COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP197 **Cir. Ct. No. 2014CV112**

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

WALTER H. WISE AND WALTER R. J. WISE,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF KIMBERLY AND CITIES & VILLAGES MUTUAL INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Walter H. Wise and his son, Walter R. J. Wise, appeal a summary judgment dismissing their property damage action against the Village of Kimberly and its insurer, Cities & Villages Mutual Insurance Company.

The Wises contend the circuit court erred by concluding their action is procedurally barred by the statute of repose, WIS. STAT. § 893.89(2) (2013-14).[1] We reject the Wises' arguments and affirm the judgment.

BACKGROUND

¶2 In 1991, the Village modified the lateral pipe from the Wises' house to connect to a new main sewer line that was built to address a surcharging issue.[2] The modified lateral pipe contained a series of sharp-angled bends to circumvent an abandoned manhole. The Wises claim they were not given notice that the lateral pipe was being modified. After the modification, the Wises began having regular sewage backups in their house. After attempting to address the backups by hiring rooting or augering contractors, and investigating toilets and washing machines for leaks, the Wises ultimately replaced the lateral pipe in May 2012. At that time, the Wises' contractor identified the multiple bends in the lateral pipe as the cause of the sewage backup problems.

¶3 In February 2014, the Wises filed the underlying property damage suit against the Village and its insurer, alleging the Village negligently designed and installed the lateral pipe.[3] The Village and its insurer moved for summary

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Although the definition of "surcharging" is not readily apparent from the record, counsel for the Village described it generally as "a problem with the way the water is flowing." The younger Wise added his understanding that "it means that the water is not flowing or actually flowing either in the wrong direction or … flowing so little to the point where it is backing up in certain places."

[3] Although the elder Wise owned the house, the younger Wise resided there and claimed damage to his personal possessions within the house.

judgment, arguing the applicable statute of limitations had expired; the Wises' claims were barred by the doctrine of laches; the Village did not have notice of any sewer problems; the Village is entitled to discretionary immunity; and the claims are barred by the applicable statute of repose. The insurer alternatively claimed it should be dismissed from the action because it had not been properly served. The circuit court dismissed the insurer from the action for lack of service and determined that the statute of repose barred the Wises' suit. This appeal follows.

DISCUSSION

¶4 We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. ***Malzewski v. Rapkin***, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The circuit court concluded the Village was entitled to judgment as a matter of law because the undisputed facts showed the Wises' action was barred by the statute of repose provided in WIS. STAT. § 893.89(2). Interpretation of a statute and its application to a set of undisputed facts are questions of law that we review independently. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

¶5 The statute of repose at issue bars an action against any person involved in the improvement to real property if the action is not brought within ten years of the substantial completion of the improvement. *See* WIS. STAT. § 893.89. The statute provides, in relevant part:

> [N]o cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or

> against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property.

WIS. STAT. § 893.89(2). The "exposure period" is "the 10 years immediately following the date of substantial completion of the improvement to real property." WIS. STAT. § 893.89(1). The purpose of the statute "is to provide protection from long-term liability for those involved in the improvement to real property." ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶62, 283 Wis. 2d 1, 698 N.W.2d 794. Statutes of repose, unlike statutes of limitation, "provide[] that a cause of action must be commenced within a specified amount of time after the defendant's action which allegedly led to injury, regardless of whether the plaintiff has discovered the injury or wrongdoing." ***Tomczak v. Bailey***, 218 Wis. 2d 245, 252, 578 N.W.2d 166 (1998). The legislature enacts a statute of repose to cut off "a right of action regardless of the time of accrual" because it has expressly decided "not to recognize rights after the conclusion of the repose period." ***Kohn***, 283 Wis. 2d 1, ¶38 (punctuation and quoted sources omitted).

¶6 Here, the Wises emphasize that it was the sewer main, and not their lateral pipe, that had surcharging issues necessitating the 1991 modifications. The Wises therefore assert that the rerouting of their formerly functional lateral pipe to the new sewer main was not an "improvement" but, rather, a detriment to the property. Our supreme court has held that an "improvement to real property," within the meaning of the statute means: "A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as

distinguished from ordinary repairs." ***Id.***, ¶17. Here, the new sewer main project, with modified lateral pipe connections, was a municipal improvement that benefited adjacent homeowners and was designed to add utility and value to the property. We therefore conclude the project was an "improvement" to real property under the statute of repose.

¶7 The Wises nevertheless contend their lawsuit falls within three of the four delineated exceptions to the ten-year statute of repose. WISCONSIN STAT. § 893.89(4) provides that the statute of repose does not apply to:

> (a) A person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property.
>
> (b) A person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.
>
> (c) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.
>
> (d) Damages that were sustained before April 29, 1994.

The Wises argue that the fraud, owner/occupier, and damages exceptions outlined in subsecs. (a), (c) and (d), respectively, apply to their action. However, only subsec. (d)—the damages exception—was addressed by the circuit court. Because arguments regarding the fraud and owner/occupier exceptions were not raised in the circuit court, we deem them forfeited. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited). Regardless, we conclude there is nothing in the record to support the application of either exception were we to address these arguments on their merits.

¶8 With respect to the exception for damages sustained before April 29, 1994, the Wises alleged sewage backups beginning in the "early-to-mid-1990s," but did not particularize any damages before 2004. A party seeking damages must present sufficient evidence of damages "from which the trial court or jury could properly estimate the amount" to a "reasonable certainty." ***Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977).

¶9 As the circuit court noted, the Wises provided some reference to loss in a general sense when the younger Wise averred that problems began "at least since around 1992." The Wises also described having "one of the lateral plug issues in the mid 1990s" and associated that with seeing people working under the street "in or about 1996 or 1997." The Wises additionally claimed they had to throw out personal property in the 1990s, but they did not list or describe the items. Likewise, the Wises did not have information regarding any rooting or augering services they hired before April 29, 1994, nor how much those services cost them. Moreover, the notice of claim submitted to the Village under WIS. STAT. § 893.80 did not include any damages identified as arising between 1991 and 1994. Because the Wises did not particularize any damages before April 29, 1994, the circuit court properly determined they are not entitled to damages under this exception to the statute of repose.

¶10 Finally, we note that apart from simply asking for reinstatement of their action against the insurer, the Wises make no argument challenging the insurer's dismissal based on lack of service. On appeal, an issue that is raised but not briefed or argued is deemed abandoned. ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). Even on the

merits, the insurer was properly dismissed for lack of service. Alternatively, its dismissal is proper under the statute of repose.

By the Court.—Judgment affirmed.

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