

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 29, 2005**

Cornelia G. Clark  
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. 04-0891  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV007841**

**IN COURT OF APPEALS  
DISTRICT I**

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**MILOS LAZAREVIC AND  
JANE L. LAZAREVIC,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**SUZETTE L. TURNER-WILLIAMS AND  
AI SOUTH INSURANCE COMPANY,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Reversed and cause remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Suzette L. Turner-Williams and AI South Insurance Company (collectively, “AI South”) appeal from a judgment entered in favor of

plaintiffs Milos and Jane L. Lazarevic. AI South also appeals from an order denying its motion for reconsideration.<sup>1</sup> We conclude that AI South is entitled to a new trial and, therefore, reverse and remand for further proceedings.

## BACKGROUND

¶2 This case involves personal injuries Milos Lazarevic suffered when his bike collided with a vehicle driven by Turner-Williams. The accident happened in a crosswalk at the controlled intersection of Good Hope Road and 60th Street in Milwaukee.

¶3 Good Hope Road runs east and west; 60th Street runs north and south. This intersection is controlled by stoplights, which include left turn arrows and lanes on Good Hope Road and 60th Street. Lazarevic and his son were attempting to ride their bicycles across Good Hope Road from the southeast corner of the intersection to the northeast corner, using the crosswalk. When Lazarevic collided with Turner-Williams' vehicle, she was driving south on 60th Street and turning left onto Good Hope Road to proceed east.

¶4 Lazarevic filed suit to recover for personal injuries he suffered. The matter was tried to the trial court. AI South contested both liability and damages. However, because only the trial court's liability ruling is challenged on appeal, only those facts will be discussed here.

¶5 Lazarevic testified that before entering the intersection, he pushed the button to request a "Walk" light several times, but it never changed, leading

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<sup>1</sup> We consider the "Decision of Trial Court and Order for Judgment," dated February 19, 2004, to be the judgment in this case.

him to believe that the light was not working.<sup>2</sup> He stated that when he saw traffic begin to proceed south on 60th Street, he assumed it would be safe to proceed north on 60th Street to cross Good Hope Road. Lazarevic testified that he saw Turner-Williams' car in the intersection, beginning to turn left onto Good Hope Road. However, he continued crossing because he believed he had the right-of-way. He claimed that Turner-Williams' car struck him.

¶6 Turner-Williams was not available to testify at trial, but the trial court admitted her deposition testimony. Turner-Williams testified that she had a green left turn arrow at the time she started her turn, and that she was driving at a speed of five to ten miles per hour as she turned. She said that she saw Lazarevic when she was five or ten feet away from him, and that she stopped her car. She further testified that Lazarevic did not attempt to avoid the accident and that her car was completely stopped when Lazarevic collided with her car.

¶7 The trial court also heard testimony from Lawrence Klein, a witness who was directly behind Turner-Williams, and also turning left onto Good Hope Road. Klein testified that when he and Turner-Williams had the green left turn arrow, the southbound traffic also had a green light. The 60th Street northbound traffic was stopped, allowing Turner-Williams and Klein to turn left, consistent with the green left turn arrow. Klein testified that as the vehicles were turning left, he saw Lazarevic and his son start to cross in the crosswalk, riding their bicycles. Klein stated:

[Turner-Williams'] car came to a complete stop. The gentleman continued riding his bicycle, at which time I

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<sup>2</sup> The police officer who responded to the accident testified that he too tried the "Walk" signal and concluded that it was not working properly.

would have to say there was like two to four feet from the time ... before he hit the car, you know, from the time she stopped to when he hit the car.

Anyway, the car was stopped. Must have been about two to four seconds. [Lazarevic] continued on. He slowed down a little bit. He wasn't riding fast, and he wasn't riding slow, but he slowed down, and the [bicycle's] front tire bumped the front bumper of the car.

¶8 The trial court made the following findings of fact and conclusions of law:

- Turner-Williams proceeded with the permission of a green left arrow at the time of the accident.
- The crossing signal for Lazarevic was not working properly.
- Both Lazarevic and Turner-Williams “should have had a fairly good view of each other during the course of their interaction and approaching the intersection and the turn.”
- Both had a duty to avoid the accident if at all possible, and to conduct themselves in a “reasonably safe manner.”
- Lazarevic proceeded through the intersection “knowing that the light was not in his favor, but because the light was never going to be in his favor, given the broken nature of it” and when traffic on Good Hope Road was stopped.
- The fact that Turner-Williams saw Lazarevic only within five feet of the impact “indicates to [the trial court] that she was not exercising proper lookout or management and control.”
- Lazarevic did not maneuver to get out of the way of the car, even though he saw the vehicle turning in his direction.
- Turner-Williams, once she saw Lazarevic, slowed down, stopped and tried to pull left in order to avoid him.
- There was poor lookout and a lack of ordinary care on the part of both Lazarevic and Turner-Williams.

- Turner-Williams was seventy percent at fault; Lazarevic was thirty percent at fault.
- Lazarevic's damages included \$6,350 in medical bills, \$2,000 in future medical damages, \$2,500 in loss of consortium, and \$10,000 for pain and suffering.

¶9 The trial court entered judgment for \$14,595 (seventy percent of total damages). AI South moved for reconsideration. The trial court denied the motion and this appeal followed.

## DISCUSSION

¶10 AI South asks this court to reverse and remand with instructions to enter judgment in its favor, reasoning that once the legal errors made by the trial court are corrected, no reasonable finder of fact could render a verdict in Lazarevic's favor. In the alternative, AI South argues it is entitled to a new trial. AI South contends the trial court erred when it: (1) concluded that both Turner-Williams and Lazarevic had the right-of-way; (2) held Turner-Williams to a higher standard of care; (3) refused to consider whether Lazarevic had violated MILWAUKEE, WIS., ORDINANCE § 102-1, which prohibits operating a bicycle on a public sidewalk; and (4) apportioned negligence, finding Lazarevic less than fifty percent negligent.

### **I. Whether both parties had the right-of-way**

¶11 AI South argues that the trial court's findings with respect to right-of-way are both factually and legally impossible. This court will not overturn findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2003-

04).<sup>3</sup> The credibility of witnesses and the weight to be attached to their testimony is for the trier of fact, not the appellate court, to determine. *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). Conversely, whether the trial court correctly interpreted the statutes it applied to the facts is a question of law we review *de novo*. See *State v. Greve*, 2004 WI 69, ¶6, 272 Wis. 2d 444, 681 N.W.2d 479.

¶12 In its oral decision, the trial court found that it was appropriate for Lazarevic to cross Good Hope Road when traffic across that road was stopped, and that Turner-Williams “proceeded with the permission or authority of the green arrow, which was appropriate.” The trial court continued:

So basically, I think that, given the status of that particular crosswalk, they both had some right of way. I think that the right of way is not really in contest, here, because there’s, I think, support for both of them proceeding – deciding to proceed, as long as they proceed reasonably at that time.

¶13 AI South argues that the trial court misstated and misapplied the law. AI South explains: “[Lazarevic] may have believed that he had the right of way, but [Turner-Williams], by statute, had the right of way and [Lazarevic] had the duty to yield to [Turner-Williams].” In support, AI South relies on WIS JI—CIVIL 1225, which provides:

The Wisconsin statutes define “right of way” as the privilege of the immediate use of the roadway and, further provide, that at an intersection or crosswalk where traffic is controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian crossing or who has started to cross the highway

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

on a green or “Walk” signal and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at this intersection, where traffic was controlled by (traffic control signals) (a traffic officer), (pedestrian) was in the act of crossing the highway on the (green) (Walk) signal, then (pedestrian) was entitled to the right of way over an approaching automobile. However, if you find that (pedestrian) was not crossing or had not started to cross the highway on a (green) (Walk) signal, then it became (pedestrian)’s duty to yield the right of way to an approaching automobile on the highway proceeding directly ahead on the (green) signal.

¶14 “[W]hile jury instructions are not precedential, they are of persuasive authority.” *State v. Olson*, 175 Wis.2d 628, 642 n.10, 498 N.W.2d 661 (1993). Moreover, the jury instruction is consistent with WIS. STAT. §§ 340.01(51) and 346.23(1), on which it is based. *See* Comment, WIS JI—CIVIL 1225. Section 340.01(51) provides: “‘Right-of-way’ means the privilege of the immediate use of the roadway.” Section 346.23(1) provides:

**346.23 Crossing controlled intersection or crosswalk.**

(1) At an intersection or crosswalk where traffic is controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right-of-way to a pedestrian, or to a person who is riding a bicycle or electric personal assistive mobility device in a manner which is consistent with the safe use of the crosswalk by pedestrians, who has started to cross the highway on a green or “Walk” signal and in all other cases pedestrians, bicyclists, and riders of electric personal assistive mobility devices shall yield the right-of-way to vehicles lawfully proceeding directly ahead on a green signal. No operator of a vehicle proceeding ahead on a green signal may begin a turn at a controlled intersection or crosswalk when a pedestrian, bicyclist, or rider of an electric personal assistive mobility device crossing in the crosswalk on a green or “Walk” signal would be endangered or interfered with in any way. The rules stated in this subsection are modified at intersections or crosswalks on divided highways or highways provided with safety zones in the manner and to the extent stated in sub. (2).

¶15 “[T]here are no ‘rights-of-way’ at intersections other than those specifically described by statute.” *Betchkal v. Willis*, 127 Wis. 2d 177, 186, 378 N.W.2d 684 (1985). Pursuant to WIS. STAT. §§ 340.01(51) and 346.23, the pedestrian and the driver cannot share the right-of-way. Either Turner-Williams or Lazarevic had the right-of-way; it could not have been shared.

¶16 AI South contends that because the trial court found that Turner-Williams had a green left turn arrow at the time of the accident, Lazarevic could not have also had the right-of-way to cross Good Hope Road. We agree. Accepting the trial court’s factual finding as true, Lazarevic did not have the right-of-way and was, therefore, negligent as a matter of law. See *Landrey v. United Servs. Auto. Ass’n*, 49 Wis. 2d 150, 154, 181 N.W.2d 407 (1970) (violations of WIS. STAT. § 346.23(1) constitute negligence as a matter of law).

¶17 We conclude that the trial court relied on the erroneous legal conclusion that both parties had the right-of-way. We further conclude that this error affected the substantial rights of the parties. See *Martindale v. Ripp*, 2001 WI 113, ¶¶31-32, 246 Wis. 2d 67, 629 N.W.2d 698. There is a reasonable possibility that the error contributed to the outcome of this case because the trial court did not apportion negligence with the assumption that Lazarevic was negligent as a matter of law. Therefore, AI South is entitled to a new trial.

¶18 AI South contends that a new trial is not necessary because Lazarevic was more than fifty percent negligent as a matter of law. We disagree. “It is only in an exceptional case that a trial court, or reviewing court, may say as a matter of law that the negligence of the pedestrian is greater than that of the driver.” *Staples v. Glienke*, 142 Wis. 2d 19, 34-35, 416 N.W.2d 920 (Ct. App. 1987). We are unconvinced this is such an exceptional case. There are other



factors that must be weighed. We conclude that a new trial is necessary to determine, in view of our holding that both parties cannot have the right-of-way, whether both parties were negligent and, if necessary, to apportion negligence.

## **II. Additional bases for new trial**

¶19 AI South has offered three additional reasons why it is entitled to a new trial. However, this court is to decide cases on the “narrowest possible ground.” *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). We decline to address the other alleged errors, except to note that we do have some doubts about the trial court’s apparent conclusion that Turner-Williams had a greater standard of care, as the driver of a vehicle. We encourage the trial court to examine this issue closely upon retrial.

## **CONCLUSION**

¶20 For the foregoing reasons, we reverse the judgment and order of the trial court and remand for further proceedings consistent with this opinion.

*By the Court.*—Judgment and order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

