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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-2129**

Kenneth Tabish,  
Appellant,

vs.

Target Corporation,  
Respondent,

IMPACT Resource Group, Inc., an Ohio corporation, et al.,  
Respondents,

John Does I-X,  
Defendants

**Filed June 27, 2011  
Affirmed in part, reversed in part, and remanded  
Worke, Judge**

Hennepin County District Court  
File No. 27-CV-07-10139

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Peter J. Korneffel, Jr., Brownstein Hyatt Farber Schreck, LLP, Denver, Colorado (for respondents IMPACT Resource Group, Inc. and National Product Services Acquisition Corporation)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Worke, Judge.

## **UNPUBLISHED OPINION**

**WORKE**, Judge

Appellant challenges the district court's grant of summary judgment on his negligence and strict-liability claims. We conclude that the district court appropriately granted summary judgment in favor of both respondents on appellant's negligence claims. In granting summary judgment on appellant's strict-liability claims, however, the district court abused its discretion by sanctioning appellant for spoliation of evidence. Despite this error, summary judgment is still appropriate on appellant's strict-liability claim against respondent IMPACT Resource Group, Inc. But because genuine issues of material fact exist regarding appellant's strict-liability claim against respondent Target Corporation, we reverse and remand this issue for further proceedings.

### **FACTS**

In September 2004, appellant Kenneth Tabish was knocked unconscious and comatose for several weeks after crashing a bicycle owned by his friend, Joseph DeGrado, in Salt Lake City, Utah. The bicycle appellant crashed was a Huffy Surfside, which featured a fender partially covering the front wheel. The fender was made of a relatively flimsy material and required assembly at retail stores. Assembly involved attaching the fender anywhere along a sliding slot above the wheel; at the lowest slot location, the fender cleared the actual wheel by only 0.2 inch. DeGrado purchased the bicycle from a Target store in Utah less than a week before the accident. DeGrado

attached a gasoline motor to the bicycle after purchasing it; despite this modification, DeGrado did not notice anything wrong during test rides prior to the accident. There were no witnesses to the accident and appellant has no memory of the crash.

Officer Michael Anderson, an accident reconstructionist for the Salt Lake County Sheriff's Office, responded to the scene of the accident and collected the bicycle as evidence. Officer Anderson observed nothing abnormal about the road that could have contributed to the accident. Officer Anderson also noted a short, straight tire-skid mark on the road where the accident occurred, indicating that appellant had not lost control of the bicycle. Officer Anderson concluded that the fender came in contact with the front wheel, causing the wheel to abruptly collapse and flip the bicycle, tossing appellant over the handlebar.

Officer Anderson examined the remainder of the bicycle and the motor, and concluded that there was no irregularity or defect in these parts. Having independently concluded that the cause of the accident was the fender digging into the front wheel, Officer Anderson retained only these pieces of the bicycle and returned the rest of the frame and the motor to DeGrado. But Officer Anderson did not instruct DeGrado to retain the returned pieces. DeGrado disassembled the remainder of the bicycle, found the motor to be in working condition, attached it to another bicycle, and sold the new bicycle with the old motor. DeGrado does not recall to whom he sold the new bicycle, and he discarded the remaining parts of the bicycle appellant crashed within nine months of the accident.

Appellant asserted several claims against Huffy, the manufacturer of the bicycle, respondent Target Corporation, the retailer of the bicycle, and respondent IMPACT Resource Group, Inc., the company Target contracted with to assemble the bicycle; Huffy was dismissed from the action when the company filed for Chapter 11 bankruptcy, and DeGrado was not sued. Several potential witnesses were deposed regarding the cause of the accident. Wes Beachell was the IMPACT employee who was believed to have assembled the bicycle that appellant crashed. In Beachell's opinion, the fender on the Surfside was particularly flimsy and could rub against the tire with little force even when correctly assembled. Beachell testified that this assessment was consistent with customer complaints regarding the flimsy nature of the fender. Beachell also believed that the design of the bicycle was poor because the slot where the fender attached allowed for too small of a clearance for the tire to rotate. But Beachell testified that, as a whole, the fender is appropriate; the problem was DeGrado attaching the motor to the bicycle, which caused the fender to vibrate. This conclusion was consistent with the opinions of expert witnesses retained by both Target and IMPACT.

Appellant retained James Green, a professional engineer and bicycle-accident reconstructionist, as an expert witness. Green tested a similar bicycle with a similar motor attached. Green testified that the bicycle's design permitted unintended contact between the fender and the front wheel, and that appellant's accident was caused by the fender catching the front wheel, just as Officer Anderson concluded. Green also testified that the bicycle appellant crashed was improperly assembled because the fender was not fastened high enough in the slot to allow for appropriate wheel clearance. Although

Green testified that he believed the motor had no bearing on the accident, he acknowledged that the true cause of the accident could not be determined.

Based partly on the unavailability of the bicycle's frame and motor, as well as the testimony of their experts, Target and IMPACT both moved for summary judgment. The district court granted summary judgment on appellant's breach-of-warranty claims, concluding that the attachment of the motor to the bicycle created an unintended use of the bicycle. The district court also granted summary judgment on appellant's negligence claim, concluding that there was no evidence that IMPACT improperly assembled the bicycle, nor was there evidence that Target or IMPACT should have known that the bicycle was potentially dangerous.

In moving for summary judgment against appellant's strict-liability claim, Target asserted spoliation of evidence. The district court concluded that appellant had the opportunity to examine the evidence because his family was aware that DeGrado had the bicycle, and failed to take advantage of the opportunity through either impleading DeGrado as a defendant or simply asking him for the bicycle and the motor. Target and IMPACT, on the other hand, had no such opportunity as the bicycle was discarded and the motor refitted and sold prior to the beginning of this lawsuit. The district court concluded that the reason the fender collapsed into the bicycle was indeterminate and that respondents were greatly prejudiced by the unknown whereabouts of the bicycle and the motor. Because the prejudice to Target and IMPACT could not be remedied, the district court determined that appellant was responsible for spoliation of the evidence and that the appropriate remedy was the exclusion of all evidence pertaining to the bicycle appellant

crashed, including Green’s testimony regarding the cause of the accident. Without evidence to support the strict-liability claim, the district court granted summary judgment in favor of Target and IMPACT. This appeal follows.

## **D E C I S I O N**

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriately granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law are reviewed de novo. *Id.* at 77. We may affirm summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

### ***Negligence***

Appellant first challenges the district court’s grant of summary judgment on his negligence claim. “The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury.” *Bjerke v.*

*Johnson*, 742 N.W.2d 660, 664 (Minn. 2007) (citing *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954)). A claim cannot survive if there is a complete lack of proof of any of these elements. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). No party denies that appellant suffered an injury or that damages resulted from that injury. Nor do Target and IMPACT deny the existence of a duty of care. Thus, our analysis focuses solely on whether either respondent breached its duty of care.

Appellant argues that Target breached its duty of care because it was aware of customer complaints regarding the substandard quality of the bicycle. *See Minn. Horse & Hunt Club v. Sunridge Farms, Inc. (In re Shigellosis Litig.)*, 647 N.W.2d 1, 9 (Minn. App. 2002) (“[A] seller may also be liable in negligence for failure to discover a product defect if the seller knows, or has reason to know, that the product is dangerous.”), *review denied* (Minn. Aug. 20, 2002). As Target argues and the district court concluded, however, poor customer reviews do not amount to a showing that Target knew the product was dangerous. Because appellant advanced no evidence to reasonably permit the inference that Target knew that the bicycle was dangerous, the district court did not err by granting Target’s summary-judgment motion on appellant’s negligence claim.

Appellant argues that IMPACT breached its duty of care because Beachell, as the one who likely assembled the bicycle appellant crashed, admitted that he knew that the bicycle was of poor quality and failed to bring this to the attention of his superiors. But, as the district court concluded, Beachell also testified that he did not believe that the fenders were so inherently dangerous so as to render the bicycle defective. Moreover,

there is no evidence of improper assembly in this case; Green asserted that the fender was fastened too low, but did not allege that the fender was fastened out of accordance with the general assembly protocols issued by the manufacturer. Accordingly, the district court did not err by granting IMPACT's summary-judgment motion on appellant's negligence claim.

### ***Strict Liability***

Appellant next challenges the district court's grant of summary judgment on his strict-liability claims. Because the district court's grant of summary judgment occurred after the court excluded all evidence pertaining to the bicycle appellant crashed as a sanction for spoliation, we first assess whether the sanction was appropriate.

### ***Spoliation***

Spoliation is the destruction of relevant evidence by a party or a party's agents. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998). Spoliation encompasses the destruction of evidence through inadvertence or negligence, and may also include the destruction of evidence by a non-party under certain circumstances. *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 470-71 (Minn. App. 1997), *review denied* (Minn. Aug. 26, 1997). A district court may sanction a party who destroys evidence if that party gains an evidentiary advantage due to its failure to present evidence after having had the opportunity to examine it. *Id.* The appropriate sanction for spoliation is determined by the prejudice to the opposing party in light of the nature of the evidence lost in the context of the claims asserted as well as the potential for remediation of the prejudice. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995).

Excluding evidence is a permissible sanction for spoliation. *Id.* On review, we consider whether the district court “is authorized to impose a sanction for spoliation of evidence and, if so, whether it abused its discretion by imposing such a sanction.” *Id.* at 118. This court may reverse a district court’s spoliation sanction “only when it is clear that no reasonable person would agree [with] the [district] court’s assessment of what sanctions are appropriate.” *Himes*, 565 N.W.2d at 470 (quotation omitted).

Appellant argues that the district court abused its discretion by issuing a spoliation sanction because appellant never had physical control of the bicycle: appellant was unconscious and likely comatose the instant the accident occurred; the bicycle was collected by Officer Anderson, who determined that it was necessary to retain only the front wheel and fender as evidence of the accident; and the remainder of the bicycle and the motor were returned to DeGrado, who discarded the frame remains and sold the motor. Because he never actually possessed control of the bicycle after the accident or during the time leading up to litigation, appellant asserts that it is fundamentally unfair to punish him for the failure of Officer Anderson and DeGrado to retain evidence for a case that they were not parties to.

Respondents assert that *Himes* should be viewed as controlling precedent. In *Himes*, a railroad employee was hurt by a bolt wrench that broke. *Id.* The employee settled his claim against his railroad employer largely due to the employer’s expert concluding that the wrench was made out of unsuitable materials. *Id.* The employee then sued the wrench manufacturer, alleging product-liability and negligent-design claims. *Id.* But the wrench apparently was lost by the railroad company’s insurance carrier at some

point after the settlement, thereby preventing the manufacturer from inspecting the wrench. *Id.* The manufacturer moved for summary judgment on the ground of spoliation, arguing that there was no opportunity for the manufacturer to inspect the wrench whereas the employee already possessed expert testimony about the product's deficiencies. *Id.* The district court granted summary judgment based on spoliation of evidence, and this court affirmed, noting that the sanction of excluding evidence "does not imply any wrongdoing on [the employee's] behalf, but simply recognizes that he, as the plaintiff, should have to bear the consequences for the loss of the tool rather than [the manufacturer]." *Id.* at 470, 471. Similarly, respondents argue that appellant should suffer the consequences of the discarded bicycle regardless of whether he ever possessed the evidence.

But shortly after the district court issued its order in this case, we squarely addressed the interplay between spoliation and physical control in *Willis v. Indiana Harbor S.S. Co.*, 790 N.W.2d 177 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). *Willis* involved a crewman of a shipping boat that docked at a Duluth Harbor shortly after another ship left port. 790 N.W.2d at 182, 183. While handling one of the ship's mooring lines during docking, the crewman slipped on the dock and injured his knee when it hit an area of the dock covered by scattered taconite pellets presumably spilled from the previous ship. *Id.* The area where the crewman slipped was made of limestone and covered in slimy water. *Id.* at 182. There was no accident report detailing the conditions of the dock because the accident was not promptly reported by the shipping company, and the docking company cleaned the dock shortly after the accident.

*Id.* at 183, 184. The crewman sued the shipping company for negligence, and the shipping company impleaded the dock owner. *Id.* at 182. The district court decided that the condition of the dock and the place and time of the accident were known by the shipping company. *Id.* at 184. Because the shipping company failed to promptly report the accident, thereby effectively prohibiting a timely accident report from being made, the district court gave a negative-inference jury instruction regarding the breach element as a spoliation sanction. *Id.* at 184, 185. The jury returned a verdict in favor of the crewman. *Id.* at 182.

The shipping company appealed, arguing that the spoliation sanction was inappropriate because it never possessed physical control over the dock. *Id.* at 184. We noted that the record was devoid of any proof that the shipping company had any control over the dock or, more importantly, when the dock was cleaned. *Id.* at 185. We further noted that the dock owner was the only party that had control over the dock and could have destroyed the evidence of slime and taconite pellets, which caused the fall and the injury. *Id.* We concluded that:

Our caselaw has not extended the reach of a spoliation sanction to a party who has had no physical control over the evidence, and we decline to extend the reach of spoliation sanctions here. Because the record clearly shows that appellants never had actual control over the dock and because physical control is necessary for a spoliation sanction, we conclude that the sanction for spoliation was not authorized.

*Id.*

Target and IMPACT assert that *Willis* is not controlling because it is not a products-liability case. While respondents are correct in this assertion, the holding in

*Willis* is not limited to any particular genre of civil matters; rather, the expansive rule of law adopted by this court in *Willis* covers all instances when spoliation may be asserted: “A party is not subject to a spoliation sanction for the loss of evidence over which the party had no physical control.” *Id.* at 181. Additionally, while *Willis* does not address *Himes*, we adopted this rule after reviewing *Patton*, a products-liability case in which a plaintiff’s expert lost the parts of a motor home that were integral to their claim. *See* 538 N.W.2d at 117-18. Even after reviewing a product-liability case, *Willis* announced a rule of law with no caveats. *See* 790 N.W.2d at 185. Thus, respondents’ contention that *Willis* is not controlling is unavailing.

Accordingly, under the plain import of *Willis*, appellant cannot be sanctioned for spoliation unless he had control over the bicycle. Neither respondent denies that appellant did not have control over the bicycle frame and the motor after the accident. Thus, the district court abused its discretion by granting sanctions on the grounds of spoliation.

#### *Merits*

Despite the district court’s evidentiary error, summary judgment may still be granted if there is no genuine issue of material fact or either respondent is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *see also Winkler*, 539 N.W.2d at 827 (stating that we may affirm summary judgment if it can be sustained on any ground). To demonstrate strict liability, a plaintiff must show: “(1) that the defendant’s product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant’s control, and (3) that the defect was

the proximate cause of the injury sustained.” *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 n.3 (Minn. 1984).

Regarding his claim against Target, appellant argues that the evidence excluded by the district court was sufficient to demonstrate that the bicycle was in a defective condition when it was sold. Appellant points to the testimony of Green, who asserted that the bicycle was designed with the fender of the bicycle too low to allow sufficient clearance for the wheel; thus, the product was in a defective condition unreasonably dangerous for its intended use, and sellers may be held strictly liable if they “sell products that are in a defective condition and harm a user, even if the seller was not negligent.” *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 730 (Minn. App. 1998), *review denied* (Minn. Apr. 14, 1998). Appellant further argues that Green’s expert testimony that the accident was caused by the fender ramming into the tire and flipping appellant off of the bicycle was sufficient to establish causation. Thus, appellant contends that there are genuine issues of material fact regarding whether the bicycle was sold in a defective condition unreasonably dangerous for its intended use.

Target counters by arguing that there was no provable defect in the bicycle appellant crashed when it left the store. Moreover, Target argues that it should not be held liable because DeGrado attaching a motor was an unforeseeable, abnormal use of the product. But Target seems to ignore Green’s testimony, which can be reasonably seen as creating a genuine issue of material fact for trial when granting all beneficial inferences to appellant under Minn. R. Civ. P. 56.03. Because genuine issues of material fact exist as to whether the bicycle appellant crashed was in a defective condition when sold by

Target, granting summary judgment on appellant's strict-liability claim against Target was inappropriate.

IMPACT, on the other hand, argues that it cannot be held liable because it is not a seller or manufacturer, but rather a service provider. This argument has merit. Traditionally, strict-liability claims are enforceable only against manufacturers, suppliers, and sellers of products. *See Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004); *Marcon*, 573 N.W.2d at 730 (Minn. App. 1998). Because IMPACT falls outside of the traditional strict-liability scope, the district court's grant of summary judgment on appellant's strict-liability claim was appropriate.

While we conclude that the district court abused its discretion by issuing spoliation sanctions against appellant, we also conclude that the district court did not err by granting summary judgment in favor of IMPACT on appellant's negligence and strict-liability claims. But because we conclude that genuine issues of material fact exist regarding appellant's strict-liability claim against Target, we reverse and remand this claim for further proceedings absent the previous spoliation sanction.

**Affirmed in part, reversed in part, and remanded.**