

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 03-1067

Cir. Ct. No. 01CV000048

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ELAINE MARIE KOHN, RONNIE A. KOHN AND LORI K.
KOHN,**

PLAINTIFFS-APPELLANTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

PLAINTIFF,

v.

**DARLINGTON COMMUNITY SCHOOLS, EMC INSURANCE
COMPANY, STANDARD STEEL INDUSTRIES, INC., AND
MEDALIST INDUSTRIES, INC.,**

DEFENDANTS,

ILLINOIS TOOL WORKS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lafayette County:
DANIEL L. LaROCQUE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Elaine, Ronnie and Lori Kohn appeal from the circuit court’s judgment dismissing this case. The issue is whether aluminum bleachers are an “improvement to real property” within the meaning of WIS. STAT. § 893.89(2) (2001-02).¹ We conclude that they are not. Therefore, we reverse and remand for further proceedings.

¶2 Lori Kohn and her four-year-old daughter, Elaine, attended a football game at a public high school. Elaine fell through an opening in the metal bleachers, sustaining a severe head injury. The Kohns commenced a lawsuit against the school district, its insurer, and Illinois Tool Works, Inc., the successor corporation to the company that constructed and installed the bleachers.²

¶3 Illinois Tool Works moved for summary judgment arguing that the suit against it was barred by WIS. STAT. § 893.89(2). This statute prohibits actions from being brought against the owner or occupier of real property, or against any person involved in the improvement to real property, more than ten years immediately following the date of substantial completion of the improvement to real property.³ The circuit court concluded that the bleachers were an

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The predecessor corporations were also named as defendants, but they no longer exist.

³ WISCONSIN STAT. § 893.89 provides:

(1) In this section, “exposure period” means the 10 years immediately following the date of substantial completion of the improvement to real property.

(continued)

improvement to real property to which the ten-year limitation period applied. Because Elaine was injured almost thirty-one years after the bleachers were installed, the circuit court dismissed the case.

¶4 Whether the bleachers are an improvement to real property under the statute is a question of law because it requires the court to decide whether undisputed facts fall within the scope of the statute. See *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975). Two supreme court cases provide guidance. In *Kallas*, the supreme court decided that a high-pressure water pipe was an improvement to real property under a predecessor statute. *Id.* The court relied on the dictionary definition of “improvement,” which is “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.* In *U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982), the supreme court held that an underground oil pipe was an improvement to real property, again relying on the common usage of the word “improvement.” *Id.*, 105 Wis. 2d at 309.

(2) Except as provided in sub. (3), no 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. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

¶5 The Kohns argue that the bleachers are not an improvement to real property because they rest on top of the ground, did not require excavation to be installed, did not change the basic nature of the land upon which they sit, and may be taken apart and moved, in contrast to the underground gas and water pipelines in *Kallas* and *U.S. Fire*. The Kohns contend the bleachers are analogous to the water slide discussed in *Massie v. City of Duluth*, 425 N.W.2d 858, 861 (Minn. Ct. App. 1988), where the Minnesota Court of Appeals decided a water slide was not an improvement to real property. The court reasoned that, while the slide was bolted in concrete at the bottom of a pond, it was designed to be and was removed every winter for storage. *Id.*

¶6 Illinois Tool argues that the bleachers *are* an improvement to real property because they are a permanent fixture at the football field. Illinois Tool points out that the bleachers have never been disassembled or moved in thirty-one years and, relying on photographs of the bleachers, contends that they are permanently erected on a steel frame and anchored in asphalt.

¶7 Illinois Tool, however, points to no place in the record describing how the bleachers are supposedly “anchored” to the ground. Our review of the photographs supports the plaintiffs’ view that the bleachers rest on the ground. The degree of physical annexation shown by the pictures convinces us that the bleachers are not an improvement to real property. The pipelines in *Kallas* and *U.S. Fire* had a higher degree of physical annexation than the bleachers because the pipes could not be moved absent extensive excavation. The water slide in *Massie* presents the closest analogy and, while that case is not binding on us, it persuades us that the bleachers do not fall within the ambit of the statute. We note, too, our holding is in accord with a recent decision we made, albeit regarding a tax statute, that a communications tower was not an improvement to real

property because it could be disassembled and moved. *See All City Communication Co., Inc. v. DOR*, 2003 WI App 77, ¶25, 263 Wis. 2d 394, 661 N.W.2d 845.

¶8 In sum, we conclude that WIS. STAT. § 893.89(2) does not bar this action. This case is therefore governed by the three-year statute of limitations applicable to personal injury cases, *see* WIS. STAT. § 893.54, and was timely filed. We reverse the circuit court's order dismissing Illinois Tool Works and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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

