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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
JANUARY 14, 2009
(FILE NO. 2008-SC-0530-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002373-MR

GARY LEMASTER AND LARRY LEMASTER

APPELLANTS

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 01-CI-00214

FLUKE CORPORATION

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,¹ SENIOR
JUDGE.

COMBS, CHIEF JUDGE: Gary LeMaster and Carl “Larry” LeMaster appeal from
a summary judgment and an order of the Perry Circuit Court dismissing their

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

products liability claims against Fluke Corporation. The case involved injuries that the appellants sustained in an explosion at a coal processing operation in Perry County, Kentucky. In their complaint, the LeMasters alleged that Fluke manufactured and put into the stream of commerce a defective and unreasonably dangerous voltage meter which was a substantial factor in causing their injuries. The trial court dismissed the claims on the ground that the applicable statute of limitations had expired before they filed the complaint. After our review of the extensive record, we conclude that the doctrine of equitable estoppel properly operated to prevent Fluke from asserting the defense of statute of limitations. Consequently, we vacate the summary judgment and remand for further proceedings.

On the morning of April 25, 2000, Gary LeMaster, Larry LeMaster, and Travis Arnett, employees of Eagle Electrical Contractors, Inc., were dispatched to Typo Tipple, a coal processing facility owned by Leslie Resources, Inc. Employees of Leslie Resources had been unable to start the facility's coal crusher unit to process the morning's run of mine product. Smoke was coming from the facility's motor control center. Believing that there was an electrical failure, the coal workers contacted Eagle Electrical for assistance.

Arnett and the LeMasters entered the control center of the crusher unit to check out the circuit breakers. Arnett advised the employees of Leslie Resources that he would have to shut off power in the building. The facility was then evacuated. At Arnett's instruction, Gary LeMaster disengaged the circuit

breaker labeled “MAIN.” The facility lost lights and power to the remaining machine components. Arnett was carrying a hand-held voltage meter which indicated that there was no electricity flowing to the crusher unit’s breaker; nonetheless, the unit was still energized. With the aid of a flashlight held by Gary LeMaster, Arnett had just begun to work inside the cabinet that housed the crusher breaker when an electrical arc developed and blasted through the cabinet. The flash was so sudden and intense that Arnett was severely burned and suffered permanently disabling injuries. Gary LeMaster and Larry LeMaster were injured as well.

An investigation was conducted by the U.S. Department of Labor Mine Safety and Health Administration (MSHA), and Arnett’s tools were removed from the site for examination. The inspection indicated that Arnett’s voltage meter was in good working order following the explosion. MSHA’s report concluded that the explosion occurred as a result of inadequate identification of the circuit breaker. Arnett’s tools remained in the custody of MSHA.

On April 23, 2001, Arnett and both of the LeMasters joined in a personal injury action against Leslie Resources.² The complaint included allegations of ordinary negligence, gross negligence, and statutory negligence. The plaintiffs alleged that the electrical circuit connecting the power source to the

² In August, 2001, American Interstate Insurance Company, the provider of workers’ compensation benefits to the plaintiffs, filed an intervening complaint in the action. The insurance company sought to recover the costs of benefits that it had paid to Arnett and to both of the LeMasters.

crusher unit breaker and to the crusher unit motor had been wired to bypass the main breaker. They believed that they had been injured as a result of the improperly wired or erroneously labeled circuit breakers. They also included an allegation that it had been Arnett's custom and practice to utilize a hand-held voltage meter as a precaution to retest the status of circuitry. In a deposition taken on August 29, 2001, Arnett stated that his Fluke 87-III electrical multimeter indicated that there was no voltage going into the breaker box.

In late August of 2001, the plaintiffs learned that some Fluke voltage meters were likely to give inaccurate readings under certain circumstances. On September 3, 2001, Arnett and the LeMasters filed an amended complaint charging that Fluke Corporation had manufactured and placed into the stream of commerce a faulty voltage meter. They alleged that the meter had been purchased by Arnett just months before the explosion and that it had failed to operate as designed, intended, and warranted. They claimed that its malfunction was a substantial factor in causing their injuries. The complaint included allegations of negligence and breach of warranty.

Fluke answered and denied the allegations of the complaint. It also asserted the statute of limitations as an affirmative defense. On February 1, 2002, Fluke filed a motion for summary judgment arguing that it was entitled to judgment as a matter of law because Arnett and the LeMasters had failed to assert their claims within the statutory period.

Arnett and the LeMasters opposed Fluke's motion for summary judgment. They acknowledged that their claims for negligence and strict liability under the Kentucky Products Liability Act were governed by the one-year statute of limitations as set forth at Kentucky Revised Statutes (KRS) 413.140. However, they contended that the limitations period had been tolled until March 2001. Fluke Corporation first disclosed the existence of defects in one of its voltage meter products in a recall notice issued in March 2001. That recall notice for the first time provided them a reasonable basis to believe that the injuries that they suffered may have been caused by the defective Fluke 87-III electrical multimeter. Until March 2001, they contended that no reasonably diligent consumer could have been expected to know that Arnett's Fluke voltage meter was highly likely to be defective. Under these particular circumstances, they invoked the benefit and applicability of the discovery rule. *Perkins v. Northeastern Log Homes*, 808 S.W.2d. 809 (Ky.App. 1991).

On May 20, 2002, the Perry Circuit Court denied Fluke's motion for summary judgment, concluding that there was a genuine issue of material fact: whether with reasonable diligence, the plaintiffs could have discovered that their injuries may have been caused by the Fluke voltage meter before Fluke issued its recall notice disclosing the possibility of a defect.³

On November 24, 2004, following a period of intense discovery, Fluke filed a second motion for summary judgment, again contending that the

³ A few days later, the parties agreed that the breach of warranty claims asserted by each of the LeMasters would be dismissed with prejudice.

plaintiffs' claims were barred by the statute of limitations. Fluke argued that the discovery rule was inapplicable because the plaintiffs should have been on notice from the sequence of events on the day of the accident that they might have a cause of action against the manufacturer of Arnett's voltage meter.

Arnett and the LeMasters again opposed the motion for summary judgment. Armed with the results of their discovery efforts, they argued that the statute of limitations had been tolled by Fluke's fraudulent concealment of the 87-III multimeter's defect. They contended that as early as 1991, Fluke knew that operating the 87 model multimeter at low-battery status could result in inaccurate voltage readings, thus posing a risk of grave danger to its user. Nonetheless, they argued that Fluke ignored its reporting obligation and failed to disclose the potentially dangerous condition of its product to the federal Consumer Product Safety Commission (CPSC). The plaintiffs contended that Fluke should not be permitted or entitled to rely on the statute of limitations defense since it had engaged in a fraudulent concealment of its product's defect. The trial court took the matter under advisement.⁴

In an order entered September 15, 2005, the trial court granted summary judgment in favor of Fluke with respect to the LeMasters' claims. However, the court denied the motion for summary judgment as to Travis Arnett, concluding that the statute of limitations had been tolled with respect to his claims against Fluke because he had suffered an extended period of mental incapacity as a

⁴ On January 26, 2005, each of the plaintiffs dismissed with prejudice all claims against Leslie Resources.

result of his injuries. As the order was not designated as final and appealable, the court retained jurisdiction of all claims. Kentucky Rules of Civil Procedure (CR) 54.02.

The action proceeded to trial on Arnett's claims. The jury found that the voltage meter was in a defective and unreasonably dangerous condition at the time that it was sold and that it was a substantial factor in causing Arnett's injuries. The jury also found that Arnett's 87-III multimeter was unreasonably dangerous since it lacked a sufficient notice or warning of its potential danger. On July 28, 2006, judgment was entered in Arnett's favor in the amount of \$2,049,397.50. Following disposition of post-trial matters, the court entered final judgment on October 11, 2006. On November 9, 2006, the LeMasters filed their notice of appeal of the trial court's summary judgment.

On appeal, the LeMasters argue that the trial court erred by granting summary judgment, again contending that Fluke should have been estopped from relying on the defense of the statute of limitations since it had fraudulently concealed the existence of the defect in the 87-III multimeter.

In reviewing a grant of summary judgment, our inquiry focuses upon whether the trial court correctly determined that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the

respondent to produce evidence at the trial warranting a judgment in his favor.”

Steelvest v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

In the interest of barring “stale claims arising out of transactions or occurrences which took place in the distant past,” Kentucky courts are diligent in enforcing statutes of limitations. *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992), *citing Armstrong v. Logsdon*, 469 S.W.2d 342, 343 (Ky. 1971). However, an estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false representation or fraudulent concealment. *Resthaven Memorial Cemetery, Inc. v. Volk*, 150 S.W.2d 908 (Ky. 1941). While proof of fraud ordinarily requires a showing of an affirmative act by the party charged, his silence under circumstances entailing a legally required duty to disclose may be sufficient to justify and – indeed to require – an equitable tolling of the statute. *Munday*, 831 S.W.2d at 912.

Kentucky courts have also acknowledged that an action may not accrue until a plaintiff has knowledge of sufficient facts to sustain a cause of action. Under the “discovery rule,” a cause of action will not accrue until the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) not only that he has been injured, but also that this injury may have been caused by the defendant’s conduct. *Perkins*, 808 S.W.2d at 809; *see also Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141 (2007).

As a manufacturer of consumer products, Fluke is regulated by the provisions of the Consumer Product Safety Act, 15 U.S.C. §2064(b). Those provisions require it to file a timely report with the CPSC whenever it receives information which reasonably supports the conclusion either that a product contains a defect that could create a substantial product hazard or that might create an unreasonable risk of serious injury or death to consumers. The LeMasters contend that Fluke's willful failure to disclose its voltage meter's defects to consumers through a proper report to the CPSC triggered an equitable tolling of the statute of limitation in this case.

Documents collected by the LeMasters during the course of discovery indicate that a Fluke representative was seriously concerned about the tendency of the 87-III multimeter to provide inaccurate indications of voltage when the unit's battery began to run low. That representative provided notice of his concerns to Fluke in several detailed memoranda prepared in 1991 – approximately nine years before the accident at issue. The LeMasters contend that as soon as Fluke became aware of potential problems with its voltage meter, it was bound by federal reporting requirements to **immediately** disclose to consumers that potential for serious harm. The LeMasters argue that they were entitled to rely on information provided by the Consumer Protection Agency and that Fluke's willful misconduct effectively misled them as to the product's safety and caused them to postpone their investigation of Arnett's voltage meter.

Fluke vigorously counters that the discovery rule should not toll the limitations period in this case. Fluke believes that in light of the sequence of events on the day of the accident, the LeMasters were on notice that “something” extraordinary had happened prior to the explosion. They were aware that Arnett had relied on his Fluke voltage meter and that the meter had indicated that the mechanism was not energized. Under these facts, they contend that the statute of limitations began to run from the date on which the injuries were actually sustained rather than from the date on which the plaintiffs discovered that they had a cause of action against Fluke; *i.e.*, the action accrued at the time of the accident.

As to the fraudulent concealment doctrine, Fluke believes that the cause of action was plainly discoverable from a timely analysis of Arnett’s voltage meter and that it did nothing to prevent the LeMasters from learning enough about the cause or causes of the explosion. In essence, Fluke contends that reasonable diligence on their part could have led to a timely filing of a complaint against the company as the manufacturer of a defective voltage meter. Their lack of due diligence was the **only** impediment to a timely filing of the action. Fluke argues that these facts do not support an equitable tolling of the statute and that the trial court correctly concluded that the doctrine of estoppel did not apply to prevent Fluke from asserting the defense based on the statute of limitations defense.

Fluke cites us to the decision of a federal court in *Hazel v. General Motors Corporation*, 863 F.Supp. 435 (W.D.Ky. 1994), upon which it relies heavily. *Hazel* was a products liability case in which the plaintiff claimed that the

defendant manufacturer of trucks had fraudulently concealed evidence tending to demonstrate a design defect inherent in its trucks; that it had kept confidential settlement agreements that had been reached in similar cases in order to prevent the wide circulation of information related to the purported design defect; and that it had taken other steps to minimize publicity concerning similar accidents involving the trucks. The federal court held that the statute of limitations would not be equitably tolled under these circumstances. It mused that it believed that other Kentucky courts (including state courts) might be reluctant to apply equitable tolling, reasoning that the standard required to weigh the reasonableness of the plaintiff's delay in filing was subjective in nature and therefore in conflict with the specificity inherent in statutes of limitations. Because of the necessarily subjective nature of the "reasonableness" standard, the court declined to apply estoppel to defeat the defense of a highly specific time frame announced in the pertinent statute of limitations.

The LeMasters have cited us to an opinion of the Supreme Court of Alaska in *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243 (AK. 1992). In *Palmer*, Alaska's highest state court considered whether the defendant-manufacturer's alleged fraudulent concealment of a product defect in an industry heavily regulated by the federal government could trigger an equitable estoppel – or an equitable tolling of the statute of limitations. Relying in part on the decisions of other state court jurisdictions, the Alaska Supreme Court concluded that when product safety is well regulated and a manufacturer has a statutory duty to reveal a potentially

dangerous product defect, consumers are entitled to rely upon information made available by regulatory bodies. The court held that a manufacturer's failure to disclose sufficient information with respect to known or suspected defects to the regulatory agency (and thus to the consumer) may preclude its use of the statute of limitation as a defense under the doctrine of equitable estoppel.

Finally, although no party has cited it, we have reviewed the opinion of the Supreme Court of Kentucky in *Harralson v. Monger*, 206 S.W.3d 336 (Ky. 2006). In *Harralson*, our Supreme Court considered whether a defendant in a personal injury action should be estopped from pleading the statute of limitations when he allegedly had intentionally concealed or misrepresented his potential liability. In rejecting the defendant's attempt to characterize his initial statements as "technically" true, the court held that it is "not good public policy to allow a person who presents inaccurate information to benefit from the misrepresentation." *Id.* at 340. The Court emphasized the punctilio of honorable conduct as the proper end, observing as follows:

When the benefits realized from strict enforcement of the statute of limitations are weighed against the problems created by either silence, half-truths, or material omissions, the scale clearly favors the tolling of . . . limitations in this case.

Id.

We cannot conclude that Fluke has shown that it is entitled to judgment as a matter of law. The common law principle of equitable estoppel is soundly established in Kentucky law. *Electric & Water Plant Bd. v. Suburban*

Acres Development, Inc., 513 S.W.2d 489 (Ky. 1974). It is aptly applied to prevent a defendant from asserting the statute of limitations defense. Equitable estoppel requires a party to show that his reliance upon the conduct or representation of the adverse party prejudiced him or induced to change his position for the worse. *Embry v. Long*, 75 S.W.2d 1036 (Ky. 1934).

The elements of equitable estoppel have been met in this case. In light of the circumstances alleged by the LeMasters and supported by their discovery documents, it appears that the manufacturer indeed remained silent when it had an affirmative statutory obligation to report information relative to the safety of its product. We adopt the cogent reasoning of the Supreme Court of Alaska and hold that parties are entitled to assume that a product is safe if there is no adverse information reported as required to indicate that it may pose a danger. Fluke would place a burden on the plaintiffs for their failure to inquire into any and every possible defect inherent in its product despite its own failure to disclose a known defect.

The LeMasters were surely not anticipating potential tortfeasors in utilizing the voltage meter. Arnett's meter was retrieved by federal officials and was examined; it was cleared as to defects. The cause of the explosion was initially attributed to another source altogether. The LeMasters' failure to inquire was wholly attributable to Fluke's fraudulent concealment of critical facts – facts peculiarly and uniquely within its knowledge as the manufacturer and distributor of the product.

Moreover, the LeMasters acted with due diligence under the circumstances. As soon as they became aware that Fluke had produced defective meters and that it had a history of failing to make required reports to the Consumer Product Safety Commission, they acted promptly to test Arnett's voltage meter and to file this products liability action.

We conclude that Fluke should be estopped as a matter of law from relying on the statute of limitations by virtue of its fraudulent concealment of defects associated with its product. Therefore, we agree that summary judgment was prematurely entered in this matter. The judgment is vacated, and this case is remanded to the trial court for further proceedings.

ALL CONCUR.

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