COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2816

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

RICHARD WEYENBERG AND FRANK R. THOMPSON,

PLAINTIFFS-APPELLANTS,

V.

ROD KOLPIEN, D/B/A KOLPIEN LANDSCAPING, KENNETH W. HAMMAN AND SCOTTSDALE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

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

MYSE, J. The plaintiffs, Richard Weyenberg and Frank Thompson, appeal a judgment, after a jury trial, dismissing their personal injury action and an order denying postconviction relief. The plaintiffs contend that the trial court erred by refusing to instruct the jury that Ken Hamman had a duty to

reduce to a reasonable speed as he approached an intersection and that Hamman would forfeit his right-of-way if he was traveling in excess of a reasonable speed at the time he entered the intersection. The plaintiffs also contend that the trial court failed to adequately instruct the jury as to the defendant's duty upon approaching a yellow light, and erroneously denied their motion for a new trial based upon newly discovered evidence. Because this court concludes that the jury was adequately instructed on the duty to reduce to a reasonable speed, there was no error. We further conclude that the plaintiffs have waived their objection to the court's failure to instruct regarding the defendant's forfeiture of right-of-way because the instruction was not requested during the trial. Finally, we conclude that the trial court properly instructed the jury in regard to the defendant's duty upon approaching a yellow light, and properly rejected the plaintiffs' motion for a new trial based on its conclusion that the newly discovered evidence was cumulative. Accordingly, we affirm the judgment.

This case arises from a motor vehicle accident occurring in the City of Eau Claire at the intersection of Clairemont and University Avenues. The accident occurred at rush hour with heavy traffic at all points of the intersection. Weyenberg was driving a vehicle owned by Thompson eastbound on Clairemont Avenue, intending to make a left turn onto University Avenue. While the traffic light was green, Weyenberg entered the intersection and stopped to wait for the intersection to clear before completing his turn. When the traffic light turned to yellow, Weyenberg waited for some cars to proceed through the intersection and began his turn.

Hamman was operating an orange dump truck westbound on Clairemont Avenue at a speed between thirty and forty miles per hour, below the posted forty-five mile-per-hour speed limit. As Hamman approached the

intersection he observed the traffic signal turn from green to yellow approximately forty to fifty yards before the intersection. Hamman testified that he entered the intersection because he believed he could not safely stop his dump trunk before entering the intersection.[1] Neither Hamman nor Weyenberg saw each other until it was too late, and Hamman struck Weyenberg as Weyenberg was making a left turn.

At the trial, Weyenberg requested a jury instruction on Hamman's duty under both §§ 346.57(2) and (3), STATS.[2] The requested jury instruction reads:

> A Wisconsin safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of such a vehicle shall be so controlled as may be necessary to avoid colliding with any object or vehicle after using due care.

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[1] Hamman also gave somewhat contradictory testimony that he could have brought his truck to a stop safely within 50 to 100 feet. When the trial court asked Hamman about this contradiction, Hamman again replied, "I didn't think I could come to a stop safely."

[2] Section 346.57(2), STATS., states:

> REASONABLE AND PRUDENT LIMIT. No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements using due care.

Section 346.57(3), STATS., states, in part:

> CONDITIONS REQUIRING REDUCED SPEED. The operator of every vehicle shall, consistent with the requirements of sub. (2), drive at an appropriate reduced speed when approaching and crossing an intersection … and when special hazard exists with regard to other traffic or by reason of weather or highway conditions.

> In addition, Wisconsin safety statutes require that an operator of a vehicle shall drive at an appropriate reduced speed when approaching and crossing an intersection or other highway features and when special hazards exist with regard to other traffic, the weather, or highway conditions.
>
> Further, you are instructed that as operators of motor vehicles approach an intersection in the face of a green traffic light they may proceed, although, when they are approaching from some distance away, they are required to anticipate that the signal will change, and under certain circumstances, such operator has an affirmative duty to reduce their speed. Moreover, the longer the light has been green, the greater is the necessity that the operator of a motor vehicle be prepared to come to a stop.

The trial court rejected the plaintiffs' request, and gave the following instruction based on § 346.57(2), STATS., and WIS J I—CIVIL 1285:

> As to Kenneth Hamman, you are instructed that a safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions. This statute requires that a driver in hazardous circumstances exercise ordinary care to so regulate the vehicle's rate of speed to avoid colliding with any vehicle on or entering the highway in compliance with legal requirements and using due care.

The jury found Weyenberg 70% causally negligent and Hamman 30% causally negligent for the accident. The plaintiffs then sought relief through several postconviction motions, which the trial court denied.

Weyenberg first contends that the trial court erred by refusing to instruct the jury of the specific requirement contained in § 346.57(3), STATS., that a driver "shall … drive at an appropriate reduced speed when approaching and crossing an intersection …." Weyenberg argues that the jury was therefore instructed on the wrong legal duty because there is a greater legal duty to reduce speed under § 346.57(3) than under the instruction given based on § 346.57(2),

STATS. *See* ***Thoreson v. Milwaukee & Suburban Transp. Corp.***, 56 Wis.2d 231, 235-36, 201 N.W.2d 745, 748 (1972).

The trial court has broad discretion when instructing a jury. ***Fischer v. Ganju***, 168 Wis.2d 834, 850, 485 N.W.2d 10, 16 (1992). If the overall meaning communicated by the instructions was a correct statement of the law, the trial court properly exercised its discretion. ***Id***. The trial court is not required to give a requested instruction, even if that instruction is fair and adequate, if the trial court's instructions adequately address the issue. ***Id***. at 855, 485 N.W.2d at 18.

We conclude that the trial court did not erroneously exercise its discretion when it instructed the jury. Although we agree with the plaintiffs that §§ 346.57(2) and (3), STATS., are not redundant and both should be given in any case where the duties under both are triggered, the trial court adequately informed the jury of the relevant provisions of law in this case by instructing them under § 346.57(2).

Under both subsections (2) and (3), the driver of a vehicle must reduce to the same speed when confronting a hazard: the reasonable and prudent speed under the conditions then existing. Subsection (2) requires the driver of a motor vehicle to refrain from operating the vehicle at a speed greater than is "reasonable and prudent under the conditions … then existing." Similarly, subsection (3) requires a driver who approaches and crosses an intersection to reduce his or her speed to that which is reasonable and prudent under the circumstances then existing. *See* ***McGee v. Kuchenbaker***, 32 Wis.2d 668, 672-73, 146 N.W.2d 387, 389 (1966).

> A person driving less than the posted speed might not be required to reduce his speed because he is already driving at a reduced speed. Certainly a driver traveling five or 10

> miles an hour could hardly be expected to reduce his speed. What reduced speed is appropriate depends upon the particular facts in light of the speed a person of ordinary intelligence and prudence would drive under the circumstances, so as not to subject himself or others or his or their property to an unreasonable risk of injury or damage.

Id. at 671-72, 146 N.W.2d at 389.

In this case, there is no discernible difference between the subsection (2) standard of "reasonable and prudent speed" having regard for the presence of heavy traffic, and the subsection (3) standard of an "appropriate reduced speed" triggered by the presence of the intersection. Under either standard, the jury is required to determine what a reasonable and prudent speed would be under the circumstances, and measure Hamman's negligence in regard to that determination. In making this determination, it is irrelevant whether the duty was imposed by virtue of the more general language that he have regard for actual and potential hazards, or by virtue of the more specific language triggered by the presence of the intersection. The instructions therefore gave the jury a correct view of the law because they focused the jury on the appropriate issue—whether Hamman exceeded a reasonable and prudent speed considering the conditions and potential hazards confronting him.

The supreme court's holding in ***Greene v. Farmers Mut. Auto. Ins. Co.***, 5 Wis.2d 551, 93 N.W.2d 431 (1958), supports our decision. In ***Greene***, as in this case, the reviewing court was asked whether the trial court erred by instructing the jury under the language of subsection (2) without also instructing the jury

under the language of subsection (3).[3] The court concluded that there was no error, reasoning that it "would have difficulty in distinguishing between a standard of a 'reasonable and prudent' speed, having regard for the presence of a pedestrian, and a standard of an 'appropriate reduced speed.'" ***Id***. at 555, 93 N.W.2d at 433. Similarly, we would have a difficult time trying to make such a distinction in this case.

We acknowledge that there is language in ***Thoreson*** that may give rise to an argument that subsection (3) requires a driver to reduce his or her speed to one that is less than reasonable and prudent under the existing circumstances. *See* ***Thoreson***, 56 Wis.2d at 236, 201 N.W.2d at 748 ("Sub[section] (3) is specific and requires a lesser speed than the maximum limit of sub. (2) …."). Such an interpretation, however, is unreasonable. ***Thoreson*** decided whether the duty to drive at a reasonable and prudent speed under subsection (2) arose only if the conditions expressly mentioned in subsection (3) existed. ***Id***. The court rejected such an interpretation, holding that subsection (2) created a legal duty to drive at a reasonable and prudent speed where there were any hazards, regardless of whether the hazards were also listed in subsection (3). ***Id***.

Thoreson therefore recognized that subsection (2) encompasses a broader list of hazards than those enumerated in subsection (3). This difference is important because subsection (2) requires the jury to first determine whether driving conditions created a hazard sufficient to require a speed reduced below the posted limits. Only after the jury makes this determination does it then proceed to

[3] Although the statutes in ***Greene v. Farmers Mut. Auto. Ins. Co.***, 5 Wis.2d 551, 93 N.W.2d 431 (1958), were numbered differently, they contained identical language to the statutes at issue here.

determine whether the driver was operating at a reasonable and prudent speed for those conditions. Under subsection (3), however, the jury does not make a threshold determination about whether there is a hazard. If any of the enumerated conditions exist, there is a hazard as a matter of law, and the jury then proceeds to determine whether the driver was operating at a reasonable and prudent speed. The difference between the two subsections is not the speed that each establishes, therefore, but rather whether the triggering hazard is a determination made by a jury or is decided as a matter of law.

Adopting the plaintiffs' contrary interpretation of ***Thoreson*** to require that a driver, operating under a duty in place by subsection (3), reduce his or her vehicle to a less than a reasonable and prudent speed would violate common sense and therefore cannot have been what the court intended. As noted in ***McGee***, subsection (3) does not compel a driver to reduce his or her speed when already driving at the speed of an ordinary and prudent person under those conditions. ***McGee***, 32 Wis.2d at 671-72, 146 N.W.2d at 389. We therefore conclude that a construction of ***Thoreson*** implying that the speed requirements under subsection (3) are less than the reasonable and prudent speed requirements of subsection (2) is a misapplication of the court's language. Both subsections ultimately require reduction to the same speed, a reasonable and prudent one, and the jury was properly instructed concerning Hamman's duty to drive at that speed.

Weyenberg next contends that the trial court erred by instructing the jury that Weyenberg had an absolute duty to yield the right-of-way to other traffic approaching the intersection. The trial court instructed the jury that "vehicular traffic facing a green signal and intending to turn left shall yield the right of way to other traffic approaching the intersection." The plaintiffs objected to this instruction on the grounds that the light was yellow when Weyenberg began his

turn. The trial court overruled the objection, but told the plaintiffs that they were free to argue that the light's turning to yellow evaporated the defendant's right-of-way. The plaintiffs did not raise any additional objections to this jury instruction.

On appeal, the plaintiffs apparently have abandoned their argument that the instruction was improperly given because the light had turned yellow. They now contend, however, that the instruction misled the jury because it suggested that the duty to yield is absolute. This, they claim, is improper because the defendant would have lost his right-of-way under § 346.18(1), STATS., if he was driving at an excessive speed.

We decline to address the merits of this argument. The plaintiffs never suggested to the trial court that they wanted a jury instruction stating that the defendant would lose his right-of-way if he drove at an excessive speed, nor did they object to the instruction actually given on these grounds. The failure to request an instruction or the failure to object to those given waives such alleged errors. *See* ***Hein v. Torgeson***, 58 Wis.2d 9, 17, 205 N.W.2d 408, 413 (1973).

The plaintiffs next contend that the court inadequately instructed the jury regarding the duty on approaching a yellow light. They raise two arguments. First, the plaintiffs claim that the trial court failed to instruct the jury on the duty to anticipate and prepare for a changing light at an intersection. The plaintiffs proposed such an instruction, which the trial court rejected.

This court affirms the trial court's decision. The trial court properly instructed the jury regarding the duty on approaching a yellow light. The trial instructed the jury in accordance with WIS J I—CIVIL § 1192, as the plaintiffs themselves proposed, as follows:

> If you find that the yellow or amber light, which signifies caution, was showing before either driver entered the intersection, then that driver was required to stop unless he was so close to the traffic signal that a stop could not be made in safety.

Further, we have already noted that the trial court also gave this instruction:

> As to [the defendant] Kenneth Hamman, you are instructed that a safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions. This statute requires that a driver in hazardous circumstances exercise ordinary care to so regulate the vehicle's rate of speed to avoid colliding with any vehicle on or entering the highway in compliance with legal requirements and using due care.

These instructions properly conveyed the applicable law concerning the defendant's duties upon facing a yellow light. *See* § 346.37(1)(b), STATS. ("When shown with or following the green, traffic facing a yellow signal shall stop before entering the intersection unless so close to it that a stop may not be made in safety."). Therefore, the trial court's denial of the plaintiffs' proposed instruction that a driver "anticipate that the signal will change, and under certain circumstances, such operator has an affirmative duty to reduce their [sic] speed" was not erroneous.

The plaintiffs next argue that the yellow light instruction was inadequate because:

> the court failed to instruct the jury of an obligation on the part of the defendant to provide proof to a reasonable certainty by the greater weight of the credible evidence that the dump truck could not be stopped short of the intersection when the defendant's own calculations indicated that he could.

The plaintiffs, however, do not cite any support for their legal proposition. This court will not consider the merits of unsupported legal arguments. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

The plaintiffs' final argument is that they are entitled to a new trial based upon newly discovered evidence. The newly discovered evidence consists of the testimony of Harry Freeman, an alleged eyewitness to the accident. The plaintiffs contend that a tape-recorded statement demonstrates that Freeman would testify that the defendant accelerated as he approached the intersection in an attempt to beat the yellow light. The trial court denied a new trial based upon this evidence, noting that Freeman's statement was cumulative to other evidence and so internally inconsistent that it was not credible.

The tape-recorded statement is not a part of the appellate record and consequently cannot be reviewed by us. In the absence of this evidence, we must assume that it supports the trial court's determinations. *See* ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis.2d 683, 689, 273 N.W.2d 285, 287-88 (1979). We affirm the court's denial of the motion for a new trial because a statement that is cumulative and not credible does not merit a new trial. *See* ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.