

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 00-1195

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STEVEN G. ROBILLARD AND LORI ROBILLARD,

PLAINTIFFS-APPELLANTS,

V.

**DOUGLAS W. NARDI, BELOIT BEVERAGE COMPANY,
REGENT INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

**ABC INSURANCE COMPANY, STATE OF WISCONSIN,
DEPT. OF HEALTH AND SOCIAL SERVICES, DONNA
SHALALA, SECRETARY OF HEALTH AND HUMAN
SERVICES,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee
County: STANLEY A. MILLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven and Lori Robillard appeal a judgment dismissing their personal injury action against Douglas Nardi, his former employer, the Beloit Beverage Company, and Beloit Beverage's insurer. The issues are whether the trial court made erroneous evidentiary rulings during the trial, and whether it properly instructed the jury. We affirm.¹

¶2 Nardi was driving a tractor trailer north on a two-lane arterial highway. Steven Robillard was traveling toward Nardi from the north. As Nardi began a left turn across the highway, Steven drove straight into him and was seriously injured.

¶3 At the trial on the Robillards' claims, the parties offered different theories of the accident. The Robillards attributed it to Nardi's negligence in violating Steven's right-of-way. They offered evidence that he was driving at or below the thirty-mile-an-hour speed limit and had no time to avoid the accident when Nardi turned into his lane. Nardi, on the other hand, contended that Steven could have stopped in plenty of time and avoided the accident, had he not been traveling at an excessive rate of speed. Support for that theory came from the testimony of Barry Duffek, the only non-party who witnessed the accident. Duffek testified that Steven was traveling 40-45 miles an hour and still accelerating when he drove into Nardi's truck.

¶4 During the trial, the court overruled the Robillards' objection to evidence indicating that Steven had a history of anger and impatience. The jury

¹ Steven also contends that the trial court erred in calculating his medical expenses. Nardi concedes the error. However, because we affirm on the liability issues the error is moot.

also heard a statement Duffek gave to a police officer shortly after the accident. One of Nardi's witnesses was an expert who offered opinion testimony about the accident based on a set of assumed facts about how it occurred.

¶5 In parts relevant to this appeal, the trial court instructed the jury on the following points.

1. To consider whether an expert's opinion is based on facts in the case.
2. The standard emergency instruction.
3. That one turning left across the path of an approaching vehicle must yield the right-of-way.
4. It is negligent to drive a vehicle in excess of a reasonable and prudent speed. Driving above the posted speed (30 mph here) is negligence.

¶6 The jury found Steven eighty percent causally negligent and Nardi twenty percent causally negligent. The trial court granted judgment on that verdict and dismissed the action. In this appeal, the Robillards challenge the decisions to allow proof regarding Steven's temperament and Duffek's statement to police. They also challenge the decision to include an instruction on reasonable and prudent speed and the decision to exclude certain other instructions bearing on the right-of-way in a left-turn situation.

¶7 We review a trial court decision on evidence under the erroneous exercise of discretion standard. *State v. Edmunds*, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999). We uphold a discretionary decision if the trial court relied on facts of record, applied the correct legal standard and reached a reasonable conclusion. *Id.* Instructing the jury is also within the trial court's discretion. *State v. McCoy*, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988).

However, we review *de novo* whether those instructions correctly state the law applicable in the circumstances. *Id.*

¶8 The trial court properly allowed testimony and evidence regarding Steven’s temperament. The Robillards “opened the door” by first eliciting testimony from Lori about his impatience and anger at times. Thereafter, Nardi was free to pursue the subject, even for a different purpose. *Mancheski v. State*, 49 Wis. 2d 46, 52-53, 181 N.W.2d 420 (1970) (a party who opens door to a subject cannot later object to another party’s exploitation of that open door for a different purpose).

¶9 The trial court also properly allowed Duffek’s statement into evidence. The Robillards claim error because Duffek could not remember making it six and one-half years earlier. However, the document containing it was undisputedly an authentic police report on the accident. “The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” WIS. STAT. § 909.01 (1999-2000).² In any event, the prior statement was consistent with Duffek’s trial testimony, and we fail to see any prejudice from its admission.

¶10 The Robillards also claim error because the trial court refused to add instructions that “[t]he driver proceeding in a straight direction on the highway has an absolute right of way as to a vehicle turning left in front of him,” and that “[a] driver of a vehicle on an arterial highway has no duty to anticipate that another

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

user will not yield the right of way.”³ However, the instructions the Robillards wished to add were merely cumulative because the trial court adequately instructed the jury that Steven had the right-of-way and Nardi had a duty to yield to him.

¶11 The Robillards also claim error in failure to give WIS JI—CIVIL 265 EXPERT TESTIMONY: HYPOTHETICAL QUESTIONS which instructs that “[c]onsider [an expert witness’s opinion] only if you believed the assumed facts upon which it is based. If you find that the facts stated in the hypothetical question have not been proved, then the opinion based on those facts is not to be given any weight.” Again, that instruction was cumulative. It is not substantially different from the instruction given in this case, “[i]n determining the weight to be given an opinion, you should consider ... whether reasons for the opinion are based on facts in the case.”

¶12 Finally, the Robillards claim error in the instructions pertaining to speed limits and reasonable and prudent speed. They appear to contend that the facts do not support the instruction because the evidence showed Steven did not have time to react to Nardi’s left turn. However, that issue was in dispute. In any event, the jury was also instructed on the doctrine of emergency, which cured any objection to the instructions on speed.

By the Court.—Judgment affirmed.

³ Robillard also requested WIS JI—CIVIL 1190.

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

