RENDERED: OCTOBER 27, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000345-MR

OMAR WHITEMAN AND
CARLA WHITEMAN — APPELLANTS

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 13-CI-00084

WERNER COMPANY AND KENTUCKY
CABINET FOR HEALTH & FAMILY SERVICES
(MEDICAID) — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Omar and Carla Whiteman (the Whitemans) appeal the Mason Circuit Court order granting summary judgment to the Werner Company. We affirm.

Omar was hired by John Walton to remove the top of a tree on Walton's property near Maysville, Kentucky. Omar and Walton orally agreed on a

price ($500.00) and time (at Omar's convenience). On March 30, 2012, Omar and two others arrived at Walton's place. Walton was not home; Omar instructed his assistants to get a ladder from Walton's garage. The two chose a 40-foot extension ladder and set it up against the tree that was to be trimmed. Without checking the ladder's latches, Omar climbed the ladder. He was about 30 feet above ground (and before he could attach his safety harness to the tree) when the ladder telescoped suddenly which caused Omar to fall and sustain severe injuries.[1] He is now deemed totally disabled. He has limited use of his legs, and can walk only short distances.

On March 27, 2013, the Whitemans filed suit against Walton and his wife, and against Werner Company, the alleged manufacturer of the ladder. Medicaid was included as a necessary party, for having paid the majority of Omar's medical expenses emanating from the injuries.[2] The Waltons have since been dismissed (at the circuit court and again at the appellate court level) as parties to the lawsuit.[3]

The Whitemans' theory of recovery against the Werner Company was product liability. They allege that the ladder's defective design resulted in the

[1] Omar suffered fractures of two vertebrae, his left femur, his breastbone, and most of his ribs. Both lungs collapsed.

[2] As a result of his physical condition, Omar, his wife, and his son receive Social Security disability payments of approximately $1,160.00 per month. His medical expenses at the time he filed the suit were upwards of $800,000.00. The Whitemans sought to recover $60,000,000.00.

[3] The Waltons were dismissed as defendants at the circuit court level by order dated February 4, 2015. John Walton was dismissed as a party by order entered by this Court on December 17, 2015. Sorella Walton was dismissed as a party by order entered by this Court on July 15, 2016.

ladder's failure and thus directly caused Omar's injuries. The ladder in controversy is a Werner Job Master medium duty (aluminum) commercial extension ladder, model number D1240-2, manufactured in January 1984. Walton testified that he had purchased it for approximately $500.00 near the date of its manufacture.

Walton had not given Omar permission to use the ladder. Walton expressed his opinion that an extension ladder of that length would have been inappropriate to use for trimming a tree. Omar himself testified that he ordinarily would have climbed the tree, but this tree was covered in vines which made it difficult to scale. Omar's intent was to use the ladder to reach a certain height and then use the tree's branches to climb the rest of the way. He had attached a chainsaw, safety harness, and rope to his belt to effectuate that purpose.

In July 2014, the Werner Company filed a motion for summary judgment, arguing that the ladder was designed, manufactured, distributed, and sold by the Old Ladder Company, which was sold in bankruptcy to the Werner Company in 2007, six years prior to this incident. As successor in interest to the Old Ladder Company, the Werner Company only assumed liabilities existing at the time of the 2007 sale. Therefore, the Werner Company maintained it was not responsible for any alleged defects in the ladder. The ladder was manufactured and purchased in 1984 and allegedly caused Omar's injury in 2012. After hearing oral arguments on the issues, the Mason Circuit Court entered an order on October 8, 2014, granting summary judgment. The Whitemans' first appeal was dismissed

as premature, but they appealed once more after remaining issues and parties were disposed of by the circuit court on February 19, 2015.

The Whitemans argue that summary judgment was improperly granted for three reasons: (1) they were not afforded ample opportunity to conduct discovery; (2) the facts do not support the circuit court's application of collateral estoppel to the bankruptcy court's findings regarding the sale of the Old Ladder Company to the Werner Company; and (3) there were genuine issues of material fact concerning the ladder's continued marketing by Werner. We shall discuss the issues in the order presented.

> "The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In *Steelvest*, the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481.

Ryan v. Fast Lane, Inc., 360 S.W.3d 787, 789–90 (Ky. App. 2012).

The record does not support the Whitemans' first argument. The lawsuit was filed one year after the incident, and the Whitemans had well over a year after suit was filed to conduct discovery. Thus, the Whitemans had over two years to gather information.[4]

The Whitemans insist they should have been allowed to depose an engineer of the Werner Company (Frederick J. Bartnicki) and its general counsel (Geoffrey R. Hartenstein) to establish that the Werner Company is a mere continuation of the Old Ladder Company. *See Conn v. Fales Div. of Mathewson Corp.*, 835 F.2d 145, 146 (6th Cir. 1987) (citing *American Railway Express Co. v. Commonwealth*, 190 Ky. 636, 228 S.W. 433, 441 (1920)). The Werner Company disagrees, citing Kentucky Rule of Civil Procedure (CR) 56.06, which states:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he **cannot for reasons stated present by affidavit facts essential to justify his opposition**, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(Emphasis added.)

The Whitemans' counsel failed to present "facts essential to justify [their] position" in their request for continuance in opposition to the motion for

[4] The only depositions that appear in the record are those of Omar Whiteman and John Walton; both of those depositions were taken before the motion for summary judgment but not filed in the record until after the circuit court's granting of the motion in the Werner Company's favor. Neither of those depositions are relevant to the issue of corporate successor liability.

summary judgment. "If the appellant had proof that a genuine fact issue existed, it was appellant's duty to tender some proof to the court." *Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246, 250 (Ky. App. 1978) (citations omitted). Counsel's affidavit opposing the Werner Company's motion offered mere conjecture, not proof. Counsel did supplement the record prior to the circuit court's ruling, but there was no proof of a genuine fact issue. We find nothing in the record supporting the Whitemans' assertion that the deposition testimony of the engineer and general counsel would have provided such proof. Thus, the circuit court did not err in failing to grant the Whitemans' request for continuance to complete discovery. CR 56.06; *Neel*, *supra*.

We turn next to the issue of whether the circuit court erred in its application of collateral estoppel concerning the bankruptcy court's findings. The circuit court found there was "no genuine issue of material fact as to whether Werner is a mere continuation of Old Ladder Company." In so ruling, the circuit court referenced the United States Bankruptcy Court for the District of Delaware, which approved the sale of the Old Ladder Company as a "*bona fide* sale with valuable consideration given." The circuit court listed six findings of fact, enumerated by the bankruptcy court, analyzed pursuant to *Pearson*, *supra* at 49, and held:

> The Bankruptcy Court concluded that this was a *bona fide*, arms' length sale, and this Court so finds. There being no applicable exception to the general rule of successor-in-interest liability, the Court finds that Werner is not liable to the [Whitemans] as a matter of law.

We find no error in the circuit court's conclusion. *Id.*; *see also Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474, 479–80 (Ky. App. 2005).

Lastly, we consider the Whitemans' allegation that there were genuine issues of material fact concerning the ladder's continued marketing by Werner, and whether such action qualifies as a "continuing enterprise" exception to the successor liability rule, thereby making the Werner Company liable to the Whitemans. We agree with Werner that this argument must fail for two reasons: (1) it was not properly preserved for appellate review (CR 76.03(8); *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008)); and (2) it is not a legally accepted exception in the Commonwealth of Kentucky. The circuit court considered and rejected the Whitemans' theory, and we find no error in its analysis.

The order of the Mason Circuit Court granting summary judgment to the Werner Company is affirmed.

TAYLOR, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Randy A. Byrd
Cincinnati, Ohio

BRIEF FOR APPELLEE:

John G. McNeill
Evan B. Jones
Lexington, Kentucky