COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3464 **Cir. Ct. No. 98-CV-218**

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

SANDRA S. HENSLER, ERIC HENSLER, AND THOMAS HENSLER, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, MATTHEW HUPPERTZ,

PLAINTIFFS-APPELLANTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFF-CO-APPELLANT,

V.

FORD MOTOR COMPANY, A FOREIGN CORPORATION, CAPITOL FORD SALES, INC., A WISCONSIN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

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

¶1 VERGERONT, P.J. This is a products liability action in which Sandra Hensler[1] claims that Ford Motor Company was negligent and strictly liable with respect to defects in the design of her 1987 Aerostar van; this negligence and the defects, she claims, were a cause of the serious injuries she sustained when her vehicle was hit from behind. The jury found that Ford was negligent in the design and testing of the driver's seat and the warning, but this negligence did not cause Hensler's injuries in the accident. It also found the seat was not defective and unreasonably dangerous. Hensler appeals the judgment entered on the verdict, contending that the jury instructions on strict product liability and enhanced injury were in error, and the court erred in denying modifications and instructions she proposed. We conclude that, as to those issues Hensler has properly preserved for appeal, the court either did not err in instructing the jury or the error did not affect her substantial rights. We therefore affirm.

BACKGROUND

¶2 The accident occurred when Hensler's vehicle was hit from behind as she was slowing down to make a left turn, with her signal on. The driver of the rear vehicle, Paul Noe, was traveling fifty-five to fifty-six miles per hour.[2] According to Hensler's and Ford's experts at trial, the change in velocity of the Aerostar on impact was between 26 and 29.3 miles per hour, and the severity of this impact was in the top 2% to 4% of all impacts. As the Aerostar accelerated forward from the impact, Hensler went backward relative to the vehicle. She did

[1] Sandra Hensler's husband and child are also plaintiffs in this action.

[2] According to Hensler's brief, she settled her claim against Noe and released him to the extent of $100,000 of his policy limits.

not have her seat belt on. The back of the driver's seat gave way to about a fifty-five-degree angle from its starting position of about twenty degrees, putting Hensler's head in a horizontal position relative to the back of the rear seat. Hensler hit her head on the back of the rear seat, breaking the sixth cervical vertebra at the base of her neck and causing partial quadriplegia.

¶3 At trial, Hensler's experts opined that the Aerostar driver's seat was defective and caused Hensler's injuries because it did not have sufficient strength and adequate head restraint, and that a properly designed seat would have prevented Hensler's injuries. According to one expert, the technology and knowledge to build an adequate seat existed in 1987, and both experts testified that Ford was negligent in failing to build an adequate seat. In their opinion, Ford was negligent for failing to dynamically crash test for seat performance and to have a specific design standard for seat performance in rear crashes.

¶4 Ford presented evidence that the purpose of a yielding seat design was to absorb energy in a crash, reduce the forces transmitted to the occupant, and keep the head, neck, and torso aligned during a crash. It also presented evidence that a stiffer seat design increased certain risks, and that the height of the seat did not cause Hensler's injuries.

¶5 On the special verdict form, the court answered "yes" to the questions whether Noe was negligent and whether his negligence caused the accident, and "no" to the question whether Hensler was negligent in the operation of her vehicle immediately prior to the accident.

¶6 The jury was given the standard strict product liability instruction on the manufacturer's duty to the consumer, WIS JI—CIVIL 3260.[3]

[3] WISCONSIN JI—CIVIL 3260 has recently been amended, but, since Hensler requested that the court give the prior version of WIS JI—CIVIL 3260, the revisions to that standard instruction are not relevant to our analysis. The following is the instruction actually given:

> A manufacturer of a product who sells (places on the market) a defective product which is unreasonably dangerous to the user or consumer, or to his or her property, and which is expected to and does reach the user or consumer without substantial change in the condition in which it is sold, is regarded by law as negligent even though he or she has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used.
>
> A product is said to be defective when it is not reasonably fit for the ordinary purposes for which such product was sold and intended to be used, and the defect arose out of design, manufacture, or inspection while the article was in the control of the manufacturer. A defective product is unreasonably dangerous to the user or consumer when it is dangerous to an extent beyond which would be contemplated by the ordinary user possessing the knowledge of the product's characteristics which were common to the community.
>
> A manufacturer is not under a duty to manufacture a product which is absolutely free from all possible harm to every individual. A manufacturer is also not under an absolute duty to give special warning against remote possibilities of harm in the use or consumption of his or her product.
>
> It is the duty of the manufacturer not to place upon the market a defective product which is unreasonably dangerous to the user.
>
> Before you can answer the first question yes, that the 1987 Aerostar seat was defective so as to be unreasonably dangerous, you must be satisfied by the greater weight of credible evidence to a reasonable certainty that: (1) the product was in a defective condition; (2) the defective condition made the product unreasonably dangerous to persons or property; (3) the defective condition of the product existed when the product was under the control of the manufacturer; and (4) the product reached the user without substantial change in the condition in which it was sold.

In addition, at Ford's request and over Hensler's objection, the court instructed the jury as follows, based on language from ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.***, 121 Wis. 2d 338, 372, 360 N.W.2d 2 (1984):

> In determining whether a product design is defective and unreasonably dangerous, the following factors are relevant for you to consider: (1) whether or not defendant's design conforms to the practices of other manufacturers in its industry at the time of manufacture; (2) whether or not the alleged danger was open and obvious; (3) the extent of plaintiff's and other's use of the product and the period of time involved in such use without injury or harmful incident; (4) whether or not the manufacturer could have eliminated the danger without impairing the product's usefulness or making it unduly expensive; and (5) the relative likelihood of injury resulting from the product's present design.

¶7 The jury was also given WIS JI—CIVIL 1723—Enhanced Injuries, with a modification in the second to last paragraph proposed by Ford.[4]

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[4] This was the modified version of WIS JI—CIVIL 1723 given to the jury:

> This is an enhanced injury case. Plaintiff does not claim Ford Motor Company caused the accident to occur.
>
> Plaintiff does claim that Ford was negligent and that there existed a defect in the Aerostar seat which was unreasonably dangerous to a prospective user.
>
> Plaintiff further claims that such negligence and defect was a substantial factor in producing enhanced injuries to herself.
>
> Question 13 refers to those alleged enhanced injuries. It applies to those injuries that plaintiff received over and above any injuries she would have received as a result of the accident if Ford was not negligent and the Aerostar seat was not unreasonably dangerous and defective.
>
> First, you must determine whether Ford was negligent and whether Ford's product was unreasonably dangerous and defective as inquired about in questions 3, 5, 7, 9.

(continued)

> If you find that Ford was negligent or that the product was defective, then you must determine in questions 4, 6, 8, 10 whether that negligence or defective product was a cause of enhanced injuries to plaintiff; i.e., whether that negligence or defective product was a substantial factor in producing injuries over and above what probably would have been sustained in the accident if Ford was not negligent and the Aerostar seat was not defective.
>
> The burden in these questions is to convince you to a reasonable certainty by the greater weight of the credible evidence that "yes" should be your answer. Finding a product to be so defective as to be unreasonably dangerous is considered in the law as negligence.
>
> If you have found that Ford's negligence was a cause of enhanced injuries to the plaintiff, then you will answer question 13 and determine how much and to what extent plaintiff's total injuries and damages were caused by the accident, and how much and to what extent plaintiff's total injuries and damages were enhanced or increased by the negligence of Ford.
>
> You will affix a percentage, or part of 100%, which you find to a reasonable certainty by the greater weight of the credible evidence should be attributable to the accident, and what percentage, or part of 100%, should be attributable to the negligence of Ford in enhancing or increasing plaintiff's total injuries or damages.
>
> Once plaintiff has established that she sustained enhanced injuries as a result of Ford's negligence or defective product, then Ford has the burden of apportioning how much of those injuries should be allocated between the accident and the alleged enhancement occurrence.

The second and third to last paragraphs of the above instruction are a modification of the second to last paragraph of WIS JI—CIVIL 1723, which reads as follows:

(continued)

¶8 The jury found that the 1987 Ford Aerostar seat was not in a defective condition so as to be unreasonably dangerous to the user at the time it left the possession of Ford with respect to warning. It found that Ford was negligent in its warnings and in the design and testing with respect to the 1987 Ford Aerostar, but that none of this negligence was a cause of enhanced injuries to Hensler. It found that of the total injuries sustained by Hensler, 90% were caused by the accident, 0% were caused by any causal negligence and/or defects in the Aerostar seat, and 10% were caused by Hensler's negligence in not wearing her seat belt.

¶9 Hensler moved for a new trial on a number of grounds, including error in giving the instruction on the five ***Sumnicht*** factors ("factors instruction"), and failing to give other instructions she had proposed. The court denied these motions. It concluded that the factors instruction was an accurate statement of the law, was appropriate given the evidence, and assisted the jury. It also concluded that the special instructions proposed by Hensler that it did not give were unnecessary and not helpful because they either duplicated other instructions or were not relevant to the evidence in this case.

> If you have found that at least one party's negligence was a cause of injuries to (*plaintiff*) in the [collision] [accident] and have further found that (*enhancing injury defendant*)'s [negligence] [product] was a cause of enhanced injuries to (*plaintiff*), then you will answer question ___ and determine how much and to what extent (*plaintiff*)'s total injuries and damages were enhanced or increased by the negligence of (*enhancing injury defendant*). You will affix a percentage, or part of 100%, which you find to a reasonable certainty by the greater weight of the credible evidence should be attributable to (*enhancing injury defendant*).

DISCUSSION

¶10 On appeal Hensler renews her challenge to the factors instruction and to the court's failure to give the intended use instruction she requested. She also argues that WIS JI—CIVIL 1723, without the modifications she requested and without certain other instructions she requested, did not accurately state the law.

¶11 The purpose of a jury instruction is to inform the jury fully and fairly of a rule or principle of law applicable to a particular case. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶36, 246 Wis. 2d 132, 629 N.W.2d 301. A circuit court has broad discretion when instructing a jury. ***Id.*** at ¶50. We do not reverse if the overall meaning communicated by the instructions as a whole is a correct statement of the law, and the instructions comported with the facts of the case at hand. ***Id.*** We review an instruction in the context of the overall charge to the jury. ***Muskevitsch-Otto v. Otto***, 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611, *review denied*, 2002 WI 2, 249 Wis. 2d 582, 638 N.W.2d 591 (Wis. Dec. 17, 2001) (No. 00-3353). The question whether the instructions correctly state the law is a question of law, which we review de novo. ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶25, 245 Wis. 2d 772, 629 N.W.2d 727.

¶12 If we conclude an instruction is erroneous, we must then determine whether that error affected the substantial rights of the party. ***Nommensen***, 2001 WI 112 at ¶51. An error affects the substantial rights of a party when there is a reasonable possibility that the error contributed to the outcome of the action or proceeding. ***Id.*** at ¶52. A "reasonable possibility" of a different outcome is a

possibility sufficient to "undermine confidence in the outcome."[5] ***Id.*** (quoting ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985)).

¶13 If the instructions as a whole adequately cover the law, a trial court does not erroneously exercise its discretion in refusing to give an instruction, even if the proposed instruction is correct. ***Wingad v. John Deere & Co.***, 187 Wis. 2d 441, 454, 523 N.W.2d 274 (Ct. App. 1994). A trial court properly exercises its discretion in this context when it reaches a reasonable result that is based on a logical rationale and is consistent with applicable law. ***Id.*** at 454-55.

¶14 In order to preserve for appeal an objection to a jury instruction, the ground for objection must be stated "with particularity." WIS. STAT. § 805.13(3) (1999-2000).[6] The purpose of this requirement is to afford the opposing party and the trial court an opportunity to correct the error and to afford appellate review of the grounds for the objection. ***Air Wis., Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980). Therefore, the objection in the trial court must be specific enough to "bring[] into focus the nature of the alleged error." ***Id***. (citations omitted).

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[5] In ***Nommensen***, the supreme court noted that it had previously stated the standard for "harmless error" in jury instruction cases in a variety of ways, but that the "reasonable possibility" test described the proper test to measure whether the substantial rights of the party had been affected. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52 n.6, 246 Wis. 2d 132, 629 N.W.2d 301 (discussing the "reasonable possibility" test of ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727; ***Koffman v. Leichtfuss,*** 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201; ***Martindale v. Ripp,*** 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698). A "reasonable possibility" in this context means the same as a "reasonable probability." *See* ***Muskevitsch-Otto v. Otto,*** 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611.

[6] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

*The **Sumnicht** Factors Instruction*

¶15 At the jury instruction conference Hensler proposed that WIS JI—CIVIL 3260 be given. She objected to Ford's proposal that an additional instruction be given, referring to the five factors mentioned in ***Sumnicht***. Initially, she contended that the first and fifth factors were redundant because other instructions covered them, and the other three factors were inapplicable in this case. She later added additional grounds for objection: (1) There was no evidence regarding the first factor. (2) As for the fourth factor, "Ford itself has adduced testimony that it is both feasible, cost effective and not weight additive to correct the defect in this product. And the suggestion that the jury can consider something contrary to Ford's own evidence, I think is inapplicable to the case." (3) The fifth factor was subject to argument, not instruction.

¶16 The court decided to give the factors instruction, concluding it was equally helpful to both sides and was "exactly the language the court used in ***Sumnicht***." The court viewed the second factor as favorable to Hensler because Hensler had elicited testimony that the danger was not known or knowable to a consumer, while the fourth factor was helpful to Ford.[7] With respect to the first factor, the court observed that Hensler had already requested essentially the same instruction, WIS JI—CIVIL 1019, and the court had agreed to give it.

¶17 We conclude that the factors instruction given in conjunction with WIS JI—CIVIL 3260 is an accurate statement of the law. As Hensler points out, the supreme court in ***Green***, 2001 WI 109 at ¶29, reaffirmed that Wisconsin

[7] The court rejected Ford's request to add "or overall safety" to the end of the fourth factor.

applies the consumer-contemplation test in strict product liability cases: a product is defective and unreasonably dangerous when it is in a condition not contemplated by the ultimate consumer and unreasonably dangerous to that consumer. In ***Green***, the court rejected the argument that ***Sumnicht*** was inconsistent with the consumer-contemplation test and, in particular, rejected the argument that the court in ***Sumnicht*** was altering this test when it listed the five factors contained in the factors instruction. ***Green***, 2001 WI 109 at ¶32. Rather in ***Green***, the court said that when it listed these five factors in ***Sumnicht***, it "merely recognized that consumer expectations about products may vary depending on the nature of and consumer familiarity with those products. These factors are not supplements to the consumer-contemplation test, to be considered in addition to consumer expectations. Nor are these factors independent legal tests."[8] ***Green***, 2001 WI 109 at ¶32. The court in ***Green*** discussed as examples the first and fourth factors, explaining how they may be relevant to the consumer-contemplation test. ***Id.*** at ¶33.

¶18 Hensler appears to suggest that listing factors for the jury to consider undermines the consumer-contemplation test. We do not agree. The factor instruction in this case tells the jury that "[i]n determining whether a product design is defective and unreasonably dangerous, the following factors are relevant

[8] The court in ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.***, 121 Wis. 2d 338, 370-72, 360 N.W.2d 2 (1984), referred to these factors in the context of rejecting the manufacturer's argument that there must be evidence of an alternative, safer design before a product may be found defective and unreasonably dangerous. The court explained that there were no mandatory factors that had to be weighed when determining if a product is defective and dangerous, that the factors would differ from case to case. ***Id.*** at 371-72. The court then went on to list the five factors, which had been applied in a Seventh Circuit decision applying Wisconsin law, describing them as factors that "may be beneficial to plaintiffs in proving their case, but these factors are clearly permissive." ***Id.*** at 372.

for you to consider." It does not modify, undercut, or replace the instruction in WIS JI—CIVIL 3260 that a defective product is "unreasonably dangerous to the user or consumer when it is dangerous to an extent beyond which would be contemplated by the ordinary user possessing the knowledge of the product's characteristics which were common to the community."

¶19 The trial court in this case decided that it would be helpful to the jury to have some guidance in factors to consider in applying the test articulated in WIS JI—CIVIL 3260. The law as articulated in ***Sumnicht***, 121 Wis. 2d at 368, 371-72, and ***Green***, 2001 WI 109, ¶¶30-34, permits this, provided that the factors relate to the consumer-contemplation test and are appropriate in the particular case. ***Green*** tells us that the factors in the challenged instruction are related to the consumer-contemplation test. We therefore turn to Hensler's objection that these factors are not relevant in this particular case.

¶20 We conclude there is evidence with respect to the first, second, fourth, and fifth factors, making it appropriate to include them in the instruction. With respect to the first factor, Hensler submitted evidence of the practice of other manufacturers in testing their seats, utilizing design standards for rear crash performance, and producing seats that were stronger than the Aerostar seat. Hensler contends the court erred by limiting this factor to the "time of manufacture," because there was evidence that Ford's knowledge of industry practice changed radically after 1987 and that is relevant. However, Hensler never objected to including this factor for this reason, and therefore we do not consider this objection. *See* WIS. STAT. § 805.13(3).

¶21 With respect to the second factor, Hensler presented evidence that the Aerostar seat design presented a danger that was not open and obvious, and

that Ford did not warn about this danger. Hensler does not dispute this, but appears to argue that this factor was not relevant because there was no contrary evidence. We fail to understand this argument. As the trial court correctly pointed out, precisely because there was evidence favorable to Hensler on this point, the factor was relevant and was helpful to her case.

¶22 With respect to the fourth factor, there was evidence that alternative, stronger seat designs were available and feasible, and that a stronger seat design would have eliminated the danger and prevented Hensler's injuries. Indeed, this was a large part of Hensler's case. Hensler does not appear to argue otherwise, but rather points out that ***Sumnicht*** prohibits a mandatory requirement that there be an alternative, safer design. However, this instruction does not require the plaintiff to prove a mandatory alternative design, and does not, as Hensler also suggests, express the product risk-benefit balancing that the court in ***Sumnicht*** and ***Green*** rejected. To the contrary, as we have already stated, the court in ***Green*** viewed this as a permissible factor that may be relevant to the consumer-contemplation test. ***Green***, 2001 WI 109 at ¶33.

¶23 With respect to the fifth factor, Hensler does not argue that there was no evidence on the relative likelihood of injury resulting from the product's design, and we conclude there was. Hensler presented evidence that injuries like hers were common and predictable given the number of serious injuries in rear-end collisions every year, and evidence of other persons injured while occupying the Aerostar or a similar seat.

¶24 However, we agree with Hensler that the third factor—the extent and length of time of use of the product by herself and others—is not related to consumer expectations in this case. The defect in the car seat has nothing to do

with how much or how long the seat is used by the consumer; the defect is not related to wear and tear on the product from use over time, but on a particular degree of force applied to the vehicle which occurs in an accident.[9] We conclude that the trial court erroneously exercised its discretion in including this factor in the instruction. However, Hensler does not explain why there is a reasonable possibility that the inclusion of this factor contributed to the jury's finding that the seat was not defective and unreasonably dangerous with respect to design, and we conclude there is not. The jury would have understood, from the evidence and arguments in the case, that the length of time Hensler had used the seat—or the length of time others who had similar experiences with the same or similar seat had used those seats—had nothing to do with whether the seat was defective or unreasonably dangerous in an accident. Thus, in deciding whether the seat was defective and unreasonably dangerous, the jury would simply have ignored the third factor in its analysis. We are satisfied that the inclusion of this factor in the instruction did not affect Hensler's substantial rights.

¶25 Hensler appears to suggest that other factors should have been included in the instruction, but she did not propose any additional or alternative factors to the court. Moreover, the factors instruction did not preclude the jury from considering any evidence presented that was relevant to whether the car seat was defective and unreasonably dangerous as defined in WIS JI—CIVIL 3260; the

[9] Ford points to evidence Hensler presented that other persons were injured while occupying the Aerostar or a similar seat, but this is not evidence of how much or for how long the car seat had been used without injury.

factors instruction focused attention on the five mentioned, but it did not preclude consideration of others.[10]

Proposed Intended Use Instruction

¶26 Hensler requested that the court give an instruction on the intended use of an automotive product, based on language from ***Larsen v. General Motors Corp.***, 391 F.2d 495, 502-03 (8th Cir. 1968):

> SPECIAL INSTRUCTION: INTENDED USE OF AUTOMOTIVE PRODUCT
>
> The intended use of an automotive product contemplates its travel on crowded and high speed roads and highways that inevitably subject it to the foreseeable hazards of collisions and impacts.

Ford objected to this instruction and the court decided it was unnecessary, since WIS JI—CIVIL 3262 already informed the jury that the relevant proper use of the product was the use for which it was intended by the manufacturer. Hensler responded that it was necessary to make clear that the intended use of an automobile included being involved in collisions, in case Ford should argue otherwise. The court said it would give the instruction if Ford argued that the intended use of an automobile did not include collisions, and Ford's counsel said it

[10] In the midst of Hensler's argument on the factors instruction, she claims the trial court erred in not giving another instruction she requested—that "an entire industry can be negligent for failing to employ available safety measures"—and she claims the court erred in excluding certain evidence. She does not develop an argument with reference to the case law and the evidence that would help us understand why it was an erroneous exercise of the court's discretion not to give the proposed instruction, and she does not tell us the reasons for the trial court's evidentiary ruling and why it was error. We therefore do not consider these issues further. We do observe, however, that the court did give WIS JI—CIVIL 1019, which contains very similar language to that contained in her proposed instruction on industry negligence.

did not intend to make that argument. Ford did not make that argument, and this requested instruction was never given.

¶27 We conclude the court did not erroneously exercise its discretion in declining to give this instruction. The trial court gave a logical explanation for its decision, and its decision was reasonable and consistent with the law. The jury was already correctly instructed by WIS JI—CIVIL 3260 that a product is defective "when it is not reasonably fit for the ordinary purposes for which such product was sold and intended to be used." In addition, the jury was instructed by WIS JI—CIVIL 3262 that "proper use" is a "use which is intended by the manufacturer." Ford was not contending that Hensler was using the car in an unintended manner or for an extraordinary purpose when the accident occurred. Therefore, the court could reasonably decide that the jury did not need to be specifically told that Hensler was using her van for its intended purpose when it was hit by Noe's vehicle. There was no argument or evidence to the contrary.

WIS JI—CIVIL 1723

¶28 Hensler argues that instruction WIS JI—CIVIL 1723 on enhanced injuries misstates the law in the absence of modifications she requested and in the absence of two instructions she requested that the court did not give: "Alternative Safer Design" and "Strict Liability: Proof of Negative Facts."

¶29 Hensler's proposed modifications to WIS JI—CIVIL 1723 on enhanced injuries included: (1) an elaboration on the explanation that the plaintiff was not claiming that the defendant caused the accident, but rather that its negligence and the defective seat were a substantial factor in producing enhanced injuries; and (2) an explanation of "a cause." The court declined to make the first modification because it viewed this as Hensler's argument rather than instruction

on the law. The court declined to give the second modification because it viewed this as repeating the standard cause instruction, WIS JI—CIVIL 1500, which the court was already giving.

¶30 Ford sought a modification to the second to last paragraph of the standard instruction for enhanced injuries, WIS JI—CIVIL 1723, which would instruct the jury to first determine what percentage of Hensler's injuries were caused by the accident, in Question 13(a), before answering the questions on enhanced injuries in Questions 13(b) and (c).[11] Hensler objected to this change, contending that it focused on the accident rather than on the enhanced injuries and was unnecessary, because the sum of the percentages in Questions 13(b) and (c) could be subtracted from 100% to provide the answer to Question 13(a). However, she did propose an alternative modification to Ford's on this point, in case the court decided a modification was necessary. The court did decide that

[11] Question No. 13 asked:

> Taking 100% as the total injuries and damages sustained by Sandra Hensler, what percentage of those total injuries and damages, if any, do you attribute as being caused by:
>
> a) the accident? _____%
>
> b) any enhanced injuries resulting from any causal negligence and/or defects in the Aerostar seat (if Questions 4, 6, 8 or 10 are answered "yes")? _____%
>
> c) Any enhanced injuries resulting from any causal negligence of Sandra Hensler in not wearing her seatbelt to maximum of 15% (if Question 12 is answered "yes")?
>
> _____%
>
> Total _____%
>
> You must answer this question irrespective of your answers to previous questions:

WIS JI—CIVIL 1723 needed to be modified to instruct the jury on answering Question 13(a), and it chose Ford's proposed modification on this point rather than Hensler's as less cumbersome.

¶31 Hensler's proposed instruction on an alternative, safer design was based on language in ***Sumnicht***: "Although evidence of an alternative[,] safer design may be relevant and admissible in a products liability case, Wisconsin's strict products liability rule does not mandate such evidence. A product may be defective and unreasonably dangerous even though there are no alternative, safer designs available." *See* ***Sumnicht***, 121 Wis. 2d at 370-71. Ford proposed its own instruction on alternative designs. The court declined to give either instruction. It agreed with Hensler that, contrary to Ford's position, Wisconsin law does not require a plaintiff to prove an alternative, safer design, and therefore Ford's proposal was not a correct statement of the law. It declined to give Hensler's instruction because that would confuse the jury.

¶32 Hensler's proposed instruction on proof of negative facts was also based on language from ***Sumnicht***: "Under Wisconsin's strict products liability law, a plaintiff is not required to prove the negative fact of what Sandy Hensler's injuries would have been had there been no defect." *See* ***Sumnicht***, 121 Wis. 2d at 357. Hensler does not provide in her brief any citation to the record of any discussion on this instruction. From our reading of the record, it does not appear that Ford objected to this instruction; there appears to have been no discussion on it at the instruction conference, and the notation next to it in the record, apparently that of the court's, is "ok." However, the instruction was not given.

¶33 Hensler argues that, standing alone, WIS JI—CIVIL 1723 incorrectly puts the burden on her to apportion the harm between that caused by Noe's car

striking hers and that caused by the seat design; this, Hensler contends, is the defendant's burden. According to Hensler, in ***Sumnicht*** the supreme court disapproved of the "over and above" language contained in instruction WIS JI—CIVIL 1723. However, Hensler did not challenge WIS JI—CIVIL 1723 on this ground in the trial court. The modifications she initially requested were not directed to this asserted deficiency; indeed, her initially proposed modified instruction contained the "over and above" language she now contends is an erroneous statement of the law.

¶34 Hensler insists she did preserve this argument in the trial court, referring to some comments her counsel made on ***Sumnicht*** in the context of discussing modifications to WIS JI—CIVIL 1723. However, he referred to ***Sumnicht*** in response to Ford's request that WIS JI—CIVIL 1723 be modified to instruct the jury on answering Question 13(a) (what percentage of total injuries and damages, if any, did the jury attribute to being caused by the accident). Hensler's counsel asked the court for the opportunity to review ***Sumnicht*** before taking a position on Ford's proposal, and the position he asserted in writing the next day was that WIS JI—CIVIL 1723 should not be modified as Ford proposed. Hensler's counsel did, as we have noted above, propose some language that would separately focus on Question 13(a), but he emphasized that his preference was that WIS JI—CIVIL 1723 not be modified in this regard. We conclude that Hensler's counsel's comments on ***Sumnicht*** did not preserve the objection to WIS JI—CIVIL 1723 she now makes on appeal.

¶35 Hensler also argues that her proposed instructions on alternative, safer design and proof of negative facts were efforts to correct the error in the "over and above" language in WIS JI—CIVIL 1723, and it was error for the court not to give those. However, she does not develop an argument linking her

proposed "Alternative Safer Design" instruction to the objection she raises on appeal to WIS JI—CIVIL 1723. Before the trial court she argued simply that the court should give this instruction because it was an exact quotation from ***Sumnicht***. However, the trial court reasonably exercised its discretion in declining to give this proposed instruction. WISCONSIN JI—CIVIL 3260 sets the standard for strict product liability, and does not mention an alternative, safer design. The factors instruction tells the jury that it may consider the feasibility of alternative, safer designs as one factor. The court could reasonably decide that these instructions were sufficient to accurately state the law, and that it would confuse the jury to instruct that there did not have to be evidence of an alternative, safer design, but if there were such evidence, it was relevant.

¶36 With respect to Hensler's proposed instruction on proof of negative facts, there is no explanation in the record why the court did not give this instruction, nor is there any indication Hensler objected to the court's failure to give the instruction.[12] We therefore do not know whether the absence of the proposed instruction was due to oversight or the court's decision not to give it for reasons the record does not disclose. We do not agree with Hensler's suggestion that simply because she proposed the instruction, she has preserved for appeal the claim that the court erred in not giving it. The case she cites, ***West Bend Mut. Ins. Co. v. Christensen***, 58 Wis. 2d 395, 206 N.W.2d 202 (1973), was decided before WIS. STAT. § 805.13(3) became effective on January 1, 1976. *See* ***Air Wis., Inc.***, 98 Wis. 2d at 316. Under § 805.13(3), simply submitting a requested instruction

[12] The court gave each counsel a package of instructions it intended to give after the close of the instruction conference and asked for objections. Hensler had other objections, but did not object to the absence of this instruction.

that is rejected by the court is not enough to preserve an objection to the instruction actually given. ***Douglas v. Dewey***, 154 Wis. 2d 451, 467, 453 N.W.2d 500 (Ct. App. 1990). Although submission of a proposed instruction has the effect of notifying the circuit court of an objection to the instructions, it does not explain the basis for the objection and does not aid the trial court in correcting the instruction if necessary. ***Waukesha County Dep't of Soc. Servs. v. C.E.W.***, 124 Wis. 2d 47, 54, 368 N.W.2d 47 (1985). In this case, Hensler's failure to object to the absence of her proposed instruction on negative proof deprived the court of the opportunity to either include the instruction or explain its decision not to do so. As a result, the record is insufficient for appellate review.

¶37 We conclude Hensler has not preserved for appellate review the objections she now asserts to WIS JI—CIVIL 1723, nor her claim that the trial court erred in failing to give her proposed instruction on proof of negative facts. We also conclude the trial court's decision not to give her proposed instruction on alternative, safer design was a proper exercise of discretion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.