

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000890-MR

THOMAS STONE
AND CHERYL STONE

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 15-CI-01290

HOME DEPOT U.S.A., INC.
AND MTA DISTRIBUTORS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Thomas Stone and Cheryl Stone, his wife, appeal from separate summary judgments of the Fayette Circuit Court dismissing their claims against MTA Distributors, Inc., and Home Depot U.S.A., Inc., d/b/a The Home Depot.

They also appeal the trial court's order excluding the testimony of their proffered expert witness. After our review, we affirm.

The Stones filed this product liability action in the Fayette Circuit Court seeking money damages for personal injury and loss of consortium. They leased a scaffold from Home Depot, which failed to support Thomas as he was painting a two-story foyer in the interior of a rental home owned by the Stones. The Stones alleged defective design and warnings; breach of implied and express warranties; and negligence based on injuries suffered when a scaffold manufactured and sold to retailers by MTA Distributors allegedly failed.

The Stones alleged that Home Depot failed to provide them with a safety information booklet that contained the manufacturer's directions for erecting the scaffold and which warned of the risk for serious injury and death upon its improper assembly. They alleged that Home Depot failed to provide them with an adequate demonstration of the scaffold's proper assembly and failed to provide them with all the component parts necessary for proper assembly, including guardrails, outriggers, and safety pins. They alleged that MTA Distributors failed to ensure that adequate warnings about the danger of improperly assembling the scaffold were provided to them. Finally, the Stones alleged that MTA Distributors failed to adequately inspect the scaffold's condition for fitness to rent to Home Depot's customers under its "Inventory Refresh" program.

Following a period of discovery, Home Depot and MTA Distributors filed motions for summary judgment. Pointing to photographs taken of the scaffold following the incident and to the Stones' descriptions of the event, Home Depot claimed that there was no evidence of any failure or malfunction of the scaffold and that Thomas simply stumbled from the scaffold, causing it to tip over. MTA echoed the arguments presented by Home Depot and contended that there was no evidence to indicate that MTA shipped the unassembled scaffold without all its component parts or that it had failed adequately to inspect the parts at Home Depot to see that it was fit for its intended purpose. MTA contended that no evidence indicated that the scaffold failed, that it was improperly assembled, or that the platform upon which Thomas was standing ever separated from the scaffold frame as described by the Stones' proffered expert.

Following its final pre-trial conference, the trial court granted summary judgment to MTA Distributors. The court also granted partial summary judgment to Home Depot, dismissing the strict liability and breach of warranty claims asserted against it. Later, the court entered an order that excluded the testimony of the Stones' expert, an engineer, Stephen Fournier. Eventually, the court granted summary judgment to Home Depot on the negligence claims. This appeal followed.

On appeal, the Stones contend that the trial court erred by granting summary judgment to MTA Distributors and Home Depot. They argue that the scaffold that MTA Distributors manufactured and shipped to Home Depot was unreasonably dangerous because it lacked an instruction booklet and appropriate warning labels when it reached them. Separately, they contend that MTA was negligent by failing to inspect the scaffold adequately -- having undertaken an obligation to do so -- after the scaffold was sold to Home Depot for lease to the retailer's customers. The Stones argue that they produced expert testimony sufficient to establish that the scaffold was defective and that MTA Distributors and Home Depot were negligent. They contend that even without expert testimony, a jury could reasonably conclude from the circumstantial evidence that the scaffold was unreasonably dangerous. They claim that the trial court also erred by dismissing the strict liability and warranty claims against Home Depot.

In response, MTA Distributors and Home Depot argue that the only evidence regarding the issue of strict liability or negligence comes through the opinion testimony of Fournier, the Stones' expert. They argue that the trial court's exclusion of Fournier's testimony was proper because his opinion was not based upon sufficient facts or data. Consequently, they believe that it was unreliable. MTA Distributors and Home Depot argue that without evidence that the scaffold

was defective or that the alleged defect caused Stone's injury, they were entitled to judgment as a matter of law. We agree.

Summary judgments involve only the resolution of issues of law and a determination of whether there exists a genuine issue of material fact. CR¹ 56.03. In this case, we review, *de novo*, the trial court's conclusion that the Stones cannot demonstrate the existence of a genuine issue of material fact as to the cause of their damages. *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). However, with respect to the admissibility of the proffered expert opinion, we must defer to the trial court's judgment. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004).

In order to state a cause of action based on negligence, a plaintiff must establish the defendant's duty, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky. App. 2001). Causation is an element of proof in an action brought under a theory of product liability as well. *Holbrook v. Rose*, 458 S.W.2d 155 (Ky. 1970). A plaintiff must establish that the defendant's product or acts (or omissions) caused the harm -- whether a case is analyzed as one involving: a manufacturing design defect and/or warnings issue; breach of implied and/or express warranties; the lease of a product so defective as to be unreasonably

¹ Kentucky Rules of Civil Procedure.

dangerous because of an inherent defect or inadequate warning; negligence in the inspection of a product to be leased; or other negligence.

Both the existence of a defect in the product and causation may be established through sufficient circumstantial evidence from which a jury may reasonably infer that the product was defective or otherwise a cause of the harm. *Holbrook, supra*. In order to be sufficient, however, the circumstantial evidence must permit the jury to find to a *reasonable probability* that a defect in the product or some negligent act (or a combination of both) was responsible for the harm. *Id.*

The Stones contend that the testimony of their expert, Fournier, was sufficient to establish causation and that the trial court erred by excluding it. We must review the trial court's findings of fact with respect to the reliability of the expert opinion for clear error. In reviewing a trial court's ruling as to whether the expert testimony is relevant, our standard is abuse of discretion. *Miller, supra*.

The Stones' proffered expert witness opined that Thomas's fall was caused by a malfunction of the scaffolding; *i.e.*, that the scaffolding was improperly assembled and that the wooden platform affixed to the top of the scaffolding came loose and fell through the scaffolding, causing Thomas to fall and sustain his injuries. Fournier was the only person who testified that the cause of Thomas's injuries was a malfunctioning scaffold. He based his opinion specifically on an inaccurate history of events. Fournier stated that the bases for

his opinion were this history and his re-enactment or recreation of the alleged scaffold failure.

In his testimony, Fournier admitted that he had never spoken with either Thomas or Cheryl. He admitted that he was unaware of the dimensions of the foyer where Thomas was working on the scaffold and that he had not viewed photographs of the area. He testified that he did not know which of the walls that Thomas was painting when he fell or the direction in which he was standing atop the scaffold.

Fournier admitted that he had **no objective evidence** to support his conclusion that the scaffold was improperly assembled or that it was assembled with unsuitable components. He testified that he had not talked with either of the Stones' neighbors who had disassembled the scaffold at the rental house following the incident. He also testified that he had not talked with or read the deposition testimony of the Stones' neighbor who had collected the component parts of the scaffold and returned them to Home Depot. Fournier also admitted that he had no video record of the "re-enactment" he undertook using the component parts of the scaffold provided to him by Home Depot, but he indicated that when he "gently shook" the platform and the opposite beam frame, the platform truss assembly "walked" outward until the platform fell to the ground.

During Fournier's deposition, the Stones' attorney objected to questions aimed at determining what precipitated Thomas's fall, explaining that Fournier could only "speculate" as to what had happened. She observed that "[t]he only person that knows that is Mr. Stone." However, Thomas had no recollection of his fall from the scaffold, and no one saw it happen. Cheryl knew only that the entire scaffold had ended up tilted against the rail of the stairs and that Thomas had landed upside down on his head and shoulder in the corner of the foyer. He was facing outward, and his legs were entwined in the ladder portion at one end of the scaffold. Cheryl did not indicate that the platform separated or detached from the scaffold. Cheryl indicated that the scaffold had been moved around twice while Thomas was painting and that Thomas had had no problems climbing up the scaffold. Thomas himself recounted ascending and descending the scaffold several times during the day; he did not recall the scaffold's being unstable or shaking.

Photographs of the scaffold taken at the house just hours after the accident show the scaffold **completely intact**. There was simply no evidence to indicate that the platform had become disengaged from the rest of the scaffold. Thomas admitted that it was just as likely that he had stepped off the edge of the scaffold, causing it to tip.

KRE² 702 provides that expert opinion testimony is admissible if “(1) [t]he testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to the facts of the case.” The party proffering the expert testimony bears the burden of showing its admissibility. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court must ensure that expert testimony is relevant and reliable before it is admitted. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). That court is in the best position to evaluate the proffered testimony. *Id.*

In the case before us, the trial court found that the facts upon which Fournier’s opinion was based were inconsistent both with the Stones’ testimony and with the photographic evidence. As a result, the trial court concluded that his opinion was not based on sufficient facts or data as required by our rules of evidence and that it constituted mere speculation instead. The trial court did not err in concluding that the proffered opinion was not reliable and, therefore, that it was inadmissible.

The remaining evidence does not constitute the probative evidence necessary to show that the allegedly defective scaffold or the defendants’ negligence with respect to it caused Stone’s injuries. The evidence fails to

² Kentucky Rules of Evidence.

establish that it was more likely than not that a defect in the scaffold was a cause of the harm. Where only one reasonable conclusion can be reached, the trial court may decide the issue of causation as a matter of law. *Adkins v. Greyhound Corp.*, 357 S.W.2d 860 (Ky. 1962). Consequently, the trial court did not err by granting summary judgment either to MTA Distributing or to Home Depot.

The judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

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