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

**September 19, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP947** **Cir. Ct. No. 2012CV13059**

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

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**ESTATE OF RONALD ZIOLKOWSKI, JULIE ZIOLKOWSKI AND U.S.A. DEPT. OF VETERAN AFFAIRS,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**WMK, LLC D/B/A MOBILITY WORKS, LLC AND NAVIGATORS INSURANCE COMPANY,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRASH, J. WMK, LLC d/b/a Mobility Works, LLC together with its insurer, Navigators Insurance Company (collectively "Mobility Works"),

appeal from a judgment entered in favor of the Estate of Ronald Ziolkowski, Julie Ziolkowski, and the United States Department of Veteran Affairs (collectively "Plaintiffs"). Ronald[1], who suffered from multiple sclerosis (MS), was driving his van, which had been outfitted with wheelchair adaptive equipment by Mobility Works, when he lost control of the vehicle; in the resulting crash, Ronald's leg was broken. A jury found Mobility Works negligent in its installation of the wheelchair adaptive equipment in Ronald's vehicle and awarded damages totaling over $5,000,000.

¶2 On appeal, Mobility Works challenges numerous evidentiary rulings and asserts that the evidence is insufficient to support the verdict. It also argues that the trial court erroneously exercised its discretion in failing to instruct the jury on comparative negligence with regard to Julie's occasional removal of the wheelchair locking plate to install a regular seat in the van.

¶3 Additionally, Mobility Works appeals the damages awarded to the Plaintiffs for past pain, suffering and disability, past health care expenses and nursing care, and loss of consortium, asserting that the amounts are excessive. Mobility Works also contends that a curative instruction should have been given to the jury with regard to the consideration of Ronald's death, which occurred during the course of this action, as it relates to Julie's loss of consortium claim. Finally, Mobility Works asserts that the trial court should have ordered remittitur for the allegedly excessive verdict. We affirm.

[1] To avoid confusion, for the purposes of this appeal Ronald and Julie Ziolkowski will be referred to by their first names.

## BACKGROUND

¶4 This case stems from a single-vehicle accident that occurred on December 17, 2009, when Ronald lost control of his van and crashed into a tree. Ronald had been diagnosed with MS in 1984, and at the time of the accident was required to use a wheelchair. His van was equipped with adaptive equipment that allowed him to operate the vehicle: a locking plate, called a Permolock device, had been installed in the floor of the driver's side of the van which locked the wheelchair in place while Ronald was driving. The button to release the locking plate was located on the dashboard. There was also a steering knob and hand controls for the gas and the brake. Mobility Works had installed the Permolock device and the other adaptive equipment, and serviced them as well.

¶5 Ronald alleged that at the time of the accident, he was accelerating away from a stop sign when his wheelchair suddenly detached from the locking plate and started sliding backwards. He let go of the hand control for the gas and brake and grabbed the steering wheel to try to keep his wheelchair from going back any further. He was able to steer himself out of traffic and into a driveway, but could not reach the brakes to stop the van before running into a tree. Ronald suffered a broken femur as a result of the accident. He also claimed that the accident significantly exacerbated his MS symptoms.

¶6 The Plaintiffs filed this action in December 2012, alleging that Mobility Works was negligent with regard to the installation of the adaptive equipment in Ronald's van. During the course of these proceedings, on October 14, 2015, Ronald passed away.

¶7 This matter went to trial in December 2015. Ultimately, the jury agreed with the Plaintiffs, finding Mobility Works negligent in the installation,

inspection, assembly, or maintenance of the Permolock device and other adaptive equipment in the van, and that this negligence was a cause of Ronald's accident. The jury awarded Ronald's estate $3,000,000 for past pain, suffering, and disability, $350,000 for past health care expenses, and $500,000 for personal nursing care. It further awarded $2,000,000 to Julie for loss of consortium. The jury apportioned no negligence on Ronald's part for the accident.

¶8 Mobility Works filed motions after verdict seeking a directed verdict or a new trial on grounds that there was insufficient credible evidence to support the verdict, and on grounds that the damages were excessive. The motions were denied by the trial court. This appeal follows.

## DISCUSSION

### I. Challenges to the Verdict with Regard to Liability

¶9 Mobility Works asserts that the trial court erroneously exercised its discretion with regard to several evidentiary rulings, including the admissibility of expert testimony, which led to the jury's finding of liability on the part of Mobility Works. Mobility Works also challenges the trial court's failure to instruct the jury with regard to potential comparative negligence. It further contends that there was no credible evidence to establish causation on the part of Mobility Works for the accident, and that the jury's verdict on causation was against the great weight and clear preponderance of the evidence.

#### A. Evidentiary Rulings

¶10 "When reviewing a question on the admissibility of evidence, an appellate court must determine whether the court exercised its discretion in accordance with accepted legal standards and with the facts of record." ***State v.***

***Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). This court will uphold a discretionary decision "'if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Hefty v. Strickhouser***, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted).

¶11 The admissibility of expert testimony is determined according to the provisions of WIS. STAT. § 907.02 (2015-16).[2] That statute, which is based on the ***Daubert***[3] standard, provides:

> (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

WIS. STAT. § 907.02(1).

¶12 Under this standard, the trial court acts as a "gate-keeper" to "ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. In making its determination, the trial court asks "whether the scientific principles and methods that the expert relies upon have a reliable foundation 'in the knowledge and experience of [the expert's] discipline.'" ***Id.***

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

(quoting ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 592 (1993)). Factors that are relevant to this determination include "whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." ***Giese***, 356 Wis. 2d 796, ¶18.

¶13 Nevertheless, the trial court enjoys "'the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.'" ***Seifert v. Balink***, 2017 WI 2, ¶64, 372 Wis. 2d 525, 888 N.W.2d 816 (quoting ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 142 (1999)) (emphasis omitted). As such, the trial court "may consider some, all, or none of the factors listed to determine whether the expert evidence is reliable." ***Seifert***, 372 Wis. 2d 525, ¶65. Ultimately, the goal of the trial court should be to "prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Giese***, 356 Wis. 2d 796, ¶19. Accordingly, the trial court should "focus on the principles and methodology the expert relies upon, not on the conclusion generated." ***Id.***, ¶18. As with other evidentiary rulings, we review the admission or exclusion of expert testimony under the erroneous exercise of discretion standard. *See* ***id.***, ¶16.

*1. Objection to Plaintiffs' Expert Witness Larry Burck*

¶14 Mobility Works first challenges the trial court's denial of its motion to exclude the deposition testimony of Larry Burck, the Plaintiffs' liability expert.[4] Burck's deposition testimony supported the Plaintiffs' theories of causation and liability: that Ronald had, just prior to the accident, inadvertently touched the

[4] During the course of these proceedings, Burck fell ill and was unable to continue his involvement in this case, including testifying at trial.

release button for the locking plate located on the dashboard because of its proximity to the hand controls as well as the heating vent and turn signal. The Plaintiffs claimed that Mobility Works was negligent in the installation of the adaptive equipment, particularly with regard to a faulty electrical fuse tap connection. That fuse should have caused an alarm to sound upon release of the wheelchair from the locking plate; however, the Plaintiffs alleged that due to its faulty installation, there was no warning that the wheelchair had been released from the locking plate just prior to the accident.

¶15 Mobility Works argues that the provisions of WIS. STAT. § 907.02(1) regarding the admissibility of expert testimony were not followed, and thus Burck's deposition testimony should not have been admitted. Specifically, Mobility Works points to the fact that Ronald, in his deposition testimony, indicated that he was not aware of having inadvertently hit the release button with the hand controls or while using the hand controls in the vehicle just prior to the accident. Based on that statement, Mobility Works asserts that Burck's expert opinion was not applied correctly to the facts of the case; in fact, Mobility Works contends that Burck's opinion was premised on assumed facts and speculation because it contradicted the facts in the record.

¶16 The trial court disagreed. Initially, in making its pretrial determination on the matter, the trial court noted that even though Ronald stated in his deposition testimony that he was not aware of touching the release button, he could still acknowledge in his trial testimony that there was a possibility that he hit the button. Mobility Works, through counsel, would then have the opportunity to cross-examine Ronald on the inconsistencies of his testimony. Of course, this never occurred, because Ronald passed away prior to trial.

¶17 Nevertheless, the trial court maintained that Burck's deposition testimony was properly admitted. In its decision and order regarding the motions after verdict, the trial court, while acknowledging that there was no direct evidence that Ronald had inadvertently touched the release button on the dashboard, found it to be a reasonable inference by the jury that he did. The trial court further held that it was reasonable for the jury to conclude that the wheelchair would not have been released after such a quick touch but for the negligence of Mobility Works in its installation of the equipment. The court emphasized the fact that there was evidence that the locking plate had failed prior to the accident, in June 2009, at which time Ronald had taken his vehicle to Mobility Works to repair the problem.

¶18 "[I]t is for the trial court to resolve conflicts in the testimony." ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. Therefore, "we will uphold [the trial court's] calls as to witness credibility unless they are inherently or patently incredible, and we will not second-guess the trial court's reasonable factual inferences." ***Id.*** Here the trial court considered Burck's deposition testimony as it applied to the facts of the case, pursuant to the requisite standard, and found it to be sufficiently reliable. *See* WIS. STAT. § 907.02(1). We find that to be a reasonable exercise of discretion.

*2. Objection to Plaintiffs' Expert Witness John DeRosia*

¶19 Mobility Works objects to the admission of the testimony of John DeRosia, the liability expert witness retained by the Plaintiffs in place of Burck. The challenge was not related to DeRosia's qualifications; rather, Mobility Works opposed the admission of DeRosia's testimony because his opinion was based in part on Burck's expert report. As just discussed, Mobility Works argued that Burck's testimony was inadmissible due to his reliance on the possibility that

Ronald had inadvertently touched the release button for the wheelchair locking plate. As we have already found that the admission of Burck's report and deposition testimony was not an erroneous exercise of discretion on the part of the trial court, we do not discuss this argument further.

¶20 Additionally, Mobility Works argues that DeRosia should not have been permitted to rely on an affidavit of Ronald's that was submitted with a pretrial motion on this issue. In that affidavit, brought in April 2015, well after his deposition testimony taken in 2013, Ronald stated that he may have accidentally touched the release button when he was at the stop sign just prior to the accident, when he was reaching for the heating vent or the turn signal.

¶21 Mobility Works asserts that this is a "sham affidavit" because it directly contradicts Ronald's deposition testimony that he was not aware of having touched the wheelchair release button on the dashboard prior to the accident. Wisconsin adopted the federal rule regarding sham affidavits as they relate to summary judgment motions, "precluding the creation of genuine issues of fact on summary judgment by the submission of an affidavit that directly contradicts earlier deposition testimony." ***Yahnke v. Carson***, 2000 WI 74, ¶¶15, 20, 236 Wis. 2d 257, 613 N.W.2d 102. The premise for this rule is that "testimony given in depositions, in which witnesses speak for themselves, subject to the give and take of examination and the opportunity for cross-examination, is more trustworthy than testimony by affidavit, which is almost always prepared by attorneys." ***Id.***, ¶15. Although referred to as the "sham affidavit rule," it is not necessarily meant to be indicative of fraud or that the affidavit was brought for other "improper purposes"; "[r]ather, the rule recognizes that contradictory affidavits tend to create sham, rather than genuine, issues." ***Id.***, ¶16.

¶22 The Plaintiffs contend that the affidavit did not actually contradict Ronald's previous testimony because he was "never directly and specifically asked about inadvertent touching." That is not entirely accurate. Ronald was asked on at least two different occasions whether he had ever inadvertently hit the release button with the hand controls. His replies to those questions were "[n]ever" and "[n]ot that I'm aware of." However, Ronald's affidavit focuses on other facts: that Ronald was wearing gloves on the day of the accident, and that it was possible that he had inadvertently touched the release button when he adjusted the heating vent or put the turn signal on just before the accident without being aware that he had done so.

¶23 We also note that Ronald's affidavit was brought approximately six months before his death. There is evidence that Ronald's health was declining at that point, and this affidavit may have been an attempt to elicit relevant testimony in the event that he was not able to testify at trial, which, in fact, he was not. Thus, we do not consider the affidavit to be a sham affidavit.

¶24 This issue was addressed at a pretrial hearing on Mobility Works's motion to preclude DeRosia's expert testimony. The trial court noted that Ronald had not definitively stated, in either his deposition testimony or his subsequent affidavit, that he had pressed or not pressed the release button. Therefore, the trial court reasoned that the door was open for an expert to form a theory as to what happened.

¶25 In the same vein, during the trial Mobility Works objected to DeRosia's testimony that he believed that Ronald had inadvertently hit the release button just prior to the accident. In making its ruling, the trial court reiterated that an expert cannot be a conduit for introducing inadmissible hearsay or speculation.

However, the trial court allowed testimony relating to the proximity of Ronald's hand to the release button, finding that to be a reasonable inference as opposed to speculation. Thus, the court allowed DeRosia's testimony, finding that it had a proper factual basis from Ronald's statements as well as from data used by other experts.

¶26 We find that the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28. Therefore, this was not an erroneous exercise of discretion on the part of the trial court.

*3. Objection to Plaintiffs' Expert Witness Dr. Farhad Sepahpanah*

¶27 Mobility Works sought to preclude the testimony of Dr. Farhad Sepahpanah, a physician with the Medical College of Wisconsin who treated patients at the Veterans Affairs Medical Center in Milwaukee. Dr. Sepahpanah is an expert in treating patients with spinal cord injuries, about ten percent of whom have MS. He began treating Ronald in 2008 and continued to treat him until he died.

¶28 In its pretrial motion, Mobility Works argued that Dr. Sepahpanah was not an expert in treating MS. It further argued, and reiterates on appeal, that Dr. Sepahpanah did not review all of Ronald's medical records, and therefore his opinion was based on insufficient facts and data. The trial court rejected both arguments. It found that as a physician who treats MS patients, Dr. Sepahpanah's qualifications were sufficient to meet the ***Daubert*** standard. It further found that Dr. Sepahpanah's review of a portion of Ronald's medical records, and his application of his knowledge of MS to those records and to the facts of the case, was an appropriate methodology. In fact, the trial court correctly pointed out that

Dr. Sepahpanah's failure to review all of Ronald's medical records goes to the weight of his testimony, not its admissibility.

¶29 We agree. As our supreme court recently reaffirmed, "***Daubert*** makes the trial court a gatekeeper, not a fact finder. When credible, qualified experts disagree, a litigant is entitled to have the jury, not the trial court, decide which expert to believe." ***Seifert***, 372 Wis. 2d 525, ¶59. The trial court again applied the proper standard and reached a reasonable conclusion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28. Accordingly, we find that it did not erroneously exercise its discretion.

*4. Objection to Plaintiffs' Expert Witness Cynthia Bune, R.N., CLNC*

¶30 Mobility Works objects to this witness first on procedural grounds. Cynthia Bune is a legal nursing consultant, and was not disclosed by the Plaintiffs as an expert witness until one year after the deadline for expert designations. Prior to the deadline, the Plaintiffs had merely stated that they planned on calling a nursing consultant, without providing a name, as they had not yet retained Bune. The trial court indicated at the pretrial motion hearing that this was not an appropriate way for the Plaintiffs to have handled the situation; instead, they should have requested from the court relief from the scheduling order. However, given that the trial was already subject to delay due to the health problems of another of the Plaintiffs' expert witnesses, Burck, the trial court allowed the late disclosure because Mobility Works had enough time to perform discovery relating to this witness.

¶31 "A [trial] court has both statutory and inherent authority to control its docket through a scheduling order." ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶57, 338 Wis. 2d 34, 808 N.W.2d 372; WIS. STAT. § 802.10(3). We review

such a decision under the erroneous exercise of discretion standard, and the trial court's decision "'will not be disturbed unless rights of the parties have been prejudiced.'" ***Alexander v. Riegert***, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987) (citation omitted). The trial court specifically addressed the issue of prejudice to the defense with this scheduling order modification, finding that there would be none since the defense was being provided ample time for discovery relating to this witness as well as for the replacement witness for Burck. We agree, and therefore affirm the admission of Bune's testimony.

*5. Objection to Hearsay Permitted in Plaintiffs' Opening Statement*

¶32 Mobility Works next argues that the trial court improperly denied its request for a mistrial after the Plaintiffs, in their opening statement, referenced the conclusions of two of their experts who ultimately did not testify. One of the experts, Donald Marty, was an employee of Permobil, the company that manufactured the wheelchair locking system; Permobil was released from the lawsuit prior to trial. The other expert cited in Plaintiffs' opening statement was Burck, who fell ill prior to trial and was unable to continue his involvement in the case.

¶33 Mobility Works contends that these references to non-testifying experts were hearsay statements that the trial court had already warned should not be included. The Plaintiffs, on the other hand, assert that Mobility Works did not properly preserve this objection. "'It is necessary to make immediate objection and to move for a mistrial if the issue is misconduct of counsel.'" ***Sanders v. State***, 69 Wis. 2d 242, 263, 230 N.W.2d 845 (1975) (citation omitted).

¶34 The record reflects that counsel for Mobility Works objected at this point in the Plaintiffs' opening statement and requested a sidebar, which was

denied; however, the trial court immediately advised the jury that anything said during opening statements that is not "ultimately received in evidence, you are going to have to completely disregard it and strike it from your minds because your decision is made based on the evidence." The trial court confirmed that all thirteen jurors understood that instruction.

¶35 At the conclusion of the Plaintiffs' opening statement, and outside of the presence of the jury, the trial court heard Mobility Works's argument upon which its objection was based. Although not specifically stated by Mobility Works, the trial court recognized the argument as a motion for mistrial and denied it. "Whether to grant a motion for a mistrial is within the trial court's discretion." ***State v. Givens***, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). This discretion is due to the trial court's "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 and one set of quotation marks omitted). "The trial court's decision on a motion for a mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court." ***Jensen v. McPherson***, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 685 N.W.2d 603.

¶36 Here, the trial court denied Mobility Works's motion for mistrial because it found that the jury was not "in any manner, shape or form prejudiced by the opening statement." We affirm that decision because the curative instruction given to the jury by the trial court—that the jury was to consider only evidence that is admitted during trial in making its decision—was sufficient to resolve any problematic issues with the Plaintiffs' opening statement. Courts are "required to presume the jury obeyed the instructions as given." ***State v. Abbott Labs.***, 2012

WI 62, ¶103, 341 Wis. 2d 510, 816 N.W.2d 145. The trial court was confident in the jury's understanding of the instruction.

¶37 Furthermore, pursuant to the ***Daubert*** standard, conclusions of other experts may be relied upon by testifying experts. ***State v. Williams***, 2002 WI 58, ¶29, 253 Wis. 2d 99, 644 N.W.2d 919. Thus, even if it was error to allow references to non-testifying experts during the opening statement, the error was harmless because the testifying experts were allowed consider that information in forming their opinions.

*6. Exclusion of Mobility Works's Witness Carol Fleuter*

¶38 Carol Fleuter is Ronald's sister. Prior to trial, she approached Mobility Works indicating that she had personal knowledge regarding Ronald's physical condition, as well as information about his use of the vehicle that was relevant to this lawsuit. She was deposed and was willing to testify at trial as a defense witness. However, the Plaintiffs moved to exclude her as a witness on grounds that she was not named until well after the deadline set forth in the scheduling order for disclosing witnesses. They also suggested that Fleuter's true motive for her testimony was grounded in family turmoil.

¶39 The trial court granted the Plaintiffs' motion. The court acknowledged that the testimony was relevant, and that any underlying motive could be attacked on cross-examination. However, the court focused on the fact that Fleuter had not come forward until after Ronald had passed away and that her testimony could have been contradicted only by Ronald. The court determined that that would be "patently unfair," citing ***Fredrickson v. Louisville Ladder Co.***, where the court, referencing a rule from the American Law Institute Model Code of Evidence, stated that a trial court may "'exclude evidence if [it] finds that its

probative value is outweighed by the risk that its admission will ... unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.'" ***Id.***, 52 Wis. 2d 776, 783, 191 N.W.2d 193 (1971) (citation omitted).

¶40 The trial court here noted that those circumstances are "exactly what we have here." The court further recognized that for Fleuter to be allowed to testify at trial, Mobility Works essentially needed the court to grant a motion to amend the scheduling order. The court refused to exercise its discretion to do so.

¶41 We again note that we review the decision of the trial court relating to amendments to the scheduling order under the erroneous exercise of discretion standard. *See* ***Alexander***, 141 Wis. 2d at 298. We find that the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28. Accordingly, this was not an erroneous exercise of its discretion.

*7. Exclusion of Ramp Demonstration*

¶42 The defense presented by Mobility Works in this case included the position that Ronald's wheelchair was never locked into the locking plate on the date of the accident. To demonstrate that Ronald could have backed out of his sloping driveway without being locked in and without the wheelchair rolling backwards, Mobility Works sought permission to perform a courtroom demonstration for the jury with a wooden ramp with the same slope as the Ziolkowskis' driveway, and a wheelchair similar to the one Ronald was using at the time of the accident. This demonstration was to rebut the testimony of the Plaintiffs' expert DeRosia, who testified that the wheelchair would start to roll back at a lesser slope than the driveway.

¶43 The trial court did not allow the demonstration. It ruled that the demonstration would not utilize equipment that was sufficiently similar to Ronald's equipment at the time of the accident. Specifically, the trial court noted that the locking plate in Ziolkowskis' van was metal, while the ramp that would have been used for the demonstration was wood. The court further noted that Mobility Works had not laid a proper foundation to show that the replicate wheelchair that was to be used for the demonstration was similar to Ronald's wheelchair.

¶44 Mobility Works's argument is basically that it was "unfair" for the trial court to deny this demonstration when it had allowed DeRosia to perform demonstrations during his testimony. That, however, is not our standard of review. Rather, in reviewing a trial court's evidentiary ruling, we determine whether the trial court properly exercised its discretion, and will affirm the ruling "if there is a reasonable basis for the trial court's determination." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). This standard is based on the trial court's "broad discretion in determining the relevance and admissibility of proffered evidence." ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988).

¶45 In its analysis, as described above, the trial court established a reasonable basis for denying Mobility Works's request to perform the ramp demonstration. We therefore affirm the trial court's ruling.

*8. Admission of Plaintiffs' "Day in the Life" Video*

¶46 Next, Mobility Works challenges the trial court's denial of its motion to preclude a video presented by the Plaintiffs of a "Day in the Life" of Ronald. The video depicted Ronald's physical condition since the accident, and

was designed to assist the jury in understanding the testimony of Dr. Sepahpanah, Ronald's treating physician.

¶47 Mobility Works argued that the video misrepresented the effects of the accident and instead was actually was a depiction of the day in the life of someone with MS, because there was evidence that Ronald required some of the care shown in the video prior to the accident as well as afterwards. The Plaintiffs countered that Mobility Works's arguments went to the weight of the evidence as opposed to its admissibility.

¶48 The trial court ruled that Dr. Sepahpanah's testimony provided a basis for admission of the video. The court reasoned that the video could help the jury "parse out" what part of Ronald's condition had been exacerbated by the accident, if any, for its determination of damages. Additionally, the court read a cautionary instruction to the jury, prior to the showing of the video, in which it stated that the purpose of the video was to assist the jury with the damages questions of the verdict, and not to "evoke or arouse any sympathy, prejudice or passion," and that the jury was not to "let it have such an influence on you."

¶49 We reiterate that courts are "required to presume the jury obeyed the instructions as given." ***Abbott Labs.***, 341 Wis. 2d 510, ¶103. We further note that the trial court's reasoning as described above establishes a reasonable basis for allowing the video to be shown. We therefore affirm the trial court's ruling on this issue.

### B. Rejection of Comparative Negligence Jury Instruction

¶50 Mobility Works objects to the trial court's denial of its request to instruct the jury as to possible comparative negligence on the part of Julie or other

unknown persons who had, at different times prior to the accident, removed the locking plate from the van and installed a regular driver's seat for their use of the vehicle. Mobility Works asserted that there was sufficient evidence that the locking plate had not been properly reinstalled after one of these substitutions.

¶51 The trial court disagreed, stating that this argument was speculative and it would thus be inappropriate to add Julie to the verdict form for purposes of negligence apportionment. The court also noted that even if Julie had reinstalled the locking plate in the correct position, it was ultimately up to Ronald to ensure that the placement of the plate was proper before operating the vehicle, and therefore any apportionment of negligence would be proper only as to Ronald.

¶52 "A trial court has wide discretion in issuing jury instructions." ***State v. Clausen***, 105 Wis. 2d 231, 240, 313 N.W.2d 819 (1982). Furthermore, "'ultimate resolution of the issue of the appropriateness of giving particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground.'" ***Id.*** at 240-41 (citation and brackets omitted). This being a discretionary decision, we review whether the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28.

¶53 Mobility Works provided no evidence that Julie or any other person made any substitution of the driver's seat just prior to the accident. Therefore, based on the law and the facts of the case, the trial court made a reasonable determination not to include the jury instruction for comparative negligence. As a result, this was not an erroneous exercise of discretion.

### C. Sufficiency of the Evidence

¶54 Mobility Works also challenges the overall sufficiency of the evidence, arguing that is does not support the finding that its negligence caused the accident. A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." WIS. STAT. § 805.14(1). This standard applies to appellate court review as well as to the trial court. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). However, because the trial court is "better positioned to decide the weight and relevancy of the testimony, an appellate court 'must also give substantial deference to the trial court's better ability to assess the evidence.'" ***Id.*** at 388-89 (citation omitted).

¶55 In its decision and order on motions after verdict, the trial court noted that there were only two ways in which the wheelchair could have come free from the locking plate: (1) Ronald intentionally depressed the release button; or (2) Ronald inadvertently hit the release button momentarily and, due to improper installation of the equipment by Mobility Works, the alarm failed to warn him that it had been released. In contrast, Mobility Works argues that there are other possible reasons—basically, errors by Ronald in using the equipment—that would explain why the wheelchair was detached from the locking plate just prior to the accident.

¶56 In considering a motion after verdict challenging the sufficiency of the evidence, the trial court "must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence."

***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). "'The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment." ***Id.*** (citation omitted). Furthermore, "'where more than one inference can be drawn from the evidence,' the trial court must accept the inference drawn by the jury." ***Id.*** (citation omitted). On appeal, we abide by these same guidelines. *See* ***id.***

¶57 The trial court pointed to the deposition testimony of Ronald and the expert testimony of DeRosia as evidence supporting the jury's verdict. Ronald testified that he had significant experience in working the adaptive equipment, having driven his vehicle with this equipment over 500 times. He further testified that on the day of the accident, prior to leaving his house, he had engaged the locking system and saw the green light on the dashboard indicating that the system was in working order. In addition, DeRosia testified as to how the system could have malfunctioned resulting in the wheelchair releasing from the locking plate without warning.

¶58 The trial court determined this to be sufficient credible evidence to sustain the jury verdict. Nevertheless, Mobility Works argues that even if the evidence is found to be credible, it is entitled to a new trial because the verdict was contrary to the great weight and clear preponderance of the evidence. The trial court rejected that argument.

¶59 "[W]here, as here, the trial court has approved the jury verdict, the scope of our review is even narrower: the verdict may not be overturned unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996) (citation omitted). Based on the evidence in the record, a portion

of which is described above, that is not the case here. Rather, in spite of Mobility Works's offer of alternative possibilities, the jury simply chose to believe the Plaintiffs' theory. We therefore affirm the jury's verdict regarding the liability of Mobility Works.

## II. Challenges to the Damages Awarded in the Verdict

¶60 Mobility Works next asserts that the trial court erred in upholding the damages awarded to the Plaintiffs by the jury. In its verdict, the jury awarded Ronald's estate $350,000 in past health care expenses; $3,000,000 for past pain, suffering, and disability; and $500,000 for personal nursing care and service. Additionally, Julie was awarded $2,000,000 for lack of consortium. Mobility Works contends that these damages are excessive and not supported by the evidence, and that it is therefore entitled to a new trial. The trial court approved each of these awards, ruling that they were fair and reasonable and supported by the evidence.

¶61 Mobility Works further argues that it was prejudiced by the trial court's failure to issue a curative instruction with regard to Dr. Sepahpanah's testimony that Ronald ultimately died due to the injuries he suffered in the accident, because this resulted in an excessive damages award. Additionally, Mobility Works asserts that the trial court should have ordered remittitur due to the excessive damages.

### A. Request for New Trial Due to Excessive Damages

¶62 "A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-

discovered evidence, or in the interest of justice." WIS. STAT. § 805.15(1). However, we will not overturn the trial court's decision regarding whether or not to grant a new trial unless there is "a clear showing of an erroneous exercise of discretion." *See* ***Hegarty v. Beauchaine***, 2006 WI App 248, ¶247, 297 Wis. 2d 70, 727 N.W.2d 857. "We exercise our discretionary power to grant a new trial infrequently and judiciously." ***Id.***

¶63 An award is excessive if it "reflects injuries not proved or 'a rate of compensation beyond reason.'" ***Staskal v. Symons Corp.***, 2005 WI App 216, ¶38, 287 Wis. 2d 511, 706 N.W.2d 311 (citation omitted). "When a [trial] court rules on a motion challenging a damage award as excessive, the court is to view the evidence in the light most favorable to the jury's verdict." ***Id.***, ¶39. To that end, if there is "any credible evidence under any reasonable view that supports the jury's finding on the amount of damages, the court is to affirm it." ***Id.***

*1. Damages for Past Pain, Suffering and Disability*

¶64 Mobility Works argues that these damages are not supported by the evidence because the Plaintiffs' evidence on this issue, namely the testimony of Ronald's family members who stood to gain from a large damages award, should have been outweighed by the evidence set forth in Ronald's medical records.

¶65 The trial court, on the other hand, focused on the testimony of Dr. Sepahpanah. The court noted that Dr. Sepahpanah was "the only person in the medical field" who treated Ronald both before and after the accident. In fact, Dr. Sepahpanah was not paid for his expert testimony; he voluntarily came forward out of a sense of duty toward his patient.

¶66 Dr. Sepahpanah unequivocally stated that Ronald's injuries from the accident aggravated and exacerbated his MS. His testimony was then corroborated by Ronald's family, who testified about the immense pain he was in from his wounds after the accident. Dr. Sepahpanah's testimony also established that the costs and expenses for Ronald's medical treatment after the accident were for "reasonable and necessary care as a result of the accident."

¶67 "'We afford special deference to a jury determination in those situations in which the trial court approves the finding of a jury.'" ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803 (citation omitted). "'Under our judicial system, we rely primarily upon the good sense of jurors to determine the amount of money which will compensate an individual for whatever loss of well-being he has suffered as a result of injury.'" ***Id.***, ¶58 (citation omitted). Furthermore, it is not the task of the trial court, nor the task of this court upon review, to "'substitute [its] judgment for that of the jury'"; rather, courts are to "'determine whether the award is within reasonable limits.'" ***Id.*** (citation omitted; brackets in original). The trial court did just that in its analysis, and we affirm.

*2. Damages for Past Health Care and Nursing Expenses*

¶68 The Plaintiffs established the basis for the damages for nursing expenses through the testimony of Bune, the legal nursing consultant the Plaintiffs called as an expert witness. Mobility Works challenged Bune's testimony on procedural grounds, as discussed above. The trial court rejected Mobility Works's argument on that issue, a decision that we are affirming, as discussed above.

¶69 In addition to Bune's testimony, Ronald's family testified as to the level of care he required after the accident, as well as providing further evidence

as shown in the "Day in the Life" video that the trial court admitted. This court is affirming that evidentiary decision as well.

¶70 With regard to the damages for past health care expenses, Mobility Works argues that the expenses were unproven, because instead of submitting the actual medical bills, the Plaintiffs offered only a chart summarizing Ronald's medical expenses. In contrast, the Plaintiffs contend that WIS. STAT. § 910.06 allows for such summaries to be used in cases of "voluminous" records which "cannot conveniently be examined in court." ***Id.*** The Plaintiffs further assert that Dr. Sepahpanah authenticated the summary, which was confirmed by the trial court in its decision and order on the motions after verdict. The trial court also noted that Mobility Works had called its own expert witness, Dr. Barry Arnason, a neurologist specializing in MS, to counter Dr. Sepahpanah's testimony.

¶71 The party disputing the accuracy of a summary admitted pursuant to WIS. STAT. § 910.06 has the burden of showing "how the summary does not accurately reflect the underlying data when that party has access to the underlying data." ***Horak v. Building Servs. Indus. Sales Co.***, 2008 WI App 56, ¶4, 309 Wis. 2d 188, 750 N.W.2d 512. Mobility Works does not even argue that the amounts set forth in the summary were inaccurate, much less provide proof of any inaccuracies. Moreover, the trial court found that the amount awarded by the jury for past medical expenses, $500,000, was reasonable compensation that was supported by the evidence. In fact, the trial court pointed out that this amount was $50,000 less than the amount requested by the Plaintiffs for these expenses.

¶72 After again giving the appropriate deference due to the jury verdict as well as the trial court's findings on this issue, we affirm. *See* ***D.L. Anderson's Lakeside Leisure Co.***, 314 Wis. 2d 560, ¶22.

*3. Damages for Loss of Consortium*

¶73 A party may recover for loss of companionship of a spouse, which includes "intangibles such as love, affection, sex and solace." ***Redepenning v. Dore***, 56 Wis. 2d 129, 137, 201 N.W.2d 580 (1972). Mobility Works asserts that there is no evidence showing that the Ziolkowskis' relationship was any different after the accident than it was before the accident due to Ronald's condition. On the contrary, there was testimony from family members regarding changes in Ronald after the accident. For example, his stepdaughter testified that after the accident "he was very depressed" and withdrawn, and "didn't want to do anything." In addition, his grandson testified that Ronald lost most of his control of his upper body after the accident, and was no longer able to do things he enjoyed, like driving and cooking.

¶74 Thus, the trial court ruled that the award to Julie was supported by the evidence. The court found that the award covered an expanse of six years following the accident, as Julie watched her husband deteriorate until he ultimately died. Therefore, the trial court ruled that the award, which was slightly more than twice the amount for Ronald's health care and personal nursing expenses, was "fair and just compensation."

¶75 Again, giving proper deference to the jury verdict along with the trial court's ruling, we affirm. *See* ***D.L. Anderson's Lakeside Leisure Co.***, 314 Wis. 2d 560, ¶22. Furthermore, because we do not find a "clear showing of an erroneous exercise of discretion" by the trial court in its decision, we reject Mobility Works's request to "exercise our discretionary power to grant a new trial." *See* ***Hegarty***, 297 Wis. 2d 70, ¶247.

### B. Damages were not the Result of Prejudice or Perversity

¶76 A verdict is determined to be perverse "when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning***, 56 Wis. 2d at 134 (footnote omitted). Again, the trial court's confirmation of a verdict will be overturned only if it is found to have been the result of an erroneous exercise of discretion. ***Id.***

¶77 Mobility Works argues that the damages awarded, particularly the loss of consortium award to Julie, was an emotional response on the part of the jury that stemmed primarily from Dr. Sepahpanah's testimony that Ronald ultimately died as a result of his injuries from the accident. The premise for this argument appears to be based in the Plaintiffs' request that the jury consider damages for future loss of consortium as well as past loss of consortium. The trial court rejected this request, noting that the Plaintiffs had an opportunity to amend their complaint to include a claim for wrongful death, but did not do so. Mobility Works thus argues that there should have been a curative instruction to the jury to disregard Dr. Sepahpanah's testimony.

¶78 In our review of the record, we note that Mobility Works did not request a curative instruction at the time the trial court was reviewing the proposed jury instructions. Section 805.13(3) of the Wisconsin Statutes states that during the review of proposed jury instructions "[c]ounsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record." However, failure by

counsel to object to any proposed instruction "constitutes a waiver of any error in the proposed instructions or verdict." ***Id.***

¶79 Furthermore, even if this argument was not waived, it nevertheless fails. We again note that the trial court "has wide discretion in issuing jury instructions." ***Clausen***, 105 Wis. 2d at 240. Moreover, we have already discussed and affirmed the trial court's reasoning for upholding the loss of consortium damages. The "'ultimate resolution of the issue of the appropriateness of giving particular instruction turns on a case-by-case review of the evidence,'" which, as we noted, occurred in this case. ***Id.*** at 240-41 (citation and brackets omitted). Accordingly, we find that the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion, and therefore did not erroneously exercise its discretion in not giving a curative instruction relating to Dr. Sepahpanah's testimony. *See* ***Hefty***, 312 Wis. 2d 530, ¶28.

**C. Remittitur**

¶80 Finally, Mobility Works asserts that the trial court erred in failing to order remittitur, pursuant to WIS. STAT. § 805.15(6). Under this statute, a trial court may determine "that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages)." ***Id.*** In that case, the trial court "shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages." ***Id.***

¶81 Because we uphold the trial court's determination that the damages were fair and reasonable and are supported by the evidence, we reject this argument.

¶82 In sum, we affirm all of the evidentiary and discretionary rulings of the trial court as well as the damages awarded to the Plaintiffs by the jury and approved by the trial court. We further affirm the trial court's ruling that the evidence is sufficient to support the verdict.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.