COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP970 **Cir. Ct. No. 2002CV2655**

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

KENNETH F. SULLIVAN CO.,

PLAINTIFF,

V.

CINCINNATI INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

PHILLIP MCMANAMY, ARCHITECTURAL METALS, LLC, SOUTHERN WISCONSIN ROOFING CO., INC., STATZ & HARROP, INC., CHRISTOPHER BOZYK ARCHITECTS LTD., PHOENIX GLASS (1992), INC., AND SCHULTZ ELECTRIC, INC.,

DEFENDANTS,

KENNETH S. KERYLUK AND MELISSA E. WEE,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY, ROBERT E. RILEY AND THOMAS A. KNOOP,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

MEAD & HUNT, INC., MONONA PLUMBING & FIRE PROTECTION, INC., SCHULTZ ELECTRIC, INC., VALLEY FORGE INSURANCE COMPANY, ACUITY, LEXINGTON INSURANCE COMPANY AND ARTISTIC STONE, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Vergeront, Lundsten, and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal arises out of a contract dispute between general contractor Kenneth F. Sullivan Company and homeowners Kenneth Keryluk and Melissa Wee (the Keryluks), who retained Sullivan to construct a large home. The Keryluks counterclaimed and also filed third-party complaints against a number of parties, including Sullivan's President Robert Riley, a licensed professional engineer, and Vice-President Thomas Knoop, a licensed architect. At issue on this appeal is the circuit court's grant of summary judgment dismissing Riley and Knoop. The court concluded that the Keryluks failed to present sufficient evidence to rebut Riley and Knoop's prima facie showing that they did not provide or supervise professional engineering or architectural services on the Keryluks' home and thus were not personally liable for the alleged damages.

¶2 The Keryluks appeal and we affirm. We conclude Riley and Knoop have presented a prima facie defense showing that neither provided or supervised

professional engineering or architectural services for the Keryluk home, and that the Keryluks' submissions are insufficient to create a genuine issue of material fact on this point. We also conclude that Riley and Knoop have presented a prima facie defense showing that they are not personally liable for failing to supervise a particular Sullivan employee, Fred Schuhmacher, and the Keryluks' submissions are insufficient to create a genuine issue of material fact on this point. Finally, we conclude the Keryluks are not entitled to a trial against either Riley or Knoop on their claim that the Sullivan contract misrepresents Schuhmacher as a licensed professional engineer.

BACKGROUND

¶3 Sullivan entered into a contract with the Keryluks to serve as general contractor in the construction of a home to be built according to the plans and specifications of Christopher Bozyk Architects, who had been retained by the Keryluks.[1] The contract identified another firm, Mead & Hunt, as the licensed structural engineer from whom Sullivan was to obtain structural engineering drawings prior to construction, and these were to become a part of the plans and specifications for the home.

¶4 Before the home was completed, Sullivan left the project due to a payment dispute with the Keryluks. Sullivan sued the Keryluks, seeking payment

[1] Under the contract Sullivan agreed to "construct the Residence on the Property in accordance with the Plans and Specifications." "Plans and Specifications" were defined as "Initial Plans and Specifications as modified from time to time," and "Initial Plans and Specifications" were defined as "those certain plans and specifications, dated June 8, 2001, prepared by Christopher Bozyk Architects (the 'Architect')…." According to the contract, Sullivan acknowledged that the Initial Plans and Specifications were "in the process of being modified by the Architect and Owner [the Keryluks]…."

it claimed was due for its performance under the contract. The Keryluks responded with counterclaims against Sullivan and with third-party complaints, all alleging deficient construction of their home. As relevant to this case, the Keryluks filed third-party complaints against Riley, Sullivan's president and a licensed professional engineer, and Knoop, Sullivan's vice-president and a licensed architect. The Keryluks claimed that Riley and Knoop each breached the contract by negligently providing or supervising professional engineering or architectural services and were each personally liable for the resulting damages under WIS. STAT. § 443.08(4)(a) (2007-08).[2] This statute provides in part that an individual practicing professional engineering or architecture may not "be relieved of responsibility [for performing those services] by reason of his or her employment or relationship with the firm, partnership or corporation."

¶5 Riley and Knoop each moved for summary judgment and the circuit court granted their motions.[3] The circuit court did not reach the Kerlyluks' underlying legal theory—that Riley and Knoop were personally liable under WIS. STAT. § 443.08(4)(a) for any professional engineering or architectural services performed by them or under their supervision. The court concluded that it was unnecessary to do so because Riley and Knoop had made a prima facie showing that they did not perform or supervise professional engineering or architectural services on the Keryluks' home and the Keryluks' submissions were insufficient

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] At the same time, Sullivan moved for summary judgment on certain of the Keryluks' counterclaims against them, and the court partially granted this motion. The Keryluks' counterclaims of negligence and breach of contract against Sullivan were not involved in this motion and are apparently still pending.

to create a genuine issue of material fact on this point. The court also rejected the Keryluks' argument that Sullivan had misrepresented the status of an employee, Schuhmacher, by identifying him in the contract as "In-house Engineer" when he is not a licensed professional engineer under ch. 443.

DISCUSSION

¶6 On appeal the Keryluks make these challenges to the circuit court's grant of summary judgment: 1) Riley and Knoop's affidavits do not make a prima facie showing that they neither performed nor supervised professional work on the Keryluks' home; 2) even if they do make a prima facie showing, as to Knoop there is evidence that creates a genuine factual dispute on that issue; 3) even if Riley and Knoop did not perform or supervise professional engineering or architectural work on the Keryluks' home, they are personally liable for *not* supervising the work of the unlicensed Schuhmacher, as required by WIS. STAT. ch. 443 and WIS. ADMIN. CODE ch. A-E 8; and 4) Riley and Knoop are personally liable for misrepresenting Schuhmacher's status.

I. Standard of Review and Background Law

¶7 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). A material fact is one that would influence the outcome of the controversy. ***Metropolitan Ventures, LLC v. GEA Associates***, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58. An issue of fact is genuine if a reasonable jury could find for the nonmoving party. ***Id.***

¶8 When deciding a summary judgment motion, we examine the submissions of the moving party to determine if they make a prima facie showing that the party is entitled to the relief the party seeks. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. When, as here, the moving party is a defendant, a prima facie defense for summary judgment means a showing of a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If the defendant makes that showing, then to avoid summary judgment, the plaintiff must produce evidentiary material showing a genuine issue of material fact. ***Transportation Ins. Co., Inc.. v. Hunzinger Const. Co***., 179 Wis. 2d 281, 290-291, 507 N.W.2d 136 (Ct. App. 1993).

¶9 In deciding if there is a genuine issue of material fact, we view the evidence most favorably to the nonmoving party and draw all reasonable inferences in favor of that party. ***Metropolitan Ventures,*** 291 Wis. 2d 393, ¶21. However, the ultimate burden of proving that there is sufficient evidence to go to trial is on the party that bears the burden of proof on the issue that is the subject of the motion. ***Hunzinger,*** 179 Wis. 2d at 290.

¶10 The Keryluks' claims against Riley and Knoop derive from their status as licensed professionals—Riley as a professional engineer, licensed under WIS. STAT. § 443.04, and Knoop as an architect, licensed under § 443.03. As noted above, they are not relieved from personal liability for performing architectural and professional services simply because they did so as employees of Sullivan. § 443.08(4)(a). However, there is personal liability only for the services that are included within the statutory definition of professional engineering services and architectural services. ***Herkert v. Stauber***, 106 Wis. 2d 545, 567, 317 N.W.2d 834 (1982) (in the context of a licensed architect working for a

professional service corporation, holding that § 443.08(4)(a) preserves personal liability based only on services that are architectural services and the record there was devoid of any evidence that assistance in securing financing or approvals was architectural services). Thus, a licensed professional is personally liable for a breach of contract entered into with the corporation he or she works for only if the plaintiff proves "both that the breach relates to 'professional services' and that the breach was a negligent or wrongful act committed in the rendition of those professional services." ***Id.*** at 568.

¶11 The "practice of professional engineering" and the "practice of architecture" are both defined in the statute.

> "Practice of professional engineering" includes any professional service requiring the application of engineering principles and data, in which the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private … structures….

WIS. STAT. § 443.01(6).

> "Practice of architecture" includes any professional service, such as consultation, investigation, evaluation, planning, architectural and structural design, or responsible supervision of construction, in connection with the construction of any private or public buildings, structures, projects … in which the public welfare or the safeguarding of life, health or property is concerned or involved.

WIS. STAT. § 443.01(5).

II. Providing or Supervising Professional Engineering or Architectural Services

¶12 The Keryluks' argue that Riley and Knoop failed to make a prima facie showing that they did not provide or supervise professional engineering or architectural services, respectively, on the Keryluks' home.

¶13 The contract, part of Riley's and Knoop's submissions, specifies Sullivan's obligations under the contract, and does not state that Sullivan is to perform professional engineering or architectural services.[4] Bozyk is identified in the contract as the "Architect" and Mead & Hunt as the "Engineer."

[4] In addition to constructing the home in accordance with the plans and specifications and obtaining the structural engineering drawings from Mead & Hunt and delivering them to the Keryluks, the contract required Sullivan to obtain from the subcontractors and deliver to the Keryluks "final mechanical, electrical, plumbing and HVAC plans for their review and approval"; to obtain all applicable permits; and to perform or furnish "those items of the Work described on the attached Exhibit C (collectively the 'Contractor's Work') with its own personnel." Exhibit C, entitled "Contractor's Work and Budgeted Costs," imposed these duties on Sullivan:

> Supervision;
> Erection of the structural steel;
> Installation of the concrete (including topping);
> Stucco/cedar siding;
> Installation of the structural studs 14' drywall;
> Installation of the overhead doors;
> Installation of 55 interior doors;
> Installation of the interior trim;
> Installation of 2 sets/3 levels of stairs (1 set/level);
> Finish carpentry labor;
> Canopies – framing;
> Waterproofing;
> Small tools;
> Temporary facilities: toilets, trailer, phone;
> Cleaning and hauling; and
> Engineering and drafting (including Endres and Mead & Hunt).

The contract defines "Work" (as opposed to "Contractor's Work") as "the performing, furnishing and/or installing of all labor, materials and equipment necessary to construct the Residence on the Property in accordance with the Plans and Specifications and all applicable Legal Requirements."

¶14 In his affidavit, Riley denied providing "any professional engineering services to [the Keryluks]"; denied "creat[ing], review[ing], revis[ing], or approv[ing] engineering drawings, specifications, or plans" or providing "any other engineering or professional services to [the Keryluks]"; and denied supervising or directing any Sullivan employee in "providing any services to [the Keryluks] during the design and construction of the house ...."

¶15 Similarly, Knoop denied "creat[ing], review[ing], revis[ing], or approv[ing] architectural drawings, specifications or plans" or "any other architectural or professional services to [the Keryluks]," and denied "during the design and construction of the house" directing or supervising "architectural or professional work completed by employees of [Sullivan]." Knoop averred that prior to the construction of the house he, along with other officers, met with the Keryluks to generally discuss the construction of the home but his role was that of an officer and he did not provide architectural services. According to Knoop, the Keryluks had retained an architect not affiliated with Sullivan. Knoop asked them if they needed any architectural services from Sullivan and they said they would let him know if they did, but they did not ask Sullivan for architectural services.

¶16 The Keryluks' argue that Riley's and Knoop's affidavits are insufficient to establish a prima facie defense because they aver only that Riley and Knoop did not provide professional services directly to the Keryluks and fail to deny doing professional work for Sullivan itself, which Sullivan then used for the Keryluks' home. We reject this argument. The only reasonable reading of these affidavits is that Riley and Knoop are asserting that they did not, either directly or indirectly, perform any professional engineering or architectural services for the Keryluks. The affidavits combined with the contract are sufficient to establish a prima facie defense to the Keryluks' claims that Riley and Knoop

breached the contract by negligently providing or supervising professional engineering or architectural services.

¶17 The Keryluks' second argument is that, even if Knoop has established a prima facie defense, the Keryluks' submissions show that Knoop was involved in "the design work." Although the Keryluks do not specify what type of "design work" they assert Knoop did, we assume they mean "architectural and structural design" because that is the type of design described in WIS. STAT. § 443.01(5). We will shorten this statutory term to "architectural design."

¶18 The Keryluks rely primarily on the deposition of Martin Ballweg, a former Sullivan officer and co-owner, who was listed as the "Primary Owner Contact" on the contract, which he signed on behalf of Sullivan. The Keryluks refer to Ballweg's testimony that there was a "joint venture."[5] Ballweg used the term "kind of like a joint venture on the architectural design" with reference to the fact that Schuhmacher communicated with Bozyk regularly; and Ballweg used the term "design-build joint venture" again in explaining that, instead of having the architectural firm provide or hire the engineer for all the subcontractors, the subcontractors on the Keryluks' home did that work in-house or worked on their own with an outside engineering firm. This loose and general use of "joint venture" falls far short of creating a reasonable inference that Knoop either

[5] The Keryluks cite to eight pages of Ballweg's deposition, asserting that Ballweg's testimony "describing the design as a 'joint venture' directly shows Knoop engaged in the design process." The circuit court concluded that certain portions of Ballweg's testimony in these pages regarding Knoop's involvement lacked adequate foundation or were not based on firsthand knowledge. *See* WIS. STAT. § 802.08(3) (requiring that affidavits submitted in support of or in opposition to a summary judgment "be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence"). The Keryluks do not present a developed argument challenging this decision. Accordingly, we do not consider any portion of Ballweg's testimony that the circuit court excluded based on lack of foundation or firsthand knowledge.

performed or supervised architectural design work. Indeed, when asked directly if Knoop was involved in "the design" of the home, Balweg answered:

> He didn't have a whole lot to do with the design. He had a couple items he was working on. I know specifically that we had a problem with getting the huge panes of glass … that [the Keryluks], and [Knoop] worked on that with a company called Mobile Glass in Waunakee, so he had some input.

The specific part of this averment asserts only that Knoop assisted in attempting to obtain the panes of glass.

¶19 The Keryluks also refer us to Ballweg's testimony that Knoop and Ballweg together set Sullivan's $50-per-hour rate for "the design work" and his testimony that Sullivan charged more than $100,000 for "the design work" on the Keryluk's home. However, this evidence does not create a reasonable inference that Knoop himself provided or supervised architectural design work. The same is true of the evidence that Knoop hired the firm Mead & Hunt as the professional engineer. In short, none of the evidence to which the Keryluks refer us is sufficient to permit a reasonable fact-finder to decide that Knoop performed or supervised architectural design services for the Keryluk home. Accordingly, the Keryluks have not shown they are entitled to a trial on this issue. And, because the Keryluks point to no evidence that rebuts Riley's prima facie defense, they are not entitled to a trial on whether Riley performed or supervised professional engineering services.

III. Failing to supervise Schuhmacher

¶20 The Keryluks argue that, even if Riley and Knoop did not provide or supervise professional engineering or architectural services under the contract between Sullivan and the Keryluks, they are personally liable under WIS. STAT.

ch. 443 for damages resulting from their *failure* to supervise Schuhmacher. It is undisputed that Schuhmacher is not licensed either as a professional engineer or an architect and that he performed drafting services for the construction of the Keryluk home. The parties disagree on whether there is evidence that Schuhmacher performed professional engineering or architectural services and disagree on whether ch. 443 requires Riley or Knoop to supervise Schuhmacher given the evidence.

¶21 The circuit court did not address the issue of Riley's and Knoop's obligation to supervise Schuhmacher, and the Keryluks fault the circuit court for this. We do not agree that the circuit court was remiss. The few conclusory statements in the Keryluks' circuit court brief that Riley "could have and should have" "stepped in" because Schuhmacher was involved in the design process do not constitute a sufficiently developed argument on Riley's (and certainly not Knoop's) statutory obligation to supervise Schuhmacher and do not alert the circuit court of the need to decide the issue.[6] We could choose not to address this issue for this reason. *See* ***Rizzuto v. Cincinnati Ins. Co.***, 2003 WI App 59, ¶24, 261 Wis. 2d 581, 659 N.W.2d 476. However, Riley and Knoop address the issue in their responsive appellate brief without arguing waiver. Accordingly, we choose to address it.[7]

[6] The Keryluks did argue in the circuit court that Sullivan misrepresented Schuhmacher as a professional engineer, an issue which the court decided against them and which we address later in the opinion.

[7] We also observe that it is questionable whether this claim—personal liability based on a *failure* to supervise—is contained in the complaint, which alleges a negligent *provision of services* either directly or *through the supervision of others*. However, Riley and Knoop do not raise this issue, and we therefore do not address it.

¶22 The Keryluks rely on WIS. STAT. § 443.08(1) for their argument that Riley and Knoop are personally liable for failure to supervise Schuhmacher. This section provides:

> Registration requirement: firms, partnerships and corporations. (1) The practice of architecture or professional engineering pertaining to the internal operations of a firm, partnership or corporation may be performed by employees if the architectural or professional engineering services are performed by or under the direct supervision of architects or professional engineers registered under this chapter….

WIS. STAT. § 443.08(1). Riley and Knoop respond that this subsection does not require that an unlicensed employee be supervised by licensed professionals employed by the same company. Their position is that if there is evidence that Schuhmacher performed any professional engineering or architectural services—which they deny—the undisputed evidence is that he was supervised by Terry Kennedy, a licensed professional engineer of Mead & Hunt.[8] Riley and Knoop implicitly concede that, if Schuhmacher did perform professional engineering or architectural services without supervision of an appropriate licensed professional outside the company, then one or both of them are personally liable for damages flowing from those services. We accept this concession for purposes of this opinion.

[8] Riley and Knoop also argue that the evidence shows that Bozyk, a licensed architect, supervised Schuhmacher, assuming there is evidence to show that Schuhmacher performed architectural services, which they deny. The Keryluks reply that the evidence shows that Bozyk is not licensed in Wisconsin and therefore does not meet the requirement in WIS. STAT. § 443.08(1) of being "registered under this chapter…." It is unnecessary to address whether Bozyk did or could supervise Schuhmacher because of our conclusion that the undisputed evidence shows that Schuhmacher did not perform architectural services.

¶23 The Keryluks do not reply to the argument that WIS. STAT. § 443.08(1) does not require that the supervision be done by a professional engineer or licensed architect employed by the same company. Accordingly, we take this as a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). The inquiry thus becomes whether Riley and Knoop are entitled to summary judgment on the claim that Schuhmacher performed professional engineering or architectural services unsupervised by an appropriate licensed professional other than Riley or Knoop.

¶24 We examine Riley's and Knoop's submissions to determine whether they establish a prima facie defense. Schuhmacher's affidavit states as follows. He drafted plans for the footings, foundation, and structural steel layouts of the Keryluks' home and, in order to perform that drafting, Kennedy provided calculations and supervision in preparation and design of these plans. In addition, Schuhmacher "relayed the structural steel layouts to Endres Manufacturing in the form of a drawn sketch in order for them to do structural drawings and fabrication of steel needed for the residence," and those plans prepared by Endres were sent directly from Endres to Bozyk. Schuhmacher provided drafting services "only as directed by a professional engineer." He also worked with Bozyk and his staff, relaying information from Bozyk's office "to the field" and relaying back to Bozyk's office any difficulty the people in the field had with Bozyk's plans and information. He would occasionally "sketch out an *in situ* field design in order for Bozyk's office to accommodate the design."

¶25 Schuhmacher averred in his affidavit that his "position as a draftsman means that [he is] able to sketch any materials received from a professional engineer or architect, as provided by them; however [he does] not perform those design services [himself]." He also averred that he "did not design

any portion of the Keryluk home, nor did [he] provide design services to the Keryluks."[9]

¶26 We conclude that Schuhmacher's affidavit makes a prima facie defense that he did not perform any professional engineering or architectural services that were not supervised by an appropriate licensed professional. Neither drafting nor drawing is included in the definitions in WIS. STAT. § 443.01(5) and (6). Schuhmacher's description of what he does in drafting—making sketches based on information received from a licensed professional but not doing the design work himself—and his averment that he did no design work for the Keryluks are sufficient for a prima facie defense that he did not do "architectural and structural design" and did not create designs requiring the application of engineering principles. § 443.01(5) and (6). To the extent there may be some ambiguity in the distinction between drafting and design in the work Schuhmacher did on the Keryluks' home, Schuhmacher's averment that he did drafting "only as directed by a professional engineer" on the Keryluks' home makes a prima facie defense that he was supervised by Kennedy if the drafting work did involve any professional engineering services. The activities Schuhmacher performed besides drafting—relaying information back and forth between Bozyk's office and the field—does not give rise to a reasonable inference that he was performing a "professional service, such as consultation, investigation, evaluation." *See* § 443.01(6). Rather, it indicates that Schuhmacher was communicating with

[9] Both parties refer to a letter Schuhmacher filed as part of Sullivan's disclosure of expert witnesses. We do not consider this because a letter that is not in affidavit form is not a proper submission under WIS. STAT. § 802.08(3). ***Mach v. Allison***, 2003 WI App 11, ¶17, 259 Wis. 2d 686, 656 N.W.2d 766 (Ct. App. 2002).

Bozyk and facilitating communication between Bozyk and the persons working in the field.

¶27 The Keryluks contend that Schuhmacher's affidavit shows that he was involved in the "responsible supervision of construction." We disagree.

¶28 "The responsible supervision of construction" is included in the definitions of both "practice of architecture" and "practice of professional engineering." WIS. STAT. § 443.01(5) and (6). This term is defined as:

> … a professional service, as distinguished from superintending of construction, and means the performance, or the supervision thereof, of reasonable and ordinary on-site observations to determine that the construction is in substantial compliance with the approved drawings, plans and specifications.

§ 443.01(8). The Keryluks contend that Schuhmacher's preparation of the drawings is included in the definition of "responsible supervision of construction," citing to WIS. ADMIN. CODE § A-E 8.03(5). This argument is deficient in two respects.

¶29 First, WIS. ADMIN. CODE § A-E 8.03(5) does not define "responsible supervision of construction," but defines the terms "supervision," "direct supervision," "responsible charge," and "direction and control." Section A-E 8.03(4) addresses "responsible supervision of construction" and states that this term "is defined in s. 443.01(8), Stats." In other words, the administrative code does not add to the statutory definition of "responsible supervision of construction." Second, assuming § A-E 8.03(5) were somehow applicable to determining what constitutes the "responsible supervision of construction," the Keryluks omit a critical part of the § A-E 8.03(5) definition. The terms "supervision," "direct supervision," "responsible charge," and "direction and

control" mean "*direct, personal, active supervision and control of* the preparation of plans, drawings, documents, specifications …." § A-E 8.03(5) (emphasis added). Because of Schuhmacher's averment that he provided drafting services only as directed by a professional engineer, it is not reasonable to infer from his affidavit that he had "direct, personal, active supervision and control of the preparation of … drawings …." ***Id.***

¶30 The Keryluks may also be contending that Schuhmacher's description of his work in relaying information between Bozyk and persons in the field constitutes the "responsible supervision of construction." However, this does not create a reasonable inference that Schuhmacher conducted "on-site observations to determine that the construction [was] in substantial compliance with the approved drawings, plans, and specifications." WIS. STAT. § 443.01(8).

¶31 Having concluded that Riley and Knoop have established a prima facie defense that they are not personally liable for a failure to supervise Schuhmacher, we consider whether there are material factual disputes on this issue. In doing so, we bear in mind that, although Riley and Knoop are the moving parties, the Keryluks, as the counterclaimants, have the burden of proving that Riley and Knoop were personally liable because Schuhmacher performed those services without being supervised by either one of them or another appropriate licensed professional. Thus, there must be evidence or reasonable inferences from the evidence from which a reasonable jury could make that finding. *See* ***Hunzinger,*** 179 Wis. 2d at 290.

¶32 The Keryluks' primary contention is that there is evidence that Schuhmacher did "design work." We assume when the Keryluks use the word "design" in making this argument that they are referring either to the "architectural

and structural design" component of the definition of professional architectural services, WIS. STAT. § 443.01(5) (which we will continue to shorten to "architectural design"), or to the "design" component of the definition of professional engineering services, which "require[s] the application of engineering principles and data." § 443.01 (6).

¶33 The Keryluks rely primarily on Ballweg's deposition in arguing that Schuhmacher performed these design services. Just as we concluded that Ballweg's loose and general reference to a "joint venture" did not create a reasonable inference that Knoop either performed or supervised architectural design work, we conclude it does not create a reasonable inference that Schuhmacher performed either professional engineering or architectural design work. The same is true of Ballweg's testimony that Schuhmacher "took the bull by the horns," working on the the Keryluks' home "every day." This does not describe what specific services Schuhmacher performed.

¶34 The Keryluks also point to Ballweg's testimony that: 1) Sullivan used Bozyk's title block to stamp all the plans, "even if they were drawn by Fred [Schuhmacher]"; 2) he agreed that "both Bozyk and Sullivan through Mr. Schuhmacher were jointly involved in the design of this home"; and 3) "Fred [Schuhmacher] drew the concrete foundation work, plans, and all of the structural plans." However, the Keryluks ignore Ballweg's testimony that more specifically addresses Schuhmacher's role in the design work. When Ballweg was asked directly if Schuhmacher did design work on the Keryluks' home, he replied, "Only under Terry Kennedy's information as far as beam sizes and foundation, soil bearing points and all that because we've got to get that all from an engineering firm." In addition, the sentence preceding Ballweg's statement that "Fred [Schuhmacher] drew the concrete foundation work, plans, and all of the structural

plans" is: "… once we got the layout of the size they wanted, Terry Kennedy designed the foundations and everything." In short, while it is reasonable to infer from Ballweg's testimony that Schuhmacher played a significant role in drafting, a reasonable jury could not find from this testimony that Schuhmacher performed either professional engineering or architectural design services. Instead, Ballweg's testimony is consistent with Schuhmacher's affidavit.[10]

¶35 In addition to Ballweg's testimony, the Keryluks point to evidence that, they assert, shows Sullivan did design work and charged "substantial sums" for it. If Riley and Knoop did not do design work, they contend, another Sullivan employee must have, and, they assert, it is reasonable to infer that Schuhmacher

[10] The Keryluks cite to a portion of the deposition testimony of Sullivan treasurer, Roger Graff, and ask this court either to consider these statements as "admissions against interest" or to allow the Keryluks to supplement the record to include Graf's deposition, at least the pages they have included in their appendix. There is no basis for granting either request. Before Riley and Knoop filed their summary judgment motion, the Keryluks successfully moved the circuit court to exclude Graff as an expert witness for Sullivan because Sullivan did not file an expert report from Graf. Sullivan contended that Graf's deposition was the equivalent of a report, but the circuit court disagreed. The only portion of Graf's deposition filed at that time were pages 5-13, which Sullivan filed to show that Graf was testifying as an expert. In opposing Riley's and Knoop's motion for summary judgment, the Keryluks had the opportunity to file the portions of Graf's deposition they now seek to have us consider, but they did not do so. In order for a deposition to constitute a proper summary judgment submission, it must be accompanied by an affidavit and the affidavit must identify the specific portions relied on. *See* WIS. STAT. § 802.08(2) and (3); ***Commercial Disc. Corp. v. Milwaukee W. Bank***, 61 Wis. 2d 671, 678, 214 N.W.2d 33 (1974). A summary judgment motion is determined based on the submissions properly filed in support of and in opposition to the motion in accordance with WIS. STAT. § 802.08, not on documents that were not before the circuit court when it decided the motion. Our review on appeal, likewise, is confined to those submissions.

The Keryluks also argue that architect Brian Witteman's expert report "raised unanswered questions" regarding the role of Sullivan in providing architectural design. We do not consider this report. We do not find it among the summary judgment submissions. The Keryluks did state in a footnote in their brief in the circuit court that they "hereby incorporate by reference all parties' expert witness reports that are critical of the drawings and plans in this case as well as including their criticisms of Bozyk…." However, this does not meet the requirements of WIS. STAT. § 802.08(2) and (3) and ***Commercial Discount Corp.***

did. We reject this argument because the evidence they point to does not create a reasonable inference that Schuhmacher performed professional engineering or architectural design work *unsupervised* by an appropriate licensed professional.

¶36 The Keryluks rely on Sullivan's admission to a request to admit that it "did design work on the Keryluk home," along with Sullivan's application for payment for work on the home. We note that Sullivan also admits that Mead & Hunt and Endres did design work on the home. Thus the admissions are evidence that Sullivan along with two other companies did design work, but it is entirely speculative which of those companies did "design work" that comes within the statutory definitions of professional engineering and architectural services. Sullivan's application for payment does not add any evidence in this regard because the forty-five items on the pages to which the Keryluks refer us, for which Sullivan is requesting payment, do not include design services as an item. The Keryluks may also be relying on the $100,000 line item in the Contractor's Work and Budgeted Costs, attached as Exhibit C to the contract, to which Ballweg was apparently referring in his testimony. *See* ***supra***, ¶19. However this item is described as "Engineering & drafting (including Endres and Mead & Hunt)." There is no other item on this addendum that refers to design. Thus this addendum, like Sullivan's application for payment, does not create a reasonable inference that Sullivan performed any design services, let alone design services that fell within the statutory definitions and were performed by Schuhmacher without supervision by an appropriate licensed professional.

¶37 The Keryluks also assert there is evidence that creates a material factual dispute over whether Schuhmacher was engaged in the "responsible supervision of construction." We reject this argument because none of the citations they provide show properly submitted evidentiary materials that support

their conclusory statement that Schuhmacher was "responsible for the supervision of the construction and design compliance." They cite to Schuhmacher's letter and pages of Graf's deposition, which we have already explained are not proper submissions. *See* ***supra***, ¶25 n.9, ¶34 n.10. They also cite to Ballweg's testimony that Schuhmacher "took the bull by the horns" and worked "every day" on the Keryluks' home. As we have already explained, this testimony does not show *what* work Schuhmacher was performing.[11]

¶38 The Keryluks contend that the extent of Kennedy's supervision of Schuhmacher is in dispute because Kennedy did not testify or aver that he supervised Schuhmacher, and Riley and Knoop in their affidavits do not address the scope of Kennedy's supervision. The Keryluks misunderstand summary judgment procedure. Because Schuhmacher averred that he did drafting only under the supervision of a professional engineer and did not do design work, it is the Keryluks' burden to present evidentiary material showing that Schuhmacher did professional engineering design work, or other work requiring supervision under the statute, that was not supervised by Kennedy. Because they have not done so, these averments remain undisputed.

¶39 We conclude that the Keryluks have not presented evidence or reasonable inferences from the evidence that would permit a reasonable jury to find that Schuhmacher performed professional engineering or architectural

[11] The Keryluk's provide another citation to page 25 of Ballweg's deposition, but we are unable to tell from reading the page what they believe it shows about Schuhmacher's role in the "responsible supervision of construction."

services unsupervised by an appropriate licensed professional other than Riley or Knoop.[12]

IV. Misrepresentation of Schuhmacher as Professional Engineer

¶40 The contract between the Keryluks and Sullivan provides that Sullivan was to provide the items of work listed in Exhibit C, entitled "Contractor's Work and Budgeted Costs," with its own personnel, and the identified personnel included Schuhmacher, as "In-house Engineer." The Keryluks contend this is misleading and, because of it, they believed Schuhmacher was a licensed professional engineer. The assert they would not have entered into the contract had they known he was not. They also assert that this misleading designation constitutes a violation of a number of statutory and regulatory sections

[12] The Keryluks contend that Riley and Knoop could not prevail on summary judgment without expert testimony that their conduct comported with the required standard of care. They cite to ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶19, 277 Wis. 2d 21, 690 N.W.2d 1, for the proposition that expert testimony is needed to establish that a particular task is the professional responsibility of an architect. We do not resolve this issue because our review of the record does not show that the Keryluks raised this issue in the circuit court. Although our review on summary judgment is de novo, we may decline to address an issue on appeal if it would be unfair to the other party. *See* ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. If the Keryluks had raised the issue below, Riley and Knoop would have had the opportunity to submit an expert's affidavit if they believed one was required.

Although we do not resolve the issue, we make this brief comment. ***Baumeister*** does not appear to support the proposition that Riley and Knoop need an expert witness to establish a prima facie defense that they did not perform or supervise professional engineering or architectural services on the Keryluks' home or that Schuhmacher did not perform professional engineering or architectural services without supervision by another appropriate licensed professional. And the Keryluks do not explain why ***Baumeister*** can be reasonably read in this way.

that make Riley and Knoop personally liable for damages.[13] The circuit court concluded that "engineer" does not mean "professional engineer," relying on ***State ex rel. Wisconsin Registration Board of Architects & Professional Engineers v. T.V. Engineers of Kenosha, Inc.***, 30 Wis. 2d 434, 442, 141 N.W.2d 235 (1966).[14]

¶41 We do not decide whether designating Schuhmacher as "In-house Engineer" is misleading because the statutory and regulatory provisions to which the Keryluks refer us do not on their face make either Riley or Knoop personally

[13] We are uncertain why the Keryluks believe that their actually being misled is relevant to whether a violation of these provisions has occurred and why they believe it is relevant that they would not have entered into the contract had they understood Schuhmacher was not a professional engineer. The Keryluks have not alleged a claim of misrepresentation against Riley, Knoop, or Schuhmacher, and there is no evidence of which we are aware that any of the three represented to the Keryluks that Schuhmacher was a professional engineer. We note that in his affidavit Schuhmacher avers: "I never held myself as a professional engineer during the construction of the Keryluk/Wee home…. I never informed the Keryluk/Wees that I would perform engineering work on their home…. I never informed the Keryluk/Wees that I would perform design work on their home."

We also observe that the Keryluks assume that, if either Riley or Knoop *did* violate one of these statutory or regulatory provisions because Schuhmacher was identified as "In-house Engineer" in the contract, they are for that reason personally liable for any damages resulting from Schuhmacher's work. It is unnecessary to decide whether this assumption is correct.

[14] In ***State ex rel. Wisconsin Registration Board of Architects & Professional Engineers v. T.V. Engineers of Kenosha, Inc.***, 30 Wis. 2d 434, 442, 141 N.W.2d 235 (1966), the court held that "engineer" describes persons of various learning and skills "while 'professional engineer' connotes and identifies a person with a high degree of learning, experience, and competence in mathematics, physics, and chemistry." ***Id.*** The court concluded that the use of the word "engineer" in the defendant's corporate name did not violate WIS. STAT. § 101.31(7) (1965), the predecessor to § 443.08(5), which prohibited a corporation from using a "title or description tending to convey the impression that it is engaged in the practice of … professional engineering …." ***Id.*** at 442, 445.

liable, and the Keryluks do not develop an argument that persuades us otherwise. We briefly discuss each of the provisions on which the Keryluks rely.[15]

¶42 WISCONSIN STAT. § 443.08(5) provides:

> No firm … may engage in the practice of or offer to practice … professional engineering … in this state, or use in connection with its name or otherwise assume, use or advertise any title or description tending to convey the impression that it is engaged in the practice of architecture, professional engineering or designing, nor may it advertise or offer to furnish an architectural, professional engineering or designing service, unless the firm, partnership or corporation has complied with this chapter.

This does not apply unless Sullivan has not complied with the statute, and the Keryluks do not refer us to any evidence or legal analysis that shows this is the case.

¶43 WISCONSIN ADMIN. CODE § A-E 8.04(1) provides: "Offers to perform services shall be truthful. When offering to perform professional services, an architect … [or] professional engineer … [s]hall accurately and truthfully represent to a prospective client or employer the capabilities and qualifications which the registrant has to perform the services to be rendered." The contract is between Sullivan and the Keryluks and was signed by Ballweg on behalf of Sullivan. The contract does not state that anyone from Sullivan is going to perform professional engineering services; that role is assigned to Mead & Hunt

[15] Besides the identification of Schuhmacher as "In-house Engineer," the Keryluks refer us to Brian Wittman's expert report which, they assert, shows that Sullivan's website misrepresented the architectural services it would perform. This report is not properly part of the summary judgment submissions. *See* ***supra***, ¶34 n.10. Accordingly, we address only the contract reference to Schuhmacher.

under the contract. Thus we do not see how either Riley or Knoop has violated this regulation.

¶44 WISCONSIN ADMIN. CODE § A-E 8.04(7) provides: "When offering to perform professional services, an architect … [or] professional engineer … [m]ay not practice under a firm name that misrepresents the identity of those practicing in the firm or misrepresents the type of services which the individuals, firm or partnership is authorized and qualified to perform." The firm name, Kenneth Sullivan Co., does not misrepresent as proscribed by this regulation.

¶45 WISCONSIN ADMIN. CODE § A-E 8.06(3) provides: "An architect … [or] professional engineer … [m]ay not enter into an agreement which provides that a person not legally and actually qualified to perform professional services has control over the registrant's judgment as related to public health, safety or welfare." Neither Riley nor Knoop nor Sullivan has entered into a contract permitting Schuhmacher to control Riley's or Knoop's judgment in any area.

CONCLUSION

¶46 We affirm the circuit court's order for summary judgment dismissing both Riley and Knoop.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.