**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 10, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP2486** **Cir. Ct. No. 2014CV732**

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

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**RUSSELL ROBERTSON, INDIVIDUALLY AND EXECUTOR OF THE ESTATE OF DONALD J. ROBERTSON,**

**PLAINTIFF-APPELLANT,**

**V.**

**CLEAVER-BROOKS, INC., L & S INSULATION COMPANY, INC., SPRINKMANN SONS CORPORATION AND WEIL-MCLAIN COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**OAKFABCO, INC., BLUE CROSS BLUE SHIELD OF TENNESSEE, AND OWENS-ILLINOIS, INC.,**

**DEFENDANTS.**

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

Before Kessler, Brash and Dugan, JJ.

¶1 KESSLER, J. Russell Robertson, individually and as the executor of the estate of Donald J. Robertson, appeals from an order granting summary judgment dismissing his claim of negligence and strict liability against multiple defendants.[1] Russell brought claims of negligence and strict products liability against L&S Insulation Company, Inc., Sprinkmann Sons Corporation, Cleaver-Brooks, Inc. and Weil-McLain Company, based upon allegations that Donald was exposed to asbestos fibers emanating from asbestos products either manufactured or supplied by the defendants.[2] Donald ultimately died from malignant mesothelioma and Russell filed an amended complaint individually and on behalf of his father's estate. The circuit court dismissed the claims with respect to all of the above defendants on their individual motions for summary judgment. We conclude that genuine questions of material fact exist and reverse.

## BACKGROUND

¶2 Because this case comes to us following a summary judgment motion, we look at the facts in the record in the light most favorable to the plaintiff. *See* ***Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95 ("'We view the summary judgment materials in the light most favorable to the nonmoving party.'") (citation omitted).

[1] Because Donald and Russell share the same last name, we refer to the parties by their first names.

[2] The original complaint included Owens-Illinois, Inc. The circuit court also granted summary judgment in favor of Owens-Illinois. Since the filing of this appeal, Owens-Illinois and Russell Robertson entered a stipulation which effectively dismissed Owens-Illinois from this appeal.

¶3 Donald began working for his family's mechanical contracting company, J.E. Robertson, in 1949. In 1967, Donald bought the company and renamed it D.K. Robertson.[3] According to deposition testimony taken from Donald prior to his death, the Robertson Company used Kaylo, an asbestos-containing product, which it purchased from L&S and Sprinkmann. The Robertson Company subcontracted insulation work, including service work, to both L&S and Sprinkmann. Donald stated in deposition testimony that when he became president of the Robertson Company in 1967, he tried to visit every job site daily. He stated that he was present on job sites where L&S and Sprinkmann removed and installed insulation. Deposition testimony from an L&S representative and contract books from L&S verify that L&S provided labor and material to many of the job sites where Donald worked.

¶4 Donald also stated in deposition testimony that he installed, repaired and maintained boilers built by Cleaver-Brooks and Weil-McLain. Both companies sold asbestos-containing replacement parts. Donald stated that he opened and repaired Cleaver-Brooks boilers approximately twenty-five to thirty times, that he opened and repaired Weil-McLain boilers approximately twenty to thirty times, and that the Robertson Company routinely obtained replacement parts from the two boiler companies. Donald also recalled two specific job sites where the Robertson Company installed Cleaver-Brooks boilers and provided service agreements—Waukesha Memorial Hospital and Cudahy High School.

¶5 Donald was diagnosed with malignant mesothelioma in November 2013. He filed his complaint against the defendants on January 23, 2014, alleging negligence and strict products liability. Donald passed away on June 30, 2014.

[3] To avoid confusion, we refer to D.K. Robertson as "the Robertson Company."

Russell filed an amended complaint on January 7, 2015. All of the defendants ultimately moved for summary judgment. The circuit court informed the parties that because of the voluminous nature of the filings and issues, the court would split the issues between three hearings.

¶6 The first hearing addressed the Construction Statute of Repose. The circuit court granted all of the defendants' motions for summary judgment as to the Construction Statute of Repose to the extent the installation of insulation and boilers were at issue. Russell does not appeal this ruling.

¶7 The second hearing addressed the twenty-five year Statute of Repose, the duty to warn, the sophisticated user doctrine, and the legal basis for Russell's design defect and failure to test claims. The circuit court denied the motion, noting that any issues pertaining to Donald's exposure to asbestos-containing products would be addressed at a later hearing. Russell does not appeal this ruling.

¶8 The third hearing addressed the question of causation. Specifically, whether a genuine issue of material fact existed as to whether Donald was exposed to asbestos fibers from products supplied or manufactured by the defendants. The circuit court granted summary judgment to all of the defendants, addressing each of their motions individually. As to L&S, the circuit court found "no evidence that L&S was present on any particular job site at the same time as … [Donald]" and no evidence that products either sold to the Robertson Company or used by L&S in its subcontracting work contained asbestos. As to Sprinkmann, the court found that Russell did not respond to Sprinkmann's summary judgment argument pertaining to causation and therefore presented no evidence to create a genuine issue of material fact. As to Cleaver-Brooks, the circuit court found that "[the]

evidence establishes that [Donald] sometimes did or was around the kind of work that used asbestos-containing [boiler] replacement parts, but it does not support a reasonable inference that [Donald] actually worked with or around such parts at any given location." Similarly, as to Weil-McLain, the court found it significant that Donald could not identify specific job sites where he worked on a Weil-McLain boiler, was near someone who did, or used a Weil-McLain supplied asbestos-containing part.

¶9 Russell, individually and as a representative of his father's estate, appeals the circuit court's rulings from the third hearing.

## DISCUSSION

¶10 On appeal, Russell contends that the circuit court erred in dismissing his claims against all of the defendants. Specifically, he contends that: (1) the circuit court ignored evidence supporting his claims against L&S and improperly resolved questions of fact; (2) the court dismissed his claims against Sprinkmann based on a procedural technicality and ignored evidence in the record creating a genuine question of material fact; and (3) the court dismissed his negligence and strict liability claims against Cleaver-Brooks and Weil-McLain by essentially ignoring Donald's deposition testimony.[4]

¶11 "'Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law.'" ***Horak v. Building Servs. Indus. Sales Co.***, 2008 WI App 56, ¶8, 309 Wis. 2d 188, 750 N.W.2d 512 (citation omitted). "Of

[4] Because Russell does not appeal the circuit court's ruling on the Statute of Repose, the focus of this appeal is on whether Donald was exposed to asbestos in the course of servicing or maintaining products either supplied or manufactured by the defendants.

course, 'summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear.'" ***Id.*** (citation and one set of quotation marks omitted). "In order to survive summary judgment, however, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material 'set[ting] forth specific facts,' … material to that element." ***Id.*** (citation and one set of quotation marks omitted; brackets in ***Horak***). "'Our review of a [circuit] court's grant of summary judgment is *de novo.*'" ***Id.*** (citation omitted).

¶12 Whether under a strict liability or negligence theory, to prevail on a products liability claim, a plaintiff must prove that the alleged defect was a cause of the injury. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶45, 235 Wis. 2d 325, 611 N.W.2d 659 (negligence); ***Zielinski v. A.P. Green Indus., Inc.***, 2003 WI App 85, ¶8, 263 Wis. 2d 294, 661 N.W.2d 491 (strict products liability). To determine whether a plaintiff has sufficient evidence to prove causation at summary judgment, the court must evaluate "'whether the defendant's negligence was a substantial factor in contributing to the result.'" ***Zielinski***, 263 Wis. 2d 294, ¶16 (citation omitted).

¶13 The circuit court's decision was primarily premised on the facts that: Donald could not recall specific job sites where he was present at the same time as L&S or Sprinkmann employees; there was no evidence that L&S or Sprinkmann sold the Robertson Company asbestos-containing products; and that the evidence did not establish whether Donald worked with or around Cleaver-Brooks or Weil-McLain boilers at any given job site or that either company sold asbestos-containing boiler replacement parts.

¶14 We disagree with the circuit court's assessment of the evidence because the court essentially disregarded Donald's testimony and failed to draw all reasonable inferences in the plaintiff's favor. That Donald was unable to recall specific job sites is inconsequential at the summary judgment stage. On summary judgment, an asbestos plaintiff need only present evidence of potential exposure to survive summary judgment. *See* ***Horak***, 309 Wis. 2d 188, ¶¶10-16; ***Zielinski***, 263 Wis. 2d 294, ¶16 (plaintiff must "present[ ] credible evidence from which a reasonable person could infer that [the plaintiff] was exposed"). A jury may infer exposure, i.e., causation, from the "totality of the circumstances." ***Zielinski***, 263 Wis. 2d 294, ¶18. At the summary judgment stage, "the court does not decide an issue of fact," rather, the "court decides only whether a genuine issue of fact exists." *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Moreover, "[t]he court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts." ***Id.***

¶15 As to L&S, the circuit court acknowledged that Russell "arguably presented evidence … which creates a genuine issue of material fact as to whether L&S sold or supplied asbestos-containing products," but found that Donald's inability to pinpoint specific job sites in which Donald personally encountered those products precluded his claim. Contract books from L&S contain a list of dates and job sites where L&S had done work. The list confirms that between the 1950s and 1970s, L&S was hired by the Robertson Company on multiple occasions to perform insulation work. The list does not specify, however, whether the listings corresponded with new construction work or service and maintenance work. According to Donald, he visited job sites almost daily once he became the president of the company and recalled frequently being present when

L&S employees would remove or install insulation. Invoices in the record also show that L&S purchased Kaylo, an asbestos-containing product used at many Robertson Company job sites, during the early 1960s. Viewing the evidence in the light most favorable to the nonmoving party, we conclude that there is a genuine issue of material fact as to whether exposure to L&S's products through repair and maintenance work caused harm to Donald.

¶16 A similar analysis applies to Sprinkmann. Michael Dowling, a corporate representative for Sprinkmann, testified during his deposition that Sprinkmann was a distributor of asbestos insulation products in the 1960s and sold the products until their discontinuation in the 1970s. Dowling acknowledged that Sprinkmann supplied and/or installed asbestos-containing insulation to job sites where the Robertson Company was the mechanical contractor, but could not state which Robertson Company job sites involved service and maintenance contracts. Donald recalled working at many job sites where Sprinkmann insulation contractors were present. The evidence suggests that: Sprinkmann supplied or used asbestos-containing products at Robertson Company job sites; Sprinkmann may have performed service or maintenance work at those sites; Donald recalled Sprinkmann's presence; and Donald visited job sites almost daily. Consequently, a genuine question of material fact exists as to whether exposure to Sprinkmann products through its maintenance and repair work caused harm to Donald.

¶17 As to Weil-McLain, we conclude that the circuit court erred in holding that Russell failed to present sufficient evidence that Donald used or was around someone who used asbestos-containing boiler replacement parts from Weil-McLain or that the parts were used for maintenance. In his deposition testimony, Donald stated that he installed and serviced heating equipment for Weil-McLain and stated that he knew "the [company's] name well." Donald

stated that he serviced Weil-McLain boilers and had occasion to open the boilers between twenty and thirty times. Servicing the boilers included opening the boilers, replacing gaskets and making repairs to the interior components of the boilers. Donald stated that replacement parts were generally ordered from the boiler manufacturers. In the time period relevant to this action, Weil-McLain was a prominent boiler manufacturer. The company supplied asbestos products, including asbestos gaskets, asbestos rope, and asbestos air cell insulation, for its boilers until the 1980s. Viewing the evidence in the light most favorable to the plaintiff, we conclude that a reasonable trier of fact could infer that Donald serviced Weil-McLain boilers, ordered asbestos-containing replacement parts from Weil-McLain, and was exposed to asbestos fibers in the process of servicing those boilers. *See* ***Zielinski***, 263 Wis. 2d 294, ¶¶9-13 (where no direct evidence tied asbestos-product supplier to plaintiff's employer, summary judgment was precluded because a reasonable jury could conclude that the employer bought asbestos from the supplier because the supplier was on an approved-vendor list).

¶18 Finally, we conclude that a reasonable jury could infer that Donald's service and maintenance of Cleaver-Brooks boilers led to asbestos exposure. The circuit court noted that evidence in the record "establishes that [Donald] sometimes did or was around the kind of work that used asbestos-containing replacement parts, but it does not support a reasonable inference that [Donald] actually worked with or around such parts at any given location." The court found it significant that Donald could not pinpoint any locations where he was near a Cleaver-Brooks boiler. As stated earlier, an asbestos plaintiff need not recall specific locations for there to be a reasonable inference of asbestos exposure. Moreover, Donald testified in his deposition that he serviced Cleaver-Brooks boilers and had occasion to open the boilers approximately twenty-five to thirty

times. Donald stated that asbestos-containing replacement parts were generally ordered from the boiler manufacturers. Documents from Cleaver-Brooks indicate that the Robertson Company installed Cleaver-Brooks boilers at Waukesha Memorial Hospital and Cudahy High School. Donald testified that the Robertson Company typically offered service contracts with installation and would service the boilers it installed. Donald also stated that he tried to visit job sites daily. Based on this evidence, a reasonable jury could infer that Donald not only serviced Cleaver-Brooks boilers, but that he did so at two specific locations and/or was present while other Robertson Company employees serviced the boilers at those sites, and thus was exposed to asbestos while at those sites. Accordingly, summary judgment in favor of Cleaver-Brooks was not warranted.

¶19 We conclude that the circuit court erroneously weighed the evidence against Donald's testimony and failed to view the evidence in the light most favorable to the plaintiff. Accordingly, we reverse the circuit court.

*By the Court.*—Order reversed and cause remanded for further proceedings.

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