

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2010

A. John Voelker
Acting 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. 2009AP3136

Cir. Ct. No. 2009SC289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY, INC.,

PLAINTIFF-APPELLANT,

V.

DEBORAH M. GRAUPNER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County:
FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded with
directions.*

¶1 BRUNNER, J.¹ Northern States Power Company d/b/a Xcel
Energy, Inc., appeals an order dismissing its small claims action against Deborah

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Graupner to recover for damage to its equipment caused by Graupner's minor daughter. We conclude we lack sufficient facts to determine whether the circuit court properly exercised its discretion, and therefore reverse and remand to the circuit court for additional factfinding.

¶2 On August 18, 2007, a vehicle driven by Graupner's fifteen-year-old daughter crashed into an Xcel utility pole, causing \$5,989.63 in damage. Graupner was uninsured and refused to pay for the repairs. Xcel then filed this small claims action.

¶3 Robert Italiano, a claims investigator who is not a licensed attorney, appeared at trial on Xcel's behalf. After the circuit court scolded Italiano for asking Graupner, his first witness, about settlement discussions, the court stated it was "not going to waste any more time with this stuff." It directed Italiano to provide legal authority for Xcel's claim, but Italiano was unable to cite a specific statute. The circuit court then dismissed Xcel's action with prejudice:

I know you are a lay person. We will dismiss it. You can step down. Maybe you can get an attorney to help you.

Northern States Power or Excel Energies [sic] has enough money that if it felt an attorney is needed they can get one. All right. Go back. They must have counsel or something. I asked how she is obligated for the damages of her daughter, and you didn't show that.

¶4 Xcel did obtain counsel, as the circuit court directed, and filed a timely motion for reconsideration, which cited legal authorities purportedly establishing Graupner's liability. The circuit court did not act on Xcel's motion, which was consequently deemed denied after ninety days. *See* WIS. STAT. § 805.17(3).

¶5 We first address whether the circuit court properly directed Xcel to obtain counsel. The circuit court, not Graupner, raised the issue of Italiano’s competency, but failed to conduct a complete analysis before dismissing Xcel’s claim. Ordinarily, a party need not be represented by counsel in a small claims action. *See* WIS. STAT. § 799.06(2). A corporation, however, “is considered to be acting in ... its own proper person if the appearance is by a full-time authorized employee” *Id.* Further, “An assignee of any cause of action ... shall not appear by a full-time authorized employee, unless the employee is an attorney regularly authorized to practice in the courts of this state.” *Id.*

¶6 While the record establishes that Italiano is not an attorney, the circuit court failed to inquire whether he was a full-time Xcel employee authorized to prosecute Xcel’s action under WIS. STAT. § 799.06(2).² If Italiano was a full-time employee, and therefore capable of representing Xcel, the circuit court improperly dismissed Xcel’s claim. If Italiano was not, the circuit court properly dismissed Xcel’s claim for what was essentially a failure to appear.

¶7 We therefore reverse and remand for additional factfinding on Italiano’s employment status at the time of the small claims hearing. If on remand the circuit court determines Italiano is not a “full-time authorized employee” under WIS. STAT. § 799.06, it is directed to enter judgment in Graupner’s favor. If the circuit court determines Italiano is such an employee, it is directed to hold further

² The record does contain a document signed by Xcel’s Vice President and Deputy General Counsel purporting to appoint Italiano as an attorney-in-fact to “commence, prosecute, defend, satisfy or settle any claim or cause of action” brought by or against Xcel in Wisconsin. However, this document does not establish Italiano’s employment status, and is therefore insufficient to establish Italiano’s authority to prosecute Xcel’s claim.

proceedings to determine whether Graupner is liable under the authorities cited in Xcel's reconsideration motion.³

¶8 We must also address one final issue. Xcel requests that we direct the circuit court enter judgment against Graupner, claiming she is liable to Xcel as a matter of law under WIS. STAT. § 895.035(2)(a). That statute imposes parental liability for property damage caused by a minor child, but does so only for that damage “attributable to a willful, malicious, or wanton act of the child.” *Id.* The record does not describe the circumstances of the accident. Moreover, the circuit court cut off testimony before Xcel was able to present facts that would allow a reasonable factfinder to infer the minor's mental state. Accordingly, we decline Xcel's invitation.⁴

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

³ If Italiano is a “full-time authorized employee” of Xcel, and therefore allowed to prosecute Xcel's action under WIS. STAT. § 799.06(2), we conclude the circuit court erroneously exercised its discretion by failing to reconsider dismissal. By failing to respond to authority under which Graupner could arguably be found liable, after specifically requesting it, the circuit court did not provide Xcel an opportunity to fairly present its claim. See WIS. STAT. § 799.209(3). Xcel was also deprived of a “prompt resolution of the dispute on its merits according to the substantive law.” See WIS. STAT. § 799.209(4).

⁴ Citing *First Bank Southeast, N.A. v. Bentkowski*, 138 Wis.2d 283, 287-88, 405 N.W.2d 764 (Ct. App. 1987), Xcel's brief goes to great lengths to assure us that liability under WIS. STAT. § 895.035(2)(a) is “absolute.” To the extent these assurances suggest Xcel is relieved of the obligation to prove the minor's intent, *Bentkowski* provides otherwise: “[T]he statute is clear in imposing liability based solely upon the existence of the parent-child relationship as outlined in the statute and the minor child's commission of a wilful, malicious or wanton act; *once these elements are established*, ... liability follows as a matter of law.” *Id.* (emphasis added).

