

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2005

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SUSAN K. GOODMAN AND ROBERT W. GOODMAN,

PLAINTIFFS-RESPONDENTS,

**CENEX/LAND O'LAKES AND STATE FARM INSURANCE
COMPANIES,**

INVOLUNTARY-PLAINTIFFS,

V.

**SARA J. BENDORF AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Reversed and cause remanded with
directions.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Sara Bendorf and the State Farm Mutual Automobile Insurance Company appeal an order granting Susan and Robert Goodman and the Cenex/Land O'Lakes and State Farm Insurance Companies a new trial on the Goodmans' personal injury suit against Bendorf. Bendorf claims the trial court erroneously exercised its discretion when it ordered a new trial after determining that its submission of an emergency doctrine instruction had been improper. We conclude that that the emergency doctrine instruction was proper, and remand with directions to reinstate the judgment and verdict.

BACKGROUND

¶2 Goodman was injured in a collision between the bicycle she was riding and a motorcycle being operated by Bendorf. Several conflicting accounts of the accident were presented at trial. The evidence most favorable to Bendorf is that Bendorf was traveling in the middle of an unmarked left westbound lane of a city street at about twenty-five miles per hour, and Goodman was traveling ahead of her about two feet from the curb in the right westbound lane, when Goodman signaled a left turn with her arm and then turned left from the curb deviating into Bendorf's lane approximately two to three car lengths in front of Bendorf.

¶3 The jury returned a verdict finding Goodman 70% negligent and Bendorf 30% negligent in causing the accident. The trial court was surprised by the verdict and granted Goodman's motion for a new trial on the grounds that the jury had likely been misled by an emergency doctrine instruction that should not have been given. Bendorf appeals.

STANDARD OF REVIEW

¶4 The circuit court's decision to grant a new trial is discretionary. *See Totsky v. Riteway Bus Serv., Inc.*, 220 Wis. 2d 889, 898, 584 N.W.2d 188 (Ct. App. 1998), *aff'd*, 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637. We therefore examine the record for reasons to sustain the trial court's order, rather than the jury's verdict. *See id.* However, we may find an erroneous exercise of discretion if the trial court's decision was based upon a mistaken view of the evidence or an erroneous view of the law. *See id.*

ANALYSIS

¶5 The emergency doctrine excuses a party from negligence for actions taken to avoid a sudden dangerous situation. In order for the emergency doctrine to apply, the party seeking its benefit must be free from negligence contributing to the emergency; the time element in which action is required must be short enough to preclude a deliberate and intelligent choice; and the element of negligence inquired into must concern management and control. *See Totsky*, 220 Wis. 2d at 901. An emergency may be found to exist as a matter of law when a driver is given less than four seconds to react. *See Krause v. Milwaukee Mut. Ins. Co.*, 44 Wis. 2d 590, 605, 172 N.W.2d 181 (1969). The question should be submitted to the jury, however, when there is a dispute about the time element or about whether the party seeking the benefit of the rule contributed to the emergency situation. *See Zillmer v. Miglautsch*, 35 Wis. 2d 691, 702-03, 151 N.W.2d 741 (1967).

¶6 Here, there was evidence presented from which the jury could find that Goodman crossed into Berndorf's lane approximately two to three car lengths, or thirty to forty-five feet, in front of Berndorf, who was traveling at about twenty-five miles per hour. Using the stipulated conversion rate of about one and

one-half feet per second for each mile per hour traveled, Bendorf would have had less than two seconds to react to Goodman's lane deviation. A jury could conclude based on these facts that Bendorf lacked time to make a deliberate and intelligent choice on how to manage and control her motorcycle to avoid hitting Goodman.¹

¶7 The next question is whether Bendorf contributed to the creation of the emergency situation by her own negligent conduct. The trial court determined that Bendorf must have been negligent, as a matter of law, for failing to sound her horn, reduce her speed or alter her position in her lane upon seeing Goodman's hand signal.

¶8 The first problem with this conclusion is that there was conflicting evidence regarding how long Goodman's arm was extended before she began her turn. By at least one account, the signal was made nearly simultaneous with the start of the turn.

¶9 With regard to Bendorf's failure to sound her horn, Bendorf testified that she had seen Goodman look back at her at least once before she began her turn. Since the primary purpose of sounding a horn is to make someone aware of the presence of another vehicle, a jury could have found that Bendorf had no reason to sound her horn until the emergency situation had already been created by Goodman turning directly in front of her.

¶10 Similarly, with regard to reducing speed and altering her position within her lane, Bendorf testified that, after seeing Goodman look at her, she

¹ Bendorf hit her brakes and swerved to the left, just hitting the back wheel of Goodman's bicycle. Had Bendorf swerved to the right, she might have avoided the collision.

believed that Goodman would wait until she had passed before making her turn. As the trial court instructed the jury, a bicyclist has the duty to refrain from moving right or left upon a roadway until such movement can be made with reasonable safety, and every user of the road has the right to assume that every other user will obey the rules of the road. Thus, the jury could have found that Bendorf's assumption that Goodman would wait to make her turn upon seeing that there was a car behind her was reasonable. There was also sufficient evidence to find that Bendorf was traveling within the posted speed limit, and was in a separate lane from Goodman, who was traveling near the curb right up until the time she began her turn.

¶11 In sum, while there was certainly conflicting evidence from which a jury could have found Bendorf negligent prior to the time that Goodman began her turn, that was not the only conclusion that could have been reached. Therefore, the question of Goodman's negligence in the creation of an emergency situation was for the jury to decide. Not only was the trial court right to instruct the jury on the emergency doctrine, it would have erred had it not done so upon Goodman's request. Therefore, its subsequent decision to grant a new trial was based upon an erroneous view of the law. We reverse the order and remand with instructions that the trial court reinstate the verdict rendered by the jury and enter judgment accordingly.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

