COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 4, 1996

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. 95-2775

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

LOUISE HUSBY
and KENNETH HUSBY,

Plaintiffs-Respondents,

v.

KENNETH FRYE and
WISCONSIN MUTUAL
INSURANCE COMPANY,

Defendants-Appellants,

EMPLOYERS HEALTH
INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for St. Croix County: CONRAD A. RICHARDS, Judge. *Affirmed*.

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

PER CURIAM. Kenneth Frye and his insurer appeal a judgment awarding Louise Husby and her husband damages for injuries arising out of an accident between Frye's pickup truck and Louise Husby's snowmobile. The jury found Frye 90% responsible for the accident. Frye argues that Husby was more negligent as a matter of law, that the court improperly instructed the jury, and that the court erroneously restricted testimony. We reject these arguments and affirm the judgment.

The accident occurred as Husby was crossing 260th Street, an infrequently traveled road that was described at trial as "the back way to Woodville." Husby was traveling on a snowmobile trail posted with signs requesting snowmobilers to stay on the path. When she came to the road, she stopped at the stop sign and looked for cars. She testified that the visibility over railroad tracks at the crest of a nearby hill was poor so she stood on the running boards of her snowmobile to get a better look. Seeing no signs of oncoming traffic, she pulled onto the road where she was struck by Frye's pickup truck.

Frye testified that he was going the posted speed limit, thirty-five miles per hour when he crossed the railroad tracks at the crest of a hill. A passenger in the pickup truck testified that Frye was traveling thirty-five to forty miles per hour. An eyewitness testified that he believed that Frye was traveling at fifty miles per hour. The engineering expert witnesses testified that Frye was traveling between thirty-nine and forty-five miles per hour or between twenty-seven and thirty-six miles per hour. They also testified that a vehicle traveling thirty-five miles per hour could not come to a complete stop before the snowmobile crossing. In addition, the road surface was icy at the time of the accident.

Husby was not familiar with the snowmobile trail, had never driven on 260th Street and did not know its speed limit. Frye was familiar with both 260th Street and the snowmobile trail.

We cannot say that as a matter of law Husby was more negligent than Frye. The jury had the right to believe the testimony that Frye was speeding. *See* ***Bauer v. Piper***, 154 Wis.2d 758, 763, 454 N.W.2d 28, 30 (Ct. App. 1990). Even if Frye was traveling at the posted speed limit, thirty-five miles per hour, he violated § 346.57(3), STATS., in four respects. That statute requires a

driver to reduce his speed when approaching a railway crossing, when approaching a hillcrest, when weather conditions require a slower speed or when a "special hazard" exists. Because of his familiarity with the road and the snowmobile trail, Frye should have known that it was unsafe to travel at thirty-five miles per hour on an icy surface at a hillcrest with a snowmobile trail only seventy-five feet from the railroad tracks. While it may not have been possible for Frye to completely stop his pickup truck before reaching the snowmobile crossing unless he was traveling at twenty miles per hour or less, a reduced speed would have given Husby additional time to cross the road and would have allowed Frye the opportunity to swerve to avoid the accident.

Husby, on the other hand, had no personal knowledge of the danger presented by the crossing. The jury had the right to believe her testimony that she came to a complete stop and stood on the running boards in an effort to maximize her safety. The parties' comparative negligence under these circumstances is the province of the jury. *See* ***Midthun v. Morgan***, 35 Wis.2d 203, 207, 150 N.W.2d 367, 369 (1967).

Frye argues that Husby was more negligent as a matter of law because she violated § 350.02(2)(a)1, STATS., which requires that she yield the right-of-way to roadway traffic. The applicability of that statute is in question, however, because § 350.02(2)(a)5, STATS., allows highway crossings designated as "routes." The record does not conclusively establish whether Husby was traveling on a snowmobile route as that term is defined in § 350.01(16), STATS. We need not resolve that question because even if § 350.02(2)(a)1, applies Husby's negligence does not necessarily exceed Frye's. The requirement that the snowmobile operator yield the right-of-way to all vehicles approaching on the roadway does not compel the impossible. One cannot yield the right of way to a vehicle that cannot be seen. In addition, the statute requires the snowmobiler to cross at a place where no obstruction prevents a quick and safe crossing. The jury could reasonably have found that the obstruction did not prevent a quick and safe crossing provided the motorist maintained a reasonable speed.

The trial court properly exercised its discretion when it refused to read Frye's proffered jury instruction. The trial court has broad discretion in deciding what jury instructions will be given. ***Fischer v. Ganju***, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). The proffered instruction would have informed

the jury of the content of § 350.02(2)(a)1, STATS. As noted earlier, the applicability of that section is not clear because crossing the road may have been authorized by § 350.02(2)(a)5, STATS. While the record does not conclusively establish whether the crossing was a designated snowmobile route, the trial court could reasonably resolve doubt in Husby's favor because other jury instructions informed the jury that Husby had the duty to yield the right-of-way. The question whether a quick and safe crossing could be made despite the topography, assuming a reasonable speed by users of the roadway, was fairly presented to the jury.

Finally, Frye's failure to make an offer of proof precludes review of whether the trial court erred when it disallowed questions concerning other possible places to cross the roadway. An offer of proof is required to preserve alleged error excluding evidence. *See* ***Franklin v. Badger Ford Truck Sales, Inc.***, 58 Wis.2d 641, 656, 207 N.W.2d 866, 873 (1977). The record contains no evidence as to whether there was space for a snowmobile to travel adjacent to the highway or the topography or other factors that would influence a decision regarding the safest place to cross. The record also contains no evidence suggesting that it would be reasonable for Husby to ignore the established trail crossing in favor of a crossing she must find for herself in the dark and unfamiliar terrain. In the absence of an offer or proof, Frye has not established that he was prejudiced by the trial court's ruling. Frye correctly notes that an offer or proof is not necessary where the substance of the evidence "was apparent from the context within which questions were asked." *See* § 901.03(1)(b), STATS. The answers to the questions Frye sought to admit are not evident from the question.

By the Court.—Judgment affirmed.

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