

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP1195

Cir. Ct. No. 2007CV9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL F. DOBRZYNSKI,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN PUBLIC SERVICE CORPORATION, M. J. ELECTRIC, INC. AND
NORTHERN CLEARING, INC.,**

DEFENDANTS-RESPONDENTS,

POWER ENGINEERS, INC. AND FAMILY HEALTH CENTER OF MARSHFIELD,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Clark County:
JAMES M. MASON, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Dobrzynski appeals a judgment dismissing his personal injury claims against Wisconsin Public Service Corporation, M. J. Electric, Inc. and Northern Clearing, Inc. The issue is whether the trial court properly granted summary judgment, or whether a material factual dispute remains as to any or all of the respondents. We affirm dismissal as to WPS and Northern Clearing. However, we conclude that a material factual dispute exists concerning Dobrzynski's claim against M. J. Electric. We therefore reverse and remand for further proceedings on that claim.

¶2 Dobrzynski granted WPS an easement to construct a transmission line across his farm. WPS hired M. J. Electric to construct the line. M. J. Electric hired Northern Clearing to prepare Dobrzynski's property for construction, and to restore it and clean it up after completion of the line.

¶3 Northern Clearing constructed a driveway connecting a public road to the easement in the fall of 2005 to give the construction crews access. To bar access to anyone but the work crews, Northern Clearing erected a temporary, movable fence across the entrance to the driveway.

¶4 On July 23, 2006, as Dobrzynski was mowing hay in the vicinity of the fence, his mower struck a metal fence post that was lying in the hayfield, and he was injured. He sued WPS and M. J. Electric, alleging that their negligence caused his injury. The trial court later granted Northern Clearing's motion to intervene as a defendant. All of the defendants were granted summary judgment after the trial court concluded that no evidence existed linking the fence post that caused Dobrzynski injury to any of the defendants or to the construction work on his property. Dobrzynski appeals that determination.

¶5 We review summary judgments independently, using the same methodology as the circuit court. *Wisconsin Mall Props., LLC v. Younkers, Inc.*, 2006 WI 95, ¶19, 293 Wis. 2d 573, 717 N.W.2d 703. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).¹ In determining whether there is a material factual dispute, we view inferences from the underlying facts in the light most favorable to the party opposing the motion. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. If there are competing reasonable inferences, then summary judgment is not appropriate.

¶6 WPS is entitled to summary judgment. There is no evidence that any WPS employee ever worked on the construction project on Dobrzynski's property. The only theory under which it could be liable for on-site negligence is one of general contractor liability for a subcontractor's act. Dobrzynski neither alleged nor argued liability under such a theory. He sued WPS directly for its own alleged negligence with regard to the fencepost, and there was no evidence introduced in the record of any such direct negligence.

¶7 Northern Clearing is also entitled to summary judgment. According to Dobrzynski, the fencepost appeared on his land between June 1 and July 23, 2006. The undisputed evidence shows that Northern Clearing employees prepared the site for construction in late 2005, and did not enter the site again until after Dobrzynski's July 23, 2006 accident. Its employees could not, therefore, have

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

been responsible for an act of negligence that occurred sometime in June or July 2006.

¶8 Material facts remain disputed concerning M. J. Electric's liability for the accident. Dobrzynski introduced evidence that: (1) his accident occurred adjacent to the driveway to the construction site and no more than 25-50 feet from the driveway fence; (2) the fencepost that injured him was a common type of metal fencepost, typically used to hold up fencing like the driveway fence; (3) it was placed on his land before the project concluded and during the time M. J. Electric had access to and was performing work on his land; and (4) it was not Dobrzynski's fencepost, and he never erected fencing in the vicinity where it was found. Accepting that evidence as true leads to reasonable inferences that the fencepost originated from the construction site, and that M. J. Electric was responsible for it ending up in Dobrzynski's hayfield. Dobrzynski is entitled to further proceedings to resolve these disputed issues of the fence post's origin and placement.

¶9 Dobrzynski may tax costs against M. J. Electric. WPS and Northern Clearing may tax costs against Dobrzynski.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

