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

May 21, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

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**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.**

**No. 97-0700**

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

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**JEANNINE C. BAERTSCH, WISCONSIN HEALTH FUND AND THE ESTATE OF FREDERICK A. BAERTSCH,**

**PLAINTIFFS-RESPONDENTS,**

**RYAN BAERTSCH BY HIS GUARDIAN AD LITEM, ATTORNEY JANE E. KOHLWEY,**

**PLAINTIFF,**

**V.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**BRIAN TOOL,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. American Family Mutual Insurance Company appeals a judgment which held it liable for damages caused by the negligence of its insured in a fatal boating accident. American Family claims the trial was tainted by a host of erroneous rulings by the circuit court, including its failure to dismiss under the emergency doctrine. American Family also contends we should reverse and remand for a new trial because of alleged misconduct by opposing counsel and because the evidence was insufficient to support the jury's verdict. However, we conclude the trial was properly conducted and accordingly we affirm the judgment of the circuit court.

## BACKGROUND

Frederick (Rick) Baertsch died shortly after he was struck by a motorboat while snorkeling in Swan Lake on Sunday, July 30, 1995. Rick's widow and his estate brought suit in Columbia County. Rick's thirteen-year-old son, Ryan, was with him that day. Ryan testified that they were looking for golf balls in the water near the third hole of the Swan Lake Golf Course. Ryan said that they had anchored the boat along a sand shelf in about waist deep water in front of a red cedar tree. They spent most of the afternoon in and out of the boat, swimming and looking for golf balls. At one point, Ryan saw Brian Tool's boat drive by pulling an inner-tuber, and he waved at the children he knew in the boat. A little later, Rick put on his orange-tipped snorkel, mask and fins to look for one last golf ball. Moments after Tool's boat passed by a second time, Ryan saw his dad surface behind the boat and heard him shouting for help. He had to swim about five feet beyond where he could touch the bottom of the lake in order to

reach his father, who was using his arms to stay above water.[1] Ryan managed to get Rick to shore, but he bled to death at the scene.

At trial, Tool explained that he had taken his two children, and two of their friends out inner-tubing that afternoon, and that he was operating his boat closer to shore than he normally did due to heavy boat traffic on the lake. He noted that the water was medium choppy that day. As he made his first twenty-minute circuit around the lake towing his daughter at fifteen to twenty miles per hour, he and his children saw Ryan looking for golf balls in waist deep water near the third hole. His daughter's eight-year-old friend next took a turn in the inner tube. Tool traveled at ten to fifteen miles an hour at her request for a slow ride. He testified that he was standing behind the wheel and that his vision was unobstructed except for a small blind spot immediately in front of the boat where the nose rose slightly out of the water.

Tool testified that about ten to fifteen seconds after he had passed thirty-five to forty yards from Rick's boat,[2] he saw Rick's head suddenly surface on the right side of the Tool boat. He immediately turned to the left, but he was unable to avoid hitting Rick. When Tool put the boat in neutral and turned around, he saw Rick treading water and calling to his son for help.

Greg Santina testified he had taken his children swimming that afternoon. He was sitting on a pier watching people tee-off on the third hole.

[1] Ryan was not able to say whether his father had been moving in toward him as he tried to reach him; however, Deputy Dodge testified that Rick's spine appeared to have been severed in the accident.

[2] All three of the children in the boat told investigators that the impact occurred just as they were passing Rick's boat a second time. Two of the three said that they had again seen Ryan in the water near his boat, and had waved to him.

Through binoculars, he observed the head and snorkel of a man in the water near the third hole, and then he saw a blue boat coming toward the swimmer. He thought that the boat's nose was slightly out of the water. He estimated that the impact occurred between two and four seconds after he had first observed the swimmer, and he stated that the swimmer's head was visible for the entire time. Santina had time to exclaim to his brother, "Jeez, that boat is going to hit him." He did not believe that the swimmer's head had "popped up" just before impact. He also recalled seeing the operator of the boat glance back over his shoulder once or twice before the impact, apparently looking at an inner-tuber whom he was pulling. He told police that the swimmer and boat were both in line with a pump house on the opposite shore from his vantage point on the pier. Santina originally thought that Rick's boat might have been anchored between fifteen to twenty feet from shore, and that the swimmer might have been sixty to seventy feet off shore, but later he changed his estimate of Rick's position to ninety to 120 feet from shore.

Columbia County Deputy Peter Dodge responded to the boating accident. He said he observed Rick being attended to on the shore near some bushes, and he saw Rick's boat anchored in the lake to the right of Rick's position on the shore. After the boat had been moved so that a medical helicopter could land, Dodge and another investigator from the DNR placed buoys on the water sixty-seven feet from shore, where they believed that Rick's boat had been located. Dodge observed what he called "a drag mark" about 100 feet from shore, and concluded that that was where the impact had occurred, but he was unable to recover Rick's mask, snorkel, or fins from that area when he went scuba diving for them the next day. He said a brandy bottle was collected from Rick's boat. Four-and-one-eighth ounces of brandy had been removed.

About six months after the accident, Ryan went out on the frozen ice of Swan Lake to show surveyor Scott Hewitt where he believed their boat had been anchored and where he thought the impact had occurred. Hewitt measured the location for the boat at eighty feet from shore and the estimated point of impact at one hundred feet from shore. Hewitt also drew a scaled map which showed Santina's line of sight from the pier to the pump house and measured another possible point of impact as being sixty-eight feet from shore, based on the intersection of the Santina line of sight and Dodge's recollection of the location of Rick's boat with reference to certain bushes.

Columbia County Coroner Keith Epps testified that he withdrew thirty milliliters of blood from Rick's heart with a syringe at approximately 6:30 p.m. the day of the accident, as he was required to do in any boating fatality. He was confident that his sample had been properly taken. He sealed the vial and sent it to the State Laboratory of Hygiene.

Dr. Patricia Fields, a forensic toxicologist at the state lab, testified that the blood sample taken by the county coroner from Rick's heart showed a blood alcohol concentration of .108. She admitted that the consumption of four-and-one-eighth ounces of brandy would not result in an alcohol concentration nearly that high, especially if it had been consumed over the course of the afternoon.

Robert Eberhardt, the laboratory director at the Milwaukee County Coroner's office, testified that the method used by Epps was not recommended unless it was done at autopsy, because there is no way to ascertain whether the fluid sample was recovered solely from the heart. He also noted that the state laboratory report failed to consider whether any alcohol which Rick had consumed

immediately prior to the accident could have resulted in an artificially high concentration because it would have been distributed into a smaller blood volume, due to his blood loss in the time between the accident and his death.

Dale Morey, Wisconsin's first State Boating Law Administrator, testified as an expert witness. He opined that Tool was negligent in four ways: (1) for operating his boat too close to an anchored, occupied boat; (2) for failing to use reasonable and prudent speed; (3) for failing to provide a proper lookout; and (4) for operating his boat within one hundred feet of a swimmer whom he should have seen. He based his conclusions largely on Ryan's estimate that his father was less than thirty feet from his boat when he was hit, and on Santina's statement that Tool was looking back at the inner-tuber shortly before the accident. He also noted that Rick had not violated any safety laws or regulations by drinking or by failing to post a red diving flag, since he was within 150 feet of the shore.

William Engler, Wisconsin's current State Boating Law Administrator, also testified. Engler had supervised the investigation of the accident. A few days after the accident, DNR personnel found Rick's mask 139 feet from shore, one fin 146 feet offshore, and the other fin closer to shore. Engler testified that the location where Rick's equipment was found was the best indication of where the accident had occurred. He concluded that Tool had not been negligent, based largely on Tool's own statement that he had seen Rick's head surface immediately before impact. Although Engler agreed that Rick had not violated any laws, he said Rick had acted imprudently by drinking and skin diving and that intoxication could have affected his judgment.

On the last day of the four-day trial, American Family moved to dismiss based on the emergency doctrine and on an insufficiency of evidence to

find negligent lookout. The circuit court denied the motion, and the jury found that Tool's negligence was 100% of the cause of the accident. The circuit court entered judgment against American Family in the amount of $800,000, pursuant to the parties' stipulation on damages.

## DISCUSSION

### Standard of Review.

American Family raises a number of issues which we review under various standards of review. The applicability of the emergency doctrine and the interpretation of a statute are questions of law which this court reviews *de novo.* ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977); ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). However, most of the other circuit court decisions which are being challenged on appeal are discretionary in nature. It is well established that the circuit court has broad discretion when instructing a jury. ***Fischer v. Ganju***, 168 Wis.2d 834, 849-50, 485 N.W.2d 10, 16 (1992). The admission or exclusion of evidence is also a discretionary determination which will not be reversed if there is a reasonable factual basis in the record for the circuit court's determination and it was based on a correct application of the law. ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 584 (1989). Whether to grant a motion for a mistrial also lies within the sound discretion of the circuit court. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). Therefore, we will reverse the denial of a mistrial motion only on a clear showing that the circuit court erred in the exercise of its discretion. ***Id***. And finally, we will uphold a jury verdict if our examination of the record reveals any credible evidence to

support it. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 158, 187, 557 N.W.2d 67, 79 (1996).

**Emergency Doctrine.**

American Family correctly asserts that the emergency doctrine operates to "relieve a [boater] who is confronted with an emergency that his [or her] conduct did not create or help to create from being labeled negligent in connection with management and control of his or her [boat]." *See* ***Garceau v. Bunnell***, 148 Wis.2d 146, 152, 434 N.W.2d 794, 796 (Ct. App. 1988) (citation omitted). Ordinarily, this is a jury question. ***Id***. However, the circuit court may direct a verdict based on the emergency doctrine, as a matter of law when "the uncontroverted evidence establishes that (1) the party seeking the benefit of the rule is free from negligence; (2) the time interval between the danger and impact is too short to allow intelligent and deliberate choice of action; and (3) the element of negligence inquired into must concern management and control." ***Id***. at 153, 434 N.W.2d at 796 (citation omitted).

On review, we examine whether there was any credible evidence that Tool was negligent. American Family first argues that it was irrelevant whether Tool glanced over his shoulder at his inner-tuber shortly before the impact because when he saw Rick surface, he reacted immediately. However, Santina testified that he saw Tool glance back over his shoulder at least once, and maybe twice, *after* Santina had noticed the swimmer in the water directly in the boat's path. Therefore, a direct conflict in the testimony existed on this point.[3] The jury

[3] We are not persuaded by American Family's representation on page 12 of its appellate brief that "[t]here was no dispute that Tool actually saw [Rick] come to the surface, very close to Tool's boat." Simply because Tool did not see Rick sooner, it does not necessarily follow that Rick was not visible.

was entitled to give more weight to Santina's version of the incident or to disregard Tool's account entirely, if it did not find him credible. Furthermore, Santina did not testify that he ever saw Rick surface. Rick's head merely came into focus through his binoculars as he scanned the area. From this testimony, the jury could also have reasonably inferred that Rick was visible on the water for longer than the two to four seconds during which Santina observed him, and that Tool was inattentive and negligent in failing to see him earlier.

In addition, there was evidence from which the jury could have concluded that Tool violated his duty of ordinary care merely by operating his boat too close to Rick's boat or to the shore. The evidence included Hewitt's map, which identified one possible point of impact as close as sixty-seven feet from shore, and Tool's own testimony that he was operating his boat closer to the shore than normal that day. American Family adamantly maintains that the mask should have been accepted as the best indication of the location of impact, 139 feet from shore.[4] However, its assertion ignores, among other things, Ryan's testimony about how short a distance he had to swim to reach his father. It was for the jury to determine whether the mask and fins may have drifted farther from shore in the wake of the boat before sinking. Furthermore, since Tool had seen that Ryan was in the water on his first trip around the lake, a jury could have concluded that he should have been on the alert for swimmers near the third hole. However, Tool admitted he was not looking for Ryan at the time of the accident. Even defense

[4] First of all, we are unpersuaded by American Family's representation on page 10 of its appellate brief that "[t]he expert witnesses (including Baertsch's boating accident investigator, Dale Morey) testified that the location of [Rick's] mask was the most reliable *evidence* of the point of impact," in light of Morey's specific denial that the location where the mask was found was the most reliable indicator of the point of impact, as opposed to his deposition statement that "the mask … is the most reliable piece of *equipment* …out there." (Emphasis added). In any event, the jury was not required to adopt the experts' opinions.

counsel conceded in closing argument, "If you believe that Brian Tool came within ten feet of that boat as their theory and their map and everything else they rely on shows, you bet he was negligent."

Finally, there was expert testimony that Tool could most likely have avoided Rick at a speed of fifeen miles per hour if he had seen him three to four seconds before impact. Santina testified that Rick was visible for about that long. From this, and Santina's testimony that Tool's boat had its nose out of the water and was giving off a good stream of water from the sides, a jury could have concluded either that Tool was actually going faster than his estimated ten to fifteen miles per hour, or alternatively, that the front of his boat was out of the water too far for him to maintain an adequate lookout. In short, the circuit court correctly declined to direct a verdict based upon the emergency doctrine because there was credible evidence in the record from which a reasonable jury could have found that Tool had acted negligently.

**Contributory Negligence.**

American Family next asserts that, even if there was sufficient evidence of Tool's negligence to reach the jury, the evidence also established that Rick's negligence exceeded Tool's as a matter of law. However, American Family reaches its conclusion by relying on its own evidence and ignoring that presented by the plaintiffs. Testimony was presented that Rick had had access to no more than four-and-one-eighth ounces of brandy the entire afternoon, which amount would not have resulted in a blood alcohol concentration of .108. Additionally, an expert opined that the blood sample tested by the state laboratory may have contained an artificially high alcohol concentration because of Rick's metabolism of alcohol into a severely reduced blood volume subsequent to the

accident and prior to his death. Moreover, testimony was also presented that the accident could have occurred in the same manner, even if Rick had not been drinking. And finally, there was evidence received which controverted American Family's theory that Rick was swimming nearly 140 feet from shore. Therefore, the issue of whether Rick was contributorily negligent was clearly a jury issue, and the circuit court did not err by failing to direct the verdict in favor of American Family.

**Jury Instructions.**

American Family also asserts error occurred in the jury instructions given on lookout, speed, location of operation, and management and control and also in regard to the clarifying instructions, WIS J I—CIVIL 1055 and 1105, which the circuit court did not give. However, American Family did not request WIS J I—CIVIL 1055 and 1105 and it objected only to the management and control instruction before the jury retired to deliberate. Therefore, with respect to the contentions of error based on jury instructions, we will review only the management and control instruction; all other issues were waived, as a matter of law. Section 805.13(3), STATS.; ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988) (holding that the court of appeals does not have the power to review alleged instructional errors which were not objected to at the instruction conference).

With regard to management and control, the circuit court instructed the jury that:

> A safety statute provides that a person operating a motorboat having in tow a person on water skis, aquaplane or similar device shall operate such boat in a careful and prudent manner and at a reasonable distance from persons

> and property so as not to endanger the life or property of any person.

All but the first five words of the instruction were taken verbatim from § 30.69(2), STATS. Nonetheless, American Family maintains that the instruction as given was error because there was no evidence that Tool had reason to know that a swimmer could be in the water, and even if there were such evidence, the form in which the instruction was given was unfairly prejudicial. We disagree. Both Tool and his passengers had seen Ryan in the area of the accident. The instruction was a direct quote from a safety statute that applied to the circumstances surrounding the accident. A circuit court does not err when it instructs the jury with a direct quote of a statute that applies to the facts of the case. *See* ***State v. Vick***, 104 Wis.2d 678, 690-91, 312 N.W.2d 489, 495 (1981).

Moreover, the totality of the instructions as given must be judged in light of the facts that the jury was asked to resolve. ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). In this case, the totality of the instructions also included the court's directive that:

> When considering negligence as to management and control, bear in mind that a boater may suddenly be confronted with an emergency not brought about or contributed to by his own negligence. If that happens and the boater is compelled to act instantly to avoid collision, the boater is not negligent if he or she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that his or her choice was not the best or safest course.

Thus, the jury was clearly asked to decide whether the facts supported American Family's theory of the case. If the jury had believed Tool's version of events, the emergency doctrine instruction would have led to a finding that Tool was not negligent.

**Evidentiary Matters.**

***1. Rebuttal Testimony.***

American Family claims that the circuit court erroneously exercised its discretion when it allowed the Baertschs to present three rebuttal witnesses, because "[r]ebuttal is appropriate only when the defense injects a new matter or new facts." ***Pophal v. Silverhus***, 168 Wis.2d 533, 555, 484 N.W.2d 555, 563 (Ct. App. 1992). However, the record shows that the circuit court was well aware of the proper standard for rebuttal, and that it carefully limited the Baertschs' rebuttal case to the presentation of evidence designed to meet the facts which American Family had presented relating to Rick's blood alcohol concentration and Tool's lookout.[5]

When one of the Baertschs' rebuttal witnesses, boating expert Gary Mahler, strayed from the issues for rebuttal established by the circuit court and testified to a new theory of negligence based on Tool's possible failure to have had his hand on the throttle, the court struck his entire rebuttal testimony. American Family claims that the court erred by not granting its motion for a mistrial or allowing it to recall Tool.

In ruling on a mistrial motion, the circuit court must decide, in light of the entire facts and circumstances, whether the claimed error is sufficiently prejudicial to warrant a mistrial. ***State v. Grady***, 93 Wis.2d 1, 13, 286 N.W.2d 607, 612 (Ct. App. 1979). A curative jury instruction is presumed to eliminate

[5] We are not persuaded by American Family's assertion that once the Baertschs raised the general issue of intoxication in their case in chief, they were precluded from responding to any new facts which American Family had introduced on that topic. Rebuttal testimony need not be so narrowly delineated.

prejudice. ***State v. Jennaro***, 76 Wis.2d 499, 508, 251 N.W.2d 800, 804 (1977). In addition to striking Mahler's testimony, the court directed during in its jury instructions:

> During the trial, I have ordered that parts of the testimony of various witnesses be stricken. You are directed to disregard all such testimony. And I will further instruct you that you are not to draw any inferences regarding the fact that I struck the testimony.

The court's action was clearly appropriate. Having struck the testimony, there was no need to recall Tool to respond to it, nor to declare a mistrial.

***2. Surprise.***

American Family claims to have been unfairly surprised by certain testimony introduced at trial, and argues that the circuit court erroneously exercised its discretion when it failed to exclude the testimony. A circuit court may, in certain circumstances, preclude the admission of testimony, which was not disclosed during discovery. ***Jenzake v. City of Brookfield***, 108 Wis.2d 537, 543, 322 N.W.2d 516, 520 (Ct. App. 1982). Section 804.12(2), STATS., provides in relevant part:

> FAILURE TO COMPLY WITH ORDER. (a) If a party … fails to obey an order to provide or permit discovery, … the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> ….
>
> 2. An order … prohibiting the disobedient party from introducing designated matters into evidence;

American Family complains of four items: (1) Mahler's "throttle theory"; (2) the measurement of the brandy taken from the bottle; (3) Morey's

second opinion on a possible point of impact; and (4) Ryan's mentioning the cedar tree. American Family cites § 804.12(2), STATS., but it refers us to no order of record directing the pretrial disclosure of this evidence. It also does not develop its argument with relevant precedent. Instead, it string cites two cases without any discussion of either one. We do not consider arguments which are not developed by the parties in their briefs. ***Truttschel***, 208 Wis.2d at 369, 560 N.W.2d at 318. Because American Family did not refer us to an order that had been violated or develop any legal arguments to support its contention of error in this regard, we conclude its claims of surprise are not a basis for reversal.

***3. Rulings on Objections.***

American Family relies upon ***Pecor v. Home Indemnity Co. of New York***, 234 Wis. 407, 291 N.W. 313 (1940), for the proposition that it is reversible error for a circuit court to refuse to rule on evidentiary objections in the presence of the jury. ***Pecor*** is not precedent for the proposition asserted. The circuit court in ***Pecor*** had refused to rule, either before the jury or outside of its presence, on counsel's objections to a number of blatantly improper and prejudicial comments of opposing counsel. Instead, the judge told counsel to "move on." That clearly gave the jury the impression that the objecting attorney was out of line. However, here, the circuit court listened to the positions of both parties and ruled on each and every objection made. Additionally, it took appropriate care to avoid confusing the jury with possibly prejudicial comments, by hearing arguments on objections out of the jury's presence. We find no error in the procedure employed by the circuit court, which evidenced good judgment in the management of the case before it.

***4. Tool's Deposition.***

At trial, portions of Tool's deposition were read to the jury. American Family asserts this was an impermissible use of § 804.07(1)(b), STATS., because while Tool had been a party at the time his deposition was taken, he had been dismissed prior to trial, and therefore, § 804.07(1)(b) did not apply.

American Family's contention presents a question of statutory construction. When we construe a statute, our aim is to ascertain the intent of the legislature, by looking first to the language of the statute itself. ***Truttschel***, 208 Wis.2d at 365, 560 N.W.2d at 317. We must determine whether the statute is clear and unambiguous on its face or whether its language is capable of being understood by reasonably well informed persons in two or more ways. ***Id***. When the language of the statute is clear, we will not look beyond that language to determine legislative intent. ***Cynthia E. v. La Crosse County Human Servs. Dep't***, 172 Wis.2d 218, 225, 493 N.W.2d 56, 59 (1992).

Section 804.07(1)(b), STATS., states in relevant part: "The deposition of a party or anyone who at the time of taking the deposition was an officer, director, or managing agent or employe or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a public or private corporation … may be used by an adverse party for any purpose." The statute clearly requires that the person be a party "at the time of taking the deposition," before para. (1)(b) applies. However, there are no words of limitation requiring continued status as a party as a precondition to use of the deposition at trial. Section 804.07 treats the deposition of an adverse party differently from the deposition of any other witness. This differentiation is bottomed in part on the self interest which is presumed to exist in the opposing sides of litigation, making it unlikely that testimony given by a party would be favorable to an opposing party unless it was truthful. Therefore, the reliability of a party's deposition is not affected by whether the deponent's

status changes subsequent to taking the deposition. Section 804.07(1)(b) unambiguously permits the same use of a deposition taken when the deponent was a party, irrespective of whether his/her status remains the same or changes at trial. Therefore, we conclude that the circuit court correctly refused to read words into § 804.07(1)(b) which would have limited its use and that it did not err when it allowed portions of Tool's deposition to be read to the jury.

American Family further contends that, even if parts of Tool's deposition were properly admitted, the circuit court should have allowed it to introduce additional parts of the deposition immediately after each part of the deposition was read by the Baertschs, rather than permitting plaintiffs' counsel to read all of the deposition they wished to admit and then reading the sections American Family wanted. It relies on § 804.07(1)(d), STATS., which states in relevant part:

> If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced ….

Once again we are presented with a question of statutory interpretation. However, we are not assisted in our task with the citation of any precedent or legal argument. American Family simply asserts that the circuit court failed to follow the statute and therefore it was prejudiced. It does not tell us how it was prejudiced. It asserts that the jury was probably confused, but it does not tell us as to what. This argument has not been sufficiently developed and we decline to consider it further.

***5. Cross-examination.***

American Family argues that the circuit court erred when it limited its cross-examination of Mahler to matters which had been testified to on direct examination. Section 906.11(2), STATS., is the statutory basis for the scope of cross-examination. It provides:

> SCOPE OF CROSS-EXAMINATION. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

American Family relies on the first sentence of this subsection. However, the second sentence of the subsection clearly makes the scope of cross-examination a discretionary determination for the circuit court. Even more importantly, in order to preserve the issue of an allegedly erroneous exclusion of evidence, the party contending that error occurred must make an offer of proof on the record. ***Frankard v. Amoco Oil Co.***, 116 Wis.2d 254, 267, 342 N.W.2d 247, 253 (Ct. App. 1983); § 901.03(1)(b), STATS. American Family made no offer of proof as to what testimony it would have elicited if broader cross-examination had been permitted. Therefore, it has not preserved this objection for appeal.

American Family also claims that it ought to have been allowed to introduce portions of contemporaneous accident reports which concluded that Tool had not been negligent, which reports Dodge and Morey had read, in order to impeach them. American Family contends that the accident reports are independently admissible under § 908.03(8), STATS., and because both witnesses reviewed them but ignored the conclusion that Tool was not negligent. The circuit court found that the reports contained hearsay statements by various officers and investigators who were not present at trial and that any benefit from using the

documents was out-weighed by the potential for confusion among the jury members.

While it is true that otherwise inadmissible hearsay statements may be admitted for certain purposes, if an expert relied on them, and that certain data which is hearsay may be admitted if the expert reviewed the data and chose to use some of it and ignore other portions, in formulating his or her opinion, ***State v. Weber***, 174 Wis.2d 98, 107 n.6, 496 N.W.2d 762, 767 n.6 (Ct. App. 1993), American Family did not seek to introduce the reports to establish any facts relating to the accident. Rather, it sought to introduce the opinions of others which bore upon the legal significance of facts already in the record. If American Family thought it could establish a foundation sufficient to enable the preparers of the reports to give their opinions about negligence, it was free to call them at trial. However, the mere fact that they drew conclusions different from those of the Baertschs' expert witnesses is irrelevant, and it is an inappropriate use of material reviewed by an expert. Additionally, we agree with the circuit court that it had the potential to confuse the jury. Therefore, we conclude that the material sought to be admitted was properly excluded.

**Alleged Misconduct.**

American Family also claims entitlement to a new trial based on allegations that the Baertschs' counsel engaged in a pattern of misconduct and misrepresentation at the circuit court, including (1) misrepresenting to the court the nature and scope of Mahler's rebuttal testimony; (2) allowing Eberhardt to test the brandy bottle from Rick's boat after he had given his deposition and discovery was closed; (3) presenting expert testimony about a possible point of impact that was not disclosed during discovery; (4) making false and sometimes accusatory

assertions before the jury; (5) presenting previously undisclosed testimony that Rick's boat had been anchored in front of the cedar tree; and (6) presenting testimony of an accident reconstruction performed by Morey, after he was deposed. It asks this court to "send a message" by ordering a new trial. We decline that invitation.

The circuit court was aware of all of the conduct about which American Family complains. It was in the best position to evaluate the conduct, yet it chose not to impose sanctions on opposing counsel. We see no reason to interfere with the circuit court's management of the case before it. In addition to noting that there appears to be enough blame to assign to counsel on both sides of this case, we remind American Family's counsel that he is a more effective advocate for his client on appeal when he directs his energies to the legal issues presented by the appeal, rather than making *ad hominem* attacks on opposing counsel.

**Interests of Justice.**

American Family's last claim is that the circuit court erroneously exercised its discretion when it refused to grant a new trial in the interests of justice. However, for the reasons already discussed above, we conclude that no miscarriage of justice occurred, and that there is no reasonable probability of a different result if the case were to be retried. *See* ***Gonzales v. City of Franklin***, 137 Wis.2d 109, 133-34, 403 N.W.2d 747, 757 (1987).

## CONCLUSION

There was sufficient evidence admitted for a jury to conclude that American Family's insured failed to exercise reasonable care in the operation of his motorboat, which caused the death of Frederick Baertsch. The circuit court exercised proper discretionary control over the admission of evidence and the behavior of counsel. Therefore we affirm the judgment it entered.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.