Illinois Official Reports

Appellate Court

Combs v. Schmidt, 2015 IL App (2d) 131053

Appellate Court Caption	PATRICIA COMBS, as Personal Representative of the Estates of Harvey Combs, Trenell Combs, and Niesha Combs, Deceased, Plaintiff-Appellee, v. GARY SCHMIDT, CYNTHIA SCHMIDT, and PEKIN INSURANCE COMPANY, Defendants-Appellants.
District & No.	Second District Docket No. 2-13-1053
Filed	November 12, 2015
Decision Under Review	Appeal from the Circuit Court of Winnebago County, No. 01-L-479; the Hon. Eugene G. Doherty, Judge, presiding.
Judgment	Certified questions answered; cause remanded.
Counsel on Appeal	David J. Brassfield and Erik E. Carlson, both of Brassfield, Krueger & Ramlow, Ltd., of Rockford, for appellants Cynthia Schmidt and Gary Schmidt. Robert Marc Chemers, William W. Elinski, and Scott L. Howie, all of Pretzel & Stouffer, Chtrd., of Chicago, for appellant Pekin Insurance Company. Devon C. Bruce and Kathryn L. Conway, both of Power, Rogers & Smith, P.C., of Chicago, and John J. Holevas, of WilliamsMcCarthy LLP, and Joseph A. Morrissey, of Morrissey Law Offices, both of Rockford, for appellee.

Panel JUSTICE HUDSON delivered the judgment of the court, with opinion.
Justices Zenoff and Burke concurred in the judgment and opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 In *Combs v. Schmidt*, 2012 IL App (2d) 110517, this court reversed a grant of summary judgment against plaintiff, Patricia Combs, in her capacity as the personal representative of the estates of Harvey Combs, Trenell Combs, and Niesha Combs (who are deceased), and in favor of defendants, Gary Schmidt, Cynthia Schmidt, and the Pekin Insurance Company regarding three counts of a legal complaint alleging the tort of spoliation of evidence. We remanded for further proceedings. Subsequently, the supreme court decided *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, which also involved spoliation of evidence. Defendants sought to appeal our decision to the supreme court; however, it denied leave to appeal. Thereafter, before the trial court, defendants took the position that *Martin* is inconsistent with our decision. The trial court felt that the law-of-the-case doctrine required it to follow our decision, and it certified a number of questions to this court concerning the effect of *Martin* on the instant proceedings.[1]

¶ 3 Before turning to the merits of this appeal, we will address the application of the law-of-the-case doctrine under the present circumstances. The trial court correctly noted that there are two primary situations under which the doctrine does not apply to an issue resolved in an earlier appeal: when a higher reviewing court makes a contrary decision on the issue or when the original reviewing court determines that its earlier decision was "palpably erroneous." *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 31. Here, the question is whether *Martin* is so inconsistent with our earlier decision in this case that it constitutes a contrary decision on the same issue that we previously decided. The trial court felt that, if there were a clear conflict, the exception would apply. However, it believed that it would be "unseemly" for a "subordinate court to pick through the [a]ppellate [c]ourt's analysis to determine what parts it deems to be in conflict with the [s]upreme [c]ourt's decision." While we appreciate the trial court's sensitivity to our position in the judicial system, such deference is unnecessary. If *Martin* effectively overruled our earlier decision, the trial court was free to point that out. In any event, the trial court provided a well-reasoned discussion of the issues in an appendix to its decision. Though our review here is *de novo*, we found the appendix helpful and wish to acknowledge the trial court for its efforts.

¶ 4 II. ANALYSIS

¶ 5 The questions certified by the trial court are as follows:

> "(1) Does *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, call for a different result in *Combs v. Schmidt*, 2012 IL App (2d) 110517, as to whether 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence?

[1]The factual background of this case can be found in our earlier decision. See *Combs*, 2012 IL App (2d) 110517, ¶¶ 4-9. We will not restate it here.

(2) In light of *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270:

(a) are complaints made to a defendant about the evidence at issue a functional equivalent of a request to preserve evidence, to be assessed in determining if 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence;

(b) is a plaintiff's opportunity to inspect the evidence at issue, or lack thereof, a factor to be assessed in determining if 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence; and

(c) can there be a duty to preserve evidence arising out of 'special circumstances,' based on a defendant's alleged possession and/or control of the evidence, when the plaintiff made complaints that the evidence was defective, or alleges that her opportunity to inspect the evidence was inadequate[?]"

¶ 6 Before proceeding further, we must comment upon the scope of our review–particularly as it limits our consideration of the first question certified by the trial court. Generally, review pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015) is limited to the questions certified, and the propriety of any particular order of the trial court is not before us. *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 987 (2008). Where resolution of a certified question " 'will depend on the resolution of a host of factual predicates,' " a reviewing court should typically decline to answer the question. *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15 (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 469 (1998)). In answering a certified question, our role is "to answer the specific question and return the parties to the trial court without analyzing the propriety of the underlying order." *Abrams v. Oak Lawn-Hometown Middle School*, 2014 IL App (1st) 132987, ¶ 5. Rule 308 "was not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of a particular case," and it does not "permit us to review the propriety of the order entered by the lower court." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. These rules are jurisdictional. *Id.*

¶ 7 Hence, we emphasize that our analysis is limited to considering the questions certified by the trial court *as matters of law*. The first certified question–"Does *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, call for a different result in *Combs v. Schmidt*, 2012 IL App (2d) 110517, as to whether 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence?"–invites review of the trial court's earlier ruling on the summary judgment motion filed in this case, including whether the complaints plaintiff made to defendants about the evidence *in this case* are insufficient to allow plaintiff to survive a summary judgment motion. The scope of our review is not so broad. Once we resolve the legal question of whether a complaint about the evidence and a request to preserve the evidence may serve the same function, we may not (indeed, we lack jurisdiction to) consider the propriety of the underlying order in light of the specific facts of this case.

¶ 8 An exception exists under which a court may exceed the usual bounds of review set by Rule 308. Where the interests of judicial economy and the need to reach an equitable result so require, a reviewing court may go beyond the scope of a certified question and consider the appropriateness of the order giving rise to the appeal. *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009). In *De Bouse*, the plaintiff filed a consumer-fraud action against a pharmaceutical company, based on the company's advertising. However, the plaintiff failed to allege that her doctor was misled by any of the advertising. *Id.* at 560. The supreme court went beyond the

usual bounds of Rule 308 and determined that, absent any allegation of a nexus between the advertising and the doctor, the trial court erred in denying the defendant's motion for summary judgment. *Id*. Furthermore, ruling on the underlying order allowed the supreme court to easily dispose of an additional issue, involving class certification. *Id*.

¶ 9 No similar circumstances exist in the instant case. The essence of the first certified question is whether plaintiff's complaints about the evidence implicitly communicated the same sort of information that a request to preserve the evidence explicitly communicates, which ultimately requires a consideration of the factual context of the communication. Conversely, *De Bouse* involved a straightforward question concerning the plaintiff's failure to allege a necessary element of her cause of action. The question in *De Bouse* was far simpler than the one before us now. Moreover, reaching the underlying order would not allow us to deal simply with any additional issue, like the class-certification issue in *De Bouse*, minimizing any consideration regarding judicial efficiency. In other words, the exception set forth in *De Bouse* does not apply here. In short, we decline to address the first question, as it is outside the scope of Rule 308. See *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008).

¶ 10 Our scope of review is limited to purely legal matters here. When a reviewing court allows a certified question, an issue of law is presented, so review is *de novo*. *De Bouse*, 235 Ill. 2d at 550. Under the *de novo* standard, we owe no deference to the trial court. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). We will address the more straightforward issues first and then turn to the more complex questions.

¶ 11 A. OPPORTUNITY TO INSPECT

¶ 12 We first address the certified question of whether "a plaintiff's opportunity to inspect the evidence at issue, or lack thereof, [is] a factor to be assessed in determining if 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence." In light of *Martin*, we hold that it is not.

¶ 13 In *Martin*, 2012 IL 113270, ¶ 46, the supreme court held:

> "We recognize that plaintiffs in this case had little or no opportunity to request that Keeley preserve the I-beam before it was destroyed on the day following the accident. Nevertheless, plaintiffs and counter-claimants bear the burden of establishing all elements of their spoliation claims. The general rule is that a defendant has no duty to preserve evidence, unless the plaintiff can show that an exception applies. See *Dardeen* [*v. Kuehling*, 213 Ill. 2d 329, 336 (2004)]. Plaintiffs have failed to show that Keeley's mere possession and control of the I-beam constitute special circumstances giving rise to a duty by Keeley to preserve the beam."

Thus, the supreme court found it of no moment–as it pertained to the existence of a duty–that the evidence at issue was destroyed the day after the accident, even though the defendant had possession and control of the evidence.

¶ 14 Plaintiff attempts to distinguish this portion of *Martin*, pointing out that the supreme court was addressing the plaintiff's opportunity to request to preserve the evidence as opposed to an opportunity to actually inspect it. We see little difference between the two. The point of a request to preserve evidence is to allow a party access to that evidence. It would be anomalous to hold that a duty to preserve evidence lasts longer for an opportunity to inspect it than it does for an opportunity to *request* an opportunity to inspect it. Indeed, plaintiff cites nothing to

support such an odd proposition. Moreover, the lack of an opportunity to inspect evidence would seem more relevant to showing a breach than to establishing a duty. See *American Family Mutual Insurance Co. v. Golke*, 2009 WI 81, ¶ 31, 319 Wis. 2d 397, 768 N.W.2d 729. In short, a plaintiff's opportunity to inspect evidence is not a factor to be assessed in determining if special circumstances exist to satisfy the relationship prong of a duty to preserve evidence.

¶ 15 B. COMPLAINTS TO A DEFENDANT ABOUT THE EVIDENCE AT ISSUE

¶ 16 We now turn to the role a plaintiff's complaints about the evidence play in determining whether a special circumstance exists such that a defendant has a duty to preserve the evidence. Initially, we will review pertinent portions of the law concerning spoliation claims. To establish a duty to preserve evidence, a plaintiff must satisfy a two-prong test. First, under the relationship prong, the plaintiff must show that there is some "agreement, contract, statute, special circumstance, or voluntary undertaking" sufficient to justify the imposition of a duty. *Dardeen*, 213 Ill. 2d at 336. Second, under the foreseeability prong, the plaintiff must show that a reasonable person would have foreseen that the evidence was relevant to a "potential civil action." *Id*. At issue here is whether, under the relationship prong, there is some special circumstance upon which a duty may be based. Pertinent here, in *Martin*, 2012 IL 113270, ¶ 45, the supreme court, while discussing special circumstances, reaffirmed that the existence of a request to preserve evidence is a factor to be assessed under the relationship prong:

> "It is clear from the context of the *Dardeen* decision that something more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit."

Thus, in accordance with *Martin*, possession and control, plus a request to preserve, are sufficient to create an actionable duty in a spoliation case. Parenthetically, we point out that *Martin*'s use of "such as" indicates that this is not an exclusive list.

¶ 17 In our earlier decision, we analogized complaints about the evidence to requests to preserve evidence, noting that both put parties on notice of the potential for litigation. *Combs*, 2012 IL App (2d) 110517, ¶ 21. In *Martin*, 2012 IL 113270, ¶¶ 50-51, the supreme court flatly rejected that rationale for creating a duty. Nevertheless, it continued to hold that a request to preserve evidence (along with other pertinent factors) could create such a duty. *Id.* ¶ 45. It did not address complaints about the evidence.

¶ 18 Thus, the question remains as to whether complaints about the evidence can serve the same function as a request to preserve evidence, whatever that function might be, beyond providing notice of the potential for litigation.[2] Our initial difficulty is that it is not apparent what other

[2]Of course, a discovery violation might warrant severe sanctions in accordance with a potential litigant's duty under *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 121-22 (1998). Indeed, sanctions as severe as a *de facto* grant of summary judgment have been found to be within the discretion of the trial court where a party destroys key evidence. See *American Family Insurance Co. v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 629 (1992) (barring essential evidence leading to summary judgment). However, the duty to preserve evidence as a potential litigant is not relevant to the duty at issue in a spoliation case. *Martin*, 2012 IL 113270, ¶¶ 50-51.

function a request to preserve evidence would serve such that it would alter the relationship between the parties, so it is difficult to either analogize or distinguish complaints about the evidence and a request to preserve it. However, we can say with a reasonable degree of certainty that, by making such a request, a plaintiff provides the defendant with actual knowledge that the plaintiff wishes the defendant to preserve the evidence. Conversely, mere complaints about the evidence cannot rise to the level of actual knowledge.

¶ 19 We find sound guidance in the recent First District case of *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408. There, the court held, "We find mere knowledge of the accident and of the possible causes of the accident, standing alone, is insufficient to create a duty to preserve the evidence." *Id*. ¶ 32. Of course, complaints about the evidence may be viewed as putting a defendant on notice of a possible cause of an accident. Pursuant to *Kilburg*, this "is insufficient to create a duty to preserve the evidence." *Id*.

¶ 20 We agree with the First District. While we do not foreclose the possibility that some sort of communication other than a request to preserve evidence might provide a defendant with the same sort of clear knowledge that a request provides, we hold that mere complaints about the evidence can never provide such clear knowledge–even along with possession and control–to form the basis of a duty. We hold only that *mere* complaints about the evidence are not the functional equivalent of a request to preserve evidence.

¶ 21 Our supreme court has stated that there is generally no duty to preserve evidence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 195 (1995). In this vein, we conclude that a complaint about the evidence may not constitute the "something more" than mere possession and control that the supreme court said was necessary for a duty to arise in a spoliation case. *Martin*, 2012 IL 113270, ¶ 45.

¶ 22 III. CONCLUSION

¶ 23 In light of the foregoing, we provide the following answers to the questions certified to this court: (1) we decline to answer the first question as it is outside the scope of Rule 308; (2)(a) complaints about the evidence are not the functional equivalent of a request to preserve evidence; (2)(b) a plaintiff's opportunity to inspect is not a factor to consider in assessing the relationship prong of the duty analysis in a spoliation case; and (2)(c) mere complaints about the evidence plus the defendant's possession and control are not sufficient to create a duty to preserve evidence, nor does one arise out of possession and control and a lack of an opportunity for the plaintiff to inspect the evidence.

¶ 24 Finally, we have received a motion from plaintiff to cite additional authority, specifically, *Awalt v. Marketti*, 74 F. Supp. 3d 909 (N.D. Ill. 2014). That motion is granted. This court was already aware of that case. We recognize that it provides some tangential support to plaintiff's position; however, as it relies on the potential-litigant rationale rejected by the supreme court in *Martin*, 2012 IL 113270, ¶¶ 50-51, it provides only limited guidance here.

¶ 25 Certified questions answered; cause remanded.