

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 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. 99-2274

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**TINA TOBORG AND BRONSON TOBORG AND MORGAN
TOBORG, MINORS, BY THEIR GUARDIAN AD LITEM, JIM
SCHERNECKER,**

PLAINTIFFS-APPELLANTS,

V.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
AND JOHN UTTERBACK,**

DEFENDANTS-RESPONDENTS,

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

SUBROGEE.

APPEAL from a judgment of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Tina Toborg, and her children, appeal a judgment dismissing their personal injury claim against John Utterback and his insurer. Toborg sued for injuries suffered in an automobile accident involving Utterback. The trial court entered judgment after a jury found Utterback not negligent in the accident. The issues on appeal are whether the trial court properly instructed the jury and properly ruled on two evidentiary issues. We affirm.

¶2 Utterback was driving north on a snow-covered Madison city street, while Toborg was traveling south toward him in a vehicle driven by Sara Glynn. Utterback's vehicle went into a long slide, crossed the centerline, struck Glynn's vehicle, and injured Toborg.

¶3 Before trial, Toborg unsuccessfully moved to compel discovery of Utterback's vision records. At trial, she and Glynn testified that Utterback was passing other vehicles and traveling too fast on the slippery, snow-covered road, and that he had already fishtailed out of control once before entering the slide that caused the accident. Utterback testified that he had only just turned onto the road, had not fishtailed before, was driving only fifteen miles an hour and was not passing any other vehicles. According to him, ice hidden under the snow caused him to slide, and once it began he had no means of controlling his vehicle. He said that he honked his horn to warn Glynn, but she did not stop.

¶4 The trial court instructed the jury on each driver's potential negligence as to management, control and speed. Over Toborg's objection the court also gave WIS JI—CIVIL 1105A, which explains the negligence standard for management and control in an emergency. The jury found neither driver negligent, and the trial court granted judgment on the verdict. On appeal, Toborg challenges the court's ruling on her discovery motion, the decision to give the

emergency instruction, and the exclusion of certain evidence pertaining to her damages. Because we affirm the judgment as to Utterback's negligence, we do not address the issue on damages.

¶5 The trial court properly denied the motion to discover Utterback's vision records. Whether to grant the motion was within the trial court's discretion. *See Franzen v. Children's Hosp. of Wisconsin, Inc.*, 169 Wis. 2d 366, 376, 485 N.W.2d 603 (Ct. App. 1992). We affirm discretionary decisions if they correctly apply the law and facts, and are reasonable. *See Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). Here, Toborg advanced no theory of the case suggesting that impaired vision caused the accident. It is undisputed that if ice existed on the roadway, no one could see it under the snow cover. Toborg limited her allegations and her evidence at trial to the claim that Utterback was driving too fast for conditions. Whether he had eye problems was irrelevant to that allegation of negligence.

¶6 Toborg suffered no prejudice from the trial court's instruction on management and control in an emergency. WISCONSIN JI—CIVIL 1105A provides that a driver is not negligent as to management and control for doing what a prudent person might do when confronted with a sudden emergency, in this case sliding across the centerline. Toborg objected that Utterback was not entitled to the instruction because his speeding caused him to slide in the first place. However, the instruction itself cures Toborg's concern, stating that "[t]his rule does not apply to any person whose negligence wholly or in part creates the emergency." WIS JI—CIVIL 1105A. It further expressly instructs that the emergency rule concerns negligence only as to management and control, a claim Toborg now says she never pursued against Utterback. In other words, had the jury found that Utterback was speeding, it would have disregarded the emergency

instruction. Moreover, we note that a court should give the emergency instruction whenever there is a jury question regarding whether a party contributed to the emergency. *See Zillmer v. Miglautsch*, 35 Wis. 2d 691, 702-03, 151 N.W.2d 741 (1967).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

