RENDERED: OCTOBER 15, 2010; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000096-MR

RIVER RUN FARM, LLC;
STAR ROBBINS AND COMPANY,
INC.; STAR ROBBINS KUSIAK; AND
WALTER KUSIAK — APPELLANTS

v. — APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NOS. 04-CI-00469 & 04-CI-00489

ROBERT STORM — APPELLEE

AND — NO. 2009-CA-000855-MR

RIVER RUN FARM, LLC;
STAR ROBBINS AND COMPANY,
INC.; STAR ROBBINS KUSIAK; AND
WALTER KUSIAK — APPELLANTS

v. — APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NOS. 04-CI-00469 & 04-CI-00489

GRUNDFOS PUMPS CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal involving two appellees. The first appeal is from the granting of summary judgment. The second involves alleged trial errors. We affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellee Robert Storm ("Storm") constructed a home in late 1991/early 1992 in Laurel County, Kentucky. The home was to serve as his primary residence. At the time he constructed this home, Storm was married to Carol Storm, but in November of 1993, the two separated and divorced in 1994. The home remained vacant from November 1993 until November 1995. The appellants Walter and Star Kusiak moved into the home in mid-November 1995. The Kusiaks leased the home at the beginning but eventually purchased it. River Run Farm, LLC and Star Robbins and Company, Inc., conducted business in the home.

On May 20, 2002, a fire broke out in the home originating with a Grundfos UPS 15-42F water circulation pump manufactured by appellee Grundfos Pumps Corporation ("Grundfos"). The pump was installed by Bill Petrey, a

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

plumber hired by Storm to do all the plumbing during the construction of the house.

The Kusiaks brought an action against Robert Storm and Grundfos arguing that Storm, as the builder/contractor, was liable for negligence having to do with the installation of the pump and that Grundfos had negligently manufactured the pump. Carol Storm was not sued.

Storm moved for summary judgment in the Laurel Circuit Court, arguing that he owed no duty to the Kusiaks because he was not a professional builder/contractor. The trial court granted summary judgment finding that:

> [u]nder the prevailing case law, in order to impose liability on a builder of homes for negligence, that builder must construct homes professionally as an occupation, or otherwise be under contract to construct the home. Laurel Circuit Court Opinion at 7-8.

The Kusiaks argue that the trial court erred in deciding Storm was not a builder/contractor as a matter of law. They contend that evidence existed to prove Storm was acting as a builder and a general contractor in the construction of the home. The Kusiaks relied on testimony from Storm and Petrey in support of their argument. Storm, however, argues that he has no education or training in construction or general contracting. He states that, since his graduation from Eastern Kentucky University in 1975 with a Bachelor's degree in business administration, he has continuously worked in the security business.

While Storm acknowledges that he has built four homes over the years, he argues that they were all residences that he intended to live in and that he

was not "in the business" of construction or general contracting. The trial court found that as a matter of law, Storm could not be held liable because he was not a "professional" builder or contractor. The Kusiaks now appeal that decision.

After granting summary judgment to Storm, the trial court allowed the case to move forward against Grundfos. After a jury trial, the jury found Grundfos was not negligent and, consequently, not liable to the Kusiaks for damages relating to the fire. The Kusiaks appeal the judgment, arguing that the trial court erred in denying its motion for a new trial based upon several alleged trial errors.

DISCUSSION

**I. THE KUSIAKS' CLAIM**

The Kusiaks begin by asserting that builders and contractors are liable for negligent acts. Storm agrees with this statement, however, he contends that only professional builders and contractors owe a duty to the purchasers of homes they built.

> To recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the plaintiff's damages. *See Mullins v. Commonwealth Life Insurance Co.,* 839 S.W.2d 245 (Ky. 1992). Whether the defendant owed a duty is a question of law for the court to decide. *Id.*; *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 88 (Ky. 2003). Whether the defendant breached its duty is generally a question of fact for the jury. *See Pathways,* 113 S.W.3d at 89. The Kentucky Supreme Court has noted that the duty analysis is "essentially . . . a policy determination[,]" *Mullins, supra* at 248, and "is but a conclusion of whether a plaintiff's interest are entitled to legal protection against the

> defendant's conduct." *Sheehan v. United Services Automobile Association,* 913 S.W.2d 4, 6 (Ky. App. 1996).

*Lee v. Farmer's Rural Elec. Co-op. Corp.,* 245 S.W.3d 209, 211-12 (Ky. App. 2007).

The Kusiaks argue that in *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926 (Ky. 1994), the Kentucky Supreme Court held that one did not have to have privity with the builder in order to bring an action for negligence. Such is not the issue in this case. The issue may be summed up as whether one who oversees the construction of his or her home, but who is not in the business of building, may be held liable to a purchaser of the home for negligence.

The trial court answered this question in the negative and found that, as a matter of law, Storm could not be held liable for negligence by the Kusiaks because he was not in the business of building. Summary judgments deal with questions of law and, as such, are subject to a de novo standard of review. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

A "general contractor" is:

> One who **contracts** for the construction of an entire building or project, rather than for a portion of the work. The general contractor hires subcontractors (*e.g.,* plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors. Also called "prime" contractor. Black's Law Dictionary 615 ($5^{th}$ Ed., 1979). (Emphasis added).

Storm as "general contractor" hired individuals to perform various tasks in the construction of his home. He hired Petrey to install the circulating hot

water pump which eventually was the source of the fire. Storm argues that he was not a builder, but rather only a homeowner, and should be treated as such under the caselaw in Kentucky.

We agree with Storm that he was not "in the business" of building homes for sale. As set forth above, part of the definition of "general contractor" is one who contracts to provide the service of overseeing the construction of a project. Storm did not enter into a contract with anyone to supervise the building of the home. Thus, we agree with the trial court's determination that Storm was not a professional builder or general contractor and affirm the granting of summary judgment.

**II. GRUNDFOS PUMPS CORPORATION**.

The Kusiaks also brought suit against Grundfos alleging that it was negligent in the manufacturing of the pump. Grundfos, however, contended during trial that water seeped into the pump and caused the fire. It asserted that the water got into the pump because it was incorrectly installed. The Kusiaks contend that the trial court erred in not granting their motion for a new trial. They assert several allegations of trial errors in support of their argument.

The appellants first argue that the trial court committed reversible error by precluding the admittance of x-rays of the pump's terminal box cover to impeach Grundfos's expert testimony. They contend that Grundfos's experts testified the pump was not defective, but that the terminal box cover had been

improperly installed upside down, causing a gap that allowed water to enter the pump's terminal box and that this, eventually, led to the fire. The appellants contend that the x-rays they moved to introduce would have refuted this theory.

In objecting to the introduction of the x-rays, Grundfos argued that they were taken when their expert was not present. Thus, they argued that there was no authentication of the x-ray. The trial court agreed and we affirm.

Appeals of errors regarding the admission or exclusion of evidence by the trial court are reviewed under the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). A trial court has abused its discretion when its decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Id*. at 581 (citing *Com. v. English,* 993 S.W.2d 941, 945 (Ky. 1999)).

Appellants were asking to introduce the x-ray without establishing a foundation which was necessary. Thus, we affirm the decision of the trial court in excluding it. The appellants also argue that the x-ray should have been allowed in as rebuttal evidence. They assert that it proved the cover was not improperly installed and that no independent foundation was necessary for the x-ray to be used as rebuttal evidence. We disagree.

Derek Longeway, an electrical engineering expert for Grundfos, testified that x-rays were taken at a facility in Texas between December 15 and 16, 2003. The x-ray the appellants moved to introduce, however, was taken on December 19, 2003. Longeway's avowal testimony indicated that he had not been

shown the x-ray until two weeks before the trial. Given the facts that Longeway was not present when the x-ray was taken, the appellants did not present an expert witness to provide foundation regarding the photo, and the appellants did not reveal the x-ray to the experts until just before the trial, we do not believe that there was any abuse of discretion by the trial court in denying the motion to introduce even for impeachment purposes.

Next, appellants contend that a new trial should be granted under Kentucky Rules of Civil Procedure (CR) 59.01(b), given the testimony procured by defendant's expert Roger Tate regarding the source of the external leak. Tate testified regarding the cause of rust and mineralization on the surface of the pump. Basically, Tate was allowed to testify how the water got into the pump. He was not allowed to testify as to the source of the water.

Appellants contend that Tate provided testimony that a leak occurred in the pipe attached to the pump and that he admitted he could not identify the exact source of the leak, but was allowed to testify and speculate regarding the source of the leak over their objection and the trial court's ruling.

The testimony was as follows:

> Q: How did the water get into the terminal box?
>
> A: The path for the water getting into the terminal box from above the pump.
>
> Q: Do you know exactly where it was from above the pump?
>
> A: As to where the water got out of the system?

Q: Yeah.

A: No.

Q: And you can't tell us exactly pinpoint where the water came from?

A: No. All I can tell you is that it was from a location somewhere above
the pump in some sense or another.

Counsel for the appellants did not object to this questioning. In fact, Tate did not testify as to where the water came from other than to say from above. He did not state where because he stated that he did not know. Therefore, there was not sufficient evidence that would result in the trial court's granting a new trial. Thus, we affirm on this issue as well.

The appellants also argue that the admittance of testimony related to the Underwriters Laboratories (UL) testing from Grundfos's expert Terry Kennedy was in error. Appellants assert that they were prevented from being able to properly cross-examine Kennedy regarding the temperature effects on the gaskets at a locked rotor condition because Grundfos failed to produce a copy of the actual test results from the UL file. Appellants argue that if the integrity of the pump's gaskets were affected during a locked rotor condition, then the jury could have found Grundfos designed an unreasonably dangerous product, since the gaskets would not have prevented the intrusion of water into non-wetted areas. Appellants state that they were not given the UL file pertaining to pump type UPS 15-42F even though it was requested.

Kennedy testified regarding his personal knowledge of UL's testing and approval process. Grundfos argues that Kennedy was testifying as a fact witness, not as an expert witness. It contends that it neither disclosed him as an expert nor solicited expert testimony from him. Instead, Kennedy was called to testify regarding Grundfos's interactions with UL and to outline the testing parameters set forth in UL Standard No. 778, which relate to the testing requirements for the gaskets used in the pump.

While the appellants assert in their brief that they requested the document, it appears from the record that it was another party who requested it. Thus, the appellants cannot now argue that they were prejudiced by the document's not being produced. Kennedy's testimony dealt with the procedure of the testing at UL. While he agreed that UL engineers would have knowledge regarding the temperature of the gaskets during a locked rotor test and whether the gaskets could keep water out, he admitted that he did not possess that knowledge. The appellants had the opportunity to call UL witnesses and did not do so; thus, we will affirm the decision of the trial court on this issue.

Next, appellants contend that the trial court erred in allowing testimony of Gary Rickerd regarding performance of the seals and gaskets contained in the pump. After reviewing Rickerd's testimony, however, we note that he did not testify regarding UL except to identify it as the tester of the gaskets and o-rings. Therefore, the trial court did not abuse its discretion in allowing Rickerd's testimony.

Finally, appellants contend that the trial court erred in allowing a warning defect jury instruction. "Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review." *Peters v. Wooten*, 297 S.W.3d 55, 64 (Ky. App. 2009). In Kentucky, jury instructions "should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Id*.

Appellants contend that the jury instructions should have mirrored the language in John S. Palmore, *Kentucky Instructions to Juries* § 49.02 (5th Ed., 2006), regarding adequacy of warning in a product liability case. In this case, the trial court used the suggested instruction to a degree, but omitted the language, "without a reasonable notice or warning of danger." Appellants assert that the removal of this language altered Grundfos's burden regarding its duty to warn and was palpable error by the trial court.

Appellants argue that, pursuant to *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), it must be presumed that the verdict was influenced by the improper instruction. In *Ford*, the Kentucky Supreme Court held that:

> Rather than speculating whether the jury understood the issues despite the instructions, we must presume that a verdict was influenced by an improper instruction. *Barrett v. Stephany,* Ky., 510 S.W.2d 524 (1974). The plaintiffs tendered an instruction properly stating the law, and this does not invite or excuse giving an incorrect instruction.

*Id.* at 124.

Grundfos contends that the appellants did not set forth the language at issue in their tendered instructions. The appellants did, however, set forth an instruction for warning of defects. Grundfos also argues that the jury instructions tendered by the trial court met the bare bones standard required by the law and served the purpose of accurately providing guidance to the jury about law that applied in this case. It contends that the removal of the language was not prejudicial to the appellants' substantial rights. In fact, Grundfos contends that omitting the language was more prejudicial to its case because it reduced the appellants' burden of proof.

We agree with the argument set forth by Grundfos. Given that neither of the sets of tendered instructions contained the language set forth in Palmore and that it appears the language would not benefit the appellants, the trial court did not err in omitting the language in its instructions to the jury.

Thus, we affirm the decision of the trial court, both as it relates to the decision to grant summary judgment in favor of Robert Storm and to the case against Grundfos.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Austin Mehr
Timothy E. Geertz
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Timothy E. Geertz
Lexington, Kentucky

BRIEF FOR APPELLEE ROBERT STORM:

R. William Tooms
Michael J. Bender
Terry Beckner
London, Kentucky

ORAL ARGUMENT FOR APPELLEE ROBERT STORM:

R. William Tooms
London, Kentucky

BRIEF FOR APPELLEE GRUNDFOS PUMPS CORPORATION:

Michael P. Casey
Tressa H. Milburn
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE GRUNDFOS PUMPS CORPORATION:

Michael P. Casey
Lexington, Kentucky