STATE OF MINNESOTA
IN COURT OF APPEALS
A10-796

Auto-Owners Insurance Company,
Appellant,

vs.

Wensmann Homes, Inc.,
Respondent.

Filed January 11, 2011
Affirmed
Ross, Judge

Carver County District Court
File No. 10-CV-09-1309

David W. Van Der Heyden, Brian J. Ellsworth, VanDerHeyden Law Office, P.A., Rochester, Minnesota (for appellant)

Randi W. LaFleur, Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

A property insurer filed this subrogation action against a general contractor to recover damages arising from two pipe-freezing occurrences. The district court ordered summary judgment in the general contractor's favor after deeming the insurer's lawsuit to

be time-barred. Because the insurer presented no admissible evidence supporting its position that its actions fall within an exception to the statute of limitations, we affirm.

FACTS

The Steiger Lakes Condominium internal sprinkler system twice froze and burst in early 2007. Wensmann Homes, Inc., had served as general contractor during construction of the recently completed building. Wensmann had engaged a subcontractor to install the building's fire extinguishing sprinkler system and Auto-Owners Insurance Company insured Steiger Lakes at the time of the pipe-freezing occurrences. Steiger Lakes discovered the breaks and the resulting water damage and filed an insurance claim, which Auto-Owners covered. More than two years after the discovery, Auto-Owners brought this subrogation suit against Wensmann to recover money damages for the allegedly negligent construction of the sprinkler system. Wensmann moved for summary judgment on the ground that Auto-Owners's lawsuit was time-barred under Minnesota Statutes section 541.051, subdivision (1)(a) (2008). The district court granted the motion. Auto-Owners appeals.

D E C I S I O N

Auto-Owners challenges the district court's summary judgment for Wensmann. A district court must grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review de novo whether any genuine issues of

material fact exist and whether the district court properly applied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

Auto-Owners maintains that there is a genuine issue of material fact as to whether the two-year statute of limitations applies to its subrogation action. The statute limits the time within which actions may be brought for damages based on services or construction to improve real property:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property . . . more than two years after discovery of the injury[.]

Minn. Stat. § 541.051, subd. 1(a). But the statute includes an exception that Auto-Owners seeks to invoke here, which is that "the limitations . . . do not apply to the manufacturer or supplier of any equipment or machinery installed upon real property." *Id.*, subd. 1(e).

Auto-Owners contends that the exception applies here because the breaks occurred in the sprinkler heads and because the sprinkler heads are "equipment and machinery" under the exception. The contention faces at least two insurmountable obstacles, one legal and one factual.

The legal obstacle is our precedent of *Red Wing Motel Investors v. Red Wing Fire Dep't*, in which we addressed a similar pipe-freeze case and held that "sprinkler heads" are "ordinary building materials" and "not machinery or equipment." 552 N.W.2d 295, 297 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). That holding alone disposes of this appeal, but Auto-Owners seeks to avoid that result by relying on other language in the case. We noted in dicta that if the sprinkler heads themselves had "failed," the exception would apply in a suit against their manufacturer. *Id*. at 297–98. That language is not helpful to Auto-Owners, however, because this case does not involve a claim of a "failed" sprinkler head caused by a manufacturer's or supplier's conduct, but a frozen sprinkler system caused by the system's negligent construction. This case is a near replica of *Red Wing Motel Investors*, and we hold that the sprinkler heads are merely building materials that do not fit the statute-of-limitations exception.

The factual obstacle is that Auto-Owners failed to introduce evidence meeting the requirements of rule 56.05 of the Rules of Civil Procedure. That rule establishes that a party opposing summary judgment may rely only on admissible, first-hand evidence:

> Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth *such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . . When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial.

Minn. R. Civ. P. 56.05 (emphasis added). Auto-Owners's factual assertion that the freezes and breaks occurred in the sprinkler heads rather than in the pipes rests entirely

on an affidavit prepared by architect Steven Flaten. In it, Flaten testified only that "[i]t is my understanding from the management staff on site that the area that broke was in the sprinkler heads and lines." The testimony could not support Auto-Owner's argument, even if the argument were not legally flawed.

We note in passing that the affidavit testimony is directly contradicted by Flaten's own letter to Auto-Owners written after Flaten personally "was able to observe" the damaged sprinkler system. In that letter, Flaten discussed the "two areas where the *pipe* has broken." (emphasis added). Unlike affidavits, which customarily are drafted by attorneys, Flaten's letter has the earmarks of personal draftsmanship. In the face of his plainly stated letter, the content of Flaten's contradicting and vague affidavit seems at least suspicious. Again, this is only a passing observation since factual contradictions are not resolved on appeal.

The current problem is that the affidavit, credible or not, fails to include admissible testimony representing Flaten's personal knowledge. This affidavit testimony therefore is generally inadmissible hearsay under rule 802 of the Rules of Evidence rather than admissible "personal knowledge" required by procedural rule 56.05. "If a party relies on affidavits in opposition to a summary judgment motion, hearsay is insufficient to avoid summary judgment." *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 881 (Minn. App. 1988). Construed most favorably to Auto-Owners, Flaten's affidavit indicates only that he reached an "understanding" that the breaks occurred partly in the sprinkler heads and he based this understanding on what he learned from unnamed members of "the management staff on site." Flaten's affidavit offering hearsay testimony is not

admissible evidence that the breaks occurred in the sprinkler heads, and Auto-Owners points us to nothing else that can elevate the assertion into a genuine issue of material fact.

Auto-Owners asserts that Wensmann continued to have an interest in and control over the improvement to the property and argues alternatively that the two-year statute of limitations therefore should not apply. The district court did not address this issue, and the record reveals why: it was never raised. An appellate court generally reviews only those issues that the record shows were presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Auto-Owners represented to us through counsel at oral argument that the issue of Wensmann's continued control was preserved factually in the evidence submitted to the district court and that its counsel made the argument expressly at the March 2, 2010, motion hearing. The representation is apparently mistaken; we have reviewed the hearing transcript and find no support for counsel's claim. We conclude that Auto-Owners never presented the argument to the district court. And this explains why the district court did not address it. Neither will we.

Wensmann moved this court on appeal to strike this new argument from Auto-Owners's brief, arguing that a court "is limited to review of the facts and legal arguments that are contained in the trial record." Minn. R. App. P. 103.04 1998 advisory comm. note. Wensmann's argument is well-founded but its motion is unnecessary. We do not need to "strike" Auto-Owners's improper argument, we simply refuse to consider its merits under the rule and under *Thiele*.

The district court properly issued summary judgment in Wensmann's favor and dismissed Auto-Owners's claim as time-barred under the two-year statute of limitations in section 541.051, subdivision 1(a).

Affirmed.