COURT OF APPEALS DECISION DATED AND FILED

July 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP1414

Cir. Ct. No. 2009CV1880

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JUNE CALEWARTS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR ON BEHALF OF THE ESTATE OF ROBERT J. CALEWARTS,

PLAINTIFF-APPELLANT,

V.

CR MEYER AND SONS COMPANY, INTERNATIONAL PAPER COMPANY, THILMANY, LLC, COLONIAL HEIGHTS PACKAGING, INC. AND PHILIP MORRIS USA, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 HOOVER, P.J. June Calewarts appeals summary judgments dismissing her respective claims against CR Meyer and Sons Company; International Paper Company and Thilmany, LLC; and Colonial Heights Packaging, Inc. and Philip Morris USA, Inc. We agree with Calewarts that there are disputed issues of material fact that preclude summary judgment, except as to Philip Morris USA. We therefore affirm the judgment as to Philip Morris USA and reverse and remand for further proceedings as to the remaining defendants.

BACKGROUND

¶2 June Calewarts, individually and on behalf of her husband Robert's Estate, brought an action for Robert's death due to asbestos exposure at work.[1] Calewarts's claims against CR Meyer were based on the installation, repair, and removal of asbestos steam pipe insulation. The claims against the other defendants were based on their status as nonemployer owners and/or lessors of the building where Calewarts worked from 1950 through 1990. Calewarts died from mesothelioma due to asbestos exposure.[2]

¶3 Calewarts worked at Milprint, which produced and printed candy wrappers, snack bags, and cheese pouches. Milprint's manufacturing operations were located in a building owned by Nicolet Paper. Nicolet Paper operated a separate paper mill in the same building. Although the two businesses shared the same structure, they were distinct operations physically separated by walls and

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[1] We refer to June, Robert, and/or the Estate individually and collectively as Calewarts.

[2] As the case was resolved on summary judgment, we construe the facts in Calewarts's favor. *See* ***Johnson v. Mt. Morris Mut. Ins. Co.***, 2012 WI App 3, ¶8, 338 Wis. 2d 327, 809 N.W.2d 53.

floors. However, as Calewarts's coworker explained, because Milprint did not have its own power plant, "all the steam ... came from the Nicolet power plant on the basement of the building, and that was ... rented from Nicolet. Milprint paid Nicolet for buying their steam."

¶4 Calewarts worked on Milprint's fourth floor for much of his career. He operated printing presses from 1950 until the early 1970s, rotating weekly among the six presses on the fourth floor. He then worked as an oiler for several years, working on every floor. He returned to press work by 1975. From 1980 to 1985, Calewarts worked in the molding department, also on the fourth floor. He then worked on the second floor in the cheese department until 1990, when he and Milprint's operations relocated to another facility.

¶5 Milprint's printing presses were partially steam powered. CR Meyer installed the original steam pipes, including insulation, that supplied the presses. There was a trunk feed and return steam line, which ran the length of the fourth floor, approximately 250 to 300 feet. Individual steam lines then ran from the trunk line to the presses. One of Calewarts's coworkers testified CR Meyer personnel "told [Milprint employees] they were putting in asbestos." The steam lines were covered with asbestos insulation, which was "hard, white ... plaster-like" in appearance.

¶6 According to Calewarts's coworker, the steam lines would "invariably" leak after the presses were shut down each weekend and restarted on Monday. "[I]t was pretty much a joke that it was a Band-Aid and a 2-gallon pail to fix things every Monday whenever we started up a machine." Repairs required removing the pipe insulation to repair or change valves or pipes. Approximately one foot of insulation on either side of the leak was "torn off or ... knocked off."

Scheduled valve maintenance also required similar removal of the pipe insulation. The resulting debris was swept up and placed in a "broke box," which was an open trash cart approximately three feet wide, five feet long, and four feet deep. The insulation sat in the broke boxes until the cart was full.

¶7 Given the frequency of repairs, Calewarts's coworker was "certain" that Calewarts would have been operating presses, and adjacent presses, where piping was being repaired. A coworker testified that large blowers for drying the ink on the fourth floor presses blew "everything else around, too. I mean, there was a lot of dust and I'm sure there was a lot of asbestos dust in there, too." Insulation was frequently knocked off the press ovens by employees or fell off due to vibrations from the equipment running. Insulation dust also fell off the ovens on the presses when the doors to the ovens were slammed shut. "[I]t was always a problem. There was ... always dust."

¶8 The asbestos-coated steam pipes were on all four floors at Milprint. The Milprint workers were not advised to wear protective gear and no safety warnings or instructions about asbestos were given until sometime after 1985. The asbestos was never encapsulated and remained a subject of union bargaining discussions until the plant closed. Calewarts's witnesses did not observe abatement work, involving the use of special protective measures, until 1989. Occupational Safety and Health Administration (OSHA) citations were issued in 1990 after CR Meyer removed a section of asbestos-insulated pipe without proper precautions. Milprint's operations relocated the following year.

¶9 The ownership history of Milprint, Nicolet Paper, and the building is complex, involving various sales, mergers, and leases. Initially, Nicolet Paper owned the building. Milprint then acquired Nicolet Paper as a subsidiary in 1946,

with Nicolet Paper retaining ownership of the building. Philip Morris USA acquired the stock of both companies in 1957. In 1962, Nicolet Paper merged into Milprint. However, Nicolet Paper continued operating as an independent division of Milprint. In 1977, Milprint merged with another company and changed its name to Philip Morris Industrial.[3] In 1982, Philip Morris Industrial sold the Milprint division to BRH Corporation. BRH changed its name to Milprint. Philip Morris Industrial retained ownership of Nicolet Paper and the building, and leased the Milprint portion to Milprint. In 1985, Philip Morris Industrial sold the Nicolet Paper division to Hammermill Paper Company. Thus, Hammermill took ownership of the building and the existing lease to Milprint. International Paper subsequently acquired Hammermill. In 1988, Philip Morris Industrial changed its name to Colonial Heights Packaging.

¶10 Colonial Heights/Philip Morris USA, International Paper/Thilmany,[4] and CR Meyer each moved for summary judgment. The circuit court granted all three motions, adopting all of the defendants' various arguments, and dismissing Calewarts's respective claims. Calewarts now appeals.

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[3] Philip Morris USA and Philip Morris Industrial were distinct entities, with the former owning the latter as a subsidiary.

[4] While International Paper and Thilmany share a brief on appeal, it is unclear how Thilmany is related to the case. We therefore make no further reference to Thilmany, and assume the claims against it stand or fall with those of International Paper.

DISCUSSION

Colonial Heights/Philip Morris USA

¶11 Calewarts argues Colonial Heights is subject to premises liability for his asbestos exposure from 1950-62 and 1982-85, as the successor entity to the companies that owned the Milprint/Nicolet Paper building during those periods. Calewarts concedes that the worker's compensation exclusive remedy bar precludes liability from 1962-82, because the building owner was also his employer during that time period.

¶12 Calewarts did not obtain a copy of any lease in existence during the first period of alleged liability. The lease for the second period, commencing in January 1982, provided in part:

> VI. REPAIRS AND MAINTENANCE
>
> Lessor shall keep the foundation, bearing walls, doors and windows, roof, elevators, all mechanical systems (HVAC, sprinkler, etc.), and all utility systems (sewer, water, electric, gas, steam, etc.) ... in good condition and repair .... Lessee shall be responsible for minor and routine repairs and maintenance ... as may be necessary other than repairs and maintenance affecting the [previously listed items], which are the responsibility of the Lessor as provided above.
>
> VII. UTILITIES
>
> Lessee shall be responsible for and promptly pay all charges for heat, gas, steam, and electricity .... The parties acknowledge that the steam presently provided ... and used in connection with Lessee's process equipment is manufactured by Lessor. Such steam as utilized by Lessee is metered. Lessee agrees to pay to Lessor the cost of ... steam ..., together with a [15%] surcharge .... The surcharge ... is intended to reimburse Lessor a portion of its administrative charges incurred in connection with the manufacture of steam as well as the cost of maintaining, repairing, replacing and otherwise keeping the steam

> manufacture and distribution equipment in good order and repair. ...
>
> ....
>
> VIII. ALTERATIONS
>
> Lessee may make alterations in or additions to the Leased Premises without first procuring Lessor's ... consent, [except for] alterations that would result in additional requirements for steam, [which shall require] Lessor's consent ....

¶13 Calewarts asserts that as the nonemployer owner/lessor of the entire building, Colonial Heights and its predecessors are liable under the safe place statute, which provides: "Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe." WIS. STAT. § 101.11.[5] Calewarts does not argue there were any asbestos exposures on the Nicolet Paper/owner-side of the building; the alleged exposures were only on his employer's leased premises, in the Milprint portion of the building. Nor does Calewarts argue that his employer, Milprint (and its successors), is liable. That is, he concedes that the worker's compensation exclusive remedy bar precludes suit against Milprint.

¶14 The circuit court's written decision granted summary judgment "for the reasons stated in the transcript of the motion hearing, which incorporates in full the arguments raised in the briefs of Colonial Heights ...." At the hearing, the court had indicated it was "not satisfied that [Calewarts] ... has [provided] the correct legal standard for arguing the liability of a property owner and the

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

safe place statute," and concluded the "workman's compensation act as argued by the defendant is operative in this case." The court further observed it was undisputed that Calewarts never entered the Nicolet Paper portion of the building. Finally, the court stated it was incorporating Colonial Heights' arguments and briefs "as the basis of my decision." We independently review a grant of summary judgment, applying the same standard as the trial court. ***Wagner v. Cincinnati Cas. Co.***, 2011 WI App 85, ¶11, 334 Wis. 2d 516, 800 N.W.2d 27; *see* WIS. STAT. § 802.08.

¶15 We first address Calewarts's argument that the worker's compensation exclusive remedy rule does not protect Colonial Heights from liability for asbestos exposures for the first period, from 1950-62. Calewarts emphasizes that Colonial Heights is the successor to the building owner, Nicolet Paper, during that period and Nicolet Paper was not his employer.

¶16 We agree that the exclusive remedy rule does not protect Colonial Heights. The safe place statute "imposes an absolute duty upon the owner of the building, as well as the employer[.]" ***Saxhaug v. Forsyth Leather Co.***, 252 Wis. 376, 382, 31 N.W.2d 589 (1948). The duties imposed on employers and property owners under the safe place statute are nondelegable. ***Barry v. Emp'rs Mut. Cas. Co.***, 2001 WI 101, ¶42, 245 Wis. 2d 560, 630 N.W.2d 517. An entity who has that duty cannot assert that another is to be substituted as the primary defendant in its stead for a safe place violation. ***Id.***

¶17 Colonial Heights argues it cannot be held liable because the building owner, Nicolet Paper, was a subsidiary of the employer, Milprint, and Colonial Heights is the successor to both companies, which merged in 1962. We reject this argument.

¶18 Nicolet Paper's status as a subsidiary is irrelevant. The two companies were distinct, independently operated corporate entities. The exclusive remedy rule protects only the employer; it does not extend via a parent-subsidiary relationship to protect nonemployer entities. *See* ***Miller v. Bristol Myers Co.***, 168 Wis. 2d 863, 878-82, 485 N.W.2d 31 (1992). Colonial Heights does not dispute that this is the rule from ***Miller***. Instead, it seeks to distinguish the case on its facts, asserting that Calewarts seeks to hold his direct employer liable. Colonial Heights is mistaken. Calewarts does not seek to hold his employer, Milprint, liable; he seeks to hold Nicolet Paper liable.

¶19 Colonial Heights nonetheless asserts it is immune because Milprint and Nicolet Paper later merged, thus effectively making Colonial Heights, as successor, both the employer and the building owner. We agree with Calewarts that the dual persona doctrine defeats Colonial Heights' argument.

¶20 When a corporation merges into another, the merged entity becomes liable for the obligations of the predecessor corporation. *See* ***Sedbrook v. Zimmerman Design Group, Ltd.***, 190 Wis. 2d 14, 20, 526 N.W.2d 758 (Ct. App. 1994); ***Schweiner v. Hartford Accident & Indem. Co.***, 120 Wis. 2d 344, 348-52, 354 N.W.2d 767 (Ct. App. 1984). An employer becomes subject to the dual persona doctrine if "there ... exist[s] a duality or, in other words, a separate and distinct legal person." ***Id.*** at 352 (citing 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 72.8 (1983)). Thus, following a merger, an employer may acquire a dual persona relative to its employees, first as the employer and second as the party responsible for inherited liabilities. ***Schweiner***, 120 Wis. 2d at 352-54. This dual persona makes the employer liable in tort to employees for inherited liabilities distinct from the current employee-employer relationship, despite its protected status as an employer under the worker's compensation exclusive

remedy rule. ***Id.*** In adopting the dual persona doctrine, we "conclude[d] that the legislature never intended the Worker's Compensation Act to immunize the employer from liability for obligations arising from a source other than its role as an employer." ***Id.*** at 354.

¶21 Here, after the merger with Nicolet Paper, Milprint (Colonial Heights) acquired a "dual persona" relative to Calewarts, just as in ***Schweiner***. Therefore, while immune from safe place liability as Calewarts's employer from 1962-82, it is not immune from inherited liability for Nicolet Paper's conduct prior to the merger.

¶22 Colonial Heights argues ***Schweiner*** is distinguishable because it was a products liability case. It contends the doctrine cannot apply to a safe place violation by a property owner because such claims are not "independent from and unrelated to" the safe place duty the employer also owes the employee. We reject this contention. The proper focus of the dual persona doctrine is whether the obligations to the employee arose from distinct entities, not on the theory of liability. *See* ***id.*** at 352-53. Indeed, in ***Schweiner***, the plaintiff alleged ordinary negligence in addition to strict products liability. ***Id.*** at 347. The court did not bar the negligence claim simply because the employer also owed a duty of ordinary care to its employees. In any event, Colonial Heights' argument is a nonstarter. The treatise language it relies upon states that it is the *persona*—not the duty—that

must be independent and unrelated to the status as an employer.[6] *See* 6 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 113.01 (2010).

¶23 Colonial Heights next argues it cannot be liable under the safe place statute for the period prior to 1962 or from 1982-85 because it did not have actual or constructive notice of the unsafe conditions. Notice must be proven only if the alleged asbestos exposure was caused by an "unsafe condition associated with the structure," as opposed to a "structural defect," which carries no notice requirement. ***Barry***, 245 Wis. 2d 560, ¶¶22-23. Unsafe conditions are "those which involve the structure (or the materials with which it is composed) becoming out of repair or not being maintained in a safe manner." ***Id.***, ¶25 (citing HOWARD H. BOYLE, JR., WISCONSIN SAFE-PLACE LAW REVISED 143-44 (1980)). On the other hand:

> A defect is structural if it arises "by reason of the materials used in construction or from improper layout or construction." Thus, unlike a condition associated with the structure, which may develop over time, a structural defect is a hazardous condition inherent in the structure by reason of its design or construction.

Id., ¶28 (citations omitted).

¶24 The determination whether a property condition is an unsafe condition associated with the structure or a structural defect presents a question of law. ***Id.***, ¶17. We conclude Calewarts's alleged asbestos exposures resulted from an unsafe condition associated with the structure. Calewarts cites no evidence that

[6] Colonial Heights further argues the dual persona doctrine does not apply where the alleged second persona arises only because of additional duties concurrently owed to the employee, such as duties of a landowner. Calewarts does not, however, seek to hold Colonial Heights liable as the property owner after the merger, when Colonial Heights was both employer and owner.

the insulation was improperly installed or otherwise defective. While asbestos may be inherently dangerous, it is well-known that it is harmless if not disturbed. "The common theme of [cases involving unsafe conditions] is that the property hazards arose from the failure to keep an originally safe structure in proper repair or properly maintained." ***Id.***, ¶27. Calewarts's witnesses indicated the asbestos insulation was removed or released by intentional or accidental impacts or cutting, or, perhaps, due to repeated vibrations from the machinery. This falls squarely within the failure to maintain or repair framework.

¶25 Because the insulation was not a structural defect, Calewarts must demonstrate Nicolet Paper (Colonial Heights) had actual or constructive notice that the asbestos insulation was being released into Milprint's workplace prior to 1962, and that Philip Morris Industrial (Colonial Heights) had such notice from 1982-85. We conclude there is sufficient evidence of actual or constructive notice to at least create a material issue of disputed fact as to both time periods.

¶26 "Constructive notice of course is neither notice nor knowledge, but a mere shorthand expression. [A] person has constructive notice of something when for the promotion of sound policy or purpose he is to be treated as if he had actual notice, whether or not he had it in fact." ***Uhrman v. Cutler-Hammer, Inc.***, 2 Wis. 2d 71, 75, 85 N.W.2d 772 (1957). As a general rule, an owner "is deemed to have constructive notice of a defect or unsafe condition when that defect or condition has existed a long enough time for a reasonably vigilant owner to discover and repair it." ***Megal v. Green Bay Area Visitor & Conv. Bureau, Inc.***, 2004 WI 98, ¶12, 274 Wis. 2d 162, 682 N.W.2d 857. "The length of time required for the existence of a defect or unsafe condition that is sufficient to constitute constructive notice depends on the surrounding facts and circumstances, including the nature of the business and the nature of the defect." ***Id.***, ¶13. "When an

unsafe condition ... arises out of the course of conduct of the owner or operator of a premises or may reasonably be expected from [the] method of operation, a much shorter period of time, and possibly no appreciable period of time ..., need exist to constitute constructive notice." ***Id.*** (quoting ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 55, 150 N.W.2d 361 (1967)). Whether an employer had actual or constructive notice is generally a jury question. ***Gulbrandsen v. H & D, Inc.***, 2009 WI App 138, ¶14, 321 Wis. 2d 410, 773 N.W.2d 506.

¶27 Colonial Heights argues there is no evidence that Nicolet Paper, as mere owner, had any knowledge of the conditions in the Milprint side of the building prior to 1962. However, the asbestos insulation had been in place since before Calewarts was hired in 1950. There was evidence that the insulation was regularly disturbed or released by pipe repairs, vibrations, and impacts in the course of work; that insulation dust was abundant; and that Nicolet Paper sent CR Meyer employees to Milprint to repair the steam pipes and insulation. Moreover, as the steam and, therefore, steam pipes, originated in Nicolet Paper's portion of the building, it would be reasonable to infer that similar conditions existed on Nicolet Paper's premises. Thus, there is ample evidence on which a jury could rely to conclude Nicolet Paper had constructive notice because a reasonable owner would have discovered the unsafe conditions by 1962.

¶28 The case for notice is even stronger for 1982-85. While Philip Morris Industrial no longer operated Milprint after the sale in 1982, it had done so for over three decades, and had owned the building for two decades. Thus, one could reasonably infer it had constructive, if not actual, notice of the frequent pipe repairs, insulation disturbances, and abundant insulation dust on its premises. While Philip Morris Industrial was merely an owner/lessor after 1985, it would be reasonable to infer it knew, or should have known, the long-standing conditions

had not changed. This is particularly so given the lease terms, which explicitly required Philip Morris Industrial to maintain the steam lines.

¶29 Colonial Heights next argues it has no safe place liability because, as mere owners/lessors, its predecessors lacked control over the Milprint premises before 1962 and after 1982. Calewarts replies that, as to the first period, Colonial Heights did not raise the control issue in the circuit court until its reply brief. Calewarts further argues that, regardless, there is sufficient evidence of control as to both periods to preclude summary judgment. We agree.

¶30 Colonial Heights relies on ***Berger v. Metropolitan Sewerage Commission***, 56 Wis. 2d 741, 746, 203 N.W.2d 87 (1973), which held that an owner is not subject to safe place liability where a contractor takes "the complete control and custody of" the premises. Additionally, amicus curiae cites the following treatise language:

> Where the tenant uses the demised premises as a place of employment, the landlord has the duties of an "owner of a place of employment," at least where he knew of such use by the tenant. … The landlord's responsibility for unsafe conditions associated with the structure, which occur in demised premises, is limited to situations where he has retained some control over the demised premises, by way of right to reenter and repair or otherwise, and has actual or constructive notice of the defect.

BOYLE, *supra* at 125-27.

¶31 Colonial Heights' control argument as to the second period, 1982-85, is easily rejected. The lease terms explicitly required Philip Morris Industrial (Colonial Heights) to maintain the steam lines. This alone would permit a jury to infer Philip Morris Industrial "retained some control over the demised premises, by way of right to reenter and repair." Additionally, the lease stated that Milprint

was paying Philip Morris Industrial a surcharge to cover the cost of maintaining the steam pipes. It also required Milprint to obtain permission before making certain types of alterations to the premises, including those that would result in additional requirements for steam. Moreover, there is evidence that CR Meyer personnel were sent to Milprint for the purpose of maintaining or repairing the pipes.

¶32 This evidence that the Nicolet Papers division sent CR Meyer employees to Milprint similarly provides evidence of control as to the first period, before 1962. Additionally, the terms of the later lease, together with Nicolet Paper's supply of steam to Milprint, further support an inference that Nicolet Paper retained some right of control to enter the Milprint premises to conduct repairs on its steam lines. Regardless, unlike ***Berger***, 56 Wis. 2d at 744, here the defendant owner has proffered no contract language (i.e., a lease) in support of its argument that it relinquished complete control over the premises. As the party seeking summary judgment, it was Colonial Heights' burden to present a prima facie defense. ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 550, 327 N.W.2d 55 (1982). Indeed, Colonial Heights could not have presented a prima facie defense in the circuit court because it did not raise the control issue, as to the first time period, until its summary judgment reply brief.[7]

[7] Calewarts asserts that Colonial Heights' tardy argument deprived Calewarts of the ability to obtain a copy of the lease for the first period. According to the circuit court's scheduling order, discovery remained open beyond the motions filing deadline. Calewarts stressed at the summary judgment hearing that the issue was first raised in Colonial Heights' reply brief. However, as the circuit court did not provide detailed reasons for its decision, adopting Colonial Heights' arguments in toto, it did not address this matter.

¶33 As to Philip Morris USA, Colonial Heights asserts the circuit court dismissed the claims against that related entity because Calewarts failed to identify any basis for its liability and conceded it was not attempting to pierce the corporate veil. Calewarts does not address this issue, much less the distinction between Philip Morris USA and Philip Morris Industrial, in her initial appellate brief. Therefore, we deem Calewarts to have forfeited the matter. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Further, while Calewarts replied with argument when this failure to appeal was addressed in Colonial Heights' response brief, we generally disregard issues raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). Regardless, Calewarts's reply argument is insufficiently developed and lacks citation to the record. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may disregard issues that are inadequately briefed or lack record citation). We therefore affirm that part of the judgment dismissing all claims against Philip Morris USA.

International Paper

¶34 International Paper (Hammermill) purchased the Nicolet Paper division in 1985, taking ownership of the building and the existing lease to Milprint. International Paper first argues there is no "reliable" evidence that Calewarts was exposed to asbestos from 1985 to 1990, when he transferred to a new facility. This argument, ignoring the summary judgment standard and lacking citation to legal authority, does not merit discussion. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. In any event, International Paper's acknowledgements of asbestos evidence as late as 1971, and of the 1990 OSHA violation for improper asbestos handling—regardless whether the violation occurred before or after Calewarts

transferred—would permit a jury to conclude that there was also asbestos insulation present at Milprint from 1985-90.

¶35 Next, International Paper argues, for the first time on appeal, that a statute of repose would apply and bar Calewarts's claim if the asbestos insulation is deemed a structural defect. Because we have concluded the insulation was not a structural defect, we need not resolve this issue.

¶36 International Paper also argues it has no safe place liability because it had no control over the Milprint portion of the building. This argument fails for the same reason Colonial Heights' argument on this issue fails. The same lease and other evidence of control/repairs regarding the steam piping applies to both parties.

¶37 International Paper further suggests it lacked notice of the allegedly unsafe conditions. However, it then concedes the issue by failing to respond to Calewarts's argument or develop any argument of its own. Instead, International Paper asserts we need not "even consider the issue" because it lacked control over the premises.

¶38 Finally, International Paper argues the circuit court properly determined that Calewarts failed to plead a claim for common law negligence. We disagree. Alleging a safe place violation subsumes common law negligence. "Wisconsin's safe place statute ... is a negligence statute that, rather than creating a distinct cause of action, instead establishes a duty greater than that of ordinary care imposed at common law." ***Barry***, 245 Wis. 2d 560, ¶18. However, "the safe place and common law standards of care address different types of negligence—the safe place statute addresses unsafe conditions and common law addresses negligent acts." ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶23, 329

Wis. 2d 91, 789 N.W.2d 106 (citing ***Megal***, 274 Wis. 2d 162, ¶9). Despite this different focus, the same set of facts may support both a safe place claim and an ordinary negligence claim. *See* ***Megal***, 274 Wis. 2d 162, ¶25. Thus, Calewarts's amended complaint, which asserted a safe place negligence claim and alleged failures to warn, investigate, test for asbestos, and establish adequate safety measures, gave the defendants sufficient notice of an ordinary negligence claim. "A person is negligent if the person, without intending to cause harm, either acts affirmatively or fails to act in a way that a reasonable person would recognize as creating an unreasonable risk of injury." ***Id.***

CR Meyer

¶39 CR Meyer, an independent contractor that was hired to perform work at both Nicolet Paper and Milprint, argues summary judgment was appropriately granted because there was no evidence that it performed any work that exposed Calewarts to asbestos. We disagree and conclude the circuit court erred by requiring evidence of a specific instance of exposure.

¶40 Calewarts's amended complaint alleged CR Meyer removed asbestos from his place of employment. It further alleged, generally, that the several named products liability negligence defendants, inter alia, "[u]sed unsafe techniques, methods, or processes in the installation or removal of asbestos containing products." Calewarts produced evidence that CR Meyer installed, repaired, and removed asbestos insulation on the steam pipes at Milprint.

¶41 CR Meyer asserts, "The testimony in this case varies as to the frequency in which [it] worked at Milprint." It then gives three examples: Mark Motiff estimated that CR Meyer worked at Milprint every couple of months; another witness specifically recalled only a single four- to five-day project in the

1970s; and Bernard Jones "testified that [CR Meyer] only worked at Milprint during a three year period in the 1940s."

¶42 Of course, on summary judgment, we are not concerned about whether the evidence "varies" among witnesses. We construe all of the evidence in favor of the nonmoving party—here, Calewarts. Moreover, CR Meyer's recitation of the testimony is selective at best. For instance, while Motiff testified he only saw them working on steam lines on the fourth floor about "once every couple of months," he continued, "[B]ut that's not to say that they weren't there more often because I worked a first and second shift. So you wouldn't always see them on second shift." He further testified, "They were all over the place doing work all the time at Milprint and were observed by our people actually on the floors." Similarly, Jones testified not only that CR Meyer installed pipes and insulation once around 1947, but that "I think they were back for some smaller jobs." Although he could not recall what those jobs were or whether they involved asbestos, "[t]hey could have."

¶43 CR Meyer then variously attacks the weight of evidence proffered by Calewarts. For example, it asserts Kenneth Willems's testimony does not support Calewarts's assertion that CR Meyer's work on the fourth floor exposed Calewarts to asbestos because "Willems admitted that he could not provide any testimony that Robert was in the vicinity of any work performed by [CR Meyer] on the fourth floor." While Willems could not recall a specific instance where he, Calewarts, and a CR Meyer employee were present together, in response to a suggestion that Willems's testimony was "pure speculation," Willems responded, "Well if I [saw] the guys ... and everybody else [saw] them ..., and he was alive and he had eyes, he [saw] them, too." CR Meyer also emphasizes that Willems stated he never observed its employees replace any pipe insulation. However, it

omits Willems's testimony that he assumed CR Meyer did so because "they were in the mill a lot of different times, and there was stuff done that we know our steam fitter didn't do ...."

¶44 CR Meyer similarly challenges the value of Motiff's testimony, because his "specific testimony reveals that [he] denied any knowledge that insulation purportedly removed by [CR Meyer] in the steam line repair work was asbestos-containing." However, Motiff testified CR Meyer employees would come over from Nicolet Paper and do work on Milprint's steam lines and they would just knock the insulation off with a hammer, sweep it up, and toss it in a broke box. Further, while Motiff stated he did not have "personal knowledge" that the pipe insulation contained asbestos, he described the insulation's appearance and explained that he was involved in union bargaining and that around 1987 Milprint agreed to shut off two presses with plastic barriers so that no one would be exposed to the asbestos that was being removed. Moreover, there is hardly a dispute that the pipe insulation contained asbestos, given CR Meyer's OSHA violation for improperly removing asbestos pipe insulation in 1990.

¶45 The foregoing examples demonstrate there is evidence that CR Meyer installed, repaired, and removed asbestos insulation many times over many years and that Calewarts could have been exposed, either during repairs or after, as the insulation was simply knocked off and left lying in open trash carts. While the amount of work and exposure may be disputed, those disputed facts preclude resolution by summary judgment.

¶46 Further, CR Meyer is mistaken when it argues Calewarts must provide direct evidence of specific exposures. That is not the law. Rather, he need only present evidence of potential exposure to survive summary judgment.

See ***Horak v. Building Servs. Indus. Sales Co.***, 2008 WI App 56, ¶¶10-16, 309 Wis. 2d 188, 750 N.W.2d 512; ***Zielinski v. A.P. Green Indus., Inc.***, 2003 WI App 85, ¶16, 263 Wis. 2d 294, 661 N.W.2d 491 (plaintiff must "present[] credible evidence from which a reasonable person could infer that [the plaintiff] was exposed"). A jury may infer exposure, i.e., causation, from the "totality of the circumstances." ***Zielinski***, 263 Wis. 2d 294, ¶18.

¶47 While Calewarts's industrial hygiene expert, William Ewing, was unable to point to any direct evidence of specific exposures—providing the basis of the circuit court's summary judgment holding—Ewing opined that the types of exposure described by Calewarts's witnesses would constitute "significant exposure" that would increase the risk of asbestos related disease. Taken as a whole, the evidence in this case would permit a reasonable inference that CR Meyer's actions exposed Calewarts to asbestos.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.