COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2379 **Cir. Ct. No. 99-CV-94**

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

JACK LOBENSTEIN AND CONNIE LOBENSTEIN,

PLAINTIFFS-RESPONDENTS,

MERIDIAN RESOURCE CORPORATION, AN INVOLUNTARY PLAINTIFF AND FOREIGN CORPORATION,

PLAINTIFF-(IN T.CT.),

V.

AMERICAN FAMILY INSURANCE,

DEFENDANT-APPELLANT,

MILWAUKEE INSURANCE COMPANY, A FOREIGN INSURANCE CORPORATION, AND THE ESTATE OF LUCILLE A. CASSIDY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

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

¶1 DYKMAN, J. American Family Mutual Insurance Company appeals from a judgment awarding plaintiffs $135,000 in damages for injuries resulting from a car accident between plaintiff, Jack Lobenstein, and Lucille Cassidy, who was insured by American Family. American Family makes six claims: (1) the trial court erred by denying its motion for summary judgment; (2) the trial court erred by excluding evidence concerning possible alternate explanations of the collision; (3) the trial court erred by refusing to give a curative instruction when the Lobensteins' counsel reversed the burden of proof during closing argument; (4) the conduct of the Lobensteins' counsel prejudiced the jury, requiring a new trial; (5) the damage award was perverse requiring either remittitur or a new trial; and (6) the totality of errors requires a new trial in the interest of justice. We reject these claims and affirm.

BACKGROUND

¶2 On November 12, 1996, Lucille Cassidy was driving her automobile when it crossed the centerline into oncoming traffic. A station wagon swerved to avoid Cassidy's vehicle. Cassidy's vehicle then moved back into the correct lane. After traveling a short distance, her vehicle again crossed the centerline, this time colliding with an oncoming dump truck driven by Jack Lobenstein. Cassidy was killed and Lobenstein suffered a shoulder injury.

¶3 The Lobensteins filed a complaint seeking damages resulting from Cassidy's negligence. Jack Lobenstein sought damages resulting from the collision. Jack's wife, Connie, sought damages for loss of consortium. American Family moved for summary judgment, arguing that Cassidy was not negligent. Included with its motion were Cassidy's medical records, the affidavit of an

eyewitness, Cheryl Selbach, and the deposition testimony of Jack Lobenstein. American Family argued that the collision was caused either by sudden illness or by Cassidy's suicide, and that under either circumstance American Family was not liable because its policy only covered negligent acts of the insured. The Lobensteins filed their attorney's affidavit in opposition to American Family's motion. The trial court denied the motion.

¶4 The Lobensteins filed a motion in limine seeking to exclude evidence that the accident was caused either by Cassidy's intentional suicide or by a sudden illness. The trial court granted the motion and denied American Family's motion to reconsider. American Family then submitted offers of proof concerning this evidence. At trial, American Family argued the two alternate explanations for the accident, and the issues were submitted to the jury.

¶5 The jury found that Cassidy was negligent and that her negligence was the cause of the Lobensteins' injuries. It awarded Jack Lobenstein $125,000 for his injuries and Connie Lobenstein $10,000 for loss of consortium. The trial court denied American Family's postverdict motions and American Family appeals.

DISCUSSION

1. Summary Judgment

¶6 American Family argues that the trial court erred by denying its motion for summary judgment. We review summary judgment de novo. ***Cody v. Dane County***, 2001 WI App 60 ¶11, 242 Wis. 2d 173, 625 N.W.2d 630. Summary judgment is appropriate where there is no issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶7 We first address American Family's argument that its motion should have been granted because the Lobensteins were required to oppose the motion by producing evidentiary affidavits or other evidentiary materials, and failed to do so.

¶8 A decision not to file evidentiary affidavits or other material in opposition to a motion for summary judgment is a dangerous strategy, but does not require that summary judgment be granted. WIS. STAT. § 802.08(3) (1999-2000)[1] states that "[i]f the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against such party." (Emphasis added.) American Family was still required to establish that summary judgment was appropriate. *Cf.* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 121, 334 N.W.2d 580 (Ct. App. 1983) (noting that since movant's motion had failed to establish a prima facie case for summary judgment "[w]e could deny the [movants'] motion for that reason, without considering appellants' affidavit").

¶9 American Family's reliance on ***Helland v. Froedtert Memorial Lutheran Hospital***, 229 Wis. 2d 751, 601 N.W.2d 318 (Ct. App. 1999), is misplaced. In ***Helland***, while we affirmed the trial court's grant of summary judgment, we did so not because of the plaintiff's failure to submit an affidavit, but because the plaintiff had failed to submit a proper affidavit after the defendant had established a prima facie case for summary judgment. ***Id.*** at 764. We reject American Family's claim that the Lobensteins' failure to file evidentiary affidavits or other evidentiary materials required the court to grant its motion

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

¶10 We next address American Family's argument that its motion and attached materials establish a prima facie case for summary judgment. American Family argues that there is no evidence from which a jury could conclude that Cassidy was negligent. It bases its argument on (1) the presumption of due care afforded to a decedent, and (2) evidence showing that the collision was the result of either a sudden illness or Cassidy's intentional suicide.

¶11 American Family relies heavily on ***Seligman v. Hammond***, 205 Wis. 199, 203-04, 236 N.W. 115 (1931), to support its contention that there is a "strong presumption of non-negligence afforded to [a decedent]." Later cases, however, clarify the operation of the presumption. After ***Seligman***, in ***Booth v. Frankenstien***, 209 Wis. 362, 366, 245 N.W. 191 (1932), the court said: "Nor does the presumption that the deceased used due care for his safety destroy, as a matter of law, the inference arising from the presence of the deceased upon the wrong side of the highway." In ***Carlsen v. Hardware Mutual Casualty Co.***, 255 Wis. 407, 410-11, 39 N.W.2d 442 (1949), the court wrote: "The deceased person is entitled to the presumption of due care. However, this presumption disappears when evidence is introduced from which a jury might properly find negligence on the part of the deceased." The ***Carlsen*** court implicitly concluded that the presumption was rebutted, when it upheld the finding of negligence, where evidence established that at the time of the accident the decedent had crossed the centerline and traveled on the wrong side of the road. ***Id.*** at 410. Similarly, ***Theisen v. Milwaukee Automobile Mutual Insurance Co.***, 18 Wis. 2d 91, 101-02, 118 N.W.2d 140 (1962), instructs that, absent an explanation which a jury must accept, "the mere operation of an automobile on the wrong side of the highway" is sufficient to warrant an inference of negligence and overcome the presumption of due care afforded to the decedent.

¶12 The material submitted with American Family's motion for summary judgment establishes that Cassidy crossed the centerline and collided with Lobenstein. ***Theisen***, ***Carlsen***, and ***Booth*** instruct that this is sufficient to rebut the presumption of due care and raise an inference of negligence. Summary judgment is therefore inappropriate.

¶13 Next, American Family argues that even if there is an inference of negligence, summary judgment is required because: (1) evidence of the non-negligent causes negates the inference of negligence and, in the alternative, (2) a jury could only rely on speculation to choose between the negligent and non-negligent alternatives.

¶14 We conclude that ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751, is dispositive. In ***Lambrecht***, a defendant driver rear-ended one vehicle, then hit a second, before crossing the median and hitting a third vehicle. ***Id.*** at ¶12. When police arrived they discovered that the defendant was not breathing and had no pulse. ***Id.*** at ¶13. Emergency personnel were unable to revive him, and a later autopsy showed that he had suffered a heart attack. ***Id.*** at ¶¶13-14. In motions for summary judgment, medical experts disagreed about when the heart attack occurred. ***Id.*** at ¶15.

¶15 The ***Lambrecht*** court considered the issue of whether evidence of non-negligence negates an inference of negligence. The court concluded that while evidence of non-negligence may be sufficient to negate a weak inference of negligence, "[u]nder other circumstances, *such as when a driver veers into other lanes of traffic* …, the inference may be strong enough to survive alongside evidence of other, non-actionable causes." ***Id.*** at ¶¶73-74 (emphasis added). The court went on to state that "[i]f a defendant seeks summary judgment, he or she

must produce evidence that will destroy any reasonable inference of negligence or so completely contradict it that reasonable persons could no longer accept it." ***Id.*** at ¶78.

¶16 Cassidy crossed the centerline and collided with an oncoming car. This raises a strong inference of negligence. *See, e.g.,* ***Reid v. Thrams***, 35 Wis. 2d 615, 151 N.W.2d 662 (1967) (noting that there is a strong inference of negligence when one invades the wrong lane of the road). The evidence American Family put forth was not sufficient to "destroy" or "completely contradict" this inference. That evidence consisted primarily of statements that Cassidy did not attempt to avoid the accident, and medical records showing that she had a history of medical problems and suicidal ideation. Included was a copy of the autopsy performed on Cassidy. The coroner noted that the death was caused by the motor vehicle accident, but decided to leave the manner of death as undetermined pending further investigation. American Family filed no medical opinion that Cassidy had suffered a sudden illness, nor a medical opinion that that Cassidy had committed suicide. We conclude that in light of the strong inference of negligence, the evidence of non-negligent causes was not sufficient to negate the inference.

¶17 ***Lambrecht*** next addressed the argument that summary judgment was proper because it was equally likely that the heart attack occurred before, during, or after the collision, and the jury could only speculate in choosing between the negligent and non-negligent alternative. ***Lambrecht***, 2001 WI 25 at ¶79. The court rejected this argument stating that "[w]hen a defendant can offer only inconclusive evidence of a non-negligent cause, a court should not attempt to weigh the probabilities of negligence created by the competing inferences; that is the function of the jury." ***Id.*** at ¶85. Here, the evidence of non-negligent causes is

far from conclusive. The trial court properly denied American Family's motion for summary judgment.

2. Trial Court's Exclusion of Evidence of Non-Negligent Causes

¶18 American Family next argues that the trial court erred when it excluded evidence offered to prove that Cassidy had suffered a sudden illness or that she had committed suicide. It is unclear on what basis the trial court excluded the evidence. We will therefore independently review the record to determine whether it provides a basis for the exercise of discretion. ***State v. Grey***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).

¶19 American Family sought to question two witnesses to show that Cassidy had committed suicide. The first witness was Dr. Andrews, who had treated Cassidy for many years. American Family argues that Dr. Andrews was ready to testify that it was possible that Cassidy had committed suicide. During an offer of proof, Andrews testified that he could not say for certain that Cassidy had committed suicide and in fact said that he believed that it would have been very difficult for her to do so. Andrews testified that Cassidy had a long history of suicidal ideation, had threatened suicide many times, and had been involved in several civil commitment proceedings. Andrews also stated that to his knowledge Cassidy had never actually attempted suicide. The second witness was Irene Haumschild, Cassidy's friend. Haumschild stated that Cassidy had often spoken of suicide and had recently told her that she had made funeral arrangements. Haumschild said that she was unsure whether Cassidy had discussed suicide when they spoke a day or two before the accident. Haumschild testified that she "felt" Cassidy's life would ultimately end in suicide, but also said that she had no knowledge of whether or not Cassidy had committed suicide.

¶20 The evidence regarding suicide was properly excluded. The opinion American Family sought from Dr. Andrews was that it was a possibility that Cassidy had committed suicide. Expert medical testimony couched in terms of possibilities is not admissible unless it is being used to contradict a contrary opinion. *Compare* ***McGarrity v. Welch Plumbing Co***., 104 Wis. 2d 414, 430, 312 N.W.2d 37 (1981), *with* ***Peil v. Kohnke***, 50 Wis. 2d 168, 183, 184 N.W.2d 433 (1971). American Family argues that ***Peil*** authorizes Dr. Andrew's opinion as to possibilities of suicide. In ***Peil,*** the court said, "[A] contrary opinion to that presented by an opposing party may be presented in terms of possibilities." ***Peil***, 50 Wis. 2d at 183. We agree with this statement, but it has no bearing here because plaintiffs' witnesses did not testify that Cassidy had not committed suicide. Further, if American Family is arguing that in *every* negligence case defendants are permitted to present expert opinions of non-negligent causes couched in terms of possibilities, we reject that argument. The oft-stated rule is that possibilities are allowed only when being used to weaken a contrary opinion. ***Id.*** Therefore, Dr Andrews's opinion could properly be excluded.

¶21 The remaining "evidence" of suicide could properly be excluded under WIS. STAT. § 904.03, which allows relevant evidence to be excluded if its probative value is substantially outweighed by its potential to mislead the jury or to confuse the issues. The testimony was that Cassidy had a long history of talking about suicide, and that one of her friends "felt" that Cassidy's life would end in suicide. The difficulty we see with this "evidence" is that there was no expert testimony indicating the predictive value of Cassidy's psychiatric history. Is it likely that persons who discuss suicide will commit suicide? Or is suicide more likely among those who make no threats? Given Cassidy's history of discussing or threatening suicide, was it probable that she committed suicide on

November 12, 1996? Even Haumschild admitted that she had no knowledge whether Cassidy committed suicide on that day. The jury would have had no basis to determine if Haumschild's conclusions were rationally and scientifically based or simply those of a concerned friend. We conclude that the trial court did not erroneously exercise its discretion when it concluded that this evidence could be properly excluded under § 904.03.[2]

¶22 The evidence regarding a possible sudden illness suffers from similar problems and thus could also be properly excluded under WIS. STAT. § 904.03. The evidence consisted only of testimony that Cassidy had a long history of medical problems, that she had a family history of heart disease, and that she had visited the emergency room the night prior to the accident. Again, however, there was no evidence regarding whether one of these maladies had manifested itself as a sudden illness that caused the accident. The doctor who treated Cassidy the night before the crash stated that he did not think that she was then having a heart attack and that her pain was alleviated with medication. While he stated that he recommended Cassidy follow up with a cardiologist, he did not testify that he believed her condition had caused the collision. Again, the jury would have had to guess as to the meaning of the evidence. Therefore, the evidence could be properly excluded under § 904.03.

[2] We do not make any determination as to whether this "evidence" should be considered "other acts" evidence. We need not reach this issue because our conclusion that it is properly excluded under WIS. STAT. § 904.03 is dispositive whether or not it is considered "other acts" evidence. *See* ***State v. Sullivan***, 216 Wis. 2d 768, ¶¶4-8, 576 N.W.2d 30 (1998) (outlining the test for "other acts" evidence and indicating that the third prong is whether the evidence is admissible under § 904.03).

¶23 American Family relies on ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751. ***Lambrecht*** is not applicable. ***Lambrecht*** was a summary judgment case, and considered, not whether particular evidence was admissible, but whether an issue as a whole could go to the jury. ***Id.*** at ¶¶81-85. American Family has seized upon the language in ***Lambrecht*** indicating that a jury "may engage in some level of speculation" when choosing between competing inferences of negligence and non-negligence. ***Id.*** at ¶82. Our conclusion does not conflict with this language.

¶24 We do not conclude that the evidence of suicide or sudden illness could be properly excluded because its admission would have led the jury to speculate between non-negligent and negligent causes of the accident. We conclude that exclusion of Dr. Andrews's opinion was proper because the opinion was couched in terms of possibilities. The remaining evidence was properly excluded because the jury would have had no basis on which to adequately determine its meaning and probative value.

3. Reversal of Burden of Proof

¶25 American Family argues that the trial court erred in refusing to give a curative instruction after the Lobensteins "reversed the burden of proof" during closing argument. We reject this argument because the Lobensteins did *not* reverse the burden of proof, but argued a correct statement of law.

¶26 American Family contends that the Lobensteins reversed the burden of proof by suggesting that American Family had the burden of proving sudden illness or intentional act. Our supreme court has held:

> We do not hereby revise the rule that an injured plaintiff has the burden of proving that the defendant driver

> was negligent. *However, once having introduced evidence that the defendant driver crossed into the wrong lane, the defendant driver has the burden of going forward with evidence to prove that such invasion was nonnegligent*.

Voight v. Voight, 22 Wis. 2d 573, 584, 126 N.W.2d 543 (1964) (emphasis added), *rev'd on other grounds,* ***Wilder v. Classified Risk Ins. Co***., 47 Wis. 2d 286, 289-90, 177 N.W.2d 109 (1970).[3] There was undisputed evidence that Cassidy crossed into the oncoming lane of traffic. Therefore, if the Lobensteins did tell the jury that American Family had to prove sudden illness or suicide, they did not reverse the burden of proof but correctly stated the law. Since there was no error, there was no need for a curative instruction.

4. Inflammatory and Improper Remarks by the Lobensteins' Counsel

¶27 American Family argues that improper conduct by the Lobensteins' counsel during voir dire and opening and closing statements requires reversal or a new trial. American Family has waived this argument by failing to move for a mistrial.[4]

---

[3] *See also*, ***Bunkfeldt v. Country Mut. Ins. Co***., 29 Wis. 2d 179, 183, 138 N.W.2d 271 (1965) (noting that past decisions of the supreme court have established the principle that when a driver crosses over into oncoming traffic and hits a vehicle the inference of negligence is "not dissipated until [the defendant driver] proves that he is without fault"); ***Hamilton v. Reinemann*** 233 Wis. 572, 581, 290 N.W. 194 (1940) (noting "that the mere operation of a car upon the wrong side of the highway makes at least a prima facie case of negligence and is enough, in the absence of an explanation which the jury is bound to accept, to warrant an inference of negligence" and that such "is not a mere legal presumption of negligence but a genuine inference of fact"), *overruled on other grounds*, ***Gelhaar v. State***, 41 Wis. 2d 230, 163 N.W.2d 609 (1969).

[4] We also note that while American Family has referenced many instances of alleged improper conduct, the record shows that it failed to object to the overwhelming majority of these instances. The only objection made to closing argument was the objection to the "reversal of burden of proof," which we have concluded was not erroneous. Failure to object to opposing counsel's improper conduct during closing waives the argument. ***Miles v. Ace Van Lines & Movers, Inc***., 72 Wis. 2d 538, 545, 241 N.W.2d 186 (1976).

¶28 Supreme court cases establish that failure to move for a mistrial waives any argument concerning opposing counsel's conduct during opening or closing statements. *See, e.g.,* ***Peot v. Ferraro***, 83 Wis. 2d 727, 741-42, 266 N.W.2d 586 (1978) ("[T]his court … will not review as a matter of right an allegedly improper closing argument where the objecting party did not move for a mistrial … before the jury returned its verdict."); ***Zweifel v. Milwaukee Auto. Mut. Ins. Co.***, 28 Wis. 2d 249, 256, 137 N.W.2d 6 (1965); ***Kink v. Combs***, 28 Wis. 2d 65, 72, 135 N.W.2d 789 (1965) (failure to move for a mistrial waives any argument concerning opposing counsel's conduct during opening statement). The rationale for this rule is laid out in ***Kink*** where the supreme court stated: "[f]ailure to make a timely motion [for mistrial] can only be construed as an election to rely on the possibility of a favorable jury verdict." ***Id.*** This reasoning applies equally to claims of improper conduct during voir dire. Therefore, we conclude that by failing to move for a mistrial, American Family has waived any argument concerning the conduct of opposing counsel.

¶29 American Family relies on ***Pophal v. Siverhus***, 168 Wis. 2d 533, 542-45, 484 N.W.2d 555 (Ct. App. 1992), as holding that it was not required to move for a mistrial when opposing counsel's behavior was out of line. American Family overreads ***Pophal***. In ***Pophal***, we cited ***Lobermeier v. General Telephone Co.***, 119 Wis. 2d 129, 349 N.W. 2d 466 (1984), for its clarification of the mistrial waiver rule:

> [I]f a litigant has raised a claim of error of *so serious a nature that it may warrant a mistrial*, the litigant must not only claim error but must demand the mistrial, for to fail to demand a mistrial is tantamount to an acknowledgement that the error is harmless, or at least it is not prejudicial to the degree that the aggrieved party is not willing to proceed on the assumption, or hope, there will be a favorable verdict despite the error.

Pophal, 168 Wis. 2d at 543 (quoting ***Lobermeier***, 119 Wis. 2d at 136).

¶30 ***Pophal*** also noted that the mistrial waiver rule seemed inconsistent with Wisconsin's Rules of Evidence, as set out in WIS. STAT. chs. 901-911. ***Pophal***, 168 Wis. 2d at 543 n.1. The "antics" of counsel were not evidentiary errors, if they were errors. And, if opposing counsel's antics were as devastating as American Family now claims them to be, the error would be so serious as to require a mistrial, as ***Pophal*** notes. ***Id.*** at 543. Our conclusion is the same as noted in ***Lobermeier***. American Family was able to argue that the accident was the result of suicide or sudden illness. The jury could easily have agreed with that view of the evidence. It did not. We conclude that by failing to object to some of opposing counsel's conduct or to move for a mistrial, American Family has waived its objection to the Lobensteins' counsel's antics.

5. Excessive Damages

¶31 American Family argues that the damage award was so excessive as to be perverse and therefore, "[t]his court should grant remittitur …, or alternatively, grant a new trial." If a damage award is perverse, remittitur is not a proper remedy. The proper remedy is a new trial. ***Redepenning v. Dore***, 56 Wis. 2d 129, 133-34, 201 N.W.2d 580 (1972). We therefore do not consider further American Family's request for remittitur. A verdict is perverse if: (1) the jury clearly refuses to follow the direction or instruction of the trial court on a point of law; (2) the verdict reflects highly emotional, inflammatory, or immaterial considerations; or (3) the verdict reflects an obvious prejudgment with no attempt at fairness. ***Id.*** at 134. Since the trial judge is in a better position to determine whether the judgment is perverse, his conclusion will not be upset unless it is shown to be an erroneous exercise of discretion. ***Id.***

¶32 American Family gives two reasons why the verdict was perverse: (1) the jury had a misperception about the burden of proof, and (2) the amount of damages are so excessive as to show the verdict was rendered as a result of passion and unfair prejudice.

¶33 American Family's first reason is without merit because the Lobensteins did not argue an improper burden of proof. As to damages, American Family argues that the awards of $125,000 to Jack Lobenstein and $10,000 to Connie Lobenstein are so excessive as to show perversity. Accepting American Family's assertion that the trial court failed to adequately explain its decision to uphold the award, we still affirm the decision because an independent review of the facts shows that, while high, the verdict was not so excessive as to show perversity. We note that even when doing an independent review of the record, we consider only "whether, resolving all conflicts in the testimony in a light most favorable to [the Lobensteins], there is any credible evidence to support the verdict of the jury. ***Ostreng v. Lowrey***, 37 Wis. 2d 556, 561, 155 N.W.2d 558 (1968).

¶34 Jack Lobenstein testified that immediately after the accident he missed between two weeks and one month of work. In addition, he stated that during the four and one-half years between the accident and trial, he went to the doctor thirty-five times for treatment and often missed work because of these visits. He testified that while he continues to work, he is often in pain and takes pills almost daily. At times he needs injections to handle the pain. Additionally, Jack testified that the injuries make it very difficult for him to go deer hunting.

¶35 Dr. Radat, one of the doctors treating Jack Lobenstein, testified that the injury was permanent and that Jack would experience chronic pain. The doctor also stated that in the four and one-half years since the collision Jack had

incurred $9,000 in medical bills and that all of these expenditures were reasonable, necessary, and related to the collision. Dr. Bjelland, another physician who had treated Jack, offered testimony consistent with that of Dr. Radat.

¶36 From this evidence we conclude that while high, the jury's award of damages to Jack Lobenstein was not so excessive as to show that it was the result of passion and prejudice. To the extent that American Family is arguing that the categorical breakdown of the damages shows perversity, we reject this argument. If the total amount is not excessive, it is unimportant how the jury chose to allocate the Lobensteins' damages.

¶37 Next, we consider the jury's award to Connie Lobenstein for loss of consortium. Jack Lobenstein testified that his pain made him a difficult person to live with. Connie testified that she and Jack were no longer able to take car rides, an activity they used to enjoy and would do often prior to the accident. Further, she testified that the injuries and the effects of her husband's pain medication affected their sex life. While we agree that this is modest evidence, the award of $10,000 was also modest. Considering that Jack Lobenstein had a life expectancy of 30.7 years, this award is equivalent to just over $300 a year. Such an award does not indicate a perverse verdict.

6. Interest of Justice

¶38 Finally, American Family appears to ask this court to invoke its discretionary power under WIS. STAT. § 752.35 and order a new trial in the interest of justice. In order to grant a new trial in the interest of justice, we must be convinced, when viewing the record as a whole, that there has been either a miscarriage of justice or that the real controversy has not been fully tried. ***Brookhouse v. State Farm Mut. Auto. Ins. Co.***, 130 Wis. 2d 166, 171, 387

N.W.2d 82 (Ct. App. 1986). To reverse on miscarriage grounds, we must conclude that there is a substantial probability of a different result on retrial. ***Id.*** The only claimed evidentiary error was not error, and we conclude that the Lobensteins' counsel's antics had little impact on the jury. There is not a substantial probability that this case would have a different outcome on retrial.

¶39 While there is no definite formula for the real controversy prong, this element has been satisfied where: (1) the jury was not given the opportunity to hear important testimony; or (2) the jury had before it improperly admitted evidence that obscured the crucial issues. *See* ***State v. Smith***, 153 Wis. 2d 739, 742, 451 N.W.2d 794 (Ct. App. 1989); *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-22, 456 N.W.2d 797 (1990) (noting other situations where the controversy was not fully tried).

¶40 We have concluded that the majority of alleged errors upon which American Family has based this argument were not error. The Lobensteins' argument regarding burden of proof was correct, and the damages awarded were not excessive. Most importantly, the trial court's exclusion of the sudden illness and suicide evidence was not an erroneous exercise of discretion. We also note that American Family was allowed to argue both sudden illness and suicide to the jury. The antics of the Lobensteins' counsel, while irrelevant to the issues, were not so significant that they became the controversy that was tried. The real controversy was whether Cassidy's operation of her vehicle was negligent or intentional. That issue was fully tried.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶41 VERGERONT, P.J. *(Concurring)*. I write separately because my analysis of the exclusion of Haumschild's testimony differs from that of the majority, although I reach the same conclusion. As I read the transcript, the trial court excluded her testimony because it was too speculative. Haumschild did not specifically describe what Cassidy said to her about suicide in their conversations and could not remember whether suicide had been discussed in a conversation within a day or two of the accident. I would conclude the trial court properly exercised its discretion in excluding Haumschild's testimony for this reason.

¶42 LUNDSTEN, J. (*concurring*). I agree with all parts of the majority opinion, except part of its reasoning in section 2.

¶43 In section 2, the majority addresses American Family's argument that the trial court improperly excluded evidence supporting its theory that its insured, Lucille Cassidy, committed suicide. My only disagreement here is with the majority's analysis of part of that proffered testimony. American Family offered to present testimony from a doctor, who treated Cassidy for many years, that Cassidy had threatened suicide many times. American Family also offered the testimony of Cassidy's friend, who would say that Cassidy often spoke of suicide, that she had made funeral arrangements, and that she made constant references to those arrangements right up until her death. The majority concludes that this testimony was properly excluded under WIS. STAT. § 904.03. *See* Majority at ¶21. While paragraph twenty-one of the majority opinion explains why it is upholding the exclusion of more than the limited testimony I have specified above, this concurrence only addresses the testimony I have singled out. The majority decides it was properly excluded because there was no expert testimony indicating the predictive value of the testimony. I respectfully disagree with this analysis.

¶44 Based on the record in this case, testimony that Cassidy had a history of threatening suicide, both to her doctor and to a friend, and had recently told the friend that she had made funeral arrangements was admissible regardless whether American Family offered to accompany that testimony with expert testimony. Unassisted by expert testimony, a reasonable jury could infer that Cassidy's talk of

suicide and her funeral arrangements, considered in light of other evidence, made it more likely that Cassidy committed suicide by intentionally driving her car into Jack Lobenstein's truck. This strikes me as comparable to testimony that a complaining sexual assault victim exhibited post-assault behavior inconsistent with being a sexual assault victim. While it is true that we permit expert testimony to disabuse jurors of mistaken notions about post-sexual-assault behavior, *see generally* ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), the admission of evidence of an alleged victim's behavior does not depend on explanatory expert testimony. While it is true that a trial judge may exercise discretion under WIS. STAT. § 904.03 to prohibit evidence of threats of suicide when suicide is an issue in a case, admissibility of the suicide evidence in this case did not hinge on explanatory expert testimony.

¶45 Nonetheless, I would not order a new trial. As the majority points out in section 3 of its opinion, Lobenstein presented evidence that Cassidy crossed into the wrong lane of traffic. Once Lobenstein presented this evidence, the "burden of going forward with evidence to prove that such invasion was nonnegligent" was on American Family. ***Voigt v. Voigt***, 22 Wis. 2d 573, 584, 126 N.W.2d 543 (1964), *overruled on other grounds*, ***Wilder v. Classified Risk Ins. Co.***, 47 Wis. 2d 286, 289-90, 177 N.W.2d 109 (1970). "The inference of negligence when one invades the wrong lane is a vigorous one; the inference is not dissipated unless [the party contesting negligence] proves [the act was not negligent]." ***Voigt***, 22 Wis. 2d at 584.

¶46 I conclude that, even if the exclusion of evidence of Cassidy's talk of suicide was error, it was harmless error, because this evidence, combined with other evidence in the case, would not have been sufficient to prove that Cassidy intentionally drove into oncoming traffic in an effort to commit suicide. Under the

particular facts in this case, at best the jury would have been left wondering whether Cassidy had committed suicide. While that might require inclusion of the evidence in another context, exclusion was harmless here under the case law governing the inference of negligence when drivers invade a lane of oncoming traffic.

¶47 Accordingly, I respectfully concur.