COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2592

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MIGUEL A. RIVERA,

PLAINTIFF-RESPONDENT,

V.

BETH T. VANDEBOOM AND
STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

COMPCARE HEALTH SERVICES
INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Beth T. Vandeboom and State Farm Mutual Automobile Insurance Company (collectively, "State Farm") appeal from a circuit court judgment,[1] following a jury trial, awarding Miguel A. Rivera $548,312.23 in damages[2] for injuries he suffered in a collision between the motorcycle he was driving and the automobile Vandeboom was driving. State Farm seeks a new trial, on liability only, alleging that the trial court erred by: (1) denying its requests for certain jury instructions; and (2) overruling its objections to Rivera's counsel's comments in closing argument. Because State Farm has not shown that the alleged errors were prejudicial, we affirm.

I. BACKGROUND

¶2 On July 10, 1995, Rivera, having completed his shift as a postal worker, left his workplace in West Allis on his motorcycle and drove to a mortgage company in Hales Corners to sign some papers. After leaving the mortgage company, Rivera drove to Big Bend to the automotive garage of his friend, Dwight Olson, to return some tools he had borrowed; Rivera and Olson drank some beer during the visit. Rivera then headed for his home in Mukwonago, traveling south on Highway 164, then west on Highway L, until he

[1] The appeal also brings before this court the trial court order denying State Farm's postverdict motions. WIS. STAT. RULE 809.10(4) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The jury, having found Vandeboom and Rivera each 50% causally negligent regarding their motor vehicle accident, determined that $1,092,624.46 would be fair and reasonable compensation to Rivera for injuries sustained in the accident. Half of this amount would be $546,312.23; we note, however, that the July 18, 2000 order for judgment erroneously described $548,312.23 as "50% of the total amount of damages awarded by the jury." Thus, the judgment filed on August 10, 2000, awarding Rivera $548,312.23 in damages (plus $17,651.52 in costs, disbursements, and attorneys' fees, for a total judgment of $565,963.75), erroneously provides Rivera with a $2,000.00 bonus. The parties to this appeal did not call our attention to the $2,000.00 discrepancy.

turned north onto Stone School Road, directly behind Vandeboom's car which had been traveling east on Highway L until it also turned north onto Stone School Road. Rivera's motorcycle collided with Vandeboom's car as Rivera was trying to pass on the left while Vandeboom was making a left turn into her driveway. On June 8, 1998, Rivera filed a lawsuit alleging that Vandeboom's negligent operation of her vehicle caused him bodily injury, emotional distress, pain, medical expenses, loss of earning capacity, and inability to engage in his normal activities.

¶3 At the trial, Rivera testified: (1) that he had felt Vandeboom was traveling so slowly he "could have almost put down [his] kickstand and parked"; (2) that he had deemed Vandeboom an inattentive driver who was sightseeing; (3) that he had accelerated to pass her; (4) that he had been aware of driveways on his left and only fields on his right as he was traveling on Stone School Road just prior to the accident; and (5) that his view had not been obstructed while he was attempting to pass. Vandeboom testified that she was going about seven to ten miles per hour when she checked her mirrors to see if there was anyone behind her and then began turning into her driveway. Rivera's accident reconstruction expert testified that he determined Rivera's speed at the time of the collision was between thirty-two and forty-three miles per hour; he also testified that he had found no skid marks from Rivera's motorcycle, but he acknowledged that braking does not always result in skid marks.

¶4 The trial court instructed the jury regarding negligence, the right to assume due care by highway users, lookout, causation, burden of proof, comparative negligence, credibility of witnesses, weight of evidence, exhibits as evidence, circumstantial evidence, and other issues pertinent to both Rivera and Vandeboom. The court also instructed the jury on: Rivera's duty not to pass on

the left any vehicle signaling its intention to make a left turn; Rivera's duty to issue an audible warning prior to passing on the left a vehicle proceeding in the same direction; chemical test for intoxication; chart showing estimated alcohol concentration; and Vandeboom's duties with respect to signaling her intention to turn. The court, however, denied State Farm's request to instruct the jury on Rivera's duties regarding: (1) management and control; and (2) reduced speed.

¶5 The jury found Rivera and Vandeboom each 50% causally negligent. State Farm moved for an order setting aside the verdict and granting a new trial on liability. State Farm alleged four grounds for the motion: (1) the trial court erred by refusing to instruct the jury on Rivera's duties regarding management and control of his motorcycle, as well as his duty to appropriately reduce his speed, at the time of the accident; (2) Rivera's trial counsel made improper statements during closing argument; (3) the jury's 50% apportionment of causal negligence to Vandeboom was "against the great weight of the credible evidence"; and (4) the trial court erred in limiting evidence of Rivera's work-life expectancy. Alternatively, State Farm moved for an order reducing the amounts awarded by the jury for all damages other than past medical and health care expenses and past loss of earning capacity, alleging that the amounts awarded were excessive. Additionally, State Farm moved for an order limiting Rivera's recovery for past medical and health care expenses to the amount actually incurred by him, as opposed to the amount originally charged for the services. The trial court denied State Farm's motions and entered judgment on the verdict.

II. DISCUSSION

A. Jury Instructions

¶6 A trial court has "broad discretion" in deciding whether to accept or reject requested jury instructions. ***State v. Tee & Bee, Inc.***, 229 Wis. 2d 446, 450, 600 N.W.2d 230 (Ct. App. 1999). "In determining whether an instruction should be given, the evidence must be viewed in the light most favorable to the party requesting it." ***Couillard v. Van Ess***, 141 Wis. 2d 459, 464, 415 N.W.2d 554 (Ct. App. 1987). As the supreme court explained in ***Lutz v. Shelby Mutual Insurance Co.,*** 70 Wis. 2d 743, 235 N.W.2d 426 (1975):

> As a general rule, … a trial court should instruct the jury with due regard to the facts of the case. It is error for a court either to refuse to instruct on an issue which is raised by the evidence or to give an instruction on an issue which finds no support in the evidence. Where the court has erroneously given or refused to give an instruction, however, *a new trial is not warranted unless the error is determined to be prejudicial. The test to be applied in determining whether such an error is prejudicial is the probability and not mere possibility that the jury was misled* thereby. Stated another way, an error relating to the giving or refusing to give an instruction is not prejudicial if it appears that the result would not be different had the error not occurred.

Id. at 750-51 (citation and footnotes omitted; emphasis added). We are required to consider the jury instructions in their entirety, and if "the overall meaning communicated by the instructions was a correct statement of the law," then a trial court error in giving or refusing to give any instruction does not constitute a basis for reversal. ***Betchkal v. Willis***, 127 Wis. 2d 177, 187-88, 378 N.W.2d 684 (1985).

¶7 State Farm contends that the trial court erred by "refusing to instruct the jury on Rivera's duties to operate his motorcycle at an appropriately reduced

speed … at the time of the accident." As relevant to this case, the instruction State Farm requested provides:

> A safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions. This statute requires that a driver in hazardous circumstances exercise ordinary care to so regulate the vehicle's rate of speed to avoid colliding with any object, person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and using due care.
>
> The statute also provides that a driver must drive at an appropriate reduced speed … when special hazards exist with regard to other traffic ….
>
> Appropriate reduced speed as used in this instruction is a relative term and means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.

WIS JI—CIVIL 1285. State Farm asserts that the court's refusal "was made on a mistaken view of the evidence and was not made in a light most favorable to State Farm as the party requesting [the instruction]."

¶8 Noting that the triage nursing assessment notes of Rivera's hospital admission following the accident indicate that Rivera had been traveling at forty-five to fifty miles per hour,[3] State Farm maintains that "[c]redible evidence existed for the jury to conclude that Rivera attempted to pass Vandeboom's car at too great a speed under the circumstances." State Farm claims that because the posted legal speed limit was forty-five miles per hour, this evidence alone should have

[3] Rivera testified that he did not remember providing this information to the nurse. He also testified that he was in second gear at the time of the accident and estimated that his speed was thirty to thirty-five miles per hour. He acknowledged, however, that the supplemental report of his interview with police two days after the accident indicates that he had estimated his speed at forty to forty-five miles per hour.

entitled it to the requested instruction regarding reduced speed. State Farm argues that the reduced-speed instruction should have been given because the jury could have concluded that a person exercising ordinary care could not safely have attempted to pass Vandeboom's car at the speed at which Rivera had been traveling and that "the passing maneuver should have been undertaken at a greatly reduced speed."

¶9 Rivera, citing ***McGee v. Kuchenbaker***, 32 Wis. 2d 668, 671, 146 N.W.2d 387 (1966), responds that the trial court's refusal to give the reduced-speed instruction was proper because "the trial court determines what the reduced speed should have been on a case by case basis." Rivera is incorrect. The ***McGee*** court considered whether there was "sufficient credible evidence to sustain *the jury's finding* that McGee was negligent in respect to speed." ***Id.*** at 670 (emphasis added). The court explained that "[w]hat reduced speed is appropriate depends upon the particular facts in light of the speed a person of ordinary intelligence and prudence would drive under the circumstances, so as not to subject himself or others or his or their property to an unreasonable risk of injury or damage." ***Id.*** at 671-72. Thus, in this case, we conclude that the evidence, viewed most favorably to State Farm, supported its request for WIS JI—CIVIL 1285.

¶10 State Farm next argues that "credible evidence existed to warrant the submission of the management and control instruction." As relevant to this case, the instruction State Farm requested provides:

> A driver must exercise ordinary care to keep his or her vehicle under proper management and control so that when danger appears, the driver may stop the vehicle, reduce speed, change course, or take other proper means to avoid injury or damage.
>
> [If 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.]

WIS JI—CIVIL 1105. Relying on ***Zillmer v. Miglautsch***, 35 Wis. 2d 691, 701-02, 151 N.W.2d 741 (1967), ***Scott v. Gilbertson***, 2 Wis. 2d 102, 109-10, 85 N.W.2d 852 (1957), ***Simon v. Van de Hey***, 269 Wis. 50, 55, 68 N.W.2d 529 (1955), and ***Anderson v. Stricker***, 266 Wis. 1, 4-5, 62 N.W.2d 396 (1954), State Farm correctly notes that courts have "recognized a driver's obligation to exercise proper management and control when passing another vehicle" and have "pointed out that the determination of whether that obligation ha[s] been fulfilled is a question for the jury."

¶11 Rivera, relying on ***Schmit v. Sekach***, 29 Wis. 2d 281, 289, 139 N.W.2d 88 (1966), responds that the trial court's refusal to give the management and control instruction was proper. He asserts: "[T]he issue before the trial court was [his] duty to maintain a lookout. Management and control relates to an individual's manner of driving.… Management and control is the choice of action, or inaction, that an individual makes about his motorcycle." Contending that the instant case involved not management and control, but rather, an emergency situation, Rivera cites ***Gage v. Seal***, 36 Wis. 2d 661, 664, 154 N.W.2d 354 (1967), and maintains that his behavior did not justify the instruction requested by State Farm because "a driver is not negligent, in relation to management and control, if the time between the creation of the danger and the actual impact from the danger is too short, under the circumstances, to allow a reasoned choice of action in response to realizing the danger."[4] Once again, Rivera is mistaken.

[4] During the trial, the court and the attorneys for the parties discussed the request for jury instructions regarding reduced speed, management and control, and the emergency doctrine:
(continued)

¶12 In ***Gage***, the supreme court explained the emergency doctrine and its application to cases involving motor vehicle accidents:

> "The application of the emergency rule rests upon the psychological fact that the time which elapses between the creation of the danger and the impact is too short under the particular circumstances to allow an intelligent or deliberate choice of action in response to the realization of danger.…"
>
> "There are three basic requirements which must be met before the emergency doctrine can be applied. First, *the party seeking the benefits of the emergency doctrine must be free from negligence which contributed to the creation of the emergency*. Second, the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action. Third, the element of negligence being inquired into must concern management and control before the emergency doctrine can apply. Unless a favorable finding on each of these

---

> THE COURT: … I don't think this is a speed or management, control case. This is a left turn case, and a lookout case.… I didn't see anything in here to suggest his speed was excessive.…
>
> [RIVERA'S COUNSEL]: [If y]ou are not going to give a management and control instruction, then my requested Instruction 1105-A [regarding the emergency doctrine] would not be needed because it talks about reaction time and refers basically to Mr. Rivera not being able to react in time to be able to do anything at all.
>
> THE COURT: There was a request for speed, obstructed vision. There wasn't any obstructed vision at the point in time when the accident occurred.…
>
> [DEFENSE COUNSEL]: … I requested the speed instruction based upon Mr. Rivera's testimony that he concluded that my client was sightseeing, wasn't paying attention. He came to that conclusion when he decided to pass her. There was testimony that []he was going 45 to 47 miles an hour, and if the jury chooses to believe that, coupled with the fact that the driveways are to the left and not to the right, … they could infer that he exercised improper management and control. He should have been going, under those circumstances, a lot slower.
>
> [THE COURT]: I don't agree with you at all. He's within the speed limit.… So … I won't give it.

> elements is made, the emergency doctrine cannot be applied to a course of conduct which led to an automobile accident."

Gage, 36 Wis. 2d at 664 (footnote omitted; emphasis added). Clearly, in this case, the evidence, even viewed most favorably to Rivera, established that he was not "free from negligence."[5] Thus, the emergency doctrine was inapplicable.

¶13 Even more significantly, however, under WIS JI—CIVIL 1105, "[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." Whether Rivera, or Vandeboom for that matter, became aware of danger, in time to take proper means to avoid this accident, was for the jury to consider. Clearly, therefore, the evidence established the basis for WIS JI—CIVIL 1105.

¶14 Thus, the issue is whether State Farm was prejudiced by the trial court's failure to give either of the requested instructions. State Farm maintains

---

[5] Indeed, even Rivera's own account of the event indicates that he was not "free from negligence." At trial, he testified that he was very familiar with the area of Stone School Road where the accident occurred; that he was aware that a farmer's field was on his right, with no roads or driveways leading into it; that the nearest intersection was about three-tenths of a mile away; and that the only driveways on that part of the road were on the left side, leading to various homes. Nevertheless, as he acknowledged, after observing Vandeboom's car slow down, and after driving his motorcycle to within approximately two car lengths of Vandeboom's car, Rivera, instead of remaining behind Vandeboom's car in anticipation of what he should have surmised was about to be a left turn, attempted to pass on the left.

Additionally, the evidence included: (1) a test result showing that, two hours after the accident, Rivera's blood alcohol concentration was .068; and (2) an estimated-alcohol-concentration chart which, in conjunction with Rivera's .068 result, indicated that his blood alcohol concentration at the time of the accident could have been .098.

In Wisconsin, the legal limit for blood alcohol concentration, depending on one's age, record of prior convictions for operating under the influence of an intoxicant, or status as an operator of a commercial motor vehicle, is 0.0, 0.02, 0.04, 0.08, or 0.1. *See* WIS. STAT. §§ 340.01(46m), 346.63; *cf.* ***State v. Caibaiosai***, 122 Wis. 2d 587, 595, 363 N.W.2d 574 (1985) ("It is negligence per se to operate a motor vehicle while under the influence of intoxicants.").

that because none of the instructions given to the jury "addressed the specific duties of Rivera to operate his motorcycle at an appropriate reduced speed and to exercise proper management and control, the jury was not apprised of those standards of conduct required of him in those respects." State Farm concludes, therefore, that because the jury's negligence allocation was equal, "it cannot be reasonably asserted that the failure to instruct the jury, with respect to those specific duties, would not have made a difference in the jury's verdict."

¶15 Unquestionably, State Farm has successfully posed the "possibility" that these additional instructions could have altered the outcome. However, State Farm has offered nothing to establish the "probability" that they would have done so. *See* ***Lutz***, 70 Wis. 2d at 751. Notably, State Farm points to no evidentiary error connected to these instructions. That is, State Farm does not contend that, because of the trial court's refusal to instruct on reduced speed or management and control, favorable evidence was excluded or unfavorable evidence was admitted. Moreover, State Farm does not contend that, due to the lack of these instructions, it was unable to present or argue its essential theories on the relative negligence of Vandeboom and Rivera. In fact, State Farm, never even quoting the excluded instructions in its briefs to this court, points to no specific language of either instruction that provides any legal pivot point, not substantially covered in other instructions, on which the jury's determination would turn. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "insufficiently developed" argument).

B. Closing Argument

¶16 During closing argument, counsel for Rivera stated:

> Turning your blinker on does not change the right-of-way. It does not give you the right-of-way if you don't have it

> already. All it does is tell somebody, "This is what I'm going to do." You can't yell at them, shout at them, or put it on the radio. So we put a blinker on.

Defense counsel then objected "with regards to the legal argument with regard to[] right-of-way." The trial court overruled the objection, and counsel for Rivera continued:

> Right-of-way was Mr. Rivera's because he was passing, and he was in a situation where he was already going around the car before she started to turn.… He was in a position where he was passing that car, and for her to change lanes would cause a danger, so it was Mr. Rivera, when he started passing that car and when the accident happened, he had the right-of-way.

¶17 State Farm concedes that the trial court did instruct the jury on Rivera's duty not to pass on the left any vehicle signaling its intention to make a left turn. State Farm points out, however, that the closing argument by Rivera's trial counsel "ignored the fact that right-of-way exists only when provided for by statute." *See* ***Betchkal***, 127 Wis. 2d at 187. State Farm argues, therefore, that by overruling its objection, the trial court undermined the jury instruction and left the jury "with the impression that [Rivera's] counsel's argument was legally valid," and that the jury consequently "would have falsely assumed that Vandeboom would have had to yield the right-of-way to Rivera before commencing her turn."

¶18 Rivera responds that trial counsel's argument "only referred to the evidence as it related to [the trial court's] instructions" and that counsel used the term "right-of-way" in a descriptive, rather than a legal, sense. We agree.

¶19 In closing argument, counsel's statements are improper when they result in the denial of a party's "due process right to a fair trial." *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992); *see also* ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. Although

"[c]ounsel may not make statements of law which are of dubious correctness," counsel may properly "comment upon the evidence in respect to the instructions [the court intends to give to the jury]." ***State v. Lenarchick***, 74 Wis. 2d 425, 459, 247 N.W.2d 80 (1976). "While counsel has wide latitude in closing argument, the control of the content of the argument is within the sound discretion of the trial court." ***State v. Stinson***, 134 Wis. 2d 224, 241, 397 N.W.2d 136 (Ct. App. 1986). We will uphold the trial court's ruling on the propriety of counsel's argument "unless there has been an [erroneous exercise] of discretion *that is likely to have affected the jury's verdict*." ***State v. Bjerkaas***, 163 Wis. 2d 949, 963, 472 N.W.2d 615 (Ct. App. 1991) (emphasis added).

¶20 We presume that the jurors followed the instructions they received from the court. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). State Farm has failed to establish that counsel's reference to "right-of-way" during closing argument was improper, or that any arguably improper implication was likely to have influenced the jury's verdict.

By the Court.—Judgment affirmed.

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