COURT OF APPEALS
DECISION
DATED AND RELEASED

October 3, 1995

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. 95-0473

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

LISA LEPAK,
AMY LEPAK, and
ASHLEY LEPAK, minors,
by their guardian ad litem,
GEORGE BURNETT,

Plaintiffs-Appellants,

v.

BRYAN D. JOHNVIN,
SECURA INSURANCE,
a mutual company,
EMPLOYERS INS. CO.,

Defendants,

THOMAS E. and JOAN GARRITY,
and PRUDENTIAL PROPERTY
AND CASUALTY CO.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

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

PER CURIAM. Lisa Lepak, and her daughters, Amy Lepak and Ashley Lepak, (hereinafter "the appellants") appeal a summary judgment dismissing their wrongful death action against Thomas and Joan Garrity and their insurer, Prudential Property and Casualty Co. This action arises out of a highway accident death of Lisa's husband, Kevin Lepak (Lepak). The appellants argue that the trial court erroneously held that it was the plaintiff's burden to prove the lack of Lepak's contributory negligence. They further argue that an issue of material fact exists whether Lepak's negligence exceeded Thomas Garrity's (Garrity).[1] We reject these challenges and affirm the judgment.

The appellants' complaint alleges that at approximately midnight on September 15, 1990, as a result of Garrity's negligence, Bryan Johnvin, who was operating a different vehicle, negligently ran over Kevin Lepak, who was laying unconscious on U.S. Highway 41. According to Johnvin's statement, when he pulled onto the highway he noticed a motorcycle and two cars in front of him. He traveled northward behind this group of vehicles until he lost sight of them at the crest of a hill. As he came over the hill, he saw two vehicles facing him in his lane. One was on the right-hand shoulder half-way on the pavement and the other was on the left-hand shoulder, also half on the pavement. Both vehicles were flashing their headlights from low to high beam.

Garrity testified that when he came upon Lepak lying in the middle of the road, he only had time to pull over and warn oncoming traffic by turning his car and flashing his headlights. His unrefuted statement was that there was not enough time to move the body before an oncoming car approached.

Upon seeing the flashing headlights, Johnvin slowed down to thirty-five miles per hour but did not see anything in the roadway ahead. He continued at thirty-five miles per hour and saw Lepak an instant before running over him. He could not avoid him. Johnvin testified that Garrity's headlights blinded him. He had to look away to get the light out of his eyes.

[1] Joan Garrity is joined solely because of her potential marital interest in marital property.

Lepak died five days later from injuries sustained in the accident. It is undisputed that at the accident scene Lepak was administered massive amounts of an intravenous solution that substantially reduced his blood alcohol content by the time the hospital measured it to be .18%. The uncontroverted testimony of an accident reconstructionist determined that Lepak was traveling at sixty to sixty-nine miles per hour before braking. Neither party offers direct evidence how Lepak came to be lying in the road.

The appellants initiated this action against Johnvin and Garrity. The negligence ascribed to Garrity was the flashing of headlights at oncoming drivers. The trial court dismissed the action against Garrity, concluding as a matter of law that Lepak's causal negligence exceeded that of Garrity's. The appellants appeal the ruling.

The appellants argue that the trial court improperly reversed the burden of proof, because it concluded that Lepak's alcohol consumption and speed demonstrated that as a matter of law his negligence was greater than Garrity's. When reviewing summary judgment, our review is de novo. We apply the standards set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). From the documents of record, the non-moving party is entitled to the benefit of all favorable facts and reasonable inferences drawn in his favor. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). The purpose of summary judgment is not to find facts, but to determine whether disputes of material fact exist to require trial. ***Id.***[2]

Generally, the comparison of negligence is a question of fact, peculiarly within the jury's province. ***Holzem v. Mueller,*** 54 Wis.2d 388, 393, 195 N.W.2d 635, 638 (1972). Nonetheless, in extreme cases, the degree of negligence may be determined as a matter of law. ***Johnson v. Grzadzielewski,*** 159 Wis.2d 601, 608, 465 N.W.2d 503, 506 (Ct. App. 1990) (Where it appears that plaintiff's negligence as a matter of law exceeds that of the defendant, "it is not only within the power of the court but it is the duty of the court to so hold.").

[2] On a de novo review, we may affirm the judgment if the trial court reached the correct result but for the wrong reason. Because our review is independent of the trial court, it is unnecessary to address whether the trial court erroneously shifted a burden of proof. ***Liberty Trucking Co. v. DILHR,*** 57 Wis.2d 331, 342-43, 204 N.W.2d 457, 463-64 (1973).

On the record before us, we conclude that the undisputed facts demonstrate Lepak's negligence exceeded Garrity's as a matter of law. Lepak had a duty to exercise ordinary care for his own safety. *See* ***id.*** "Evidence of intoxication is a proper consideration in determining negligence only if it is found that the amount of alcohol consumed so affected the person so as to appreciably lessen or impair his ability to exercise ordinary care for his own safety." ***Landrey v. United Servs. Auto. Ass'n,*** 49 Wis.2d 150, 158, 181 N.W.2d 407, 412 (1970); *see* ***Klinzing v. Huck,*** 45 Wis.2d 458, 468-69, 173 N.W.2d 159, 164 (1970). Here, the amount of alcohol consumed was nearly twice the prohibited concentration of .10% under § 346.63, STATS., permitting the only reasonable inference that the amount consumed appreciably lessened or impaired Lepak's ability to exercise ordinary care for his own safety. It is also undisputed that Lepak's speed of over sixty miles per hour was in excess of the posted speed of fifty-five miles per hour. *See* § 346.57(4), STATS. Here, there was undisputed evidence of negligent operation. Lepak's illegal blood alcohol level, combined with his negligent excessive speed, left no issue of fact with respect to the existence of Lepak's negligence to be determined by a jury.

The appellants contend that even assuming Lepak's negligence, a fact issue is presented by its comparison to Garrity's negligence, which consisted of turning his vehicle the wrong way and flashing bright headlights in the eyes of oncoming drivers. We disagree. Based on the undisputed facts before us, we conclude, as a matter of law, that Garrity's negligence, if any, is less than Lepak's negligence of driving a motorcycle in excess of sixty miles per hour with over .18% blood alcohol content. The only negligence ascribed to Garrity was that of flashing his headlights that were claimed to have blinded the oncoming driver. Even were that so, the oncoming driver should have been expected to behave reasonably if blinded, and the only reasonable course of action for a blinded driver is to stop his vehicle, which was the result Garrity was trying to achieve.[3]

Flashing headlights is only minimal negligence, if any, under the circumstances, which were an insufficient period of time to return to the body

[3] *Cf.*, ***Quady v. Sickl,*** 260 Wis. 348, 353, 51 N.W.2d 3, 5 (1952) ("When the situation on a highway is such that one's vision is completely obscured, it is one's duty to slow down or even stop until the cause of such obscured vision is at least in part removed."); *see also* ***Schmit v. Jansen,*** 247 Wis. 648, 650-51, 20 N.W.2d 542, 543 (Motorist has right to rely on assumption that approaching motorist will observe the rules of the road.).

and remove it from the highway before the oncoming vehicle reached it. Garrity's course of action was reasonably calculated to alert oncoming vehicles to a dangerous situation particularly here where the highway was a divided four-lane.

The appellants argue, however, that Lepak's negligence, as an unconscious person lying in the roadway, cannot exceed Garrity's. This argument ignores the undisputed facts of Lepak's blood alcohol and speed. While summary judgment standards require the courts to give the benefit of all reasonable inferences to the non-moving party, it does not require the court to ignore undisputed evidence because it is unfavorable.

The appellants also contend that Garrity must prove not only Lepak's greater negligence but also that it was causally related to his accident. *See* ***Klinzing,*** 45 Wis.2d at 468-69, 173 N.W.2d at 164. The appellants argue that there is no proof of Lepak's causal negligence and that it is mere speculation to conclude that because Lepak was intoxicated and lying in the roadway, his negligence was a cause of the accident. They argue that another vehicle, animal or mechanical failure may have contributed to Lepak's loss of control and skid mark on the roadway and that "[t]here is no evidence that Lepak was driving negligently" or that Lepak's conduct caused his accident.

We conclude, as a matter of law, that Lepak's excessive speed and .18% blood alcohol content were causally related to an impaired ability to control his motorcycle. While there is no direct evidence of how Lepak's body came to be lying in the roadway, time to react and speed affected at least in substantial part his ability to operate and control his motorcycle. Consequently, the undisputed circumstantial evidence creates the only reasonable inference that Lepak's negligence exceeded Garrity's and was a substantial factor resulting in his position on the roadway.[4]

By the Court.—Judgment affirmed.

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

[4] Because we decide the matter on the issue of comparative negligence, we do not reach the issue of Garrity's immunity under the Good Samaritan Act.