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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000888-MR

COLLEEN MCCARTHY, AS ADMINISTRATRIX OF THE ESTATE OF COLIN JOSEPH MCCARTHY-CLARKE, DECEASED; COLLEEN MCCARTHY, AS BIOLOGICAL MOTHER AND NEXT FRIEND OF COLIN JOSEPH MCCARTHY-CLARKE, DECEASED; AND JOSEPH CLARKE, AS BIOLOGICAL FATHER AND NEXT FRIEND OF JOSEPH MCCARTHY-CLARKE, DECEASED — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 09-CI-012303

RITESCREEN COMPANY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Colleen McCarthy and Joseph Clarke, parents of Colin McCarthy-Clarke, appeal the Jefferson Circuit Court's dismissal of their claims stemming from the death of their two-year-old child following a fall through an open window. In dismissing the action, the circuit court determined the appellee, the manufacturer of the screen which was in the open window, owed the decedent no duty to design its screens in a fashion which would have prevented the child's injury or to warn users of the screen that it was not designed to prevent a child's fall. We are asked on appeal to determine whether dismissal was proper on these grounds. Having carefully considered the record and, in particular the circuit court's orders, as well as the parties' arguments, we affirm on all grounds.

I. Facts and procedure

Colin was in the fourth-floor apartment of his grandmother on October 8, 2009. A window in the living room was open, but the screen was in place. The window sill was approximately seven (7) inches above the floor. Although it is unclear exactly what events immediately preceded the accident, it is sadly certain that Colin fell through the window to the concrete slab below. The screen was found outside. Colin died from his injuries.

There was no warning on the screen alerting users that it was not intended to support the weight of a child and would not prevent a fall through an open window. Other screens in the building, including those in the common area on the fourth floor, had affixed to them a label which cautioned, "Screen will not stop child from falling out window. Keep child away from open window."

Colin's parents brought a wrongful death action[1] against an array of defendants, including the manufacturer of the window and the owners and managers of the apartment building. Eventually, and following a series of procedural steps which need not be recounted here, the plaintiffs were permitted to amend their complaint to include RiteScreen as a defendant.

Ritescreen filed a motion to dismiss under Kentucky Rules of Civil Procedure (CR) 12.02(f), contending Colin's parents had failed to state a claim upon which relief could be granted. More precisely, Ritescreen took the position that the plaintiffs' claims must fail as a matter of law because Ritescreen owed them no duty to warn of any dangerous condition of the screen, and because the design of the product was not defective.

Colin's parents responded by filing a motion to convert the CR 12.02(f) motion to a summary judgment motion pursuant to CR 56 and to consider "matters outside the pleadings." They also filed a response to the motion to dismiss which included thirteen attachments; most were advertisements, website screen shots, photos of screens in the building, and flyers. There were no depositions, stipulations, admissions, or affidavits. However, they did attach a copy of Windsor Window Company's interrogatory answers.

[1] Colleen brought suit as administrator of Colin's estate and as the child's "next friend." Joseph's participation in the action was also as Colin's "next friend." While claims may be brought on behalf of a minor in accordance with Kentucky Rules of Civil Procedure (CR) 17.03, it is implied in that rule that the "next friend" mechanism grants standing to the parents of *living* children only. Because Colleen also brought suit as administrator of Colin's estate, we need not address whether the case must be dismissed. We have corrected the caption of this opinion accordingly.

Ritescreen filed a reply to Colin's parents' response noting that no matters outside the pleadings were attached to its motion to dismiss and that Ritescreen had accepted the allegations of the complaint as true. Ritescreen then urged the court to apply the CR 12.02(f) standard. Ritescreen argued not only that the court should not consider matters outside the pleadings, but also that "[n]o amount of additional time or factual discovery could possibly affect the Court's ruling on a purely legal question . . . ."

The circuit court entered an order denying Colin's parents' motion to convert the CR 12.02(f) motion to a summary judgment motion. In a subsequent order, the circuit court dismissed all claims against Ritescreen.

As it pertains to this appeal, the order dismissed both the claim that there was a breach of the duty to warn and that the design of the screen was defective. Addressing the negligent design claim first, the circuit court did not consider any matters outside the pleadings, stating it was persuaded by the legal authority cited by Ritescreen[2] and finding:

> that Ritescreen had no duty to design a window screen which would prevent children from falling out of an open window and cannot be held liable because the window screen's primary use appears to be preventing insects from entering, while allowing light and air in an area. Clearly, the use for which the window screen was designed would not prevent a young child, such as Colin, from falling through the window . . . . Furthermore, Ritescreen is not charged with a duty to safeguard against the misuse of the window screen as body restraints as this

[2] Primarily, *Brower v. Metal Industries, Inc.*, 719 A.2d 941 (Del. 1998); *Jeld-Wen, Inc. v. Gamble by Gamble*, 501 S.E.2d 393 (Va. 1998); *Lamkin v. Towner*, 563 N.W.2de 449 (Ill. 1990); *Drager by Gutzman v. Aluminum Industries Corp.*, 495 N.W.2d 879 (Minn. App. 1993).

> misuse is not considered reasonably foreseeable despite, or perhaps even because of, the obvious nature of the danger the misuse presents. Accordingly, it does not appear that the plaintiffs can prevail on their claim that Ritescreen negligently designed the window screen as a matter of law.

(Memorandum and Order, March 11, 2011, page 9).

The circuit court then considered Colin's parents' claim that Ritescreen breached its duty to warn that the screen would not prevent falls through the window opening. In doing so, the circuit court did consider some of the attachments to Colin's parents' response to the motion to dismiss. Again citing legal authority provided by Ritescreen, the circuit court found that the risk of a child falling through an open window with only a screen in it

> is fully obvious and generally appreciated. Although the record reflects that the window screens in the common areas of the apartment building had warnings, Ritescreen's placement of those warnings on the screens did not constitute the voluntary undertaking of a duty that would require it to place warnings on all window screens, since the dangerous condition is fully obvious and generally appreciated and nothing of value would be added by the warnings. . . . As such, it does not appear that Plaintiffs can prevail on their claim that Ritescreen negligently failed to warn as a matter of law.

(*Id*. page 10).

Colin's parents bring their appeal from this order as it pertains to the dismissal of (1) their claim of negligent failure to warn, and (2) their claim that the design of the screen was defective.

II. Standard of review

The procedural history of this case and the argument of Colin's parents before this Court compel us to carefully determine the proper standard of review. We begin by noting that Ritescreen's motion was filed pursuant to CR 12.02(f).

CR 12.02(f) authorizes judgment in favor of a defendant on the basis of the plaintiff's "failure to state a claim upon which relief can be granted[.]" CR 12.02(f). However, CR 12.02 goes on to explicitly state that:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, *matters outside the pleading* are presented to *and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56*.

CR 12.02 (emphasis added).

To be clear, a CR 12.02(f) motion is not automatically converted to a summary judgment motion simply because there are attachments to the motion or response, or other matters in the record. The rule identifies three qualifications to the conversion from a motion to dismiss to a motion for summary judgment.

First, not all attachments or documents will fall "within the category of 'matters outside the pleading' contemplated by the rule." *Spillman v. Beauchamp*, 362 S.W.2d 33, 34 (Ky. 1962). As Kentucky's highest court indicated in *Spillman*, the attachment must not "lack the ceremonial quality of testimony in open court which may be found in depositions, admissions or affidavits." *Id.* (citing *Sardo v.*

McGrath, 196 F.2d 20, 23 (D.C. Cir. 1952) (interpreting Federal Rules of Civil Procedure 12(b))).[3] As the federal case relied upon in *Spillman* clarifies:

> the extra-pleading matters presented must be either "depositions," "admissions" or "affidavits". All three possess certain characteristics which make them fitting instruments for cutting through a possible maze of false, illusory or collateral issues raised by loosely-drawn pleadings. As the sworn statements of those who have first-hand knowledge of that about which they speak, they partake not only of the ceremonial quality of testimony in open court, but also of some of the guarantees of trustworthiness which characterize such testimony.

Sardo, 196 F.2d at 22-23. This is entirely consistent with CR 56.03's list of matters the trial court may consider in determining the existence or non-existence of a genuine issue of material fact – *i.e.*, "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any[.]" CR 56.03.

Therefore, because the effect of the presentation and consideration of "matters outside the pleadings" on a motion to dismiss under CR 12.02(f) is to convert that motion into one for summary judgment under CR 56, the matters so presented must meet the requirements of CR 56 and must be in the form of depositions, answers to interrogatories, admissions on file, or affidavits.

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[3] *See also Fox v. Grayson*, 317 S.W.3d 1, 7 fn21 (Ky. 2010) ("The parties do not really address whether the documents . . . converted the Governor's motion to a summary judgment motion under CR 56."); *Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc.*, 842 S.W.2d 873, 874 fn1 (Ky. App. 1992) ("We do not believe that the facts argued to the trial court were such as to come under the heading of 'matters outside the pleading.'") (*overruled, in part, on other grounds, Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000)).

Second, the matters presented (including those matters satisfying the first qualification) must not be excluded from the trial court's consideration. In considering a motion to dismiss, "[i]t is within the discretion of the court whether or not this extraneous matter shall be considered[.]" *Vigue v. Underwood*, 139 S.W.3d 168, 170 fn8 (Ky. App. 2004) (quoting 6 Philipps, Kentucky Practice, CR 12.02, cmt. 9 (5th ed.1995)). However, this does not mean that the trial court must make an express ruling to exclude such matters. We agree with the United States Court of Appeals for the First Circuit which stated:

> We think the proper approach to Rule 12(b)(6) [CR 12.02(f)] conversion is functional rather than mechanical. A motion to dismiss is not automatically transformed into a motion for summary judgment simply because matters outside the pleadings are filed with, and not expressly rejected by, the district court. If the district court chooses to ignore the supplementary materials and determines the motion under the Rule 12(b)(6) [CR 12.02(f)] standard, no conversion occurs. [Numerous citations omitted.] In other words, the test is not whether supplementary materials were filed, but whether the court actually took cognizance of them, or invoked Rule 56, in arriving at its decision.

Garita Hotel Ltd. Partnership v. Ponce Federal Bank, F.S.B., 958 F.2d 15, 18-19 (1st Cir. 1992).

Under this functional approach, the reviewing court must determine if reliance on qualifying matters outside the pleadings is shown by examining the order granting the relief requested. *See Bard v. Commonwealth*, 359 S.W.3d 1, 8 (Ky. 2011)("In Kentucky, a court speaks through the language of its orders and judgments."); *City of Owensboro v. Top Vision Cable Co. of Ky.*, 487 S.W.2d 283,

285 (Ky. 1972) ("The judgment also recites that the court 'considered the pleadings, exhibits, memoranda and argument of counsel.'"). If reliance on qualifying matters outside the pleadings is not demonstrated, we must presume such matters were excluded by the court and the motion to dismiss was not converted to one for summary judgment. Under such circumstances, appellate review will be pursuant to the standard set forth in CR 12.02(f).

Third, CR 12.02 requires that if the motion to dismiss is "treated as one for summary judgment and disposed of as provided in Rule 56, . . . all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." CR 12.02. Therefore, if the trial court chooses to recast the defendant's motion, the defendant must be given an opportunity to present additional matters outside the pleadings made pertinent by the trial court's conversion of his motion.

When we apply this analysis to the case before us, and carefully consider the order, we conclude that we must apply the CR 56 standard of review to the dismissal of the claim that Ritescreen breached its duty to warn, but that we will be applying the CR 12.02(f) standard to the dismissal of the claim that Ritescreen negligently designed the window screen.

Regarding the breach-of-duty-to-warn claim, the circuit court did consider the attachments to Colin's parents' response to the motion.[4] Consequently, despite

[4] The documents considered by the circuit court included information regarding the apartment building, photos of screens in the building containing warnings, and publications of the Screen Manufacturers' Association (SMA) regarding warning labels and a safety program. There is a good argument that these documents do not qualify as "matters outside the pleadings" for

having explicitly denied the motion to convert the motion to dismiss to one for summary judgment, the court's actual consideration of matters outside the pleadings effectively did exactly that. Therefore, we will apply the summary judgment standard.

Our standard of review when a summary judgment is granted was concisely stated in *Litsey v. Allen*, 371 S.W.3d 786 (Ky. App. 2012):

> We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. The 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. Since a summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court.

Id. at 788 (internal brackets, citations and quotation marks omitted).

However, the record reveals that the circuit court made no reference to any extraneous matter, attachment, or document when it analyzed the claim that the design of the screen was defective. Therefore, we will apply the standard for review of orders dismissing pursuant to CR 12.02(f) and perform a *de novo* review. We cannot affirm the circuit court's grant of the motion to dismiss:

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purposes of converting the motion to one for summary judgment because they fail to bear the ceremonial quality of testimony to which *Spillman*, *supra*, refers. However, in this case, we will take the same approach taken by our Supreme Court in *Fox*. 317 S.W.3d at 7 fn21 ("The parties do not really address whether the documents . . . converted the . . . motion to a summary judgment motion under CR 56. We need not definitively resolve this issue because our conclusion would not be changed if we applied the summary judgment standard provided in CR 56 . . . .").

> unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. . . . [T]he question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotation and citation omitted).

III. Discussion

Both claims which are the subject of this appeal were dismissed because the circuit court found Ritescreen owed no duty to warn of the danger that Colin would fall from a window fitted only with a screen and no duty to manufacture a screen that would have prevented his fall. The determination of "duty presents questions of law and policy." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

We address the circuit court's dismissal of each claim in turn.

A. Failure to warn

This Court has expressed a manufacturer's duty to warn of risks posed by the intended use of its product as follows:

> [A] manufacturer must warn of *latent* risks that reasonably foreseeable "users and consumers would reasonably deem material or significant in deciding whether to use or consume the product." This does not mean that manufacturers must warn against every conceivable risk. *There is no duty to warn against obvious risks*. A reasonable consumer, moreover, expects warnings only against *latent* risks that are substantial, those risks sufficiently likely and sufficiently serious to demand attention.

Edwards v. Hop Sin, Inc., 140 S.W.3d 13, 16 (Ky. App. 2003) (emphasis added).

The circuit court effectively concluded that the risk of a child falling through an open window fitted only with a screen designed to let in air and sunlight and keep out insects was not a latent risk. As the circuit court said, the risk "that children might fall through the window screen . . . is fully obvious and generally appreciated." We agree and, applying the following authority, we conclude there was no duty to warn of the risk.

As stated above in *Edwards*, "[a] reasonable consumer . . . expects warnings only against latent risks[.]" And as this Court later said in *West v. KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008), "Kentucky law imposes a general duty on manufacturers and suppliers to warn of dangers known to them *but not known to persons whose use of the product can reasonably be anticipated*." *Id.* at 192 (emphasis added)(quoting *Watters v. TSR, Inc*., 904 F.2d 378, 381 (6th Cir. 1990)).

Our view is consistent with other jurisdictions, cited by the circuit court, that the risk is obvious. *See, e.g., Jeld-Wen, Inc. v. Gamble by Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998) (citing "the obvious nature of the danger the misuse presents"); *see also Brower v. Metal Industries, Inc.,* 719 A.2d 941, 946 (Del. 1998)("no duty to persons who could be harmed by a screen improperly used for the unintended purpose of restraining infant children from falling out of an open window"). There was no duty to warn of an obvious risk.

Colin's parents argue that even if Ritescreen had no legal obligation to warn of the risk, it assumed the duty to warn by affixing the warning label to some of its

screens. In so doing, the appellants contend, Ritescreen undertook a duty to place a warning on all its screens. We disagree.

The appellants are correct that "one who volunteers to act, though under no duty to do so, is charged with the duty of acting with due care." *Sheehan v. United Services Auto Ass'n,* 913 S.W.2d 4, 6 (Ky. App. 1996) (citation omitted). More importantly with regard to this case, "imposing liability upon a party who has assumed a duty to act is premised upon reliance." *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530 (Ky. 2003) (citing *Louisville Cooperage Co. v. Lawrence,* 230 S.W.2d 103 (Ky. 1950)). The appellants have neither pleaded reliance nor presented evidence which would support a finding that they did in fact rely upon any warnings Ritescreen did issue. Therefore, we are not persuaded by this argument.

There are no genuine issues regarding the material facts of this case. Colin's parents acknowledge "the public's academic appreciation of the intended function of a window screen" and even that "window screens are not designed to prevent falls[.]" (Appellants' brief, page 20). They have repeated this understanding often throughout the case. Given that understanding, and given the circumstances as they existed at the time of the accident, it is impossible to classify the risk of Colin's fall as a latent risk. Furthermore, additional discovery on this issue will not yield a different result.

We affirm the circuit court's conclusion that Ritescreen had no duty to warn consumers of the risk of a child falling through an open window which contains one of its screens.

B. Design defect

The law imposes upon every manufacturer the duty "to design a product that is reasonably safe for its intended and foreseeable use." *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 128 (Ky. 1991). The intended purpose of the product in this case is to allow sunlight and air through a window while keeping insects out. The complaint does not allege any other purpose; specifically, the complaint does not allege that one of the screen's foreseeable, yet unintended, uses was restraining children from falling through windows. Nor does the complaint allege that, as designed, the screen was unreasonably dangerous. We believe this is the reason the circuit court found that Ritescreen breached no duty regarding the screen. A reasonable person does not use insect screens for the purpose of restraining children.

On appeal, Colin's parents argue that "there is only one question. Did the Plaintiffs allege Ritescreen owed a legal duty?" (Appellants' brief, page 24). But that was not the question decided by the circuit court, or to be decided by this Court on review. The proper question, to be considered under CR 12.02(f), is whether Ritescreen owed a duty under any set of facts that, if satisfied, would have lessened the injury. The answer to that question is no. And ironically, Colin's parents agree, for they make repeated statements to the effect that "Ritescreen did

not have a duty to manufacture screens capable of preventing falls." (*Id.*). In short, the screen was not a product of defective design for its design did not render the screen unreasonably dangerous; only its misuse did.

On this point, we agree with the Minnesota Court of Appeals, from a case cited by the circuit court, that "[t]he failure of a window screen to restrict a child's fall from a window does not render the window screen unreasonably dangerous. [Colin's] exposure to danger in this case resulted from an unfortunate accident." *Drager by Gutzman v. Aluminum Industries Corp*., 495 N.W.2d 879, 884 (Minn. App. 1993).

Our own Supreme Court's analysis of defective design cases also focuses on reasonable consumer expectation, stating:

> The prevailing interpretation of "defective" is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety. It has been said that this amounts to saying that if the seller knew of the condition he would be negligent in marketing the product.

Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976) (quoting Prosser, Handbook of the Law of Torts § 99, page 659 (4th ed. 1971)). One is hard-pressed to find that window screens fail to meet the reasonable expectations of the ordinary consumer as to their safety.

The plethora of commentary regarding this area of jurisprudence does not make this simple question more difficult, as *Ulrich* makes clear.

> [D]ivorced from the glut of erudition erupting from the scholars, a theory of strict liability for manufacturers of

> mechanical products ought to be rather simple. The product either is or is not unreasonably dangerous to a person who should be expected to use or be exposed to it. If it is, it can make no difference whether it is dangerous by design or by accident. As aptly observed in 62 Ky.L.J. 866, 875, "the important factor is how safe or dangerous the product is when used as it was intended to be used" (or should reasonably have been anticipated to be used).

Id.; *see also Nichols v. Union Underwear Co., Inc*., 602 S.W.2d 429, 433 (Ky. 1980) ("In design defect cases liability is founded upon the premise that the design itself selected by the manufacturer amounted to a defective condition which was unreasonably dangerous[.]").

To be clear, Colin's parents are not asserting a claim that the screen was defective because of a manufacturing or construction flaw, but because its design was unreasonably dangerous. "[T]he main difference between design defects and construction flaws is that with respect to design defects the feasibility of making a safer product is usually in issue, while feasibility is not generally an issue for construction flaws." *Nichols*, 602 S.W.2d at 433. And so, we return to the question of feasible design alternatives.

Our problem with Colin's parents' complaint is that they never allege, even to the effect, that but for a feasible design alternative of the screen, Colin would not have suffered as he sadly did. In fact, they admit that, regarding "Ritescreen's duty to design window screens capable of preventing falls, the Plaintiffs never alleged such a duty." (Appellant's brief, page 24). That is effectively the same as admitting that Ritescreen owed no duty to have selected a feasible design

alternative for its screen that would restrain users (even foreseeable misusers) from falling out of windows.

This is a classic example of the principle of logic known as the law of excluded middle, or Aristotle's principle of non-contradiction: either Ritescreen had a duty to utilize a feasible design alternative that would have prevented the fall, or it did not. Both cannot be true.

As noted above, "duty presents questions of law and policy." *Pathways*, 113 S.W.3d at 89. As regrettable and tragic as the events of this case are, we do not find that Ritescreen owed a duty to design and manufacture a screen that would have prevented them.

Given these circumstances, and considering the reasoning and authority cited by the circuit court, and applying CR 12.02(f), we conclude that the appellants would not be entitled to relief under any set of facts which could be proved in support of their claim of a design defect.

IV. Conclusions

For the foregoing reasons, the circuit court's March 11, 2011 order dismissing all claims against Ritescreen is affirmed.

ALL CONCUR.

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