COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP2272 **Cir. Ct. No. 2006CV6312**

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

DEBRA A. MATYSIK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MATYSIK,

PLAINTIFF-RESPONDENT,

WISCONSIN PIPE TRADES HEALTH FUND AND AMERICAN STANDARD INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS-RESPONDENTS,

V.

DEAN R. SCHIPKE AND MIDDLESEX INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Dean R. Schipke and his insurance company, Middlesex Insurance Company (collectively, Schipke) appeal the judgment entered upon a jury's verdict in favor of Debra A. Matysik, individually and as Personal Representative of the Estate of Scott Matysik.[1] Schipke claims that the trial court: (1) erred in refusing to grant a mistrial when, in opening statements, Matysik's attorney made reference to the fact that Schipke was issued a traffic ticket following the accident; (2) gave an erroneous curative jury instruction concerning Schipke's traffic ticket mistakenly revealed to the jury in opening statements; (3) erroneously exercised its discretion in permitting the introduction of evidence concerning Scott Matysik's ability to operate a motorcycle; (4) erred in refusing to change several of the answers in the special verdict because there was insufficient evidence to support the answers; (5) erroneously exercised its discretion in denying Schipke's motion seeking a new trial; and (6) erroneously exercised its discretion in denying Schipke's motion seeking an order allowing him to pay the judgment to the clerk of courts, thereby tolling interest while this appeal was pending. Because the mention of the traffic ticket was not sufficiently prejudicial; the curative instruction was not prejudicial; sufficient evidence was introduced at trial to sustain the verdict; the one question asked of a witness concerning Matysik's motorcyclist abilities was harmless error; the trial court properly exercised its discretion in denying a new trial; and the trial court properly exercised its discretion in denying the request to pay the judgment to the clerk of courts, we affirm.

[1] We reference Debra Matysik as Matysik through this opinion and will reference Scott Matysik by his first and last name.

I. BACKGROUND.

¶2 According to the undisputed facts testified to at the jury trial, in the early morning of August 9, 2005, Schipke, a driver of a single-occupant automobile, was involved in an accident with a motorcycle being driven by Scott Matysik. The accident occurred on the "on ramp" to I-94. The on ramp has a circular configuration with two lanes. The left lane is for use by multiple-occupant vehicles and motorcycles (sometimes referred to as the high-occupancy vehicles lane or HOV), and the right lane is designated as a lane reserved for single-occupant vehicles. Just prior to the accident, four vehicles were on the ramp in the single-occupant lane. Scott Matysik, operating a motorcycle, was first, Schipke was next, and two cars driven by Dan Carroll and Matt Fohl, in that order, were behind Schipke. Originally, all four vehicles were in the right lane. At some point Schipke moved into the HOV lane, despite the fact that he was alone in the car. Schipke testified that he was looking to the left and did not know what the motorcyclist was doing as he passed him. Schipke's vehicle and the motorcycle's point of impact was the right side of Schipke's vehicle. The parties disputed exactly where the accident occurred. One expert witness put it on or near the line dividing the lanes of traffic. There were other disputed issues at trial, including Schipke's reasons for moving into the HOV lane, whether Schipke improperly moved back into Scott Matysik's lane, what Schipke did once in the HOV lane, and Scott Matysik's driving habits.

¶3 Prior to the trial's commencement, various motions *in limine* were heard and decided by the trial court. Schipke brought a motion requesting that the trial court prevent any mention of the fact that Schipke was illegally in the HOV lane. The trial court denied the motion and ruled that the jury could know that Schipke was in the HOV lane and could consider this evidence. Never decided at

the motion was whether the jury could learn that Schipke received a traffic ticket as a result of his being in the HOV lane.[2] During the opening statement Matysik's lawyer told the jury that Schipke was "given a ticket for driving…." Schipke's attorney moved for a mistrial. The trial court refused to grant a mistrial but did give a curative instruction to the jury.

¶4 During the trial, Matysik called a witness, Thomas Bauer, the chief of police for the City of Oak Creek to discuss Scott Matysik's abilities as a motorcyclist. Bauer testified over Schipke's objection that Scott Matysik was an excellent motorcycle operator. At the end of the trial, the jury returned a verdict that found Schipke 70% causally negligent and Scott Matysik 30% causally negligent, and awarded Matysik damages in the amount of $1,290,813.43. Following the return of the verdict, Schipke moved the trial court to change several of the jury's answers, and also requested a new trial in the interest of justice. The trial court refused to change the verdict and declined the request for a new trial. In addition, Schipke sought to pay the amount of the judgment into the court, which would have had the effect of tolling the running of interest pending appeal. The trial court again declined Schipke's request. This appeal follows.

[2] Specifically, Schipke claims he received a citation for failing to obey a traffic officer/signal, contrary to WIS. STAT. § 346.04(2) (2005-06). Schipke also alleged that he pled no contest to a reduced charge of parking/standing where prohibited.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

II. ANALYSIS.

A. The trial court properly denied the request for a mistrial.

¶5 Schipke maintains that the trial court should have granted his mistrial motion after opposing counsel mentioned during his opening statement that Schipke received a traffic ticket after the accident. The trial court refused to grant the request.

¶6 Whether to grant a motion for mistrial is within the trial court's discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). This "'discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Southeast Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.***, 2007 WI App 185, ¶39, 304 Wis. 2d 637, 738 N.W.2d 87 (citation omitted).

¶7 In determining whether a mistrial is appropriate, the trial court must conclude that the claimed error is sufficiently prejudicial such that a mistrial is necessary to protect the rights of the parties, *see* ***Oseman v. State***, 32 Wis. 2d 523, 528-29, 145 N.W.2d 766 (1966), and its inquiry "'must center primarily around the facts [of the] case,'" ***id.*** at 528 (citation omitted). "In exercising discretion on whether to grant a mistrial, the [trial] court is in a particularly good 'on-the-spot' position to evaluate factors such as a statement's 'likely impact or effect upon the jury.'" ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 657, 511 N.W.2d 879 (1994) (citation omitted).

¶8 In refusing to grant the requested mistrial, the trial court reasoned:

> THE COURT: ….
>
> I'll have to work up some language because I – this jury cannot – I think there's some prejudicial effect. I don't think it's anything near mistrial status, I don't think, because it's a concede[d] fact that he was not legally in that lane. I don't see how this points to, you know, a watershed event here. But I do want to avoid the impact of this jury saying: Well, the cop said he was in the wrong. What else do we need to decide?

We agree with the trial court's decision.

¶9 First, as Matysik points out in her brief, opening statements are not evidence and the jury was instructed that opening statements are not evidence. No other reference was ever made to the ticket by Matysik. The jury did not know what the traffic ticket was for, and the officer who gave it to him was never asked any questions by Matysik about it. Second, the trial court acknowledged that the general rule is not to admit evidence that a party was issued a citation in a civil case. However, the trial court did not believe that the fact that a citation was issued was crucial in this case because the jury was going to learn that Schipke was driving in the HOV lane, despite the fact he was alone in his automobile. Nevertheless, the trial court was concerned that "the jury [would] simply default[] to the opinions of the issuing officer." As a result, the trial court decided to fashion a curative instruction to cover the court's concern. This was an appropriate exercise of discretion. The fact that Schipke was driving in the HOV lane and could have been ticketed for this conduct was something that would have been inferred by the jury. Thus, the information that the jury heard was not sufficiently prejudicial to warrant a mistrial. *See* ***Oseman***, 32 Wis. 2d at 528-29.

B. The trial court's curative instruction on the issue of the citation given to Schipke was appropriate.

¶10 Schipke next argues that the curative instruction was "erroneous" and, as a result, Schipke is entitled to a new trial. This is so, according to Schipke, because the trial court's instruction "directly or indirectly equated the 'illegal' use of the HOV lane with negligence." After the trial court denied the mistrial request and determined that a curative instruction should be given, the parties could not reach an agreement on what the curative instruction should say. Ultimately, the trial court read the following instruction to the jury:

> You will recall that in my opening instructions I informed you that the statements of the lawyers in their opening remarks are not evidence and that you are to decide this case on the evidence that is admitted in the trial and my instructions on the law. During the opening statements Mr. Hills objected to a comment by Mr. Peterson regarding a ticket that may or may not have been issued to Mr. Schipke. No evidence was admitted on this subject and whether a ticket was or was not issued is not material for your deliberations.
>
> Mr. Schipke concedes that he was in the carpool lane although he was the sole occupant of his vehicle and would ordinarily be prohibited from using that lane under those circumstances. However, he disputes that he was illegally using the carpool lane based on his assertion that he was using it solely to avoid potential hazards created by the manner in which he claims Mr. Matysik was operating his vehicle. The plaintiff denies that there was any legal justification for his use of the lane based upon any potential hazard.
>
> It is for you and you alone to determine whether Mr. Schipke's use of the carpool lane was or was not legal and, if illegal, whether that illegal use was or was not a substantial factor in causing the accident or otherwise bears on how and why this accident occurred.

Schipke insists that the last sentence is the most offensive because:

> Notwithstanding the above, this instruction equates the "illegal" use of an HOV lane with negligence. There is simply no legal basis for this statement. It utterly removed the issue of negligence from the jury and allowed Plaintiff to avoid her burden to establish negligence. Instead, the instruction told the jury if it believed it was illegal for Schipke to be in the HOV lane, it should move right to the cause question of the verdict without any analysis or conclusion as to whether Schipke was negligent.

We are not persuaded.

¶11 Trial courts have the responsibility and discretion to formulate curative instructions to reduce the risk that a jury may be adversely influenced by some error that occurred at trial. *See* ***Genova v. State***, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979).

> The trial court has broad discretion when instructing a jury. A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. An error is prejudicial if it probably and not merely possibly misled the jury. If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist.

Fischer v. Ganju, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992) (citations omitted).

¶12 Here, the trial court advised the parties that one of the reasons the court felt a curative instruction was necessary was because it was concerned the jury would accept the judgment of a police officer that Schipke was illegally in the HOV lane. In other words, the curative instruction was given to remove any possibility that the jury would simply accept the fact that Schipke must be negligent because the police gave him a traffic citation. The trial court also incorporated Schipke's defense to being in the HOV lane into the instruction (i.e.

that he moved into the lane to avoid Scott Matysik, who was driving his motorcycle erratically). Contrary to Schipke's claim, the instruction did not state that if Schipke was in the HOV lane he was negligent. Rather, the instruction left the question to the jury to determine whether Schipke was in the lane legally or illegally, and, *if* illegally, whether it "was or was not a substantial factor in causing the accident." The instruction did not, as Schipke suggests, "remove[] the issue of negligence from the jury and allow[] Plaintiff to avoid her burden to establish negligence." There was no dispute that Schipke was in the HOV lane, and the issue of why Schipke was in the HOV line was critical to determining who caused the accident. Here, there was no error in the trial court's curative instruction; therefore, it was not prejudicial.

C. The asking of one question concerning Scott Matysik's motorcyclist abilities and the subsequent answer was harmless error.

¶13 During the trial, Matysik called Thomas Bauer as a witness. Bauer is the chief of police for the City of Oak Creek, a suburb of Milwaukee. His daughter is married to Matysik's son. His testimony covers five-and-one-half pages of the transcript. Bauer was asked one question concerning Scott Matysik's driving skills, over the objection of Schipke's attorney: "Well, you say he was a Harley man. How good of a biker was he?" Bauer gave the following answer: "Well, I do have an opinion based upon what I saw on [sic] him. He is kind of a smaller guy operating a full-sized Harley. I remember watching him on that grass at the high school and I was very impressed with how he handled the motorcycle."

¶14 Schipke argues that this evidence was improper "other acts" evidence requiring a new trial. We agree that the question was improper; however, we believe it to be harmless error.

¶15 WISCONSIN STAT. § 904.04(2)(a) sets out the rule prohibiting character evidence as it relates to other acts and the exceptions to the rule. Section 904.04(2)(a) reads:

> **Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> ….
>
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We agree that the solitary question asking for the assessment of Scott Matysik's motorcyclist skills should not have been admitted. In ***Hart v. State***, 75 Wis. 2d 371, 377-78, 249 N.W.2d 810 (1977), Hart was prosecuted for the death of a bicyclist allegedly caused by Hart's high degree of negligence at the time of the accident. Our supreme court discussed the admission of testimony concerning Hart's driving practices three months before a fatal accident. ***Id.*** at 390-94. The court determined that such testimony was inadmissible. ***Id.*** at 393. Thus, we agree with Schipke that the question concerning Scott Matysik's motorcycle driving skills that Bauer saw some time before the accident was inadmissible. The question then becomes whether the admission of this evidence is harmless error. We determine that it is.

¶16 An error is harmless if there is no reasonable possibility that the error contributed to the outcome of the action. *See* ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467. We first observe that Bauer was asked only one question concerning Scott Matysik's driving skills on a

motorcycle and this testimony was never mentioned at closing arguments. In addition, the jury was well aware of the likely bias on the part of Bauer towards the Matysiks, since his daughter was married to Matysik's son. Given that the jury attributed 30% negligence to Scott Matysik, we do not believe that one favorable answer concerning Scott Matysik's motorcyclist skills, in a trial that lasted three days, particularly when several objective eye witnesses testified to Scott Matysik's driving shortly before the accident, constituted an error that likely contributed to the outcome of the action.

D. The trial court properly denied Schipke's request to change the jury's answers to questions in the special verdict.

¶17 Schipke argues that the trial court erred in refusing to change several answers in the special verdict. Schipke requested that the trial court change the answer to three questions on the special verdict. He wanted the answer to question one to be changed to "no." Question one and the jury's answer reads:

> Question No. 1: At or immediately prior to the time of the accident of August 9, 2005, was the defendant, Dean Schipke negligent in the operation of his vehicle?
>
> Answer: Yes.

He also sought, if he was unsuccessful in getting the answer to question one changed, to have the trial court change the answer to question two to "no." Question two and the jury's answer reads:

> Question No. 2: Was such negligence a cause of the accident of August 9, 2005?
>
> Answer: Yes.

Finally, he sought a change in the percentages attributed to Schipke and Scott Matysik in the answer to question five. Schipke urges us to reapportion the

percentages to reflect that Scott Matysik's negligence was greater than Schipke's negligence. Question five and the jury's answer reads:

> Question 5: Taking the total negligence that caused the accident to be 100%, what amount of negligence [do] you attribute to:
>
> | | |
> |---|---|
> | Dean Schipke | 70% |
> | Scott Matysik | 30% |
> | TOTAL | 100% |

¶18 A motion to change answers on a special verdict form challenges the sufficiency of the evidence to sustain the jury's answers. *See* WIS. STAT. § 805.14(5)(c). A trial court will grant such a motion if there is no credible evidence to sustain the verdict. *See* § 805.14(1). We review challenges to the sufficiency of the evidence under the same standard. *See* ***State v. Michael J.W.***, 210 Wis. 2d 132, 143, 565 N.W.2d 179 (Ct. App. 1997). In addressing a motion to change a jury's special verdict answer, the trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). On appeal, we are guided by these same rules. ***Id.*** Moreover, we afford special deference to a jury determination in situations like this where the trial court has approved the findings of the jury. ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659. In such circumstances, "[w]e will not overturn the jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id.*** (citation omitted). We are satisfied that sufficient credible evidence was admitted at trial to permit the jury to answer the questions in the manner that they did.

¶19 Schipke first argues that there is no credible evidence to sustain the jury's determination that he was negligent, and if he was negligent, that it was a cause of the accident. Schipke insists that there is ample evidence of Scott Matysik's negligence, but none exists concerning his negligence. We disagree.

¶20 One eyewitness, Dan Carroll, testified that, contrary to Schipke's later explanation that he needed to go into the HOV lane because Scott Matysik was driving slowly and erratically, Scott Matysik never tipped the bike and never slowed to less than fifteen miles an hour prior to when Schipke entered the HOV lane. In addition, he testified that Schipke's vehicle jerked to the right (the direction where Scott Matysik was located) seconds before the accident. He also told the jury that Schipke told him he went into the HOV lane because Scott Matysik was driving too slowly, an assessment that Carroll did not share.

¶21 Another eyewitness, Matt Fohl, also testified. He stated that when Schipke's car drifted into the HOV lane he thought the driver may have been on the phone. Like Carroll, Fohl did not see the motorcycle traveling at an unusually slow pace, and he testified he witnessed no hazardous tipping of the motorcycle. He confirmed that earlier in the litigation he had stated that Schipke's car entered Scott Matysik's lane. In any event, he could tell that an accident was about to occur because of the close proximity of the vehicles to one another. He also described a conversation he had with Schipke after the accident. Schipke told Fohl that Scott Matysik must not have liked the fact that Schipke was accelerating. Further, there was evidence that Schipke had been tailgating the motorcycle, traveling only five feet behind the motorcycle until Schipke decided to pass Scott Matysik by moving into the HOV lane. Finally, Schipke admitted that at the time of the accident he was looking to his left, so he had no idea where the motorcycle was when the accident occurred, and it was not until after the accident that

Schipke claimed he moved into the HOV lane because of Scott Matysik's slow and erratic driving.

¶22 The cumulative effect of this evidence is that the jury could have concluded that Schipke became impatient while traveling behind the motorcycle, tailgated Scott Matysik until Schipke decided to pass Scott Matysik by going into the HOV lane, and while there, he did not keep a proper lookout for Scott Matysik's vehicle while accelerating, and thus, was also negligent in managing and controlling his vehicle when he struck the motorcycle. This evidence would support findings that Schipke was negligent, his negligence contributed to the accident, and the jury's attributing seventy percent of the total causal negligence to Schipke.

E. The trial court properly denied the request for a new trial in the interest of justice.

¶23 Schipke contends that the trial court should have granted his request for a new trial based upon the "totality of the errors" committed during the trial. The errors complained of are the identical issues raised in this appeal.

¶24 A trial court may grant a new trial in the interest of justice when the jury's findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. *See* ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 662, 279 N.W.2d 227 (1979). Thus, unlike the motion to change verdict answers or to direct a verdict, which are governed by the "any credible evidence" standard, *see* WIS. STAT. § 805.14, a new trial motion under WIS. STAT. § 805.15(1) invites (and permits) the trial court to weigh, at least to a limited extent, the evidence presented at trial. That court is better positioned than we "to observe and evaluate the evidence," and, thus, when

we review a trial court's decision to grant or deny a new trial motion under § 805.15(1) grounded on the claim that the verdict is "contrary to the great weight and clear preponderance of the evidence," we accord "great deference" to the trial court's exercise of discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). The reason for our deference is the trial court's superior opportunity to evaluate the evidence by observing the demeanor of witnesses and gauging the persuasiveness of their testimony. *See* ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 580-81, 278 N.W.2d 865 (1979). Thus, our role on Schipke's claim is to review the trial court's exercise of its discretion in denying the motion. *See* ***Priske***, 89 Wis. 2d at 663 ("The function of this court is not to exercise discretion in the first instance but to review the exercise of discretion by the trial court.").

¶25 In denying the motion for a new trial, the trial court analyzed the evidence as follows:

> There is overwhelming evidence in this record that this tragic incident was caused by Mr. Schipke initially following Mr. Matysik at an incredibly dangerous distance on the ramp then abruptly, and I hesitated when I put that word in my notes, but then I went back and looked at some of the briefs, and my notes, and I settled on abruptly being an adequate description based primarily on the testimony of Mr. Fohl who, if you will recall, testified that I think he said that he knew as soon as he moved the accident was going to happen. And he made some very disparaging comments about Mr. Schipke because of what was going on at that very instance.
>
> So he starts the sequence of events with this very dangerous tailgating. And I jerked a little bit when you said that the only evidence of a violation of the safety statute was Mr. Matysik deviating form his lane. I don't agree with that. I think there's clearly compelling evidence that Mr. Schipke violated a safety statute by the manner in which he was following this vehicle at a distance at which he was following this vehicle – motorcycle, not vehicle; then abruptly passing him illegally in the HOV lane which

> the jury ultimately, I don't think there is any question, that they ultimately determined that he was illegally using that lane, that there was [no] justification based upon the way in which Mr. Matysik was operating his motorcycle that he abruptly passed this motorcycle while illegally using the HOV lane while not maintaining an appropriate, effective looking out as to the movement of Mr. Matysik's motorcycle and not sounding a warning, a horn to warn Mr. Matysik of his intent to pass.
>
> Now, I do agree with Mr. Hills that, in fact, the safety statute does not apply. There was no statutory duty to sound the horn. However, I think it more than reasonable for this jury to, I think, a reasonable jury could and probably did factor in that under these circumstances, even circumstances as Mr. Schipke asserted them to be, that it was very inappropriate to pass this vehicle under these circumstances without warning the person ahead of you that you were going to do that.
>
> So under the reasonable care standards rather than a statutory safety statute standard I think a jury could usually determine that that was a contributing factor.
>
> One parting of the ways that I clearly have from Mr. Hills is Mr. Hills is insistent that nothing that happened before Mr. Schipke had changed lanes is – could conceivably be or should be considered as a causal factor to this accident. And I vehemently disagree with that. This was an ongoing series of events.

¶26 We agree with the trial court. There is ample evidence to support the jury's verdict. Evidence was admitted from a variety of witnesses to establish that Schipke was tailgating Scott Matysik and then decided to pass him by moving into the HOV lane. While accelerating to pass Scott Matysik, Schipke was looking to his left (Scott Matysik would have been on his right) and, at one point, his car jerked to the right. Matysik's expert witness calculated that the accident occurred on or near the stripe dividing the two lanes. Schipke also gave conflicting reasons as to why he went into the HOV lane. In weighing this evidence, the trial court was satisfied that sufficient evidence was introduced to sustain the jury's verdict. The trial court had the advantage of both observing the

witnesses and hearing their testimony. The trial court also could evaluate the effect of the testimony on the jury. Consequently, we see nothing that suggests the trial court erroneously exercised its discretion in refusing to order a new trial.

F. The trial court properly denied the request to pay the judgment amount to the clerk of courts.

¶27 Finally, Schipke argues that the trial court properly stayed the execution of the judgment but erroneously exercised its discretion in refusing to permit Schipke to pay the amount of the judgment into the clerk of courts, which would have had the effect of tolling the interest. We disagree.

¶28 ***Scullion v. Wisconsin Power & Light Co.***, 2000 WI App 120, ¶¶18-22, 237 Wis. 2d 498, 614 N.W.2d 565, lists the four factors that a trial court should consider when a party asks to stay the execution of the judgment and to toll the statutory interest: (1) the issues appealed and the likelihood of success on those issues; (2) the need to ensure the collectability of the judgment and accumulated interest if the appellant does not succeed on appeal; (3) the interests of the appellant; and (4) the harm to the respondent that may result if the judgment is not paid until completion of an unsuccessful appeal. These factors are not intended to be prerequisites, but rather interrelated considerations that must be balanced together. ***Id.***, ¶13.

¶29 Here, Matysik made an offer of settlement pursuant to WIS. STAT. § 807.01. Since Schipke did not accept the settlement offer, § 807.01(4) entitles Matysik "to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid."

¶30 In deciding against permitting Schipke to toll the interest, the trial court noted the intention behind the offer of settlement statute is to promote

settlements, and to allow the tolling would run counter to the statute's purpose to promote settlement. Further, the trial court observed that it would be "flabbergasted if this gets reversed on appeal." After discussing the other factors, the trial court elected to deny the tolling of interest because it believed Matysik was entitled to it. We agree.

¶31 As the trial court observed, in passing the offer of settlement statute, the legislature made a policy decision by permitting interest to run at a higher rate if a party elects not to accept an offer of settlement and then loses at trial than would otherwise apply. *See generally* ***Erickson v. Gunderson***, 183 Wis. 2d 106, 121, 515 N.W.2d 293 (Ct. App. 1994) (discussing common law prejudgment interest, which accumulates at the legal rate of 5%). In light of this and the other factors favoring Matysik, we see no erroneous exercise of discretion by denying Schipke's request to toll the interest. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.