[Cite as *Allstate Ins. Co. v. Pittman*, 2015-Ohio-699.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

ALLSTATE INSURANCE COMPANY	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 26330
	:	
v.	:	Trial Court Case No. 2013-CV-2647
	:	
DEWAYNE K. PITTMAN, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 27th day of February, 2015.

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WELBAUM, J.

{¶ 1} Plaintiff-Appellant, Allstate Insurance Company ("Allstate") appeals from a summary judgment rendered in favor of Defendant-Appellee, Dewayne Pittman d/b/a Pittman Home Improvement ("Pittman"). In support of its appeal, Allstate contends that the trial court erred in failing to construe the evidence in its favor. Allstate further contends that the court erred in granting summary judgment based on lack of causation, and in excluding Allstate's causation evidence as a sanction for alleged spoliation of evidence.

{¶ 2} We conclude that the trial court erred by engaging in conjecture and by construing the facts in favor of the moving party, contrary to summary judgment requirements. The trial court also erred in excluding Allstate's causation evidence as a sanction for alleged spoliation. The evidence in question was available for inspection and was not damaged by Allstate during testing. More importantly, even if Pittman established the initial elements of spoliation, Allstate met its burden of showing lack of prejudice to the defendant. Specifically, Pittman's defense was that he never repaired or had any contact with the product that caused the leak. Therefore, the cause of the leak would not have been critical to his defense. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for further proceedings.

I. Facts and Course of Proceedings

{¶ 3} At all times relevant to this action, Dr. Laila Gomaa ("Gomaa") owned a home that was insured by Allstate under a comprehensive home owners' insurance policy. On

June 26, 2012, Gomaa returned home after a trip to California, and upon entering the house, heard something swishing or something strange going on. The door to the main floor half-bath was partly closed, and when Gomaa opened the door, something splashed in her face from beneath the toilet. Water was splashing full-force, like from a fountain about three feet high, toward the door opening. The water level in the bathroom was about two inches high.

{¶ 4} The water was coming from an area below the toilet tank. Gomaa ran over and turned off the shut-off valve under the pipe that led to the tank. When Gomaa went to shut the valve, she saw that water was coming from underneath a plastic valve (later identified as a coupling nut) that was on top of a copper pipe. The other end of the pipe was not leaking; water was only coming from the junction of the plastic nut and the copper pipe.

{¶ 5} When Gomaa started to step back into the living room, she noticed that the carpet was already soaking wet and splashing water. The water was almost to the level of half her foot. Because she thought the only problem was in the bathroom, Gomaa went down to the basement to get her wet vac. As she did so, she saw water dripping like “Niagara Falls” from underneath the bathroom, over the furnace, stairs, and the bottom of the stairs. The water was slippery and slimy, and was up to her ankles. As soon as Gomaa put her foot on the basement floor, she slipped. After taking a few more steps by holding onto a table, she slipped again, and broke her wrist. Gomaa then went upstairs and called Dewayne Pittman, who had done repair and maintenance work for her in the past.

{¶ 6} According to Gomaa, Pittman had worked on her home between 2005 and

2012. Pittman was a patient in her medical practice, and she had hired him to do various jobs, sometimes paying him in cash, and sometimes by check. Gomaa had the home built in 2000, and according to her, no one other than Pittman had ever done any repairs. Gomaa claimed that Pittman had previously repaired leaks in all three of her bathrooms. The last leak to be repaired was in the downstairs half-bath. Gomaa thought this repair occurred either around Easter 2012, or in October 2011. At one of those times, Gomaa's daughter was visiting and told Gomaa that there was a leak in the half-bath. The leak was not dripping constantly, but was leaving white marks from the water deposits. Gomaa could not tell where the leak was coming from, but the wet area was right under the supply pipe's location under the toilet tank. According to Gomaa, Pittman went to his truck and brought in a white plastic valve (coupling nut) that he showed to her. He also had pliers and a wrench. Pittman went into the bathroom, came back out, and told her he had changed the valve.

{¶ 7} In contrast, Pittman denied ever having worked on any of the toilet supply lines in Gomaa's home, and also denied that Gomaa had ever called him to say that her toilet was running or leaking. He indicated that on one occasion, when he was at Gomaa's house, Gomaa said her toilet was running. At that point, Pittman adjusted the ball valve inside the toilet tank in the half-bath, and adjusted the water level down to about one-half inch below the neck. This work was all done inside the tank, not to the supply line or anything connected to the supply line. Pittman also indicated that he did not have formal training in plumbing; his knowledge was based on job experience.

{¶ 8} After she fell, Gomaa called Pittman and told him she had a water leak. She asked him to come help clean it up. He was not able to come immediately, but arrived

about two hours later. An arrangement was made to leave the house unlocked so that Pittman could get in. However, the rescue squad apparently locked the house when they took Gomaa to the hospital, and Pittman could not get in. Gomaa also called Allstate from the emergency room to report the leak.

{¶ 9} When Gomaa arrived home from the emergency room later that day, nothing had been cleaned. She then called Pittman to find out why he had not come. Both Gomaa and Pittman agree that they thereafter had an unpleasant telephone conversation, or series of conversations. However, they disagreed on the details. Gomaa claimed that Pittman was angry with her because she had not hired him to replace her roof, which had been damaged in a hail and windstorm in 2011, and in turn, she was angry because his sloppy work had caused the damage to her home. In contrast, Pittman claimed that Gomaa was angry because he had not cleaned up the property, and began making threats that she was going to "get him." Pittman did not return to Gomaa's property thereafter.

{¶ 10} The following day, Allstate sent out a company, SERVPRO, to extract the water. At that time, severe damage was discovered.

{¶ 11} Gomaa wanted to replace the valve (coupling nut) as soon as possible. She called an individual named Al Black, who had also been a patient in her practice. According to Gomaa, Black had done some lawn work for her but had never done any repairs inside her home. Gomaa had Black replace the coupling nuts on all three toilets in her home because she did not want to take a chance on further leaks. Black took the supply line and valve off the toilet in the half-bath, and gave them to Gomaa. Gomaa then gave the supply line and valve to Dale Carman, an Allstate adjuster, on July 10,

2012, when he came out to inspect the property.

{¶ 12} When Carman visited the property, Gomaa provided him with a repair history that included a discussion of Pittman's involvement. Carman did a visual inspection of the supply line, which was made of copper pipe. He was trying to determine if there were any fractures in the copper pipe, and did not see any. A metal bolt was on one end of the supply line, and there were no fractures or teeth marks on the bolt, such as would have been made by a wrench. A white nylon coupling nut was on the other end of the supply line, and Carman was able to see fractures or cracks in the white coupling nut. According to Carman, over-torquing of a coupling nut can cause a fracture either when the tightening occurs or it can have no effect on the coupling for months, and then, suddenly, a fracture can occur. Pittman also indicated that he had seen this type of break frequently over the years. He stated that it can be caused by age or by over-tightening.

{¶ 13} Pittman additionally stated that although the manufacturer indicates that coupling nuts should be tightened by hand, a wrench must be used because, otherwise, the nut cannot be tightened enough to prevent leaks. Pittman testified that he, personally, did not use the type of supply line assembly used at Gomaa's house because it is subject to breaking and the copper pipe is difficult to work with. He stated that instead, he would use a wire-braided supply line with steel nuts on both the top and bottom.

{¶ 14} After receiving the supply line and coupling nut, Carman took them to Connie Sinko, the Allstate subrogation coordinator. Carman knew what had caused the leak, but wanted an expert opinion to support his conclusion. Allstate then sent the

supply line and coupling nut to Interscience, Inc. ("Interscience"), which received the products on July 25, 2012. Interscience was asked to non-destructively examine the products to determine the cause of the leak. No destructive testing was performed, and the toilet supply line assembly was then returned to Allstate's evidence control room in Roanoke, Virginia, where it was maintained.

{¶ 15} According to Curt Lessl of Interscience, the toilet supply line was examined, and revealed two hairline fractures in the ballcock coupling nut. The coupling nut was examined with the aid of low-power magnification, and abrasion damage was observed on the exterior surfaces of the nut, consistent with repeated application of a gripping tool like pliers in the tightening direction. Residue of a greasy substance that appeared to be pipe dope lubricant or a similar lubricant was also observed on the coupling nut threads. No other damage to the supply line was observed.

{¶ 16} In Lessl's professional opinion, the failure of the toilet supply line was caused by a partial circumferential fracture of the ballcock coupling nut at the root of the base thread, and the location and nature of the failure was consistent with excessive tensile stress on the threads due to over-tightening. In turn, the over-tightening was facilitated by the use of a gripping tool and thread lubricant. Lessl also indicated that manufacturers of plumbing components typically caution against the use of thread lubricants, which can reduce friction and facilitate over-tightening. He also stated that plastic ballcock manufacturers instruct that coupling nuts are to be tightened by hand only, or at most, wrench-tightened, with no more than a one-quarter turn past hand-tightening.

{¶ 17} Allstate subsequently filed suit against Pittman in April 2013, alleging that

Pittman was liable under theories of breach of contract and negligence for the damage to Gomaa's home, for which Allstate had paid Gomaa approximately $186,832. In December 2013, Pittman filed a motion for summary judgment, contending that Allstate could not prove causation. In this regard, Pittman argued that Gomaa did not see fractures in the coupling and that the damage could have been caused by Black, who may have accidentally tightened the coupling when trying to remove it after the loss. Pittman also argued that Allstate should be precluded from offering evidence on causation as a sanction for spoliation.

{¶ 18} The trial court agreed with Pittman, and precluded Allstate from presenting any evidence on causation. Based on the lack of causation evidence, the trial court then granted summary judgment in Pittman's favor. Allstate now appeals from the judgment of the trial court.

II. Alleged Error in Construing Evidence

{¶ 19} Allstate's First Assignment of Error states that:

> The Trial Court Failed to Construe the Evidence of Record and All Reasonable Inferences to be Drawn Therefrom in Favor of Allstate, as Required by Civ.R. 56, and Thereby Erred in Granting Summary Judgment to Pittman on Allstate's Subrogation Claims.

{¶ 20} Under this assignment of error, Allstate contends that the trial court improperly weighed the evidence and incorrectly construed the evidence in favor of Pittman by concluding that it was "entirely possible that Black applied torque pressure in the incorrect direction to remove the coupling and created the abrasions and/or fracture"

on the coupling nut. Doc. #40, Decision, Order, and Entry Sustaining Motion of Defendant, Dewayne Pittman d/b/a Pittman Home Improvement for Summary Judgment on All Claims, pp. 6-7. In response, Allstate argues that it is also entirely plausible that Black loosened the coupling nut and never over-tightened it. More importantly, Allstate argues that the trial court's conclusion ignores the testimony of Allstate's expert, who indicated that the supply line was leaking when it was initially discovered – before Black's removal. This means that the supply line had already failed because of over-tightening.

{¶ 21} "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." (Citation omitted.) *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999). "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." (Citations omitted.) *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.)

{¶ 22} We have previously stressed that:

> The main purpose of the summary judgment procedure is to enable a party to go behind the allegations in the pleadings and assess the proof in order to see whether there is a genuine need for trial. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46 [8 O.O.3d 73]. Any inferences to be drawn from the underlying facts contained in depositions, affidavits and exhibits must be viewed in the light most

> favorable to the party opposing the motion. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433, 424 N.E.2d 311 [21 O.O.3d 267]. Although the summary judgment procedure facilitates prompt disposition of cases involving no genuine issues of material fact, the remedy should be applied sparingly and only in those cases where the justice of its application is unusually clear. Consequently, the primary function of a trial court in reviewing a motion for summary judgment is to determine whether triable issues of fact exist, not the sufficiency of those facts. Resolving issues of credibility or reconciling ambiguities and conflicts in witness' testimony is outside the province of a summary judgment hearing. *Duke v. Sanymetal Products Co.* (1972), 31 Ohio App.2d 78, 83, 286 N.E.2d 324 [60 O.O.2d 171].

Napier v. Brown, 24 Ohio App.3d 12, 13-14, 492 N.E.2d 847 (2d Dist.1985). *Accord Green v. Lemarr*, 139 Ohio App.3d 414, 425, 744 N.E.2d 212 (2d Dist.2000). *See also, e.g.*, *Mishler v. Hale*, 2d Dist. Montgomery No. 25962, 2014-Ohio-5805, ¶ 37, quoting *Wheeler v. Johnson*, 2d Dist. Montgomery No. 22178, 2008-Ohio-2599, ¶ 28 (stressing that trial courts must not weigh evidence or judge credibility, and " ' "must consider all the evidence and reasonable inferences that can be drawn from the evidentiary materials in favor of the nonmoving party" ' ").

{¶ 23} With these standards in mind, we next consider whether the trial court improperly construed the evidence. As was noted, Allstate sued Pittman under theories of negligence and breach of contract to perform services in a workmanlike manner. Because this was a subrogation suit, Allstate, as a subrogee, "stands in the shoes of the

subrogor and is entitled to all the rights and remedies available to the subrogor, to the extent of the subrogee's interest." *Allstate Ins. Co. v. Cope*, 2d Dist. Montgomery No. 20179, 2004-Ohio-2603, ¶ 13, citing *Chemtrol Adhesives, Inc. v. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 42, 537 N.E.2d 624 (1989).

{¶ 24} In order to establish a cause of action for negligence against Pittman, Gomaa, and therefore, Allstate, would have had to prove " '(1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting therefrom.' " *Gibbs v. Speedway*, LLC, 2014-Ohio-3055, 15 N.E.3d 444, ¶ 11 (2d Dist.), quoting *Colville v. Meijer Stores Ltd*., 2d Dist. Miami No. 2011-CA-011, 2012-Ohio-2413, ¶ 23. (Other citation omitted.)

{¶ 25} Similarly, " 'The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff.' " *Winner Bros., L.L.C. v. Seitz Elec., Inc*., 182 Ohio App.3d 388, 2009-Ohio-2316, 912 N.E.2d 1180, ¶ 31 (2d Dist.), quoting *Flaim v. Med. College of Ohio*, 10th Dist. Franklin No. 04AP-1131, 2005-Ohio-1515, ¶ 12. "A contract to perform work imposes on the contractor the duty to perform in a workmanlike manner." *River Oaks Homes, Inc. v. Twin Vinyl, Inc.*, Lake App. No. 2007–L–117, 2008-Ohio-4301, ¶ 29, citing *Mitchem v. Johnson*, 7 Ohio St.2d 66, 218 N.E.2d 594 (1966), paragraph three of the syllabus. " 'Workmanlike manner' has been defined as the way work is customarily done by other contractors in the community." (Citation omitted.) *Jones v. Davenport*, 2d Dist. Montgomery No. 18162, 2001 WL 62513, *8 (Jan. 26, 2001).

{¶ 26} In the case before us, genuine issues of material fact existed under both of

these theories, and the trial court erred by construing the evidence against Allstate and by basing its decision on conjecture. As a preliminary matter, we note that there were factual issues regarding whether Pittman had performed work on the toilet supply line. Gomaa maintained that he did, and that he, in fact, had replaced the plastic coupling nut some months before the loss. In contrast, Pittman denied having performed any work pertaining to the toilet supply lines in Gomaa's house. The trial court was required to construe this evidence in favor of Gomaa, and to conclude, for purposes of summary judgment, that Pittman had installed the plastic coupling nut on the supply line during a period ranging from a few months to eight months before the incident that caused the damage.

{¶ 27} Furthermore, there was no evidence that Black over-tightened the coupling nut when he removed it and caused the fracture after the loss. In fact, the only evidence is to the contrary. Specifically, the supply line assembly was leaking, causing the damage, *before* Black was asked to remove the old assembly and install a new supply line. (Emphasis added.) The only defects that were ever observed on any of the components of the supply line assembly were the fractures on the coupling nut. The rest of the supply line assembly, including the copper pipe and bolt on the other end, was intact and free of any defects, meaning that the leak could only have come from the fractures in the coupling nut. For example, if there had been a split in the copper pipe as well, one could conclude that Black may have caused the damage to the coupling nut. However, as noted, there was no evidence of any such damage to any of the component parts other than the coupling nut.

{¶ 28} Moreover, Pittman has never suggested, and there is no evidence, that the

supply line assembly given to Allstate was not the one that was on the toilet when the leak occurred. According to the testimony, Black gave the product to Gomaa when he removed it, and she gave it to the Allstate claims adjuster. Allstate then sent the product to Interscience for analysis. Accordingly, the trial court improperly construed the evidence against Allstate and engaged in improper speculation by concluding that Black could have caused the damage to the coupling nut.

{¶ 29} In arguing that summary judgment was proper, Pittman points to Gomaa's testimony that the water was coming from the spot where the plastic coupling was over the copper pipe, and that Gomaa was not able to see a fracture or crack in the pipe or anything else; she just saw water coming." Appellee's Brief, p. 4. However, these facts are not inconsistent with the fact that the plastic coupling nut was fractured. In the first place, the coupling was, in fact, installed over, or at one end of the copper pipe. Furthermore, Allstate's expert indicated that the cracks were hairline fractures. He also indicated that Gomaa would not have been expected to observe the fracture because water was gushing out of the line and would have obscured her ability to see the fractures. Whether one accepts this as a permissible "expert" conclusion or not, the fact is that Gomaa stated that she just saw water coming. A reasonable inference is that the fractures were not visible through the water. We also note that Gomaa was neither a plumber nor an expert; she was a layperson experiencing some quite startling events.

{¶ 30} As a final matter, as will be discussed in more detail below, Pittman's defense was that he never repaired any supply lines at Gomaa's house. Therefore, the cause of a leak on a product that he never repaired or had contact with would not have been critical to his defense.

{¶ 31} Based on the preceding discussion, we agree with Allstate that the trial court erred by engaging in conjecture and in construing the facts against Allstate. Accordingly, the First Assignment of Error is sustained.

III. Lack of Causation

{¶ 32} Allstate's Second Assignment of Error states that:

> The Trial Court Erred in Granting Summary Judgment to Pittman Based on Lack of Causation Because: (a) Allstate's Insured Testified that Prior to the Toilet Supply Line Failing[,] Pittman Was the Only Person Who Ever Performed Any Work on Her Toilet; (b) Allstate's Engineering Expert Specifically Stated that the Cause of the Toilet Supply Line's Failure Was Over-Tightening of the Coupling Nut; and (c) the Removal of the Toilet Supply Line by Al Black After it had Failed Would Have Necessarily Involved the Loosening of the Coupling Nut, Not Tightening of It.

{¶ 33} Under this assignment of error, Allstate argues that the trial court erred in finding a lack of proximate cause, based on Gomaa's failure to see the fracture on the coupling nut. As we read the trial court's decision, the finding of a lack of causation resulted from the court's spoliation sanction, which excluded any evidence from Allstate on causation. In fact, most of the court's discussion centered on that point. *See* Doc. #40, Decision, Order, and Entry Sustaining Motion of Defendant, Dewayne Pittman d/b/a Pittman Home Improvement for Summary Judgment on All Claims, pp. 5-8.

{¶ 34} " 'Causation' refers to the cause and effect relationship between tortious conduct and a loss that must exist before liability for that loss may be imposed." *Dobran*

v. Franciscan Med. Ctr., 149 Ohio App.3d 455, 2002-Ohio-5378, 777 N.E.2d 907, ¶ 12 (2d Dist.), *rev'd on other grounds*, *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St.3d 54, 2004-Ohio-1883, 806 N.E.2d 537. The Supreme Court of Ohio has indicated that " '(t)he term "proximate cause," is often difficult of exact definition as applied to the facts of a particular case. However, it is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability.' " *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287, 423 N.E.2d 467 (1981), quoting *Clinger v. Duncan*, 166 Ohio St. 216, 217, 223, 141 N.E.2d 471 (1957). "One is thus liable for the natural and probable consequences of his negligent acts." *Id.*, citing *Foss-Schneider Brewing Co. v. Ulland*, 97 Ohio St. 210, 119 N.E. 454 (1918).

{¶ 35} As we indicated in the discussion of the First Assignment of Error, the facts, construed most strongly in Allstate's favor, as required, indicate that genuine issues of material fact exist regarding whether the damage was proximately caused by Pittman's alleged negligent acts or failure to perform duties in a workmanlike manner. Accordingly, to the extent that the trial court's decision may be read as having rejected the existence of genuine issues of material fact on the issue of proximate cause, the Second Assignment of Error is sustained.

IV. Spoliation Sanctions

{¶ 36} Allstate's Third Assignment of Error states that:

> The Trial Court Erred in Granting Summary Judgment to Pittman

Based on Spoliation of Evidence, and the Exclusion of Allstate's Causation Evidence, Because the Toilet Supply Line and Coupling Nut Which Failed Were Never Destroyed, Were Maintained and Retained by Allstate, and Were Readily Available for Inspection, and Because There Was No Bad Faith on the Part of Allstate or Its Insured, and No Prejudice to Pittman.

{¶ 37} Under this assignment of error, Allstate contends that Pittman did not establish any of the elements of spoliation. Allstate, therefore, contends that the trial court erred by refusing to allow Allstate to present causation evidence and by granting summary judgment based on a lack of causation.

{¶ 38} In *Hetzer-Young v. Elano Corp*., 2d Dist. Greene No. 2013-CA-32, 2014-Ohio-1104, we discussed the spoliation doctrine at length. We initially noted that:

> "In product liability cases where evidence is intentionally or negligently 'spoiled' or destroyed by a plaintiff or his expert before the defense has an opportunity to examine that evidence for alleged defects, a court may preclude any and all expert testimony as a sanction for 'spoliation of evidence.' In such cases, the intent of the spoliator in destroying or altering evidence can be inferred from the surrounding circumstances. In other words, intent can be inferred from the fact that the evidence was destroyed prior to the commencement of any litigation against the defendant and there is only a potential for litigation. Therefore, the plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."

Id. at ¶ 29, quoting *Cincinnati Ins. Co. v. General Motors Corp*., 6th Dist. Ottawa No.

94OT017, 1994 WL 590566, *3 (Oct. 28, 1994).

{¶ 39} We further noted that in such situations, " 'the defendant must first establish (1) that the evidence is relevant; (2) that the plaintiff's expert had an opportunity to examine the unaltered evidence; and (3) that, even though the plaintiff was contemplating litigation against the defendant, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the defense.' " *Hetzer-Young* at ¶ 30, quoting *Cincinnati Ins. Co.* at *4. (Other citation omitted.) After the defendant makes this threshold showing:

> " '[T]he burden then shifts to the proponent of the evidence to prove that the other side was not prejudiced by the alteration or destruction of the evidence. The test for prejudice is whether there is a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered, and which was not otherwise obtainable, would produce evidence favorable to the objecting party.' " *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co*., 174 F.3d at 804, citing *Bright v. Ford Motor Co*. (1990), 63 Ohio App.3d 256, 578 N.E.2d 547. In applying this test, the trial court " 'must determine the degree of prejudice to the defendant and impose a sanction commensurate with that degree of prejudice.' "

Hetzer-Young at ¶ 30, quoting *Loukinas v. Roto–Rooter Servs. Co*., 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 14 (1st Dist.). (Other citation omitted.)

{¶ 40} We review spoliation decisions for abuse of discretion. *Hetzer-Young*, 2d Dist. Greene No. 2013-CA-32, 2014-Ohio-1104, at ¶ 31. (Citations omitted.) An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or

unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[A]n abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, 876 N.E.2d 1312, ¶ 11 (2d Dist.), citing *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 300, 741 N.E.2d 155 (2d Dist.2000). (Other citation omitted.) "Decisions are unreasonable if they lack a sound reasoning process." *Id.*

{¶ 41} In prohibiting causation evidence as a sanction, the trial court concluded that the removal of the supply line assembly without documenting its condition or without having provided Pittman with the ability to examine it prior to removal precluded Pittman from defending himself. However, the court's decision was not based on sound reasoning.

{¶ 42} As an initial matter, Pittman was made aware of the leak and was given the opportunity to come to the scene immediately after the incident occurred. At that time, he would have been able to make whatever observations he desired. He did attempt to come, but due to a mix-up that was not the fault of either party, the doors were locked and he could not get in. During a conversation with Gomaa later that night, Pittman was made aware, or at least there is a genuine issue of material fact whether he was made aware, that his plumbing work was being questioned as a cause of the leak. Pittman did not ask to return and view the supply line; instead, he asked Gomaa not to call him anymore. Gomaa then asked another individual to replace the supply line in the half-bath, as well as her other bathrooms, due to her fear that another leak would occur. Thus, it would be difficult to conclude that Pittman was not given an opportunity to examine the supply line while it was in place.

{¶ 43} Nonetheless, the emphasis on whether the supply line was observed while attached is misplaced and is basically irrelevant. As was noted above, no part of the supply line assembly, other than the plastic coupling nut, showed any evidence of fracture or a defect. Because the leak occurred prior to removal of the line, the fracture had to exist at that time; no other potential causes of the leak have been advanced by anyone. The only evidence is that the water was coming from outside the toilet tank, and there is no evidence that it was coming from anywhere other than the supply line.

{¶ 44} Furthermore, Allstate performed only non-destructive testing, and the entire supply line assembly was available to Pittman for inspection and testing. Thus, the supply line assembly was in the same condition as it was when Allstate received it, and no damage was done. Pittman was free to request access to the supply line and to conduct his own examination, but there is no indication that he ever attempted to do so.

{¶ 45} In addition, Pittman and his attorney were given contact information for Al Black, the individual who removed the supply line. *See* Deposition of Laila Gomaa, p. 166. Again, there is no indication in the record that Pittman attempted to subpoena Black in order to find out what Black observed and what he did when he removed the supply line. Pittman was not prevented from uncovering this information; he simply chose not to do so. As a result, we attach no weight to the argument that the condition of the supply assembly line prior to removal was not documented.

{¶ 46} Unlike the typical spoliation case, Pittman is not arguing that the product causing injury is incomplete or damaged based on the plaintiff's actions, and, therefore, precludes determination of causation – he is arguing that the actions of a third party, Black, may have altered the product after the loss. Again, Pittman had contact

information for Black and was not precluded from uncovering information. However, as we have also previously stressed, the only damage to the supply line assembly had to have occurred before Black removed it. Otherwise, the leak could not have occurred.

{¶ 47} Most importantly, however, Pittman's position in this case is not that his actions in repairing the supply line assembly failed to cause injury; Pittman's position, instead, is that he did never repaired or touched any of the supply lines in Gomaa's house. *See* Deposition of Dewayne Pittman, pp. 43-44 and pp. 54-56. From this standpoint, observation of the supply line after the loss would not have aided Pittman's defense. Whether the incorrect installation of the plastic coupling nut occurred at the time the house was built (as Pittman implied in his deposition, at pp. 46-47), or may have been the work of another contractor that Gomaa used (as Pittman also implied in his deposition, at pp. 44-45), Pittman's defense did not hinge on the cause of the leak. His defense, as noted, was based on the fact that he never did any such work in Gomaa's home.

{¶ 48} In view of these facts, even if we concluded that Pittman established the initial requirements of spoliation, Allstate met the burden of establishing that Pittman's defense was not prejudiced. *Hetzer-Young*, 2d Dist. Greene No. 2013-CA-32, 2014-Ohio-1104, at ¶ 30.

{¶ 49} Based on the reasons stated above, the trial court erred in applying the sanction of excluding Allstate's evidence on causation. Accordingly, the Third Assignment of Error is sustained.

V. Conclusion

{¶ 50} Having sustained all of Allstate's assignments of error, the judgment of the trial court is reversed, and this cause is remanded to the trial court for further proceedings.

. . . . . .

FROELICH, P.J. and HALL, J., concur.

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