



54 of 62 DOCUMENTS

**SCOTT MYERS, Individually, and SCOTT MYERS, as Parent as Next Friend of
SIERRA MYERS and BRENNAN MYERS, Minors, Plaintiffs-Appellants, vs.
RELIANCE WATER HEATER COMPANY, RELIANCE WATER HEATER
COMPANY, INC., RELIANCE STA KLEEN WATER HEATER COMPANY,
RELIANCE STA KLEEN WATER HEATER COMPANY, INC., STATE
INDUSTRIES, INC., A.H. SMITH CORPORATION, A.O. SMITH
CORPORATION, INC., and/or UNKNOWN and UNNAMED MANUFACTURER
OF THE CERTAIN STA KLEEN 502 WATER HEATER, Defendants-Appellees.**

No. 7-712 / 07-0328

COURT OF APPEALS OF IOWA

2007 Iowa App. LEXIS 1307; CCH Prod. Liab. Rep. P17,890

December 12, 2007, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at *Myers v. Reliance Water Heater Co.*, 743 N.W.2d 872, 2007 Iowa App. LEXIS 2027 (Iowa Ct. App., Dec. 12, 2007)

PRIOR HISTORY: [*1]

Appeal from the Iowa District Court for Wright County, Kurt Wilke, Judge. Plaintiff appeals from a district court summary judgment ruling dismissing his product liability action against the manufacturer of a water heater as barred by the statute of repose.

DISPOSITION: REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

COUNSEL: Brett J. Beattie and Donald G. Beattie of Beattie Law Firm, P.C., Des Moines, for appellants.

Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron, & Wegman, L.L.P., Des Moines, and James A. Niquet and Travis J. Rhoades of Drivello, Carlson & Mentkowski, Milwaukee, Wisconsin, for appellees.

JUDGES: ZIMMER, J. Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

OPINION BY: ZIMMER**OPINION****ZIMMER, J.**

Scott Myers, individually and as parent and next friend of Sierra and Brennan Myers, appeals from a district court summary judgment ruling dismissing his product liability action against defendants (collectively "State Industries") as barred by the statute of repose set forth in *Iowa Code section 614.1(11) (2005)*. We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

Myers was injured in a propane gas explosion that occurred in his home on June 25, 2004. He filed suit against State Industries [*2] on June 28, 2005, asserting claims of negligence, breach of express and implied warranty, and strict liability. Myers alleged a Reliance Sta Kleen 502 water heater manufactured by State Industries caused or contributed to the explosion.

The serial number affixed to the water heater was H90586488. The serial number indicates the manufacture date of the water heater. The month of manufacture is designated by the first letter of the serial number, and the year of manufacture is designated by the first two numbers.

State Industries moved for summary judgment, contending the claims against it should be dismissed as barred by the fifteen-year statute of repose set forth in *section 614.1(11)*. State Industries argued the serial number prefix "H90" [*3] means the water heater was manufactured in May 1990, while Myers argued the prefix indicated the water heater was manufactured in August 1990. The district court agreed with State Industries and found the undisputed facts established that the water heater was manufactured in May 1990. The court accordingly granted the motion for summary judgment because Myers's suit was brought more than fifteen years after the date the water heater was manufactured.

Myers appeals. He claims the district court erred in granting summary judgment in favor of State Industries because a genuine issue of material fact exists as to the date the water heater was manufactured.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. *Iowa R. App. P. 6.4; Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Iowa R. Civ. P. 1.981(3); Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). [*4] A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

The party moving for summary judgment has the burden to prove the facts are undisputed. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). However, when a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing the existence of a genuine issue for trial. *Iowa R. Civ. P. 1.981(5); Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). The court views the facts in a light most favorable to the nonmoving party. *Walderbach*, 730 N.W.2d at 199-200.

III. Discussion.

Iowa Code section 614.1(11) provides:

Improvements to real property. In addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty . . . and founded on injury to [*5] property, real or personal, or injury to the person or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death.

Our supreme court has characterized *section 614.1(11)* as a statute of repose, "which closes the door after fifteen years on certain claims arising from improvements to real property." *Krull v. Thermogas Co.*, 522 N.W.2d 607, 611 (*Iowa 1994*). The fifteen-year period begins to run from the date the improvement to real property was manufactured. *E. Iowa Propane, Ltd. v. Honeywell*, 652 N.W.2d 462, 464 (*Iowa 2002*).

The issue in this case concerns the month Myers's water heater was manufactured. State Industries argues the undisputed facts establish that the water heater was manufactured in May 1990. We do not agree.

In support of its motion for summary judgment, State Industries offered the affidavit and deposition of Donald J. McKeeby Jr. He has been employed by State Industries as a claims manager since 1991. McKeeby stated that in the 1990s, the letters assigned to the month of manufacture correlated to the fiscal year for State Industries. [*6] He explained State Industries' serial number system "started with A through M, skipping I, and A started with October" because the company's fiscal year "ended at the end of September." Thus, for example, the prefix "A90" would indicate the water heater was manufactured in October 1989, while "D90" meant the water heater was manufactured in January 1990.¹ McKeeby therefore concluded the "H90" prefix of the serial number for Myers's water heater established that it was manufactured in May 1990.

1 State Industries also submitted computer printouts as exhibits at McKeeby's deposition. One such printout shows a water heater with a serial number of "B95355638" was manufactured on "11/10/94."

Steve Maxey, the national technical sales manager for State Industries, has worked for the company in various positions since 1967. Maxey's affidavit submitted in support of the company's motion for summary judgment stated from 1989 to 1995, he was the national product service manager for State Industries. As such, he was "intimately familiar with the manufacturing process of all State Industries, Inc. water heaters in 1990." He confirmed that in 1990, State Industries "assigned serial numbers to its [*7] water heaters with the first letter denoting the month of manufacture as follows: A = October . . . H = May . . . M = September." Thus, Maxey likewise concluded, "[T]he serial number on the data plate of the subject State Industries, Inc. water heater, which begins 'H90,' means that the product was manufactured in . . . May, 1990."

In resistance to the summary judgment motion, Myers offered the affidavit of W.A. Bullerdiek, a "graduate Engineer who has been involved for many years with propane safety."² He has also served as a "principal investigator and/or consultant to State and Federal Agencies dealing with propane matters including specifically water heaters and controls," in addition to "decades of involvement in propane litigation" and "litigation involving the water heaters manufactured by State Industries." Bullerdiek's affidavit stated that "[i]t is the custom and standard of the industry to use a calendar year" for its serial number system. In his experience with "serial numbers assigned to propane-fired appliances, this is the first time" he has "ever learned that a manufacturer . . . has attempted to claim that . . . its serial number system was based upon a fiscal year, [*8] as opposed to a calendar year." He also noted that "[a]lthough most manufacturers of liquefied propane-fired appliances have produced written documentation to explain the meaning of the serial numbers attached to their products," State Industries "denies having such documentation in this case."

2 Myers also offered a document purporting to be the affidavit of James Thrasher, a licensed plumbing

contractor in the state of Iowa, in addition to printouts from two different websites and a portion of a study from the United States Department of Energy in its resistance. State Industries argues Thrasher's statement, website printouts, and the Department of Energy study are deficient in various respects under our rules of civil procedure governing summary judgment. We need not address these arguments due to our conclusion that Bullerdiek's affidavit alone is sufficient to defeat summary judgment.

According to Bullerdiek, the control valve of Myers's water heater was manufactured between April 29 and May 5, 1990. State Industries does not dispute this fact. Bullerdiek therefore concluded the manufacture of the water heater itself was "most likely" not completed until "sometime between July [*9] 28, 1990 and August 3, 1990," because the date of manufacture for water heaters is "typically on the order of ninety (90) days from the date of manufacture of the control valve that is included as a component of the end product." Maxey, however, stated that in 1990, the "standard production process did not take State Industries 90 days to complete" because the company "had its own fleet of trucks which it would regularly use to pick up control valves from its suppliers on an as-needed basis, usually weekly."

Upon viewing the record in the light most favorable to Myers, we conclude reasonable minds could differ as to the date the water heater was manufactured. We reject State Industries' argument that Bullerdiek's affidavit is deficient because he does not have "personal knowledge regarding the serial numbering and manufacture process of State water heaters in the 1990s." His conclusion as to the date Myers's water heater was manufactured is based upon his considerable experience with "propane safety," which has made him "very aware of the standards, customs and practices of propane appliance manufacturers." He has "personally been involved in numerous cases involving issues concerning [*10] how water heaters are manufactured, as well as the timing of the manufacture and selling of water heaters."

We likewise reject State Industries' argument that Bullerdiek's affidavit is insufficient to defeat summary judgment because it is "based on conclusions" and "generalities." While it is true that Bullerdiek's affidavit contains his opinion as to the date the water heater was manufactured, "that is the nature of expert testimony." ³ *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988). State Industries also contends Bullerdiek's affidavit merely "attack[s] the credibility of the sworn testimony of the State employees." We agree with Myers that credibility determinations are "peculiarly the responsibility of the fact finder to assess," and not the district court when ruling on a motion for summary judgment. *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005).

3 State Industries also argues Bullerdiek's affidavit is "not admissible expert testimony." This argument was not presented to or decided by the district court. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided [*11] by the district court before we will decide them on appeal."). We therefore need not and do not address this argument on appeal.

We therefore conclude Bullerdiek's affidavit sets forth a genuine issue of material fact as to the date Myers's water heater was manufactured. The district court consequently erred in granting summary judgment in favor of State Industries.

IV. Conclusion.

Based upon the foregoing, we conclude a genuine issue of material fact exists as to the date the water heater was manufactured. The district court consequently erred in granting summary judgment in favor of State Industries. We therefore reverse the judgment of the district court and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.