

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2006

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. 2005AP919-FT

Cir. Ct. No. 2003CV29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHRISTINA L. DAHLEN, N/K/A CHRISTINA L. TROFTGRUBEN,

PLAINTIFF-APPELLANT,

V.

**ATLANTIC MUTUAL INSURANCE CO., CHIZEK TRANSPORT, INC.,
CHIZEK ELEVATOR & TRANSPORT, INC., DANIEL J. BARRY AND
DONALD D. POTTS,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

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

¶1 CANE, C.J. Christina Troftgruben appeals a judgment of the circuit court dismissing her claims.¹ Troftgruben contends the court erred when it gave the jury the emergency doctrine instruction over his objections. We disagree and affirm.

BACKGROUND

¶2 On a snowy, icy, and windy day, Naveneethan Kaneshan and Troftgruben were traveling in their vehicle eastbound on the highway. Kaneshan was driving, and Troftgruben was the passenger. Daniel Barry was following Donald Potts westbound in their respective trucks with trailers attached. A gust of wind hit Potts's trailer, and he lost traction and jack-knifed, partially blocking the westbound lane. Barry steered around Potts's truck and collided with Kaneshan. Troftgruben was injured.

¶3 Troftgruben filed suit for negligence against the three drivers. The drivers asked the court to provide the emergency instruction to the jury, which the judge did over Troftgruben's objections. The jury found none of the drivers negligent. Troftgruben filed a post-trial motion seeking a new trial based on the alleged erroneous instruction, which the court denied.

STANDARD OF REVIEW

¶4 A circuit court has broad discretion with jury instructions. *Garceau v. Bunnell*, 148 Wis. 2d 146, 151, 434 N.W.2d 794 (Ct. App. 1988). A court instructs the jury of the applicable law and assists the jury in making a reasonable

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04).

analysis of the evidence. *Id.* “The appropriateness of a particular instruction, however, turns on a case-by-case review of the evidence.” *Id.* A court errs when it refuses to instruct on an issue raised by the evidence or instructs on an issue that has no support in the evidence. *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975).

¶5 A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. *Macherey v. Home Ins. Co.*, 184 Wis. 2d 1, 13-14, 516 N.W.2d 434 (Ct. App. 1994) (citation omitted). An error is prejudicial if it probably and not merely possibly misled the jury. *Id.* If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist. *Id.*

DISCUSSION

¶6 Troftgruben contends the circuit court improperly gave the emergency instruction to the jury because none of the drivers were entitled to the benefit of the instruction. “The emergency doctrine relieves a person of liability for his action or non-action when faced with an emergency which his conduct did not create or help to create.” *Hoefst v. Friedel*, 70 Wis. 2d 1022, 1030, 235 N.W.2d 918 (1975). A court may determine the emergency doctrine applies as a matter of law and direct a verdict in favor of the party faced with an emergency if the uncontroverted evidence establishes: “(1) the party seeking the benefit of the rule is free from negligence; (2) the time interval between the danger and impact is too short to allow intelligent and deliberate choice of action; and (3) the element of negligence inquired into must concern management and control.” *Garceau*, 148 Wis. 2d at 153. To apply the emergency doctrine as a matter of law, “the trial court must conclude that there is no credible evidence which would support a

finding that any one of the three prerequisites was not met.” *Hoefl*, 70 Wis. 2d at 1030. However, “[o]rdinarily the application of the emergency rule in automobile case[s] is a question for the jury.” *Id.* When determining whether the emergency instruction should be given, the courts must view the evidence in the light most favorable to the party requesting it. *Lutz*, 70 Wis. 2d at 754.

A. The emergency instruction for Potts

¶7 Troftgruben first argues that the emergency instruction was improperly given for Potts because the third prerequisite was not met. She contends that her negligence claim was based on Potts driving too fast for conditions prior to losing control of his vehicle. Thus, she concludes the element of negligence inquired into did not concern management and control. We disagree.

¶8 We are satisfied the trial court acted within its discretion when it provided the emergency instruction because the record fails to support Troftgruben’s assertion that her claim did not concern management and control. First, Troftgruben’s complaint makes only a general claim of negligence against Potts, and nothing suggests the negligence claim is limited to Potts driving too fast for conditions prior to the accident. Next, although the evidence at trial and Troftgruben’s closing argument reference Potts’s speed, they were intermixed with statements that suggest the negligence claim goes to management and control. For example, in the closing argument, Troftgruben’s counsel stated:

[Y]ou have to ask yourself given all of the testimony we have heard what most likely happened ... on that day back in February. ...

So how do I think you answer those questions? I think you answer the first question, yes, Mr. [Potts] was negligent. I think he was driving too fast. I think that he lost control of

the vehicle. I don't think there's any explanation that there was any specifically unusual condition that caused him to lose control of the vehicle. I think he was aware of the ice conditions and it has been radioed to him. He needs to maintain control of his vehicle. He didn't do that.

This statement points not only to the speed Potts was traveling but also to the management and control of the vehicle due to the hazardous conditions. As stated previously, the application of the emergency doctrine is ordinarily a question for the jury, *Hoelt*, 70 Wis. 2d at 1029-30, and courts must view the evidence in the light most favorable to the party requesting instruction. *Lutz*, 70 Wis. 2d at 754. Given these assumptions, the court reasonably exercised its discretion when giving the instruction to the jury to resolve whether the doctrine applied.

B. The emergency instruction for Barry and Kaneshan

¶9 Troftgruben contends that neither Barry nor Kaneshan were entitled to the emergency instruction because both had the sufficient time to make deliberate choices with their vehicles in reaction to the situation. Troftgruben states that Barry had seven seconds to react, and therefore had sufficient time to make an informed decision. Troftgruben relies heavily on *Zimmer v. Zimmer*, 6 Wis. 2d 427, 95 N.W.2d 438 (1959). In that case, the driver had approximately seven seconds to react prior to a collision, and our supreme court rejected his argument that he was confronted with an emergency and therefore as a matter of law he was not negligent as to management and control.

¶10 Troftgruben argues that *Zimmer* “is illustrative in showing that the Wisconsin Supreme Court has deemed seven seconds as a time interval long enough for a driver to have an opportunity in which to make an intelligent choice of action in response to a dangerous situation.” However, the *Zimmer* court’s

holding only states that the emergency doctrine is not applicable to the driver as a matter of law under *Zimmer*'s facts, not that the emergency instruction cannot be given to a jury for a driver with a seven-second time frame to react. Thus, *Zimmer* did not prevent the court from giving the emergency doctrine instruction.

¶11 Additionally, whether Barry had seven seconds or less to react prior to the collision was never an issue at trial. The only reference to the seven seconds is when Barry testified that he normally maintains a seven second time lapse from the vehicle in front of him. However, whether he had seven seconds or less to react prior to the collision remained a factual issue for the jury, and thus it was within the circuit court's discretion to give the emergency instruction for Barry. It then became a matter for the jury to find the applicable facts and determine whether to apply the emergency doctrine.

C. The emergency instruction for Kaneshan

¶12 Troftgruben argues that Kaneshan was not entitled to the emergency instruction because his vehicle was moving even slower than Barry's, and he was farther from Potts's jackknifing vehicle. We again disagree. The trial court viewed all the evidence in the light most favorable to the requesting party, which included the hazardous conditions of the roads, the inclement weather conditions, and the types of vehicles involved in the collision. Application of the emergency doctrine is ordinarily an issue for the jury, and the circuit court did not erroneously exercise its discretion when it gave the emergency instruction.

¶13 Because the court reasonably exercised its discretion in giving the emergency instruction, we do not address prejudice.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

