

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2010

A. John Voelker
Acting 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. 2010AP200

Cir. Ct. No. 2007CV16439

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY
AND JOHN L. DIGAUDIO,**

PLAINTIFFS-RESPONDENTS,

v.

KEITH A. NORDGULEN,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Keith A. Nordgulen appeals from a judgment entered following a bench trial at which the circuit court determined that he was sixty-five percent negligent and that John L. Digaudio was thirty-five percent negligent in a motor vehicle accident. The circuit court ordered judgment in favor

of Digaudio's insurer, American Family Mutual Insurance Co., and dismissed Nordgulen's counterclaim. We affirm.

BACKGROUND

¶2 This appeal arises out of a subrogation action filed against Nordgulen by American Family Mutual Insurance Co. to recover monies paid to its insured, Digaudio, for property damage he incurred in a two-vehicle accident. Nordgulen filed a counterclaim alleging that he sustained personal injuries and damage to his motorcycle.

¶3 We take the facts from the testimony presented at the bench trial. In the late afternoon of July 25, 2006, Digaudio was driving his car southbound in the right-hand lane on 60th Street in West Allis, Wisconsin. The road was dry and the day was sunny. Approximately three and one-half blocks before he reached the intersection of 60th and Madison Streets, he passed a yellow, diamond-shaped road sign with black graphics showing that the right lane ends. Signs were also posted prohibiting parking in the right lane from 4:30 p.m. to 6:00 p.m. Christopher St. Clair, a traffic engineer for the city of West Allis, testified that the purpose of the parking prohibition is to "open up a lane of traffic during the evening peak hour." Digaudio testified that southbound traffic in the left lane was heavily congested so he proceeded in the unobstructed right lane, traveling at the posted speed limit of thirty miles per hour. He approached the intersection of 60th and Madison Streets at about 5:30 p.m.

¶4 At the same time, Nordgulen was riding a motorcycle northbound on 60th Street. At the intersection of 60th and Madison Streets, Nordgulen stopped and prepared to make a left turn. Nordgulen faced a pick-up truck with an extended cab and a topper on the back that was stopped at the intersection in the

left southbound lane, unable to proceed due to the congested traffic conditions. According to the testimony of Robert Krenz, a consulting engineer with expertise in motorcycle accidents, the pick-up truck obstructed Nordgulen's view of approaching traffic in the right southbound lane.

¶5 Laurel Mazur testified that she was in a vehicle two car lengths behind Nordgulen facing north when Nordgulen prepared to turn left into the intersection. She testified that she saw Nordgulen begin to turn when Digaudio's vehicle was four car lengths from the intersection. As Nordgulen turned, Digaudio drove into the intersection and they collided.

¶6 The circuit court found that Digaudio was driving within the speed limit in a lawful travel lane, but that he was thirty-five percent causally negligent by driving too fast for the congested traffic conditions. The circuit court found that Nordgulen was sixty-five percent causally negligent by failing to yield the right-of-way when he made a left turn in front of traffic and by failing to maintain an adequate lookout. The parties stipulated to the amount of Digaudio's damages. The circuit court entered judgment in favor of American Family Mutual Insurance Co. for sixty-five percent of the stipulated amount and dismissed Nordgulen's counterclaim. *See* WIS. STAT. § 895.045 (2007-08).¹ Nordgulen appeals.

DISCUSSION

¶7 Nordgulen asserts that this appeal involves nine issues that require us to determine whether the circuit court "adopt[ed] ... appropriate legal

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

standard[s]” for assessing Digaudio’s driving. He does not, however, identify a standard that he believes the circuit court adopted, nor does he identify a standard of review for this court to apply.

¶8 We are not bound by the manner in which a party frames the issues. *See Travelers Indem. Co. of Ill. v. Staff Right, Inc.*, 2006 WI App 59, ¶8, 291 Wis. 2d 249, 714 N.W.2d 219. Our examination of the parties’ substantive arguments discloses that we are asked to interpret and apply statutes and regulations governing traffic control devices and right-of-way. We are also asked to determine whether the evidence is sufficient to sustain the circuit court’s findings. We review these issues under a mixed standard. Interpretation of statutes and regulations presents questions of law, as does application of a statute or regulation to a given set of facts. *County of Milwaukee v. Superior of Wis., Inc.*, 2000 WI App 75, ¶10, 234 Wis. 2d 218, 610 N.W.2d 484. We review such questions *de novo*. *Id.* Our review of a circuit court’s findings of fact, however, is deferential. We will not set aside the circuit court’s express or implied findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *see also Shepard v. Circuit Court*, 189 Wis. 2d 279, 286, 525 N.W.2d 764 (Ct. App. 1994). Moreover, a circuit court acting as the factfinder is the “ultimate arbiter of the credibility of witnesses. When more than one reasonable inference may be drawn from the credible evidence, a reviewing court must accept the inference drawn by the [circuit] court.” *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981) (citation omitted). With these principles in mind, we address the parties’ contentions.

¶9 Nordgulen argues that the traffic sign on 60th Street showing that the right lane ends gave notice to southbound drivers of a legal requirement to merge into the left lane. We disagree.

¶10 Pursuant to WIS. STAT. § 84.02(4)(e), Wisconsin has established a uniform system of signs and other traffic control devices by adopting a manual, namely, Fed. Highway Admin., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (MUTCD). See *Harmann v. Schulke*, 146 Wis.2d 848, 853-54, 432 N.W.2d 671 (Ct. App. 1988); see also WISCONSIN MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES at 4 (<http://mutcd.fhwa.dot.gov/pdfs/2003/pdf-index.htm>) (last visited October 11, 2010) (reflecting that the 2003 edition of the MUTCD and a 2005 Wisconsin supplement were in effect in Wisconsin on the date of the accident at issue here).² The design and use of signs and other traffic control devices in Wisconsin must conform to the MUTCD. See WIS. STAT. § 349.065.

¶11 The MUTCD distinguishes between regulatory signs and warning signs. “Regulatory signs give notice of traffic laws or regulations.” MUTCD, § 2A.05. Such signs “inform road users of selected traffic laws or regulations and indicate the applicability of the legal requirements.” *Id.*, § 2B.01. Warning signs, on the other hand, “give notice of a situation that might not be readily apparent.” *Id.*, § 2A.05. A warning sign alerts drivers to a condition “that might call for a reduction of speed or an action in the interest of safety and efficient traffic operations.” *Id.*, § 2C.01.

¶12 The design of regulatory signs and warning signs is standardized. Regulatory signs are generally rectangular. See *id.*, § 2B.02. By contrast, “[a]ll warning signs shall be diamond-shaped (square with one diagonal vertical) with a black legend and border on a yellow background.” *Id.*, § 2C.03.

² All references to specific sections of the MUTCD are to the 2003 edition.

¶13 No dispute exists that the sign on 60th Street showing that the right lane ends was diamond-shaped, with a black legend and border on a yellow background. Thus, we must apply the provisions of the MUTCD to the undisputed facts. We conclude that the diamond-shaped sign did not serve to give notice of an applicable traffic regulation or other legal requirement. Rather, the sign served to warn drivers of a condition that “might call for ... an action.” MUTCD, § 2C.01.

¶14 Further, no dispute exists that on the day of the accident a rectangular regulatory sign prohibited parking on 60th Street between 4:30 p.m. and 6:00 p.m. on the southbound stretch of roadway leading up to Madison Street. The right southbound lane was therefore not available for use as a parking lane during that time period. *See* MUTCD, § 2B.01. Because the record reflects that the right lane of 60th Street was not a parking lane or otherwise obstructed at the time of the accident, the evidence supports the circuit court’s implicit finding that the existing road conditions did not require Digaudio to merge into the left lane.

¶15 Nordgulen nonetheless asserts that Digaudio could not use the right southbound lane to travel up to and through the intersection of 60th and Madison Streets. Nordgulen appears to argue that traffic on 60th Street may move in only one lane in each direction because the street is marked with a broken yellow line. We reject this argument.

¶16 A broken yellow line is one of several available devices for marking a two-lane, two-way street. *See* MUTCD, § 3B.01. Nordgulen does not, however, point to any regulation preventing a municipality from permitting traffic to move in more than two lanes at limited times on a roadway marked with a broken yellow line.

¶17 We also reject Nordgulen’s contention that Digaudio could not approach the intersection of 60th and Madison Streets in the right lane because it was not separated from the left lane by white dashed lines. Separate lanes of traffic must be “clearly indicated.” *See* WIS. STAT. § 346.13. White dashed lines, however, are not required. *See id.* St. Clair testified that a lane delineation can be “anything that would actually guide a motorist properly.” He further explained that “a crack in between the two lanes ... can be used as a lane delineation” and that such use of roadway cracks is “very common in engineering practice.”

¶18 Digaudio testified that a crack in the roadway separated the two southbound lanes on the stretch of road at issue in this case. That testimony is uncontradicted in the record. The evidence thus fully supports the circuit court’s finding that Digaudio was travelling in a lawful traffic lane at the time of the accident.

¶19 We next examine the circuit court’s findings of negligence. Negligence entails: “(1) a duty of care ...; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.” *Lemke-Wojnicki v. Kolodziej*, 2002 WI App 316, ¶7, 258 Wis. 2d 950, 655 N.W.2d 212. Whether negligence exists is generally a question of fact. *See Heuser v. Community Ins. Corp.*, 2009 WI App 151, ¶11, 321 Wis. 2d 729, 774 N.W.2d 653.

¶20 The circuit court found that Digaudio was negligent by driving too fast for conditions, a violation of WIS. STAT. § 346.57(3). Digaudio testified that he was traveling at the posted speed limit of thirty miles per hour, and West Allis Police Officer Mark Sopa testified that the heavy traffic on 60th Street at the time

of the accident required motorists to travel at a speed less than the posted limit. Thus, the evidence supports the finding that Digaudio was negligent as to speed.

¶21 Nordgulen insists that Digaudio was negligent by driving at a speed greater than was reasonable and prudent, a violation of WIS. STAT. § 346.57(2). Because the circuit court found that Digaudio drove too fast for conditions, however, the circuit court found that Digaudio breached a greater duty as to speed than the obligation imposed by § 346.57(2). *See Thoreson v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 231, 236, 201 N.W.2d 745 (1972) (stating that “[WIS. STAT. § 346.57] sub. (3) creates a greater duty in respect to speed than [§ 346.57] sub. (2) does.”).³ Specifically, § 346.57(3) “requires a lesser speed than the maximum limit of sub. (2).” *Thoreson*, 56 Wis. 2d at 236. Nordgulen fails to explain how he is aggrieved by the circuit court’s determination that Digaudio breached the greater rather than the lesser duty of care. We conclude that Nordgulen inadequately briefed this issue, and we address it no further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).⁴

¶22 We turn to the circuit court’s finding that Nordgulen was negligent. Pursuant to WIS. STAT. § 346.18(2), “[t]he operator of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching

³ The current version of WIS. STAT. §§ 346.57(2)-(3) are identical to the versions discussed in *Thoreson v. Milwaukee Suburban Transp. Corp.*, 56 Wis. 2d 231, 236, 201 N.W.2d 745 (1972).

⁴ Nordgulen refers in his brief to WIS. STAT. § 939.24(1), a statute that provides “a uniform definition of criminal recklessness, the culpable mental state of numerous [criminal] offenses.” Judicial Council Committee Note, 1988, § 939.24. The statutory definition applies to crimes that include recklessness as an element. *See* WIS. STAT. § 939.24(2). Nordgulen does not explain why the definition of criminal recklessness is applicable to the instant subrogation action. We will not develop his arguments for him. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

from the opposite direction shall yield the right-of-way to such vehicle.” The duty imposed by the statute is a particularly significant obligation of a Wisconsin driver. “The legislature, as well as this court, has recognized the seriousness involved in making a left-hand turn in the face of oncoming traffic. The statute places an absolute duty of yielding the right of way in such cases.” *Paster v. Mutual Auto Ins. Co.*, 10 Wis.2d 314, 321, 102 N.W.2d 772 (1960) (some punctuation added). The evidence plainly supports the circuit court’s conclusion that Nordgulen breached that absolute duty when he turned left across Digaudio’s path.

¶23 The evidence also supports the circuit court’s conclusion that Nordgulen breached his duty to maintain an adequate lookout. A driver who enters an intersection with his or her vision obstructed is negligent as to lookout. *See Bey v. Transport Indem. Co.*, 23 Wis. 2d 182, 189, 127 N.W.2d 251 (1964). Additionally, “a driver ... crossing a through highway ... has the duty to look sufficient distances to determine that a vehicle approaching on the through highway cannot reasonably be expected to interfere with the driver’s ... crossing the through highway.” WIS JI—CIVIL 1065 (2010) (some punctuation omitted). Here, Krenz testified that the pick-up truck stopped at the corner of 60th and Madison Streets obstructed Nordgulen’s view of southbound traffic. Mazur testified that Nordgulen nevertheless began to turn left when Digaudio’s approaching vehicle was four car lengths from the intersection. Krenz opined to a reasonable degree of engineering certainty that, under the circumstances, a collision was thus unavoidable.

¶24 Apportionment of negligence is a decision for the fact finder, and we will sustain the decision unless it is clearly erroneous. *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2005 WI 85, ¶45, 282 Wis. 2d 69, 698 N.W.2d 643. Moreover,

we are mindful that the decision cannot be made with mathematical certainty. *Anderson v. Combustion Eng'g, Inc.*, 2002 WI App 143, ¶13, 256 Wis. 2d 389, 647 N.W.2d 460. Nothing in the record persuades us that the circuit court erroneously apportioned negligence here. The circuit court found that Nordgulen entered an intersection with his view of the road obstructed and that he failed to yield the right-of-way when he turned left in front of approaching traffic. These findings fully support the circuit court's conclusion that Nordgulen's negligence contributed to the accident far more substantially than Digaudio's negligence in driving within the speed limit but too fast for the congested traffic conditions.

By the Court.—Judgment affirmed.

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

