

IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 23, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

AT KNOXVILLE

CHIP HARBOUR,)	C/A NO. 03A01-9812-CV-00394
)	
Plaintiff-Appellee,)	
)	
)	
v.)	APPEAL AS OF RIGHT FROM THE
)	HAMILTON COUNTY CIRCUIT COURT
)	
)	
)	
KELSAY PLUMBING COMPANY,)	
)	HONORABLE W. NEIL THOMAS,
Defendant-Appellant.))	JUDGE

For Appellant

For Appellee

DANIEL J. RIPPER
Luther - Anderson, PLLP
Chattanooga, Tennessee

RONALD J. BERKE
Berke, Berke & Berke
Chattanooga, Tennessee

OPINION

AFFIRMED AND REMANDED

Susano, J.

This litigation arose out of work performed by the defendant Kelsay Plumbing Company ("Kelsay Plumbing") in connection with the plumbing contract on a new house built by the plaintiff Chip Harbour ("Harbour"). In response to a question posed to it, the jury determined that "there [was] negligence on the part of [Kelsay Plumbing], which caused loss or damage to [Harbour]." It awarded damages of \$100,000. Kelsay Plumbing appeals, raising one issue that poses the following question for our resolution:

Did the trial court err in refusing to allow Kelsay Plumbing to assert as a defense that it did not cause the damages complained of by Harbour and by refusing to allow the testimony of Herbert Stewart ("Stewart") to the effect that the water flowing through Harbour's plumbing system caused the damage complained of by Harbour and not the acts of Kelsay Plumbing?

We find and hold that, because Kelsay Plumbing failed to raise the affirmative defense of the comparative fault of Savannah Utility District ("Savannah") as required by Rule 8.03, Tenn.R.Civ.P.,¹ the trial court was correct in refusing to

allow Kelsay Plumbing to pursue at trial its claim that leaks in Harbour's plumbing system were caused by the corrosive nature of the water supply.

I.

In 1988, Harbour entered into a contract with Kelsay Plumbing for the installation of a plumbing system in connection with the construction of Harbour's new residence in Ooltewah. The system was to include a re-circulating hot water system. The water for the residence was supplied by Savannah. Shortly after the installation of the plumbing system, a series of leaks occurred in the pipes.

Kelsay Plumbing hired Stewart of VCE Investigative Engineers to investigate the leaks. In 1991, Stewart summarized his initial findings in a report ("1991 report"), in which he concluded that the most probable cause of the leaks was chemical corrosion, and that such corrosion was possibly caused by an excessive amount of soldering paste being used in the joints of the pipes. In 1994, two years after this litigation was commenced, Stewart prepared another report ("1994 report") further addressing the problems in the plumbing system. In the 1994 report, Stewart surmised that the corrosive nature of the water flowing through the pipes contributed to the failure of the plumbing system. Stewart noted that Savannah had discovered the water supply's "corrosion problem" four or five years earlier and that, in 1992, it had initiated a corrosion inhibitor program that reduced the corrosive state of the water by 50%.

Harbour filed this action in 1992.² In his complaint, he alleged *inter alia* that Kelsay Plumbing performed "slipshod and shoddy work which [had] caused leaks throughout the [plumbing] system" and that the work was done in a negligent manner. In its answer, Kelsay Plumbing denied these allegations and asserted several defenses: failure to state a claim upon which relief could be granted; the statute of limitations; lack of personal jurisdiction; failure to join the pipe manufacturer and contracting electrician as indispensable parties; all defenses contained in the Tennessee Products Liability Act; and all defenses contained in the Uniform Commercial Code. Finally, Kelsay Plumbing, in its answer, took the position that the problems in the plumbing system were caused by Harbour in the negligent construction of his residence.³ Thereafter, in 1995, Harbour amended the complaint to include allegations that Kelsay Plumbing had committed several building and plumbing code violations; that it had used improper sizing for the pump in the re-circulating system; and that it had been negligent in its selection and installation of equipment and materials.

Trial of this matter commenced on June 30, 1998. At the conclusion of the first day of proof, the trial court orally observed that Kelsay Plumbing's attorney had made references to the water being the cause of the leaks. The trial court asked the attorney if he planned to raise the issue of comparative fault on the part of Savannah. In

response, the defendant's attorney stated that, in order to refute Harbour's allegation that the pump in the re-circulating system was the source of the problem, he intended to present the expert testimony of Stewart to show that the water had corrosive properties that caused the leaks. Harbour's attorney objected to such proof, arguing that such proof obviously would be offered in an attempt to blame Savannah for the leaks, and that such blame-shifting was impermissible because Kelsay Plumbing had failed to allege the comparative fault of Savannah in its answer.

The trial court held that Kelsay Plumbing could not introduce the testimony of its expert to show that the corrosive nature of the water was the *cause in fact* of the leaks. It also ruled that Kelsay Plumbing could not otherwise attempt to prove this theory of defense. The trial court predicated its ruling on the failure of Kelsay Plumbing to allege the comparative fault of Savannah in its answer, as required by Rule 8.03, Tenn.R.Civ.P. Upon the trial court's ruling, Kelsay Plumbing moved to amend its pleadings to allege that the water was the cause in fact of the leaks. When the trial court denied this motion, Kelsay Plumbing moved for a continuance, which was also denied.

After the above rulings, the trial resumed. As previously indicated, the jury returned a verdict for Harbour, finding that Kelsay Plumbing was liable for damages of

\$100,000. After the trial court denied the defendant's motion for a new trial, Kelsay Plumbing filed this appeal.

II.

Kelsay Plumbing's sole issue raises a question of law; hence, the scope of our review is *de novo* with no presumption of correctness. Rule 13(d), T.R.A.P.; **Ridings v. Ralph M. Parsons Co.**, 914 S.W.2d 79, 80 (Tenn. 1996).

III.

On this appeal, Kelsay Plumbing argues that the trial court erred in refusing to allow it to prove that the corrosive nature of the water was the *cause in fact* of the leaks. It sought to establish that the corrosive properties of the water -- and not Kelsay Plumbing's negligence -- was the cause of the leaks. It planned to present this theory of defense primarily through the testimony of its expert, Stewart. Kelsay Plumbing contends that the trial court erroneously relied on Rule 8.03, Tenn.R.Civ.P., and the Supreme Court's decision in **George v. Alexander**, 931 S.W.2d 517 (Tenn. 1996), in concluding that Kelsay Plumbing was required to identify Savannah in its answer as the entity legally responsible for Harbour's problems in order to pursue the defense under discussion. Kelsay Plumbing's position is best illustrated by the following quotes from its brief:

In the present case, however, Kelsay is clearly not relying upon the defense of comparative fault. Rather, Kelsay was acting in accordance with its original answer in this case in which it denied its responsibility and negligence for the damages being claimed by the appellee. That is to say, the problems which the appellee was having and for which he brought suit, were the result of a combination of factors including the water flowing through the pipes, none of which are the result of any negligent act of Kelsay. The water and factors related to the water were the "cause in fact" of Harbour's problems, not any act of Kelsay or any other party against whom fault could be apportioned. The water was the "cause in fact" of the problems complained of, not a party or person against whom comparative fault could be alleged.

* * *

[i]t is alleged that the water corrosion to the inside of the pipe which is the cause in fact of the leaks in the hot water recirculating system of the appellant is not the proximate result of any actions taken by any individual or entity. Rather, it is the result of factors inherent in the composition of the water itself when combined with heat.

We understand the point being made by Kelsay Plumbing in arguing that Rule 8.03, Tenn.R.Civ.P., does not preclude it from attempting to show that the corrosive nature of the water was the *cause in fact* of Harbour's problems; however, we disagree with its conclusion that Rule 8.03 is not applicable to this defense.

IV.

Rule 8.03, Tenn.R.Civ.P., requires a party to affirmatively plead comparative fault, including the identity or description of any other alleged tortfeasor. Thus, a defendant in a negligence case must plead comparative fault as an affirmative defense if the defendant wishes to show that another person caused the plaintiff's injury. **George**, 931 S.W.2d at 518. A defendant's failure to identify another potential tortfeasor precludes a trier of fact from attributing any percentage of fault to that individual or entity. **Ridings**, 914 S.W.2d at 84.

In the instant case, the trial court found the Supreme Court's decision in **George v. Alexander** to be controlling. In **George**, the plaintiff sued two physicians, alleging that they were negligent in administering spinal anesthesia prior to the plaintiff's surgery. **George**, 931 S.W.2d at 519. At trial, the physicians sought to introduce evidence to establish that the positioning of the plaintiff's body by another physician prior to surgery was the cause in fact of the plaintiff's injury. **Id.** at 520. The plaintiff argued that Rule 8.03 required the defendant physicians to plead comparative fault as a defense if they wanted to show that another physician caused the injury. **Id.** The physicians responded that Rule 8.03 is triggered only when a defendant intends to show that another person was the *proximate* cause of the injury. **Id.** As they intended to show only that another

physician was the *cause in fact*, the physicians argued that they were not attempting to show that the non-party physician was negligent. **Id.** at 521. Thus, they reasoned that Rule 8.03 is inapplicable, and they were not required to plead comparative fault in order to assert this defense. **Id.**

The Supreme Court rejected the physicians' argument, finding that if a defendant introduces evidence that another person was the cause in fact of the plaintiff's injuries, the defendant effectively shifts the blame to that person. **Id.**

The Court went on to note:

if the defendants' position were to be accepted, any defendant wishing to transfer blame to another person at trial could *always* maintain that it is not trying to show that the other's conduct satisfies the legal definition of negligence, but that it is merely trying to establish that the other person's conduct actually caused the injury. In the latter situation, however, the defendant has fully accomplished what Rule 8.03 was intended to prevent: it has effectively shifted the blame to another person without giving the plaintiff notice of its intent to do so. Therefore, the

purpose of Rule 8.03 would be undermined to a substantial degree if the defendants' overly technical argument were to prevail.

Id.

We hold that the trial court correctly excluded the proffered evidence. Under Rule 8.03, Kelsay Plumbing's theory that the corrosiveness of the water caused the damage should have been pled. Its answer is devoid of any allegation that the water, much less Savannah, was at fault for the leaks in the pipes. The relevant portion of Rule 8.03 is designed to require a defendant to clearly state its position that someone other than itself is legally at fault for the matters about which the plaintiff complains. A defense properly asserted pursuant to the "comparative fault" part of Rule 8.03 can have very significant ramifications not only with respect to putting the plaintiff on notice as to another alleged fault-target but also with respect to extending the statute of limitations as to the individual or entity identified in the answer. See T.C.A. § 20-1-119 (1994).

Kelsay Plumbing argues that it could not name a tortfeasor in its answer because it is asserting that the water, not another person, was the cause of Harbour's damages. We do not find this argument persuasive. Kelsay Plumbing states in its brief that the composition of the water was created by

Savannah. Furthermore, and significantly, the 1994 report prepared by Stewart, upon whom Kelsay Plumbing intended to rely, describes in detail Savannah's efforts to control the corrosiveness of the water supply. If, as Kelsay Plumbing alleges, the particular composition of the water resulted in a level of corrosiveness so high as to create holes in Harbour's pipes, it seems to us an unavoidable conclusion that Savannah would be a potential tortfeasor as contemplated by Rule 8.03.

Kelsay Plumbing argues that the Supreme Court's decision in *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252 (Tenn. 1997), controls this case. In *Snyder*, the plaintiff sued the manufacturer and seller of a cotton baler, alleging negligence and products liability. *Id.* at 254. The defendants wanted to introduce evidence at trial that equipment alterations made by the plaintiff's employer were the proximate cause of the plaintiff's injuries. *Id.* at 254. The Supreme Court noted the trier of fact was precluded from finding that the employer was the proximate cause of the plaintiff's injuries because the employer was immune from tort liability by virtue of the workers' compensation law. *Id.* at 256. The Court held, however, that this rule does not preclude a trier of fact from finding that the alteration or improper use of a product by an immune employer was the cause *in fact* of the plaintiff's injuries:

If the rule were otherwise, the defendants would effectively be precluded from presenting a defense. A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Id. Kelsay Plumbing argues that this rationale should apply to the instant case. We disagree. In **Snyder**, the Supreme Court was required to separate the *fact of causation* from the legal consequences that would usually flow from such causation, not because they were not logically associated concepts, but rather because the immunity of the employer would not allow the coupling of these related concepts. The proof problems caused by the employer's immunity in **Snyder** are not present in this case. To argue that the corrosive nature of the water produced by Savannah was the cause in fact of the leaky pipes, is to point the finger of blame at another – one who is not immune, and one against whom a jury could legally assign fault. This case is not controlled by **Snyder**; it is subject to the holding in **George**. The defendant could not assert its theory as to the corrosive nature of the water without identifying Savannah in its answer as required by Rule 8.03.

The trial court did not err in refusing to allow

Kelsay Plumbing to pursue its theory of defense that the corrosive nature of the water was the cause in fact of the leaky pipes and Harbour's damages.

V.

In view of our decision with respect to Kelsay Plumbing's sole issue, we do not find it necessary to address in any detail Harbour's argument that the trial court had another basis for refusing to receive Stewart's testimony – a ground not attacked by Kelsay Plumbing on this appeal. It is true that the trial court also alluded to the fact that Kelsay Plumbing had not timely furnished counsel for Harbour with a copy of Stewart's 1994 report. While this failure may have played some role in the trial court's decision not to allow Kelsay Plumbing to put Stewart's testimony before the jury, it is obvious that the main basis for the court's more general ruling that the defense based on the corrosive nature of the water would not be permitted was the defendant's failure to comply with Rule 8.03.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for enforcement of that court's judgment and for collection of costs assessed below, all pursuant to

applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.