

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 18, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-2133**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ROBERTA L. BRUNELL,**

**PLAINTIFF-APPELLANT,**

**STATE OF WISCONSIN/IRON COUNTY DEPARTMENT OF  
HUMAN SERVICES,**

**PLAINTIFF,**

**V.**

**MILJEVICH CORPORATION, A MICHIGAN CORPORATION,**

**DEFENDANT-RESPONDENT,**

**CITIZENS INSURANCE COMPANY OF AMERICA,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Iron County:  
PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Roberta Brunell appeals a summary judgment dismissing her personal injury claim against Miljevich Corporation (hereinafter, Miljevich) and its insurer. Brunell contends that the trial court erroneously concluded that her negligence exceeded Miljevich's as a matter of law. We agree and therefore reverse the judgment and remand for further proceedings.

Roberta was injured when a backing truck, driven by Randy Hemming, struck and pinned her against a wood chipper. Roberta's complaint alleges that Miljevich was in possession and control of the accident site. Miljevich is a "chipping" business; it chips trees for use at paper mills. The chipping operation is carried on only during daylight hours, but the trucks transporting the chips sometimes arrive at night to be in line first thing in the morning.

The trucks must back up to the chipper, and the chips are blown into the van. Sometimes the ground around the chipper is rutted up, muddy and littered with branches, bark and other wood debris. It varies from day to day; a bulldozer is used to level and clear off the ground. The chippers have two battery operated lights, one illuminating the spot where the truck is and the other in the back where the fuel tank is. The motor does not have to be running to turn on the lights. Miljevich does not work at night; therefore, the lights are not generally used.

Randy, Roberta's boyfriend,<sup>1</sup> worked as a truck driver for Ribach Trucking. Ribach is an independent contractor who contracted with Miljevich to haul the wood chips to the mills. At her deposition, Roberta testified to the effect that Ribach and Miljevich both knew that she rode with Randy in his truck to and

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<sup>1</sup> He is now her husband.

from job sites.<sup>2</sup> Randy and Roberta arrived at the work site after dark so that Randy could be the first one loaded in the morning. Roberta apparently exited the truck to direct Randy where to back up. She testified that the area was unlit, the ground was uneven and littered with debris, and she was injured because she slipped and fell while trying to avoid the backing truck.<sup>3</sup> Although Roberta and Randy were at a picnic earlier in the day and Roberta consumed alcohol, she denied that she was under the influence of alcohol at the time of her accident.

The trial court found the following facts undisputed: Roberta entered the premises at eleven o'clock in the evening when the company was not open for business, and she had a flashlight in hand to survey the area where she would stand and to direct the truck. Roberta placed herself in a dangerous position between a heavy piece of equipment and a large semi truck, being aware of the dangers involved. The court discounted her blood alcohol level of .121%. Nonetheless, it concluded that her negligence exceeded 50% and granted summary judgment in favor of Miljevich.

When reviewing a summary judgment, this court applies the same standards set forth in § 802.08, STATS., as the trial court. ***Griebler v. Doughboy Recreational***, 160 Wis.2d 547, 559, 466 N.W.2d 897, 902 (1991). Our review is de novo. *See id.* Summary judgment is granted when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

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<sup>2</sup> Both parties fail to provide document numbers for their record citations. Failure to provide document numbers inhibits the court's ability to locate documents in the record. Because the underlying facts are essentially not disputed, we largely rely on the briefs for the factual statement. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (contentions not refuted deemed admitted).

<sup>3</sup> In his brief, Miljevich states that Roberta has filed an action in Michigan against Randy and Ribach Trucking, his employer. That action was scheduled for trial April 12, 1999.

The trial court may not base its ruling on its assessment of the weight of the evidence or the witnesses' credibility, but must deny summary judgment sought by a defendant if the plaintiff presents any evidence upon which a jury could reasonably find in the plaintiff's favor. *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). Justifiable inferences are drawn in favor of the nonmoving party. *Id.* at 338-39, 294 N.W.2d at 477.

Brunell argues that the trial court erroneously concluded that her negligence exceeded Miljevich's as a matter of law. She maintains that the area surrounding the chipper was littered with debris, was muddy and uneven. She contends that Miljevich knew truck drivers arrived at night or before dawn to be first in line behind the wood chipper. She points out that Miljevich employed a night watchman who was aware of the activities, but that Miljevich failed to supply adequate lighting and failed to clean up the dangerous conditions around the chipper machine.<sup>4</sup> She contends that the debris caused her fall and prevented her from getting away from the backing truck. We conclude that the record discloses evidence from which competing inferences may be drawn. "The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others ...." *Ceplina v. South Milwaukee School Bd.*, 73 Wis.2d 338, 342, 243 N.W.2d 183, 185 (1976). "'Negligence' consists of failing to use that degree of care which would be exercised by a reasonable person under the circumstances." *Id.* As a general rule, however, the existence of negligence is a question of fact for the jury. *Id.* "This court has stated that summary judgment

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<sup>4</sup> It is undisputed that the chipper's operating manual requires the area around the chipper to be cleared of debris after each day's operation.

does not lend itself well to negligence questions and should be granted in actions based on negligence only in rare cases." *Id.* at 342-43, 243 N.W.2d at 185.

The resolution of competing inferences concerning comparative negligence is factually sensitive. Summary judgment methodology prohibits the trial court from weighing evidence, assessing credibility or deciding an issue of fact. *In re Cherokee Park Plat*, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment. *Id.* at 116, 334 N.W.2d at 583. We conclude that the issue before us, the parties' comparative negligence, presents a fact question inappropriate for summary judgment.

Miljevich argues that Brunell's claim should be barred as a matter of law by application of the open and obvious danger defense. "[T]he open and obvious danger defense applies whenever a plaintiff confronts an open and obvious condition and a reasonable person in the position of the plaintiff would recognize the condition and the risk the condition presents." *Griebler*, 160 Wis.2d at 551, 466 N.W.2d at 898. It also applies when a reasonable person in the plaintiff's position would not appreciate the gravity of the harm threatened by the open and obvious condition. *Id.* Our supreme court applied this doctrine to bar Griebler's claim for injuries resulting from his headfirst dive into water of unknown depth.

Miljevich compares the case before us with *Griebler* and urges that we reach the same conclusion as our supreme court did in *Griebler*. We appreciate the similarities, but conclude that there are material distinctions. First, Brunell claims to have slipped on debris; she did not dive headfirst into it.

Although she concedes she was behind the truck, she apparently believed that if not for the debris, she would have been able to move out of its way. Miljevich exercised control of the premises and cleaned up and leveled the area at times, apparently recognizing the danger of working in a debris laden area. Although the work site was not open, the record suggests that Miljevich permitted trucks to arrive and line up at night. We conclude that the record suggests sufficient factual ambiguities to warrant a trial on the issue of the parties' comparative negligence.

Next, Miljevich contends that the facts demonstrate that Brunell's negligence outweighed Miljevich's as a matter of law, comparing this case to *Johnson v. Grzadzielewski*, 159 Wis.2d 601, 465 N.W.2d 503 (1990). *Johnson* involved a college student's claim for injuries sustained while "expressing" an elevator. The *Johnson* court observed that the plaintiff not only "expressed" the elevator, but intentionally climbed into a dangerous location instead of using a clearly available safe means of exit. *Id.* at 608-09, 465 N.W.2d at 506. *Johnson* held that expressing an elevator was a "dangerous and intentional misuse of an elevator, which can foreseeably lead to the grave injury that occurred in this case." *Id.* at 608, 465 N.W.2d at 506.

We conclude that the facts before us are unlike *Johnson* because they do not present an intentional and patently dangerous misuse of equipment. While Miljevich characterizes Brunell's actions as intentional, Brunell maintains that her fall was unintentional and the result of the debris laden premises. We conclude that a trial is warranted to develop the facts to permit the fact-finder to compare the parties' negligence.

*By the Court.*—Judgment reversed and cause remanded.

This opinion will not be published. RULE 802.23(1)(b)5, STATS.

