COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP964 Cir. Ct. No. 2009CV011570

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

RODNETTE SORENSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE ON BEHALF OF THE ESTATE OF GEORGE SORENSON,

PLAINTIFFS-APPELLANTS,

V.

BUILDING SERVICE INDUSTRIAL SALES, INC.,

DEFENDANT-RESPONDENT,

METROPOLITAN LIFE INSURANCE COMPANY, OAKFABCO, INC. AND TRANE US, INC.,

DEFENDANTS,

LOCAL 19 & 27 HEALTH & WELFARE FUND,

SUBROGATED DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Reversed and cause remanded.*

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

¶1 BRENNAN, J. George Sorenson's estate[1] filed strict-products-liability and negligence claims, based upon a failure to warn, against Building Service Industrial Sales, Inc. ("BSIS"), a company that supplied asbestos insulation products to Sorenson's employers.[2] Following a motion for summary judgment, the circuit court dismissed Sorenson's claims against BSIS, concluding that those claims were barred by the construction statute of repose, WIS. STAT. § 893.89(2) (2013-14).[3] Sorenson appeals, arguing that material issues of fact exist regarding whether BSIS was "a person involved in the improvement of real property." *See* ***id.*** We agree that a genuine issue of material fact exists and remand the case back to the circuit court for trial.

BACKGROUND[4]

¶2 George Sorenson worked in the insulation trade as an "asbestos worker" from 1955 until he retired in 1997. During that time, BSIS served as the

[1] Rodnette Sorenson, George Sorenson's wife, filed the initial complaint in this matter on behalf of George Sorenson's estate. The circuit court later allowed Rodnette to amend the complaint to name her son Mark Sorenson as Special Administrator to the estate. For purposes of this opinion, we do not differentiate between George Sorenson and his estate and refer to both as "Sorenson."

[2] The complaint also named numerous other defendants whose rights are not before us on appeal.

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

[4] This case is before us following an order granting a motion for summary judgment. As such, the facts set forth in the background section are undisputed unless otherwise noted.

main supplier of asbestos insulation to Sorenson's two primary employers, J. Bashaw and L&S Insulation. As an insulator, Sorenson often utilized BSIS-supplied insulation materials when insulating boilers, storage tanks, heating and steam pipes, duct work, and other high-pressure, high-temperature systems at various worksites.

¶3 In May 2007, Sorenson was diagnosed with lung cancer, and in February 2009, he died from the disease. A medical expert concluded exposure to asbestos caused Sorenson's lung cancer. After Sorenson's death, his estate sued BSIS, alleging injuries and wrongful death.

¶4 BSIS, and two other defendants, Oakfabco, Inc., and Cleaver Brooks, all filed motions seeking summary judgment based on Wisconsin's construction statute of repose, WIS. STAT. § 893.89. The circuit court agreed that the statute barred Sorenson's claims against all three defendants. Sorenson filed a notice of appeal from the order dismissing his claims against BSIS, but did not file notices of appeal with respect to the orders dismissing his claims against Oakfabco or Cleaver Brooks. The time for appealing the orders dismissing Oakfabco and Cleaver Brooks has now passed.

STANDARD OF REVIEW

¶5 This case comes to us on a motion for summary judgment. 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).

DISCUSSION

¶6 All of Sorenson's arguments on appeal arise from the circuit court's conclusion that Sorenson's claims against BSIS are barred by the construction statute of repose, WIS. STAT. § 893.89. "Generally speaking, … § 893.89 provides that persons involved in improvements to real property may not be sued more than ten years after substantial completion of a project." ***Kalahari Dev., LLC v. Iconica, Inc.***, 2012 WI App 34, ¶6, 340 Wis. 2d 454, 811 N.W.2d 825. As relevant here, the statute states:

> [N]o cause of action may accrue and no action may be commenced … against any person involved in the improvement to real property after the end of the exposure period, to recover damages … for any injury to the person, or for wrongful death, arising out of any deficiency or defect in … the furnishing of materials for[] the improvement to real property….

See § 893.89(2). The purpose of the statute "is to provide protection from long-term liability for those involved in the improvement to real property." ***Kohn v.***

Darlington Cmty. Schs., 2005 WI 99, ¶62, 283 Wis. 2d 1, 698 N.W.2d 794 (emphasis omitted).

¶7 Sorenson raises the following arguments with respect to the circuit court's application of WIS. STAT. § 893.89 to his claims against BSIS: (1) that a genuine issue of fact exists regarding whether BSIS furnished asbestos insulation products to Sorenson's employers that were used exclusively for making improvements to real property; (2) that § 893.89 only bars claims arising from injuries caused by "structural defects" and that inhalation of airborne asbestos fibers is not a "structural defect"; and (3) various other issues not raised before the circuit court. We address each in turn.

I. Sorenson has presented sufficient evidence to create a genuine issue of material fact regarding whether BSIS furnished asbestos products exclusively for making improvements to real property.

¶8 The first question before this court is whether the evidence presented by Sorenson on summary judgment, when viewed in the light most favorable to Sorenson, shows that BSIS furnished asbestos insulation products to Sorenson's employers that were used exclusively for making improvements to real property, as that term is used in WIS. STAT. § 893.89(2). While that is ultimately a legal issue, it first requires a jury to decide whether the materials were provided exclusively for a permanent improvement to property or whether they were provided for repair or maintenance.. Because we conclude that a genuine issue of fact exists regarding that question, we reverse and remand this case back to the circuit court.

¶9 "Whether an item is an 'improvement to real property' under [WIS. STAT.] § 893.89 is a question of law that we review de novo." ***Kohn***, 283 Wis. 2d 1, ¶12. The Wisconsin Supreme Court has held that an "improvement

to real property," within the meaning of the statute means: "A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." ***Id.***, ¶17 (brackets, quotation marks and citation omitted). By contrast, maintenance has been defined as the "work of keeping something in proper condition; upkeep." ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶48, 326 Wis. 2d 155, 785 N.W.2d 398 (quotation marks and citation omitted). "The legislature has chosen to protect persons or entities which make permanent improvements to real property, not to absolve those who make regular repairs or do maintenance work. This distinction is reasonable because improvements to real property have a completion date whereas regular repairs and maintenance can continue *ad infinitum*." ***Peter v. Sprinkmann Sons Corp.***, 2015 WI App 17, ¶23, ___ Wis. 2d ___, 860 N.W.2d 308.

¶10 Sorenson admitted both to the circuit court and to this court that in *some* instances BSIS furnished asbestos products to Sorenson's employers that were used to make improvements to real property. However, he argues that this was not *exclusively* the case and that there is also evidence demonstrating that BSIS furnished asbestos products used for maintenance and repair work. Sorenson believes that, to the extent that he has evidence demonstrating that BSIS furnished Sorenson's employers with asbestos insulation products used for maintenance and repair, the statute of repose does not apply.

¶11 Sorenson relies on both his own deposition testimony[5] and deposition testimony from Dennis Zwaga to support his assertion that there is

[5] Sorenson was not deposed in this case. However, prior testimony about his asbestos work was taken in other cases.

evidence in the record that BSIS furnished asbestos insulation products to Sorenson's employers used for maintenance and repair work. Sorenson specifically relies on deposition testimony regarding the following worksites:

- Oak Creek Power Plant: Sorenson testified that he remembered doing "little jobs" at the Oak Creek Power Plant. He recalled "running some insulation on some pipes going up alongside of a boiler, and it was so hot in there we had to push the pipe ahead of us because it was too hot to get right at the pipe." He testified that the boiler was running at the time the insulation was installed and described the job as "[r]epair or something."

- "Old" St. Mary's Hospital:[6] Sorenson testified that he remembered insulating steam and water pipes at "old" St. Mary's Hospital. When asked if his work was "in the nature of new construction work or was this repair work?" Sorenson responded that "it was … patchwork, here and there, stuff like that."

- St. Luke's Hospital: Sorenson testified that he insulated "plumbing pipes, heating pipes, ductwork, we did tanks" in St. Luke's Hospital. He stated that the building was an "existing facility," "[s]ome was new; some was existing."

- Various Johnson Wax facilities: Sorenson also testified that he worked "a lot" at various facilities owned by Johnson Wax, and specifically recalled a facility he worked at in the "'50s, early '60s" located in "downtown" Racine on "14th and Racine." He remembered using "all the asbestos stuff" on the job and described the job as "all redoing stuff," as opposed to new construction.

- Hotel Racine: Zwaga testified that he worked with Sorenson and observed Sorenson "[i]nstalling pipe covering and insulating fittings" as part of "remodeling work" in Hotel Racine. Zwaga specifically testified that they used "asbestos or insulating cement on each fitting."

[6] There is some confusion in the record and the briefs regarding whether the "old" St. Mary's Hospital referred to in Sorenson's deposition testimony is its own entity or is a Johnson Wax facility. However, regardless of the facility name, the work described by Sorenson reveals an issue of fact regarding whether the work done at the facility was maintenance and repair or whether it was an improvement to real property.

¶12 BSIS refutes that a question of material fact exists regarding whether BSIS furnished asbestos products to Sorenson's employers used for maintenance and repair work, as opposed to asbestos products used to make improvements to real property. Addressing each of the worksites listed above, BSIS cites to competing evidence in the record that it claims demonstrates that the work performed with the BSIS-supplied asbestos products at each of the worksites involved large permanent structures or was new construction work, such that the work constituted improvements to real property. However, to the extent that other evidence exists in the record contradicting Sorenson's and Zwaga's testimony, that contradictory evidence merely raises an issue of fact. The existence of material issues of fact requires us to conclude that Sorenson's claims must survive summary judgment. *See* ***Lambrecht***, 241 Wis. 2d 804, ¶22. As such, we reverse the circuit court's summary judgment order and remand the case back to the circuit court for trial. *See* ***id.***

¶13 BSIS also raises two other issues in response to Sorenson's argument that a material issue of fact exists regarding whether BSIS furnished asbestos products exclusively for the improvement to real property. We briefly address those issues here.

¶14 First, BSIS alleges that with respect to several of the above worksites—specifically, St. Luke's Hospital, Johnson Wax, and Hotel Racine—that the evidence shows that Sorenson used fiberglass insulation, as opposed to asbestos insulation. However, BSIS raises this argument for the first time on appeal. As a general rule, we will not consider an issue not raised in the circuit court, particularly when, as here, the issue involves questions of fact not brought to the circuit court's attention. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

BSIS has already filed, and the circuit court has already ruled upon, two motions for summary judgment: the first based upon BSIS's claim that it did not have a duty to warn and the second based upon the statute of repose. BSIS has had ample opportunity to raise this issue before the circuit court and has not done so. We will not address it for the first time here. *See* ***id.***

¶15 Second, BSIS also claims that Sorenson's testimony that he was doing "repairs," "patchwork," and "remodeling" at the above worksites does not remove BSIS from WIS. STAT. § 893.89's protection because BSIS is not an owner or occupier of real property pursuant to § 893.89(4)(c). BSIS's argument in that regard is completely irrelevant because Sorenson does not rely on the exceptions to the statute of repose that are set forth in (4); rather, Sorenson's claims are based upon the definition of "improvement to real property" set forth in § 893.89(2) and ***Kohn***. *See* ***id.***, 283 Wis. 2d 1, ¶¶17-18.

¶16 We remand this case back to the circuit court for trial on Sorenson's claims related to the five worksites described above where Sorenson has presented evidence of repair or maintenance, potentially taking those claims outside the protection of the statute of repose. It is the jury's province to determine what evidence to believe on the question of whether the work done at these five worksites was repair and maintenance, or was exclusively for new construction. The circuit court will then be able to reach the legal issue of whether the claims related to the work at those worksites are barred by statute of repose. Sorenson also raises several alternate issues in his appellate submissions related to the applicability of WIS. STAT. § 893.89 to his claims against BSIS that affect his claims regarding work he did at worksites other than those above. We briefly address Sorenson's other concerns.

II. Safe-place-claim case law, distinguishing between structural defects and unsafe conditions, does not apply to Sorenson's negligence and strict-products-liability claims.

¶17 Sorenson also spends a great deal of time in his appellate brief arguing that "[u]nder Wisconsin case law the only claims barred by Wis. Stat. § 893.89 are those arising from injuries caused by 'structural defects.'" Sorenson then goes on to cite numerous cases discussing the interplay between the safe-place statute, WIS. STAT. § 101.11, and the construction statute of repose, WIS. STAT. § 893.89, to support his argument that the statute of repose does not apply to his negligence and strict-products-liability claims because "[t]he condition of airborne asbestos is not a 'structural defect' to which … § 893.89 applies." This argument is without merit.

¶18 To be sure, it is well established in our case law that WIS. STAT. "§ 893.89 bars *safe place claims* resulting from injuries caused by structural defects, but not by unsafe conditions associated with the structure." ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶29, 291 Wis. 2d 132, 715 N.W.2d 598 (emphasis added). However, Sorenson does not raise a safe-place claim against BSIS and we are unconvinced by his argument that ***Mair*** and § 893.89's legislative history stand for the proposition that the term "structural defect," as that term is used in ***Mair***, is "equivalent to the [§ 893.89] requirement of a 'defect or deficiency' in the construction of an 'improvement to real property.'" As such, the line of cases setting forth the differences between "structural defects" and "unsafe conditions" is inapplicable.

III. We do not address the remainder of Sorenson's claims because he raises them for the first time on appeal.

¶19 Sorenson raises two remaining arguments to support his claim that BSIS is not entitled to protection under WIS. STAT. § 893.89. First, Sorenson claims that BSIS, as a material supplier, was only a middleman between the manufacturer and the contractor and did not engage in the "furnishing of materials" as that phrase is used under the statute. Instead, Sorenson claims that Sorenson's employers, who ordered their asbestos supplies from BSIS, "furnish[ed] materials."[7] *See* ***id.*** Second, Sorenson contends that BSIS is not entitled to protection under § 893.89 because the alleged defects in the insulation existed before the insulation was furnished by BSIS. In so arguing, Sorenson relies on ***Kohn***'s holding that "material providers are included within the scope of the statute to the extent that a cause of action is based on 'the furnishing of materials for' the improvement, § 893.89(2), and are excluded only when liability is based upon a defect in the material provided." *See* ***Kohn***, 283 Wis. 2d 1, ¶67.

¶20 The problem with both of these arguments is that Sorenson failed to raise them in his summary judgment brief before the circuit court. "[A]s a matter of judicial policy, we decline to consider legal arguments that are posed for the first time on appeal and which were not raised in the [circuit] court." ***Wisconsin Dep't of Taxation v. Scherffius***, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974).

[7] In so arguing, Sorenson primarily relies on ***Swanson Furniture Co. of Marshfield v. Advance Transformer Co.***, 105 Wis. 2d 321, 328, 313 N.W.2d 840 (1982). We note that ***Swanson*** addressed a much earlier version of the statute of repose, containing substantially different language, and that has since been held unconstitutional under the Equal Protection Clause. *See* ***Kohn v. Darlington Cmty. Schs.***, 2005 WI 99, ¶¶44-80, 283 Wis. 2d 1, 698 N.W.2d 794.

Sorenson has forfeited his right to raise these arguments and therefore we will not address them. *See* ***id.***

¶21 For the reasons set forth above, we reverse and remand this case back to the circuit court for trial.[8]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[8] Sorenson has only appealed from the circuit court's order dismissing his claims against BSIS. He has not challenged the circuit court's orders dismissing his claims against Oakfabco and Cleaver Brooks on the same grounds. As such, BSIS believes that if we reverse the circuit court's decision, as we have done, it will be unduly prejudiced. BSIS could have resolved any prejudice by filing a cross-appeal, naming Oakfabco and Cleaver Brooks as adverse parties. *See* WIS. STAT. § 809.10(2)(b). It chose not to do so, and now it cannot complain that the opportunity has passed. *See* ***id.***