COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP335 **Cir. Ct. No. 2010CV012465**

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

TODD A. ALEXANDER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD F. ALEXANDER AND DONNA E. ALEXANDER , RICHARD'S WIFE,

PLAINTIFFS-APPELLANTS,

V.

AUER STEEL & HEATING CO., WEST BEND MUTUAL INSURANCE CO., AS INSURER TO AUER STEEL & HEATING SUPPLY CO., MILWAUKEE STOVE & FURNACE SUPPLY COMPANY AND CERTAINTEED CORP.,

DEFENDANTS-RESPONDENTS,

L & S. INSULATION CO., INC.,

DEFENDANT.

APPEAL from orders of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Todd Alexander, as the personal representative of the estate of Richard F. Alexander and Donna E. Alexander,[1] appeals from orders dismissing his claims against Auer Steel & Heating Company,[2] Milwaukee Stove & Furnace Supply Company, and CertainTeed Corporation. Alexander brought claims against the defendants for negligence, strict products liability, and wrongful death, based upon allegations that Richard Alexander "was exposed to dust or fibers emanating from the asbestos products … designed, sold, manufactured, distributed, packaged, removed, installed, released in the air, or otherwise placed into commerce by the[] defendants," and that the exposure caused Richard to develop the malignant mesothelioma that caused his death. The circuit court dismissed the claims with respect to all of the above defendants on their individual motions for summary judgment. We affirm, concluding that a reasonable jury could not infer from the undisputed facts that any of the individual defendants exposed Richard to asbestos.

[1] The original complaint in this case was filed in July 2010 by Richard and Donna Alexander while they were still alive. They have since passed away, and their claims have been taken up by Todd Alexander as the personal representative of their estate. For ease of reference, we refer to the plaintiff as "Alexander" and to Richard Alexander, whose asbestos exposure and death are at the center of this action, as "Richard."

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] West Bend Mutual Insurance Company was also named in the action as Auer's insurer. Numerous other defendants were also named in the action but are not included here because their interests are irrelevant to the issues raised in this appeal.

BACKGROUND

¶2 The parties agree that the facts here are essentially undisputed. They disagree, however, as to whether these facts set forth a sufficient basis from which a reasonable jury could conclude that Richard was exposed to any of the defendants' asbestos-containing products.

¶3 Richard was a sheet metal worker, heating installer, and plumber based in Waukesha, Wisconsin from approximately 1946 until his death in 2011. For the majority of his career, Richard was self-employed and owned his own business, which we refer to as Alexander Heating & Plumbing Company. Richard went to job sites to supervise his employees who used asbestos-containing products and often personally worked with asbestos-containing products.

¶4 In May 2010, Richard was diagnosed with malignant mesothelioma and he died from the disease in February 2011. Dr. Richard Kradin, a doctor certified in anatomic pathology, pulmonary medicine, and internal medicine, opined that: (1) Richard's mesothelioma was caused by cumulative work exposure to asbestos-containing products, including sheet asbestos, asbestos paper, and rope; and (2) malignant mesothelioma caused Richard's death. Dr. Henry Anderson, a licensed physician specializing in occupational and environmental medicine, including diseases caused by exposure to asbestos, opined that: (1) malignant mesothelioma is caused by exposure to all forms of asbestos; (2) malignant mesothelioma generally has a latency period of twenty to forty years after exposure to asbestos; and (3) all exposures to asbestos contribute to cause the disease malignant mesothelioma.

¶5 Alexander filed this lawsuit against Auer, Milwaukee Stove, and CertainTeed, alleging that "during the course of his employment, [Richard] was

exposed to dust or fibers emanating from the asbestos products; asbestos-manufacturing process and/or asbestos-insulated equipment which were designed, sold, manufactured, distributed, packaged, removed, installed, released in the air, or otherwise placed into commerce by these defendants," that the exposure caused him to develop malignant mesothelioma, and that the disease eventually resulted in his death. Each of these defendants filed a motion for summary judgment, asking the circuit court to dismiss Alexander's claims.

¶6 The circuit court granted all three summary judgment motions. With respect to Auer and Milwaukee Stove, the circuit court found that the statute of repose set forth in WIS. STAT. § 893.89 barred Alexander's claims; the circuit court did not rule on the other grounds for summary judgment raised by Auer and Milwaukee Stove, including causation. With respect to CertainTeed, the circuit court found that Alexander had not submitted evidence from which a reasonable jury could conclude that Richard had been exposed to CertainTeed's asbestos-containing products. Alexander appeals.

DISCUSSION

¶7 Alexander argues that the circuit court erred in concluding that the statute of repose barred his claims against Auer and Milwaukee Stove and in concluding that he needed to produce "direct evidence" that Alexander was exposed to CertainTeed's asbestos products. We affirm the circuit court's decision, albeit, partially on different grounds, concluding that Alexander failed to set forth sufficient facts alleging causation with respect to each of the defendants. *See* ***State ex rel. Harris v. Milwaukee City Fire & Police Comm'n***, 2012 WI App 23, ¶9, 339 Wis. 2d 434, 810 N.W.2d 488 ("[W]e need not base our affirmance on the reasons relied upon by the [circuit] court.").

¶8 Upon review of a circuit court's decision on summary judgment, we apply the same standards used by the circuit court, as set forth in WIS. STAT. § 802.08. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. First, we must determine if the pleadings state a claim. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If the plaintiff has stated a claim and the pleadings show the existence of factual issues, then we must examine whether the party moving for summary judgment has presented a defense that would defeat the claim. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a *prima facie* case, the court examines the pleadings, affidavits, depositions, or other proof of the opposing party to determine whether disputed material facts exist, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial. *See* ***id.*** Evidentiary facts, as set forth in the affidavits or other proof of the moving party, are taken as true if not contradicted by opposing affidavits or other proofs. ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997).

¶9 In a products liability action, both negligence and strict-products-liability claims require a plaintiff to prove that the alleged defect in a defendant's product was a *cause* of the plaintiff's injury or damages. ***Morden v. Continental AG***, 2000 WI 51, ¶45, 235 Wis. 2d 325, 611 N.W.2d 659 (negligence); ***Zielinski v. A.P. Green Indus., Inc.***, 2003 WI App 85, ¶8, 263 Wis. 2d 294, 661 N.W.2d 491 (strict products liability). In order to do so, a plaintiff must proffer either direct evidence of exposure to a defendant's harmful product *or* evidence from which a jury may reasonably infer such exposure. ***Zielinski***, 263 Wis. 2d 294, ¶16.

¶10 "'[If] there is no credible evidence upon which the trier of fact can base a reasoned choice between ... two possible inferences, any finding of

causation would be in the realm of speculation and conjecture.'" ***Id.*** (brackets and ellipses in ***Zielinski***; citation omitted). "Speculation and conjecture apply to a choice between liability and nonliability when there is no reasonable basis in the evidence upon which a choice of liability can be made." ***Id.*** (quotation marks and citation omitted). "[W]hen the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ***Id.*** (quotation marks and citation omitted).

¶11 We review a circuit court's grant of summary judgment *de novo*, owing no deference to the circuit court. ***Krier***, 317 Wis. 2d 288, ¶14. Summary judgment is only "appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶12 Keeping these legal standards in mind, we must determine whether Alexander has "presented credible evidence from which a reasonable person could infer that [Richard] was exposed to [the defendants' asbestos-containing] products." *See* ***Zielinski***, 263 Wis. 2d 294, ¶16. As such, we turn to Alexander's claims against each of the defendants in turn.

I. Auer and Milwaukee Stove

¶13 The circuit court granted both Auer's and Milwaukee Stove's motions for summary judgment on the grounds that the construction statute of repose barred Alexander's claims against both defendants. *See* WIS. STAT. § 893.89. The circuit court did not consider the alternate reason for summary judgment raised by both parties, that is, causation. However, in response to

Alexander's appeal, Milwaukee Stove has raised causation as an alternate basis on which we can uphold the circuit court's grant of summary judgment. *See* ***State ex rel. Harris***, 339 Wis. 2d 434, ¶9 (permitting the appellate court to base its affirmance on reasons other than those relied upon by the circuit court). Because we agree with Milwaukee Stove that Alexander has not set forth sufficient facts to show causation as to Milwaukee Stove and because Alexander's evidence against both Milwaukee Stove and Auer is nearly identical, we affirm the circuit court's grant of summary judgment to both defendants on that ground.

¶14 Alexander asserts that the following evidence is sufficient to set forth claims against both Auer and Milwaukee Stove:[3]

- Both Auer and Milwaukee Stove admit to selling asbestos-containing products in the past.

- Testimony from a former Alexander Heating employee, recalling that Auer and Milwaukee Stove were Alexander Heating's "biggest suppliers of sheet metal equipment and supplies."

- Testimony from a Milwaukee Stove employee who recalled making deliveries to Alexander Heating.

- Auer's admission that Alexander Heating was a customer "in the past and currently."

[3] These facts are compiled based upon Alexander's reply brief on appeal and his brief in response to Auer's and Milwaukee Stove's motions for summary judgment.

- Testimony from Ken Hunkins, who worked for Alexander Heating in the early 1960s, in which he allegedly stated that Auer and Milwaukee Stove supplied Alexander Heating with the asbestos paper for ductwork that was required by state law to be used on heating systems.

- Testimony from Carole Hahl, Alexander Heating's office manager since 1988, that Auer remains the primary source for the company's heating material.

- Testimony from Alexander Heating's employees recalling Richard wrapping ductwork with asbestos paper, as well as always being on job sites supervising his employees.

¶15 Alexander's argument that a reasonable jury could infer that Richard was exposed to asbestos paper provided by Auer or Milwaukee Stove hinges upon his assertion that Hunkins testified during his deposition that Auer and Milwaukee Stove supplied Alexander Heating with asbestos paper. But a closer look at Hunkins' testimony belies Alexander's assertion. Alexander relies on the following testimony, in which Hunkins responds to a question regarding where Alexander Heating purchased its asbestos paper:

> Q Do you know where he got, either Mr. Alexander or Alexander Heating, do you know where they got the asbestos paper?
>
> A *That would be a guess*, too. We had two suppliers that did most of our stuff, Auer Steel and Milwaukee Stove. We did a lot with Auer Steel, and most employers are

> pretty loyal to their suppliers. It helps them out with their prices sometimes. I would *guess* that's where it came from.

(Emphasis added.) In other words, contrary to Alexander's representation, Hunkins did *not* testify that Auer and Milwaukee Stove, in fact, supplied Alexander Heating with asbestos paper; rather, he *guessed* that *either* Auer *or* Milwaukee Stove provided the product. Hunkins' guess that Alexander purchased asbestos paper from Auer or Milwaukee Stove, based solely on the fact that Alexander Heating purchased other products from both companies, combined with Alexander's other evidence, is insufficient to permit a jury to infer that either Auer or Milwaukee Stove exposed Richard to asbestos products.

¶16 Alexander's evidence consists of the following: (1) Hunkins' guess; (2) admissions from both Auer and Milwaukee Stove that they sold products to Alexander Heating both in the past and present; and (3) admissions from both Auer and Milwaukee Stove that they sold asbestos paper. This is hardly sufficient evidence to move an inference of causation outside the realm of speculation or conjecture, particularly because it is undisputed that both Auer and Milwaukee Stove sell thousands of different products, the vast majority of which do not contain asbestos. *See* ***Zielinski***, 263 Wis. 2d 294, ¶16. Because "'there is no reasonable basis in the evidence upon which a choice of liability can be made,'" we must affirm the circuit court's grant of summary judgment. *See* ***id.*** (citation omitted).

II. CertainTeed

¶17 The circuit court granted CertainTeed's motion for summary judgment, finding that Alexander had not submitted sufficient evidence to demonstrate that Richard had been exposed to CertainTeed's asbestos cement air duct pipe. In doing so, the court noted that Alexander had "submitted no direct

evidence in the form of invoice, testimony, or otherwise that places CertainTeed's asbestos cement air duct at any location that [Richard] may have worked." Alexander latches onto that singular sentence and argues that in insisting upon "direct evidence" of exposure, the circuit court held Alexander to a higher standard of proof than is set forth in the law. We disagree.

¶18 The law requires Alexander to produce *either* direct evidence that Richard was exposed to CertainTeed's asbestos-containing products *or* evidence from which a jury may reasonably infer such exposure. *See* ***Zielinski***, 263 Wis. 2d 294, ¶16. When the circuit court's comments are read in context, it is clear that the circuit court did not require Alexander to produce direct evidence, but rather the court noted that Alexander had no direct evidence, and additionally, that a reasonably inference of causation could not be inferred from the evidence he did produce. Having reviewed the record, we conclude that the circuit court properly found that Alexander failed to present "credible evidence from which a reasonable person could infer that [Richard] was exposed to [CertainTeed's asbestos-containing] products." *See* ***Zielinski***, 263 Wis. 2d 294, ¶16.

¶19 Alexander argues that a reasonable jury could infer from the following evidence, presented at summary judgment, that Richard was exposed to CertainTeed's asbestos cement air duct pipe:

- CertainTeed's admission that it manufactured and sold asbestos cement air duct pipe from June 1, 1962, until January 1970.

- Testimony from Ken Hunkins, who worked for Richard in the early 1960s, in which Hunkins recalled working with cement air duct pipe while employed by Alexander Heating, drilling into that pipework, and creating

dust. Hunkins also recalled working alongside Richard in the shop and field and that Richard ordered all of the products they used.

- Testimony from LaVerl Schultz, who also worked for Richard, and who recalled working with asbestos cement air duct pipes in the mid–1960s and early 1970s in the same manner and fashion as Hunkins. Schultz recalled that the asbestos pipe was "made by Johns Manville *or* CertainTeed." (Emphasis added.) Schultz also recalled sections of this pipe being connected with a metal sleeve.

- Testimony from fellow contractor Arthur Gamroth, who worked closely with Richard, and who recalled working with an asbestos cement air duct pipe that came in an "odd size," that could have been thirteen feet in length. He recalled the pipes being connected with a metal sleeve and that cutting the pipes created dust in the air.

- CertainTeed's admission that it sold pipe in lengths of thirteen feet.

- CertainTeed's alleged admission that it recommended that one of the ways to connect pipes was with the use of steel sleeves or connectors.

- Testimony from Alexander's office assistant, Carole Hahl, who had worked for Richard since 1988. Hahl located a 1978 publication from CertainTeed in Richard's vendor files entitled: "How to fabricate and install

CertainTeed fiber glass duct systems." She also affirmed that CertainTeed was a vendor of Alexander's before and during her employment with him.

- The undisputed fact that only Johns-Manville and CertainTeed sold the cement air duct pipes in question.

¶20 After reviewing this evidence on summary judgment, the circuit court held thusly:

> In this case, plaintiff has submitted no direct evidence in the form of invoice, testimony, or otherwise that places CertainTeed's asbestos cement air duct at any location that Mr. Alexander may have worked. …
>
> … *the evidence that plaintiffs rely on to make the causal link merely calls for speculation*. Plaintiffs assert that first, Mr. Alexander's employees cut air duct pipe that was around 13 feet in length, which was according to plaintiffs the length of CertainTeed's and Johns-Mansville's asbestos pipe. Secondly, Mr. Schultz recalled two brands of asbestos pipe, CertainTeed and Johns-Manville, Mr. Schultz did not know which Alexander Heating used. Thirdly, Mr. Alexander possessed a guide to the installation of CertainTeed fiberglass ducts, which was CertainTeed fiberglass ducts 1978 edition, approximately, … seven years after CertainTeed ceased manufacturing the asbestos pipe in question. And four, Mr. Alexander purchased unknown CertainTeed products at some time prior to 1988.
>
> I find that to infer a link between CertainTeed's manufactured supplied asbestos and Mr. Alexander's inhalation of asbestos fibers based on this evidence would require a jury to find that because CertainTeed was one of possibly two asbestos pipe manufacturers during the relevant time period and the fact that Mr. Alexander may have brought [sic] different, unknown products from CertainTeed seven to seventeen years after it stopped manufacturing asbestos piping. CertainTeed's products probably caused Mr. Alexander's injury. *This leap of faith takes causation out of the realm of probability and into that of mere possibility.* To deny summary judgment based on a

> mere possibility without more substantial evidence would be inappropriate.

(Emphasis added.) We agree. A close review of the facts Alexander cites reveals that those facts do not support a reasonable inference that Richard was exposed to CertainTeed's asbestos cement air duct pipes.

¶21 First, Alexander asserts that "CertainTeed … admitted that one of the recommended ways to connect [pipe] runs was the use of steel sleeves or connectors." From this alleged admission and Schultz's and Gamroth's testimony that they recalled connecting pipes with metal sleeves, Alexander believes a reasonable jury could conclude that Richard purchased pipes from CertainTeed. However, while Schultz and Gamroth may have recalled connecting asbestos air duct pipes with metal sleeves, the record does not support Alexander's assertion that CertainTeed admitted that one of the recommended ways to connect its pipes was the use of metal sleeves. To the contrary, the record citation provided by Alexander reveals that when CertainTeed's witness Lloyd Ambler was asked during deposition whether CertainTeed recommended that its pipes be connected with metal sleeves, he responded: "No; the only thing we recommended was the duct tape." As such, Schultz's and Gamroth's testimony regarding Richard's use of metal sleeves to connect the cement air duct pipes does not support the inference that the pipes were from CertainTeed.

¶22 Second, Alexander contends that a reasonable jury could infer that asbestos cement air duct pipes used by Richard were purchased from CertainTeed because Gamroth recalled Richard using a length of pipe that was an "odd size"

and that was "probably … 13 feet," and CertainTeed admits that it sold a thirteen-foot pipe. However, CertainTeed contends that there is evidence in the record demonstrating that *both* CertainTeed and Johns-Manville manufactured thirteen-foot pipes. Alexander challenges that evidence, complaining that the affidavit CertainTeed cites in support of that assertion was attached to CertainTeed's reply brief on summary judgment after the close of discovery and therefore should not be considered. Alexander further suggests that the affiant's assertions concerning the length of Johns-Manville's product are unreliable because the affiant was a CertainTeed employee. We need not resolve this debate on appeal because, even accepting Alexander's assertions as true, that is, that only CertainTeed sold the thirteen-foot pipe, that fact fails to support a reasonable inference that the air duct pipe purchased by Richard was from CertainTeed.

¶23 Even if we assume without deciding that only CertainTeed produced thirteen-foot asbestos cement air duct pipe, Alexander has not produced a witness who can do more than guess that the pipe used by Richard was thirteen feet in length. Alexander relies on testimony from Gamroth that the length of the pipe was an "odd size" and "probably was 13 feet." However, when Gamroth was asked, "Do you remember for a fact it was 13 feet or you just remember it was generally an odd size?," Gamroth responded, "Just generally it was an odd size, right." Without testimony from a witness who could do more than speculate as to the size of the pipe used by Alexander Heating, the fact that CertainTeed may have been the only company selling thirteen-foot pipe does not support a reasonable inference that Alexander Heating purchased CertainTeed's pipe.

¶24 Third, the existence of the 1978 installation guide for CertainTeed fiberglass duct systems in Alexander Heating's files does not support an inference that Alexander Heating purchased asbestos cement air duct pipes from

CertainTeed in the 1960s. The guide is for an entirely different CertainTeed product and was printed eight years after CertainTeed stopped producing the asbestos cement air duct pipe at issue here. The guide only provides evidence from which a reasonable jury could infer that Richard purchased *fiberglass* ducts from CertainTeed in the late 1970s. It in no way suggests that Richard purchased *asbestos* cement air duct pipes from CertainTeed in the 1960s.

¶25 Fourth, Hahl's testimony also does not support the reasonable inference that Alexander Heating purchased its asbestos air duct pipes from CertainTeed. Hahl did not begin working for Richard until 1988, eighteen years after CertainTeed stopped manufacturing the asbestos cement air duct pipes. Hahl's testimony, that Richard bought products from CertainTeed at some time prior to 1988, does not lead to the reasonable inference that the unknown product Richard purchased was asbestos-containing pipe eighteen years earlier.

¶26 This leaves Alexander with the following evidence to support his claim that Richard was exposed to CertainTeed's asbestos cement air duct pipes: (1) Schultz's testimony that the pipe used by Richard was manufactured by either Johns-Manville *or* CertainTeed; and (2) CertainTeed's admission that Johns-Manville and CertainTeed were the only two manufacturers of this particular product. These facts, even combined with the other evidence Alexander presents, at best, present only a "mere possibility" that Richard was exposed to CertainTeed's asbestos cement air duct pipes. It is equally possible that Richard purchased air duct pipes from Johns-Manville. As we have seen, "'when the matter remains one of pure speculation or conjecture *or the probabilities are at best evenly balanced*, it becomes the duty of the court to direct a verdict for the defendant.'" *See* ***Zielinski***, 263 Wis. 2d 294, ¶16 (citation omitted; emphasis

added). That is the case here. A possibility of causation is not enough, and therefore, we affirm.

By the Court.—Orders affirmed

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