RENDERED: JUNE 28, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000694-MR

ROYAL CONSUMER PRODUCTS, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 14-CI-004614

BUCKEYE BOXES, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

CLAYTON, CHIEF JUDGE: Royal Consumer Products, LLC ("Royal") appeals from the Jefferson Circuit Court's grant of summary judgment in favor of Buckeye Boxes, Inc. ("Buckeye") on Royal's breach of contract claim against Buckeye. Upon careful review, we affirm.

BACKGROUND

In September of 2014, Royal filed a complaint against Buckeye alleging that Buckeye had breached the parties' contract by failing to timely deliver certain project boards. In its first interrogatory request, Buckeye asked that Royal "[i]dentify each person . . . who you know or believe has knowledge of any facts relevant to [the suit between the parties] or the allegations contained in the Complaint . . . [.]" In response, Royal identified Christopher Stiles and Steve Schulman, and stated:

> Mr. Stiles has personal knowledge of the underlying events that gave rise to this Action. [Royal's] product orders, communications between the parties regarding [Buckeye's] failure to fulfill the terms of [Royal's] purchase orders, the necessity of [Royal] to fill those orders from other supplies, and personal knowledge of the underlying events that gave rise to this Action.

Royal's representation of Schulman's knowledge was very similar, stating:

> Mr. Schulman has personal knowledge of [Royal's] product orders, communications between the parties regarding [Buckeye's] failure to fulfill the terms of [Royal's] purchase orders, and personal knowledge of the underlying events that gave rise to this Action.

Buckeye later submitted a second set of interrogatories and requests for the production of documents aimed at determining specific evidence of Royal's damages, requesting that Royal:

> Identify each and itemize all damages that you are seeking in this lawsuit, the method by which you

> determined each amount, your efforts to mitigate [y]our damages, and identify all persons with knowledge regarding these damages and all documents evidencing the same.

Royal responded to this interrogatory in June of 2017 as follows:

> ANSWER: [Royal] seeks damages in the total amount of not less than $14,331.90. That figure consists of the following categories of damages: (1) lost margins totaling $14,331.90 (office Depot - $5,926.68; K-Mart - $3,617.82; and Office Max - $4,787.40; (2) price increase (for having to resort to alternate vendors on short notice) totaling ($3,784.16); and PAL penalties totaling $2,098.74. [Royal] attaches hereto documentation upon which it relied to determine its damages. [Royal] mitigated its damages by seeking out orders from alternate vendors to enable [Royal] to meet its requirements. Steven Schulman and Chris Stiles have knowledge of [Royal's] damages and of the documents produced herewith.

Attached to Royal's response were several spreadsheets on which various dollar amounts and vendors were listed.

Buckeye further submitted a notice for the deposition of Royal's corporate representative under Kentucky Rules of Civil Procedure (CR) 30.02(6). Specifically, Buckeye requested that Royal designate one or more representatives to testify about the following topics:

- All communications between Royal and Buckeye regarding agreements and contracts between the parties, payment and delivery of products under any such agreements and contracts, purchase orders, and the dispute that is the subject of the litigation;

- Royal's policies and practices for making payments on invoices;

- Royal's recordkeeping, accounting, and bookkeeping policies and practices;

- Royal's communications regarding the project boards with the entity or entities that purchased the project boards from Royal;

- Royal's "lost sales and penalties," and documents regarding these lost sales and penalties;

- Royal's allegation that Buckeye had improperly placed a hold on a certain order, and this hold caused "Royal to suffer substantial damages and necessitating that Royal retain the balance of the amount owed as security until such time as Buckeye agreed to compensate Royal for said damages"; and,

- Royal's allegation that it was "forced to cover . . . by obtaining substitute boards from another seller, thereby causing Royal to incur substantial damages including but not limited to the costs of the substitute project boards, as well as expediting fees, back order fees, and lost sales."

Royal produced Stiles as its corporate representative under CR 30.02(6), and Stiles was deposed in August of 2017.

At the deposition, Stiles admitted that he had done nothing in the way of preparation in order to answer the questions posed to him as Royal's corporate representative under CR 30.02(6). For example:

> Q: All right. What did you do to prepare for your testimony today?

A: I have done nothing.

Q: Did you review any documents?

A: No ma'am. I don't have any documents to review.

Q: Okay. Have you talked with the attorney for [Royal]?

A: I have.

Q: Okay. And when did you talk to him?

A: I've talked to him via email a couple of times about my flight today . . . about when to be here. But outside of that, zero. Never spoken on the phone.

Q: Did you have a conference with the attorney for [Royal] before today's session started?

A: The last time that I spoke with the attorney was during the –

Q: During the mediation?

A: Yes, ma'am.

Q: Okay.

. . .

Q: . . . and I think the mediation was in January of – [2017].

. . .

Q: Did you review documents when you were here for the mediation?

A: Not that I remember. Not that I recall.

Later, the following exchange occurred:

> Q: All right. So I'm just trying to get an understanding. And other than you relying on your memory of these events that happened two and three years ago, you have not specifically done anything to prepare for today's deposition.
>
> Is that right?
>
> A: That would be correct.

Although Stiles was ill-prepared to answer questions as Royal's corporate representative, it appeared that Stiles did understand that he was there as Royal's representative, to be deposed concerning Royal's damages:

> Q: Well, you are the designated representative of [Royal] today.
>
> A: I am. I am.
>
> Q: Who is prepared to talk about damages.
>
> A: Yes, ma'am.

Additionally, Stiles stated that he was the one who knew the "most" concerning Royal's cover damages.

Moreover, Stiles' testimony was unavailing regarding the specific damages Royal alleged and itemized in its discovery responses or how Royal calculated such damages, including no knowledge concerning the documents attached to Royal's response to Buckeye's second set of interrogatories. When

questioned concerning the "lost margins" damages claimed by Royal, the following exchange occurred:

> Q: And the first item is lost margins, totaling $14,331.90.
>
> . . .
>
> Q: Do you know how those figures were arrived at?
>
> A: No, ma'am.

When asked Royal's claim of damages for "price increase," Stiles testified:

> Q: Okay. Item number two is price increase for having to resort to alternate vendors on a short notice totaling $3,784.16.
>
> Did you have any involvement in preparing that figure?
>
> A: No, ma'am.
>
> Q: And do you know how it was arrived at?
>
> A: No, ma'am.

When questioned concerning Royal's third category of alleged damages, penalties and late fees ("PAL"), Stiles testified that Royal's PAL damages were generated from a spreadsheet included as an exhibit with the deposition but did not know if the figures on that exhibit included only the damages related to Buckeye, or if they also included alleged damages from other suppliers as well.

When Stiles was questioned concerning documents described by Royal in its discovery responses, Stiles testified:

> Q: And tell us what this exhibit is.
>
> A: I have no idea.
>
> Q: Is this something that you received from Office Max?
>
> A: Again, I've never seen these.
>
> . . .
>
> Q: All right, but in your capacity as the designated representative of [Royal] today, you don't know what these documents are?
>
> A: That is correct.
>
> Q: All right. Thank you. And therefore, you don't know how they figure into a claim for expenses?
>
> A: I don't know what these documents are.

When asked about another set of documents Royal pointed to in support of its alleged damages, Stiles replied:

> A: It appears as if it's lost margins.
>
> Q: Okay. And explain that, if you would, please.
>
> A: I'm not sure who these figures were derived . . .
>
> . . .
>
> Q: Thanks. But as the representative of [Royal] today, you don't understand what these documents mean with respect to the expenses allegedly incurred by [Royal]?

A: I don't.

When asked about another document which appeared to mention lost margins, Stiles said:

Q: Uh-huh. What is that, please?

A: More lost margin information.

Q: Are you familiar with what those figures represent?

A: No, ma'am.

Q: And I'm just asking you again - -

A: I understand.

Q: - - as the designated representative of [Royal] for your deposition today, are you familiar with what these mean in terms of expenses?

A: Are you asking - - re-ask your question.

Q: Sure. As the designated representative of [Royal] here today for your deposition, can you explain to us what these figures are on these documents?

A: No, I can't.

Finally, Stiles was unable to discuss Royal's overall claimed damages amount:

Q: Sitting here today, as the representative for [Royal], can you state with definity (sic) what the number is that [Royal] is claiming as expenses it incurred as a result of [Buckeye] not producing product?

A: I cannot answer that question.

From the time of Stiles' deposition in August of 2017, Royal did nothing thereafter to supplement the deficiencies in Stiles' deposition testimony and did not designate any other person as its corporate representative to be deposed on the issue of damages in this case. In January of 2018, Buckeye's counsel filed a motion for the court to set a trial date, which trial was set for May 8, 2018. Further, the trial court entered a Civil Jury Trial Order on January 19, 2018 setting the deadlines for filing dispositive motions and witness lists by February 7, 2018, which was later extended to February 16, 2018.

Subsequently, on February 16, 2018, Buckeye filed a motion for summary judgment, arguing that Stiles' inadequate testimony regarding damages was a judicial admission that Royal had sustained no damages with regard to Buckeye's alleged conduct, a required component of Royal's breach of contract claim. Buckeye also argued that, even if the court did not find that Stiles' non-responsive testimony was a judicial admission, that Royal was nevertheless still bound by Stiles' testimony, as he was Royal's designated CR 30.02(6) representative.

Alternatively, Royal argued that Schulman had information about Royal's damages and would be able to testify about this issue, and that once Royal recognized that Stiles would not be able to provide information concerning Royal's

damages, Buckeye should have proactively requested to depose Schulman to gain access to such information. Royal further claimed that there was no case law in Kentucky holding that a witness is bound by non-responsive testimony. With its response, Royal attached a number of exhibits, including a witness list, itemization of damages, and an amended itemization of damages. Royal also submitted a "Supplemental and Corrected" response to Buckeye's Second Set of Interrogatories and Requests for Production which had never before been produced in the case. Buckeye replied, arguing that its motion for summary judgment was supported by Kentucky law and that the exhibits attached to Royal's response should not be considered by the court because they violated CR 56.03 or directly contradicted testimony on the same topic. The trial court granted Buckeye's motion for summary judgment, and this appeal followed.

ANALYSIS

a. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. Summary judgment should be granted "where the movant shows that the adverse party cannot prevail under any circumstances." *Steelvest, Inc. v. Scansteel Service*

Center. Inc., 807 S.W.2d 476, 479 (Ky. 1991). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482) (internal citations omitted). Summary judgment is also appropriate where a party completely fails to meet its evidentiary burden with respect to any essential element of his or her claim. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007). The circuit court's grant of summary judgment is subject to *de novo* review. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (internal citation omitted).

b. <u>Did Stiles' Deposition Testimony Amount to a Judicial Admission?</u>

Royal first argues that Stiles' statements in his deposition testimony did not rise to the level of a judicial admission, and with that argument we agree. The general rule in Kentucky is that "[a] judicial admission is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question." *Nolin Production Credit Ass'n v. Canmer Deposit Bank*, 726 S.W.2d 693, 701 (Ky. App. 1986) (internal citations

omitted); s*ee also Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 380 (Ky. 1992). A judicial admission is a party's deliberate, clear, unequivocal statement about a fact "peculiarly within [that party's] own knowledge." *Schoenbaechler v. Louisville Taxicab & Transfer Co.*, 328 S.W.2d 514, 515 (Ky. 1959). The statements must be made, however, under circumstances where there is "no probability of error." *Moore v. Roberts By and Through Roberts*, 684 S.W.2d 276, 277–78 (Ky. 1982); *see also Sutherland v. Davis*, 151 S.W.2d 1021, 1024 (Ky. 1941).

While judicial admissions are not to be taken lightly, they "should be narrowly construed." *Lewis v. Kenady*, 894 S.W.2d 619, 622 (Ky. 1994). As the Kentucky Supreme Court stated in *Goldsmith*, "[m]anifestly, the determination by a court that a party may not contradict an admission is strong medicine and should be sparingly administered. . . . [T]he judicial admission rule 'should be applied with caution because of the variable nature of testimony and because of the ever present possibility of honest mistake.'" *Goldsmith*, 833 S.W.2d at 380 (quoting *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955)). Further, in *McCallum v. Harris*, 379 S.W.2d 438 (Ky. 1964), the Court questioned whether, where a party's testimony merely involved the absence of knowledge of the facts supporting a negligence claim, such party's statements could be held to be a judicial admission because they were not "deliberate and unequivocal and unexplained." *McCallum*,

at 441 (internal citation omitted). The *McCallum* Court characterized the party's testimony as being of a "negative character; that is, [the party] simply testified as to an absence of knowledge about the crucial facts" rather than detailing any specific negligent act. *Id*.

We find Stiles' deposition testimony to be similar in nature to that discussed in *McCallum* and unlike the testimony discussed in the primary case cited by Royal to bolster its arguments concerning Stiles' supposed judicial admissions, *Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc.*, 215 S.W.3d 56 (Ky. App. 2006). In *Gilliam*, the plaintiff filed suit alleging defamation. *Id*. at 59-60. At his deposition, the plaintiff's testimony was that he had not been harassed or ridiculed because of the alleged defamatory statements and had suffered no adverse financial impact as a result of the alleged defamatory statements. *Id*. at 61. Further, when directly asked, the plaintiff did not identify any mental or physical pain caused by the flyer's publication, aside from his own anger. *Id*. While we do not have the specific content of the *Gilliam* plaintiff's deposition testimony, the Court's description of his testimony does not indicate a complete lack of knowledge on the plaintiff's part, but rather that he had made specific statements to the effect that he had incurred no damages as a result of the alleged defamatory statements. Alternatively, in this case, Stiles' statements were not "deliberate [and] unequivocal," but rather his testimony regarding damages

was similar to that of the party in *McCallum* and indicated "an absence of knowledge about the crucial facts." *McCallum*, 379 S.W.2d at 441. Therefore, we do not believe Stiles' deposition testimony statements rose to the level of judicial admissions as such term of art is defined in Kentucky jurisprudence.

c. <u>Was Stiles' Deposition Testimony Nevertheless Binding on Royal?</u>

We do, however, agree with Buckeye's contention that Stiles' testimony was binding on Royal, and that Royal's failure to proactively rehabilitate Stiles' testimony, substitute a new CR 30.02(6) witness, or provide further timely evidence of the damages suffered by Royal as a result of Buckeye's alleged breach of contract made summary judgment appropriate. CR 30.02(6) governs deposition notices directed to an organization and states the following:

> A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named *shall* designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated *shall* testify as to matters known or reasonably available *to the organization*. This paragraph (6) does not preclude taking a deposition by any other procedure authorized in these rules.

(Emphasis added). Therefore, the clear language of CR 30.02(6) requires the following: in response to a deposition notice which "describe[s] with reasonable particularity the matters [for] examination," an organization must designate one or more persons to testify *on its behalf* as to those matters and the person or persons "so designated ***shall*** testify as to matters *known or reasonably available* ***to the organization***." CR 30.02(6) (emphasis added).

As the foregoing language indicates, once a company designates a CR 30.02(6) witness, they are representing that the individual is prepared to testify as to matters available to the company, and not just within his or her individual knowledge. Federal cases interpreting the virtually identical federal counterpart to CR 30.02(6), Federal Rules of Civil Procedure (FRCP) 30(b)(6), have stated that because an FRCP 30(b)(6) designee presents the corporation's position on a particular topic, when a corporation produces a witness pursuant to a FRCP 30(b)(6) notice, it represents "the knowledge of the corporation, not of the individual deponents." *See U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *see also Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 25 (E.D. Pa. 1986) (FRCP 30(b)(6) "places the onus for identification [of the corporation's spokesman] on the corporation."); *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent.").

Implicit in the language of both the federal and Kentucky rule is that, because a corporate designee presents the entity's position on a particular topic, and not just his or her personal opinion, a corporation must act responsively and proactively to prepare any individual designated by the corporation under the rule. As stated by the Fifth Circuit, because the person designated represents the corporation at the deposition, just as an individual represents himself at a deposition, the organization's "duty to present and prepare a [FRCP] 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved. *The* [*organization*] *must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources*." *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (internal citation and quotation marks omitted) (emphasis added). *See also Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005) (A corporation "must produce live witnesses who know or who can reasonably find out what happened in given circumstances."); *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (Internal citations omitted) (The organization must prepare the designees "so that they may give complete, knowledgeable and binding answers on behalf of the corporation."). A corporate party does not satisfy its obligations under FRCP 30(b)(6) by merely "producing a

designee and [then] seeing what he has to say or what he can cover." *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000).

Thereafter, "If it becomes obvious that the deposition representative designated by the corporation is deficient, the corporation is obligated to provide a substitute." *Brazos River Authority*, 469 F.3d at 433 (citing *Marker*, 125 F.R.D. at 126); *Marker*, 125 F.R.D. at 126 (noting that even where defendant in good faith thought deponent would satisfy the deposition notice, it had a duty to substitute another person once the deficiency of its designation became apparent during the course of the deposition). If the designated "agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all." *Resolution Trust*, 985 F.2d at 197.

In this case, Stiles' deposition testimony evidences a complete lack of effort on Royal's part to prepare Stiles to testify on behalf of Royal and as Royal's CR 30.02(6) witness. Further, Royal made no effort, either during the deposition nor thereafter, to rehabilitate Stiles' deposition testimony or to substitute a CR 30.02(6) representative with more knowledge or preparation on the subject of damages.

Instead, Royal now claims that another witness, Schulman, may have information about Royal's alleged damages, and that, because his name was listed

in Royal's answers to Buckeye's interrogatories, Buckeye should have proactively sought Schulman's deposition testimony. However, discovery by means of a CR 30.02(6) deposition differs from discovery obtained through other means, such as interrogatories or requests for production. *See Marker*, 125 F.R.D. at 126 (rejecting defendant's argument that the information sought by a Rule 30(b)(6) deposition had already been produced in its written answers to interrogatories). "Producing documents and responding to written discovery is not a substitute for providing a thoroughly educated Rule 30(b)(6) deponent." *Great American Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 541 (D. Nev. 2008). Therefore, the mere fact that Royal listed Schulman in its answers to the interrogatories was not enough. Royal had the affirmative responsibility to substitute Schulman, or another individual, as its designated representative on the issue of damages once it became evident that Stiles was unprepared or unable to testify as to damages.

The fact remains that, ultimately, it was not up to Buckeye to determine what discovery Royal may or may not need to prove Royal's case. It was Royal's, not Buckeye's, responsibility to prove Royal's breach of contract claim. It was Royal's, not Buckeye's, responsibility to obtain testimony favorable to Royal. Nor was it Buckeye's responsibility to depose every individual who may have knowledge about Royal's damages, or to obtain evidence that might show

that Royal was damaged, or to request that Royal designate another corporate representative to create evidence supporting Royal's own claim of damages. The onus was on Royal to prove each element of its own case.

Further, we do not find that the documents attached to Royal's response to Buckeye's motion for summary judgment created a genuine issue of material fact so as to overcome the trial court's grant of summary judgment in favor of Buckeye. Generally, information which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact. *Gilliam*, 215 S.W.3d at 62. We do not believe that self-serving "supplemental and corrected responses" filed after the motion for summary judgment to a set of interrogatories propounded by Buckeye almost a year before creates a genuine issue of material fact.

Moreover, this was not a case where the supplemental responses and documents were introduced to resolve inconsistencies in Stiles' deposition testimony because he did not have the benefit of the information contained in such documents at the time of his deposition. *See Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 736 (Ky. 2000). All of the additional documents attached to Royal's supplemental responses dated back to 2013 and were presumably available to Royal, and therefore Stiles, as their CR 30.02(6) deponent. Royal attempted to contradict Stiles' sworn deposition answers that Stiles did not know the amount of

damages with responses that Royal did know the amount of damages they allegedly incurred, as evidenced by documents dating back to 2013. Royal's last-minute attempt to create a genuine issue of material fact through the exhibits attached to its response to Buckeye's motion for summary judgment is unavailing.

d. Conclusion

For the foregoing reasons, the Jefferson Circuit Court's order granting summary judgment in favor of Buckeye is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Raymond G. Smith Michael W. McClain Louisville, Kentucky	Carolyn A. Taggart Justin J. Joyce Cincinnati, Ohio