COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0212
STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TODD STENDAHL, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GERALD D. STENDAHL, DECEASED,

PLAINTIFF-APPELLANT,

V.

A & M INSULATION CO., AN ILLINOIS CORPORATION,

DEFENDANT,

UNITED STATES MINERAL PRODUCTS CORP., A NEW JERSEY CORPORATION,

DEFENDANT-RESPONDENT,

ACANDS, INC., A DELAWARE CORPORATION, OWEN-CORNING CORP., A DELAWARE CORPORATION, SPRINKMANN SONS CORPORATION, A WISCONSIN CORPORATION AND W.R. GRACE CO., A CONNECTICUT CORPORATION,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Todd Stendahl, individually and as Special Administrator of the Estate of Gerald Stendahl, deceased (Estate), appeals from the order striking an affidavit submitted by the Estate in opposition to United States Mineral Products Corporation's (USM) summary judgment motion and granting summary judgment to USM. USM has moved for costs and attorney fees pursuant to WIS. STAT. § 809.25(3), claiming that the Estate's appeal is frivolous.[1] We affirm the trial court's decision to strike the affidavit and the grant of summary judgment. We also assess costs and attorney fees against the Estate because this appeal is frivolous.

I. BACKGROUND.

¶2 Stendahl died at the age of 58 from mesothelioma, a disease believed to be caused by exposure to asbestos. Stendahl's estate sued various corporations, including USM, that manufactured and distributed products containing asbestos, alleging that Stendahl's exposure to their asbestos-containing products caused his illness and his eventual death on May 26, 1995.

¶3 Before Stendahl died, he testified at a deposition in another lawsuit. At that time, he claimed he did not use USM's asbestos-containing product marketed under the brand name, CAFCO, before 1980. However, it is undisputed

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

that USM's CAFCO containing asbestos was only manufactured between the years 1954-1972. Although Stendahl worked for various employers during his lifetime, he was employed, for less than one year in 1969-1970, by Asbestos Spray Contractors (Asbestos Spray) as a fireproofing sprayer. It was at this job that the Estate alleges Stendahl was exposed to USM's CAFCO, a fireproofing substance sprayed onto the interior steel structure of a building.

¶4 USM filed a summary judgment motion, contending that no evidence existed implicating CAFCO as the source of Stendahl's illness. In opposition, the Estate filed an affidavit of an Asbestos Spray co-worker, Jack French. In his affidavit, French declared, "I saw Gerald D. Stendahl apply the Cafco Blaze Shield-D to the steel structures of various buildings throughout the state of Illinois and other locations during 1969-1970." After the trial court failed to grant summary judgment to another defendant based upon the French affidavit, USM withdrew its motion. USM then successfully sought to reopen discovery and took French's deposition. At his deposition, however, French was able to recall only one work site, the Omaha airline terminal, where he saw Stendahl applying fireproofing material, and he did not know what fireproofing product Stendahl used while working there.

¶5 After French's deposition, the trial court allowed USM to refile its summary judgment motion. USM also moved to strike French's affidavit. In response, the Estate filed a combined brief in opposition to both USM's summary judgment motion and that of another defendant. No brief or other response was filed in opposition to USM's motion to strike French's affidavit, and the Estate never objected to USM's request to strike the affidavit at the hearing. The trial court granted both of USM's motions.

II. ANALYSIS.

¶6 First, the Estate claims that the trial court should not have struck French's affidavit. A trial court's decision to admit or exclude evidence lies within the discretion of the trial court. *See* ***County of Kenosha v. C & S Mgmt, Inc.***, 223 Wis. 2d 373, 407-08, 588 N.W.2d 236 (1999). Thus, we must determine whether the trial court properly exercised its discretion when the trial court struck French's affidavit. We are satisfied that the trial court properly struck French's affidavit.

¶7 USM argues that the Estate is prohibited from raising the issue of the striking of French's affidavit from the record because the Estate failed to object to the motion at the hearing. Curiously, no argument in the Estate's appellate brief is explicitly devoted to arguing against the trial court's decision to strike the affidavit. After reviewing the record, we agree with USM that the Estate never objected to or argued against French's affidavit being stricken from the record. Consequently, the Estate has not properly preserved this argument and the trial court's ruling cannot be challenged on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995) (A failure to raise a specific challenge in the trial court waives the right to raise it on appeal.).[2] Thus, we must conclude that the trial court's striking of French's affidavit was proper.

[2] Were we to entertain the argument, we note that several of the Estate's assertions are untrue. First, it contends: "French's affidavit was never directly contradicted by USM." This contention is belied by the record. French clearly contradicted his affidavit at the deposition. When questioned about the accuracy of his prior affidavit, French recanted many of his earlier statements. For instance, in his affidavit French claimed to have seen Stendahl applying CAFCO at numerous locations. However, at his deposition, French stated that he could not recall a single location where he saw Stendahl applying CAFCO. In fact, he could recall only one job site, the Omaha airline terminal, where he ever saw Stendahl applying any fireproofing material.

(continued)

¶8 Next, the Estate argues that the trial court erred in granting USM's summary judgment motion. The Estate contends that it presented sufficient evidence that Stendahl was exposed to USM's CAFCO while working for Asbestos Spray in 1969-70. We disagree.

¶9 In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. *See, e.g.,* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶10 The trial court granted USM's summary judgment motion, concluding that summary judgment was appropriate because, as the trial court observed, "[N]o one can specifically place Mr. Stendahl at any job site where Stendahl was using CAFCO." The trial court was correct.

¶11 It is undisputed that Stendahl worked for Asbestos Spray for less than a year and it is also undisputed that, in the past, Asbestos Spray used asbestos containing CAFCO.[3] In order to survive USM's summary judgment request, the Estate had to present evidence that connected Stendahl with USM's CAFCO. Stendahl's testimony was of little help because he testified that he did not use

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The Estate also argued that "a co-worker witnessed Stendahl's exposure to asbestos dust." This is not true. French's deposition testimony supplies the reason why French may have initially believed that statement. French was mistaken both as to the number of years and the dates Stendahl worked for Asbestos Spray. French testified he believed Stendahl began working for Asbestos Spray in the mid-60s, not 1969 as the records revealed. French also testified, "you know, I might not see [Stendahl] for two years at a time although we worked for the same company." This, however, would have been impossible, because Stendahl only worked at the company for less than eight months. More importantly, French was unable to state with specificity any date or location when he "witnessed Stendahl's exposure to asbestos dust."

[3] French averred that CAFCO was used on 50% of Asbestos Spray's "smaller" jobs; however, French testified that he never saw Stendahl working on a small job so the percentage of CAFCO utilized on small jobs is of little relevance.

CAFCO while working there, believing that he was not exposed to CAFCO until 1980.[4] French's affidavit provided the necessary link between Stendahl and his use of the asbestos containing CAFCO. However, as noted, French's affidavit was stricken because at French's deposition testimony he recanted his earlier pronouncements concerning Stendahl's use of CAFCO, rendering his affidavit untrustworthy. In its appellate brief, the Estate totally ignores the fact that the French affidavit was stricken by the trial court, and relies on it almost entirely, arguing that it presented sufficient facts to survive a summary judgment motion. Because the affidavit was stricken, it cannot be used to support the Estate's contention that summary judgment was inappropriate.

¶12 Once the Estate's brief is stripped of its arguments based on the French affidavit, only one ambiguous answer from French's deposition connects Stendahl with USM's CAFCO. That tenuous connection between Stendahl and CAFCO is French's response, made at the end of his deposition, to a compound question asked by the Estate's lawyer.

> Q. In Paragraph 9 of your affidavit where it's been questioned somewhat about when you recall seeing Gerald Stendahl applying Cafco Blaze Shield to steel structures and buildings throughout Illinois, is it fair to say that you remember seeing Gerald Stendahl applying that product, but you don't remember where, the specific location?
>
> A. I wouldn't know the locations, no.

From this answer, the Estate, somewhat disingenuously, argues, "Most importantly, Mr. French testified to seeing Stendahl using asbestos-containing

[4] As noted, this was incorrect as USM's records indicate that its CAFCO product containing asbestos was only manufactured between 1954-1972.

CAFCO," and "[a]lthough he could not name a site or a specific place, Mr. French attested that he saw Gerald Stendahl using CAFCO."

¶13 We are unimpressed with this evidence. First, it would appear that French never affirmatively stated that he saw Stendahl using CAFCO; he merely answered the second part of the Estate's question, stating that he didn't remember the locations where Stendahl worked. Further, whatever limited value French's answer to this question might have had, it is undermined by French's earlier testimony:

> Q. Okay. In this – in your affidavit, Mr. French, you say that you saw Gerald Stendahl applying Cafco Blaze Shield to steel structures of various buildings throughout the State of Illinois and other locations during 1969 to 1970. That's on page 2. It's Number 9. Do you see that?
>
> A. Uh-huh, yes.
>
> Q. Can you tell me all of the jobsites [sic] where you saw Mr. Stendahl applying Cafco Blaze Shield?
>
> A. I don't remember, no.
>
> ….
>
> Q. Can you remember any job that you saw him using Cafco?
>
> A. Not right offhand, no.
>
> Q. Now, when you signed this affidavit – going back to what was marked as Exhibit 1 today, the last paragraph says, "Over the course of employment with Asbestos Spray, I saw Gerald Stendahl apply Cafco Blaze Shield D to the steel structures of various buildings throughout the state of Illinois and other locations." What is the basis for that statement, sir?
>
> A. It's – I thought he worked for us then.
>
> Q. Well, we can assume things, but I mean, from your own personal knowledge, you can't tell as you sit here today, can you, where you saw Gerald Stendahl working –
>
> A. No.
>
> Q. – at various buildings in Illinois with Cafco, can you?
>
> A. No.

¶14 Moreover, while one might read French's answer, "I wouldn't know the locations, no," to mean that he saw Stendahl using CAFCO but didn't know where he saw him use it, USM is still entitled to summary judgment because the Estate failed to satisfy the requirements of WIS. STAT. § 802.08(3).

> **(3)** SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings *but the adverse party's response*, by affidavits or as otherwise provided in this section, *must set forth specific facts showing that there is a genuine issue for trial*. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(Emphasis added.) French's deposition testimony does not contain specific facts which present a genuine issue for trial. The Estate can point to no evidence that shows when, where, or even if, Stendahl used CAFCO. Thus, the Estate is unable to establish with any specificity that Stendahl was exposed to USM's CAFCO. Nor can it begin to meet its burden of proving that CAFCO was a substantial factor causing Stendahl's disease. As a result, under the evidence submitted, the trial court properly granted summary judgment to USM.

¶15 Next, we address USM's request for costs and attorney fees. USM asserts that the Estate's appeal is frivolous and, as a result, under WIS. STAT. § 809.25(3) it is entitled to its costs and reasonable attorney fees. Section 809.25(3) reads:

> **(3)** FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, the cross-respondent's brief.
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> (b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs, fees and attorney fees.
>
> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The determination of whether an appeal is frivolous is a question of law. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 666, 586 N.W.2d 1 (Ct. App. 1998). An appeal can be found frivolous if the party or the attorney for the party knew or should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* WIS. STAT. § 809.25(3)(c)2; ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 240-41, 517 N.W.2d 658 (1994).

¶16 USM contends that one of the two issues appealed by the Estate was not properly before this court. Earlier in this decision we agreed with USM that because the Estate failed to object to USM's motion requesting that the affidavit of Jack French be stricken, the trial court's decision was not reviewable by this court.

The Estate's second argument on appeal is that the trial court erred in granting summary judgment to USM. USM claims that the Estate unfairly relied on the French affidavit in its appellate-brief argument in opposing the grant of summary judgment. USM submits that because the affidavit was stricken from the record, it cannot be used as evidence to defeat USM's summary judgment. Further, USM argues that since the Estate never based its argument to the trial court on the French affidavit, it should be foreclosed from doing so here. In sum, USM argues that the appeal of the striking of French's affidavit was improper, and it was equally improper for the Estate to ground its argument in opposition to the grant of summary judgment on a stricken document that was never raised as the basis for its opposition to summary judgment in the trial court. We agree.

¶17 The Estate should have known that its appeal of the trial court's decision to strike French's affidavit had been waived when the Estate failed to object in the trial court. Further, the Estate certainly knew that a stricken affidavit could not be used in this court to oppose the grant of summary judgment. "[I]f the attorney knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced, then the attorney has no cause of action." ***Id.*** Here, neither of the two issues raised on appeal was proper. Consequently, the Estate has not raised a single legitimate appellate issue. The Estate had no reasonable basis in law or equity to bring this appeal and its argument is not supported by a good faith argument for an extension, modification or reversal of existing law. Thus, we deem it frivolous. We remand this matter to the trial court for a determination of the attorney fees and costs due USM for the bringing of this appeal.

By the Court.—Order affirmed.

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