COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0144

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

DAVID L. SCHAUB AND KAREN M. SCHAUB,

PLAINTIFFS-APPELLANTS,

BENEFITS ASSOCIATES AND EMPLOYERS HEALTH INSURANCE,

INVOLUNTARY-PLAINTIFFS,

V.

WILSON MUTUAL INSURANCE COMPANY AND LELAND SCHAUB,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. David L. Schaub and Karen M. Schaub appeal from the judgment dismissing their negligence claim against David's father, Leland Schaub. The issue on appeal is whether the respondents were entitled to summary judgment as a matter of law. Because we conclude that the respondents were entitled to summary judgment, we affirm.

¶2 The incident underlying this action occurred in November 1995 at the home of Leland Schaub. David and Karen were visiting David's parents when Leland decided that he needed to remove ice from the roof and gutters of his house. Leland had been released from the hospital the previous day. David, Karen, and David's mother attempted to discourage Leland from undertaking this task. Eventually, David said that he would clean the ice from the roof. A ladder was set up on the frozen ground. David climbed up the ladder and used a hose with hot water to remove the ice. Apparently the hot water caused the frozen ground to start to melt, the ladder became unstable, and David fell and injured himself. He and Karen then sued Leland and his insurance company for negligence, claiming medical expenses, lost wages, and other damages as a result of this incident.

¶3 After discovery was conducted, Leland's insurance company, Wilson Mutual Insurance Company, moved for summary judgment dismissing all claims. The grounds for the summary judgment motion was that, as a matter of law, David's negligence exceeded that of Leland. Oral arguments were heard and the court granted the motion, finding that the causal negligence of David exceeded that of Leland. It is from this judgment that Karen and David appeal.

¶4 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *See* ***M & I First***

Nat'l Bank v. Episcopal Homes Management, Inc., 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97.

¶5 There are not any genuine issues of material fact in dispute.[1] The appellants argue that the trial court erred when it concluded that the respondents were entitled to judgment as a matter of law. The elements of negligence are: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 531, 247 N.W.2d 132 (1976).

¶6 Specifically, the appellants claim that Leland had a duty to David which he breached and thereby caused David's injuries. Although the appellants have identified seven specific duties which they allege Leland breached, they are, in essence, arguing that Leland created the hazardous condition which caused David's accident and that he therefore had a duty to protect David from it.[2] The trial court rejected this argument, finding that, as a matter of law, there is generally

[1] The appellants assert at one point in their brief that there are genuine issues of material fact. They do not, however, identify those issues or cite to the disputed facts in the record. The trial court found that there were not any genuine issues of fact and we agree with that finding.

[2] The appellants argue that Leland breached seven specific duties to David: (1) the duty to provide correct direction for the endeavor; (2) the duty not to create a hazardous condition to invitees upon his land; (3) the duty to set up the ladder in a proper manner; (4) the duty to provide proper tools for the endeavor; (5) the duty to hold the ladder and provide stability while David was using the ladder; (6) the duty not to force another into a dangerous situation; and (7) the duty to one in a subservient relationship.

no duty in Wisconsin to protect another from a hazardous situation. *See* ***Winslow v. Brown***, 125 Wis. 2d 327, 331, 371 N.W.2d 417 (Ct. App. 1985). We conclude that the appellants have not established that Leland owed a duty of care to David under these circumstances.

¶7 We also conclude, however, that even if Leland did have some duty to David, David's negligence was equal to or greater than Leland's. "Where the evidence of the plaintiff's negligence is so clear and the quantum so great, and where it appears that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold." ***Johnson v. Grzadzielewski***, 159 Wis. 2d 601, 608, 465 N.W.2d 503 (Ct. App. 1990).

¶8 The undisputed facts show that David was an adult at the time of the accident who agreed to undertake the ice removal in order to prevent his father from hurting himself. While Leland's actions may have caused David to go up the ladder, Leland did not require that David perform the ice removal in an unsafe manner. The appellants have not alleged that the ladder or any of the other tools used were defective in any way. The danger of climbing up a ladder is open and obvious. Further, the effect of hot water on frozen ground is also open and obvious. A reasonable person undertaking the same task would have been aware of the danger of falling off a ladder and of the frozen ground becoming unstable when doused with hot water.

¶9 We agree with the trial court's conclusion that David and Leland were in equal positions to know of the danger of using a ladder which rested on frozen ground. As the trial court stated: "[C]ommon sense says that when you stand on a ladder you have to make sure it stands up in a manner in which it won't

come down and cause injury. And there's been nothing submitted here, through expert testimony or otherwise, which would indicate that there was something unique-- uniquely known to the defendant about this circumstance that the plaintiff was unaware of ...." Therefore, the trial court properly determined that David's negligence was equal to or greater than Leland's, and we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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