**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 4, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP1149** **Cir. Ct. No. 2002CV1692**

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

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**REED J. FARR, A MINOR, BY HIS GUARDIAN AD LITEM, DANIEL A. ROTTIER, MANDIE FARR AND GEORGE FARR,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**EVENFLO COMPANY, INC. AND SHOPKO STORES, INC.,**

**DEFENDANTS-APPELLANTS,**

**REYNOLDS WHEELS INTERNATIONAL,**

**DEFENDANT-(IN T.CT.).**

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APPEAL from a judgment of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 LUNDSTEN, P.J. This is a product liability case. Plaintiffs Reed Farr, a child, and his parents, Mandie and George Farr (the Farrs), sued manufacturer Evenflo Company, Inc., and retailer Shopko Stores, Inc. (collectively Evenflo).[1] Reed Farr was injured while being transported in an Evenflo infant carrier, and the Farrs claimed that the cause was Evenflo's negligence and the defective design of the carrier. The case was tried before a jury. Evenflo makes five arguments on appeal: (1) that the trial court erred when it denied Evenflo's request that evidence regarding the infant carrier be suppressed because the Farrs intentionally discarded the carrier before Evenflo could inspect it; (2) that the trial court erred when it denied Evenflo's motion seeking dismissal of plaintiffs' "post-manufacturing" liability claim; (3) that, as a matter of law, George Farr's failure to secure Reed in the infant carrier using the available harness insulates Evenflo from liability because George's failure was a "superseding cause" and because of public policy considerations; (4) that trial evidence was insufficient to prove future medical expenses and future pain, suffering, and disability; and (5) that the trial court erred when it declined to order a new trial in the interest of justice. We reject all of Evenflo's arguments and affirm the trial court.

## *Background*

¶2 The infant carrier at issue here was manufactured by Evenflo. It was designed to be used both as a car seat and an infant carrier. The infant carrier has

[1] Counsel for Evenflo and Shopko explains that Shopko is a defendant-appellant in this case and that Shopko's liability is derivative of Evenflo's. At trial, the parties agreed to simplify the case by treating Evenflo as if it were the only defendant, and then to allow the trial court to apportion Shopko's liability, if any, after the trial. Similarly, we find it expeditious to discuss the case as if Evenflo were the only defendant-appellant.

a handle that attaches on each side of the seat. The handle can be rotated to an upright position for carrying an infant. The seat also comes equipped with a three-point harness that restrains an infant in the seat.

¶3 On June 18, 1998, five-month-old Reed Farr was in the Evenflo infant carrier. His father, George Farr, lifted the infant carrier. The seat rotated back so that Reed's head was pointed toward the floor. Reed slid out of the carrier and the top of his head struck the floor. Reed suffered serious injuries.

¶4 At trial, the parties presented conflicting evidence as to whether Evenflo was negligent and whether any negligence by Evenflo caused Reed Farr's injuries. In broad strokes, the Farrs alleged that the Evenflo infant carrier was defective, that the carrier was negligently designed, that the negligent design was the primary or sole cause of Reed's injuries, and that Evenflo was negligent for failing to recall the defective infant carrier or issue post-production warnings. Evenflo countered that it was not negligent in any respect and that it was George Farr's negligence, not Evenflo's, that caused Reed's injuries. Among other things, Evenflo contended that George Farr negligently failed to strap Reed in using the infant carrier's safety harness.

¶5 The jury answered the special verdict questions as follows:

> QUESTION 1: Was Evenflo Company negligent with respect to the [infant carrier]?
>
> Answer: Yes
>
> QUESTION 2: If you answered "Yes" to Question No. 1, then answer this question:
>
> Was such negligence a cause of Reed Farr's injuries?
>
> Answer: Yes

QUESTION 3: Was the [infant carrier], when it left the possession of Evenflo Company, in a defective condition so as to be unreasonably dangerous to a prospective user?

Answer: Yes

QUESTION 4: If you answered "Yes" to Question No. 3, then answer this question:

Was such defective condition a cause of Reed Farr's injuries?

Answer: Yes

QUESTION 5: Was George Farr negligent at and immediately prior to the incident of June 18, 1998?

Answer: Yes

QUESTION 6: If you answered "Yes" to Question No. 5, then answer this question:

Was such negligence a cause of Reed Farr's injuries?

Answer: Yes

QUESTION 7: If you answered "Yes" to Question No. 6 and also answered "Yes" to Question Nos. 2 and/or 4 (a "Yes" answer to Question No. 4 constitutes causal negligence on the part of Evenflo), then answer this question:

Assuming the total negligence, which caused Reed Farr's injuries to be 100%, what percentage do you attribute to:

| | | |
|---|---|---|
| a. | Evenflo Company | 58.75% |
| b. | George Farr | 41.25% |
| | Total | 100% |

QUESTION 8: What sum of money will fairly and reasonably compensate Reed Farr for the injuries he sustained as a result of the incident of June 18, 1998, with respect to:

| | | |
|---|---|---|
| A. | Medical, hospital and care expenses to date | $ 176,828.28 |
| B. | Medical, hospital and care expenses in the future | $ 112,500 |

| | | |
|---|---|---|
| C. | Loss of future earning capacity | $ -0- |
| D. | Past and future pain, suffering and disability | $1,500,000 |

QUESTION 9: What sum of money will fairly and reasonably compensate Mandie Farr for the damages she sustained as a result of the incident of June 18, 1998, with respect to loss of society and companionship?

$25,000

QUESTION 10: What sum of money will fairly and reasonably compensate George Farr for the damages he sustained as a result of the incident of June 18, 1998, with respect to loss of society and companionship?

$10,000

## ***Discussion***

### *1. Destruction of Evidence*

¶6 Evenflo first complains that the trial court erred when it failed to exclude evidence concerning the condition of the infant carrier as a sanction for the Farrs' act of disposing of the carrier before Evenflo had a chance to inspect it. According to Evenflo, if the trial court had properly excluded evidence of the condition of the infant carrier, Evenflo would have been entitled to summary judgment dismissing all claims because the Farrs would not have been able to present sufficient evidence supporting any of its claims. In effect, Evenflo sought dismissal of the Farrs' lawsuit as a sanction for disposing of the carrier. Thus, this challenge by Evenflo hinges on its argument that the trial court misused its discretion when it denied Evenflo's request that evidence of the condition of the infant carrier be excluded as a sanction for the Farrs' failure to preserve evidence.

¶7 "A trial court's decision whether to impose sanctions for the destruction or spoliation of evidence, and what sanction to impose, is committed to

the trial court's discretion." ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999) (footnote omitted). The sanction of dismissal should rarely be granted. ***Id.*** at 719. Dismissal is appropriate only when there is "egregious conduct." ***Id.*** Egregious conduct involves more than negligence; "'rather, it consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.'" ***Id.*** (quoting ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993)). When deciding whether and how to sanction a party who has destroyed evidence, courts consider the circumstances, including whether the destruction was intentional or negligent, whether comparable evidence is available, and whether at the time of destruction the responsible party knew or should have known that a lawsuit was a possibility. *See* ***Garfoot***, 228 Wis. 2d at 717-19. "We affirm discretionary rulings if the trial court has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 717.

¶8 We conclude that the trial court in this case applied the correct legal standard and reached a reasonable decision.

¶9 Evenflo depicts the conduct of the Farrs in simple terms. According to Evenflo, Mandie Farr intentionally discarded the infant carrier after George Farr told her not to throw it away, after the Farrs considered litigation, and after George Farr actually contacted an attorney and discussed the possibility of suing Evenflo.

Therefore, according to Evenflo, the conduct of the Farrs was obviously egregious.[2] But there is more to the story.

¶10 It is true that George Farr admitted that he contemplated a lawsuit, that while at the hospital he contacted an attorney, and that he thought the infant carrier should be examined. But George was not the person who disposed of the infant carrier. Rather, it was Mandie Farr, and there was no evidence that she had the same level of awareness that George had. Mandie averred that she came home from the hospital, where her son Reed was hospitalized, and the infant carrier was in Reed's room. Mandie "didn't want to look at it." She averred: "I didn't want it to be anywhere with anybody and I couldn't stomach looking at it, so I made up my mind." Mandie put the infant carrier in a bag and either put it out in the garage to be taken away with the garbage or put it out on the curb. Mandie acknowledged that she had discussed getting rid of the infant carrier with George and that George told her not to throw it away. Evenflo, however, directs us to no evidence showing that George told Mandie *why* she should not throw the infant carrier away.

¶11 Reviewing this evidence, the trial court concluded that the disposal of the infant carrier was not "for the purpose of gaining an advantage for the plaintiffs in potential litigation." Rather, the court found that Mandie disposed of

[2] Evenflo argues that the prejudice it suffered was equally obvious. According to Evenflo, it is undisputed that if the infant carrier had been available for inspection, experts could have conclusively determined whether the infant carrier handle malfunctioned. However, we need not discuss prejudice because we conclude that the trial court properly concluded that the Farrs' conduct was not egregious. Moreover, Evenflo does not take up the challenge to find error in the Farrs' assertion that "[n]o Wisconsin case holds … that the sanction of dismissal is mandated whenever prejudice occurs, and no case allows a court to impose the sanction of dismissal, even though prejudice exists, if no egregious conduct occurred."

the infant carrier because of the emotional discomfort it caused her to have the carrier around.[3] Thus, although Mandie's conduct was intentional, the trial court correctly concluded that it was not "egregious" because it was not a "'conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.'" ***Garfoot***, 228 Wis. 2d at 719.

¶12 The above discussion is sufficient to affirm the trial court on this issue. But we also note that the trial court did sanction the Farrs by instructing the jury that, because Mandie Farr intentionally disposed of the infant carrier, the jury was entitled to infer that, "had the [carrier] not been destroyed, it would have been helpful to Evenflo in proving that the [carrier] was not defective and that Evenflo was not negligent." Thus, the trial court's decision to reject the particular sanction sought by Evenflo is all the more reasonable.

*2. "Post-Manufacturing" Liability Claims*

¶13 Among the Farrs' negligence claims were two "post-manufacturing" negligence claims. These claims alleged that Evenflo was negligent for failing to recall or retrofit the defective infant carrier and negligent for failing to issue post-production warnings. Evenflo argues that these two "post-manufacturing" negligence claims are not valid claims in Wisconsin and, therefore, the trial court

[3] The Farrs, citing ***Sentry Insurance v. Royal Insurance Co.***, 196 Wis. 2d 907, 917, 539 N.W.2d 911 (Ct. App. 1995), assert that fact finding in this context—that is, fact finding in the context of exercising discretion as to the appropriate sanction for the destruction of evidence—must be accepted on appeal unless contrary to the great weight and clear preponderance of the evidence. Under this standard, the Farrs argue, the trial court's factual finding regarding Mandie Farr's reason for disposing of the infant carrier must be upheld. Evenflo does not say that this topic was inappropriate for fact finding or that the trial court's findings lacked sufficient support in the record. Consequently, we take Evenflo's silence as a concession that the trial court's findings were proper.

should have granted Evenflo's motion for partial summary judgment dismissing the claims. We decline to address the merits of Evenflo's challenge. We conclude that Evenflo failed to properly preserve the issue for review by agreeing to a combined negligence verdict that makes it impossible to discern whether the allegedly improper negligence claims affected the verdict.

¶14 During the instruction conference, the trial court informed the parties that it had drafted a verdict form containing two negligence questions, one asking whether Evenflo was negligent prior to the sale of the infant carrier and one asking whether Evenflo was negligent after the sale. At Evenflo's request, however, the questions were merged into a single question asking whether Evenflo was negligent: "Was Evenflo Company negligent with respect to the [infant carrier]?" The trial court advised Evenflo's counsel that a combined verdict might hinder appellate review of Evenflo's challenge to the "post-manufacturing" negligence claims, but Evenflo's counsel preferred the single negligence question. Evenflo's counsel did not dispute, at least on the record, the trial court's assessment that a merged single question would hinder appellate review. While instructing the jury, the trial court gave the jury an instruction explaining that a manufacturer has a duty to exercise care with respect to product users *after* the sale of the product.

¶15 After trial, Evenflo moved for a new trial on the ground that the jury should not have been instructed on "post-manufacturing" negligence. The trial court denied the motion, reaffirming its earlier ruling that the "post-manufacturing" negligence claims were proper. The court also ruled that Evenflo

had waived its assertion of error by choosing to submit a single negligence question to the jury. We agree with the trial court's waiver ruling.[4]

¶16 Evenflo's complete argument on the topic of waiver is the following: "These motions [Evenflo's motions to dismiss the 'post-manufacturing' negligence claims] were resolved prior to trial, and therefore the issue is unaffected by Evenflo's trial decision to consent to the negligence issue being set forth in a single verdict question." This spare argument fails to convince us. First, Evenflo did not merely "consent" to the single question, it affirmatively asked the judge to merge the two questions into one question. Second, Evenflo's argument does not address the Farrs' argument that a single negligence question hinders our ability to determine whether the alleged error made a difference.

¶17 There was substantial evidence that Evenflo negligently designed and manufactured the infant carrier and that this non-post-manufacturing negligence caused Reed Farr's injuries. The evidence of Evenflo's post-manufacturing negligence was contested, and it is possible the jury did not rely on this evidence to answer the single verdict question regarding Evenflo's negligence. Consequently, Evenflo is unable to demonstrate that any alleged error in instructing the jury on "post-manufacturing" negligence affected the verdicts in a manner that prejudiced Evenflo.

[4] The Farrs also argue that the negligence finding is not necessary to sustain the damages awarded by the jury. The Farrs point out that, apart from finding Evenflo negligent, the jury also found that the infant carrier was defective when it left Evenflo's possession and that the defective condition of the infant carrier was a cause of Reed Farr's injuries. Because we agree with the trial court's waiver ruling, we need not address this argument by the Farrs.

¶18 One purpose of the waiver rule is to prompt parties to deal with issues in a manner that avoids costly retrials. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) ("If the waiver rule did not exist, a party could decline to object for strategic reasons and raise the error only when that party needed an advantage at some point in the trial. Similarly, judicial resources, not to mention the resources of the parties, are not best used to correct errors on appeal that could have been addressed during the trial."). Evenflo made a strategic decision to request a single negligence question. Whatever the thinking behind that decision, the single question hinders our ability to determine whether it matters that the jury was instructed on "post-manufacturing" negligence. If Evenflo had not made the request, the trial court would have given the jury a separate question regarding Evenflo's "post-manufacturing" negligence and we would know whether the jury relied on "post-manufacturing" negligence.

*3. Evenflo's "Superseding Cause" and Public Policy Arguments*

¶19 Evenflo argues that, as a matter of law, George Farr's failure to secure Reed Farr in the infant carrier using the available safety harness is a "superseding cause" of Reed's injuries that insulates Evenflo from liability. For purposes of this argument, Evenflo concedes that the evidence was sufficient to show that the infant carrier handle was defective and that this defect caused the infant carrier to rotate, thereby causing Reed Farr to slide out of the carrier and strike his head on the floor.[5] Still, Evenflo asserts there was unrebutted evidence

[5] Evenflo casts its argument in terms of the Farrs' failure to show that Reed Farr's injuries were caused by a "defect" in the infant carrier, without reference to the fact that the jury also found that Reed Farr's injuries were caused by Evenflo's negligence. The relationship between a product defect claim and alleged negligence in the design and manufacture of a product is complex. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶42, 235 Wis. 2d 325, 611 N.W.2d 659 ("Wisconsin case law allows plaintiffs to seek recovery from a manufacturer for the (continued)

that Reed Farr's injuries would not have occurred if Reed had been properly harnessed in the infant carrier.

¶20 Evenflo primarily relies on two sections of the Restatement (Second) of Torts. Evenflo cites RESTATEMENT (SECOND) OF TORTS § 440 (1965) for the proposition that a superseding cause is an intervening force which relieves an actor from liability for harm which his negligence was a substantial factor in producing. Evenflo also points to RESTATEMENT (SECOND) OF TORTS § 441 (1965), which defines "intervening force" as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Also, without discussing why they provide support, Evenflo cites ***Stewart v. Wulf***, 85 Wis. 2d 461, 271 N.W.2d 79 (1978), and ***Bentzler v. Braun***, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

¶21 Evenflo argues public policy two ways. First, Evenflo contends that public policy factors weigh in favor of applying the defense of superseding cause in this case. Second, Evenflo argues that we should apply public policy factors directly to shield Evenflo from liability. According to Evenflo, public policy requires that parents use an available infant carrier safety harness and a parent's failure to do so shields an infant carrier manufacturer from liability for any injury that would have been avoided had the safety harness been used.

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defective design of a product under a strict liability theory and/or a negligence theory. The coexistence of the two theories has sparked confusion and criticism because both rely on an underlying product defect." (citations omitted)). Neither party, however, discusses whether the differences between the Farrs' product defect claim and their negligence claim matter for purposes of Evenflo's causation argument. Accordingly, we do not draw a distinction and will, in this section, interchangeably refer to product defect and Evenflo's negligence.

¶22 The Farrs respond that they did present evidence that disputed that Reed Farr would not have been injured if he had been strapped in the harness.[6] But we need not address this dispute because we agree with the Farrs that, even if it were undisputed that Reed would not have been injured if restrained in the infant carrier harness, George's failure to secure Reed in the harness does not constitute a superseding cause as a matter of law. Citing ***Schuh v. Fox River Tractor Co.***, 63 Wis. 2d 728, 740-43, 218 N.W.2d 279 (1974), and other similar cases,[7] the Farrs argue that product misuse is not a defense if that misuse is foreseeable, and failing to strap a child in an infant carrier when moving a child about in a house is a foreseeable misuse.

¶23 We begin our discussion by observing that Evenflo's framing of the issue is outdated. Evenflo talks about "superseding cause" as if it were a current doctrine apart from consideration of public policy factors. However, under current Wisconsin jurisprudence, if a defendant's negligence is a cause-in-fact, the defendant is shielded from liability, if at all, by consideration of public policy factors; we do not speak in terms of superseding cause. In ***Morden v. Continental AG***, 2000 WI 51, 235 Wis. 2d 325, 611 N.W.2d 659, the supreme court wrote:

> The element of causation turns on "whether the defendant's negligence was a substantial factor in producing the injury." Our inquiry into causation focuses on the nexus between the design or manufacture of the

[6] The Farrs contend that the evidence at trial permits the factual inference that Reed Farr would have been injured even if he was strapped in because the harnessing was such that Reed's head would still have protruded beyond the top of the carrier seat when it rotated, thereby permitting Reed's head to strike the floor.

[7] The Farrs also cite ***Stewart v. Wulf***, 85 Wis. 2d 461, 477, 271 N.W.2d 79 (1978); ***Rixmann v. Somerset Public Schools***, 83 Wis. 2d 571, 586, 266 N.W.2d 326 (1978); ***Merz v. Old Republic Insurance Co.***, 53 Wis. 2d 47, 58, 191 N.W.2d 876 (1971); and ***Schneider Fuel & Supply Co. v. Thomas H. Bentley & Son, Inc.***, 26 Wis. 2d 549, 554, 133 N.W.2d 254 (1965).

> [product] and [the plaintiff's] injuries. To discern whether such a nexus exists, we must determine whether the defendant's actions were a "cause-in-fact" of the injuries. If they were, we explore whether the conduct of the defendant was a "proximate cause" of the harm sustained by the plaintiff. Proximate cause involves public policy considerations for the court that may preclude the imposition of liability. After the determination of the cause-in-fact of an injury, a court still may deny recovery after addressing policy considerations, or legal cause.

***Id.***, ¶60 (citations omitted); *see also* ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶15 n.12, 272 Wis. 2d 46, 680 N.W.2d 345 ("'The court's first public policy factor, "whether the injury is too remote from the negligence," is a restatement of the old chain of causation test.… What this factor does ... is to revive the "intervening" or "superseding" cause doctrine and dress it in new clothes.'") (quoting Kendall W. Harrison, *Wisconsin's Approach to Proximate Cause*, 73 WIS. LAW. 20, 55-56 (Feb. 2000)).[8]

¶24 Evenflo does not dispute that its defective design or its negligence was a cause-in-fact of Reed Farr's injuries. Such an argument would be futile. This case involves a textbook example of two causes-in-fact operating simultaneously to cause a single injury. If the Evenflo infant carrier handle had not been defective, the seat would not have rotated and Reed Farr would not have been injured. At the same time, if Reed had been strapped in, he would not have been injured.[9] In this case, the two worked in combination to produce Reed's injuries. Thus, it was completely appropriate to permit the jury to apportion negligence to Evenflo and for Evenflo to be held liable.

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[8] Evenflo's "proximate cause" argument is similarly outdated, and we do not separately address it.

[9] As noted above, we acknowledge that the Farrs dispute this factual proposition.

¶25 Although Evenflo's negligence is a cause-in-fact, the question still arises whether public policy considerations should preclude Evenflo's liability. Evenflo begins this part of its public policy argument by relying on ***Reber v. Hanson***, 260 Wis. 632, 636-37, 51 N.W.2d 505 (1952), for the proposition that parents have a duty to protect their children. But ***Reber***, a case addressing whether parental negligence is joint or several, does not suggest that the duty a parent owes his or her own child is different than the duty a non-parent might owe a child. The ***Reber*** court speaks in terms of parents exercising "reasonable care," ***id.*** at 637, which is the normal standard of care, *see* ***Gritzner v. Michael R.***, 2000 WI 68, ¶24 n.4, 235 Wis. 2d 781, 611 N.W.2d 906 ("[E]veryone has a duty to act with reasonable care."); ***Schuster v. St. Vincent Hosp.***, 45 Wis. 2d 135, 141, 172 N.W.2d 421 (1969) ("The duty of ordinary care and the duty of reasonable care are in our opinion identical.").[10]

¶26 Next, Evenflo points to ***Stehlik v. Rhoads***, 2002 WI 73, 253 Wis. 2d 477, 645 N.W.2d 889. According to Evenflo, in ***Stehlik*** the supreme court recognized that public policy precludes liability when a party fails to take advantage of an available safety device. Evenflo states that the ***Stehlik*** court "refused to allow an individual to shift responsibility for harm that he should have prevented by using an available safety device." According to Evenflo, Reed's parents, who must protect Reed, are like the ATV driver in ***Stehlik*** who did not use an available safety helmet and could not hold the ATV owner liable for the driver's choice not to wear the helmet. Evenflo argues that, as in ***Stehlik***, we

[10] In this case, the jury did assess the parents' negligence. At Evenflo's request, the jury was instructed on the father's obligation to exercise care. The result was that the jury found George Farr causally negligent, apportioning 41.25% of the negligence to him.

should conclude that to impose liability on Evenflo would be to impose liability that has no sensible or just stopping point. Evenflo concludes: "Where, as here, a child is physically unable to protect himself, public policy should require that parents make use of an available safety device for [the child's] protection." We are not persuaded.

¶27 First, ***Stehlik*** does not hold that *manufacturer* liability is precluded when a product user fails to take advantage of an available safety device. To the contrary, the majority in ***Stehlik*** spends most of its time explaining the procedure for apportioning liability between a manufacturer of all terrain vehicles (ATVs) and a plaintiff who chose not to use an available safety helmet. *See* ***id.***, ¶¶ 25-51.

¶28 Second, when the ***Stehlik*** court turned its attention to public policy factors, the court did not address the relationship between a manufacturer and a product user, but rather the relationship between a product owner and a product user. The ***Stehlik*** court concluded that "public policy considerations preclude imposing liability on an ATV owner for the failure of an adult ATV user to wear a safety helmet." ***Id.***, ¶57. The court explained:

> As a matter of public policy, the normal adult user of an ATV is far more culpable than the ATV owner when it comes to the personal, voluntary decision not to wear an available safety helmet while operating the ATV. Where, as here, the ATV owners made safety helmets available but the ATV user simply chose not to wear one, the degree of culpability is too disproportionate to impose liability.
>
> In addition, to impose liability on an ATV owner for an adult rider's failure to wear a helmet places too unreasonable a burden on the owner, requiring, essentially, that the ATV owner visually monitor its use at all times to ensure helmet use by all riders.
>
> Finally, to impose liability under these circumstances would enter a field that has no sensible or just stopping point. The negligence associated with an

> adult's decision to forego the use of an available safety device such as a seat belt or a helmet cannot be assigned to someone else, such as the driver of the car or the owner of the ATV.

***Id.***, ¶¶54-56. We fail to see how this public policy discussion supports Evenflo. Evenflo's position in this case is not comparable to a product owner who permits another adult to use the product without the advantage of an available safety device.

¶29 In sum, we agree with the trial court that the Farrs presented sufficient evidence showing that Evenflo was causally negligent in designing the infant carrier such that its negligence was a substantial factor in bringing about Reed Farr's injuries. We also agree with the court's conclusion that ***Stehlik*** is inapposite. We reject Evenflo's argument that George Farr's failure to secure Reed Farr in the infant carrier using the available harness is, as a matter of law, an event that insulates Evenflo from liability.

*4. Sufficiency of the Evidence to Show Future Medical Expenses and Future Pain, Suffering, and Disability*

¶30 After the verdict, Evenflo moved the trial court to set aside the verdict regarding future medical expenses and future pain, suffering, and disability. The trial court reduced the amount of future medical expenses, but otherwise denied the motion. Evenflo argues that the full awards for both future medical expenses and for future pain, suffering, and disability should have been set aside because neither was supported by sufficient evidence.

¶31 We apply the following principles and standard of review:

> A motion challenging the sufficiency of the evidence may be granted when "the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no

> credible evidence to sustain a finding in favor of such a party."
>
> In ruling upon a motion made at the close of a plaintiff's case, a circuit court may grant the motion if it finds, as a matter of law, that no jury could disagree on the proper facts or inferences to be drawn therefrom, and that there is no credible evidence to support a verdict for the plaintiff.
>
> Because circuit courts are better positioned to decide the weight and relevancy of the testimony, we accord them substantial deference. Thus, we will not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that it was "clearly wrong." A circuit court is "clearly wrong" when it grants a motion to dismiss despite the existence of "any credible evidence" to support the claim.

***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶¶15-17, 274 Wis. 2d 143, 682 N.W.2d 389 (citations omitted).

*a. Future Medical Expenses*

¶32 Evenflo asserts that an award of damages for future medical expenses must be supported by expert medical testimony. According to Evenflo, there must be expert testimony showing both that an injury will require future medical treatment and establishing the cost of such treatment. Evenflo argues that the evidence was insufficient because the only medical expert to testify on this topic did not testify about the number of procedures that Reed Farr would likely require or the future cost of such procedures. Evenflo contends that the only testimony about cost came from an economist who was not a medical expert and was not qualified to testify about the cost of medical procedures.[11] Thus, in

[11] Evenflo also complains that the medical doctor did not testify about the need for future medical procedures to a "reasonable degree of medical certainty." The Farrs respond that Evenflo disclaimed reliance on this argument in motions after the verdict and, in any event, no magic words are required. Evenflo does not reply. Moreover, Evenflo does not provide legal (continued)

Evenflo's view, the Farrs failed to provide expert *medical* testimony on the likely cost of future medical expenses.

¶33 The Farrs disagree. They summarize testimony from the medical doctor indicating that Reed will need at least two "shunt" replacements before age 16 and that some patients require a shunt replacement every six months between the ages of 5 and 16. The medical doctor also testified that it would be reasonable for Reed to have the shunt checked by a neurosurgeon twice a year while he is still growing and once a year thereafter. The Farrs point to an exhibit received, with no objection, specifying the cost of a prior shunt replacement for Reed and the cost of a neurosurgeon visit. According to the Farrs, Evenflo stipulated to these prior costs. The economist, the Farrs argue, simply provided a present value for future medical expenses based on (1) the frequency and type of procedures specified by the medical doctor, and (2) the uncontested historical cost of the procedures. We agree with the Farrs, as did the trial court.

¶34 First, Evenflo complains that a medical expert did not provide *cost* information, but Evenflo did not object at trial on that basis. Indeed, as the Farrs point out, and as the trial court found, Evenflo stipulated to the historical cost information contained in a trial exhibit.

¶35 Second, Evenflo is wrong when it asserts that a medical doctor did not testify about the "number of procedures that Reed Farr is likely to require in

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authority for the proposition that the doctor must phrase his prediction in terms of a "reasonable degree of medical certainty." We conclude that Evenflo has conceded the issue by failing to reply, *see* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments ignored may be deemed conceded), and by inadequately briefing the topic, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

the future." As the Farrs summarize, a medical doctor did testify about the procedures and doctor visits that could be expected.

¶36 Third, Evenflo relies on ***Bleyer v. Gross***, 19 Wis. 2d 305, 311, 120 N.W.2d 156 (1963), and ***Sawdey v. Schwenk***, 2 Wis. 2d 532, 537, 87 N.W.2d 500 (1958), for the proposition that an award for future medical expenses must be supported by expert medical testimony. We agree that these cases stand for the general proposition stated. But neither ***Bleyer*** nor ***Sawdey*** addresses the much more specific question here, namely, whether an economist may provide present value testimony based on otherwise admitted evidence of the types of procedures and examinations needed in the future, the number of times such procedures and examinations would be needed, and the historical cost of those procedures and examinations. The economist in this case gave testimony only on the present value of future medical procedures using medical expense information provided by the medical doctor. Evenflo did not object to the underlying information when it was introduced at trial and fails to explain why the economist was not competent to testify about the present value of future expenditures. Indeed, Evenflo's own cross-examination revealed that the economist was merely a "number cruncher" whose expertise was the current value of future expenditures and income. The economist did not supply the sort of information discussed in ***Bleyer*** and ***Sawdey*** that must be presented by a medical expert.

*b. Future Pain, Suffering, and Disability*

¶37 A combined verdict asked the jury to provide an amount needed to compensate Reed Farr for past and future pain, suffering, and disability. Evenflo complains that the evidence was insufficient to support an award for *future* pain, suffering, and disability. According to Evenflo, the only expert to testify on this

topic was a medical doctor who testified that Reed Farr's shunt may be permanent, but, says Evenflo, that doctor did not provide testimony regarding the permanency of Reed's pain, suffering, and disability. Thus, Evenflo asks us to strike the entire award for past *and* future pain, suffering, and disability. We decline the request for two reasons.

¶38 First, Evenflo did not object to a combined verdict covering both past and future pain, suffering, and disability. Thus, Evenflo faces the same problem it has with its post-manufacturing-negligence-claims challenge: a combined verdict makes it impossible to identify the portion of the jury award that Evenflo contends is invalid. If Evenflo wanted to preserve this issue for appellate review, it should have requested a separate verdict for future pain, suffering, and disability. We will not strike the entire award, or order a new trial on this issue, because some unknown part of the award may be attributable to future pain, suffering, and disability, even had the evidence on that topic been insufficient. *See* ¶¶15-18, *infra*.

¶39 Second, Evenflo has not persuaded us that the evidence was insufficient to support a substantial award of damage for future pain, suffering, and disability. Evenflo tells us there was no testimony about the permanency of Reed Farr's pain, suffering, and disability, only testimony that Reed's shunt may be permanent. However, Dr. Amy Heffelfinger testified that Reed's various impairments, including attention deficit hyperactivity disorder, behavioral problems, emotional problems, and "executive functioning" problems, are permanent. Dr. Heffelfinger admitted that, as Reed develops, the severity of his problems may change, but she opined that he would never catch up to where he

would have been without the injuries.[12] In keeping with WIS JI-CIVIL 1767 (1999), the jury was asked to consider the "effect the injuries are reasonably certain to produce in the future, bearing in mind [Reed Farr's] age, prior mental and physical condition and the probable duration of his life." We conclude that Dr. Heffelfinger's testimony, in combination with other expert testimony regarding the severity of Reed's afflictions, is sufficient.

¶40 It might be that Evenflo is arguing that Dr. Heffelfinger's testimony is insufficiently precise. Evenflo seemingly relies on ***Huss v. Vande Hey***, 29 Wis. 2d 34, 138 N.W.2d 192 (1965), and ***Kowalke v. Farmers Mutual Automobile Insurance Co.***, 3 Wis. 2d 389, 88 N.W.2d 747 (1958), in this regard. But, if this is Evenflo's argument, neither ***Huss*** nor ***Kowalke*** helps Evenflo.

¶41 ***Huss*** is easily distinguished because in that case there was no expert testimony from which a fact finder could infer that an injury caused by an automobile collision was permanent or that the injury would probably cause future pain and suffering. At best, one expert opined that the plaintiff's "condition" could be aggravated in the future "'by accidents, by overwork, by sudden twists or falls—any of those things. He can have pain again.'" ***Huss***, 29 Wis. 2d at 39.

¶42 ***Kowalke*** does not help Evenflo because in that case expert testimony found to be sufficient is comparable to the testimony presented by the Farrs here. The ***Kowalke*** court summarized:

[12] Our summary construes Dr. Heffelfinger's testimony in a light most favorable to the trial court's decision. *See* ***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶15, 274 Wis. 2d 143, 682 N.W.2d 389 (when assessing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the non-moving party).

> Dr. Stadel testified that he had found spasm in the plaintiff's lumbar region and also on the right side of her neck, and that from a study of X-ray pictures, he observed the presence of osteoarthritis to a moderate degree. He said that he was of the opinion that the arthritic condition had preceded the accident, and that had it not been aggravated, it would not have been disabling. He said that a blow to the area shown in the X-ray picture would be disabling. He said that in his opinion to a reasonable medical certainty, the accident (material detail of which was set forth in the hypothetical question) aggravated the pre-existing condition,—that the symptoms resulting from the aggravation of the osteoarthritis is more or less permanent. He further testified that it was his opinion that "this type of accident which was described could certainly cause malfunction of the tissues, ligaments, and nerves of the shoulder. Such malfunctioning would be evidenced by pain or relaxation of the muscles involved at the joints and of the ligaments involved. It is my opinion to a reasonable medical certainty that the injury to Mrs. Kowalke's shoulder is of a type which usually lasts for a long time, and may even be permanent."

***Kowalke***, 3 Wis. 2d at 407.

¶43 Therefore, we conclude that Evenflo has waived its argument that the evidence was insufficient with respect to future pain, suffering, and disability and, regardless of waiver, the evidence was sufficient on the topic.

*5. New Trial in the Interest of Justice*

¶44 Under WIS. STAT. § 805.15(1) (2003-04),[13] a trial court may set aside a jury verdict and order a new trial "in the interest of justice." We accord "great deference" to the trial court's exercise of discretion under this subsection. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75

[13] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

(Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). We apply great deference "because the order is itself discretionary, and the trial court is in the best position to observe and evaluate the evidence." ***Sievert***, 180 Wis. 2d at 431. This "interest of justice" standard encompasses the same grounds as contained in WIS. STAT. § 752.35, including the authority to reverse when errors have prevented the real controversy from being fully tried. ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991).

¶45 Evenflo does not argue that the trial court applied the wrong legal standard when it denied Evenflo's motion. Rather, Evenflo argues that the court misused its discretion.

¶46 Although Evenflo does not specify its interest-of-justice theory, we assume Evenflo takes the position that trial court errors prevented the real controversy from being fully tried here. Evenflo complains (1) that the jury was erroneously instructed that it could find Evenflo negligent based on a "post-manufacturing" duty to act and the trial court erroneously permitted the admission of post-manufacturing evidence; (2) that Evenflo was unfairly surprised by admission of a diagnosis that Reed Farr suffered from a bipolar disorder and was unfairly prevented from responding to that diagnosis; and (3) that improper closing argument by the Farrs' counsel attempted "to shift responsibility for [the Farrs'] failure to present Reed Farr to the jury onto Evenflo." We conclude that these arguments do not, individually or collectively, show that the trial court misused its discretion.

*a. Post-Manufacturing Duty and Post-Manufacturing Evidence*

¶47 Evenflo's first interest of justice argument essentially begins with a repeat of its argument that the trial court erred by instructing the jury on "post-

manufacturing" negligence claims. Evenflo then switches focus, complaining that evidence of events post-manufacturing were inadmissible to prove product defect or negligent design.

¶48 We have already explained why we choose not to address Evenflo's argument that it had no post-manufacturing duty. Nothing in this part of Evenflo's brief persuades us that we should revisit that topic. As to Evenflo's complaint about post-manufacturing evidence, Evenflo's argument is undeveloped. Evenflo makes several cursory arguments relating to post-manufacturing claims and evidence of post-manufacturing events, but these arguments are difficult to evaluate because of insufficient record cites and insufficiently developed legal arguments. For example, Evenflo points to the admission of three categories of evidence: (1) the recall of the infant carrier model used by the Farrs; (2) subsequently adopted government standards for such infant carriers; and (3) similar incidents of handle failure. But Evenflo fails to support its assertion that all of this evidence was inadmissible. Instead, Evenflo identifies just two cases that, at best, address only one of the categories of evidence Evenflo identifies.[14]

[14] Evenflo relies on ***Chart v. General Motors Corp.***, 80 Wis. 2d 91, 258 N.W.2d 680 (1977), and ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 311 N.W.2d 219 (Ct. App. 1981), but our review of these cases indicates that at best they bear on the admissibility of recall evidence. *See* ***Chart***, 80 Wis. 2d at 99-100 (evidence of design changes); ***Krueger***, 104 Wis. 2d at 203-04 (evidence of subsequent warning). Regardless, we need not resolve this question because, as noted, Evenflo does not present a developed argument on the topic. *See* ***Pettit***, 171 Wis. 2d at 646-47.

*b. Admission of a Bipolar Disorder Diagnosis*

¶49 Evenflo complains that it was unfairly prejudiced because the Farrs surprised Evenflo at trial by presenting expert testimony that Reed Farr suffers bipolar disorder as a result of his injuries. There are several reasons why this component of Evenflo's interest-of-justice argument does not convince us that the trial court misused its discretion. We will briefly discuss just two.

¶50 First, Evenflo makes several factual assertions in its brief-in-chief relating to this claim, but provides inadequate record cites. Notably, Evenflo does not bother to provide a record cite for its core factual assertion that a plaintiff's expert testified that Reed suffers from bipolar disorder. It is true that the Farrs supply record cites in their responsive brief, but this does not excuse Evenflo's omission.

¶51 Second, Evenflo argues that it was "forced" to respond to the bipolar disorder evidence with an expert—Dr. Warren Marks—selected by Evenflo to address a different diagnosis and even this expert was precluded from giving testimony on the issue. According to Evenflo, the prejudice it suffered could have been reduced had it been allowed to call a different expert—Dr. John Courtney—but Evenflo was "precluded" from calling Dr. Courtney. We agree with the Farrs that there is no merit to this argument.

¶52 Evenflo was not precluded at trial from presenting bipolar disorder testimony from Dr. Courtney for the simple reason that Evenflo never asked

during the trial to present such testimony.[15] As the trial court explained, the decision to exclude Dr. Courtney was made well before trial at a time when no one had raised the possibility of bipolar disorder. Evenflo does not explain why it did not request relief during trial or what would have occurred if it had. Was Dr. Courtney available? Could Evenflo have produced Dr. Courtney if granted a short continuance? What would Dr. Courtney have said?

¶53 In the trial court's view, this topic was a "blip on the radar screen that received little attention and was not relied upon by the plaintiffs." Evenflo does not persuade us otherwise.[16]

*c. Improper Closing Argument*

¶54 Without supporting record cites, Evenflo tells us that it attempted to depose Reed Farr prior to trial, but was denied the opportunity because the trial court quashed Evenflo's notice of deposition. Also without supporting record cites, Evenflo asserts that the reason it sought to depose Reed was that it anticipated the Farrs' counsel would not call or otherwise have Reed present in the courtroom. Evenflo asserts that the Farrs' tactic effectively precluded Evenflo from presenting Reed to the jury. Thus, according to Evenflo, it was unfairly prejudicial when the Farrs' counsel told the jury during closing argument that

[15] The Farrs explain the sequence of events before and at trial, with record cites. Evenflo does not dispute the Farrs' assertion that the only trial court decision precluding Dr. Courtney from testifying was a pretrial order decided on different grounds.

[16] In addition, the trial court ruled that the Farrs' expert did *not* diagnose Reed Farr as having bipolar disorder and that what Evenflo characterizes as the new bipolar disorder diagnosis was not available to either party until the day of jury selection, through no fault of the Farrs. Evenflo does not deal with these additional grounds supporting rejection of its bipolar disorder argument.

Evenflo could have produced Reed if Evenflo thought it was important. Specifically, Evenflo complains about the following remarks:

> If these lawyers thought and this company thought it was that important, they could have subpoenaed him. They could have made him sit in the first row, they could have had you stare at him for six days. They had that legal right.

Evenflo did not object to these remarks and does not dispute the trial court's conclusion that it has waived its right to review.[17] Rather, Evenflo argues that the trial court should have granted its post-trial motion for a new trial in the interest of justice based, in part, on this alleged transgression. We disagree.

¶55 First, Evenflo does not explain why it was "effectively" precluded from presenting Reed to the jury. Evenflo does not argue that the trial court erred when it prohibited Evenflo from deposing Reed Farr. Evenflo does not explain why deposing Reed was a necessary prerequisite to calling him as a witness at trial. For example, is Evenflo contending that the only way to assess how Reed would present to a jury is by deposing him? Is Evenflo saying that having its own expert examine Reed is an insufficient substitute for a deposition? Is Evenflo saying that the pretrial ruling prevented Evenflo's trial counsel from personally assessing Reed? Evenflo does not supply the answers. On the other hand, the Farrs assert, without refutation by Evenflo, that the pretrial ruling did not extend to prohibiting Evenflo from calling Reed Farr as a witness at trial.[18] Thus, Evenflo

[17] Even on appeal Evenflo does not specifically complain about the suggestion that it somehow could have forced Reed Farr to sit in the "first row" during trial. Rather, Evenflo's argument is more generally directed at the suggestion that it could have presented Reed at trial. Thus, we do not focus on the difference between presenting Reed as a witness and having him sit in the gallery.

[18] The Farrs provide a record cite for the trial court's pretrial ruling, and we agree that this ruling does not appear to cover whether Reed Farr could be called as a witness at trial.

has not supported its assertion that the Farrs' counsel misled the jury when he said that Evenflo could have produced Reed Farr at trial.

¶56 Second, we agree with the Farrs that Evenflo ignores context and that viewing the challenged argument of the Farrs' counsel in context substantially weakens Evenflo's assertion of unfair prejudice. During Evenflo's closing argument, its counsel suggested that the Farrs avoided presenting Reed, and certain people who interacted with Reed, to the jury because doing so would undercut the assertion that Reed is significantly disabled. In rebuttal closing argument, the Farrs' counsel responded by arguing that neither the jury nor the various people who interacted with Reed were qualified to assess his disabilities. As to the particular portion of closing argument Evenflo complains about, the Farrs' counsel argued that the jury would not have been able to appropriately assess Reed by viewing him and that the jurors were, instead, properly being asked to rely on the experts who evaluated Reed:

> Let me answer the questions [Evenflo's counsel] put. I think I've already answered why these various treaters who saw Reed for various reasons, whether it's school admission or something else, weren't here. Why wasn't Reed here? What would Reed have added and why should we do this to Reed? Dr. Heffelfinger said you can't judge him coming in here under the lights and looking at him. If these lawyers thought and this company thought it was that important, they could have subpoenaed him. They could have made him sit in the first row, they could have had you stare at him for six days. They had that legal right. But even they had the decency not to do it. It [sic] they wanted you to see him, bring him in. If I had brought him in and he knocked over the equipment, [Evenflo's counsel] would have suggested I set it up. That's not how you gauge the mental status and the condition of a young child. You have a professional, like Dr. Heffelfinger, do it under controlled circumstances, and that was what was done.

Thus, Evenflo does not challenge the main thrust of the argument: that the jurors or other non-professionals were not qualified to assess Reed and, therefore, it would not have been helpful to present Reed at trial. Viewed in context, there was no reason for the jurors to blame Evenflo for not seeing Reed Farr in person during trial. Any prejudice to Evenflo does not justify the extraordinary relief of a new trial in the interest of justice.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.