IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 21, 2015 Session

JOHN B. EVANS v. PIEDMONT NATURAL GAS CO., INC.

Appeal from the Circuit Court for Davidson County
No. 13C4240 Carol Soloman, Judge

No. M2014-01099-COA-R3-CV – Filed August 18, 2015

This appeal arises from a property damage dispute. Homeowner claims his sewer line was damaged during the installation of a natural gas pipeline in 1984 and that the damage was concealed. The gas company maintained that a subcontractor for a predecessor entity installed the pipeline and that it had no knowledge of any damage. After homeowner obtained a judgment in general sessions court, the gas company appealed to the circuit court for Davidson County. Homeowner moved to dismiss the appeal on the basis that the gas company did not timely set the case for trial. After homeowner's motion to dismiss was denied, the gas company moved for summary judgment. Following a hearing, the court granted summary judgment in favor of the gas company because: (1) there was no evidence in the record that the gas company or the predecessor entity damaged the sewer line or concealed any damage; (2) homeowner's claims were barred by the statute of repose; and (3) homeowner failed to allege facts to support an award of punitive damages. Homeowner appeals. Although the trial court properly granted summary judgment on the issue of punitive damages, we conclude the court erred in limiting homeowner's discovery. In light of this conclusion, we vacate the trial court's grant of summary judgment in all other respects and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part, and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Keith C. Dennen, Nashville, Tennessee, for the appellant, John B. Evans.

William B. Jakes, III, Nashville, Tennessee, for the appellee, Piedmont Natural Gas Co., Inc.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1984, a contractor for Nashville Gas Company ("Nashville Gas") installed a natural gas pipeline through the west side of property now owned by John Evans. At some point, which is not clear from the record, a sewer line was also installed on the west side of the property. Mr. Evans acquired the property in March 2012.

In January 2013, sewage overflowed into the basement of the home located on Mr. Evans's property. In response to the overflow, Mr. Evans called a plumber who excavated the sewer line. Mr. Evans claims the excavation revealed that the sewer line had been damaged with a backhoe or similar machine. According to Mr. Evans, no dig permits for his property had been issued except for the gas line installation by Nashville Gas in 1984. Therefore, he asserts that Nashville Gas must have damaged his sewer line during the installation of the gas line in 1984. He also alleges that the installer improperly used plastic joint tape to repair the damage and buried the line nearly three feet deep.

On June 26, 2013, Mr. Evans sued Piedmont Natural Gas Company ("Piedmont") in Davidson County General Sessions Court. In its entirety, his general sessions warrant stated that he sought:

> Damages due to the intentional destruction of property to wit; a sewer line, in connection with the installation of a gas pipeline by the Defendant and/or its agents, and the intentional concealment of said destruction, and damages accruing from the backup of waste into the home as a result of that destruction, together with the consequential and punitive damages, all in an amount under $25,000.00 dollars.

On August 19, 2013, the general sessions court awarded Mr. Evans $4,179.40 in compensatory damages. Then, after a separate hearing conducted two months later, the court awarded Mr. Evans $10,000 in punitive damages.

On October 14, 2013, Piedmont appealed the general sessions court's decision to the circuit court. Piedmont moved for summary judgment on March 18, 2014, on the following grounds: (1) Piedmont was not liable for acts of its predecessor, Nashville Gas; (2) the statute of repose, Tennessee Code Annotated § 28-3-202, barred Mr. Evans's claim; and (3) Mr. Evans failed to allege facts to support his request for punitive damages. Both parties agree that the following relevant facts are undisputed:

[ ] In 1984, gas service was extended to Cash Lane which intersects with Due West Avenue at the location of the plaintiff's property. . . . .

[ ] The gas line installation on Cash Lane in 1984 was performed by Holmes Construction Company, a contractor hired by Nashville Gas . . . .

[ ] Piedmont has not serviced or repaired the gas line on Cash Lane near, or in the vicinity of, plaintiff's sewer line since 1984.

[ ] Other than the permit issued for the installation of the natural gas pipeline by Piedmont, no other "dig permits" had been issued for the Evans Property between 1980 and 2013.

After conducting a hearing, the court granted Piedmont's motion for summary judgment. As grounds for summary judgment, the court's order stated in relevant part:

> The court determined that there was no genuine issue as to any material fact which supported the plaintiff's theories of recovery against Piedmont. There is no evidence in the record that Piedmont or its predecessor, the Nashville Gas Company, damaged the sewer line in question, repaired the sewer line in question or intentionally concealed any damage or repair to the sewer line in question. There is no proof in the record that the sewer line was damaged at the time of the gas installation in 1984. There is no proof in the record that either Piedmont or the predecessor, the Nashville Gas Company, was ever aware of any damage to the sewer line at any time before 2013 when the problem which is the subject of plaintiff's claim began.
>
> The court was also of the opinion that the plaintiff's claims were barred by the 4 year statute of repose, T.C.A. § 28-3-202. The gas line in question was installed in 1984 and the damages which are the basis of the plaintiff's claim occurred in 2013.
>
> . . . .
>
> The court was further of the opinion that there was no genuine issue as to any material fact on the plaintiff's claims for punitive damages. The court determined that there was no factual or legal basis for punitive damages under the criteria of *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. Ct. App. 1992).

II. ANALYSIS

Although not exactly stated in this manner by Mr. Evans, the issues on appeal are whether the trial court erred by: (1) denying the motion to strike and dismiss Piedmont's appeal; (2) limiting his discovery; and (3) granting summary judgment in Piedmont's favor.

A. MOTION TO DISMISS

Mr. Evans claims Piedmont's appeal should have been dismissed because Piedmont failed to comply with a local rule requiring a trial date to be set within forty-five days of the docketing of the appeal. Piedmont filed its appeal on October 14, 2013, and its motion to set the case for trial on October 22, 2013. However, Piedmont failed to serve the motion on Mr. Evans's attorney. Instead, the motion was addressed to Mr. Evans's attorney at Mr. Evans's home address.

On November 15, 2013, Mr. Evans's attorney became aware of the motion to set via an e-mail exchange. Once aware of the motion, Mr. Evans's attorney offered to consider potential trial dates proposed by Piedmont. Five days later, Mr. Evans's attorney acknowledged potential trial dates and indicated he would consult with his client. Piedmont's attorney attempted to confirm trial dates on December 5 and 10, 2013, via e-mail, but no response from Mr. Evans's attorney is included in the record.

On December 11, 2013, Mr. Evans filed a motion to strike Piedmont's motion to set the case for trial and to dismiss Piedmont's appeal. The motion alleged that Piedmont failed to properly serve a motion to set the case for trial, so the appeal should be dismissed. At a January 31, 2014 hearing on the motion, Mr. Evans's attorney admitted that he was aware of Piedmont's motion to set the case for trial when he filed the motion to dismiss. In an order entered February 27, 2014, the court denied the motion to strike and dismiss Piedmont's appeal.

A trial court's decisions regarding a party's compliance with procedural rules are reviewed under an abuse of discretion standard. *Metro. Gov't of Nashville & Davidson Cnty. v. Cuozzo*, No. M2007-01851-COA-R3-CV, 2008 WL 3914890, at *2 (Tenn. Ct. App. Aug. 25, 2008); *see also Hodges v. Att'y Gen.*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000). On appeal, we are not permitted to substitute our own discretion for that of the trial court. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Although the abuse of discretion standard is a less rigorous standard of review, it "does not . . . immunize a [trial] court's decision from any meaningful appellate scrutiny." *Id.* (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)). "Discretionary decisions must take the applicable law and the relevant facts into account." *Id*. (citing *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)).

When reviewing a lower court's discretionary decision, we must determine: "(1) whether the factual basis for the decision is properly supported by evidence in the record; (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision; and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Id*. A trial court abuses its discretion only if it: (1) applies incorrect legal standards; (2) reaches an illogical conclusion; (3) bases its decision on a clearly erroneous assessment of the evidence; or (4) employs reasoning that causes an injustice to the complaining party. *Konvalinka*, 249 S.W.3d at 358; *see also Kline v. Eyrich*, 69 S.W.3d 197, 203-04 (Tenn. 2002); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

In Davidson County, parties appealing from judgments of the general session court must promptly obtain a trial date. Davidson County Local Rule of Practice 20(b) specifies both the deadline for obtaining the trial date and the consequence for failure to meet the deadline:

> Once the warrant being appealed is received by and filed with the Circuit Court Clerk, the appellant has the duty to set the appeal for a hearing before a trial judge. The appellant has forty five (45) days to secure a trial date from the court. The time is counted from the date the Circuit Court Clerk files the appealed warrant. If the appellant fails to secure this order within the 45 day time period, an order will be entered making the judgment of the General Sessions Court the judgment of the Circuit Court with costs taxed to the appellant. At the time the appeal is perfected in the Clerk's office, the clerk shall give the appellant or the appellant's attorney written notice of this rule.

Rule 20(b), Local Rules of Practice of the Courts of Record of Davidson County.

Tennessee courts seek to resolve cases on their merits, rather than on "'legal technicalities or procedural niceties.'" *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001) (quoting *Karash v. Pigott*, 530 S.W.2d 775, 777 (Tenn. 1975)). We have previously addressed how the preference for deciding cases on the merits squares with Davidson County Local Rule of Practice 20(b):

> "[P]rocedural rules should be used to enhance, rather than impede, the search for justice and avoid legal technicalities and procedural niceties." Consequently, *where no prejudice exists*, procedural rules should not be used to "thwart the consideration of cases on their merits." "[I]t is the general rule that courts are reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits."

Pieny v. United Imports, No. M2004-01695-COA-R3-CV, 2005 WL 2140853, at *3 (Tenn. Ct. App. Sept. 6, 2005) (second alteration in original) (emphasis added) (citations omitted) (quoting *May v. Woodlawn Mem. Park, Inc.*, No. M2001-02945-COA-R3-CV, 2002 WL 31059223, at *2 (Tenn. Ct. App. Sept. 17, 2002)). Consequently, dismissals under Local Rule 20(b) are disfavored and "should generally be reserved for 'totally unresponsive parties.'" *Crom-Clark Trust v. McDowell*, No. M2005-01097-COA-R3-CV, 2006 WL 2737828, at *3 (Tenn. Ct. App. Sept. 25, 2006) (quoting *Bowers v. Gutterguard of Tenn., Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at *7 (Tenn. Ct. App. Dec. 17, 2003)).

Here, we find no abuse of discretion in denying the motion to dismiss. The record contains no evidence that Mr. Evans suffered any prejudice from Piedmont's failure to obtain a trial date within forty-five days. In addition, Piedmont promptly filed its motion to set with the court. Piedmont cannot be characterized as an unresponsive party based upon the defective service alone. *See Crom-Clark Trust*, 2006 WL 2737828, at *3.

B. MOTION TO LIMIT DISCOVERY

Mr. Evans argues that summary judgment was inappropriate because the trial court denied his ability to take adequate discovery. Well before the motion for summary judgment was filed, on October 30, 2013, Mr. Evans requested two depositions: (1) a deposition of Piedmont employee Keith Napier; and (2) a deposition of a corporate representative for Piedmont. Mr. Evans requested that Piedmont designate a corporate representative to testify, among other things, to the merger agreement between Nashville Gas and Piedmont; damage to sewer and gas lines near Mr. Evans's property; and Mr. Evans's claim against Piedmont.

On January 17, 2014, Piedmont moved for a protective order to limit the scope and number of depositions by Mr. Evans. Piedmont requested that Mr. Napier be relieved from any obligation to testify. Piedmont also requested that it be relieved of any obligation to respond to requests regarding its repair policies, damage history, regulatory filings, financial reports, and insurance policies.

Following a hearing, the court granted in part and denied in part Piedmont's motion. Although permitting the deposition of Mr. Napier to proceed, the court ordered that "if it comes out that he knows nothing and that [Mr. Napier] cannot assist Plaintiff in any way, then Plaintiff shall pay all of the costs of the deposition, the witness' costs and Defendant's attorney fees." As for the deposition of the corporate representative, the court limited the scope of the deposition by limiting the matters on which examination would be permitted. The court specifically permitted examination of a corporate representative "about the two instances when the sewer or gas lines near the Plaintiff's property were damaged," but the court again ordered that "[i]f nothing comes up in that

representative's deposition that can be used in the case, then Plaintiff shall pay all of the costs of the deposition, the witnesses' costs and Defendant's attorney fees."

Discovery may be limited in certain instances. Tennessee Rule of Civil Procedure 26.02 permits trial courts to limit the "frequency or extent of use of the discovery methods" for several reasons, including:

> (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Tenn. R. Civ. P. 26.02(1). We review the trial court's discovery decisions under an abuse of discretion standard, which we discussed above. *Lee Med., Inc.*, 312 S.W.3d at 524; *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005); *Hodges*, 43 S.W.3d at 921.

Our review of the trial court's order limiting discovery is hampered by the lack of factual findings supporting the court's ruling. However, even without the benefit of factual findings, we conclude the trial court erred in two respects. First, the trial court improperly conditioned the requested depositions on their usefulness to Mr. Evans, and second, the trial court improperly limited the matters upon which Piedmont's corporate representative could be examined.

The trial court erred by ordering Mr. Evans to pay opposing counsel attorneys' fees in the event Mr. Napier's deposition could not "assist Plaintiff in any way" or "[i]f nothing comes up in that [corporate] representative's deposition that can be used in the case."[1] Such a condition placed a discouraging or deterring effect on discovery, which we find inconsistent with the broad and liberal treatment given discovery rules. *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004) (citing *Hickman v.*

[1] Trial courts may award certain expenses associated with depositions to a prevailing party as discretionary costs. *See* Tenn. R. Civ. P. 54.04. In determining whether to exercise their discretion, courts consider whether a deposition was "necessary" at the time it was requested. *See Stalsworth v. Grummons*, 36 S.W.3d 832, 835 (Tenn. Ct. App. 2000); *see also* 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2676 (3d ed. 2015) (whether a deposition's cost may be taxed is generally determined "by deciding if the deposition reasonably seemed necessary at the time it was taken.") However, attorneys' fees are not allowable as discretionary costs. *Duncan v. DeMoss*, 880 S.W.2d 388, 390 (Tenn. Ct. App. 1994).

Taylor, 329 U.S. 495, 507 (1947)). In addition, conditioning discovery on being useful to the case of the party seeking the discovery ignores the fact that discovery sometimes relates to the claim or defense of the party defending the discovery. *See id.*

Second, the trial court erred in limiting the matters on which Piedmont's corporate representative was required to testify. The court ordered that Piedmont would not have to designate a representative for examination regarding Mr. Evans's claim. Piedmont did not request such relief,[2] and there was no factual basis upon which to grant such a limitation on discovery. The court also ordered that Piedmont would not be required to designate a representative to testify regarding the documents associated with the merger of Piedmont and Nashville Gas. Piedmont claimed that it no longer had the merger documents and could not produce a representative to give "meaningful testimony concerning the 'merger agreement' and 'all [associated] documents.'"

However, in light of Mr. Evans's basis for asserting that Piedmont was liable and the defense raised by Piedmont, Mr. Evans should have been permitted to question Piedmont's corporate representative regarding the merger documents. Mr. Evans's discovery should have been permitted to the extent the information sought appeared reasonably calculated to lead to the discovery of admissible evidence. *See* Tenn. R. Civ. P. 26.02(1). Piedmont cannot foreclose discovery on the merger documents by simply asserting a corporate representative cannot provide "meaningful" testimony about the documents. Ultimately, whether the Piedmont corporate representative's testimony is meaningful is a matter to be explored through discovery.

C. SUMMARY JUDGMENT

In light of our conclusion that Mr. Evans's discovery was improperly limited, we turn to the trial court's grant of summary judgment to Piedmont. Summary judgment may be granted only "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." Tenn. R. Civ. P. 56.04; *see also Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). The party moving for summary judgment bears the burden of demonstrating both that no genuine dispute of material facts exists and that it is entitled to a judgment as a matter of law. *Martin*, 271 S.W.3d at 83. Where the moving party fails to meet its burden of production, "the burden does not shift to the nonmovant, and the court must dismiss the motion for summary judgment." *Shipley v. Williams*, 350 S.W.3d 527, 535 (Tenn. 2011).

[2] A court is free to "act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03." Tenn. R. Civ. P. 26.02.

When considering a motion for summary judgment, the trial court must view the evidence in the light most favorable to the opposing party and draw all reasonable inferences in the opposing party's favor. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). The court is not to "weigh" the evidence when evaluating a motion for summary judgment or substitute its judgment for that of the trier of fact. *Martin*, 271 S.W.3d at 87; *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993).

Because this case was filed after July 1, 2011, the summary judgment standard outlined in Tennessee Code Annotated § 20-16-101 (Supp. 2012) applies. The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20-16-101.

We review the summary judgment decision as a question of law, with no presumption of correctness. *Martin*, 271 S.W.3d at 84; *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). Accordingly, we must review the record de novo and make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763. In this case, we do so by determining if the standard provided in Tennessee Code Annotated § 20-16-101 has been satisfied.

Piedmont moved for summary judgment on three grounds: (1) Piedmont was not liable for acts or omissions by Nashville Gas; (2) the statute of repose barred Mr. Evans's claim; and (3) Mr. Evans failed to allege facts to support an award of punitive damages. In addition to these grounds, the trial court granted summary judgment on a ground not raised by Piedmont—"[t]here [wa]s no evidence in the record that . . . Nashville Gas Company[] damaged the sewer line." In doing so, we conclude the trial court erred.

By granting summary judgment on a ground not raised by Piedmont, the court essentially acted sua sponte. Our Supreme Court is clear that "[s]uch action should be taken only in rare cases and with meticulous care." *Griffis v. Davidson Cnty. Metro.*

Gov't, 164 S.W.3d 267, 284 (Tenn. 2005); *see also March Grp., Inc. v. Bellar*, 908 S.W.2d 956, 959 (Tenn. Ct. App. 1995). Additionally, "the party against whom summary judgment is rendered must have had notice and a reasonable opportunity to respond to all the issues to be considered." *Griffis*, 164 S.W.3d at 284 (citing *Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976); *March Grp., Inc.*, 908 S.W.2d at 959). Mr. Evans had no notice and no opportunity to respond to the challenge to the sufficiency of his evidence, specifically the evidence that Nashville Gas damaged his sewer line.

As for the grounds that were raised by Piedmont, we conclude summary judgment was appropriate on only one of the three grounds. On the first ground, summary judgment was inappropriate because Piedmont is Nashville Gas's successor by merger. Piedmont merged with Nashville Gas Company in 1985, with Piedmont as the surviving corporation. The plan of merger stated:

> The Surviving Corporation shall be responsible and liable for all liabilities and obligations of the Constituent Corporations; and any claim existing or action or proceeding pending by or against either of the Constituent Corporations may be prosecuted as if such merger or consolidation had not taken place or the Surviving Corporation may be substituted in its place.

When two companies merge, the successor company "stands in the stead" of the old company. *Miller v. Lancaster*, 5 Cold. 514, 516, 520-21 (Tenn. 1868). The successor company is subject to the old company's liabilities and is able to enforce its rights. *Id.*; *see also* Tenn. Code Ann. § 48-21-108(a)(3) (2012) ("All liabilities of each corporation or eligible entity that is merged into the survivor shall be vested in the survivor.") Because Piedmont is the surviving company by merger to Nashville Gas, it stands in Nashville Gas's stead and is subject to its liabilities. *See Miller*, 5 Cold. at 520-21.

On the second ground, we cannot determine whether the statute of repose, Tennessee Code Annotated § 28-3-202 (2000),[3] applies to Mr. Evans's claim. On the record before us, we cannot determine whether the installation of the gas line was "construction," the gas line was an "improvement to real property," or any damage to the

[3] Tennessee Code Annotated § 28-3-202 states:

> All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

sewer line during the installation of the gas line constituted a "deficiency" in construction. Tenn. Code Ann. § 28-3-202. However, even assuming the claim falls within the statute of repose, Mr. Evans raised several possible exceptions to the application of the statute, [4] which he claims he could not explore due to the trial court's limitations on his discovery.

Discovery is a critical portion of litigation; it allows litigants to "seek the truth so that disputes will be decided by facts rather than by legal maneuvering." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). A party's request for additional discovery may be "one method of defeating a properly supported motion for summary judgment." *Cardiac Anesthesia Servs., PLLC v. Jones*, 385 S.W.3d 530, 537 (Tenn. Ct. App. 2012); *see also* Tenn. R. Civ. P. 56.07. Our Supreme Court has also acknowledged that a grant of summary judgment can be premature and necessitate a remand when the parties have not been permitted to conduct discovery:

> [W]here there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a thirty (30) day interval following the filing of the motion, it will be necessary to remand case to cure such error.

Craven v. Lawson, 534 S.W.2d 653, 655 (Tenn. 1976). Still, "[t]he interest in full discovery . . . must be balanced against the purpose of summary judgment: '[to] provide[ ] a quick, inexpensive way to conclude cases when there exists no dispute regarding the material facts.'" *Cardiac*, 385 S.W.3d at 537 (alterations in original) (quoting *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 13 (Tenn. 2008)).

A lack of adequate discovery must be raised by the party opposing summary judgment with the trial court. Otherwise, the issue is waived on appeal. *Id.* (citing Tenn. R. App. P. 36(a)). Even if a party objects to the trial court's limits on discovery, a trial court only errs in granting summary judgment "when the non-moving party can show that 'the requested discovery would have assisted [the non-moving party] in responding to [the moving party's] motion for summary judgment." *Id.* (alterations in original) (quoting *Regions Fin. Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 401 (Tenn. Ct. App. 2009)).

Here, Mr. Evans timely objected to the trial court's limits on his discovery. In his response to Piedmont's motion to limit discovery, he noted that "most of Plaintiff's discovery requests were prompted by defenses Piedmont has raised." In his response to

[4] Mr. Evans argues that at least one of the exceptions in Tennessee Code Annotated § 28-3-205 makes the statute of repose inapplicable. Specifically, Mr. Evans asserts that Piedmont was in actual possession or control of the gas line when his sewer line was damaged. Piedmont disputes this fact.

Piedmont's motion for summary judgment, Mr. Evans also stated that summary judgment was inappropriate because he had not yet completed the necessary discovery. In light of these objections and the questions raised regarding the applicability of the statute of repose, we conclude a remand on this issue is appropriate.

Finally, on the third ground, we conclude the trial court appropriately granted partial summary judgment in Piedmont's favor on the claim for punitive damages. In Tennessee, punitive damages may be awarded only if the plaintiff demonstrates by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Fisher v. Johnson*, No. W2008-02165-COA-R3-CV, 2009 WL 2588906, at *4-5 (Tenn. Ct. App. Aug. 24, 2009) (citing *Hodges*, 833 S.W.2d at 901). A claim for punitive damages may be challenged on a motion for summary judgment. *See Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 193 (Tenn. Ct. App. 2008). In this case, Mr. Evans failed to offer any proof of an intentional, fraudulent, malicious, or reckless act other than his own testimony both by affidavit and deposition. However, Mr. Evans lacked personal knowledge of the damage to his sewer line. *See* Tenn. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978) (holding that an affidavit based on the affiant's own belief does not satisfy the requirements of Rule 56.05). Even when viewed in the light most favorable to Mr. Evans, his assertions are not enough to support a claim for punitive damages, and Piedmont was entitled to a judgment on that issue as a matter of law.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Mr. Evans's motion to dismiss and the grant of partial summary judgment on the issue of punitive damages. We vacate the grant of summary judgment in all other respects and remand for further proceedings consistent with this opinion.

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W. NEAL McBRAYER, JUDGE