction of the evidence, and (c) their failure to inspect and test the evidence when given the opportunity precludes them from arguing that the evidence was spoliated.

The following spoliation instruction, AMI 106, was read to the jury at the conclusion of the evidence:

> If you find that a party intentionally destroyed the halogen light and electrical receptacles with the knowledge that they may be material to a potential claim, you may draw the inference that an examination of them would have been unfavorable to the plaintiff's claim. When I use the term material, I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

A. Bad Faith

Relying on decisions from the United States Court of Appeals for the Eighth Circuit, Bunn and EMC urge that a spoliation instruction is improper unless there is evidence of bad faith or "an intent to destroy the evidence for the purpose of obstructing or suppressing the truth." *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 747 (8th Cir. 2004). They further urge that a finding of bad faith on the part of the spoliator must be made before the instruction is given, as was done in *Stevenson*.

We begin our analysis by observing that Arkansas case law on spoliation is sparse. For example, this court has not previously addressed whether a finding of bad faith is required

prior to giving a spoilation instruction. The most frequently cited Arkansas case concerning spoliation, *Goff v. Harold Ives Trucking, Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000), addressed the issue of whether this court would recognize the intentional spoliation of evidence as an independent tort. In *Goff*, we defined spoliation as "the intentional destruction of evidence and when it is established, [the] fact finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its spoliation." *Goff*, 342 Ark. at 146, 27 S.W.3d at 388 (citing *Black's Law Dictionary* 1401 (6th ed. 1990)). In support of our decision to decline to adopt the new tort of intentional spoliation of evidence, this court said

> we believe that there are sufficient other avenues, short of creating a new cause of action, that serve to remedy the situation for the plaintiff. Most significant, the aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator[,] . . . can ask for discovery sanctions[,] or seek to have a criminal prosecution initiated against the party who destroyed the relevant evidence.

Id. at 150, 27 S.W.3d at 391.

Other Arkansas cases from this court that have reviewed a circuit court's decision concerning a spoliation instruction have not specifically addressed whether a finding of bad faith is required. *See, e.g.*, *Union Pacific R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004); *Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2000). In *Rodgers*, the appellants claimed that the trial court erred by failing to give the jury an instruction on the spoliation of evidence. In that case, appellant Rodgers was injured in a construction-site accident when a section of water pipe that was suspended from the ceiling fell and struck him as he was pulling feeder wires out of an electrical panel in the basement of the Pulaski County

Courthouse. The parties stipulated that the appellee, the contractor, lost the clamp and bolt that held the water pipe to the ceiling prior to the accident, and appellants requested a spoliation instruction. The circuit court rejected a non-AMI jury instruction, noting that the clamp and bolt were available at the time appellants' lawsuit was initiated and that appellants had presented no proof that the contractor willfully lost or intentionally destroyed the evidence.

On appeal, appellants argued that the record showed that the appellee, the contractor, was in physical possession and control of the pipe, clamp, and bolt involved in the accident. This court affirmed the circuit court's rejection of appellants' spoliation instructions because (1) that court specifically found that the evidence was not intentionally lost or destroyed; (2) the circuit court had permitted counsel to argue the same points even though the instructions were not submitted to the jury; and (3) the evidence was available shortly after the accident, but no meaningful discovery was commenced until five years following the accident. This court held that "[i]n absence of any intentional misconduct, we cannot say that the trial court abused its discretion by failing to give the jury an instruction on spoliation of evidence." *Rodgers*, 343 Ark. at 133, 33 S.W.3d at 511.

This court has, on the other hand, permitted the spoliation of evidence to be considered as evidence to support an award of punitive damages in a tort case. *See Union Pacific R.R. Co. v. Barber*, *supra*. In *Barber*, the railroad company failed to preserve voice tapes and

track inspection records which should have been preserved. The jury was given the following spoliation instruction:

> In this case, the Plaintiffs contend that by intentional conduct the defendant railroad failed to preserve voice tapes and track inspection records that should have been preserved. Therefore, you may, but are not required, to infer from that the contents of the voice tapes and track inspection records would have been unfavorable to the defendant.

Barber, 356 Ark. at 298, 149 S.W.3d at 344–45.

From that instruction this court concluded on appeal that "the jury was at liberty to infer that the destroyed voice tapes and track records contained remarks about the near misses testified to at trial and the dangerous condition presented by the overgrown vegetation." *Id.* at 300, 149 S.W.3d at 346. Based on this spoliation of evidence, as well as other evidence introduced to support an award of punitive damages, this court concluded that

> the evidence in this case was sufficient to allow the jury to conclude that Union Pacific likely knew or ought to have known, in light of the surrounding circumstances, that allowing the vegetation to remain overgrown and allowing trains to pass through Crossing 123 at close to sixty miles per hour would naturally or probably result in injury, and that Union Pacific continued such conduct in reckless disregard of the consequences from which malice could be inferred.

Id.

Bunn and EMC cite this court to cases from the United States Court of Appeals for the Eighth Circuit. They claim that the Eighth Circuit has said that federal law and Arkansas law are identical on spoliation in that both require a "finding of intentional destruction indicating a desire to suppress the truth." *Stevenson*, 354 F.3d at 746 (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988); *Rodgers v. CWR Constr., Inc.*, *supra*). While it is true

that the Eighth Circuit came to this conclusion, Arkansas courts have never specifically held that there must be a finding made by the circuit court of intentional destruction *indicating a desire to suppress the truth* before a spoliation instruction can be given. Furthermore, Eighth Circuit decisions are not binding on this court. *Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 954, 69 S.W.3d 393, 401 (2002). They may, however, be used as guidance where this court has never addressed an issue before it. *Stromwall v. Van Hoose*, 371 Ark. 267, 280, 265 S.W.3d 93, 103, n.6 (2007).

The circuit court did make the following findings in reference to spoliation in its pretrial order entered on September 28, 2009:

> After reviewing numerous written communications among the adjusters, experts and attorneys, and considering the arguments made about the meaning of these communications, I find that Plaintiffs' experts were under an on-going responsibility to avoid destroying the halogen lamp and receptacle and to avoid any destructive testing of said items. More important than the parties' agreements in this case, is the ongoing duty of all parties and their representatives to maintain evidence to ensure that there is a basic fairness in the litigation process. The only explanation offered for the destruction was that an Employers Mutual Casualty Company employee inadvertently ordered the destruction apparently to avoid continued storage charges by LEED Corporation (Plaintiff's expert - Vernon Wade). This was an intentional destruction even if the reason or motive is unclear.

The circuit court also made the following comments concerning its decision to instruct the jury on spoliation after Bunn and EMC presented the testimony of Lee Valdez at a pretrial hearing held on October 9, 2009:

> Just so that everyone will understand what my thinking was, these were factors I considered in making my decision, and I didn't have any evidence that suggested that this [the destruction of the halogen lamp] is a clerical error. That somehow the claim number got mixed up and we, you know—this was destroyed because we thought it

> was related to a claim that wasn't involved in this case, or had an employee who didn't know what they were doing, and the first day on the job, or anything like that, that led me to believe it was just a pure accident. And so those factors played into my decision to rule the way I did. You didn't ask for that, but I just wanted you to understand what some of my thinking was, and that I'd actually reviewed exhibit 1[2] carefully before I issued my ruling, and I didn't mean by my ruling to suggest that this witness was an evil person or was out conspiring to thwart the legal process, but I don't think that's the burden that had to be met, although I understand you argued to the contrary.

Bunn and EMC are correct that the circuit court did not make a specific finding that EMC's actions prior to informing Farm Bureau of its finding concerning the halogen lamp exhibited bad faith. In fact, the circuit court says after it made its ruling that it did not consider Valdez to be an "evil person" or that his actions were done in order "to thwart the legal process." The court adds that such a "burden" did not have to be met for AMI 106 to be given. Furthermore, although the court found that the destruction of evidence was certainly intentional and not accidental, it stated that the motive or reason behind the destruction of the evidence was unclear.

We affirm the circuit court's ruling. We hold that under Arkansas law, a circuit court is not required to make a specific finding of bad faith on the part of the spoliator prior to instructing the jury with AMI 106, and we decline to adopt the Eighth Circuit's standard requiring the circuit court to do so. We conclude that AMI 106 correctly and adequately sets forth the law with respect to spoliation of evidence and the adverse inference to be drawn

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[2]Exhibit 1 is the storage form signed by Lee Valdez, dated December 6, 2004, and returned to LEED Corporation authorizing the destruction of evidence held for EMC.

from it. Because the circuit court clearly found that Bunn and EMC intentionally destroyed evidence in this case, the circuit court did not abuse its discretion by instructing the jury on spoliation of evidence.

B. Prejudice

Bunn and EMC also contend that the circuit court erred in giving the spoliation instruction because Womack and Turner were not prejudiced by the destruction of the halogen lamp and electric receptacle. Womack and Turner, on the other hand, urge that testing conducted on the halogen lamp might have revealed an internal defect that potentially could have absolved them of liability. Bunn and EMC respond that Womack and Turner's theory of the case was that the halogen lamp was not plugged in. Thus, they contend that any testing regarding a defect in the lamp would have supported Bunn and EMC's theory of the case—that the lamp was left plugged in—and not the theory of Womack and Turner that it was unplugged.

We disagree, and we note that the circuit court made a specific finding that Womack and Turner had been prejudiced by the destruction of the halogen lamp:

> The effect of spoliation is contested. However, I find that the Defendants were prejudiced because it prevents the Defendants from conducting their own examination of the evidence or to participate in any testing. Plaintiffs argue that examination and testing are not necessary; but this argument ultimately requires that the Defendants simply accept Vernon Wade's laboratory examination and conclusions without the opportunity to independently verify the results. It would be easier to accept Plaintiff's argument in this regard if the spoliation did not [involve] evidence which goes to the essence of the Plaintiffs' case that the halogen lamp was negligently left plugged in and that the heat from the halogen lamp was involved in the fire.

The halogen lamp and receptacle were considered by Bunn and EMC to be the cause of ignition in that the lamp was negligently left plugged in and the heat from the lamp caused the lacquer on the walls and rags to ignite. Because the evidence was destroyed prior to examination by Womack and Turner, they were left no choice but to accept the findings of Bunn and EMC's experts. In short, Womack and Turner were not given the opportunity to examine the lamp in an effort to refute those findings. We cannot say that the circuit court erred in making this finding that Womack and Turner were prejudiced by the destruction of this evidence.

C. Opportunity to Examine Destroyed Evidence

Bunn and EMC further argue that the circuit court erred in giving the spoliation instruction because Farm Bureau delayed in requesting that the lamp be tested or in conducting its own testing. They claim that Womack and Turner had ample opportunity to test the evidence and declined to do so, and as a result, they should not now be permitted to allege that Bunn and EMC spoliated the evidence.

Although this argument was raised by Bunn and EMC in their motion for partial summary judgment, it does not appear to have been ruled on by the circuit court. In the circuit court's order dated September 28, 2009, the court stated that the destruction of evidence was intentional and that Womack and Turner were prejudiced by the destruction. The circuit court, however, made no reference to the argument that Womack and Turner failed to timely request the evidence for testing. This court has repeatedly held that failure to

obtain a ruling on an issue at the trial court level precludes review on appeal. *See, e.g.*, *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007). Accordingly, we will not address this argument.

Affirmed.