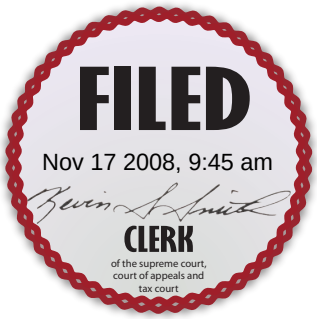

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IN THE
COURT OF APPEALS OF INDIANA

SANDRA ELBRINK, on Her Own Behalf, and on Behalf of the Estate of Robert Elbrink, Appellant-Plaintiff, vs. GENERAL ELECTRIC COMPANY, INDIANAPOLIS POWER & LIGHT COMPANY, INDUSTRIAL CONTRACTORS, INC., SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, UNITED STATES STEEL CORPORATION, and WHIRLPOOL CORPORATION, Appellants-Defendants.	)	No. 49A02-0711-CV-984

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-9801-MI-0001-335

November 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Sandra Elbrink ("Elbrink"), on her own behalf and on behalf of the estate of Robert Elbrink ("Robert"), her husband, appeals the trial court's grant of summary judgment in favor of General Electric Company ("GE"), Indianapolis Power & Light Company ("IPL"), Industrial Contractors, Inc. ("ICI"), Southern Indiana Gas and Electric Company, Inc. d/b/a Vectren Energy Delivery of Indiana, Inc. ("SIGEGO"), United States Steel Corporation ("US Steel"), and Whirlpool Corporation ("Whirlpool") (collectively the "Appellees").[1] We affirm.

Issues

Elbrink raises two issues, which we restate as follows:[2]

I. Whether the trial court erred in concluding that premises owners had no duty to Robert; and

II. Whether the trial court erred in concluding that the Construction Statute of Repose barred Elbrink's claim against ICI.

Facts and Procedural History

The following are the facts most favorable to Elbrink, the non-movant. As a sheet metal worker from 1965 to 2000, Robert "handled and/or worked around asbestos materials

[1] Elbrink did not appeal judgments in favor of several other defendants. Meanwhile, claims against other parties may remain pending. Pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court remains a party on appeal. Accordingly, while those defendants are not involved in this appeal, they remain parties.

[2] The Indiana Legal Foundation, Inc. and the Indiana Manufacturers Association submitted amici

on pipes, boilers, and other equipment. . . . He cut into the asbestos materials during repairs and applied and removed pipe/boiler lagging and steam pipe insulation." Appendix at 106-07 and 120.

In 1987 or 1988, Robert was diagnosed with Chronic Obstructive Pulmonary Disease and emphysema.[3] He worked until 2000, "when his lung problems forced him to go on disability." Appellant's Brief at 6. In January 2006, he was diagnosed with "an asbestos related disease and/or injury, malignant carcinoma." App. at 84.

In June 2006, Elbrink and Robert sued the Appellees and others "for contributing to cause his lung cancer." Appellant's Br. at 1. Five of the six Appellees owned premises where Robert was exposed to materials containing asbestos, including GE, IPL, SIGEGO, US Steel and Whirlpool ("Premises Appellees"). Meanwhile, Robert worked on "multiple jobsites" where ICI employees were also present, "installing, removing, cutting and grinding gasket and packing material, [and] removing and replacing asbestos-containing insulation products."[4] App. at 107-08. Robert died in September 2007, and Elbrink amended her complaint to include a wrongful death action.

The trial court granted summary judgment in favor of the Appellees, and ordered that the judgments were final and appealable. Elbrink now appeals.

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briefs.

[3] Robert smoked tobacco for at least forty years. Appendix at 108.

[4] Although employed by ICI for fourteen to sixteen years, Elbrink's claim against ICI, as Robert's employer, is not pertinent to this appeal. App. at 1495.

Discussion and Decision

I. Standard of Review

The trial court shall grant summary judgment "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). In reviewing the entry of summary judgment, we apply the same standard as the trial court. Filip v. Block, 879 N.E.2d 1076, 1080 (Ind. 2008), reh'g denied. We construe all facts and reasonable inferences in favor of the non-moving party. Id. "As a reviewing court, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment but rather may affirm a grant of summary judgment upon any theory supported by the evidence." Keaton & Keaton v. Keaton, 842 N.E.2d 816, 821 (Ind. 2006).

II. Premises Owners[5] Had No Duty: GE, SIGEGO, US Steel, and Whirlpool

The Premises Appellees argue that a property owner has no duty to an employee of an independent contractor working on its property. Their arguments rely heavily on PSI Energy, Inc. v. Roberts, which we agree is controlling. PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (Ind. 2005), aff'd on reh'g by 834 N.E.2d 665 (Ind. 2005), abrogated on other grounds by, Helms v. Carmel High Sch. Vocational Bldg. Trades Corp., 854 N.E.2d 345 (Ind. 2006).

"As a general rule, a property owner has no duty to furnish the employees of an independent contractor a safe place to work." Id. at 957 (citing Merrill v. Knauf Fiber Glass, GmbH, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), trans. denied). Under certain

[5] IPL did not move for summary judgment on this basis. App. at 178-90. The trial court entered summary

circumstances, however, a landowner does have a duty to business invitees. PSI Energy, 829 N.E.2d at 957. To define the scope of the landowner's duty, our Supreme Court adopted Sections 343 and 343A of the Restatement (Second) of Torts (1965).[6] PSI Energy, 829 N.E.2d at 957, 962 (citing Burrell v. Meads, 569 N.E.2d 637, 643 (Ind. 1991), and Douglass v. Irvin, 549 N.E.2d 368, 370 (Ind. 1990)).

Comparatively, the plaintiff in PSI Energy was employed by the nation's largest insulation contractor and worked for at least twenty-four years with insulation containing asbestos. He sued PSI Energy on two theories, vicarious liability and premises liability, and received a general jury verdict. Apparently in reliance on Burrell and Douglass, PSI Energy "understandably" did not object when the trial court instructed the jury with language consistent with the Restatement. Id. at 962. The PSI Energy Court concluded that "this instruction is [no longer] an accurate statement of the law." Id. However, "[e]ven erroneous instructions require affirmance if there is no objection at trial and the facts support recovery

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judgment in favor of IPL based only upon the statute of repose, addressed below.

[6] § 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, § 343 (1965).

§ 343A. Known or Obvious Dangers

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

under the instructions." Id. Accordingly, the dispositive holding in PSI Energy was that the plaintiff prevailed in light of how the jury was instructed.

The PSI Energy Court also used the word "hold" to describe its conclusion that, under most circumstances, landowners do not have a duty to provide a reasonably safe work area to employees of independent contractors.

> We also hold that as a general proposition a landowner or other possessor of real estate harboring a potentially dangerous condition is not liable to an independent contractor or its employees for injuries sustained by reason of the condition the contractor is employed to address.

Id. at 948. "We think a landowner who employs a contractor to perform specialized work such as insulation installation or removal is entitled to rely on the contractor to comply with appropriate safety standards." Id. at 959. "Unless the landowner has unique knowledge not imparted to the independent contractor, the owner should have no liability to employees of the independent contractor based on a claim that the project is unusually risky or dangerous." Id. at 960. "[W]e hold that a landowner ordinarily has no liability to an independent contractor or the contractor's employees for injuries sustained while addressing a condition as to which the landowner has no superior knowledge." Id. at 961.

Elbrink describes the PSI Energy analysis as follows:

> The entire framework of this discussion in [PSI Energy] is the analysis presented in the Restatement. There is no rejection of the duty presented; on the contrary there is a reaffirmation of the duty with an analysis of the cases and theories underlying its provisions.

Id. at 25 (citing PSI Energy, 829 N.E.2d at 957-960). Contrary to her representation, the PSI Energy Court clearly rejected certain aspects of the Restatement, concluding that the jury

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Restatement (Second) of Torts, §343A (1965).

instruction based upon the Restatement was "erroneous" and "not an accurate statement of the law." PSI Energy, 829 N.E.2d at 962.

Meanwhile, her attempt to distinguish PSI Energy is that her husband Robert was a sheet metal worker, and "[m]etal does not create a dangerous condition." Appellant's Br. at 25. The four sentences from PSI Energy quoted above make clear that the issue is not whether the condition is "dangerous," but whether the injured person was on site for the purpose of addressing the condition that caused the injury. No one would sue for claims related to safe conditions. Indeed, it is axiomatic that if a person brings a claim based upon the condition of property, then that condition has allegedly been dangerous in at least one incident. Our Supreme Court further clarified its reasoning by distinguishing this theory of liability from, for example, injuries resulting from demolition performed by another contractor. "Here, liability is premised on the condition (asbestos on the site) or activity (removing or installing asbestos) that was the reason for the plaintiff's presence on the property." PSI Energy, 829 N.E.2d at 958.

Robert's work environment was not meaningfully different from that of the plaintiff in PSI Energy. Elbrink alleged that her husband Robert "handled and/or worked around asbestos materials on pipes, boilers, and other equipment." App. at 106. The evidence most favorable to her supports the allegation. In performing their jobs, Robert and the plaintiff in PSI Energy handled and worked with asbestos, whether installing insulation or installing and replacing metal work in and around insulation. Therefore, the nominal distinction does not change our analysis.

Elbrink alleged that the Premises Owners "had superior knowledge about the specific

hazards of asbestos on their premises to that of Mr. Elbrink." Appellant's Br. at 29. Under PSI Energy, however, that allegation is irrelevant. "If the individual knowledge of each employee were the test, landowners would be required to monitor the performance of independent contractors working on their property. . . . [The independent contractor's] knowledge is the relevant benchmark here, not [the plaintiff's]." PSI Energy, 829 N.E.2d at 960. On appeal, Elbrink fails to cite the record for any allegation or any evidence that any of the Premises Owners had more knowledge of the dangers of asbestos than any of Robert's employers. Appellant's Br. at 29-31; Appellant's Reply Br. at 6-9.

Elbrink also argues that the Premises Owners were liable because of the negligent conduct of their own employees, under the principle of respondeat superior. Respondeat superior is a type of vicarious liability. See Sword v. NKC Hosp., Inc., 714 N.E.2d 142, 147-50 (Ind. 1999). Vicarious liability was one of two theories analyzed at length in PSI Energy, but the Court did not suggest that respondeat superior could serve as a source of recovery. To the contrary, while the term respondeat superior did not appear in PSI Energy, the Court wrote that "[i]n performing his own work, [the plaintiff] was often exposed to asbestos, and he was also exposed to the material as the result of activities of PSI employees and other PSI contractors." PSI Energy, 829 N.E.2d at 949. "He also points to evidence that PSI's workers kicked up dust, and that the asbestos insulation at PSI was in worse condition than that at other locations." Id. at 956. The Court concluded that, "[a]t most, PSI created a quantitatively higher risk, but not a risk unique to PSI, and not a risk requiring qualitatively different precautions from those generally associated with asbestos." Id. In light of this analysis, we conclude that Elbrink was not entitled to pursue relief under a theory of

respondeat superior. Furthermore, we read the PSI Energy Court's language to apply equally to the conduct of PSI Energy employees and the conduct of employees of its contractors.

For these reasons, the trial court did not err in entering summary judgment for GE, SIGECO, US Steel, and Whirlpool.

III. Construction Statute of Repose

The trial court concluded that Elbrink's claims against IPL and ICI were barred by Indiana Code Section 32-30-1-5 ("Construction Statute of Repose"). The interpretation of a statute is a question of law, to be reviewed de novo. Porter Dev., LLC v. First Nat'l Bank of Valparaiso, 866 N.E.2d 775, 778 (Ind. 2007). Our goal is to give effect to the General Assembly's intent. Id.

> Our primary resource for this determination is the language used by the legislature, and thus our interpretation begins with an examination of the statute's language. We presume that the words of an enactment were selected and employed to express their common and ordinary meanings. Where the statute is unambiguous, the Court will read each word and phrase in this plain, ordinary, and usual sense, without having to resort to rules of construction to decipher meanings.

Id. (citations omitted).

An action for wrongful death arising out of a "deficiency" in a real estate improvement may not be brought against the possessor or a construction contractor unless commenced within ten years of the improvement's substantial completion. Ind. Code § 32-30-1-5(d)(3) (West Supp. 2008). Elbrink does not argue that she filed her lawsuit within that period of time for purposes of any of her claims. Instead, she argues that, in many instances, Robert was performing maintenance following an improvement's substantial completion, rather than work prior to an improvement's substantial completion.

Before July 1, 2005, the statute protected from stale claims "any person who designs, plans, supervises, or observes the construction of or constructs an improvement to the real property," but it did not protect real estate possessors. I.C. § 32-30-1-5 (West 2002). There was no provision regarding maintenance. Id. This Court held that, "[t]he purpose of the construction statute of repose is to protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for defects in workmanship." J.M. Foster, Inc. v. Spriggs, 789 N.E.2d 526, 532-33 (Ind. Ct. App. 2003) (applying an earlier version of the statute). The Foster Court held that the statute applied to "the installation of asbestos-containing materials." Id. at 533.

The General Assembly amended the statute in 2005 to apply also to possessors.[7] I.C. § 32-30-1-5(b) (West Supp. 2008). In doing so, however, the legislature provided that possessors would not benefit from the statute's protection for "a failure by a possessor to use reasonable care to maintain an improvement to real property following a substantial completion of an improvement." I.C. § 32-30-1-5(c) (West Supp. 2008). "Date of substantial completion" was the earlier of: the date of the improvement's first beneficial use; or

> the date upon which construction of an improvement to real property is sufficiently completed under a contract of construction, as modified by any additions, deletions, or other amendments, so that the owner of the real property upon which the improvement is constructed can occupy and use the premises in the manner contemplated by the terms of the contract.

I.C. § 32-30-1-4 (West Supp. 2008).

A. Application to IPL

IPL's motion for summary judgment and the trial court's entry of summary judgment for IPL pertained only to application of this statute. Accordingly, we address this issue, notwithstanding our above conclusion that the Premises Owners did not have a duty to Robert.

Elbrink alleged that IPL, as a Premises Owner, "failed to take reasonable and necessary precautions to protect the health and safety of individuals such as [Robert] thus contributing to [Robert's] asbestos exposure." App. at 84. Elbrink's complaint incorporated a "Master Complaint," filed for purposes of the Marion Superior Court's management of mass tort litigation.[8] Id. In so doing, Elbrink alleged that IPL failed to warn Robert of the dangers of asbestos, "failed to schedule work performed on the premises such that [Robert's] exposure to potentially deadly asbestos fibers would be eliminated or reduced," "failed to use ordinary care to keep the premises in a reasonably safe condition," "negligently failed to maintain" its premises and thereby exposed him to asbestos while he worked on IPL's property. Id. at 87, 96-97.

For nine months in 1976 and 1977, Robert worked at IPL's plant in Petersburg, Indiana.[9] Robert testified about his work as follows:

> Q: Was this work you were doing, this lagging work, was it in relation to new construction or was it part of a shutdown or a turnaround?
>
> A: I'm thinking it might have been a shutdown.

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[7] There is no dispute that the 2005 amendment was applicable to Elbrink's claims.

[8] Attorneys intending to file multiple asbestos-related lawsuits over time must file Master Complaints, setting forth generally applicable allegations. Marion Superior LR49-TR8 Rule 701, http://www.indygov.org/NR/rdonlyres/E9F23B63-708D-42F6-9D8E-F503DDA0D0DD/0/marionall030408.pdf (last viewed Aug. 4, 2008).

[9] Although Robert also worked on the initial construction of the Petersburg plant in 1966, Elbrink does not contest the entry of summary judgment in favor of IPL for that project. Appellant's Brief at 50.

Q: And what makes you think that?

A: Time frame. That wasn't a pleasant job, and if it was new –

Q: Do you remember taking lagging off before you put it back on later?

A: No. Actually what I did, when the lagging was coming off, I was cutting lagging for the thing while some of the fellows was taking it off, is what I can remember there. I remember cutting it to go on. I was actually in a different part of the plant at that time, because I was cutting it to go on, then I helped install it.

Id. at 1214. At another deposition, Robert said the following of his work at IPL's Petersburg plant:

Q: What were you doing then?

A: I was lagging the boiler and the precipitator also I believe. I believe we worked on the precipitator too, but I do know we was relagging the boiler.

Q: Tell us what relagging the boiler is, because I'm not sure the jury would understand that.

A: Lagging is just a confusing term for a piece of metal that's covering insulation. It's a metal covering. And our function – when there was a problem with the boiler, my function was to take the lagging off the insulation, and in many cases we would be working composite with the insulator. So we would also take the insulation off, as well as the doors and access doors that go into the boiler. And then there would be a pause in there where we might actually leave the job site or go do something else while the boilermaker was inside the boiler patching the holes and the tubes or whatever, fixing whatever the problem would be. Then when he had his job done, the process was reversed for us. We'd come back and we'd weld metal stays onto the boiler . . . .

. . .

Q: So did this project redo the lagging on the entire boiler?

A: Yes.

Q: Were there employees of IPL working around while you guys were doing that work?

A: Yes, they were.

Q: What kind of work were they doing?

A: They were doing maintenance work on different things that came off of the boiler. . . . They would be working, repairing, doing maintenance work on those things.

. . .

Q: What [other] kind of work was going on?

A: It was piping work. . . . The pipe fitters would be tearing out pipe, rerouting pipe, in some cases it was just a matter of relagging the pipe.

Id. at 1410-14 (emphases added). Taking Robert's above testimony as true, the boiler had been in operation prior to his work on it. Robert, IPL employees, boilermakers, and pipe fitters performed repairs and maintenance on the boiler.

On appeal, Elbrink argues that her claim is not barred by the Construction Statute of Repose because "a failure by a possessor to use reasonable care to maintain an improvement to real property" is excluded from application of the statute. IPL responds by distinguishing negligent maintenance of an improvement from "projects involving maintenance or repair." IPL Br. at 13.

A plaintiff may sue for a deficiency for only ten years following a real estate improvement's substantial completion. I.C. § 32-30-1-5(d) (West Supp. 2008). A deficiency is not a failure by a possessor to use reasonable care to maintain an improvement following its substantial completion. I.C. § 32-30-1-5(c) (West Supp. 2008). We take the words of the

statute for their common and ordinary meanings. Porter Dev., 866 N.E.2d at 778. "Maintain" is defined as "to keep in a state of repair, efficiency, or validity." Webster's New Internat'l Dictionary 1362 (3d ed. 2002). Accordingly, the statute does not bar claims against a possessor for injuries caused by the possessor's failure to keep its premises in a reasonable condition. However, the exclusion in subsection (c) does not say anything about a possessor's conduct toward a contractor hired to perform repairs.

As noted above, Elbrink alleged both the failure to maintain the premises and failures in taking care toward contractors. Therefore, Elbrink recognized the distinction that IPL now argues. Her designated evidence, however, supported only an inference of negligence toward the contractor. None of Robert's testimony concerned how IPL had maintained its property—whether good, bad, or indifferent. Accordingly, we conclude that the exception in subsection (c) does not pertain to Elbrink's claim against IPL.

Therefore, for her lawsuit to have been timely filed under the Construction Statute of Repose, she was required to file within ten years of the improvement's substantial completion. She does not claim to have done so. In fact, her designated evidence makes clear that Robert was working on something that had been in operation no later than 1977. She filed her lawsuit in 2006. The trial court did not err in entering summary judgment in favor of IPL upon this basis.

Regardless, we note that we "may affirm a grant of summary judgment upon any theory supported by the evidence." Keaton & Keaton, 842 N.E.2d at 821. Although IPL's arguments at trial and on appeal are limited to the Construction Statute of Repose, our above analysis regarding the other Premises Appellees applies equally to IPL. Elbrink's allegations

against IPL in the complaint, first amended complaint, verified disclosure statement and second amended complaint were functionally identical to those against the other Premises Appellees. App. at 84, 104, 107 and 636. Therefore, the judgment for IPL could be affirmed based upon this theory as well.

B. Application to ICI

ICI is the only Appellee that is not a Premises Appellee. Elbrink alleged that ICI "installed or caused to be installed, [and/or] used . . . asbestos and/or asbestos-containing products" to which Robert was exposed. App. at 83-84, 104, 636. More specifically, she alleged that ICI's "[m]echanical contractors [were] present at multiple jobsites [with Robert] installing, removing, cutting and grinding gasket and packing material, removing and replacing asbestos-containing insulation products."[10] Id. at 107-08.

The Construction Statute of Repose applies to a person who "constructs an improvement to real property." I.C. § 32-30-1-5(a)(2) (West Supp. 2008). The exclusion for maintenance of an improvement, however, pertains only to possessors, not to construction contractors. I.C. § 32-30-1-5(c) (West Supp. 2008). An action for wrongful death arising out of a deficiency may not be brought unless the action is commenced within ten years after the date of substantial completion of the improvement. I.C. § 32-30-1-5(d) (West Supp. 2008). Elbrink filed her lawsuit on June 20, 2006. Therefore, the statute barred work on anything substantially completed before June 20, 1996. Elbrink's appellate argument makes no reference to events occurring any later than the early 1980s. Appellant's Br. at 10. None of

[10] Elbrink does not challenge the entry of summary judgment for ICI with respect to Robert's work at a Toyota property in 1999.

her designated evidence regarding ICI referenced events later than the late 1980s. App. at 1309. Even viewing the designated evidence and reasonable inferences in the light most favorable to Elbrink, anything Robert worked on while near ICI employees was substantially completed before 1996. The trial court did not err in entering summary judgment in favor of ICI.

Conclusion

The trial court did not err in entering summary judgment in favor of GE, SIGEGO, US Steel, Whirlpool, IPL and ICI.

Affirmed.

RILEY, J., and BRADFORD, J., concur.