COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 15, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3329

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

GARY BORSKI,

PLAINTIFF-RESPONDENT,

SNE ENTERPRISES, INC.,

INTERVENOR,

V.

WIGGLY FIELD, INC., A WISCONSIN CORPORATION, AND WILSON MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Wiggly Field, Inc., appeals a judgment awarding Gary Borski damages for injuries he sustained while participating in batting practice for a softball game at Wiggly Field. Wiggly argues that it did not breach any duty owed to Borski and that Borski's negligence exceeded Wiggly's as a matter of law because the danger to Borski was "open and obvious." We reject these arguments and affirm the judgment.

Wiggly leased the softball field to a tournament organizer in return for a fee plus an agreement to buy barrels of beer from Wiggly to sell during the tournament. The sponsor was required to sign a rental agreement that explained the cleanup rules for the concession area and the field once the tournament ended. Wiggly did not make any rules regarding safety even though it knew that a large number of participants would be using the small softball field during the weekend.

Borski was injured when both teams were simultaneously conducting batting practice on the field. Borski's team was using third base as its home plate while the opposing team used first base for that purpose. Borski was struck in the face by a ball hit by an opposing team batter. The jury allocated 25% responsibility to Borski, 25% to Wiggly Field, and the remaining 50% between others who are not parties to this appeal. Wiggly asks this court to override the jury's allocation of fault.

A jury's verdict will be sustained if there is any credible evidence to support it. ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). Questions of the apportionment of negligence are ordinarily within the province of the jury. ***Stewart v. Wulf***, 85 Wis.2d 461, 471, 271 N.W.2d 79, 84 (1978).

Borski presented sufficient evidence upon which the jury could reasonably find Wiggly as negligent as Borski. The practice of having more than one team conduct batting practice on the same field at the same time presents a danger that should have been equally apparent to Wiggly as it was to Borski. Wiggly's failure to make any rules prohibiting this practice constitutes an adequate basis for its negligence. The jury could reasonably find that all of the participants who shared responsibility for this activity were equally at fault.

Wiggly argues that the "open and obvious danger rule" applies because Borski voluntarily confronted an open and obvious condition under circumstances where he should have realized the risk. *See* ***Griebler v. Doughboy***, 160 Wis.2d 547, 558, 166 N.W.2d 897, 901 (1991). Because Wisconsin is a comparative negligence state, the open and obvious danger rule applies in limited circumstances where there is a strong public policy to justify abrogation of comparative negligence principles. *See* ***Hertelendy v. Agway Ins. Co.***, 177 Wis.2d 329, 339, 501 N.W.2d 903, 907 (Ct. App. 1993). The open and obvious danger rule is not an absolute defense. Rather, it is a factor to be weighed in the apportionment of evidence like other forms of assumed risk. *See* ***Kloes v. Eau Claire***, 170 Wis.2d 77, 87, 487 N.W.2d 77, 81 (Ct. App. 1992). The open and obvious danger doctrine has not been applied to situations of ordinary negligence such as participating in baseball games. *See* ***id***.; ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis.2d 338, 341, 243 N.W.2d 183, 185-86 (1976).

Finally, the open and obvious condition doctrine does not preclude recovery where the landowner should anticipate harm despite the obviousness or knowledge of the risk. *See* RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). This case involves equal knowledge of the danger and a common purpose by all of the participants to conduct simultaneous batting practice despite the apparent

dangers. The record discloses no basis for this court to overturn the jury's determination that Borski and Wiggly are equally negligent.

By the Court.—Judgment affirmed.

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