COURT OF APPEALS
DECISION
DATED AND RELEASED

May 1, 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

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

No. 96-1855-FT

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

MELISSA C. LENZEN,

Plaintiff-Appellant,

JOAN KAISER,
WISCONSIN PHYSICIANS SERVICE,
and U-CARE, HMO,

Plaintiffs,

v.

THOMAS A. BARNDT, and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Melissa C. Lenzen appeals from a judgment dismissing her personal injury complaint. She raises several issues related to jury instructions. We affirm.

The basic facts are not in dispute. Defendant Thomas A. Barndt was driving east on University Avenue in November 1988. At that time University Avenue was marked for one lane of traffic in each direction. Ahead of Barndt, also eastbound on University Avenue, two cars were stopped. It appears undisputed that the first car ultimately turned left. The intentions of the second car are in dispute. Barndt moved to the right and began to pass the two stopped vehicles on their right. Plaintiff Lenzen was walking north on the west side of Middleton Street, approaching University Avenue. As he approached the intersection Barndt attempted to stop, but slid on snow. His vehicle struck Lenzen near the southwest corner of the intersection, although the precise location was in dispute.

The jury found both Barndt and Lenzen negligent, and apportioned the negligence 15% to Barndt and 85% to Lenzen. Accordingly, the court dismissed the complaint. Lenzen appeals.

Lenzen argues that the circuit court erred by not giving the jury instructions based on certain rules of the road. The first rule is found in § 346.10(2), STATS., 1987-88, which provides in relevant part: "[T]he operator of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any intersection ...."

We conclude the court did not err because there is no evidence of record that Barndt's conduct violated this rule. The statute does not apply to Barndt's passing of the first vehicle waiting at the intersection because that vehicle ultimately turned left, and therefore was not "proceeding in the same direction."

Barndt's passing of the second vehicle did not violate the statute because the vehicle was not within the intersection. The prohibition on passing "at any intersection" is a penal statute which "requires a strict construction of the word 'at.'" ***Behr v. Larson***, 275 Wis. 620, 626, 83 N.W.2d 157, 161 (1957).

"[W]ithout evidence that the collision occurred *within* the intersection no violation was shown." ***Id.*** (emphasis added). The term "intersection" is defined as "the area embraced within the prolongation or connection of the curb lines ... of 2 or more highways which join one another at, or approximately at right angles." Section 340.01(25), STATS., 1987-88. Matthew McGilligan provided the only testimony of record about the specific locations of the cars Barndt passed. He testified that the first car was across the crosswalk, which extended north from the west side of Middleton Street, and the second car was five to seven feet behind that car. Therefore, the second car was not in the intersection, and Barndt's passing of it did not violate the rule.

Lenzen also argues that the circuit court erred in instructing the jury as follows:

> The operator of a vehicle may overtake and pass another vehicle upon the right if such movement can be done in safety and if he can do so without driving off the pavement or main-traveled portion of the roadway, when the vehicle overtaken is making or about to make a left turn.

The instruction which was based on § 346.08(1), STATS., 1987-88, which provided:

> The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety and only if he can do so without driving off the pavement or main-traveled portion of the roadway, and then only under the following conditions:
>
> (1) When the vehicle overtaken is making or about to make a left turn;...

Lenzen argues that the instruction should not have been given because the statute allowed Barndt to pass only one "vehicle," rather than the two "vehicles" which were present on University Avenue. Lenzen also argues that the instruction did not properly state the content of the statute because the instruction omits the part of the statute that says passing on the right can be done *only* when the passed vehicle is turning left.

Barndt responds that Lenzen waived these arguments by failing to object at trial. *See* § 805.13(3), STATS. We disagree. Lenzen's objection to this instruction was sufficiently particular to preserve the arguments made on appeal. Turning to the merits, we reject both of Lenzen's arguments. As to the first, while it is true that the statute provided only that an operator may pass a "vehicle," in construing statutes the singular includes the plural and the plural includes the singular, unless such construction would produce a result inconsistent with the manifest intent of the legislature. Section 990.001(1), STATS., 1987-88. This result does not appear inconsistent with legislative intent. As to the second argument, that the instruction did not properly state the content of the statute, we conclude that the instruction is adequate. An ordinary reading of the instruction would be that it implies passing on the right is not permitted under other circumstances.

Lenzen argues the circuit court erred by not giving the jury an instruction based on WIS J I—CIVIL 1350, which would have described a driver's duty to signal when making a lane change. We conclude that any error was harmless. Failure to give the instruction would only be prejudicial if the jury found that Barndt failed to signal. There was little evidence to support such a finding. Barndt testified that he did not remember whether he signalled in this instance, but that he "normally" does so "as an automatic reaction." Testimony from other witnesses was inconclusive.[1] The total testimony on this point was

[1] The appellant appears to overstate that testimony. Her brief states that Paulette Sprecher, driver of the rearmost vehicle Barndt passed, testified that Barndt veered around to her right "without signalling." However, Sprecher's testimony was ambiguous. She was asked: "Did you notice did the car signal to turn right?" She replied, "I don't believe so." It is not clear whether Sprecher answered that she did not notice, or that Barndt did not signal.

The appellant's brief states that Matthew McGilligan, who was stopped on Middleton Street waiting to enter University Avenue, "indicated that Mr. Barndt neither used his directional signal nor honked his horn." However, McGilligan's testimony was

very brief. In view of the other facts of the case, which were more fully explored at trial, it is unlikely that a conclusion about whether Barndt signalled was a significant factor in the jury's decision. The requested instruction would not have caused the jury to change the apportionment of negligence enough to change the ultimate result.

Lenzen also argues the court erred by not giving the jury an instruction based on WIS J I—CIVIL 1354, with unspecified "appropriate modifications." That instruction provides generally that a deviation in direction must be made with reasonable safety and ordinary care to make an efficient lookout.[2] Any error here was also harmless. This instruction adds little substance beyond what was already given in the instruction about passing vehicles making left turns, which said the movement should only be done if it can be done in safety. Again, we do not believe the giving of this instruction would have caused a different ultimate result.

By the Court.—Judgment affirmed.

(..continued)
also ambiguous. He was asked: "Matt, when the car went around the cars in front of him, you didn't see him signal?" He replied, "I did not remember," apparently speaking in the past tense because he was referring to a statement he had given to an investigator.

[2] WIS J I—CIVIL 1354 provides in relevant part:

> A safety statute provides that no person shall deviate from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.
>
> This statute requires the driver of the deviating vehicle to exercise ordinary care to make an efficient lookout. This calls for the driver to exercise ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the driver's movement. After having made these observations, the driver must also exercise reasonable judgment in calculating the time required to safely deviate from the vehicle's position on the roadway without interfering with other vehicles within or approaching the vehicle's course of travel.

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