

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2001

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. 00-1789-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SUSAN K. SCHEY,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION
AND LANGLADE COUNTY,**

DEFENDANTS-RESPONDENTS.

SHANNON SCHEY, A MINOR,

PLAINTIFF,

v.

**WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION
AND LANGLADE COUNTY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Susan Schey appeals a judgment, entered upon a jury's verdict, dismissing her negligence claim against Langlade County and its insurer, Wisconsin County Mutual Insurance Corporation (collectively the County). Schey argues that the trial court erred by failing to give the "Management and Control—Emergency" jury instruction. We reject Schey's arguments and affirm the judgment.¹

¶2 In February 1994, Schey's vehicle struck a tree that had fallen in the road after being cut down by employees of the County's highway department. Schey sued the County for injuries resulting from its employees' alleged negligence in both cutting the tree and failing to either warn the public or remove the tree from the roadway. The County moved for summary judgment, asserting governmental immunity based on its contention that its employees' acts were discretionary. We granted the County's petition for leave to appeal the trial court's denial of its summary judgment motion. In that appeal, we affirmed the order denying summary judgment of the entire action.² *See Schey v. Wisconsin*

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

² In the earlier appeal, we concluded that the crew's initial decisions as to how to fell the tree and whether to post warnings were discretionary. However, we determined that once the tree fell across the road, the crew had an absolute, certain and imperative duty to warn the public and remove the tree. Thus, although we affirmed denial of summary judgment of the entire action, we reversed the denial of summary judgment as to the crew's decision regarding how to fell the tree and whether to post warnings initially, and remanded the matter for a determination whether the crew was negligent once the tree fell onto the road. *See Schey v. Wisconsin Cty. Mut. Ins. Corp.*, No. 98-3245, unpublished slip op. (Wis. Ct. App. June 29, 1999).

Cty. Mut. Ins. Corp., No. 98-3245, unpublished slip op. (Wis. Ct. App. June 29, 1999). The trial court ultimately entered judgment dismissing Schey's negligence claim after a jury found her 65% causally negligent for her own injuries. This appeal followed.

¶3 Schey argues that the trial court erred by failing to give the jury instruction on "Management and Control—Emergency." A trial court has "broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case." *Nowatske v. Osterloh*, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). When a trial court has given an erroneous instruction or has erroneously refused to give an instruction, "a new trial is not warranted unless the error is prejudicial." *Id.* at 429.

¶4 The jury instruction on "Management and Control—Emergency," provides:

When considering negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by her or his own negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if he or she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that her or his choice was not the best or safest course.

This rule does not apply to any person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless he or she is without fault in the creation of the emergency.

This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

WIS JI—CIVIL 1105A. Because the instruction is designed to relieve a driver who is confronted with an emergency from being labeled negligent in connection with his or her manner of driving, it should not be given unless that driver's management and control are at issue. *See Schmidt v. Sekach*, 29 Wis. 2d 281, 289, 139 N.W.2d 88 (1966). Consistent with this legal standard, the trial court, in denying Schey's request for the instruction, stated, "I'm not giving the emergency instruction because I don't believe that there is any major issue regarding her ability for management and control."

¶5 A parenthetical to the jury instruction on management and control, WIS JI—CIVIL 1105, provides that "[i]f a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control." In *Schmiedeck v. Gerard*, 42 Wis. 2d 135, 166 N.W.2d 136 (1969), the plaintiff's vehicle was struck after proceeding into an intersection that had obstructed views due to the location of both a building and a parked truck. The plaintiff testified that she did not actually see the vehicle in the intersection before it struck her. *Id.* at 139. Thus a jury question as to negligent lookout was presented. Although the plaintiff claimed she was confronted by an emergency as a matter of law, our supreme court concluded that "[t]he availability of the claim of an existing emergency negating acts of alleged negligence does not apply when the negligent conduct complained of is negligent lookout; it applies only when the element of negligence inquired into concerns management and control." *Id.* at 140.

¶6 Here, the tree had fallen just over the crest of a hill. Analogous to the plaintiff in *Schmiedeck*, Schey testified at trial that she had no time to take evasive action because she saw the tree only a "split second" before hitting it. Schey opined that the hill likely obstructed her view of the tree. Because Schey

did not see or become aware of the tree in time to take proper means to avoid the accident, she was not negligent as to “management and control,” rather, the issues involved were those of speed and lookout. Thus, the trial court properly denied Schey’s request for the jury instruction on Management and Control—Emergency.³

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

³ We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

