COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP531 **Cir. Ct. No. 2009CV1880**

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

JUNE CALEWARTS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ROBERT J. CALEWARTS,

PLAINTIFF-APPELLANT,

V.

CR MEYER & SONS COMPANY, COLONIAL HEIGHTS PACKAGING, INC., INTERNATIONAL PAPER CO. AND THILMANY, LLC,

DEFENDANTS-RESPONDENTS,

METROPOLITAN LIFE INSURANCE COMPANY AND PHILIP MORRIS USA, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. This case is before us for the second time. In a previous opinion, we reversed a summary judgment dismissing June Calewarts' claims against CR Meyer & Sons Company, Colonial Heights Packaging, Inc., International Paper Co., and Thilmany, LLC. On remand, the circuit court granted various motions in limine filed by the defendants. As a result of those rulings, the parties stipulated that Calewarts could not succeed on any of her claims, and the circuit court entered a judgment of dismissal.

¶2 On appeal, Calewarts argues the circuit court erred by granting twelve of the defendants' motions in limine. We agree with Calewarts that the court erred by granting some of these motions, but we reject her arguments regarding others. We therefore reverse the judgment dismissing Calewarts' claims and remand with directions.

BACKGROUND

¶3 June Calewarts' husband, Robert, was employed by Milprint from 1950 until 1991.[1] Milprint produced and printed candy wrappers, snack bags, and cheese pouches. Robert operated printing presses on the fourth floor of Milprint's De Pere, Wisconsin facility from 1950 until the early 1970s. He then worked as an oiler for several years, working on every floor of the facility. He returned to press work by 1975. He worked in the molding department, also on the fourth floor, from 1980 to 1985. Finally, he worked in the cheese department on the

[1] We refer to June Calewarts as Calewarts and Robert Calewarts as Robert throughout the remainder of this opinion.

second floor of the De Pere facility until 1990, at which point Milprint's operations were transferred to a new facility.

¶4 The printing presses at the De Pere facility were partially steam powered. On the fourth floor, a trunk feed and return line ran the length of the floor, approximately 250 to 300 feet, and individual steam lines ran from the trunk line to the presses. There were similar steam pipes on the other three floors of the De Pere facility. Throughout the facility, the steam pipes were covered with white insulation.

¶5 In November 2008, Robert died of malignant pleural mesothelioma. Calewarts filed the instant lawsuit in July 2009, alleging Robert's death was caused by asbestos exposure at the De Pere facility. As relevant to this appeal, Calewarts asserted a negligence claim against CR Meyer for installing, repairing, and removing asbestos steam pipe insulation at the De Pere facility. Calewarts also asserted claims against Colonial Heights and International Paper/Thilmany,[2] based on their status as nonemployer owners and/or lessors of the building that housed Milprint's operations. Calewarts sought punitive damages against all defendants.

¶6 CR Meyer, Colonial Heights, and International Paper moved for summary judgment. In opposition to the defendants' summary judgment motions, Calewarts relied on the deposition testimony of four of Robert's coworkers: Bernard Jones, Mark Motiff, Dennis O'Connor, and Kenneth Willems.

[2] International Paper and Thilmany share an appellate brief and assert that their interests are aligned for purposes of this appeal. None of the other parties distinguish between International Paper and Thilmany. We therefore refer to both entities collectively as International Paper throughout the remainder of this opinion.

¶7 Jones testified he began working in the bag department on the third floor of the De Pere facility on October 20, 1947. At that time, Milprint was just beginning operations at the De Pere facility. Jones was present at the facility during the initial installation of the bag machines, which lasted until either 1949 or 1950. He testified the workers who installed the machines had baseball caps, coveralls, and trucks that said "CR Meyer." The same workers also installed the steam lines connected to the machines, including the insulation. Jones testified CR Meyer was also responsible for installing the steam pipes and insulation on the other floors of the De Pere facility. He described the insulation as white, smooth, and chalky. He testified the workers who installed the insulation "told us they were putting in asbestos."

¶8 Motiff testified he worked at Milprint from 1974 until 2006. He described the insulation surrounding the steam pipes at the De Pere facility as hard, white, and "plaster-like." He further testified the steam pipes would "invariably" leak after the presses were shut down each weekend and restarted on Monday. Repairs required tearing or knocking off insulation around the site of the leak. Scheduled valve maintenance required similar removal of insulation.

¶9 After insulation was removed, Motiff testified it was swept up and placed in a "broke box." Jones described a broke box as an open trash cart approximately three feet wide, six feet long, and four feet deep. Another of Robert's coworkers, Willems, testified the broke boxes remained in the De Pere facility until they were full.[3]

[3] Willems testified he worked on the fourth floor of the De Pere facility from 1951 until 1990.

¶10 Willems further testified he saw workers with CR Meyer's name on their uniforms repairing steam pipes at the De Pere facility. Given the frequency of repairs to the steam pipes, Willems was "certain" Calewarts would have operated presses in close proximity to areas where pipes were being repaired. Motiff similarly testified CR Meyer employees repaired the steam pipes on the fourth floor at least "once every couple of months[.]" Jones also recalled that CR Meyer returned to the De Pere facility "for some smaller jobs" after installing the presses and steam pipes. Although Jones could not recall whether those jobs involved asbestos, he testified they "could have."

¶11 Motiff and Willems testified the same type of insulation surrounding the steam pipes at the De Pere facility was also on the press ovens and would routinely fall off of the ovens when their doors were slammed shut. Willems also testified insulation was frequently knocked off the ovens by employees or fell off due to vibrations from the equipment running. Willems testified he knew the insulation was asbestos because he "worked with [the presses]" and was "looking at them all the time." Willems further stated dust was "always a problem" at the De Pere facility, and large blowers for drying the ink on the fourth floor presses blew "everything else around, too."

¶12 A fourth coworker, O'Connor, testified he worked at the De Pere facility from 1966 until 1990. O'Connor confirmed there was a "white-ish," "plaster-type" insulation surrounding the steam pipes at the De Pere facility that produced "a lot of powder" when broken. He testified there was a "rumor" around the facility that the insulation contained asbestos. Robert's coworkers also testified Milprint employees were not advised to wear any special equipment to protect them from asbestos exposure, and no safety warnings or instructions about asbestos were given until sometime after 1985.

¶13 In opposition to the defendants' summary judgment motions, Calewarts also submitted evidence that the Occupational Safety and Health Administration (OSHA) cited CR Meyer in 1990 for improperly removing asbestos from the De Pere facility. The OSHA investigation showed that a CR Meyer employee cut down a ten- to fifteen-foot section of insulated pipe in the coater room on the first floor of the De Pere facility on April 23, 1990, and dragged it through the facility without using proper protective measures. Samples of insulation taken during the OSHA investigation were found to contain asbestos.

¶14 The circuit court granted CR Meyer, Colonial Heights, and International Paper summary judgment. Calewarts appealed, and we reversed, concluding there were disputed issues of material fact. *See* ***Calewarts v. CR Meyer & Sons Co.***, No. 2011AP1414, unpublished slip op. ¶1 (WI App July 3, 2012).[4] We remanded to the circuit court for further proceedings on Calewarts' claims. ***Id.***

¶15 On remand, the circuit court scheduled a trial to begin on December 10, 2013. Before trial, CR Meyer, Colonial Heights, and International Paper filed over forty motions in limine. A hearing on the motions was held on October 25, 2013. During the hearing, the parties agreed the court could resolve the motions on the briefs.

¶16 On November 22, 2013, the court issued a two-page, written decision granting all but two of the defendants' motions in limine. The court did

[4] We affirmed the circuit court's grant of summary judgment to an additional defendant not relevant to this appeal. *See* ***Calewarts v. CR Meyer & Sons Co.***, No. 2011AP1414, unpublished slip op. ¶1 (WI App July 3, 2012).

not explain its reasoning, but merely stated whether each motion was granted or denied. The parties subsequently stipulated that, due to the court's rulings on some of the motions, Calewarts would be unable to succeed on any of her claims at trial. Accordingly, the court entered a judgment dismissing all of Calewarts' claims. Calewarts now appeals.

DISCUSSION[5]

¶17 On appeal, Calewarts argues the circuit court erred by granting twelve of the defendants' motions in limine, which she characterizes as "dispositive."[6] However, in addition to arguing that the circuit court improperly denied these motions on the merits, Calewarts also argues: (1) the court's decision

[5] CR Meyer's appellate brief is only one word shy of the 11,000-word limit set forth in WIS. STAT. RULE 809.19(8)(c)1. International Paper's appellate brief is 1150 words shy of the limit. Nevertheless, both CR Meyer and International Paper incorporate by reference arguments from other defendants' appellate briefs. International Paper does so extensively.

We do not condone the attempts of CR Meyer and International Paper to circumvent the word limit for appellate briefs. We caution counsel that future violations of the rules of appellate procedure will not be tolerated and may result in monetary sanctions. *See* WIS. STAT. RULE 809.83(2).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[6] Calewarts also purports to challenge the circuit court's rulings on certain "nondispositive" motions in limine. However, Calewarts does not develop any argument related to the nondispositive motions. Instead, she simply "relies on the trial court briefing in the appellate record." We admonish Calewarts that this practice is impermissible. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527. "[A]t a minimum, it creates the potential for exceeding the allowable length of briefs and violates the rule addressing the required form of appellate arguments." ***Id.*** Accordingly, we decline to consider any issue related to the "nondispositive" motions in limine. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed.").

violated the law of the case doctrine; and (2) the defendants forfeited[7] their right to challenge the admissibility of Calewarts' proffered evidence by failing to do so on summary judgment. We begin by addressing Calewarts' law of the case and forfeiture arguments. We then address the individual motions in limine on their merits.

I. Law of the case

¶18 "[A] decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). Whether a decision establishes the law of the case on a particular point is a question of law that we review independently. ***State v. Stuart***, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82.

¶19 In our previous decision, we relied on certain evidence that Calewarts submitted in opposition to summary judgment in order to conclude there were genuine issues of material fact requiring a trial. Calewarts notes that, pursuant to WIS. STAT. § 802.08(3), affidavits supporting and opposing summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Calewarts therefore argues it was either "explicit or implicit" in our previous decision that her proffered

[7] Throughout their briefs, the parties consistently use the term "waiver." However, under the circumstances, the term "forfeiture" appears to be more accurate. *See* ***State v. Harrison***, 2015 WI 5, ¶61, __ Wis. 2d __, 858 N.W.2d 372 (explaining that forfeiture is the failure to timely assert a right, whereas waiver is the intentional relinquishment or abandonment of a known right). We therefore use the term "forfeiture" throughout this opinion.

evidence was admissible.[8] As a result, she argues the circuit court violated the law of the case doctrine on remand by excluding the evidence.

¶20 As discussed in greater detail below, we agree with Calewarts that our previous decision established the law of the case on one point: that Calewarts was not required to present direct evidence that Robert was exposed to asbestos on specific occasions. *See infra*, ¶¶57-58. However, subject to that exception, we reject Calewarts' argument that our previous decision established the law of the case regarding the admissibility of evidence. Contrary to Calewarts' assertion, our previous decision did not decide, either explicitly or implicitly, that the evidence Calewarts submitted in opposition to summary judgment was admissible. We merely decided, based on the evidence submitted, that summary judgment was not warranted due to disputed issues of material fact. ***Calewarts***, No. 2011AP1414, ¶1. We remanded for "further proceedings," without specifying what those proceedings should be. ***Id.*** Our decision did not contain any mandate that the circuit court hold a trial at which all of Calewarts' proffered evidence would be admissible.

¶21 Moreover, Calewarts' reliance on WIS. STAT. § 802.08(3) is unavailing. On summary judgment, a party submitting an affidavit "need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit." ***Palisades Collection LLC v. Kalal***, 2010

[8] Calewarts cites ***Office of Thrift Supervision v. Felt***, 255 F.3d 220, 225 (5th Cir. 2001), for the proposition that the law of the case doctrine applies to issues decided both explicitly and implicitly in a previous decision. However, as a federal case, ***Felt*** is not binding on us, and Calewarts does not cite any Wisconsin authority for the proposition that implicit rulings can constitute the law of the case. Nevertheless, for purposes of this appeal, we assume, without deciding, that the law of the case doctrine applies to issues implicitly decided in a previous decision.

WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503. Instead, "the party need only make a prima facie showing that the evidence would be admissible at trial." ***Id.*** If another party challenges the admissibility of the evidence, the court must then determine whether it would be admissible. ***Id.*** However, absent such a challenge, the court is not required to do so.

¶22 Here, neither the circuit court nor this court addressed the admissibility of evidence at the summary judgment stage. Accordingly, our previous decision did not establish the law of the case regarding the admissibility of evidence. Therefore, subject to the limited exception noted above, we conclude the circuit court's decision granting the defendants' motions in limine did not violate the law of the case doctrine.

II. Forfeiture

¶23 Calewarts next argues the defendants forfeited their right to challenge the admissibility of her proffered evidence on remand by failing to do so on summary judgment. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Issues that are not preserved in the circuit court generally will not be considered on appeal. ***Id.*** "The mutual consolation of forfeiture is that each party can be confident that a right forfeited by the other will not be relitigated in some subsequent appeal or proceeding." ***State v. Soto***, 2012 WI 93, ¶36, 343 Wis. 2d 43, 817 N.W.2d 848.

¶24 We disagree with Calewarts that the defendants were required to challenge the admissibility of her proffered evidence on summary judgment. Under Wisconsin's summary judgment procedure, the circuit court examines the moving party's submissions to determine whether they constitute a prima facie

case for summary judgment. ***Palisades Collection***, 324 Wis. 2d 180, ¶9. If so, the court examines the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial. ***Id.*** Only if one party challenges the admissibility of another's proffered evidence must the court make a ruling on admissibility. ***Id.***, ¶10. Nothing in this procedure suggests that a moving party is required to challenge the admissibility of the opposing party's evidence. In fact, it is quite common for a moving defendant to argue on summary judgment that, even accepting the plaintiff's proffered facts as true, the defendant is nevertheless entitled to judgment as a matter of law.

¶25 In addition, we observe that Wisconsin's summary judgment rule, WIS. STAT. § 802.08, is patterned after Rule 56 of the Federal Rules of Civil Procedure. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶2 n.2, 241 Wis. 2d 804, 623 N.W.2d 751. We may therefore look to federal cases and commentary for guidance when applying § 802.08. ***Lambrecht***, 241 Wis. 2d 804, ¶2 n.2. One of the comments to Rule 56 states:

> Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. *If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.*

FED. R. CIV. P. 56 (2010 Advisory Committee note) (emphasis added). Thus, under the federal rule, a party's failure to challenge admissibility on summary judgment does not forfeit later admissibility challenges. Calewarts does not develop any argument as to why the result should be different under § 802.08.

¶26 Moreover, if every party seeking summary judgment had to challenge the admissibility of the nonmoving party's evidence both in the circuit court and on appeal, or risk forfeiting these challenges, the circuit courts and court of appeals would be inundated with evidentiary battles that, in many instances, would be unnecessary to the resolution of the case. We agree with Colonial Heights that "[e]fficiencies of litigation at both the circuit court and [c]ourt of [a]ppeals levels require that summary judgment movants be allowed to challenge the admissibility of summary judgment response evidence, but not be required to do so[.]"

¶27 Calewarts also makes a second argument regarding forfeiture. Specifically, she asserts the circuit court made a finding of fact on summary judgment that the De Pere facility was "raining asbestos." She contends the defendants were required to challenge this factual finding in a cross-appeal from the circuit court's summary judgment decision, and, because they failed to do so, they are now bound by the court's finding.

¶28 This argument fails for two reasons. First, a circuit court does not make findings of fact when ruling on a summary judgment motion. ***Tews v. NHI, LLC***, 2010 WI 137, ¶42, 330 Wis. 2d 389, 793 N.W.2d 860. Instead, the court merely decides whether there are genuine disputes of material fact requiring a trial. ***Id.***

¶29 Second, contrary to Calewarts' assertion, the circuit court never actually found that the De Pere facility was "raining asbestos." The phrase "raining asbestos" was introduced in Calewarts' response brief to International Paper's motion for summary judgment, in which she asserted, "[D]iscovery in this case revealed that the steam pipes [International Paper] had a contractual, as well

as a statutory, obligation to maintain were 'raining' asbestos." Thereafter, when addressing Calewarts' safe place claim against International Paper at the summary judgment hearing, the circuit court asked, "[H]ow is the raining down of asbestos material, how is that a structural defect or how would that be something that International Paper could ever be aware was happening?" Later, the court stated, "I make a finding of fact that there's nothing in this record to support that International Paper was ever aware of the raining of asbestos insulation nor do I conclude that that behavior was in any way a structural defect[.]"

¶30 Placed in proper context, it is unreasonable to interpret the circuit court's comments as a factual finding that the De Pere facility was "raining asbestos." The court was essentially stating that, even if it accepted as true Calewarts' metaphorical allegation that the facility was raining asbestos, Calewarts' safe place claim would still fail because that condition was not a structural defect and there was no evidence International Paper was aware of the condition. The defendants could not forfeit their right to challenge a purported factual finding the circuit court never actually made.

III. Motions in limine

¶31 We now turn to Calewarts' arguments on the merits of the defendants' motions in limine. "The purpose of [a] motion in limine is to obtain an advance ruling on admissibility of certain evidence." ***State v. Wright***, 2003 WI App 252, ¶37, 268 Wis. 2d 694, 673 N.W.2d 386. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion

standard."[9] ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Applying this standard, we will uphold the court's decision if it examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***

¶32 Despite this well-established standard of review, Calewarts argues, for four reasons, that we should independently review all aspects of the circuit court's rulings on the motions in limine. We reject Calewarts' arguments regarding the standard of review, with one exception.

¶33 First, Calewarts asserts that, by granting the defendants' motions in limine, the circuit court failed to follow the mandate set forth in this court's previous opinion. She argues that whether a circuit court followed an appellate court's mandate is a question of law for our independent review, *see* ***Harvest Savings Bank v. ROI Invs.***, 228 Wis. 2d 733, 737-38, 598 N.W.2d 571 (Ct. App. 1999), and, accordingly, we should independently review the circuit court's entire decision.

¶34 We reject Calewarts' claim that the circuit court failed to follow the mandate of our previous decision. Our supreme court has explained:

> Where a mandate directs the entry of a particular judgment, it is the duty of the trial court to proceed as directed. The trial court may, however, determine any matters left open, and in the absence of specific directions, is generally vested with a legal discretion to take such action, not inconsistent with the order of the upper court, as seems wise and proper under the circumstances. … In cases in which the

[9] Calewarts and CR Meyer use the term "abuse of discretion." However, our supreme court changed the terminology used when reviewing discretionary decisions from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585 n.1, 493 N.W.2d 367 (1992).

> appellate court reverses the decree and remands the cause to the lower court for further proceedings, that court can carry into effect the mandate of the appellate court only so far as its direction extends; *but the lower court is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.*

Fullerton Lumber Co. v. Torborg, 274 Wis. 478, 483-84, 80 N.W.2d 461 (1957), *superseded on other grounds by* WIS. STAT. § 103.465, *as recognized in* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶65, 319 Wis. 2d 274, 767 N.W.2d 898 (emphasis added).

¶35 As discussed above, in our previous decision, we determined genuine issues of material fact precluded summary judgment. ***Calewarts***, No. 2011AP1414, ¶1. We therefore reversed the circuit court's grant of summary judgment to the defendants and remanded for "further proceedings." ***Id.*** We did not address the admissibility of any evidence Calewarts submitted in opposition to summary judgment. Thus, the question of admissibility was not "settled by" our prior decision. *See* ***Fullerton***, 274 Wis. at 484. Consequently, the circuit court did not contravene our mandate when it granted the defendants' motions in limine to exclude Calewarts' proffered evidence.

¶36 Second, Calewarts contends independent review is appropriate because the defendants' motions in limine were actually dispositive motions, which are reviewed independently. *See, e.g.*, ***Palisades Collection***, 324 Wis. 2d 180, ¶9 (reciting a de novo standard of review for summary judgment motions). We disagree. The circuit court's rulings on the motions in limine did not conclude that Calewarts' claims failed as a matter of law. Rather, it was the parties who stipulated "that plaintiff cannot establish a claim against any defendant based on the evidence remaining after the Court's rulings on motions in limine[.]" While

the ultimate effect of the circuit court's decision on the motions in limine was to dispose of Calewarts' claims, the motions themselves were not dispositive motions. We therefore reject Calewarts' argument that we must employ the standard of review used for dispositive motions.[10]

¶37 Third, Calewarts argues the erroneous exercise of discretion standard does not apply when the circuit court makes summary rulings without explaining its reasoning. In a related argument, Calewarts asserts the circuit court's failure to explain its reasoning is reversible error in and of itself. "It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an [erroneous exercise of] discretion as a matter of law." ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). However, it is also well-established that, when a court fails to explain its reasoning, we independently review the record to determine whether it supports the court's exercise of discretion. *See* ***Martindale***, 246 Wis. 2d 67, ¶29. Consequently, the circuit court's failure to explain its reasoning does not require automatic reversal or application of a de novo standard of review.

¶38 Fourth, Calewarts observes that, although a circuit court's decisions to admit or exclude evidence are generally discretionary, whether a statement is admissible under a hearsay exception is a question of law subject to independent review. *See* ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290; *see also* ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809

[10] For the same reason, we reject Calewarts' argument that the motions in limine were untimely because they were not filed within the time limit for dispositive motions prescribed by the circuit court's scheduling order.

N.W.2d 1 (When a circuit court's exercise of discretion turns on a question of law, we review the legal question independently.). We agree with Calewarts on this limited point. Accordingly, to the extent Calewarts argues any of her proffered evidence was admissible under a hearsay exception, we review the circuit court's decision to exclude the evidence de novo.

¶39 We now turn to the merits of the defendants' disputed motions in limine.

A. CR Meyer's motion #4 and International Paper's motion #10: Opinion testimony of Robert's coworkers regarding the asbestos content of insulation at the De Pere facility

¶40 CR Meyer's motion in limine #4 asked the circuit court to exclude "[o]pinion testimony by lay persons concerning whether any products or equipment they worked with or around, or observed, contained asbestos." Similarly, International Paper's motion in limine #10 asked the court to bar "any and all testimony or opinions elicited from [Robert's coworkers] that the insulation used throughout the Milprint facility … contained asbestos." We conclude the circuit court properly exercised its discretion by granting these motions.

¶41 Opinion testimony of a lay witness is limited to those opinions or inferences that are: (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. WIS. STAT. § 907.01. We agree with CR Meyer that determining whether a particular substance contains asbestos requires scientific, technical, or other specialized knowledge. The presence of asbestos in a substance is not ascertainable by the naked eye. Rather, absent

specialized knowledge, scientific testing is required to determine the substance's chemical and mineral composition. Thus, testimony that a substance contains asbestos falls outside the realm of lay opinion testimony.

¶42 In addition, WIS. STAT. § 906.02 states that 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." Here, the evidence was insufficient to support a finding that any of Robert's coworkers had personal knowledge the insulation at the De Pere facility contained asbestos. Calewarts argues Robert's coworkers had personal knowledge of the insulation's asbestos content because they described the insulation's appearance as white, chalky, and plaster-like. However, being able to provide a general description of a substance's appearance does not provide a basis for testifying to the substance's chemical or mineral composition. Calewarts also argues the coworkers' extensive experience using the machinery at the De Pere facility gave them a basis to testify that the insulation contained asbestos. Experience using machinery is not tantamount to personal knowledge about the materials used in the machinery's components.

¶43 Calewarts next argues that Jones, Motiff, and Willems provided additional testimony supporting a finding that they had personal knowledge the insulation contained asbestos. For instance, she points out that Jones testified CR Meyer employees told him they were installing asbestos. As discussed below, we conclude Jones' testimony to that effect is admissible. *See infra*, ¶¶49-51. However, it does not provide a basis to conclude Jones himself had personal knowledge the material was asbestos. Jones conceded during his deposition that, aside from the CR Meyer employees' statements, he had no basis to believe the insulation contained asbestos. Thus, although Jones can testify regarding the

CR Meyer employees' statements, he cannot offer any personal opinion about the insulation's content.

¶44 Motiff similarly conceded at his deposition that he had no personal knowledge the insulation at the De Pere facility contained asbestos. Calewarts nevertheless argues Motiff *did* have personal knowledge about the insulation's asbestos content due to consultations he conducted with industrial hygienists as part of his union activities. However, Motiff conceded his consultations with the hygienists were related to concerns about fumes and solvents at the De Pere facility. The topic of asbestos came up during these consultations only because Motiff's father-in-law, who was never a Milprint employee, had been diagnosed with asbestosis. Motiff testified he "may have" discussed possible asbestos exposure at the De Pere facility with the hygienists, but he could not remember. This testimony does not provide a sufficient basis to conclude Motiff had personal knowledge that the insulation contained asbestos.

¶45 Calewarts also argues Motiff had personal knowledge about the insulation's asbestos content due to his participation on a union bargaining committee. Motiff testified the union "approached [Milprint] about encapsulating pipes" in the mid-1980s. Milprint ultimately decided to move its operations to a new facility instead, and it began abatement work on two presses it planned to move to the new location. While relevant to show that Milprint made asbestos abatement efforts in the late-1980s, this testimony does not provide a basis for Motiff to offer a personal opinion that the insulation contained asbestos.

¶46 Calewarts next argues Willems had personal knowledge that the insulation contained asbestos because he once referred to the insulation as asbestos when speaking to a supervisor, and the supervisor did not correct him. However,

the supervisor's silence after Willems referred to the insulation as asbestos is hardly sufficient to support a finding that Willems had personal knowledge the insulation contained asbestos. While Willems testified he knew the insulation at the De Pere facility contained asbestos, he could not identify any basis for that belief, other than his "own intelligence" and "innate knowledge[.]"

¶47 Because Robert's coworkers lacked personal knowledge that the insulation at the De Pere facility contained asbestos, and because opinions about the insulation's asbestos content fall outside the realm of lay opinion testimony, the circuit court properly exercised its discretion by granting CR Meyer's motion in limine #4 and International Paper's motion in limine #10. Robert's coworkers may testify to the insulation's appearance, the methods of disposal used at the facility, the fact that there was dust in the facility, and the fact that abatement procedures were ultimately used to remove the insulation, but they may not offer any opinions as to whether the insulation contained asbestos.

B. CR Meyer's motions #11(7) and #12: Jones' testimony that CR Meyer employees told him CR Meyer was installing asbestos

¶48 CR Meyer's motion in limine #11(7) asked the circuit court to exclude "[f]act witness testimony concerning [CR Meyer's] work with asbestos-containing products … as told to any co-workers or other person[.]" CR Meyer's motion #12 sought to preclude Jones' testimony "that the insulation [CR Meyer] allegedly installed was asbestos-containing." It is undisputed that the aim of these two motions was to bar Jones from testifying that CR Meyer employees told him CR Meyer was installing asbestos at the De Pere facility.

¶49 CR Meyer contends Jones' testimony about the CR Meyer employees' statements is inadmissible hearsay. We disagree. Hearsay is defined

as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). However, admissions by party opponents do not constitute hearsay. Sec. 908.01(4)(b). As relevant here, a statement qualifies as an admission of a party opponent if it is "offered against a party" and is "[a] statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship[.]" Sec. 908.01(4)(b)4. Statements by CR Meyer employees that CR Meyer was installing asbestos meet this definition.

¶50 CR Meyer argues there is no foundation for Jones' testimony that the workers he spoke to were CR Meyer employees. However, Jones testified he believed the workers installing the insulation were employed by CR Meyer because the name "CR Meyer" was on their baseball caps, coveralls, and trucks. This testimony provided an adequate foundation for Jones' testimony. CR Meyer's suggestion that the workers may have been independent contractors goes to the weight of the evidence, not its admissibility. Moreover, if CR Meyer wanted to object to the foundation for Jones' testimony, it was required to do so during his deposition. *See* ***Strelecki v. Firemans Ins. Co. of Newark***, 88 Wis. 2d 464, 475-76, 276 N.W.2d 794 (1979). Because CR Meyer failed to do so, it cannot now complain that the foundation for Jones' testimony was inadequate.

¶51 We therefore conclude Jones' testimony that CR Meyer employees told him CR Meyer was installing asbestos is not inadmissible hearsay. Accordingly, the circuit court erroneously exercised its discretion by granting CR Meyer's motions in limine #11(7) and #12.

C. CR Meyer's motion #2: Testimony that CR Meyer installed asbestos insulation at the De Pere facility in 1947

¶52 CR Meyer's motion in limine #2 sought to preclude all testimony that CR Meyer "installed asbestos insulation on machinery at the De Pere facility in 1947." CR Meyer argues such testimony is irrelevant for the purpose of proving Robert was exposed to asbestos because Robert did not begin working at the De Pere facility until 1950. CR Meyer also argues the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

¶53 We conclude the circuit court erroneously exercised its discretion by granting CR Meyer's motion #2. First, the evidence is relevant because it shows CR Meyer was responsible for installing asbestos at the De Pere facility. CR Meyer incorrectly presumes Robert was not present when the insulation was originally installed. However, Jones testified the installation began in 1947 and lasted until either 1949 or 1950. Robert began working at the De Pere facility on January 24, 1950. Thus, a jury could find Robert was working at the De Pere facility for at least some portion of the original installation and was therefore exposed to dust created by CR Meyer's work. Moreover, even if not present during the initial installation, Calewarts submitted evidence that Robert was later exposed to asbestos fibers when the insulation was removed and repaired. The release of fibers during subsequent removal of the insulation may be a foreseeable use of the product for which CR Meyer may be liable as the original installer.

¶54 Second, the probative value of testimony that CR Meyer installed the insulation is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. CR Meyer argues the evidence is unfairly prejudicial because CR Meyer "might be held responsible for acts outside

of the relevant timeframe; because the jury could be misled and mistakenly assume that [Robert] would have been exposed to asbestos at a time when he was not working at the De Pere facility; and because the evidence has the serious potential to confuse the issues at trial." These arguments are basically identical to CR Meyer's arguments regarding relevance. We therefore reject them for the reasons stated in the preceding paragraph.

¶55 Moreover, CR Meyer's argument that the disputed evidence "has the serious potential to confuse the issues at trial" is conclusory at best. As explained above, evidence that CR Meyer installed asbestos at the De Pere facility goes to a crucial issue in the case—CR Meyer's responsibility for Robert's asbestos exposure. CR Meyer seems to suggest the disputed evidence will confuse the jury simply because the facts relating to this issue are disputed. However, a mere dispute of facts is an insufficient reason to keep otherwise admissible evidence from a jury. The very purpose of a trial is for the jury to weigh disputed evidence in order to reach a conclusion.

D. CR Meyer's motion #11(8) and International Paper's motion #15: Coworker testimony about the conditions in which Robert worked

¶56 CR Meyer's motion in limine #11(8) asked the circuit court to prevent any witness from testifying about the conditions in which Robert worked "unless [the] witness witnessed the conditions at any of [Robert's] workplaces while actually present at any/all of his workplaces[.]" International Paper's motion in limine #15 sought to bar "co-worker speculation about whether Robert … worked with or around asbestos-containing insulation[.]"

¶57 The circuit court erred by granting these motions without limitation. The crux of both motions was that Robert's coworkers should not be able to testify

about conditions at the De Pere facility that could have caused asbestos exposure—for instance, the frequent removal and repair of insulation and the disposal of insulation in broke boxes—unless the coworkers could testify to specific instances when Robert was exposed to those conditions. However, in our previous decision, we addressed and rejected CR Meyer's argument that Calewarts was required to produce direct evidence of specific asbestos exposures. Instead, citing ***Zielinski v. A.P. Green Industries, Inc.***, 2003 WI App 85, ¶16, 263 Wis. 2d 294, 661 N.W.2d 491, we stated Calewarts merely needed to present credible evidence from which a reasonable person could infer that Robert was exposed to asbestos. ***Calewarts***, No. 2011AP1414, ¶46. We further noted that a jury may infer exposure from the totality of the circumstances. ***Id.*** (citing ***Zielinski***, 263 Wis. 2d 294, ¶18).

¶58 Our previous ruling that Calewarts did not need to produce direct evidence of specific instances of asbestos exposure is the law of the case. Accordingly, the circuit court erred when it granted without reservation CR Meyer's motion in limine #11(8) and International Paper's motion #15, both of which sought to exclude testimony about work conditions at the De Pere facility unless the witness specifically recalled an instance in which Robert was exposed to those conditions.

E. CR Meyer's motion #10: Evidence or argument regarding CR Meyer's legal duties

¶59 CR Meyer's motion in limine #10 asked the circuit court to preclude any arguments or evidence about CR Meyer's legal duties. On appeal, CR Meyer observes that the existence of a duty is a question of law for the court, not the jury, to decide. *See* ***Johnson v. Misericordia Cmty. Hosp.***, 99 Wis. 2d 708, 723, 301 N.W.2d 156 (1981). CR Meyer therefore argues the circuit court correctly

precluded Calewarts from making arguments or presenting evidence regarding CR Meyer's legal duties "*until* the [circuit] court ruled that such a duty existed."

¶60 We agree with CR Meyer that the circuit court could properly preclude Calewarts from making arguments about CR Meyer's legal duties until the court determined whether any legal duty existed. Likewise, the court could properly preclude lay witnesses from testifying as to the existence of a legal duty, as opposed to any facts underlying such a duty. However, the court went too far when it also precluded Calewarts from presenting evidence regarding CR Meyer's legal duties. Calewarts had to be allowed to offer evidence relevant to CR Meyer's actions bearing on its legal duties in order for the court to make a decision on the issue. The court therefore erroneously exercised its discretion by granting CR Meyer's motion in limine #10 in its entirety.

F. CR Meyer's motion #1 and International Paper's motion #12: Testimony or documents concerning the OSHA citations

¶61 CR Meyer's motion in limine #1 asked the circuit court to exclude all testimony "concerning an incident that occurred at the … De Pere facility on April 23, 1990[,] in which [CR Meyer] was cited by OSHA for safety violations relating to the cutting of an asbestos insulated pipe[.]" The motion further asked the court to exclude admission of, or reference to, any documents concerning the April 1990 incident. International Paper's motion in limine #12 similarly asked the court to exclude "all documentation" regarding the OSHA investigation and "all related testimony[.]"

¶62 On appeal, CR Meyer and International Paper argue evidence related to the OSHA investigation is irrelevant because Robert's employment records show that he was no longer working at the De Pere facility on April 23, 1990.

However, Calewarts does not assert the OSHA investigation is relevant to show that Robert was exposed to asbestos during the April 1990 incident. Instead, she argues the evidence is admissible to prove that the insulation in the De Pere facility contained asbestos. We agree with Calewarts that evidence related to the OSHA investigation is relevant for this purpose. *See* WIS. STAT. § 904.01 (Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").[11]

¶63 Alternatively, International Paper argues the circuit court properly excluded the OSHA documents because they constitute inadmissible hearsay. Calewarts does not dispute that the OSHA documents fall within the definition of hearsay. However, she asserts, without a developed argument or citation to legal authority, that the OSHA documents meet the public records exception to the hearsay rule. *See* WIS. STAT. § 908.03(8). The public records exception allows the admission of:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

[11] In support of its argument that evidence related to the OSHA investigation is not relevant, CR Meyer cites an unpublished per curiam opinion issued by this court in 2003. This citation violated WIS. STAT. RULE 809.23(3). Again, we caution counsel that future rule violations may result in monetary sanctions. *See* WIS. STAT. RULE 809.83(2).

¶64 In response to Calewarts' argument that the public records exception to the hearsay rule applies, International Paper asserts there is "long-standing precedent that investigative reports do not qualify for the public records exception[.]" Specifically, International Paper asserts that OSHA investigative reports are inherently untrustworthy because, "[u]nder federal law, an OSHA investigator cannot be compelled to testify as a witness by private litigants." International Paper also argues the OSHA documents in this case contain two levels of hearsay—statements of the OSHA investigator, and statements witnesses made to the investigator. International Paper therefore argues that, even if the investigator's statements fall within the public records exception, any statements of witnesses contained in the report remain inadmissible hearsay unless another exception applies.

¶65 Calewarts does not meaningfully respond to International Paper's argument regarding the public records exception. Instead, she simply asserts, "The results of the OSHA testing are admissible because such testing is an observation within the scope of the regular activities of OSHA, making the hearsay exception in WIS. STAT. § 908.03(8) applicable." Arguments not refuted are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979); *see also* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for the parties). We therefore accept International Paper's contention that the OSHA documents do not fall under the public records exception to the hearsay rule. Accordingly, the circuit court properly granted CR Meyer's motion in limine #1 and International Paper's motion in limine #12.

G. International Paper's motion #9: Photographs purporting to show the pipes involved in the April 1990 incident

¶66 International Paper's motion in limine #9 asked the circuit court to exclude thirteen photographs that were marked as exhibits during Motiff's deposition and purported to show the pipes involved in the April 1990 incident that led to the OSHA citations. International Paper argues Motiff's testimony was insufficient to authenticate the photographs. "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01.

¶67 International Paper observes that, while Motiff testified the photographs were taken following the April 1990 incident, he could only speculate as to who took the photographs and when and where they were taken. In addition, although Motiff stated he had seen the same photographs sometime in 1990, he admitted the photographs marked at his deposition did not come into his possession until 2006, when he found them while cleaning out a union office at a different Milprint facility. Further, Motiff admitted he was not present on the first floor of the De Pere facility when the April 1990 incident took place, and his knowledge of the incident was based on "what [he] heard from [an] elevator operator plus other people in the mill." We agree with International Paper that this testimony is insufficient to authenticate the photographs, assuming they are offered to show that the pipes depicted were the actual pipes involved in the April 1990 incident. Because Motiff lacked personal knowledge about the circum-

stances in which the photographs were taken, his testimony cannot support a finding that the photographs actually depicted the pipes involved in the incident.[12]

¶68 However, we conclude the photographs were properly authenticated for the limited purpose of showing the general condition and appearance of the pipes in the De Pere facility. As a result, the circuit court erroneously exercised its discretion by granting International Paper's motion in limine #9 without reservation. The court should have allowed Calewarts to introduce the photographs for the limited purpose described above.

H. International Paper's motion #14: Statements, references, or evidence regarding Calewarts' punitive damages claim against International Paper

¶69 Finally, International Paper's motion in limine #14 sought to exclude all "statements, references, or evidence" regarding Calewarts' punitive damages claim against International Paper. As grounds for this motion, International Paper argued there was "no evidence in the record" that it acted "maliciously or in intentional disregard" of Calewarts' rights.

¶70 On appeal, International Paper argues the issue of punitive damages is not properly before this court because Calewarts' punitive damages claim was dismissed by the circuit court on summary judgment, and Calewarts did not specifically challenge that ruling in her first appeal. International Paper therefore

[12] We also reject Calewarts' argument that the photographs were authenticated "by being attached as part of a public report compiled during the OSHA investigation. WIS. STAT. § 909.015(7)." As discussed above, the circuit court properly granted the defendants' motions to exclude the OSHA report.

argues Calewarts is bound by the circuit court's initial decision dismissing the punitive damages claim.

¶71 We disagree. In our previous opinion, aside from affirming the dismissal of an additional defendant that is not relevant to this appeal, we reversed the entirety of the circuit court's decision. We did not make any exception for Calewarts' punitive damages claim. As a result, the issue of punitive damages is properly before us in the present appeal.

¶72 International Paper also argues the circuit court properly granted its motion in limine #14 on the merits. Again, we disagree. A plaintiff may recover punitive damages "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of" the plaintiff's rights. WIS. STAT. § 895.043(3). It is undisputed that International Paper is only liable for asbestos exposure at the De Pere facility that occurred between May 1, 1985 and 1991. International Paper therefore argues that, in order to succeed on her punitive damages claim, Calewarts "must necessarily rely on the April 1990 incident allegedly involving [CR Meyer] and the resulting OSHA citation, as it is the only possible evidence of alleged exposure during the time period for which [International Paper] has any liability." International Paper further observes that the circuit court granted its motion in limine #8, barring any references to the April 1990 incident, and Calewarts does not challenge that ruling on appeal. International Paper therefore argues Calewarts cannot establish that it acted maliciously or in intentional disregard of her rights during the applicable timeframe.

¶73 International Paper's argument regarding punitive damages is underdeveloped. International Paper does not explain why testimony regarding

the April 1990 incident was the only basis for Calewarts' punitive damages claim. In our previous opinion, we noted there was evidence that

> [t]he asbestos-coated steam pipes were on all four floors at Milprint. The Milprint workers were not advised to wear protective gear and no safety warnings or instructions about asbestos were given until sometime after 1985. The asbestos was never encapsulated and remained a subject of union bargaining discussions until the plant closed. Calewarts' witnesses did not observe abatement work, involving the use of special protective measures, until 1989.

Calewarts, No. 2011AP1414, ¶8. Based on this evidence, a jury could find that International Paper acted in intentional disregard of Calewarts' rights during the relevant time period. Accordingly, the circuit court erroneously exercised its discretion by granting International Paper's motion in limine #14.

¶74 For the foregoing reasons, we reverse the judgment dismissing Calewarts' claims. We remand with instructions that the circuit court deny CR Meyer's motions in limine #2, #11(7), and #12 and International Paper's motion in limine #14, and deny in part CR Meyer's motions #10 and #11(8) and International Paper's motions #9 and #15, consistent with the reasoning set forth in this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.