COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 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. 99-0241-FT

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

KEVIN S. FROEMEL,

PLAINTIFF-APPELLANT,

V.

NORTHERN STATES POWER COMPANY AND
ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

XYZ INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Kevin Froemel appeals a summary judgment that dismissed his personal injury lawsuit against Northern States Power Company

(NSP).[1] Froemel suffered an electrical shock when he came in contact with an NSP high-voltage power line while repairing a roof. The circuit court ruled that Froemel understood the danger presented by wires in his work area and was thereby more negligent as a matter of law. On appeal, Froemel argues that he was not more negligent than NSP as a matter of law. NSP contends that Froemel acted voluntarily, in the face of an "open and obvious danger," and that this relieves the company of liability. We conclude that the record contains disputed facts concerning comparative negligence. We therefore reverse the summary judgment and remand the matter for further proceedings.

The determination of negligence presents a mixed question of fact and law. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 732, 275 N.W.2d 660, 665 (1979). Negligence is the failure to use ordinary care. *See* ***Marcniak v. Lundborg***, 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). Comparative negligence is usually a jury question. *See* ***Cirillo v. City of Milwaukee***, 34 Wis.2d 705, 716-17, 150 N.W.2d 460, 466 (1967). The circuit court should grant summary judgment only if the record showed undisputed facts and inferences that Froemel was more negligent as a matter of law. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995). Courts must draw all inferences in favor of the nonmoving party. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If a plaintiff is fifty-one percent negligent as a matter of law, however, courts have a duty to grant defendants judgment dismissing the complaint. *See* ***Gross v. Denow***, 61 Wis.2d 40, 49, 212 N.W.2d 2, 7 (1973).

[1] This is an expedited appeal under RULE 809.17, STATS.

Here, the circuit court properly ruled on the limited record that a jury could find Froemel negligent. In the process of repairing the roof, Froemel was carrying tar buckets in crouched steps over the peak and under the power wire to the other side. In that effort, he made unsuspecting and unexplainable contact with the wire. This conduct permits an inference that Froemel failed to use ordinary care. A jury could find Froemel negligent from his decision to go ahead and work near the high-voltage wire, however careful he was or thought he could be in carrying out such work. The facts, however, also permitted an inference that NSP was negligent. A predecessor power company correctly hung the wires in 1972, before the building Froemel was working on existed. At the time Froemel was injured, however, those wires hung too close to the roof, in violation of the current electrical code. NSP had come to the property sometime before the accident and therefore had reason to know of the code violation and the hazard it presented.

NSP seeks to apply the "open and obvious danger" doctrine to these facts. That doctrine applies to plaintiffs who voluntarily face an open and obviously dangerous condition, one that has a high probability of causing harm. *See* ***Kloes v. Eau Claire Cavalier***, 170 Wis.2d 77, 87, 487 N.W.2d 77, 81 (Ct. App. 1992). However, the Wisconsin Supreme Court has now cleared up the widespread confusion that crept into the doctrine by many conflicting cases. In ***Rockweit v. Senecal***, 197 Wis.2d 409, 541 N.W.2d 742 (1995), the supreme court made clear that an "open and obvious danger" is no longer a complete bar to recovery, something that would take the case from the jury. *See* ***id***. at 422-23, 541 N.W.2d at 748-49. Rather, it is now simply an element that a jury must examine in its negligence apportionment. *See* ***id***. As such, its existence would not automatically merit summary judgment.

Here, we will assume *arguendo* that the low-hanging high-voltage line represented an "open and obvious danger." The circuit court still had a duty to weigh and compare the parties' relative faults, as affected by the "open and obvious danger." NSP deserved summary judgment only if Froemel's negligence, in working near the high-voltage line in the face of the "open and obvious danger," exceeded NSP's negligence as a matter of law. We are satisfied that the circuit court could not make such a determination. A reasonable jury could find that both parties had substantial levels of fault. Froemel worked in a manifestly dangerous area despite admitted knowledge of the danger, and NSP never rectified the danger despite having at least constructive knowledge of the code violations. Under the circumstances, we cannot say as a matter of law that Froemel had a greater causative fault than NSP. If the danger was "open and obvious" to Froemel, it was the same to NSP. Summary judgment was inappropriate.

By the Court.—Order reversed and cause remanded for further proceedings consistent with this opinion.

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