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IN THE COURT OF APPEALS OF INDIANA

Synergy Healthcare Resources, LLC,
Appellant-Plaintiff,

v.

Telamon Corporation,
Appellee-Defendant.

June 22, 2022

Court of Appeals Case No. 22A-PL-121

Appeal from the Lake Superior Court

The Honorable Stephen E. Scheele, Judge

Trial Court Cause No. 45D05-1701-PL-5

Mathias, Judge.

[1] Synergy Healthcare Resources, LLC ("Synergy") appeals the trial court's order dismissing its complaint against Telamon Corporation ("Telamon") as a sanction for spoliation of evidence. Synergy presents a single issue for our review, namely, whether the trial court abused its discretion when it dismissed Synergy's complaint. We affirm.

Facts and Procedural History

[2] In 2006, Synergy started its business as a medical billing software provider. Synergy's software was a server-based application that was loaded locally onto the computers of Synergy's clients, called "PMX3 Legacy" ("the software"). On December 1, 2012, Synergy hired Telamon to convert the software to a web-based application in order to comply with new governmental regulations.

[3] In early 2014, Telamon realized that it would not be able to finish the software conversion in time for Synergy to comply with a deadline imposed by the applicable governmental regulations. Telamon decided to make a "patch" for the software to "carry [Synergy] over" until the conversion was completed. Appellant's App. Vol. 3 p. 188. However, when a dispute arose over invoices related to the patch, Telamon canceled the parties' contract. Synergy hired a company called Itransition, Inc. to finish the conversion.

[4] In May 2014, Debra Zandstra, the sole member of Synergy, instructed Joe Zhao, a Telamon representative, to send the source code for the software to Itransition. Zandstra specifically told Zhao not to send the source code to Synergy. In July, prior to the release of the source code to Itransition, Synergy and Telamon executed an agreement entitled "Release of Source Code" ("Release"), which stated as follows:

> This Release Agreement ("Agreement") made and entered on this 10th day of July, 2014, between Telamon . . . and Synergy . . . covers the following:

WHEREAS, Telamon and Synergy entered into an Agreement for Performance of Services on December 1, 2012, for the development of computer software to be fully owned and used by Synergy for healthcare clients; and

WHEREAS, Related to Article 4 of the Agreement for Performance of Services, Telamon shall provide all programs, source code, instructions, etc. back to Synergy at termination of such agreement.

AGREEMENT

NOW THEREFORE, In consideration of the mutual promises herein contained, Telamon and Synergy agree as follows:

1. Error Corrections and Updates. Telamon will provide Synergy with error corrections, bug fixes, [sic] to the software for a period of sixty (60) days from the date of shipment at no additional charge.

2. Telamon will retain a copy of the Source Code in determining if the error/correction [is] needed, based on Telamon's best judgment, [sic] was due to the original code or due to Synergy's designated "transferee of the code" changes. If the error/correction was due to a change made after transfer, then Telamon shall not be responsible to correct/fix the necessary changes and reserves the right to bill Synergy for the time expended to determine the error and to fix the error, if Synergy desires as such.

3. At the end of the sixty (60) day period as mentioned in #1 above, or the end of any work related to bug fixes or error corrections prior to the sixty (60) days, *Telamon will relinquish any/all copy of retained source code and materials to Synergy or its designee*.

Appellant's App. Vol. 4 p. 44 (emphasis added).

[5] On August 18, an attorney representing Synergy sent a letter to the president of Telamon stating that the software Telamon had provided was "not functioning and was negligently installed or not converted properly." *Id.* at 86. The attorney stated that Synergy had "lost numerous clients and sustained tremendous losses" as a result and that Synergy was "making a claim under the $500,000.00 insurance policy" required by the terms of the parties' contract. *Id.* at 87.

[6] On August 25, Telamon sent the source code to Itransition per Synergy's instructions. Telamon did not retain a copy of the source code. Itransition informed Zandstra that "the web-based [code] was approximately 75 percent done," and Itransition attempted to finish the software conversion by modifying the source code provided by Telamon. Appellant's App. Vol. 3 p. 71. By January 2015, Synergy "ran out of money" to continue to pay Itransition to work on the software conversion, and Synergy went out of business. *Id.* at 70.

[7] On September 7, 2016, Synergy filed a complaint against Telamon, which it later amended, alleging breach of contract and seeking compensatory and punitive damages. Telamon filed an answer and counterclaims alleging breach of contract and unjust enrichment.

[8] In the course of discovery, Telamon requested a copy of the version of the source code for the web-based software that Telamon had delivered to Itransition in 2014 ("as-delivered source code"). In 2018, during her deposition, Zandstra testified that the source code was located in Belarus. When asked why

she did not have it, she stated, "Where am I going to put it? It's very secure there." Appellant's App. Vol. 4 p. 24. Accordingly, in July 2019, Telamon sent a nonparty request for production of documents to Itransition, including a request for "all versions of source code received by Itransition from Synergy or Telamon[.]" *Id.* at 83. However, "the only version of the web-based software that Itransition had in its possession at [that time]" was a version Itransition had modified. *Id.* at 53.

[9] After Telamon realized that Synergy had not retained a copy of the as-delivered source code, Telamon filed a "Motion for Sanctions Due to Spoliation of Evidence." Appellant's App. Vol. 2 p. 29. In the motion, Telamon stated that, because Synergy's breach of contract claim alleges that Telamon created and delivered a "deficient source code[,] . . . the state and quality of the source code delivered by Telamon is central" to Synergy's claims. *Id.* Telamon claimed that Synergy had a duty to preserve the as-delivered source code when, in August 2014, Synergy had "retained an attorney who sent a demand letter to Telamon" alleging that the software was deficient. *Id.* at 33. Telamon alleged that Synergy had "required Telamon to relinquish the only copy [of the as-delivered source code] it had in its possession." *Id.* at 30. And Telamon alleged that "Synergy's conduct severely prejudices Telamon because the only objective contemporaneous evidence of the work Telamon performed for Synergy is the source code and that evidence no longer exists – nor can it be recreated." *Id.* In support of its motion, Telamon submitted eleven exhibits to the trial court.

[10] Synergy filed a response in opposition to the motion to dismiss with supporting exhibits. Synergy argued that it had never been in possession of the as-delivered source code and, therefore, did not have a duty to preserve it. Synergy asserted that Telamon breached the parties' contract when it did not return a copy of the source code to Synergy upon the termination of the parties' contract. And Synergy asserted further that Telamon had a duty to retain a copy of the as-delivered source code.

[11] Following a hearing, the trial court granted Telamon's motion and dismissed Synergy's complaint. The trial court found that Synergy "had a duty to preserve the subject evidence, the subject evidence was negligently destroyed and is no longer available to the parties, [and] the resulting prejudice to [Telamon] is severe[.]" *Id.* at 19. Because Telamon's counterclaim against Synergy is still a live claim, the trial court stated in its order that "there is no just reason for delay, and this is a final judgment pursuant to Trial Rule 54(B)[.]" *Id.* at 20. This appeal ensued.

Discussion and Decision

[12] Synergy contends that the trial court abused its discretion when it dismissed its complaint. Our standard of review is well settled:

> "Spoliation is a particular discovery abuse that involves the intentional or negligent destruction, mutilation, alteration, or concealment of physical evidence." *Popovich v. Ind. Dep't of State Revenue*, 17 N.E.3d 405, 410 (Ind. Tax Ct. 2014). We vest trial courts with wide discretion in dealing with discovery matters and will reverse a trial court's decision regarding discovery only for

> an abuse of discretion. *WESCO Distribs., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 703 (Ind. Ct. App. 2014), *trans. dismissed*. We will find an abuse of discretion only if it is clearly against the logic and circumstances before the court, or when the trial court has misinterpreted the law. *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 648–49 (Ind. Ct. App. 2008).

N. Ind. Pub. Serv. Co. v. Aqua Env't Container Corp., 102 N.E.3d 290, 300–01 (Ind. Ct. App. 2018).

[13] A party raising a claim of spoliation must prove that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence. *Id.* at 301. "The duty to preserve evidence occurs when a first-party claimant 'knew, or at the very least, should have known, that litigation was possible, if not probable.'" *Golden Corral Corp. v. Lenart*, 127 N.E.3d 1205, 1217 (Ind. Ct. App. 2019) (quoting *Aqua Env't Container Corp.*, 102 N.E.3d at 301), *trans. denied*. "Our Supreme Court has recognized that '[t]he intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system.'" *Aqua Env't Container Corp.*, 102 N.E.3d at 302 (quoting *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 354 (Ind. 2005)). "[A] trial court has broad discretion to redress spoliation of evidence; its power to sanction spoliation is derived from its broad and inherent discretionary powers to issue evidentiary rulings and to manage the orderly and expeditious disposition of cases." *Id.*

> Indiana Trial Rule 37(B) also authorizes 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 attorney fees.

Id. at 302–03 (emphasis added).

[14] Here, Synergy contends that the trial court abused its discretion when it found that it had spoliated evidence because: (1) Synergy could not have had a duty to preserve the as-delivered source code when it never had it in its possession; (2) Synergy did not know that litigation was possible in August 2014 when its attorney wrote a letter to Telamon seeking compensation for the allegedly deficient software conversion; and (3) there is no evidence that it either negligently or intentionally destroyed the as-delivered source code. Notably, Synergy does not dispute the trial court's finding that the prejudice to Telamon as a result of the spoliated evidence is "severe."[1] Appellant's App. Vol. 2 p. 19.

[15] First, contrary to Synergy's contention that it cannot be charged with preserving what it never had in its possession, this Court has stated that a party with a duty

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[1] In the Summary of the Argument section of its brief, Synergy alleges that Telamon "seeks to create false prejudice" when it argues that the as-delivered source code cannot be recreated. Appellant's Br. p. 12. But Synergy does not make that argument in the Argument section of its brief. As such, the issue is waived. Waiver notwithstanding, Telamon presented expert testimony that the as-delivered source code could not be recreated using the source code as modified by Itransition. And it is undisputed that the as-delivered source code is critical to this litigation, thus the prejudice to Telamon is clear.

to preserve evidence in the possession of a third party may bear responsibility for spoliation of evidence. In *Aqua Environmental Container Corp.*, when the plaintiff's building was damaged in a fire, the Fire Marshal told the plaintiff ("Aqua") that a faulty furnace may have caused the fire. 102 N.E.3d at 293. Aqua hired Xtreme Contractors to clean up the site, and some or all of the furnace was set aside and stored pending litigation. However, after years of discovery, Aqua learned that certain relevant parts of the furnace had not been preserved. On appeal, we affirmed the trial court's denial of the defendant's motion for default judgment for spoliation of evidence, but we noted that, "even if it was Xtreme that failed to save all the furnace parts, Aqua may not avoid its duty to preserve the furnace."[2] *Id.* at 301 n.8. Likewise, here, where Synergy directed Telamon to deliver the source code to Itransition, Synergy may not avoid its duty to preserve the evidence.[3]

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[2] In support of its assertion that Synergy could not have spoliated the evidence because only Itransition had possession of the as-delivered source code, Synergy relies on a selective interpretation of relevant case law. Appellant's Br. p. 21. As our Supreme Court stated in *Cahoon v. Cummings*, "'In Indiana, the *exclusive possession* of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it.'" 734 N.E.2d 535, 545 (Ind. 2000) (quoting *Porter v. Irvin's Interstate Brick & Block Co.*, 691 N.E.2d 1363, 1364-65 (Ind. Ct. App. 1998)) (emphasis added). In light of our discussion in *Aqua Environmental*, it is clear that "exclusive" in this context simply means that one party has the evidence while the other parties do not. In other words, here, where Synergy directed Telamon to deliver the source code to Synergy's designee Itransition and Telamon was contractually bound to relinquish all copies of the source code in its possession, Synergy's possession was exclusive vis-à-vis Telamon.

[3] We reject Synergy's assertion that Telamon breached the parties' contract when it did not deliver the source code directly to Synergy and did not retain a copy of the code. As Telamon points out, pursuant to the Release, Telamon was "required to 'relinquish any/all cop[ies] of retained source code and materials to Synergy or its designee'" at the conclusion of a sixty-day "error correction period." Appellee's Br. pp. 13–14 (citing Appellant's App. Vol. 4 p. 44). Thus, Telamon complied with the Release when it delivered the source code to Itransition at Zandstra's direction without also retaining a copy.

[16] Second, with respect to Synergy's attorney's August 2014 letter to Telamon, that letter included an explicit demand for compensation because the software was "not functioning and was negligently installed or not converted properly." Appellant's App. Vol. 4 p. 86. We hold that, at that time, Synergy knew or should have known that litigation was possible, if not probable, and that the as-delivered source code would be relevant evidence. *See Golden Corral Corp.*, 127 N.E.3d at 1217. Thus, Synergy was on notice in August 2014 that it had a duty to preserve the as-delivered source code.

[17] Third, Synergy is correct that the evidence does not show that it intentionally destroyed the as-delivered source code. But Synergy ignores the evidence that it was negligent by omission when it failed to direct Itransition to preserve that code when litigation became likely. The parties' Release explicitly called for Telamon to deliver "any/all cop[ies]" of the source code to Synergy "or its designee" after the error correction period. Appellant's App. Vol. 4 p. 44. Thus, when, in August 2014, Synergy instructed Telamon to deliver the code to Itransition, Synergy knew that Telamon would no longer retain a copy of the source code. And when the litigation became likely that same month, Synergy should have directed Itransition to retain a copy of the as-delivered source code. Synergy states that, "[a]s she explicitly testified," Zandstra "*assumed* the PMX3 source code was safe with Itransition in Belarus." Appellant's Br. p. 21 (emphasis added). But, as we now know, that was not a safe assumption. We

agree with the trial court that Synergy was negligent when it failed to preserve the as-delivered source code.[4]

[18] Finally, Synergy contends that, because "any loss was inadvertent, not intentional," the "imposition of the 'ultimate' sanction [of dismissal] is unwarranted." Appellant's Br. p. 24. In support of that contention, Synergy cites a single case, which we find readily distinguishable. In *Huber v. Henley*, the District Court directed the defendants to preserve a damaged tractor trailer that had been involved in a collision. 669 F. Supp. 1474, 1476 (S.D. Ind. 1987). When the tractor trailer was not preserved despite the order, the plaintiffs moved the District Court to impose sanctions that would be "tantamount" to a default judgment against them. *Id.* at 1477. The Court denied the plaintiffs' motion due to "several factors," including that the failure to preserve the evidence was due to "inadvertence (or negligence) rather than willfulness or bad faith," and "the axle and suspension removed from the trailer were not destroyed but were placed in use on another trailer" and available for inspection. *Id.* Moreover, the Court noted that the plaintiffs "apparently did not consider the front axle and suspension of the trailer extremely crucial to their defense until they learned of this violation of the court's order." *Id.*

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[4] Synergy alleges that the trial court's finding of negligence is inconsistent with the court's alleged acknowledgement during oral argument that the destruction of the as-delivered source code was "inadvertent." But taken in context, the court used the word "inadvertent" when it merely assumed inadvertence for the sake of argument. And, in any event, the definition of "inadvertent" is "unintentional," so something can be both inadvertent and negligent. *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/inadvertent (last visited June 9, 2022).

[19] In short, the *Huber* plaintiffs had not shown prejudice as a result of the spoliation of evidence. But here, Synergy's negligence resulted in severe prejudice to Telamon because, without the as-delivered source code, Telamon could not prepare a meaningful defense to Synergy's claims that the code was deficient. And the trial court acted within its broad discretion when it dismissed Synergy's complaint. *See Aqua Env't Container Corp.*, 102 N.E.3d at 302.

[20] Synergy's contentions on appeal amount to a request that we reweigh the evidence, which we cannot do. Synergy emphasizes the evidence showing that it did not intentionally destroy the as-delivered source code which was not even in its possession. But Synergy ignores the evidence that it directed Telamon to deliver the source code to Itransition and failed to direct Itransition to retain a copy of the as-delivered source code when litigation became likely in August 2014.[5] And this spoliation of the evidence severely prejudiced Telamon. The trial court did not abuse its discretion when it dismissed Synergy's complaint as a sanction for its spoliation of evidence.

[21] Affirmed.

Brown, J., and Molter, J., concur.

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[5] As Telamon points out, nothing in the record establishes when Itransition lost the as-delivered source code. It may have failed to keep a copy as soon as it started modifying the code in 2014, or it may have lost a copy between 2014 and 2019, when it received the subpoena from Telamon. In any event, there is no evidence that Synergy ever directed Itransition to retain a copy of the as-delivered source code.