COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 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(1), 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. 95-2844

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

JEFFREY L. WOODSON,

Plaintiff-Respondent-Cross Appellant,

AIR WISCONSIN, INC.,
a Wisconsin corporation,

Plaintiff,

v.

MARIE E. KREUTZER,

Defendant-Third Party Plaintiff-Appellant-Cross Respondent,

MILWAUKEE MUTUAL INSURANCE CO.,

Defendant,

v.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

Third Party Defendant-Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dunn County: ERIC J. WAHL, Judge. *Affirmed.*

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

PER CURIAM. This personal injury action arises out of a traffic accident. Jeffrey Woodson and Marie Kreutzer were traveling in opposite directions and collided in Woodson's lane of travel when Kruetzer executed a turn. The jury determined that Woodson was 51% negligent and the trial court entered a judgment of dismissal. Both parties appeal.

Marie Kreutzer appeals a summary judgment dismissing her counterclaim against Woodson and her claim against Dunn County for negligent highway design. She argues that the trial court erroneously concluded that the statute of limitations bars her claim against Woodson and municipal immunity bars her claim against Dunn County. In her appellate brief, however, she concedes that if the judgment of dismissal is affirmed, her issues on appeal are "moot."

Woodson cross-appeals, contending that (1) the jury's findings were contrary to law and the weight of the evidence, (2) the trial court erroneously instructed the jury and (3) a new trial in the interest of justice is required. We conclude that the record supports the verdict, the court correctly instructed the jury and the interests of justice do not require a new trial. Therefore, we affirm the judgment and do not reach Kreutzer's issues.

FACTS

The October 12, 1991, accident occurred on a curving hilly section of a county highway on a clear sunny day, at the intersection of County Y and Hilltop Road. Both drivers were familiar with that portion of the highway. Because County Y curves, traffic heading east from County Y onto Hilltop continues straight, crossing the opposite northbound lane of travel on Highway Y. Double yellow lines separate the traffic lanes. Although traffic entering Y

from Hilltop has stop signs, there are no stop signs on Y. However, a yellow "caution" sign with an arrow indicating a sharp curve to the left and a twenty-mile-per-hour speed limit is posted on the northbound side of County Y as traffic approaches the intersection.

Because of a head injury suffered in the collision, Woodson has no recollection of the accident itself. Dunn County Deputy Sheriff Michael Tietz investigated the collision. On the day of the accident, Kruetzer was traveling in the southbound lane of County Y and Woodson in the northbound lane as both approached the Hilltop intersection. Tietz testified that it was his opinion that a driver intending to proceed onto Hilltop should signal. Kruetzer knew she had to yield to traffic from the south on Y when proceeding onto Hilltop. The normal course of travel requires that she cross Woodson's lane of travel.

Kreutzer told Tietz that she did not signal her intention to proceed onto East Hilltop. She knew visibility was limited, and she did not see Woodson's car until the front of her car was in his lane. Tietz testified that the impact occurred in Woodson's lane. A civil engineer, qualified as an expert, testified that Kruetzer was traveling nineteen miles per hour and Woodson was traveling thirty-nine miles per hour at the time of impact. He testified that the intersection was dangerous and that Kruetzer would have only 2.5 seconds of "sight distance" from the time she first saw the Woodson vehicle until impact. Given the relative speeds and positions of the vehicles, the expert testified that the collision could not be avoided.

He also agreed that speed was a contributing factor, and if Woodson would have been traveling "within 20 or thereabouts" the accident would have been more easily avoidable. He further testified that Kruetzer's potential use of a directional signal would have made no difference because given his speed, Woodson could not have avoided the collision within the three-second time interval. He further testified that Woodson could have seen Kruetzer approximately two seconds before impact, 115 feet away from impact, while the Kreutzer vehicle was still in the southbound lane of County Y. On cross-examination, he testified:

Q. So at the point in time that Mr. Woodson can first see that Mrs. Kreutzer's vehicle is going to cross the center

> line rather than stay in her lane, his speed is irrelevant to his ability to stop or avoid the accident. Is that true?

A. I would say that's, because of perceptionary reaction, that's probably true.

> On redirect, the expert witness testified:

Q. If the Woodson vehicle had been going at a speed within the advisory, would that have given Marie Kreutzer substantially greater opportunity to take evasive action?

A. Yes.

CROSS-APPEAL

Because Kruetzer states that her appellate issues are moot if we uphold the judgment of dismissal, we first address Woodson's arguments. Woodson argues that the jury's findings with respect to causal negligence are contrary to law and the weight of evidence. He contends that the trial court erroneously submitted a question with respect to Woodson's causal negligence.

> *When the trial judge rules*, either on motion for nonsuit, motion for a directed verdict, or motion to set aside the verdict, *that there is or is not sufficient evidence upon a given question to take the case to the jury,* the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong.

Foseid v. State Bank, 197 Wis.2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995) (citation omitted; emphasis in original.).

Woodson argues that the trial erroneously submitted the issue of his negligence to the jury. We disagree. He relies on ***DeKeyser v. Milwaukee Auto. Ins. Co.,*** 236 Wis. 419, 425, 295 N.W. 755, 758 (1941): "Maintaining a given rate of speed on one's proper lane of travel on a highway is not negligent as excessive unless the circumstances render it reasonably likely to result in loss of control or it is voluntarily maintained when it is reasonably to be anticipated that the lane of travel may be invaded."

Here, the record would support a finding that Woodson was traveling thirty-nine miles per hour in an area marked twenty miles per hour and that it was near a dangerous intersection with which Woodson was familiar. Under these circumstances, a jury question is raised whether under the circumstances Woodson's speed was excessive and impaired his lookout and control. Therefore, the record supports the trial court's decision to submit negligence to the jury.

Woodson argues, however, that any negligence as to speed was not causal as a matter of law, citing ***Baker v. Herman Mut. Ins. Co.***, 17 Wis.2d 597, 602, 117 N.W.2d 725, 728 (1962):

> Even if the truck was traveling in excess of forty miles per hour, we are satisfied that its speed could not have been causal. This court has never held that excessive or unlawful speed is causal merely because it places the vehicle at a particular place at a particular time. *Excessive speed is causal, however, when it prevents or retards the operator, after seeing danger, from slowing down, stopping, or otherwise controlling the vehicle so as to avoid a collision.* (Emphasis added.)

Woodson argues that "it must be shown that such speed interfered with the driver's ability to control the vehicle so as to take action to avoid the

collision at the time the danger could first be recognized. Such a showing was never attempted, much less made, in this case."[1]

Woodson's argument relies on the reconstructionist's cross-examination testimony that at the point when Woodson first recognized the danger, it mattered not whether he was going thirty-nine miles per hour or nineteen miles per hour because he could do nothing to avoid the collision. His argument ignores, however, the reconstructionist's conflicting testimony on direct and re-direct: that speed was a contributing factor to the accident and if Woodson had been traveling nineteen miles per hour, the accident would have been more easily avoidable. Because two competing inferences could have been drawn from the reconstructionist's testimony, a jury question is presented. It is a jury function to resolve conflicting inferences in the testimony. ***Fehring v. Republic Ins. Co.,*** 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 576-77, 547 N.W.2d 592, 598-99 (1996).

Next, Woodson argues that the trial court erroneously submitted the negligence question to the jury because as a matter of law he was confronted by an emergency. We disagree. A driver faced with an emergency that is not of his making cannot be found negligent for actions taken or not taken in response to that emergency. ***Leckwee v. Gibson,*** 90 Wis.2d 275, 288, 280 N.W.2d 186, 191 (1979). To invoke the doctrine, "[t]the party seeking its benefits must be free from the negligence which contributed to the creation of the emergency ...." ***Id.***

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[1] Woodson cites other cases for essentially the same proposition. *See also* ***Dombeck v. Chicago, M., S.P. & P.R. Co.,*** 24 Wis.2d 420, 433, 129 N.W.2d 185, 192 (1964) ("Speed is not causal merely because it arrived at the crossing the instant it did while if it had been going slower the car might have safely crossed ahead of it."); ***Clark v. McCarthy,*** 210 Wis. 631, 635, 246 N.W. 326, 327-28 (1933) ("When two cars proceeding upon a highway in opposite directions collide ... [i]t is difficult to see, however, how the mere speed of a vehicle can be a factor in such an accident, provided both cars maintain their proper place on the highway, and provided the highway itself is wide enough to permit them to pass each other without interference."); ***Reshan v. Harvey,*** 63 Wis.2d 524, 528-29, 217 N.W.2d 302, 304 (1974) ("Surely a driver on a divided highway is not bound to foresee that drivers on the opposite side of a median may lose control and invade the opposite lanes of traffic and thus is not bound to maintain such a rate of speed as necessary to avoid a collision should one do so.").

Our conclusion on this issue is compelled by our previous discussion. The reconstructionist testified that Woodson was driving at a speed beyond that posted as an advisory speed for the curve in question. He further testified that speed was a factor and if Woodson had been traveling at nineteen miles per hour, the accident would have been more easily avoided. Although his cross-examination testimony arguably conflicted with this opinion, the record is sufficient to present a jury question of the issue of Woodson's negligence.

Next, Woodson argues that the record does not support the jury's findings of 51% causal negligence. We disagree.

> The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support the verdict. ... The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict.

Fehring, 118 Wis.2d at 305-06, 347 N.W.2d at 598 (citations omitted). The jury was entitled to infer from the expert testimony that the accident would have been avoidable if Woodson would have been traveling at the posted speed of twenty miles per hour around the curve. The jury was entitled to weigh the parties' negligence and determine that Woodson's excessive speed was slightly more negligent than Kruetzer's failure to yield. The jurors could have inferred that Woodson's excessive speed contributed to impaired lookout and control of his vehicle. Our review of the record convinces us that when the evidence is viewed in a manner most favorably to the verdict, it does not reflect any significant disproportionality. Because the record supports the findings made by the jury, we sustain its apportionment of negligence.

Next, Woodson argues that the jury's damage award for past wage loss, pain, suffering and disability were inadequate and contrary to the weight of the evidence. Based on the evidence of Woodson's severe injuries, he argues

that the evidence demonstrates perversity and a new trial is required. *See* ***Westfall v. Kottke,*** 110 Wis.2d 86, 328 N.W.2d 481 (1983); *see also* § 805.15(1), STATS. We are unpersuaded.

The rule is that where a jury has answered other questions so as to determine that there is no liability on the part of the defendant, which finding is supported by credible evidence, the denial of damages or granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse. ***Sell v. Milwaukee Auto. Ins. Co.,*** 17 Wis.2d 510, 519-20, 117 N.W.2d 719, 724 (1962).

Because the verdict resolves the negligence issue against Woodson, and is supported by credible evidence, we do not reach the issue of damages and conclude a new trial in the interest of justice is not required.

Next, Woodson argues that the trial court erroneously instructed the jury. A trial court has broad discretion in instructing a jury based on the facts and circumstances of a case. ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). Each instruction must be viewed in the context of the overall charge to the jury. *See* ***Buel v. La Crosse Transit Co.,*** 77 Wis.2d 480, 490-93, 253 N.W.2d 232, 237-38 (1977). "If the instructions ... adequately cover the law applicable to the facts, [we] will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous." ***State v. Higginbotham,*** 110 Wis.2d 393, 403-04, 329 N.W.2d 250, 255 (Ct. App. 1982). An instruction will be deemed prejudicial if it is probable—not merely possible—that the jury was misled. ***Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co.,*** 49 Wis.2d 591, 606, 182 N.W.2d 448, 456 (1971).

The trial court refused Woodson's request for the jury to be instructed concerning Kruetzer's duties to yield the right of way and signal her turn. *See* WIS J I—CIVIL 1195 and 1350.[2] With respect to the signal instruction,

[2] The instructions provide:

1195 RIGHT OF WAY: LEFT TURN AT INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use

number 1350, the trial court explained that based upon its view of the evidence, "any reasonable driver in her position had she seen Mr. Woodson in time would have stopped, allowing him to pass but would not have signalled. I don't know that a signal would have helped anybody."[3]

The record supports the trial court's determination. It was undisputed that Kreutzer was proceeding straight and not making any turn. Woodson does not suggest that he would have seen a left turn signal when

(..continued)

> of the roadway and, further provide, that the operator of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching from the opposite direction shall yield the right of way to such vehicle.

The word "approaching," as here employed, involves a concept of nearness in space and time. An automobile is approaching an intersection when it is not so far distant therefrom that, considering the speed at which it is traveling, it is reasonable to assume that a collision will occur if the driver of the automobile intending to turn left undertakes to do so by changing the course of the automobile from the right lane, across the center line, and into the path of the oncoming automobile.

If you find that the oncoming automobile was in fact approaching the intersection, it then became the duty of the driver turning left to yield the right of way to such approaching automobile.

1350 TURN OR DEVIATION: SIGNAL REQUIRED

A safety statute provides that, if traffic may be affected by (the turning of an automobile at an intersection) (the turning of an automobile at a private road or driveway) (deviation of an automobile from a direct course or by movement of the automobile to the right or left upon the roadway), a person so (turning) (deviating) shall give an appropriate signal by hand or directional signal of the intention to (turn) (deviate).

It is further provided that such signal shall be given continuously not less than the last 100 feet traveled by the vehicle before turning.

[3] To review this claim of error, it would have been helpful for the appellant to cite to the record his request for the specific instruction and the court's decision on the request. *See* § 809.19, STATS.

approaching from Kruetzer's right. Because the record fails to suggest that the turn signal was a factor in the accident, the trial court reasonably rejected it.

The trial court also rejected number 1195 because it related to a left turn at the intersection. The court concluded that because Kreutzer was traveling in a straight line, and not making a left-hand turn, it was not supported by the facts. The court explained it would have confused the jury because:

> Mrs. Kruetzer said she specifically did not [signal left] because there was a driveway that would have been a left turn and I think in point of fact that neither of these people saw each other until it was too late to do anything. And I think what we do to jurors is we over load them with the fine points of law that are words that we hear favor our position and I don't think we do them a great service by looking for each and every instruction that has something that's good for us and hopefully not so good for the other side.

The record is in accord with the trial court's decision. Although Kruetzer's lane of travel on County Y curved right, it is undisputed that Kruetzer was proceeding in a straight line onto Hilltop. Consequently, the trial court's refusal of instruction number 1195 is reasonably supported by the record.

CONCLUSION

We conclude that the record supports the apportionment of 51% negligence against Woodson. Because credible evidence supports the verdict, we do not reach the damages issue. We also conclude that the record supports the trial court's discretionary determinations with respect to jury instructions. A new trial in the interest of justice is not required. We accept Kreutzer's position that her appeal is rendered moot if we sustain the verdict as a waiver of her issues on appeal. Therefore, because we sustain the jury's verdict, it is unnecessary to address Kreutzer's appellate arguments.

By the Court.—Judgment affirmed.

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