

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000838-MR

FRANK BARONE AND  
CHRISTINE BARONE

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE ROBERT G. JOHNSON, JUDGE  
ACTION NO. 06-CI-00767

GLEN PERKINS AND  
EDWARD HACKER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: Frank and Christine Barone (the Barones) have appealed from the Scott Circuit Court's summary judgment in favor of Glen Perkins and Edward Hacker, the defendants below, based upon the application of KRS 275.150, which provides immunity from personal liability for members of a limited liability

company. Having determined that the entry of summary judgment was appropriate, we affirm.

On December 6, 2006, the Barones filed an unverified complaint alleging several causes of action against Perkins and Hacker in relation to the construction of a single-family dwelling located in Georgetown, Kentucky, that they purchased in February 2005. In the complaint, the Barones alleged that Perkins and Hacker were members of Glen Perkins Custom Homes, LLC, which had been administratively dissolved, and that Perkins and Hacker were the builders of the residence. In that role, Perkins and Hacker oversaw the construction project, hired subcontractors, and selected all of the materials that were used. The Barones alleged that Perkins and Hacker breached their implied duty to construct or remodel the dwelling in a good and workmanlike manner; that their work was in violation of the Uniform State Building Code; that they breached their duty of good faith and fair dealing; and that they made fraudulent misrepresentations that the dwelling was structurally sound.

Perkins and Hacker filed their answer on January 4, 2007, asserting that they were insulated from liability, that the Barones failed to join a necessary party, and that they failed to state a cause of action against them for which relief could be granted. The following month, Perkins and Hacker filed a motion for summary judgment. In the motion, they asserted that the LLC had been reinstated retroactively to the date of the administrative dissolution, and that they were shielded from individual liability based upon their status as members of the LLC.

Perkins and Hacker also maintained that the actions they took were not as individuals, but rather were in furtherance of their duties as members of the LLC. Attached to the motion was Hacker's affidavit, which detailed the circumstances of the administrative dissolution and the LLC's subsequent reinstatement.

As expected, the Barones objected to the motion, arguing that summary judgment was premature as they had not had the opportunity to complete any discovery. For this reason, they stated that material issues of fact remained to be decided, including whether Perkins and Hacker were personally liable for their actions while employees of the LLC and whether their failure to conform to the building code was the proximate cause of the damages that were incurred. Nothing was attached to the Barones' response. In reply, Perkins and Hacker stated that they were not employees of the LLC, that they were acting solely as members of the LLC, that they did not perform any labor or design work for the dwelling, and that the building passed all inspections. Affidavits from Hacker and Perkins were attached to support these statements.

The circuit court entered its Findings of Fact, Conclusions of Law and Summary Judgment on March 26, 2007. After summarizing the relevant facts and applicable law, the circuit court concluded as follows:

#### CONCLUSIONS OF LAW

1. That Glen Perkins Custom Homes, LLC has been duly reinstated as a validly existing limited liability company which is active and in good standing under the laws of the Commonwealth of Kentucky and that

reinstatement has retroactive effect as if the administrative dissolution had never occurred;

2. That although the summary judgment process should not be invoked as a substitute for trial, if the record reveals that no genuine issue of material fact exists and a party stands entitled to judgment as a matter of law, summary judgment is proper;

3. That all of the acts of the Defendants that are complained of herein were taken as either a member of Glen Perkins Custom Homes, LLC or as a member of a limited liability company that is a member of Glen Perkins Custom Homes, LLC and not as individuals and all of the acts complained of by the Plaintiffs were taken at a time when Glen Perkins Custom Homes, LLC was active and in good standing under the laws of the Commonwealth of Kentucky;

4. That neither of the Defendants performed any work on the actual construction of the LVL beam in the home at 114 Kingston Drive, Georgetown, Kentucky, either as employees of Glen Perkins Custom Homes, LLC or otherwise;

5. That neither of the Defendants performed any work on the design of the LVL beam in the home at 114 Kingston Drive, Georgetown, Kentucky, either as employees of Glen Perkins Custom Homes, LLC or otherwise;

6. That this Court has no evidence of any building code violation noticed or cited by the applicable building inspector;

7. That neither of the Defendants is the person that violated KRS 198B.130(1) with respect to the alleged building code violation involving the LVL beam in the home at 114 Kingston Drive, Georgetown, Kentucky, and KRS 502.060 has no applicability to the case at bar to hold the Defendants civilly liable as individuals;

8. That Plaintiffs will not be able to produce evidence at trial to show that either of the Defendants actually performed the work resulting in the alleged defect and building code violation in the construction of the home at 114 Kingston Drive, Georgetown, Kentucky;

9. That KRS 275.150(1) insulates members of limited liability companies from any liability of the company whether arising in contract, tort or otherwise and unlike KRS 271B.6-220(2), contains no language which exempts any acts of the members as individuals;

10. That the Plaintiff's [sic] claims against the individual Defendants sound in contract and tort and therefore, fall within the purview of KRS 275.150(1);

11. That the record reveals no genuine issues of material fact with respect to the liability of the Defendants as individuals to the Plaintiffs;

12. That the Plaintiffs have voluntarily failed to join other proper parties to this litigation;<sup>[1]</sup> and,

13. That the Defendants stand entitled to judgment as a matter of law.

This appeal followed.

On appeal, the Barones continue to argue that summary judgment was prematurely entered, as they had not had the opportunity to conduct any discovery.

In addition, the Barones contend that the circuit court misinterpreted KRS 275.150(1), specifically in concluding that the statute provided an absolute shield from liability.

#### STANDARD OF REVIEW

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<sup>1</sup> In its Findings of Fact, the circuit court found that the Barones chose not to join as parties the LLC or any of its independent contractors who worked on the construction of the home.

We shall first set forth the two-part standard of review applicable in summary judgment appeals, which is well settled in the Commonwealth:

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. 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.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelevest[, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991),]* used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*. (citations in footnotes omitted)

*Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

## ANALYSIS

### 1. Whether Summary Judgment was Prematurely Entered

“Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court’s

determination that there are no such disputed facts, summary judgment is appropriate.” *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1995).

By way of affidavit and supporting documentation attached to the summary judgment motion and reply, Perkins and Hacker established several factual bases in support of their argument that summary judgment was appropriate. However, as pointed out by the circuit court, the Barones did not submit any evidence by way of affidavit or otherwise to: 1) contradict the sworn statements of Perkins and Hacker that they were not employed by the LLC, but were members of it; 2) contradict their sworn statements about representations they made, or did not make, about the structural integrity of the dwelling; 3) establish the existence of a building code violation or citation; or 4) establish that Perkins or Hacker performed any of the work or designed the allegedly defective structure. Accordingly, the Barones did nothing to contradict the evidence Perkins and Hacker submitted to support their motion for summary judgment. The Barones cannot now maintain that material issues of disputed fact exist, when they failed in their burden to put forth affirmative evidence to combat the evidence submitted by Perkins and Hacker. Merely stating that disputed facts exist, without including at least some affirmative evidence to support that statement, is not enough to meet that burden.

Therefore, we hold that the circuit court did not prematurely enter a summary judgment and properly held that no disputed issues of fact existed.

## 2. Interpretation of KRS 275.150

In KRS 275.150, the Legislature provided for immunity from personal liability in limited liability companies. KRS 275.150(1) reads, in pertinent part, as follows:

[N]o member . . . of a limited liability company . . . shall be personally liable by reason of being a member . . . of the limited liability company . . . for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise. The status of a person as a member . . . of a limited liability company . . . shall not subject the person to personal liability for the acts or omission, including any negligence, wrongful act, or actionable misconduct, of any other member . . . of the limited liability company.

The Barones contend that the above statute does not confer absolute immunity upon members of LLCs for their individual wrongful acts, but speaks only of liability in terms of the actions of the LLC. Perkins and Hacker, on the other hand, assert that an LLC cannot act except through its representatives, and that, based upon the undisputed facts, any acts they took were on behalf of the LLC and were not tortious.

We agree with Perkins and Hacker that KRS 275.150 acts to shield them from liability under the circumstances of this case. The Barones did not submit any affirmative evidence to counter the affidavits attached to Perkins and Hacker's pleadings, which they had the opportunity to do when they filed their response to the summary judgment motion. As the circuit court ultimately found, neither Perkins nor Hacker engaged in any tortious conduct. Furthermore, at all times they were acting in their capacities as members of the LLC. We note that the



Barones did not opt to name the LLC as a defendant or even move to amend their complaint to name the LLC once its license was reinstated. Because Perkins and Hacker were acting in their capacities as members of the LLC, they are entitled to the immunity provided by KRS 275.150.

To briefly address the Barones' public policy argument, we agree with Perkins and Hacker that it is the Legislature's duty to declare public policy:

Clearly the establishment of public policy is not within the authority of the courts. Section 27 of the Kentucky Constitution provides that the powers of government be divided into three distinct units: Executive, Legislative and Judicial. The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.

*Com., ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992). Therefore, we decline the Barones' offer to create a public policy exception to the immunity granted by the legislature to LLCs and their members.

For the foregoing reasons, the summary judgment of the Scott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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