COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP829 **Cir. Ct. No. 2010CV622**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PENNY L. SPRINGER,

PLAINTIFF-APPELLANT,

V.

NOHL ELECTRIC PRODUCTS CORPORATION, GENERAL REFRACTORIES COMPANY, DANA SEALING PRODUCTS, LLC, JOHN CRANE, INC., UNION CARBIDE CORPORATION, ROCKBESTOS SURPRENANT CABLE CORPORATION A/K/A ROCKBESTOS PRODUCTS CORP AND RSCC WIRE & CABLE, INC., GARLOCK SEALING TECHNOLOGIES LLC, ANCHOR PACKING COMPANY, INC., GASKETS, INC., CINCINNATI VALVE COMPANY, LESLIE CONTROLS, INC. AND TRAC REGULATOR COMPANY, INC.,

DEFENDANTS,

POWERS HOLDINGS, INC. AND FIRE BRICK ENGINEERS COMPANY, INC.,

DEFENDANTS-RESPONDENTS,

SECURE HORIZONS BY UNITED HEALTH CARE INSURANCE COMPANY,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed and cause remanded*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Penny Springer appeals a judgment of the circuit court granting summary judgment in favor of Powers Holdings, Inc. and Fire Brick Engineers Company, Inc. (FBE Company, Inc.) (collectively, the respondents). Springer filed the present action against the respondents, seeking to hold them liable under the theory of successor liability for damages stemming from the death of Springer's husband. For the reasons explained below, we reverse the judgment.

BACKGROUND

¶2 Fire Brick Engineers Company (FBE Company) was formed by Harry J. Schofield in the 1940s. Prior to 1983, FBE Company distributed refractory and foundry supplies, some of which contained asbestos.

¶3 In 1983, a group of investors formed Fire Brick Engineers Corporation (FBE Corporation). The investors in FBE Corporation included attorneys who had previously provided legal representation to FBE Company. That same year, FBE Corporation purchased the assets of FBE Company. FBE Corporation subsequently changed its name to Fire Brick Engineers Company, Inc., which is one of the respondents in this case. In 1989, FBE Company, Inc. merged with another company to form Powers Holdings, Inc., the other respondent in this appeal. Powers Holdings, Inc. continued to do business under the name Fire Brick Engineers.

¶4 In 2010, Springer brought suit against the respondents, alleging that the respondents are liable under theories of negligence and strict liability for damages stemming from the death of her husband, who died from mesothelioma. Springer alleged that from approximately 1963 through 1969, her husband was exposed to asbestos-containing products that were manufactured and/or sold by FBE Company and that the exposure to those products contributed to her husband's mesothelioma and subsequent death. Springer sought to hold the respondents liable as successors to FBE Company.

¶5 The respondents moved for summary judgment. The respondents pointed out that there is no evidence that they distributed or sold asbestos-containing products, and argued that, although they acquired the assets of FBE Company, there was no basis upon which to impose liability on the respondents as successors to FBE Company. In support of their motion, the respondents submitted the affidavit of Richard Powers and a copy of what Powers averred is the 1983 purchase agreement between FBE Company and FBE Corporation. The copy of the 1983 agreement submitted by the respondents did not contain the signatory page. Springer argued that, without the signatory page, the copy of the 1983 agreement was insufficient to establish the intent of FBE Company and FBE Corporation as to the transfer of future liabilities associated with FBE Company's asbestos-containing products.

¶6 Thereafter, the respondents submitted a second affidavit by Powers in which Powers averred that the purchase agreement previously submitted to the court was incomplete, and Powers attached to his affidavit another copy of the purchase agreement, which is virtually identical to the first copy of the purchase agreement submitted to the court except that the second copy includes the signatory page to the agreement. In both copies of the 1983 purchase agreement

there is a provision that specifically provides that FBE Corporation agrees to assume certain specified liabilities and obligations of FBE Company, none of which relate to any potential liability FBE Company may have related to its products that contained asbestos, and a provision that states that FBE Corporation "does not … assume or agree to pay or perform any other liabilities or obligations of [FBE Company] of any kind, whether or not related to the Subject's Business, all of which liabilities and obligations remain the sole responsibility of [FBE Company]."

¶7 Thereafter, the respondents submitted an amended motion for summary judgment. In response, Springer argued that the second copy of the purchase agreement was not properly authenticated. Springer also argued that, despite the purchase agreement's disclaimer of liability, a genuine issue of material fact existed as to whether FBE Company, Inc. should be held liable as a successor to FBE Company.

¶8 The circuit court granted the respondent's motion for summary judgment. Springer appeals.

DISCUSSION

¶9 Springer contends that the circuit court erred in determining on summary judgment that no factual dispute exists as to the liability of the respondents, as successors of FBE Company, for any damages stemming from the death of her husband.

¶10 As a general rule, corporations that purchase the assets of other corporations do "'not succeed to the liabilities of the selling corporation.'" ***Fish v. Amsted Indus., Inc.***, 126 Wis. 2d 293, 298, 376 N.W.2d 820 (1985) (quoted

source omitted). This general rule against successor liability has four exceptions: (1) when the purchasing company expressly or impliedly agrees to assume liability; (2) when the transaction amounts to a consolidation or merger of the two companies; (3) when the purchasing company is merely a continuation of the seller company; or (4) when the transaction is entered into fraudulently to escape liability for the obligations at issue. ***Id.*** Springer argues that a factual dispute exists as to whether one or more of the four exceptions to the general rule against successor liability applies here, and that this creates a triable issue on the liability of the respondents.

¶11 Before we address the exception that we conclude is dispositive in this appeal, we first explain our standard of review in this case and the burden of persuasion. We review a grant or denial of summary judgment de novo. ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, 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 a judgment as a matter of law." WIS. STAT. § 802.08(2) (2013-14).[1]

¶12 Summary judgment materials are to be viewed in the light most favorable to the nonmoving party. ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95. At the same time, if the movant makes out a prima facie case for summary judgment, the nonmoving party "must set forth specific evidentiary facts that are admissible

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

in evidence showing that there is a genuine issue for trial." ***Buckett v. Jante***, 2009 WI App 55, ¶29, 316 Wis. 2d 804, 767 N.W.2d 376; *see also* ***Town of Delafield v. Sharpley***, 212 Wis. 2d 332, 341, 568 N.W.2d 779 (Ct. App. 1997) (nonmoving party must set forth specific, evidentiary facts to rebut prima facie case, and cannot rest on conclusory allegations, allegations of ultimate facts, or conclusions of law).

¶13 In opposing summary judgment, Springer does not dispute that the respondents make out a prima facie case for summary judgment based on the general rule that a purchaser in an asset sale does not succeed to the liabilities of the seller. Springer argues that a factual dispute exists as to whether one or more of the four exceptions to successor liability applies.

¶14 The party seeking the benefit of an exception to a general rule bears the burden of proving the exception applies. ***Acuity Mut. Ins. Co. v. Olivas***, 2007 WI 12, ¶44, 298 Wis. 2d 640, 726 N.W.2d 258 ("'one who relies on an exception to a general rule … has the burden of proving that the case falls within the exception'") (quoting ***State v. Big John***, 146 Wis. 2d 741, 756, 432 N.W.2d 576 (1988), which cites Charles T. McCormick, *McCormick's Handbook of the Law of Evidence*, § 337 at 787-89 (2d ed. 1972)). Thus, as the party seeking to establish that an exception to successor liability applies to hold the respondents liable in this case, the burden is on Springer to make a sufficient showing that the evidence in the record creates a factual dispute as to at least one of the exceptions. We address only the fourth exception, the fraudulent transfer exception, because we conclude that it is dispositive in that there is a genuine issue of material fact as to whether that exception applies.

¶15 Springer contends that the evidence creates a factual dispute as to whether the sale of FBE Company's assets to FBE Corporation was a fraudulent transaction, in that it was executed for the purpose of escaping responsibility for FBE Company's potential asbestos liability, and therefore, the general rule against successor liability does not apply.

¶16 Springer does not explain to this court what must be shown, in the context of successor liability, to establish that the assets of a company were fraudulently sold to avoid liability, and our own research has revealed no Wisconsin case law directly on point. However, it appears evident to us that the question of whether a transfer transaction was entered into fraudulently must be answered in the context of Wisconsin's Uniform Fraudulent Transfer Act. *See* WIS. STAT. ch. 242. WIS. STAT. § 242.04 addresses "[t]ransfers fraudulent as to present and future creditors," and sets forth what must be shown to establish a transfer was fraudulent as to a creditor. Section 242.04(1) provides:

> (1) A transfer made … by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

¶17 The respondents assert that we should not look to WIS. STAT. § 242.04(1) as the standard for a fraudulent transfer in the context of the fourth exception to the general rule against successor liability. However, the respondents do not explain why we should not look to § 242.04(1). We see no reason why § 242.04(1) cannot or should not be applied in determining whether the fourth exception to successor liability applies. Accordingly, we apply the factors set forth in § 242.04(1) in determining whether the fourth exception to successor liability applies here.

¶18 Applying this as the legal standard, we turn to Springer's argument that it can reasonably be inferred from the evidence submitted on summary judgment that FBE Company sold its assets in a fraudulent transfer. We note at the outset that, in arguing that it could be reasonably inferred from the evidence that the transaction was conducted "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor," *see* WIS. STAT. § 242.04(1)(a), Springer has the significant benefit of the fact that "the issue of intent is generally not readily susceptible of determination on summary judgment." *See* ***Tri-Tech Corp. of Am. v. Americomp Servs., Inc.***, 2002 WI 88, ¶30 n.5, 254 Wis. 2d 418, 646 N.W.2d 822.

¶19 In determining whether this is the unusual case in which an issue of intent is susceptible of determination on summary judgment, we look to WIS. STAT. § 242.04(2), which provides that the following non-exclusive list of eleven factors may be considered in determining actual intent under § 242.04(1)(a):

> (a) The transfer or obligation was to an insider;
>
> (b) The debtor retained possession or control of the property transferred after the transfer;

> (c) The transfer or the obligation was disclosed or concealed;
>
> (d) Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
>
> (e) The transfer was of substantially all the debtor's assets;
>
> (f) The debtor absconded;
>
> (g) The debtor removed or concealed assets;
>
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

We note that this is not an exclusive list, and therefore, the jury would be free to consider related concepts beyond these eleven factors in weighing the intent of the parties to the transaction.

¶20 Springer argues that the summary judgment submissions show that: the asset sale was to an insider—a director of FBE Company and multiple attorneys for FBE Company; that a shareholder of FBE Corporation was aware of FBE Company's potential asbestos-related liability; the asset sale was for substantially all of FBE Company's assets; the consideration received by FBE Company was inadequate; and FBE Company became insolvent shortly after the asset sale. *See* WIS. STAT. § 242.04(2)(a), (d), (e), (h), (i). She also argues that the following additional facts militate in favor of a finding that the asset purchase in

this case was done fraudulently: FBE Company and FBE Corporation did not have separate legal counsel; attorney-shareholders in FBE Corporation served as FBE Company's legal counsel; the asset sale was not negotiated; FBE Company's assets were not offered for sale on the open market; and an appraisal of FBE Company's value or a profitability analysis of FBE Company were not conducted.

¶21 As we now explain, we agree that the summary judgment evidence creates a genuine issue of material fact on the question of fraudulent transfer.

¶22 When facts identified by Springer are viewed in the light most favorable to her, as they must be on summary judgment, we conclude that the "drastic remedy" of summary judgment is not merited because a jury could reasonably infer that FBE Company sold its assets to FBE Corporation with intent to avoid possible future liability from sale and manufacture of asbestos-containing products. *See* ***Central Corp. v. Research Products Corp.***, 2004 WI 76, ¶20, 272 Wis. 2d 561, 681 N.W.2d 178 (referring to summary judgment as a "drastic remedy"); ***Burbank Grease Servs., LLC v. Sokolowski,*** 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (drawing reasonable inferences in light most favorable to non-moving party). In particular, we conclude that evidence that a director of FBE Company and attorneys for FBE Company were the buyers of FBE Company's assets could support each of the following as reasonable potential inferences: that at least one buyer was aware that FBE Company faced potential asbestos-related liability; that the sale was for substantially all of FBE Company's assets; and that FBE Company was represented during the asset sale by the law firm of the attorney-buyers. We conclude that, based on these potential inferences, a jury could reasonably infer that the asset sale was done fraudulently to avoid potential further asbestos liability, especially in the absence of evidence as to whether FBE Company was in fact insolvent at the conclusion of the sale or

whether FBE Company had cash assets equivalent to the value of the assets sold. Accordingly, we conclude that the circuit court erred in granting the respondents' motion for summary judgment.

¶23 Springer also argues that a factual dispute exists as to whether the first, second, and third exceptions to the general rule against successor liability apply. However, because our conclusion is dispositive that a factual dispute exists as to whether the asset sale in this case was fraudulent, the fourth exception, we do not reach those issues. *See* ***Cholvin v. Wisconsin Dep't of Health and Family Servs.***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we typically will not decide other issues raised). Our only conclusion in this appeal is that, based on the current state of the summary judgment record, a genuine issue of fact exists as to whether the fourth exception to the general rule against successor liability applies in this case. We do not intend for any statement in this opinion to preclude the circuit court from resolving any issues other than that one in advance of trial or at trial.

CONCLUSION

¶24 For the reasons discussed above, we reverse the judgment.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.