

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 8, 1997

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.

NOTICE

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No. 96-1823

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ELIZABETH M. GIBSON, GERALD W. GIBSON, AND ST.
PAUL FIRE AND MARINE INSURANCE COMPANY,**

PLAINTIFFS-RESPONDENTS,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

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

PER CURIAM. American Family Mutual Insurance Company appeals a judgment awarding Elizabeth and Gerald Gibson damages for injuries Elizabeth suffered in a head-on traffic accident with Fred Connors. After an initial jury trial resulted in a verdict in favor of American Family, the trial court granted a new trial because it failed to instruct the jury on the emergency doctrine. On

retrial, the jury found Connors 100% responsible for the accident. American family argues that the trial court should not have granted a new trial because the emergency instruction should not have been given, the evidence does not support the verdict and the Gibsons' attorney improperly informed the jury of the effect of its verdict. We reject these arguments and affirm the judgment.

As a result of the accident, Fred Connors and his passenger died and Elizabeth Gibson suffered partial amnesia. The physical evidence establishes that the accident occurred on an icy patch of road entirely in Connors' lane of travel. Gibson testified that she saw a dark colored van in her lane of travel 50 to 100 yards in front of her car, but remembers nothing after that point. A sheriff deputy testified that in his opinion, the physical evidence showed that Gibson's car "yawed to the left" immediately before the collision. The physical evidence does not indicate whether Gibson's sudden movement to the left was caused by losing control of her vehicle or swerving to avoid Connors' van which had invaded her lane of travel.

The trial court properly granted a new trial based on its failure to have instructed the first jury on the emergency doctrine. A ruling on a motion for a new trial is highly discretionary. *Suhaysik v. Milwaukee Cheese Co.*, 132 Wis.2d 289, 303, 392 N.W.2d 98, 104 (Ct. App. 1986). A trial court properly exercises its discretion when it determines the relevant facts, weighs the evidence and, using a rational process, reaches a reasonable conclusion. *Macherey v. Home Ins. Co.*, 184 Wis.2d 1, 12, 516 N.W.2d 434, 438 (Ct. App. 1994). The trial court appropriately concluded that the emergency instructions should have been given and that the outcome of the trial may have been affected by the court's failure to give the emergency instruction.

The emergency instruction should be given when the evidence, viewed in the light most favorable to the person requesting it, shows that the person requesting the instruction is free from negligence that contributed to creation of the emergency, was confronted with a situation in which action is required and the time element is short enough to preclude deliberate and intelligent choice of action, and the element of negligence being inquired into concerns management and control. See *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis.2d 743, 754, 235 N.W.2d 426, 433 (1975); *Edeler v. O'Brien*, 38 Wis.2d 691, 698, 158 N.W.2d 301, 304 (1968). Gibson's testimony that Connors' van invaded her lane of travel approximately 50 to 100 yards in front of her is sufficient to establish an evidentiary basis for the emergency instruction. The court initially refused to give the emergency instruction because "to submit her management and control which has to be before emergency can be given is strictly guess work, speculation." After the first trial, the trial court properly reconsidered that decision because, even though Gibson suffered from amnesia during the time her management and control of her car was at issue, her testimony allowed an inference that her apparent loss of management and control resulted from an emergency created by Connors. This analysis represents a proper exercise of the trial court's discretion.

Sufficient evidence supports the jury's verdict. American Family bases its argument of insufficient evidence on three factors: (1) the accident occurred entirely in Connors' lane of travel; (2) Gibson's testimony is insufficient to refute undisputed physical evidence; and (3) Connors is entitled to a presumption of due care because he is deceased. It is this court's duty to search the record for credible evidence to sustain the jury's verdict, not for evidence to sustain a verdict that the jury could have reached but did not. *Bradford v. J.J.B. Enters.*, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). Gibson's

testimony, if believed by the jury, is sufficient to rebut the presumptions that she is at fault because the accident occurred in Connors' lane and that Connors was not negligent because he is deceased. Gibson's testimony that she saw a dark van in her lane of travel shortly before the accident allows an inference that she attempted to avoid the accident by swerving into Connors' lane and that Connors did the same. Nothing in the physical evidence contradicts that scenario. Gibson's testimony creates an inference that is beyond mere speculation or conjecture.

Gibson's testimony was supported by her husband's testimony that she had amnesia in the hospital and that she told him about the dark colored van in her lane of traffic shortly after the accident. American Family argues that this prior consistent statement is not admissible because the defense had not charged Gibson with recent fabrication or improper influence or motive. A prior consistent statement is admissible for the purpose of rebutting an express or implied charge of recent fabrication or improper influence or motive. *See* § 908.01(4)(a)2, STATS. American Family's version of the accident depends upon its challenge to Elizabeth Gibson's testimony. Its entire defense, by implication, charged Elizabeth with fabricating her testimony that Connors invaded her lane of travel.

Finally, American Family has not established any prejudice from Gibson's attorney's closing argument in which he stated:

The law does not allow either of us, either Mr. Eckert or myself, to tell you what happens and whether or not Elizabeth can collect based upon the answers that you give to the questions on the verdict. But I will ask you that, if you end up considering that comparison question, that I feel very, very strongly that justice cannot be served in this case if you end up finding Elizabeth more negligent than Mr. Connors. And I would ask that you under no circumstances, would you please do that because I don't

think that there is any way that under the situation that justice could possibly be served.

The jury found that Gibson was not negligent and therefore never reached the issue of comparative negligence. To the extent the closing argument might have informed the jury of the effect of finding Gibson more than 50% negligent, that error did not prejudice American Family because the jury never reached that issue.

By the Court.—Judgment affirmed.

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

