

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-0292

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAIME (PERSIKE-LARSEN) RADTKE,

PLAINTIFF-APPELLANT,

**GROUP HEALTH COOPERATIVE OF SOUTH CENTRAL
WISCONSIN, A WISCONSIN INSURANCE CORPORATION,**

INVOLUNTARY-PLAINTIFF,

v.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, A FOREIGN INSURANCE CORPORATION,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Jaime Radtke appeals from a judgment in favor of Rebecca Stoltenberg. Radtke raises the following issues: (1) whether Stoltenberg was negligent as a matter of law for driving on the wrong side of the highway; (2) whether the trial court should have submitted the issue of Caitlin Larsen's negligence to the jury; (3) whether the trial court properly denied her motion for a new trial in the interest of justice on the ground that the verdict was against the great weight and clear preponderance of the evidence; and (4) whether we should grant her a new trial in the interest of justice because the real controversy was not tried. We resolve all issues against Radtke and affirm.

This accident occurred when Rebecca Stoltenberg was driving three of her friends home after a school dance. Stoltenberg testified that she decided to drive over the centerline to avoid snow and ice on the right-hand shoulder. When she crossed the centerline, Caitlin Larsen, the front-seat passenger, grabbed and jerked the steering wheel to bring the car back to the right side of the road. Stoltenberg testified that she turned the wheel back to the left, causing the car to go off the left side of the road and into the ditch where Radtke was injured. After hearing the testimony of the various occupants of the car, the jury concluded that Stoltenberg was not negligent.

Radtke first argues that Stoltenberg was negligent as a matter of law for driving on the wrong side of the road, a violation of a "safety statute." Section 346.05(1), STATS., provides that "[u]pon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway" Safety statutes are legislative enactments "designed to protect a specified class of persons from a particular type of harm." *Betchkal v. Willis*, 127 Wis.2d 177, 184, 378 N.W.2d 684, 687 (1985) (citation omitted). "For the violation of [a safety] statute to constitute negligence per se, it must be demonstrated that the harm inflicted was

the type the statute was designed to prevent and that the person injured was in the class sought to be protected.” *Id.*

The trial court concluded that Stoltenberg was not negligent as a matter of law because the statute was not designed to prevent the harm that occurred—driving off the highway and into the ditch on the left side of the road; it was designed to prevent collisions with on-coming vehicles. The trial court properly denied Radtke’s motion to find Stoltenberg negligent as a matter of law based on a violation of the safety statute.

Radtke next argues that the trial court should have submitted the issue of Caitlin Larsen’s negligence to the jury. We will not reverse a trial court’s discretionary decision in framing a special verdict unless the verdict questions “do not fairly present the material issues of fact to the jury.” *D’Huyvett v. A.O. Smith Harvestore Prods.*, 164 Wis.2d 306, 336, 475 N.W.2d 587, 598 (Ct. App. 1991).

The trial court explained that it did not submit the issue of Larsen’s negligence because doing so would “serve no useful purpose in resolving any issue involved in this case because she is not a party and there are no claims made by her or against her.” The trial court’s thorough jury instructions ensured that the jury would not be confused:

You will note that there is no question on the special verdict that asks whether Caitlin Larsen was negligent. This is because she is not a party to this lawsuit. Evidence of Caitlin Larsen’s conduct at and before the accident was received because it was necessary to understand all of the circumstances you may consider in determining whether Rebecca Stoltenberg was negligent and, if so, whether her negligence was a cause of the accident. If you determine that Caitlin Larsen was negligent, this does not prevent you from finding that

Rebecca Stoltenberg was also negligent or from finding that Rebecca Stoltenberg was not negligent. It is for you to determine from the evidence whether Rebecca Stoltenberg was negligent and, if so, whether her negligence was a cause of the accident.

The trial court's decision not to submit Larsen's negligence to the jury was a proper exercise of discretion.

Radtke next argues that the trial court should have granted her motion for a new trial in the interest of justice. She argued that she was entitled to a new trial because the verdict was against the great weight and clear preponderance of the evidence. The trial court may grant a new trial in the interest of justice "when the jury's findings are contrary to the great weight and clear preponderance of the evidence even though the findings are supported by credible evidence." *Priske v. General Motors Corp.*, 89 Wis.2d 642, 662, 279 N.W.2d 227, 236 (1979). The trial court's decision on a motion for a new trial in the interest of justice is highly discretionary and will be sustained unless the trial court misused its discretion. *Id.* at 663, 279 N.W.2d at 236.

The trial court concluded that the jury's verdict was not contrary to the great weight and clear preponderance of the evidence. Both Amanda Beld, one of the rear-seat passengers, and Stoltenberg testified that there was no danger until Larsen jerked the wheel. Although the testimony of the car's occupants varied to some degree, the trial court explained:

Well, to the extent that the jury accepted, which they were certainly entitled to, accept the testimony of the back seat passenger whose testimony was that this car was simply proceeding parallel with the roadway and down the roadway without any basis for anyone to be fearful, the jury could from that have concluded that the driver of this vehicle was not negligent. Therefore, the jury having done so would not have been contrary to the great weight and clear preponderance of the evidence

The trial court's decision denying the motion for a new trial was a proper exercise of discretion.

Finally, Radtke argues that we should grant her a new trial in the interest of justice because the real controversy was not tried. The real issue in this case was whether Stoltenberg was negligent given the circumstances of the accident. The parties raised the issue and the jury decided it. We conclude that the real controversy was tried.

By the Court.—Judgment affirmed.

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

