COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **§ 808.10 and RULE 809.62, STATS.**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-1723
96-1726
96-2544

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

NO. 96-1723

LESLIE R. MADDOX AND MELISSA M. MADDOX,

PLAINTIFFS-APPELLANTS,

INDEMNITY INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

BARRICADE FLASHER SERVICE, INC.,
EMPIRE FIRE AND MARINE INSURANCE COMPANY, LUNDA CONSTRUCTION COMPANY, AND ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

STEVEN C. NOEL, P.E., AND KURT WRANOVSKY,

DEFENDANTS.

NO. 96-1726

LESLIE R. MADDOX AND MELISSA M. MADDOX,

**PLAINTIFF-APPELLANTS-
CROSS-RESPONDENTS,**

INDEMNITY INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

**BARRICADE FLASHER SERVICE, INC., AND
EMPIRE FIRE AND MARINE INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS,**

**LUNDA CONSTRUCTION COMPANY AND
ST. PAUL FIRE & MARINE INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

STEVEN C. NOEL, P.E., AND KURT WRANOVSKY,

DEFENDANTS.

--

NO. 96-2544

LESLIE R. MADDOX AND MELISSA M. MADDOX,

PLAINTIFFS-RESPONDENTS,

INDEMNITY INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

BARRICADE FLASHER SERVICE, INC., AND EMPIRE FIRE AND MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

V.

LUNDA CONSTRUCTION COMPANY AND ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

STEVEN C. NOEL, P.E., AND KURT WRANOVSKY,

DEFENDANTS.

APPEALS and CROSS-APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Reversed and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. In appeal nos. 96-1723 and 96-1726, Leslie and Melissa Maddox appeal from an order entered after the trial court changed jury answers absolving Leslie (Maddox) of contributory negligence and finding Barricade Flasher Service, Inc., negligent in Maddox's accident. In appeal no. 96-1726, Barricade cross-appeals from aspects of the same order. In appeal no. 96-2544, Lunda Construction Company and its insurer, St. Paul Fire & Marine Insurance Company, appeal the dismissal of Barricade after the trial court changed the jury's negligence verdict as to Barricade. Because we conclude that the trial

court erroneously changed the jury's answers relating to the negligence of Maddox and Barricade, we reverse and remand for entry of a judgment consistent with the jury's special verdict.

Leslie Maddox was seriously injured when the tractor-trailer he was driving hit a concrete protective barrier while passing through a construction site on Interstate 43 in Sheboygan County. Maddox was traveling northbound just before dawn on April 11, 1991, when his truck struck a concrete barrier wall at a construction site at the DeWitt Road overpass. Traffic was traveling in the right lane before DeWitt Road and the left side of that lane was being further tapered by plastic barrels in advance of a concrete barrier protecting the work area. The concrete barrier extended to the right of the last barrel and encroached upon the narrowing driving lane. Maddox's truck hit the barrier, slid down a row of barriers, and when the barriers ended collided with a Lunda crane parked in the closed left lane.

Maddox sued Barricade Flasher (the traffic control subcontractor), Lunda Construction (the bridge deck repair subcontractor), and two State of Wisconsin Department of Transportation (DOT) engineers, Steven C. Noel and Kurt Wranovsky, who were later dismissed on governmental immunity grounds at the close of the Maddoxes' case. The general contractor, Fox Valley, had a contract with the State of Wisconsin for the construction project.[1] The jury found Maddox not negligent and apportioned causal negligence among Barricade (30%), Lunda (50%), Noel (15%) and Wranovsky (5%). The jury specifically found that

[1] Fox Valley and Sheboygan County were dismissed from the lawsuit.

Maddox had not fallen asleep prior to the accident. The jury awarded approximately $1.7 million to the Maddoxes.

On motions after verdict, the trial court changed the jury's answers regarding Barricade's negligence, ruling that there was no credible evidence that Barricade was negligent and further deciding that public policy precluded holding Barricade liable. The trial court also did not find any credible evidence that Maddox was not negligent. Therefore, the trial court ordered a new trial to apportion negligence between Maddox and Lunda.[2] The court sustained the jury's verdict as to damages and Lunda's causal negligence.

IMMUNITY FOR BARRICADE

We first address the issues raised in Barricade's cross-appeal: whether the trial court erroneously denied Barricade immunity.[3] Whether Barricade, a private independent contractor, is entitled to share in the State's governmental immunity is governed by ***Estate of Lyons v. CNA Insurance Cos.,*** 207 Wis.2d 448, 558 N.W.2d 658 (Ct. App. 1996).[4] Parties who contract with

---

[2] We granted the Maddoxes leave to appeal from the order requiring a new trial (appeal no. 96-1723) and Lunda filed a notice of appeal from the dismissal of Barricade (appeal no. 96-2544). The Maddoxes also filed a notice of appeal from that portion of the order dismissing Barricade; Barricade filed a cross-appeal (appeal no. 96-1726). The cases were consolidated for purposes of briefing and disposition.

[3] The trial court denied Barricade immunity on Barricade's summary judgment motion. However, we note that Barricade renewed its immunity claim in a motion to dismiss at the end of the plaintiffs' case and a directed verdict motion at the end of the trial. Although the trial court did not explicitly address Barricade's immunity claim in granting Barricade's motion after the verdict to change the jury answers to relieve it of causal negligence, we will nevertheless address this appellate issue based upon the trial record rather than the summary judgment record.

[4] Although ***Lyons*** was decided subsequent to the trial court proceedings in this case, we nevertheless apply it on appeal because the parties have briefed the applicability of this case and because the ***Lyons*** decision itself applies a three-part test to a previously-tried case. We are merely taking the same approach in applying ***Lyons*** to this previously-tried case.

State authorities and are directed to perform certain tasks under that contract enjoy a form of governmental contractor immunity if the following criteria are met: "(1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials." ***Id.*** at 459-60, 558 N.W.2d at 663. Barricade's subcontract agreement provided that its work "shall be done in conformity with the terms and conditions of the principal contract and the plans and specifications of Wis. DOT." Barricade was required to perform its work in accordance with DOT proposal requirements and conditions.

We begin and end our immunity analysis with the first prong of the ***Lyons*** test: whether the State approved reasonably precise specifications for traffic control. The trial court's factual findings in this regard will be upheld unless they are clearly erroneous. *See* § 805.17(2), STATS. However, whether facts satisfy a legal standard presents a question of law which we determine independently of the trial court. *See* ***Bantz v. Montgomery Estates, Inc.,*** 163 Wis.2d 973, 978, 473 N.W.2d 506, 508 (Ct. App. 1991).

At the hearing on motions after verdict, the trial court found that "there was no specific plan introduced into evidence to show exactly how those barrels should be configured" at the DeWitt Road overpass. The trial court found that the general or typical plan for laying out traffic control starting at Smies Road and the diagram accompanying the change order for installation of the concrete barrier left "a lot of discretion as to how it is actually supposed to be put into effect. In essence, there is nothing in any of the evidence to suggest that there was

a specific way that the barrels had to be laid out, other than in a manner that was consistent with what I guess for lack of a better term one might call common sense."

These findings are not clearly erroneous. One of the plaintiffs' experts, engineering professor William Berg, testified on cross-examination by Barricade that there was no specific plan for DeWitt traffic control. Another of the plaintiffs' experts, retired engineering professor Herman Kuhn, testified that there was no specific DeWitt traffic control plan. The DOT supervising engineer, Noel, testified that there were no plan documents governing the DeWitt closure and traffic control. He further testified that the change order he drafted at Lunda's request to install the concrete barrier was not intended to show the placement of protective barrels. The foregoing witnesses testified that page 2.17 of the project plans detailed traffic control for Smies Road, not DeWitt Road.

Based upon this evidence, the trial court's finding that there was no traffic control plan prepared by the State for DeWitt Road is not clearly erroneous. Therefore, Barricade cannot satisfy the first prong of the ***Lyons*** test because the State did not approve "reasonably precise specifications" for DeWitt traffic control. Under these facts, we cannot hold that Barricade was simply following governmental directives in establishing traffic control at DeWitt Road. *See* ***Lyons,*** 207 Wis.2d at 460, 558 N.W.2d at 663.

BARRICADE'S NEGLIGENCE

Having concluded that Barricade was not immune and could be held liable in the accident, we turn to the trial court's decision to relieve Barricade of liability by changing the jury's verdict due to a lack of credible evidence that Barricade negligently placed the barrels at DeWitt Road. "[I]f there is any

credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned." ***Foseid v. State Bank of Cross Plains,*** 197 Wis.2d 772, 782, 541 N.W.2d 203, 207 (Ct. App. 1995). "When a circuit court overturns a verdict supported by 'any credible evidence,' then the circuit court is 'clearly wrong' in doing so. When there is *any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Weiss v. United Fire & Cas. Co.,*** 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995) (footnote omitted).

On motions after the verdict, the trial court set aside the jury's determination that Barricade was causally negligent by focusing on evidence which might have supported a jury verdict in Barricade's favor. The trial court focused on whether Barricade breached a duty to place the barrels in such a way as to alert drivers to the concrete barrier. The court characterized Barricade's duty as the duty to act as a reasonable contractor would act under like or similar circumstances.[5] The court found that there was no evidence as to what barrel contractors do and "no one came to the court to testify before the jury that what they saw out there was necessarily wrong."

Here, the trial court erred. Professor Kuhn opined that if a driver used the barrels as they appeared in photographs taken the day of the accident as a guide, the driver would hit the concrete barrier. Kuhn also opined that inadequate traffic control caused Maddox's accident and that Maddox was led into the barrier by a combination of the poorly placed barrels and the defective lane line, which

[5] The jury was instructed that Barricade had a duty of ordinary care in the performance of its traffic control duties.

should have been redrawn to indicate that traffic had to move onto the shoulder to navigate the constricted right lane. Kuhn also testified that even if the last barrel before the barrier had been on what was characterized by some witnesses as a "wet spot," the barrel was still one foot too far to the left of the barrier to provide protection from the barrier.

Wranovsky, the project engineer, testified that only one barrel at the edge of the barrier was required, not three preceding the barrier as suggested by the plaintiffs' experts. Wranovsky testified from photographs of the accident scene that he would have had the last barrel moved out toward the edge of the concrete barrier.

Ellie Bresette, a former Barricade employee, testified that he was responsible for setting up the traffic control at the Smies and DeWitt overpasses. Bresette identified the page of the plan documents for the construction project addressing bridge overpass traffic control and stated that he would use such a plan in setting out traffic control. Traffic was moved out of the left lane before Smies Road and barrels between Smies and DeWitt maintained that left lane closure. Bresette expected to be advised by the engineer on site if there was a problem with the traffic control layout. Bresette did not ask for or receive any additional guidance regarding barrel placement when the concrete barrier was installed. Bresette stated that the barrels had to taper at the DeWitt overpass once the concrete barrier was installed. Bresette testified that the last barrel close to the edge of the barrier should have its right edge past the right edge of the barrier. The last barrel was straddling the center line or slightly to the left of the center line, leaving approximately eighteen inches of the barrel in the right-hand lane. The barrier extended three and one-half feet into the right lane, and if only

eighteen inches of the barrel extended into the right lane, Bresette agreed that approximately two feet of the barrier extended beyond the edge of the last barrel.

Bresette testified that he quit his job at Barricade Flasher the day before the crash because he did not receive enough assistance to monitor the job site. From the photographs of the barrels at the site, Bresette agreed that the configuration did little to indicate to the driver that a concrete barrier extended three and one-half feet into the right lane and that the driver would have to move toward the shoulder to avoid the barrier. Bresette testified that the wet spot on the pavement to the right of the last barrel may have been condensation or may indicate where the barrel was sitting.

Motorist Jeffrey Hudy testified that the week prior to the accident, he had to swerve quickly to avoid hitting the concrete barrier at DeWitt. The last barrel was just slightly to the right of the center line, leaving the barrier exposed. Hudy testified that upon approaching Smies, the barrels directed traffic to travel even with a concrete barrier installed there. After passing through Smies, the barrels returned to the left side of the center line. As he approached DeWitt, the barrels remained more or less to the left side of the center line and then as he got "real close" to the DeWitt overpass, a few barrels moved a little bit toward the center line and then a little bit to the right of the center line. Hudy remained in the right lane and did not move to the far side of that lane or the shoulder area. He testified that when he got to the DeWitt overpass, he almost hit the concrete barrier and had to swerve hard to miss it. The barrels at the DeWitt overpass were unlit and there was no change in the right lane line to indicate that he should have moved over to the shoulder out of the previously fully available right lane. Hudy drove through the overpass on the evening of April 10, several hours before

Maddox's accident, and noticed that the placement of the barrels and the barrier had not changed since his near-collision several days before.

Maddox testified that he was surprised by the concrete barrier at DeWitt because he believed he had cleared the barrier as he had at the Smies overpass. Motorist Karen Schmidt testified that there was no indication prior to the DeWitt overpass that a driver needed to move onto the shoulder to safely negotiate the bridge and opined that the barrels led traffic directly into the barrier. Herbert Weber testified that a week before the accident, he had to quickly take evasive action to avoid hitting the barrier at DeWitt because the barrels and existing lane lines gave him the impression that he had a clear right lane. Edward Hammett, Donald Schneider and William Kolberg testified similarly.

We conclude that there was credible evidence of Barricade's negligence before the jury. The plaintiffs' experts testified that the barrels should have, but did not, guide the driver around the barrier, the State engineers did not unequivocally state that the barrels were properly placed, Barricade's employee criticized the traffic control layout at DeWitt, and various motorists and Maddox testified regarding the position of the barrels and how that position affected their ability to negotiate the DeWitt overpass. Based upon this evidence, the trial court erred in finding that there was no evidence as to what Barricade should have done and did wrong in placing barrels prior to a concrete barrier adjacent to and encroaching upon an open lane of travel. Because there was credible evidence to support the jury's negligence and causation answers with regard to Barricade, the trial court was clearly wrong in overturning them.

In deciding that Barricade was not causally negligent, the trial court placed great weight upon the fact that only Maddox crashed into the barrier.

However, the trial court ignored the testimony of other motorists who said that they were forced to take evasive action to avoid striking the barrier because there was no indication that the entire right lane was not open for travel due to the encroaching barrier. The trial court focused on the fact that Wranovsky visited the site the night before the accident and found that traffic control was in place, and that the week before the accident sheriff's deputies surveyed the area and determined that traffic control was appropriate. However, there was other credible evidence upon which the jury had a right to rely that traffic control was improperly established at DeWitt Road.

The trial court also found that the barrel nearest the barrier apparently moved during the night as evidenced by the wet spot or condensation mark on the pavement. This was a factual question for the jury. However, even if that occurred, there was credible testimony that if the barrel was over the wet spot, it was still not placed so as to guide traffic around the barrier.

We also address the trial court's other grounds for changing the jury's answers as they relate to Barricade. The trial court ruled that public policy precludes liability on Barricade. The public policy factors which can preclude liability in a negligence case are set forth in ***Kelli T-G v. Charland,*** 198 Wis.2d 123, 129-30, 542 N.W.2d 175, 177-78 (Ct. App. 1995):

> [E]ven where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way to fraudulent claims; or (6) allowance of recovery

> would enter a field that has no sensible or just stopping point. [Quoted source omitted.]

The trial court found that Maddox relied upon the barrier and the lane line to guide his truck, not the barrels, and therefore his injuries were remote from the placement of the barrels. The trial court also found that Maddox's injuries were wholly out of proportion to Barricade's culpability. The trial court declined to assume that one barrel out of place could have caused the harm Maddox suffered. There was conflicting evidence on these questions. The trial court believed that placing liability on contractors setting up traffic control barrels would defeat the State's ability to carry out its responsibility to maintain the highways. The trial court stated its concern that if Barricade were held liable, subcontractors would decline to place barrels on the highway or entire highways would be closed to avoid the need to restrict traffic lanes. The trial court also found that there would be no sensible or just stopping point if Barricade were held liable.

We reject the trial court's sua sponte invocation of the public policy exception to liability of a negligent tortfeasor. Here, a heavily traveled portion of highway was under construction and the contractor charged with setting out traffic control did not meet its standard of care. As a consequence, a driver was severely injured. We perceive no public policy reason to absolve Barricade of the consequences of conduct for which credible evidence was adduced at trial. We also see no public policy reason to give some form of blanket absolution to traffic contractors who negligently perform their duties resulting in injury to a motorist.

MADDOX'S NEGLIGENCE

We now turn to the trial court's determination that Maddox was negligent because there was no credible evidence to support that he was not. The

trial court noted that even if the jury was satisfied that Maddox did not fall asleep prior to the accident, the court questioned how the jury could have been satisfied that Maddox had appropriate management and control of his vehicle and appropriate lookout. On management and control, the court cited evidence that once Maddox struck the barrier, he was unable to bring his truck under control and it was highly unlikely that Maddox activated any of the three braking systems. The trial court recalled that no expert had testified about skid marks which would indicate braking. Therefore, the trial court inferred that Maddox did not brake his vehicle and, had he done so, the vehicle would have stopped before it reached the end of the barrier and collided with Lunda's crane. The court found that there was no credible evidence that Maddox maintained a proper lookout, citing evidence that he was in a construction zone, saw the barrier and knew the truck had to move to the right to avoid it.

Again, we conclude that the trial court usurped the jury's role to weigh conflicting evidence and draw inferences from it. *See* ***Radford v. J.J.B. Enters., Ltd.,*** 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). While it is true that Kuhn said he saw no evidence of braking, Professor Berg opined that there was evidence of braking, citing a skid mark probably from the rear tires of the trailer. Berg stated that no matter what Maddox did to try to maintain control of the truck, the truck would have kept hugging to the left and riding along the barrier due to the significant damage to the left-front portion of its suspension as a result of impact with the barrier. Berg estimated that approximately six seconds elapsed from the time of the first impact until impact with the crane.

The testimony of a witness to the crash also addressed braking and management and control. Karen Schmidt testified that she was directly behind

Maddox's truck when the accident occurred. Had the truck been swerving or otherwise not under control prior to the accident, she would have increased her following distance. The truck drove normally through the Smies Road construction area. She testified that the barrels between Smies and DeWitt seemed too far to the left. As she and the truck approached the DeWitt overpass, the truck braked hard (activating its brake lights) and suddenly swerved to the right. She then heard a loud crash. After the first impact the truck seemed under control, but in the middle of the cement barrier, the truck went out of control again. Schmidt testified that there was no indication that she had to move to the right in order to avoid the barrier. Schmidt testified that at the time of the accident, she believed that the barrels guided the driver right into the cement barrier.

Maddox testified that as he approached the construction area, it was dark, and he slowed down and traveled in the right lane. He testified that as he approached Smies Road, he stayed in his lane and had no trouble following the barrels and fog line through the construction site. He testified that he wanted to stay to the left of the fog line on the right side of the road to keep the truck off the shoulder, which can be hazardous. As he approached DeWitt, he was following the barrels and traveling in the open right lane. He noticed that the barrels seemed to move to the right a bit, so he moved his truck over to the right. As he approached DeWitt, he used the barrels on his left and the fog lane on his right to guide the truck down the road. The barrier appeared in the road. He braked and veered to the right. He then crashed into the barrier and was very surprised because he believed he had cleared the barrier. Maddox testified that he never saw any indication that he had to move out of the right lane toward the shoulder to avoid the concrete barrier at DeWitt. He tried to hold onto the steering wheel to steer straight, but his spring seat was bouncing up and down and rocking back and

forth and the steering wheel was ripped out of his hands.[6] He then attempted to reach the air brakes. While he was reaching for the air brakes he was being thrown back and forth and up and down in his seat. He did not recall whether he reached the air brakes or not. He then collided with the crane.

Maddox was extensively cross-examined on aspects of his driving in the hours prior to the accident and during the accident. Maddox was also impeached with deposition testimony in which he never said that he used the barrels to guide his truck and that the concrete barrier was visible to him from 500 feet. At trial, Maddox testified that he was not able to see the barrier from 500 feet. It was for the jury, not the trial court, to sort out the inconsistencies in Maddox's testimony at deposition and trial and determine which testimony it found credible. In absolving Maddox of negligence, it is apparent that the jury performed that task, and the trial court erred in changing the jury's verdict.

The testimony of Maddox, the plaintiffs' experts and Schmidt was credible evidence to support that Maddox was not negligent in the accident. There was testimony that Maddox was driving normally, came upon a sudden hazard, braked, sought to avoid it, struck the hazard and lost control of the truck due to the damage sustained on impact which severely undermined his ability to manage and control the vehicle. There was evidence from which the jury could conclude that Maddox confronted an emergency and cannot be held negligent for responding to it.[7]

---

[6] Maddox was wearing a lap belt.

[7] The jury was instructed regarding management and control in an emergency. *See* WIS J I—CIVIL 1105A.

Barricade argues that the trial court should not have given the emergency instruction. We hold that the trial court properly exercised its discretion in giving the emergency instruction. *See* ***Garceau v. Bunnel,*** 148 Wis.2d 146, 151-52, 434 N.W.2d 794, 795-96 (Ct. App. 1988). "The purpose of an emergency instruction is to relieve a driver who is confronted with an emergency that his conduct did not create or help to create from being labeled negligent in connection with management and control of his or her vehicle." ***Id.*** at 152, 434 N.W.2d at 796 (citation omitted). The emergency instruction should be given when the evidence, viewed in the light most favorable to the person requesting it, shows that the person requesting the instruction was free from negligence that contributed to creation of the emergency, was confronted with a situation in which action was required and the time element was short enough to preclude deliberate and intelligent choice of action, and the element of negligence being inquired into concerns management and control. *See* ***Lutz v. Shelby Mut. Ins. Co.,*** 70 Wis.2d 743, 754, 235 N.W.2d 426, 433 (1975). Here, there was sufficient evidence for the instruction.

Barricade concedes that if the emergency instruction was properly given under the facts of the case, then it was error for the trial court to change the jury's answer as to Maddox's negligence based on his failure to manage and control his vehicle. Nevertheless, Barricade contends, the trial court was not precluded from changing the jury's answer regarding Maddox's negligence as to proper lookout.

The trial court found inexplicable the jury's determination that Maddox had maintained a proper lookout. The trial court sifted through the testimony and found that Maddox said that south of DeWitt he saw the barrier and

knew he had to maneuver to avoid it. The trial court also noted that Maddox knew he was in a construction zone and had been driving in the right lane alongside barrels for the previous mile.

It was a jury question whether Maddox met his duty of lookout by using ordinary care to make observations from the point where his observations would have been effective to avoid the accident and exercising reasonable judgment to calculate the position of objects which might present a hazard. *See* WIS J I—CIVIL 1055, "Lookout." The barrier extended three and one-half feet into the driving lane, the barrels did not guide the driver around the barrier and the barrier itself was unlit and unmarked by any reflective material or signs. Therefore, it was a factual question for the jury whether Maddox could have observed the barrier in time to avoid colliding with it. Moreover, whether Maddox was negligent in terms of lookout is also affected by evidence of the circumstances under which he was traveling—a narrowing lane during predawn darkness—which was relevant to the jury's determination regarding lookout.

Lunda argues that the trial court correctly ruled that Maddox must bear some responsibility for the accident as a matter of law because he struck a stationary object.[8] However, this argument is premised upon conflicting evidence that Maddox saw the barrier 500 feet before he hit it. The jury was free to weigh that conflicting testimony in deciding whether Maddox was negligent with regard to lookout.

---

[8] Lunda cites case law that a driver must keep a careful lookout for objects in the driver's path. *See* WIS J I—CIVIL 1055. Because it was a jury question exactly what Maddox observed and when, we need not address these cases.

Barricade and Lunda argue that because Maddox violated an Interstate Commerce Commission rule governing driving hours, he was negligent per se. The Maddoxes respond that Maddox did not violate the safety statute. Regardless, we note that negligence per se due to violation of a safety statute must be accompanied by a determination that the conduct prohibited by the statute was a substantial factor in the injury. *See* ***Paskiet v. Quality State Oil Co.,*** 164 Wis.2d 800, 807, 476 N.W.2d 871, 873-74 (1991). Here, whether Maddox's alleged violation of the rules prohibiting excessive driving hours was a substantial factor in the accident was a jury question.

CONCLUSION

Counsel for Barricade persists in misquoting ***Topp v. Continental Insurance Co.,*** 83 Wis.2d 780, 266 N.W.2d 397 (1978). At page twenty-one of its respondents' brief, Barricade provides a partial quote from ***Topp*** which leads the reader to believe that the quotation is exact from the cited case. Barricade's alterations by creative and misleading use of ellipses changes the meaning of the cited excerpt from ***Topp.*** Barricade's briefing in this regard has not escaped our notice. *See* SCR 20:3.3 (West 1997).

We reverse the trial court's order changing the jury answers as to Barricade and Maddox and ordering a new trial between Maddox and Lunda. We also reverse the dismissal of Barricade. Accordingly, we remand this case for reinstatement of the jury verdict and entry of judgment accordingly.[9]

[9] To the extent that this opinion does not address a party's argument, the argument is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151, *cert. denied,* 439 U.S. 865 (1978).

RULE 809.25(1), STATS., costs will be awarded as follows, subject to the timely filing of a statement of costs. Because Maddox prevailed in this court, he shall receive costs allowable under RULE 809.25(1)(b) for all three appeals. Barricade, which did not prevail in any of the three appeals, shall bear the allowable cost of Maddox's cross-respondent's brief in appeal no. 96-1726 and one-half of Maddox's remaining allowable costs for the three appeals. Lunda, which did not prevail on the question of Maddox's negligence, shall bear the other one-half of Maddox's allowable costs for the three appeals.

Lunda did not prevail in appeal nos. 96-1723 and 96-1726. While we reversed the order which was the subject of Lunda's appeal no. 96-2544, Lunda's appeal was filed subsequent to Maddox's appeals (in which Lunda was a respondent). We did not need to address Lunda's appeal in order to reverse the trial court. Furthermore, Lunda moved to consolidate appeal no. 96-2544 with Maddox's appeals, and we conclude that consolidation had a consequence for the awarding of costs. Therefore, no costs are awarded to Lunda.

By the Court.—Order reversed and cause remanded with directions.

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