**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

AUGUST 22, 1995

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2940**

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

**THEODORE FROSTMAN and HELEN FROSTMAN,**

**Plaintiff-Respondents,**

**v.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TRICIA NOTZKE, and TRANSPORTATION INSURANCE COMPANY,**

**Defendants-Respondents,**

**STATE OF WISCONSIN DEPARTMENT OF JUSTICE, and STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,**

**Defendants,**

**SENTRY INSURANCE, a Mutual Company, MICHAEL BORSKI and PORTAGE COUNTY,**

**Defendants-Appellants.**

APPEAL from a judgment of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael Borski, Portage County and its insurer (collectively the County) appeal a judgment awarding Theodore and Helen Frostman damages for injuries arising out of the County's negligent operation of a snowplow. The County argues that the Frostmans presented insufficient evidence to support a finding that the snowplow driver's negligence caused the accident or to support the damage awards for future medical expenses and loss of consortium. It further argues that even if sufficient evidence exists to support the finding on causation, no liability should attach for reasons of public policy. In the alternative, the County argues that it is entitled to a new trial due to improper jury instructions, erroneous admission of evidence regarding the speed of the snowplow, and improper use of an exhibit by the Frostmans' counsel during closing arguments. We reject these arguments and affirm the judgment.

Both the County and the Wisconsin Counties Association premised their arguments on facts that are inconsistent with the jury's findings. This court must view the evidence in the light most favorable to the verdict. ***Roach v. Keane***, 73 Wis.2d 524, 536, 243 N.W.2d 508, 515 (1976). The speed of the snowplow, times and distances involved in the accident were issues of fact at trial. We are constrained to resolve all conflicts in the testimony in the light most favorable to sustaining the verdict.

Evidence presented at trial that the jury had the right to accept shows that Tricia Notzke was driving west on a two-lane highway when a snowplow driven by Michael Borski pulled onto the highway ahead of her and proceeded west. At that time, the highway was in good driving condition and was neither snow covered nor packed with ice or snow. Shortly after the plow pulled onto the highway, it pulled over onto the shoulder and, without giving any indication that it was about to do so, began to plow the shoulder of the road. The driver did not turn on the flashing amber lights that would warn a

motorist of a dangerous activity. Within seconds, a snow cloud created by the plowing operation completely obscured Notzke's vision, causing her to wander across the centerline and strike the Frostman vehicle head-on. Notzke testified that the incident "happened very quickly" and that she "had no time to really do anything." The snowplow driver admitted that he did not check for traffic before he began plowing, an activity he knew would create a snow cloud. The jury found the County eighty percent responsible for the accident, Notzke twenty percent.

The Frostmans presented sufficient evidence to support a finding that the County's negligence was a substantial factor in causing the accident. The jury's verdict will be sustained if there is any credible evidence to support it. ***Meuer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). The evidence construed most favorably to sustain the verdict allows an inference that the snowplow driver suddenly and unexpectedly created a hazardous situation that directly led to the accident. The County argues that the driver's negligence was not a causing fact because Notzke observed the dangerous condition and nonetheless drove into the snow cloud. This argument is based on a view of the evidence that the jury need not have accepted. It is the jury's function to reconcile all inconsistencies in the testimony and determine whether the County's negligence was a substantial factor in producing the accident. *See* ***Bovi v. Mellor***, 253 Wis. 458, 464, 34 N.W.2d 780, 783 (1948).

The County argues that even if it is causally negligent, no liability should attach for reasons of public policy. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 738, 275 N.W.2d 660, 667 (1979). The County asserts that its negligence is too remote from the injury to impose liability upon it. We disagree. The snowplow driver's failure to activate his safety lights and to utilize his mirrors, coupled with his failure to reduce his speed to reduce the size or density of the snow cloud directly contributed to the accident.

The County also argues that imposing liability for snowplow operation places an unreasonable burden on the County's responsibility for snow removal.[1] As we noted in our earlier decision in this same case, imposing

[1] The County argues at length that it is not possible to efficiently remove snow and "eliminate" the snow cloud. The snowplow driver's negligence is predicated on his failure to *reduce* the hazard

liability on a County for snowplow operations is not unduly burdensome because accidents involving snowplows are rare and liability will only be imposed when the County fails to exercise its duty of ordinary care when engaging in snowplowing. ***Frostman v. State Farm***, 171 Wis.2d 138, 143, 491 N.W.2d 100, 102 (Ct. App. 1992). Furthermore, the road was already in reasonable condition and the snowplow was, in the words of a disinterested witness, doing more harm than good. We are not persuaded that it would place an undue burden on the County to subject its drivers to the duty of ordinary care when clearing the shoulder of the road under these circumstances.

The Frostmans presented sufficient evidence to support the damage awards for future medical expenses and loss of consortium.[2] The Frostmans presented evidence that Theodore faces future hip replacement at a cost of $15,000 and may face various other surgeries. He will also require future medication and physical therapy. The $30,000 award for future medical expenses is supported by this evidence. Similarly, the jury heard sufficient evidence to support the $40,000 award to Helen for loss of consortium. The "day in the life" videotape portraying the hardships endured by Helen during Theodore's convalescence supports this award.

The County has not established any basis for a new trial based on errors at trial. The trial court properly gave the emergency instruction because the evidence, construed most favorably to Notzke, established that the emergency was not created by her negligence and that she lost management and control of her car because she had insufficient time to deliberate and make an intelligent choice of action. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis.2d 743, 754, 235 N.W.2d 426, 432 (1975). Under these circumstances, it is for the jury to determine whether an emergency existed that would affect her liability. ***Misiewicz v. Waters***, 23 Wis.2d 512, 516, 127 N.W.2d 776, 778 (1964).

(..continued)
by appropriate warnings, lookout and adjustment of his speed. The testimony that the hazard could not be "eliminated" and the arguments based on that testimony fail to address the driver's ability to reduce the hazard by exercising ordinary care.

[2] In light of the $250,000 cap on the County's liability and the jury's finding that it is 80% responsible for the $588,000 damages, it is not clear why the County is pursuing this issue.

The trial court properly instructed the jury on the snowplow driver's duty of lookout to the rear. The County argues that the special instruction created by the court modifies the general instruction on the duty of lookout to give the impression that the snowplow driver must look to the rear even if he is not deviating from his course of travel or creating a hazardous situation. In this case, because the jury was focused on the driver's lookout at a time when he undeniably created a hazardous situation, the instruction was appropriate.

The trial court properly allowed testimony of oncoming vehicles regarding the estimated speed of the snowplow. The fact that the estimate is made by a person travelling in the opposite direction goes to the weight of the testimony, not its admissibility. *See* ***Pagel v. Kees***, 23 Wis.2d 462, 468-69, 127 N.W.2d 816, 819 (1964). Furthermore, the precise speed of the snowplow was not a substantial question in this case. The speed of the snowplow was relevant to determine whether its driver appropriately adjusted his speed to reduce the detrimental effects of his plowing and to judge the reasonableness of Notzke's decision to continue through the snow cloud. The oncoming vehicles were in a reasonable position to render opinions of some probative value on these questions.

The County has not properly preserved the issue whether a diagram was improperly used during closing argument because the transcript of the closing argument is not included in the record on appeal. *See* ***State v. Vlahos***, 50 Wis.2d 609, 612 n.2, 184 N.W.2d 817, 818 n.2 (1971). We are unable to review whether counsel made an appropriate argument or the potential prejudice from such an argument.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.