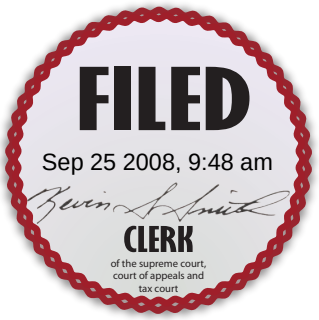


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| WILLIAM PETTIT, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 27A02-0802-CV-96 |
| | ) | |
| STEVE WEBB and AMCO INSURANCE COMPANY d/b/a ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, | ) | |
| | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0701-PL-47

**September 25, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Plaintiff William Pettit appeals the grant of the Motion to Dismiss of AMCO Insurance Company in his tort action of spoliation of evidence. We affirm.

## Issue

Whether an action for spoliation of evidence can be maintained against an alleged tortfeasor's liability insurance company for failing to preserve evidence that was in the possession of the alleged tortfeasor.

## Facts and Procedural History

On October 19, 2005, Steve Webb asked Pettit to help him trim trees on Webb's property. While on a wooden ladder supplied by Webb and using a chain saw to cut a branch, Pettit fell off the ladder, incurring severe injuries. Pettit believed that the ladder provided by Webb was cracked and that its condition was the proximate cause of his fall. Pettit also believed that Webb knew that the ladder was defective and dangerous and that Webb had failed to warn him of the ladder's condition.

Pettit retained counsel to pursue a claim against Webb through Webb's homeowner's insurance carrier, AMCO. On January 5, 2006, Pettit's counsel sent a letter to the appointed AMCO representative indicating that he represented Pettit and was in the process of completing his preliminary investigation in order to submit Pettit's claim. The letter also provided in pertinent part:

> In the interim, I would request that steps be taken to preserve the evidence in this case. Specifically, the tree involved, branches and ladder should all be left as is and preserved.

Appendix at 54. AMCO does not deny Pettit's assertions that AMCO received this letter,

failed to respond to it and failed to advise Webb that the ladder and tree should be preserved.

Some time late in 2006, Webb tossed the wooden ladder on a woodpile, expanding the crack in the leg of the ladder. Webb was not contacted by AMCO directing him to preserve the ladder until after this incident. In early 2007, AMCO obtained the ladder from Webb. According to Pettit's expert, the outside storage of the ladder and it being thrown on the woodpile made it impossible to determine the size of the crack and the degree to which the ladder may have twisted due to the crack when Pettit fell. Additionally, Webb cut down the tree in the spring of 2007. No request had been made of Webb to preserve the tree.

On January 29, 2007, Pettit filed his complaint, alleging negligence on the part of Webb. On July 26, 2007, Pettit amended his complaint to add a count of spoliation of evidence against AMCO. On August 10, 2007, AMCO filed a motion to dismiss pursuant to Trial Rule 12(b)(6) for failure to state a claim as to the count of spoliation. On October 23, 2007, Pettit filed a motion for summary judgment as to his claim against AMCO. After a hearing, the trial court granted AMCO's motion to dismiss. The trial court also denied Pettit's subsequent motion to reconsider. This appeal ensued.

**Discussion and Decision**

We review the dismissal of a claim pursuant to Trial Rule 12(B)(6) *de novo*. Weiss v. Indiana Parole Bd., 838 N.E.2d 1048, 1050 (Ind. Ct. App. 2005), trans. denied. Such a motion based on the alleged failure to state a claim upon which relief can be granted tests the sufficiency of a claim, not the facts supporting it. Id. Viewing the complaint in the light most favorable to the non-moving party, we must determine whether the complaint and the reasonable inferences drawn therefrom present any facts upon which the trial court could

have granted relief. Id. If the complaint states a set of facts that, even if true, would not support the relief requested therein, we will affirm the dismissal. Id.

On appeal, Pettit contends that the trial court erred in dismissing his spoliation claim against AMCO because there was a cognizable relationship between Pettit and AMCO, which imposed a duty on AMCO to preserve the evidence. To support his argument, Pettit cites Thompson ex rel. Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998), trans. denied.

In Thompson, a dog that broke free of its cable restraint had attacked a young girl. Id. at 135. The girl's parents sought compensation from the dog owners, the manufacturer of the restraining cable, and the landlords of the dog owners. In investigating the claim, the liability insurer of the landlords took possession of the cable restraint and subsequently lost it. No party had examined or tested the cable before it was lost. Id. at 136. The parents then sued the insurance company for negligence, alleging that the company had assumed a duty to safeguard the cable and that the breach of that duty adversely affected their claims from the incident. Id. The issue addressed by the Court was whether the insurance company had an actionable duty to maintain the evidence. Id.

The Thompson Court utilized the three factors of (1) the relationship between the parties, (2) the reasonable foreseeablity of the type of harm to the type of plaintiff at issue, and (3) the public policy promoted by recognizing an enforceable duty to determine whether a duty existed on the part of the insurance company to maintain the evidence in its possession. Id. (citing Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991)). Based on precedent that an alleged tortfeasor's knowledge of the plaintiff's circumstances may support

recognition of a duty, it concluded that "[i]n the context of the loss of evidence by an insurance carrier, the relationship between the carrier and a third party claimant could warrant recognition of a duty if the carrier knew or should have known of the likelihood of litigation and of the claimant's need for the evidence for the litigation." Id. at 137. The foreseeability of the potential harm inflicted by destruction or loss of evidence falls in line with the foreseeability of litigation. In other words, if litigation is foreseeable then the value of the evidence is as well. Id. Finally, as to the factor of public policy, the Thompson Court concluded:

> It is reasonable for the law to require claims resolution practices be responsible, because the carrier has the unique experience and ability to structure its practices to avoid harm. If a carrier intentionally or negligently engages in a claims-resolution practice that breaches the standard of care established by law, a third-party claimant is justified in seeking to hold the carrier liable for damages arising from the breach.

Id. at 139-40. Premised on this analysis, it held that the Thompsons were entitled to the opportunity to prove that the insurance company breached its duty to maintain the restraining cable, that harm resulted, and that the harm resulted in damages that can be proven with reasonable specificity. Id. at 140.

There is a critical distinction between the Thompson facts and those at hand; whether the insurance company had possession of the evidence. There are two types of spoliation: that committed by a "first party" as compared to a "third party." "The former refers to spoliation of evidence by a party to the principal litigation, and the latter to spoliation by a non-party." Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 350 (Ind. 2005). In Gribben, our Supreme Court declined to recognize an independent tort for first-party spoliation. It

concluded: "Notwithstanding the important considerations favoring the recognition of an independent tort of spoliation by parties to litigation, we are persuaded that these are minimized by existing remedies and outweighed by the attendant disadvantages." Id. at 355. The Supreme Court also acknowledged that: "It may well be that fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence." Id. However, the Court did not determine whether Indiana would recognize an independent tort of third-party spoliation as the issue was not before the Court. Id.

Here, Webb, the named defendant to the underlying litigation, is the person who altered or destroyed the relevant evidence. Thus, it is a first party, the alleged tortfeasor, who allegedly destroyed or discarded evidence. As noted in Gribben, the remedies under Indiana law for first-party spoliation include an inference that the spoliated evidence was unfavorable to the party responsible, various sanctions under Indiana Trial Rule 37(B),[1] criminal prosecution, and various penalties including disbarment if attorneys are involved in the destruction or concealment of evidence. Id. at 351. Because Pettit will have remedies available to him if spoliation by Webb is established, we decline the invitation to expand the language of Thompson and instead choose to follow the language and direction of our Supreme Court in Gribben.

[1] "Potent responses also exist under Indiana Trial Rule 37(B) authorizing trial courts to respond to discovery violations with such sanctions 'as are just' which may include, among others, ordering that designated facts be taken as established, prohibiting the introduction of evidence, dismissal of all or any part of an action, rendering a judgment by default against a disobedient party, and payment of reasonable expenses including

Affirmed.

RILEY, J., and BRADFORD, J., concur.

attorney fees." Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 351 (Ind. 2005).