

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2014AP1490

Cir. Ct. No. 2011CV1838

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ERIC A. DANTE,

PLAINTIFF-RESPONDENT,

**UNITED HEALTHCARE OF WISCONSIN, INC. AND STATE OF
WISCONSIN,**

INVOLUNTARY-PLAINTIFFS,

v.

**1ST AUTO & CASUALTY INSURANCE COMPANY AND CLAYTON R.
POTRATZ,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Winnebago
County: SCOTT C. WOLDT, Judge. *Reversed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Clayton R. Potratz and his insurer, 1st Auto & Casualty Ins. Co. (collectively, Potratz), appeal a judgment overturning a jury verdict. We reverse because the trial court was clearly wrong in changing the jury's answers, as there was credible evidence to support them.

¶2 Just before 1:00 p.m. on a December day, Potratz was traveling northbound on Highway 41. A winter storm led to area school closings that morning but it had stopped snowing by 11:00 a.m. or noon. Potratz was in the left-hand lane going 60 mph, 5 mph below the speed limit, moving with the flow of traffic. The semi-truck ahead of him slowed to 55 mph, blowing snow from the top of the trailer and kicking up snow and slush onto Potratz's windshield. The semi slowed further still. Noting several cars behind him, Potratz started to move to the right lane when he saw two state patrol cars parked on the shoulder. To give them berth, he attempted to return to the left lane. He hit a slippery patch, lost control of his vehicle, and collided with Trooper Eric Dante's squad car. Dante was injured and filed this negligence claim against Potratz.

¶3 At the end of the two-day trial, the jury was instructed, in part, that a driver is not negligent as to management and control if unaware of a danger in time to take proper means to avoid an accident; that skidding may occur without fault of the driver; that his or her knowledge of road conditions, speed, and manner of controlling the vehicle can be considered; that no person shall drive at a speed greater than is reasonable and prudent under existing conditions; and that a person must drive at an "appropriate reduced speed" when special traffic, weather, or highway hazards exist, meaning a speed less than the otherwise lawful speed and one at which a person of ordinary intelligence and prudence would drive under the

same or similar circumstances. *See* WIS JI—CIVIL 1105, 1280, and 1285.¹ The jury found Potratz 0% negligent and not a cause of Dante’s injuries.

¶4 On motions after verdict, Dante asked the trial court to change the jury’s answers. *See* WIS. STAT. § 805.14(5)(c).² Finding that no credible evidence supported the jury’s answers, the trial court changed them, thus finding Potratz 100% negligent and that his negligence caused Dante’s injuries. Potratz appeals. Additional facts will be supplied as needed.

¶5 This is a classic jury case. “When a circuit court decides as a matter of law that the evidence does not support the jury’s findings, this presents a question of law that we review de novo.” *Reuben v. Koppen*, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703. This court “will search for credible evidence to sustain the jury’s verdict” and “will overturn the circuit court’s decision if the circuit court was ‘clearly wrong,’” that is, “if the jury verdict is supported by ‘any credible evidence.’” *Best Price Plumbing, Inc. v. Erie Ins. Exch.*, 2012 WI 44, ¶44, 340 Wis. 2d 307, 814 N.W.2d 419.

¶6 Dante testified that the roadway was primarily ice-covered. The second state trooper testified that the snowfall had ended an hour or two before the

¹ Dante asked the court to also give WIS JI—CIVIL 1009, the negligence per se instruction, because Potratz was cited for failing to drive at a reasonable and prudent speed, *see* WIS. STAT. § 346.57(2) (2013-14), and violating a safety statute can constitute negligence per se, *see Totsky v. Riteway Bus Service, Inc.*, 2000 WI 29, ¶25, 233 Wis. 2d 371, 607 N.W.2d 637. The court properly exercised its broad discretion in denying Dante’s request, *see Fischer v. Ganju*, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992), because the citation was not introduced into evidence and, in fact, is inadmissible, *see Anderson v. Saunders*, 16 Wis. 2d 55, 58-59, 113 N.W.2d 831 (1962). Further, the court explained that WIS JI—CIVIL 1009 would be redundant to WIS JI—CIVIL 1105, 1280, and 1285 and thus would unfairly emphasize it. Finally, the given instructions were an overall correct statement of the law. *See Fischer*, 168 Wis. 2d at 850.

² All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

accident but wind gusts caused blowing snow and the highway “[a]t times ... was snow-covered and slippery.” The trial court found that the undisputed facts were that the road was icy and snow-blown, that “the only way to pass was to speed up” and that Potratz’s “only reasonable choice was to slow down, to speed up and pass was negligence.”

¶7 The heavy snowfall is not disputed. But other facts were. Potratz testified that the roads had been plowed, that they did not appear slippery, that he began to change lanes when the semi’s deceleration and snow from it hampered his visibility, and that he encountered no slippery conditions before attempting to switch back to the left lane. When there is conflicting credible evidence, the question is to be resolved by the jury. See *Fields v. Creek*, 21 Wis. 2d 562, 569, 124 N.W.2d 599 (1963).

¶8 Also, the school “snow day” indicates only that road conditions were anticipated to be poor when the decision was made to cancel classes. Applying their common sense and life experiences, jurors reasonably could infer that road conditions improved once the snow stopped and roadways were plowed, and that school officials make safety and transportation decisions based on the condition of streets and roads not as well-tended and -traveled as Highway 41.

¶9 That Potratz improvidently sped up also is not the only reasonable inference the evidence permits. He could have attempted to pass the semi on the right by maintaining a constant speed or even decelerating, as long as his speed was greater than the semi’s. Similarly, Dante testified that he “interpreted” Potratz’s maneuver to return to the left lane as a “jerking the wheel back to the left,” while Potratz testified that he “decided” to switch back, suggesting a more deliberate move. “[W]here more than one inference can be drawn from the

evidence,’ the circuit court ‘must accept the inference drawn by the jury.’” *Best Price Plumbing*, 340 Wis. 2d 307, ¶43.

¶10 The jury thus reasonably could conclude that Potratz traveled at an appropriate reduced speed, began to pass the semi without accelerating to gain better visibility, and suddenly lost control upon encountering an unexpected slippery patch too late to take proper means to avoid an accident. Skidding per se is not negligence but must be proved to be the result of negligence preceding or during the skidding. *Abbott v. Truck Ins. Exch. Co.*, 33 Wis. 2d 671, 677, 148 N.W.2d 116 (1967). Credible evidence supports the jury finding of zero percent negligence on Potratz’s behalf.³

By the Court.—Judgment reversed.

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

³ We decline to address Dante’s assertion that Potratz “in effect[] suggests that his [Potratz’s] actions should be excused under ... the ‘Emergency Doctrine.’” Potratz neither advances the doctrine here nor did it come up below.

