Rel: December 11, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190436

Ex parte The Water Works and Sewer Board of the City of Anniston

PETITION FOR WRIT OF MANDAMUS

(In re: Betty Milner and Teresa Holiday

v.

The Water Works and Sewer Board of the City of Anniston)

(Calhoun Circuit Court, CV-18-900510)

BRYAN, Justice.

The Water Works and Sewer Board of the City of Anniston ("the Board") petitions this Court for a writ of mandamus directing the Calhoun Circuit Court ("the trial court") to vacate its order entering a partial summary judgment in favor of Betty Milner and Teresa Holiday (hereinafter referred to collectively as "the plaintiffs"). For the reasons set forth herein, we grant the petition.

Facts and Procedural History

On September 17, 2018, the plaintiffs sued the Board seeking compensatory and punitive damages based on claims of breach of contract, nuisance, continuing trespass, negligence, and wantonness. The plaintiffs alleged that in February 2016 they instructed the Board to cut off water supply to a house they owned; that the plaintiffs "returned to reopen" the house in February 2018 and discovered that the water supply to the house had not been completely cut off; and, that the Board's failure to properly cut off the water supply caused severe damage to the house. The Board filed an answer that included general denials of the plaintiffs' allegations and asserted a number of "affirmative defenses," including that the plaintiffs' injuries were the result of the "intervening and superseding"

actions of an individual or entity other than the Board or anyone under its control.

Discovery began on November 1, 2018. On October 24, 2019, the plaintiffs, based on the Board's alleged spoliation of the evidence, filed a motion for a partial summary judgment as to the Board's liability or, in the alternative, to strike all of the Board's defenses to the plaintiffs' claims, alleging that the alleged spoliation prevented them from prosecuting their claims. In support of the motion, the plaintiffs presented evidence indicating that, at the plaintiffs' request, a service technician for the Board, Dale Bryant, placed a "cap and lock device on the cutoff valve attached to the water line which supplied water to the plaintiffs' home" on February 10, 2016. The record indicates that the house was not inhabited for two years after water service was terminated. Cam Stokes, chief executive officer of C. Stokes Construction, a contractor, went to the house on February 24, 2018, to investigate the existence of black mold at the house. Stokes saw the water meter and the cap and lock device, and determined that the water had not been properly cut off. Stokes put his findings in an e-mail dated February 25, 2018, in which he

concluded that a continuous water leak was the source of the damage to the plaintiffs' house and that he "would assume that the water company would be at fault due to the failure to properly shut off [the] main water valve." [1]

On February 28, 2018, Milner reported the problem to Wanda Crow, a customer-service supervisor with the Board. Milner provided Crow a copy of Stokes's e-mail that detailed his conclusion that the Board was at fault for the damage to the plaintiffs' house, and, during her deposition, Crow stated that Milner "seemed to be claiming damages" against the Board. In response to Milner's report of water damage, Crow sent Bryant back to the plaintiffs' house to address the complaint the same day; Crow put a "note" in the Board's system that stated: "Please check. It has been locked off since 2/2016. The customer said that the inspector found the meter running and causing water to go under the house. Please give an order back to [Crow]." Bryant stated that, when he returned to the

[1]The recipient of Stokes's e-mail is not entirely clear from the materials before us, but it appears that the e-mail was sent to one of the plaintiffs.

plaintiffs' house in February 2018 he was not aware of an allegation that the plaintiffs' house had been damaged by any actions of the Board.

According to Bryant, there was no water going through the meter and into the pipes when he turned the water off in February 2016 but that there was "just a little" water going through the meter when he returned in February 2018. Bryant recorded in his field notes that the cap and lock device he had used in 2016 to shut off the water line to the plaintiffs' house had been "tampered with" and that "the cap and lock were hanging off [the] cutoff sideways." Bryant removed both the cap and lock device he had used in 2016 and the water meter at the plaintiffs' house and ensured that there was no water running to the plaintiffs' house. Bryant did not keep the cap and lock device or the meter that he removed from the plaintiffs' house. During his deposition in June 2019, Bryant stated that such equipment was either put into use at another residence or was "scrapped."

During Bryant's deposition, counsel for the plaintiffs asked the Board to locate the "meter and equipment" the Board used to shut off the water at the plaintiffs' house in 2016. Counsel for the plaintiffs again

requested that the Board "locate" that equipment in a letter to counsel for the Board on July 11, 2019. Counsel for the Board responded that the Board no longer possessed the water meter removed from the house or the cap and lock device that Bryant said was damaged and was also removed from the house. Counsel for the Board informed the plaintiffs' counsel that older water meters contained lead and that the Board was required to follow certain regulations in disposing of those meters, but the Board offered to provide counsel with the same kind of cap and lock device that had been used on the plaintiffs' meter for their inspection.

In their October 2019 motion for a partial summary judgment, the plaintiffs argued that the Board was guilty of spoliation of evidence that was necessary to prosecute their claims against the Board. They alleged that the Board knew of a potential claim against the Board when Milner reported the water leak but that it failed to maintain possession of the water meter or the cap and lock device that had allegedly been tampered with by a third party. The plaintiffs argued that the Board's defense was based on an allegation that the cap and lock device had been tampered with by a third party, that it was this third party's action that caused the

water to run to the plaintiffs' house, and that, because the plaintiffs could not inspect the cap and lock device or the water meter, the Board should be sanctioned for its failure to maintain possession of the evidence the plaintiffs needed to rebut the Board's defenses. The plaintiffs moved the trial court for a partial summary judgment finding the Board liable for the plaintiffs' claims or, in the alternative, an order striking all the defenses asserted by the Board.

The Board filed a response in opposition to the plaintiffs' motion, which included several attachments to support its argument that the plaintiffs had not demonstrated that it was guilty of spoliation. Included with the Board's opposition was the deposition testimony of Crow in which she stated that she was "sure" that she had not seen the e-mail report from Stokes before the date of her deposition in August 2019. However, Crow also testified that she was not disputing that Milner provided Stokes's e-mail to her on February 28, 2018, when Milner reported the water leak, she just did not recall seeing it when Milner first reported the water leak that day. The Board argued that, although the plaintiffs had filed this lawsuit on September 17, 2018, and although the parties had

almost immediately engaged in discovery, the plaintiffs did not ask the Board for the meter or the cap and lock device until June 26, 2019, during Bryant's deposition. The Board also presented evidence indicating that, at the time Bryant removed the meter and the cap and lock device in 2018, he did not know that the plaintiffs were claiming that the damage to their house was caused by the water not being properly cut off in 2016 and that the meter and the device were disposed of in the regular course of business. They also argued that the plaintiffs' contractor, Stokes, had access to the meter and the cap and lock device for at least four days before the Board knew there was a problem to resolve and that the plaintiffs were aware of the problem with the water meter several days before the Board was notified of the problem.

The plaintiffs filed a response, which included additional evidence to support their motion for a partial summary judgment. Specifically, the plaintiffs attached photographs and a video of the water meter and the cap and lock device that were taken by Stokes and his partner, Willie

May, on February 24, 2018,[2] when they went to inspect the plaintiffs' house. According to the plaintiffs, the photographs and video clearly showed that "the blue cap covering the cut-off valve was in its proper place and that the lock on that cap was intact." The plaintiffs also attached an affidavit from Hugh Buchanan, who lived near the plaintiffs' house. He stated that, in the spring of 2018, his wife complained about water running into their yard from "up the street" and that, when Buchanan saw someone from the Board at the plaintiffs' house, he went to speak with him. According to Buchanan, the Board employee, whom Buchanan identified as Bryant, "stated that the water department was supposed to have cut off the water to the [plaintiffs' house] but had apparently not cut the water off properly which is why it was still running." [3] The plaintiffs

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[2]The plaintiffs actually state in their response that the photographs and video were taken on August 24, 2018. In light of the fact that they argue that this evidence "directly and profoundly contradicts ... Bryant's testimony" that the cap and lock device were "hanging off the cut off sideways" when he went to the plaintiffs' house on February 28, 2018, it appears that the date in the motion is a typographical error and the plaintiffs are alleging that the photographs and video were taken on February 24, 2018, the day Stokes inspected the plaintiffs' house.

[3]Buchanan submitted two affidavits. The first is dated November 29, 2018, and generally sets forth the information provided above. The second

argued that this evidence "directly contradicts" Bryant's testimony regarding the condition of the cap and lock device on February 28, 2018.

The Board moved to strike the plaintiffs' response and the evidentiary submissions attached to it. After the plaintiffs responded to the Board's motion, the trial court conducted a hearing, and, on January 17, 2020, the trial court entered an order denying the Board's motion to strike the plaintiffs' evidentiary submissions, granting the plaintiffs' motion to strike the Board's defenses,[4] and granting the plaintiffs' motion for a partial summary judgment as to the Board's liability to the plaintiffs. The trial court stated that the remaining issue of the plaintiffs' damages "shall be determined at the trial of this case," which would be set by separate order. The Board timely petitioned this Court for a writ of mandamus.

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affidavit, dated November 19, 2019, specifically identifies Bryant as the Board employee whom Buchanan spoke to in spring 2018.

[4]The trial court's order states that it granted the plaintiffs' motion to strike the Board's "affirmative defenses." However, given that the plaintiffs moved to strike all of the Board's defenses and that the trial court entered an order establishing the Board's liability to the plaintiffs, we construe the trial court's order as striking all of the Board's defenses, not just its affirmative defenses.

Standard of Review

> " ' " 'Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' " ' Ex parte Sears, Roebuck & Co., 895 So. 2d 265[, 268] (Ala. 2004) (quoting Ex parte Mardis, 628 So. 2d 605, 606 (Ala. 1993)(quoting in turn Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990))). 'The petitioner bears the burden of proving each of these elements before the writ will issue.' Ex parte Glover, 801 So. 2d 1, 6 (Ala. 2001)(citing Ex parte Consolidated Publ'g Co., 601 So. 2d 423 (Ala. 1992))."

Ex parte Vance, 900 So. 2d 394, 397 (Ala. 2004).

Analysis

In its petition, the Board seeks an order vacating the trial court's January 17, 2020, order striking its defenses and entering a partial summary judgment establishing its liability to the plaintiffs. It is undisputed that the Board has properly invoked the jurisdiction of this Court by filing a timely petition for a writ of mandamus from the trial court's January 17, 2020, order. See Rule 21, Ala. R. App. P. Because the petition comes to this Court in an unusual procedural posture -- from a partial summary judgment on liability in favor of the plaintiffs -- we first

consider whether the Board has demonstrated that it is entitled to the extraordinary relief requested in this petition on the basis that it lacks another adequate remedy.

The Board argues that Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810 (Ala. 2003), supports its argument that an appeal is not an adequate remedy by which to seek review of the January 17, 2020, order based on the particular circumstances of this case. In Ocwen, this Court recognized certain limited circumstances in which an eventual appeal of a discovery order is not an adequate remedy and review by mandamus is proper. The Board references the third category of discovery orders that this Court, in Ocwen, held are subject to mandamus review:

> "[W]hen the trial court either imposes sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome has been all but determined, and the petitioner would be merely going through the motions of a trial to obtain an appeal."

Ocwen, 872 So. 2d at 813–14.[5]

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[5]In later cases, this Court summarized the third Ocwen category as permitting mandamus review of discovery orders that "effectively eviscerat[e] 'a party's entire action or defense.' " Ex parte Meadowbrook

It is well settled that "discovery sanctions ... are available when spoliation is charged against an opposing party." Smith v. Atkinson, 771 So. 2d 429, 438 (Ala. 2000). Although the trial court's order entering the partial summary judgment as to liability is not a typical "discovery order," this Court has addressed the issue of spoliation in the context of both a discovery sanction entered pursuant to Rule 37, Ala. R. Civ. P., and a summary judgment as a "sanction" for spoliation. See, e.g., Hartung Com. Props., Inc. v. Buffi's Auto. Equip. & Supply Co., 279 So. 3d 1098 (Ala. 2018) (reversing a summary judgment in favor of the defendant based on the plaintiff's spoliation of the evidence); and Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989) (affirming the dismissal of the plaintiff's action pursuant to Rule 37 based on the plaintiff's failure to respond to a discovery request because the plaintiff discarded the evidence the defendant sought to inspect). Because the entry of a summary judgment on the basis of spoliation is considered a sanction, this Court, unlike in other cases in which it is reviewing a "standard" summary judgment,

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Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007).

considers whether the trial court "exceeded its discretion" in entering the summary judgment on the ground of spoliation. See Hartung, 279 So. 3d at 1102-03; and Vesta Fire Ins. Corp. v. Milam & Co. Constr., 901 So. 2d 84, 88-89 (Ala. 2004). Thus, this Court treats an order entering a summary judgment based on spoliation in a manner similar to an order imposing discovery sanctions for spoliation. Compare Vesta Fire, 901 So. 2d at 89 (holding that, "in determining whether the summary judgments for the defendants were proper on the ground of spoliation of the evidence, we consider whether the trial court exceeded its discretion in entering the summary judgments"), and Iverson, supra (in reviewing an order dismissing the plaintiff's complaint and entering a default judgment against the plaintiff based on spoliation pursuant to Rule 37, this Court stated that "[t]he choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal [unless the court exceeded its] discretion").

At the heart of this case is the plaintiffs' request for production for inspection of the cap and lock device and the water meter that the Board removed from the plaintiffs' property and the Board's inability to allow

inspection of those items because it was no longer in possession of either of them. This is akin to a failure of discovery and, even though the plaintiffs did not cite Rule 37 or specifically seek "discovery" sanctions under that rule, their motion for a partial summary judgment sought to impose a sanction on the defendant for its alleged spoliation of the evidence. The trial court agreed and entered an order striking the Board's defenses and establishing the Board's liability to the plaintiffs. These are sanctions specifically contemplated by Rule 37(d), Ala. R. Civ. P., based on a party's failure to comply with a request for production.[6] The trial court's order is, in essence, a discovery sanction "effectively precluding a decision on the merits ... so that ... the outcome has been all but determined, and the [Board] would be merely going through the motions of a trial to obtain an appeal." Ocwen, 872 So. 2d at 813-14. Thus, we conclude that the

[6]"An order to compel discovery is not required in order to bring Rule 37(d) into play. It is enough that a request for inspection or production has been properly served on the party." Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822, 825–26 (Ala. 1991) (citing Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989)).

Board has demonstrated that, under the particular circumstances of this case, an appeal is not an adequate remedy.

Accordingly, we now consider whether the Board has demonstrated a clear legal right to an order vacating the trial court's order striking the Board's defenses and establishing the Board's liability to the plaintiffs. As discussed above, to demonstrate a clear legal right to that relief, the Board must demonstrate that the trial court exceeded its discretion in entering a partial summary judgment in favor of the plaintiffs as to the Board's liability. See Story v. RAJ Props., Inc., 909 So. 2d 797, 802 (Ala. 2005) ("In determining whether the summary judgments for the ... defendants were proper on the ground of spoliation of the evidence, we consider whether the trial court exceeded its discretion in entering the summary judgment instead of imposing another, less severe, sanction against [the spoliator]."). In Vesta Fire, a decision reviewing a summary judgment entered based on spoliation, the Court stated that, because a summary judgment was under review, the evidence presented in support of the motion for a summary judgment must be viewed in a light most favorable to the nonmovant. 901 So. 2d at 96. In Story, another decision

reviewing a summary judgment based on spoliation, this Court stated that, when there are disputed issues that go to "whether the sanction of a summary judgment entered on the ground of spoliation of the evidence was appropriate", "[t]hat determination is one for the trial court to make." 909 So. 2d at 802.

> " 'Spoliation is an attempt by a party to suppress or destroy material evidence favorable to the party's adversary. May v. Moore, 424 So. 2d 596, 603 (Ala. 1982). Proof of spoliation will support an inference of guilt or negligence. May, 424 So. 2d at 603. One can prove spoliation by showing that a party purposefully or wrongfully destroyed [evidence] that the party knew supported the interest of the party's opponent. Id.'
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> "Wal–Mart Stores[, Inc. v. Goodman], 789 So. 2d [166,] 176 [(Ala. 2000)] (concluding that Wal–Mart was not entitled to a new trial based on spoliation because 'nothing in the record show[ed] that [the plaintiff] knew that the [allegedly spoliated evidence] would be a key piece of evidence in her case, and Wal–Mart provided no evidence to show that [the plaintiff] intentionally destroyed [it] in order to inhibit Wal–Mart's case.')."

Walker v. City of Huntsville, 62 So. 3d 474, 495 (Ala. 2010).

> "This Court has applied five factors in analyzing a spoliation-of-the-evidence issue: (1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the

> information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal."

Story, 909 So. 2d at 802–03 (citing Vesta Fire, 901 So. 2d at 94–95).[7] Although we briefly address each factor listed above, this case turns on the fifth factor -- the possible effectiveness of sanctions less severe than an order striking the Board's defenses and establishing the Board's liability to the plaintiffs.

The importance of the evidence destroyed -- the meter and the cap and lock device -- in and of itself, is obvious. That evidence would provide the plaintiffs the best opportunity to prove their claim that the Board never properly cut off the water in 2016 and to rebut the Board's allegation that the cutoff was not effective only because a third party tampered with the cap and lock device. However, this Court has held that the importance of the evidence destroyed "must be evaluated in the context of the importance of the evidence that was preserved or otherwise

[7]Although the parties have not cited any authority indicating that this Court has considered these five factors in analyzing whether a defendant is subject to a sanction for spoliation, the parties use these factors as a framework for their argument; therefore, we will do the same.

available," Vesta Fire, 901 So. 2d at 95, which implicates the fourth factor set forth above. Although no part of the meter or the cap and lock device was preserved, the materials before us indicate that the plaintiffs did have evidence available to them to support their contention that the Board did not properly cut off the water in 2016, namely, the testimony of their contractor, Stokes, who inspected the water meter four days before the Board was made aware of the issue at the plaintiffs' house. The plaintiffs did not present any evidence indicating that Stokes was unavailable or otherwise unable to testify regarding the condition of the cap and lock device and the water meter when he inspected that equipment on February 24, 2018, before the Board removed the equipment.[8] Thus, the

[8]There is also some indication from the materials before us that the plaintiffs are in possession of photographs and a video of the cap and lock device and the meter that were taken before the Board removed that equipment. See accompanying text and note 2, supra. In their response to the Board's petition for a writ of mandamus, the plaintiffs argue that the photographs and video are not adequate to rebut Bryant's testimony concerning the condition of the cap and lock device on February 28, 2018. Notably, this argument appears to contradict the argument the plaintiffs made to the trial court, i.e., that the photographs and video "directly and profoundly" contradict Bryant's testimony concerning the condition of the cap and lock device. Even if the photographs are not adequate, there is no indication that Stokes is unavailable to offer evidence of the status or

plaintiffs did not demonstrate that there was no alternate source for the information that would have been obtainable from the destroyed evidence.

In considering the Board's culpability in failing to preserve the meter or the cap and lock device, the Board argues that there was insufficient evidence that it acted willfully in not preserving the items.

> "At its most flagrant level, the willfulness component of the culpability factor involves knowledge and appreciation by the spoliator that the evidence being destroyed would be pertinent and materially favor the interest of his opponent in litigation being anticipated by the spoliator. McCleery[v. McCleery, 200 Ala. 4, 75 So. 316 (1917)]; May[v. Moore, 424 So. 2d 596 (Ala. 1982)]; Verchot v. General Motors Corp., 812 So. 2d 296 (Ala. 2001). 'When a party maliciously destroys evidence, that is, with the intent to affect the litigation, that party is more culpable for spoliation.' Cooper v. Toshiba Home Tech. Corp., 76 F. Supp. 2d 1269, 1274 (M.D. Ala. 1999). Conversely, willfulness is not shown where the party disposing of an item neither knew nor should have known that the item would be key evidence in the case. Wal–Mart Stores[, Inc. v. Goodman], 789 So. 2d [166,] 176 [(Ala. 2000)] ('[The defendant] provided no evidence to show that [the plaintiff] intentionally destroyed [the item of evidence] in order to inhibit [the defendant's] case.')."

Vesta Fire, 901 So. 2d at 95.

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condition of the cap and lock device and the meter before those items were removed by the Board.

The primary consideration in determining the Board's culpability is whether it knew or should have known that the cap and lock device and the water meter would be key evidence supporting the interests of the plaintiffs in foreseeable litigation by the plaintiffs against the Board. If the Board had no reason to believe there was a threat of litigation at the time it removed the equipment, the Board could not be held culpable. See Russell v. East Alabama Health Care Auth., 192 So. 3d 1170, 1177 (Ala. Civ. App. 2015) (holding that, when there was insufficient evidence that the defendant had knowledge that there was a threat of litigation when it destroyed certain evidence that might have been supportive of the plaintiff's case, there was no basis from which to conclude that the defendant had engaged in spoliation of the evidence).

Viewing the evidence before us in a light most favorable to the Board, we conclude that the trial court could have assigned some culpability to the Board. Although Crow did not recall reviewing Stokes's e-mail that detailed his opinion that the Board was at fault for the damage to the plaintiffs' house, Crow did not dispute that Milner provided Stokes's e-mail report to her before Bryant went to the plaintiffs'

house in February 2018. Crow testified that Milner "seemed to be claiming damages" against the Board when Milner first reported the water leak on February 28, 2018. Yet Crow did not convey to Bryant that Milner was attributing responsibility for her damage to the Board, nor did she make any other effort to preserve the equipment that Bryant removed from the plaintiffs' house. Thus, the trial court could have determined that the Board had some degree of culpability for failing to ask Bryant to save the cap and lock device and the meter after he removed them from the plaintiffs' house. However, when the evidence is viewed in the light most favorable to the Board, as it must be, Vesta Fire, 901 So. 2d at 96, the materials before us indicate that neither Crow nor Bryant knew that the plaintiffs would initiate litigation against the Board once it was discovered that, at least from the Board's perspective, the water was running to the plaintiffs' house only because a third party had tampered with the cap and lock device, not because the Board had failed to properly cut off the water in 2016. Accordingly, viewing the evidence in the light most favorable to the Board, any culpability imputed to the Board based on Crow's failure to maintain the equipment removed from the plaintiffs'

house was in a relatively low range on the "continuum of fault." See Vesta Fire, 901 So. 2d at 98.

Next, we consider whether notions of fundamental fairness supported the trial court's order establishing the Board's liability to the plaintiffs as a sanction for spoliation. Although we agree that it would be fundamentally unfair to allow the Board to present evidence indicating that a third party had tampered with the cap and lock device if the plaintiffs were wholly unable to rebut that evidence entirely as a result of the Board's conduct, we have already concluded that the plaintiffs failed to demonstrate that there were not adequate alternative sources of information from which they could rebut the Board's evidence in this regard. Moreover, we conclude that the plaintiffs failed to demonstrate that fundamental fairness required the most severe sanction available to the trial court to impose upon the Board. Cf. Hartung, 279 So. 3d at 1105 (noting that, when a plaintiff's action was dismissed based on the plaintiff's spoliation of the evidence, " ' "the sanction of dismissal is the most severe sanction that a court may apply .... Dismissal orders must be carefully scrutinized and the plaintiff's conduct must mandate

dismissal"'" (quoting Vesta Fire, 901 So. 2d at 95, quoting in turn Iverson, 553 So. 2d at 87)). In cases where the defendant is accused of spoliating the evidence, this Court has repeatedly approved a jury instruction on spoliation, which can include an inference of guilt, when an adequate evidentiary foundation exists from the evidence presented. See Campbell v. Williams, 638 So. 2d 804, 817 (Ala. 1994) (noting that sufficient evidentiary foundation existed to support a jury instruction on spoliation, which allowed for an inference of guilt, when the evidence indicated that the defendant physician in a medical-malpractice action attempted to conceal certain aspects of the decedent's care); Southeast Environmental Infrastructure, L.L.C. v. Rivers, 12 So. 3d 32, 44–45 (Ala. 2008) (noting that sufficient evidentiary foundation existed for a jury instruction on spoliation and holding that, "when there is evidence indicating that a defendant has spoliated essential evidence in a case, it is reasonable for the jury to infer that the defendant did so to prevent anyone from seeing that evidence. Thus, where the evidence shows spoliation, the jury may consider the defendant's spoliation of the evidence as an implied admission of culpability."); and Liberty Nat'l Life Ins. Co. v.

Sanders, 792 So. 2d 1069, 1081 (Ala. 2000) (holding that the plaintiff presented sufficient evidence to support an instruction that allowed the jury to determine whether the evidence supported a reasonable inference of the defendants' " 'guilt, culpability, or awareness' " of their wrongdoing when the evidence indicated that the defendant had falsified evidence to support its defense).

In Alabama Power Co. v. Murray, 751 So. 2d 494 (Ala. 1999), the Murrays sued Alabama Power ("APCo") alleging that a massive power surge developed on APCo's power lines, bypassed APCo's "surge arrester," and caused a fire at the Murrays' house. The Murrays alleged that APCo failed to install sufficient surge arresters and that that failure allowed the surge to travel unimpeded to the Murrays' house. Shortly after the fire, engineers with APCo, intending to inspect the surge arrester at issue, dropped the surge arrester and destroyed it. The trial court gave the jury the following spoliation charge from Alabama Pattern Jury Instructions: Civil, 15.13 (2d ed., 1998 cum. supp.):

> " 'In this case, the [Murrays claim] that the defendant [APCo] is guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with [the]

> material evidence[, namely, the surge arrester at the Seale Road substation]. If you are reasonably satisfied from the evidence that [APCo] did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of [APCo's] guilt, culpability, or awareness of the defendant's negligence.' "

Alabama Power, 751 So. 2d at 496.

After a jury found in favor of the Murrays, APCo argued on appeal that the trial court erred in giving an instruction on spoliation. This Court stated:

> "In May v. Moore, 424 So. 2d 596 (Ala. 1982), this Court held:
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> > " 'Proof may be made concerning a [party's] purposefully and wrongfully destroying a document which he knew was supportive of the interest of his opponent, whether or not an action involving such interest was pending at the time of the destruction. See Gamble, McElroy's Alabama Evidence § 190.05 (3d ed. 1977). Additionally, the spoliation, or attempt to suppress material evidence by a party to a suit, favorable to an adversary, is sufficient foundation for an inference of his guilt or negligence. Southern Home Insurance Co. of the Carolinas v. Boatwright, 231 Ala. 198, 164 So. 102 (1935); see also Gamble, McElroy's Alabama Evidence § 190.02 (3d ed.1977).'
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> "424 So. 2d at 603.

> "The Murrays contend that evidence regarding the condition of the surge arrester was vital to their case against APCo. Further, claim the Murrays, APCo knew, when it was removing the surge arrester, that the Murrays' potential claim against it depended, in part, on the condition of the surge arrester; thus, they say, the Seale Road surge arrester was evidence that APCo 'knew was supportive of the interest of [its] opponent[s].'
>
> "These contentions, say the Murrays, when viewed in the context of the inconsistent testimony of Jeff Roper and Bill Obert and the statements of the Murrays' neighbors with regard to electrical appliances in their homes that they say were destroyed as a result of the same power surge, provided a sufficient foundation for the jury charge on the doctrine of spoliation. See Campbell v. Williams, 638 So. 2d 804 (Ala. 1994). Alabama Pattern Jury Charge 15.13 requires that the fact-finder be reasonably satisfied from the evidence that spoliation has occurred. The record contains sufficient evidence to support the trial court's giving this charge and allowing the jury to determine whether that evidence also supported a reasonable inference of APCo's 'guilt, culpability, or awareness of [its] negligence.' "

Alabama Power, 751 So. 2d at 497.

The plaintiffs did not demonstrate below, and they have not demonstrated to this Court, why a similar jury instruction would not be adequate to protect their interests, assuming a proper evidentiary foundation is laid during trial. Although we can conceive a circumstance where it could be proper to strike all defenses of a defendant based on

spoliation of the evidence, in most circumstances, a jury instruction on an inference of guilt would suffice to protect the interest of the plaintiff and the fundamental fairness of the proceedings. See Alabama Power, Campbell, Rivers, and Sanders, supra.

In the context of cases involving alleged spoliation of the evidence, this Court has repeatedly recognized " 'a long-established and compelling policy objective of affording litigants a trial on the merits whenever possible.' " Hartung, 279 So. 3d at 1106 (quoting Iverson, 553 So. 2d at 89 and citing Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600 (Ala. 1988), and Jones v. Hydro-Wave of Alabama, Inc., 524 So. 2d 610 (Ala. 1988)). Accordingly, we must conclude that the trial court exceeded its discretion in striking the Board's defenses and entering a partial summary judgment establishing the Board's liability to the plaintiffs based on spoliation.

Conclusion

The Board has established: a clear legal right to an order directing the trial court to vacate the January 17, 2020, order striking its defenses and establishing its liability to the plaintiffs; the trial court's refusal to

vacate its order; the absence of another adequate remedy; and, the properly invoked jurisdiction of this Court. See Ex parte Vance, 900 So. 2d at 397. Thus, the Board has demonstrated that it is entitled to the writ of mandamus. Accordingly, we grant the petition, issue the writ, and order the trial court to vacate its January 17, 2020, order.

PETITION GRANTED; WRIT ISSUED.

Bolin, Wise, Sellers, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.

Parker, C.J., and Mendheim, J., dissent.

MENDHEIM, Justice (dissenting).

I respectfully dissent. I disagree with the main opinion's conclusion that The Water Works and Sewer Board of the City of Anniston ("the Board") has demonstrated that an appeal is not an adequate remedy in this case. As the main opinion notes:

> "'"'" Mandamus is a drastic and extraordinary writ to be issued only where there is[, among other things,] ... the lack of another adequate remedy ...."'" Ex parte Sears, Roebuck & Co., 895 So. 2d 265 (Ala. 2004) (quoting Ex parte Mardis, 628 So. 2d 605, 606 (Ala. 1993) (quoting in turn Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990))).'"

Ex parte Vance, 900 So. 2d 394, 397 (Ala. 2004). Stated differently, "[i]t is well settled that mandamus is an extraordinary writ to be issued only in situations where other relief is unavailable or inadequate and that it is not a substitute for the appellate process. Continental Oil Co. v. Williams, 370 So. 2d 953 (Ala. 1979)." Ex parte Drill Parts & Serv. Co., 590 So. 2d 252, 253 (Ala. 1991).

Ex parte Drill Parts & Service is instructive in determining whether the Board had available to it an adequate remedy. In Ex parte Drill Parts & Service, Joy Manufacturing Company ("JMC") sued Drill Parts &

Service Company ("DP&SC") alleging, among other things, that DP&SC had misappropriated its trade secrets. After the trial court entered a preliminary injunction in favor of JMC, JMC filed a motion for a partial summary judgment as to its misappropriation-of-trade-secrets claim; JMC sought a judgment only as to liability on this one claim. The trial court granted JMC's partial-summary-judgment motion, determining that DP&SC was liable, and set the matter for a hearing as to damages.

After the trial court refused to certify the matter for a permissive appeal under Rule 5, Ala. R. App. P., DP&SC petitioned this Court for a writ of mandamus, requesting that this Court set aside the trial court's order. This Court refused to consider DP&SC's mandamus petition, stating, in pertinent part:

> "We find it unnecessary to determine with respect to this petition whether [the trial court] erred in entering the partial summary judgment in favor of [JMC] on the issue of [DP&SC's] liability for misappropriating trade secrets and setting a hearing for a determination of damages. It is well settled that mandamus is an extraordinary writ to be issued only in situations where other relief is unavailable or inadequate and that it is not a substitute for the appellate process. Continental Oil Co. v. Williams, 370 So. 2d 953 (Ala. 1979). [DP&SC] could not appeal [the trial court's] interlocutory partial summary judgment in favor of [JMC] and

> the order setting a hearing for a determination of damages, pursuant to Rule 5, [Ala. R. App. P.]; nevertheless, [DP&SC] ha[s] an adequate remedy by appeal once a final judgment is entered in this case. ... In the present case, after over eight years of litigation, a partial summary judgment, albeit interlocutory in nature, was entered against [DP&SC] on the issue of liability for misappropriating trade secrets; thus, only the question of damages is left to be resolved. With the case in this posture, [DP&SC] ha[s] an adequate remedy by appeal once [the trial court] enters a final judgment. Accordingly, mandamus is not the appropriate means of review in this case."

Ex parte Drill Parts & Service, 590 So. 2d at 253-54.

In the present case, as in Ex parte Drill Parts & Service, the only issue left to be resolved as to the plaintiffs' claims against the Board is the issue of damages. Mandamus is not the appropriate means of review of the partial summary judgment entered by the circuit court. The Board has available to it an adequate remedy by appeal once the circuit court enters a final judgment in this case. Accordingly, given the posture of this case, I dissent.