COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0732

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

LARRY STABENOW, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF KYLE STABENOW, AND AUDREY STABENOW,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

BRENDA JACOBSEN AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dunn County: CONRAD A. RICHARDS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Brenda Jacobsen and American Family Mutual Insurance Company (Jacobsen) appeal from that part of a judgment, entered upon a jury's verdict, awarding Larry and Audrey Stabenow each $24,000, together with costs, for their claims of negligent infliction of emotional distress arising from the wrongful death of their son, Kyle. Jacobsen also appeals from the $15,000 awarded as punitive damages against her. The Stabenows cross-appeal from that part of the judgment awarding them $100,000, together with costs, for their loss of society and companionship and $12,000 for loss of pecuniary benefits.

¶2 Jacobsen argues that the trial court erred by failing to: (1) dismiss the Stabenows' emotional distress claims absent expert testimony proving either the existence of their emotional distress or the requisite causation; (2) give a modified emotional distress jury instruction; and (3) set aside the punitive damages award. Jacobsen also contends that the trial court erroneously exercised its discretion by not permitting her to testify by telephone at trial.

¶3 Because the determination of whether Jacobsen's negligence caused the Stabenows' emotional distress is well within the realm of ordinary experience and lay comprehension, we conclude that expert testimony was not necessary to prove the Stabenows' claims. Further, because the standard emotional distress jury instruction properly informed the jury, the court did not err by denying Jacobsen's request for a modified jury instruction. Because we affirm the judgment on the Stabenows' claims for emotional distress, we refrain from setting aside the punitive damages award. Finally, given the minimal notice of Jacobsen's intent to testify by telephone, the trial court did not misuse its discretion by denying her request. In any event, we conclude that any error in denying Jacobsen's request was harmless, as another witness provided the substance of Jacobsen's intended testimony.

¶4 On cross-appeal, the Stabenows argue that their $100,000 award for loss of society and companionship was so low as to shock the judicial conscience. The Stabenows additionally contend that the trial court erred by: (1) failing to submit separate verdict inquiries for Audrey and Larry on the issues of loss of society and companionship and pecuniary damages; (2) instructing the jury on mitigation of damages; (3) instructing the jury that the law limited the recovery for loss of society and companionship to $150,000; and (4) alternatively, failing to grant the Stabenows' motion to voluntarily dismiss their pending action without prejudice.

¶5 With respect to the cross-appeal, we conclude that there was credible evidence to support the jury's verdict awarding $100,000 to the Stabenows for their loss of society and companionship. Further, because the Stabenows presented evidence as if they had suffered equally, we conclude that the trial court did not erroneously exercise its discretion by denying the Stabenows' request to submit separate inquiries for each parent on this issue. Additionally, we conclude that the evidence supported a jury instruction on mitigation of damages and, although it may have been preferable to not instruct the jury using the breach of contract mitigation instruction, the instruction, as a whole, adequately and properly informed the jury. With regard to the statute increasing the damages cap for loss of society and companionship, the Stabenows' action accrued and was filed before the amended statute's effective date. Therefore, the trial court did not err by instructing the jury commensurate with the pre-amendment cap on damages. Finally, we conclude that the trial court reasonably exercised its discretion by denying the Stabenows' voluntary motion to dismiss without prejudice. Accordingly, we affirm the judgment.

BACKGROUND

¶6 On February 14, 1996, seventeen-year-old Kyle Stabenow died in an automobile accident, the result of a head-on collision between his vehicle and Jacobsen's vehicle. Jacobsen, with a blood alcohol content of .173%, had crossed over into Kyle's lane of traffic. It is undisputed that Jacobsen, who was later convicted of homicide by intoxicated use of a motor vehicle, was totally at fault for the accident.

¶7 The Stabenows and the estate of Kyle Stabenow filed a wrongful death suit against Jacobsen and her insurer, alleging in relevant part that Audrey and Larry had suffered a loss of society and companionship, as well as pecuniary loss. The Stabenows additionally sought punitive damages against Jacobsen. Their complaint was later amended to include their claim of negligent infliction of emotional distress.

¶8 At trial, the Stabenows testified that shortly after the collision, a friend notified them that Kyle had been in a bad accident. The Stabenows rushed to the scene. As they arrived, they saw flashing lights everywhere from the fire trucks, rescue squad and police vehicles. The Stabenows exited their vehicle and ran to look for Kyle's car. They did not recognize the car when they found it because it looked like a "tin can" that had been "smashed."

¶9 The Stabenows approached Kyle's vehicle on the driver's side, but could not get close to him because there were people blocking the driver's side door attempting to remove him from the vehicle. The Stabenows then went around to the passenger's side of the vehicle and saw their son pinned by the steering wheel. Kyle's head was turned toward the Stabenows, and his eyes were shut. Audrey attempted to talk to her son, though he did not respond. After being

told to back away from the vehicle, the Stabenows watched as the "jaws of life" were used to free Kyle from his vehicle.

¶10 The Stabenows observed as the rescue squad lay Kyle on the road and attempted to resuscitate him. After being told that nothing more could be done for him, Audrey was allowed to cradle Kyle and say goodbye for a few moments before being pulled away. Larry testified that he watched from a distance and could not go to his son because he was physically sick.

¶11 Audrey testified that every night as she attempts to sleep, she sees Kyle behind the wheel or laying in the road. Her memories of the scene of the accident often prevent her from sleeping, or wake her in the middle of the night. Audrey further testified that sometimes she will leave her bed and walk back and forth on the driveway wondering why their son died. Larry testified that he, too, cannot get the scene of the accident out of his mind. He sees Kyle in his car or laying on the blacktop, and he wonders if Kyle is asking for help.

¶12 Further trial testimony established that Kyle was engaged to be married shortly following his high school graduation. Other witnesses testified about the strong relationship between Kyle and his parents, how he would help around the house and how he enjoyed spending time with both his parents and his fiancee. The Stabenows introduced no expert testimony on the issue of their emotional distress.

¶13 The jury returned a verdict jointly awarding $100,000 to the Stabenows for the loss of society and companionship of their son and $12,000 for their loss of pecuniary benefits. Audrey and Larry were each awarded $24,000 for severe emotional distress, and the jury assessed punitive damages of $15,000 against Jacobsen. The court awarded $11,700 to Kyle's estate for his funeral and

other related expenses. The court denied all post-verdict motions and entered judgment on the verdict. This appeal followed.

ANALYSIS

A. Bystander Negligent Infliction of Emotional Distress

1. Expert Testimony

¶14 Jacobsen initially argues that expert testimony was necessary to prove the Stabenows' emotional distress claim. Whether Wisconsin law requires expert testimony to prove a bystander negligent infliction of emotional distress claim is a question of law this court reviews de novo. *See* ***Ball v. District No. 4 Area Bd.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984). The elements of a bystander negligent infliction of emotional distress claim were set forth in ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 517 N.W.2d 432 (1994).[1]

¶15 In ***Bowen***, our supreme court held that "the traditional elements of a tort action in negligence—negligent conduct, causation and injury (here severe emotional distress) should serve as the framework for evaluating a bystander's claim of negligent infliction of emotional distress."[2] ***Id***. at 652-53. The court

[1] In that case, a mother sought damages for negligent infliction of emotional distress arising from a fatal accident in which a vehicle negligently collided with her 14-year-old son as he was riding his bike. *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 634, 517 N.W.2d 432 (1994). As in the instant case, although the mother in ***Bowen*** did not witness the collision, she arrived at the scene a few minutes after it occurred and witnessed its aftermath. *See* ***id***. The mother "saw her severely injured son trapped beneath the defendant's car [and] watched the prolonged rescue attempt." ***Id***. at 634-35. She thereafter suffered "extreme emotional and psychic injuries with accompanying physical symptoms including hysteria, insomnia, nausea and the disruption of work and family relationships." ***Id***.

[2] Borrowing the requirement of severe emotional distress from the tort of intentional infliction of emotional distress, the ***Bowen*** court recognized the following definition:

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further held that "a claimant for negligent infliction of emotional distress need not prove physical manifestation of severe emotional distress." ***Id***. at 653.

¶16 The ***Bowen*** court recognized, however, that even where a claimant has satisfied the elements of a cause of action for negligent infliction of emotional distress, "a court may decide, as a matter of law, that considerations of public policy require dismissal of the claim." ***Id***. at 654. "These public policy considerations are an aspect of legal cause, although not a part of the determination of cause-in-fact." ***Id***.

¶17 To determine whether public policy considerations would preclude liability, a court must look to three factors: "the severity of the injury to the victim, the relationship of the plaintiff to the victim, and the extraordinary circumstances surrounding the plaintiff's discovery of the injury." ***Id***. at 660. The court must consider these factors on a case-by-case basis. *See* ***id***. In contemplation of these public policy considerations, the ***Bowen*** court emphasized that

> [t]he compensable serious emotional distress of a bystander under the tort of negligent infliction of emotional distress is not measured by the acute emotional distress of the loss of the family member. Rather, the damages arise from the bystander's observance of the circumstances of the death or

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> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only where the distress is so severe that no reasonable [person] could be expected to endure it.

Id. at 652-53 n.23.

> serious injury, either when the incident occurs or soon after.[3]

Id. at 660.

¶18 Given this policy-fueled distinction between compensable and noncompensable emotional distress, Jacobsen contends that expert testimony was necessary to prove that the negligent conduct caused compensable, as opposed to noncompensable, emotional distress. In other words, she contends that expert testimony was necessary to establish that the Stabenows' emotional distress was caused by viewing the aftermath of their son's accident, as opposed to arising solely from the fact of his death. We disagree.

¶19 Our supreme court has held that "[t]he requirement of expert testimony is an extraordinary one, and is to [be] applied by the trial court only when unusually complex or esoteric issues are before the jury." ***White v. Leeder***, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989). Further, "[b]efore expert testimony is held to be a prerequisite, it must be found that the matter is not within

[3] The public policy considerations address the limits of liability for negligent infliction of emotional distress on a bystander. *See* ***Bowen***, 183 Wis. 2d at 660. The ***Bowen*** court determined that in order to appropriately draw the line between recoverable and nonrecoverable claims, the court must consider the severity of the injury to the victim, the relationship of the plaintiff to the victim, and the extraordinary circumstances surrounding the plaintiff's discovery of the injury. *See* ***id***. In establishing this line, the court recognized:

> The tort of negligent infliction of emotional distress compensates plaintiffs whose natural shock and grief upon the death or severe physical injury of a spouse, parent, child, grandparent, grandchild, or sibling are compounded by the circumstances under which they learn of the serious injury or death. This tort reflects, for example, the intensity of emotional distress that can result from seeing the incident causing the serious injury or death first hand or from coming upon the gruesome scene minutes later.

Id. at 659.

the realm of ordinary experience and lay comprehension." ***Id***. Here, the jury was instructed to determine if Jacobsen's negligence was a cause-in-fact of the emotional distress the Stabenows suffered from witnessing the aftermath of their son's fatal accident. A jury can make such a determination based on its own experience in the affairs of life. Similarly, the jury's determination of the degree of emotional distress, given the circumstances of a given case, is well within the realm of human experience. Because the determination of whether the Stabenows suffered emotional distress does not involve unusually complex or esoteric issues, but rather, is well within the realm of ordinary experience and lay comprehension, we conclude that expert testimony was not necessary to prove the Stabenows' bystander negligent infliction of emotional distress claim.

2. The Jury Instruction

¶20 Jacobsen argues, in the alternative, that the trial court erred by failing to give a modified jury instruction on bystander negligent infliction of emotional distress. A trial court, however, has "broad discretion when instructing … the jury of the rules and principles of law applicable to the particular case." ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). On review, this court "must consider the instructions as a whole to determine whether the challenged instruction or part of an instruction is erroneous." ***Id***. at 429. However, "the instructions are not erroneous if, as a whole, they adequately and properly informed the jury." ***Id***. Further, even where a trial court has given an erroneous instruction, "a new trial is not warranted unless the error is prejudicial." ***Id***.

¶21 Here, the trial court instructed the jury using the standard WIS JI—CIVIL 1510, stating:

> Emotional distress may arise from the normal shock and grief of directly observing an accident which results in a death to a family member or from coming upon the scene minutes later and witnessing the aftermath. Emotional distress includes mental suffering, anguish, and shock. It can include fright, horror, grief, and worry. It need not include physical manifestations of injury, although these may also be present.
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> In order for the plaintiffs to recover, however, the emotional distress must be severe. This means it must be more than temporary discomfort or a minor psychic or emotional shock. It must be an extreme emotional response.

¶22 Jacobsen contends that the standard jury instruction is an incorrect and misleading statement of the law under ***Bowen***.[4] We disagree. As previously

[4] We note that in her reply brief, Jacobsen contends that the standard WIS JI—CIVIL 1510 was drafted in "1997, prior to ***Bowen***." Jacobsen is mistaken. ***Bowen*** was decided in May 1994, and the comments to the jury instruction indicate that they were approved in 1996.

Jacobsen's requested modified jury instruction, which emphasized the distinction between compensable and noncompensable emotional distress, stated:

> Question ___ of the special verdict asks what sum [of] money will compensate (a) Audrey Stabenow and (b) Larry Stabenow for the severe emotional distress she or he suffered as a result of coming upon the scene of the accident. In this regard you are instructed that all of us can expect at least once in our lives to be informed of the serious injury or death of a close family member such as a spouse, parent, child, grandparent, or sibling perhaps due to the negligence of another. Although the shock and grief growing out of such news is great, such shock and grief is not compensable. You therefore are instructed that in determining the amount to be inserted in answer to this portion of the verdict you many not include in that amount any sum for the emotional harm suffered by the Stabenows for the loss of their son Kyle nor may you include in your award any sum for the shock of seeing the efforts to save the life of their son Kyle. Moreover you may not include in your award an amount for the acute emotional and mental distress suffered by the Stabenows arising [out] of the death of their son Kyle. The only sum which may be included in this award is an amount to compensate the Stabenows for the severe emotional distress which she or he experienced which arose directly because of their observance of the circumstances of their son's death on the evening of February 14, 1996.

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stated, the jury was instructed to determine if Jacobsen's negligence was a cause-in-fact of the emotional distress the Stabenows suffered from witnessing the aftermath of their son's fatal accident. Because the trial court's standard instruction properly informed the jury, we conclude that the trial court did not err by giving the standard jury instruction on bystander negligent infliction of emotional distress.

B. Punitive Damages

¶23 Jacobsen additionally argues that the trial court erred by failing to set aside the punitive damages award. She concedes, however, that this court need not set aside the punitive damages award unless we reverse the judgment on the Stabenows' claim for bystander negligent infliction of emotional distress. Because we affirm the judgment on this claim, we refrain from setting aside the punitive damages award.

¶24 Jacobsen argues that a new trial should nevertheless be granted on the issue of punitive damages because the trial court erroneously exercised its discretion when it denied her request to testify by telephone. Whether to admit trial testimony by telephone in civil jury cases is left to the sound discretion of the trial court. *See* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 176, 384 N.W.2d 701 (1986). We will sustain a discretionary act if the trial court has applied the proper law to the established facts and if there is any reasonable basis for the trial court's ruling. *See* ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). An appellate court will generally look for reasons to sustain discretionary

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An alternative modified jury instruction, deleting the phrase "nor may you include in your award any sum for the shock of seeing the efforts to save the life of their son Kyle," was also requested.

determinations. *See* ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993).

¶25 Here, Jacobsen requested to testify by telephone regarding her financial situation, which was relevant to the Stabenows' punitive damages claim against her.[5] Jacobsen, who had been transferred to a prison in West Virginia, first informed the Stabenows of her desire to testify by telephone on the day before the trial was to begin.

¶26 WISCONSIN STAT. § 807.13 provides that the court may admit oral testimony communicated by telephone, subject to cross-examination, when: the applicable statutes or rules permit; the parties so stipulate; or the proponent shows good cause to the court.[6] The court stressed the importance of presenting a

[5] In determining an appropriate punitive damages award, a jury may consider the defendant's ability to pay. The jury is further instructed to "consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future." *See* WIS JI—CIVIL 1707.1.

[6] Appropriate considerations to determine good cause are:

> 1. Whether any undue surprise or prejudice would result;
> 2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
> 3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
> 4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;
> 5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
> 6. Whether the quality of the communication is sufficient to understand the offered testimony;
> 7. Whether a physical liberty interest is at stake in the proceeding; and
> 8. Such other factors as the court may, in each individual case, determine to be relevant.

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witness's testimony in open court, as well as the importance of giving the parties adequate time to prepare, especially in the absence of an adjournment request. It further expressed concern that the jury would not have an adequate opportunity to observe the witness or determine her credibility. Given these considerations, the trial court reasonably denied Jacobsen's request to testify by telephone.

¶27 Additionally, based on our independent review of the record, Jacobsen failed to satisfy the notice requirement of WIS. STAT. § 807.13.[7] Although the trial court did not specifically allude to this reasoning, we may independently review the record to determine whether additional reasons exist to support the court's exercise of discretion. *See* ***Stan's Lumber v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995).

¶28 Although Jacobsen contends that the Stabenows knew well in advance of the possibility of Jacobsen's testifying by telephone, it is undisputed that Jacobsen first informed the Stabenows of her actual intent to do so the day before trial started. Given the trial court's other considerations, coupled with Jacobsen's very minimal notice, we conclude that the denial of Jacobsen's request to testify by telephone was a reasonable exercise of the trial court's discretion.

¶29 In any event, any error by denying Jacobsen's request was harmless. Jacobsen sought to testify regarding her financial situation. However, evidence on

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WIS. STAT. § 807.13(2). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[7] WISCONSIN STAT. § 807.13(4)(b) provides: "Parties entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant other than the reporter electing to be present with any other participant shall give reasonable notice thereof to the other participants."

this issue was admitted via Jacobsen's mother, Dora Kegen. Kegen testified that she was overseeing Jacobsen's financial affairs while Jacobsen was in prison. She testified that Jacobsen did not own a house or a car, did not have any savings or investments and was not expected to inherit money or receive any trust funds. Kegen further testified that Jacobsen, unable to afford her trailer, had been forced to move in with Kegen while awaiting the criminal trial.

C. Loss of Society and Companionship

¶30 On cross-appeal, the Stabenows argue that a new trial should be granted because the $100,000 award for their loss of Kyle's society and companionship was so low as to shock the judicial conscience. On review, we will not upset a jury verdict if there is any credible evidence to support it, "even though it be contradicted and the contradictory evidence be stronger and more convincing." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). Our deference to the verdict is even greater where the verdict has the trial court's approval. *See* ***York v. National Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (Ct. App. 1990). Further, it is this court's obligation "to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach." ***Id***. Where, as here, one seeks to overturn a jury damage award, "this court may not substitute its judgment for that of the jury but, rather, must determine whether the award is within reasonable limits." ***Mikaelian v. Woyak***, 121 Wis. 2d 581, 592, 360 N.W.2d 706 (Ct. App. 1984). Further, "this court will not interfere with the jury's finding, unless the award is so unreasonably low as to shock the judicial conscience." ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 340, 291 N.W.2d 825 (1980) (quoting ***Puls v. St. Vincent Hosp.***, 36 Wis. 2d 679, 693, 154 N.W.2d 308 (1967)).

¶31 We conclude that there was credible evidence to support the jury's verdict awarding $100,000 to the Stabenows for their loss of Kyle's society and companionship. At trial, the jury was instructed:

> Society and companionship includes the love, affection, care, protection, and guidance the parents would have received from their child had he continued to live. It does not include the loss of monetary support from the child or the grief and mental suffering cased by the child's death.
>
> In determining the parents' loss of society and companionship, you should consider the age of the deceased child and the ages of the parents; the past relationship between the child and the parents; the love, affection and conduct of each toward the other; the society and companionship that had been given to the parents by the child; the personality, disposition and character of the child; and the extent … to which you find the parents have suffered from the loss. The amount inserted by you should reasonably compensate the parents for the loss of society and companionship that they have sustained since the death of their child and the amount you are reasonably certain they will sustain in the future.
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> Although the law provides that the parents cannot recover more than $150,000 for the loss of the child's society and companionship, this dollar limit is not a measure of damages, it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate the plaintiffs for any loss of society and companionship they have suffered.

¶32 The Stabenows argue that given the evidence they presented on each of the factors the jury was instructed to consider, the damages awarded for loss of society and companionship should have been far in excess of $100,000. We conclude that credible evidence supports the jury's damage award.

¶33 The jury heard testimony regarding the mutual love and respect felt between Kyle and his parents. Witnesses also testified about Kyle's upstanding character and amiable disposition. Testimony additionally established, however,

that seventeen-year-old Kyle was engaged to be married and spent the majority of his free time with his fiancee. The trial court, concluding that credible evidence supported the jury's verdict, stated:

> There was evidence that Kyle was in the process of, as we would say, ["]leaving the nest.["] He was spending … a considerable amount of time with his fiancee. There was testimony that he did have a job, had gone to his fiancee's and was returning home at the time this tragedy occurred.

We conclude that there is credible evidence supporting the jury's verdict. The trial court upheld the verdict, and the award is well within a reasonable range and not so unreasonably low as to shock the judicial conscience. *See* ***Wisconsin Natural Gas Co.***, 96 Wis. 2d at 340.

D. The Special Verdict

¶34 The Stabenows argue that the trial court misused its discretion when it denied their request to submit separate inquiries for each parent on the issues of loss of society and companionship and pecuniary damages. They also contend that this claimed error deprived them of their right to post-trial examination of the damages awarded on their individual claims. They therefore demand a new trial, contending that the real controversy has not been fully tried. We are not persuaded.

¶35 The form of the special verdict is left to the trial court's discretion. *See* ***Hannebaum v. Direnzo & Bomier***, 162 Wis. 2d 488, 501, 469 N.W.2d 900 (Ct. App. 1991). On review, "an appellate court will not interfere with the verdict if the material issues of fact are encompassed within the questions asked and appropriate instructions are given." ***Id***.

¶36 The Stabenows contend that a separate inquiry for each parent should have been submitted to the jury because they are individual plaintiffs with separate claims.[8] The trial court relied on the language of the standard jury instruction to deny the Stabenows' request for separate inquiries. Specifically, the court reasoned that the standard jury instruction discussed the parents' loss of society and companionship and that the "s" apostrophe indicated an intention to consider the parents as an entity.

¶37 The Stabenows argue, however, that Wisconsin case law does not support any automatic rule of equal division between parents under the wrongful death statute, WIS. STATS. § 895.04. We agree that normally, in order to avoid any potential problems with motions after verdict, the better procedure is to submit separate verdict questions for each parent. Nevertheless, we are satisfied that under the circumstances of this case, the trial court did not err in its discretion by refusing to submit separate inquiries for each parent.

¶38 Recovery under the wrongful death statute is "keyed to actual loss." ***Chang v. State Farm Mut. Auto. Ins. Co.***, 182 Wis. 2d 549, 560, 514 N.W.2d 399 (1994). Beneficiaries must prove their loss, however, as these damages are not automatically recoverable. *See* ***id***. at 560-61. "Damages may be stipulated … or damages may be awarded jointly to a class of beneficiaries if so requested and agreed, but since recovery is for actual damages, every individual beneficiary has the right to prove and collect upon his or her individual loss up to the statutory maximum." ***Id***. at 557.

[8] To support their contention, Audrey and Larry point out that they alleged a loss of society and companionship and pecuniary damages in separate paragraphs of their amended complaint.

¶39 Although Audrey and Larry, as individual beneficiaries in a class of beneficiaries, had the right to prove and collect upon their individual losses, they presented evidence to the jury as if both had suffered equally. Apart from their separate allegations in the amended complaint, the evidence referred to them as a collective unit.[9] Because there was no argument that one had suffered more than the other, we conclude that the trial court did not err when it denied the Stabenows' request to submit separate inquiries for each parent on the issue of loss of society and companionship and pecuniary damages.

¶40 The Stabenows additionally contend that the absence of separate damage awards for each parent prevents them from effectively challenging the adequacy of the verdict. On the contrary, "if there are no specific damage findings for individual members of the class, or if the damages are awarded jointly to a given class, damages may be presumed to be equal." ***Id***. at 573-74. Accordingly, because the damages for loss of society and companionship and pecuniary damages were awarded jointly to the Stabenows, Audrey and Larry may presume equal division of the $100,000 award. *See* ***id***.

E. The Mitigation Instruction

¶41 The Stabenows argue that the trial court erred by instructing the jury on mitigation of damages because Jacobsen failed to carry her burden of proving

[9] Counsel for the Stabenows repeatedly referred to "Mom and Dad" and Kyle's "parents" when questioning various witnesses. For example, when eliciting testimony from Carol Schindler, an instructional assistant at the high school, counsel asked if Kyle ever spoke of his "parents" and how he referred to his "parents." When questioning DuWayne Stabenow, Kyle's brother, counsel for the Stabenows asked: "Did you have occasion to observe, I suppose, his relationship with your mom and dad many times?" Counsel later asked DuWayne to describe Kyle's relationship with their "parents." Again, when questioning Diane Hoyt, Kyle's fiancee, counsel for the Stabenows asked about how much time she and Kyle would spend with his "parents."

their failure to mitigate.[10] A trial court has "broad discretion when instructing … the jury of the rules and principles of law applicable to the particular case." ***Nowatske***, 198 Wis. 2d at 428. Instructions are not erroneous if, "as a whole, they adequately and properly informed the jury." ***Id***. at 429. Further, even where a trial court has given an erroneous instruction, "a new trial is not warranted unless the error is prejudicial." ***Id***.

¶42 The failure to mitigate damages is an affirmative defense that a defendant must raise in his or her answer. *See* ***Lobermeier v. General Tel. Co.***, 119 Wis. 2d 129, 148, 349 N.W.2d 466 (1984). When properly raised, "the burden of proving failure to mitigate is upon the party asserting it." ***Id***. In the context of a personal injury claim, our supreme court has held:

> If the defendant asserts failure to mitigate on the part of the injured party, he must prove that a person of ordinary intelligence and prudence under the same or similar circumstances would have elected to undergo *the recommended medical procedure*. If the defendant meets the burden of proof, the consequence of the injured party's failure to mitigate damages is that the fact finder will not allow damages for those consequences of the injury which the plaintiff could have avoided by the exercise of ordinary care.

Id. (emphasis added).

[10] Jacobsen, in her reply to the Stabenows' cross-appeal, asserted that the Stabenows never objected to the appropriateness of the mitigation instruction. The Stabenows did not submit a reply brief to their cross-appeal. Generally, arguments that are not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Upon our review of the record, however, we noticed an objection by counsel for the Stabenows to the appropriateness of presenting the mitigation instruction to the jury. Therefore, we address their argument on its merits.

¶43 The Stabenows argue that Jacobsen's failure to introduce expert testimony as to any recommended treatment deprived her of the right to the mitigation instruction. Expert testimony is required "only when unusually complex or esoteric issues are before the jury." ***White***, 149 Wis. 2d at 960. Further, "[b]efore expert testimony is held to be a prerequisite, it must be found that the matter is not within the realm of ordinary experience and lay comprehension." ***Id***. Audrey and Larry testified that neither had seen a psychologist, psychiatrist or minister to deal with the loss of their son. Larry testified that he had not been brought up to seek counseling and that he was unable to discuss his grief without losing his composure. We conclude that the possible benefits of grief counseling are not outside the realm of ordinary experience and lay comprehension, such that expert testimony would be required to establish a recommended treatment. The trial court, therefore, did not err by instructing the jury on mitigation of damages.

¶44 The Stabenows alternatively argue that the trial court erred by instructing the jury according to the standard jury instruction applicable to mitigation of damages for breach of contract. *See* WIS JI—CIVIL 1731.[11]

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[11] The following instruction was read at trial:

> A person who has been damaged may not recover for losses that he or she knows or should have known could have been reduced by reasonable efforts. It is not reasonable to expect a person to reduce his or her damages if it appears that the attempt may cause other serious harm. A person need not take [an] unreasonable risk, subject himself or herself to unreasonable inconvenience, incur unreasonable expense, or put himself or herself in a position involving loss of honor and respect.
>
> If you find that a reasonable person would have taken steps to reduce damages, and if you find that either of the plaintiffs did not take such steps, then you should not include as damages any amount which could have been avoided by the plaintiffs. If a

(continued)

Although it may have been preferable to not use the breach of contract mitigation instruction, we conclude that the instruction, as a whole, adequately and properly informed the jury. *See* ***Nowatske***, 198 Wis. 2d at 429.

¶45 Citing the "extremely low award" for loss of society and companionship, the Stabenows contend that the jurors must have erroneously applied the duty to mitigate to the Stabenows' loss of society and companionship.[12] Such a conclusion, however, is speculative at best. The award was well within reasonable limits and supported by credible evidence.

F. Limits on Recovery for Loss of Society and Companionship

¶46 The Stabenows contend that the trial court erred by failing to instruct the jury that there was a $500,000, as opposed to $150,000, cap on damages for loss of society and companionship. At the time of Kyle's death, the wrongful death statute, WIS. STAT. § 895.04 (1996-97), limited recovery for the loss of society and companionship to $150,000. In April 1998, the Wisconsin legislature amended the statute, increasing the cap on damages to $500,000. *See* WIS. STAT.

> reasonable person would not have taken steps to reduce loss under all of these circumstances existing in this case, then plaintiff's failure to … so act may not be considered by you in determining plaintiff's damages.
>
> The burden of proof is upon the defendants to satisfy you to a reasonable certainty by the greater weight of the credible evidence that the plaintiffs should have taken steps to reduce his or her loss and failed to do so.

[12] The Stabenows take issue with comments on the issue of mitigation made by defense counsel during his closing argument. The Stabenows, however, failed to object to any of these statements and therefore waived any issue regarding the statements. *See* ***Anderson v. Nelson***, 38 Wis. 2d 509, 514, 157 N.W.2d 655 (1968) (an issue may not be raised for the first time on appeal).

§ 895.04(4). The legislature provided that the amended act "first applies to actions *commenced* on the effective date [April 28, 1998] of this subsection."[13] (Emphasis added.)

¶47 Kyle died on February 14, 1996, and the Stabenows' wrongful death action was filed on February 27, 1997. They claim that because their action had commenced as of the effective date, the $500,000 cap should apply. We disagree.

¶48 This issue presents a question of statutory interpretation, a question of law we determine de novo. *See* ***State v. Kirch***, 222 Wis. 2d 598, 602, 587 N.W.2d 919 (Ct. App. 1998). The goal of statutory interpretation is to determine and give effect to the legislature's intent. *See* ***id***. We must first look to the statute's plain language and if it is unambiguous, "we are prohibited from looking beyond the unambiguous language used by the legislature." ***Id***. However, if the statute is ambiguous, "we may look to the history, scope, context, subject matter, and object of the statute to discern legislative intent." ***Id***. "Statutory language is ambiguous if reasonably well-informed individuals could differ as to its meaning." ***Id***. at 602-03. Further, legislation in Wisconsin is presumed to apply prospectively unless: "(1) the statute reveals by express language the legislature's intent to apply the provisions retroactively; or (2) the language reveals such intent by necessary implication." ***State v. Chrysler Outboard Corp.***, 219 Wis. 2d 130, 162, 580 N.W.2d 203 (1998).

¶49 The Stabenows contend that if the legislature had intended to apply the statute to actions commenced "on or after" April 28, 1998, it would have said

[13] WISCONSIN STAT. § 801.02(1) provides: "A civil action in which a personal judgment is sought *is commenced* as to any defendant when a summons and a complaint naming the person as defendant are filed with the court …." (Emphasis added.)

so. They therefore argue that the language, "first applies to actions commenced on the effective date of this subsection," should be interpreted to mean, "first applies to actions [which have] commenced on the effective date of this subsection." Such an application is, however, nonsensical, as it would preclude applicability for those actions commenced after the effective date. We must interpret statutes to avoid absurd results. *See* ***Walag v. Town of Bloomfield***, 171 Wis. 2d 659, 663, 492 N.W.2d 342 (Ct. App. 1992). We therefore conclude that the legislature intended the amended statute to apply to actions filed on or after April 28, 1998.

¶50 Citing ***Martin v. Richards***, 192 Wis. 2d 156, 531 N.W.2d 70 (1995), the Stabenows argue that because an action cannot be commenced until it has "accrued," the statute necessarily encompasses actions that accrued before April 28, 1998.[14] ***Martin***, however, is distinguishable from the instant case. In ***Martin***, our supreme court addressed the constitutionality of retroactively applying a statute capping medical malpractice awards. In that case, at the time the action accrued, i.e., when the injury occurred, there were no caps on damages in medical malpractice cases. *See* ***id***. at 196. WISCONSIN STAT. § 665.017 (1985-86) limited noneconomic damages in medical malpractice cases to $1,000,000. Unlike the instant case, although the action accrued before the statute's effective date, the Martins filed their action after the effective date. *See* ***id***. at 197. A jury later awarded the Martins $2,150,000 in noneconomic damages. *See* ***id***. Because the Martins filed their action after the effective date, the court addressed the constitutionality of applying a statute to an action that had accrued prior to the statute's effective date.

[14] A wrongful death action accrues at the time of the decedent's death. *See* ***Miller v. Luther***, 170 Wis. 2d 429, 436, 489 N.W.2d 651 (Ct. App. 1992).

¶51 Weighing the public interest served by the statute against the private interests that are overturned by it, the ***Martin*** court recognized that at the time of the injury, the Martins "had a substantive right to unlimited damages given to them by statute." ***Id***. at 206. The court further noted that under Wisconsin law, "the amount of recovery, when set by a statute is fixed on the date of injury." ***Id***. The court concluded, in relevant part, that application of the statute unconstitutionally impaired the Martins' right to unlimited damages. *See* ***id***. at 211-12.

¶52 Here, unlike ***Martin***, the amended statute is not implicated because the Stabenows' action accrued and was filed before the statute's effective date. Accordingly, the trial court did not err by instructing the jury consistent with the $150,000 cap on damages for loss of society and companionship.[15]

G. Motion to Dismiss Voluntarily

¶53 Alternatively, the Stabenows argue that the trial court erroneously exercised its discretion by denying their motion to voluntarily dismiss their action without prejudice. We disagree. WISCONSIN STAT. § 805.04(2) provides: "[A]n action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise

[15] The Stabenows additionally argue that the claimed erroneous instruction resulted in prejudice. Even were we to assume, however, that the court should have instructed the jury on the $500,000 limit, we conclude that the Stabenows were not prejudiced. The jury awarded the Stabenows $100,000 on their loss of society and companionship claim. They argue that a jury will generally award an amount commensurate with the legal limit and will therefore tend to consider the amount set by the legislature as a benchmark for the maximum reasonable award. To presume that the Stabenows' award would have been greater had the jury been instructed consistent with the $500,000 limit would require this court to engage in pure speculation. We refrain from doing so.

specified in the order, a dismissal under this subsection is not on the merits." This court has recognized that the purpose of § 805.04(2) is to

> freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced. The rule allows the plaintiff to withdraw his action from the court without prejudice to future litigation. Allowing the court to attach conditions to the order of dismissal prevents defendants from being unfairly affected by such dismissal.

Clark v. Mudge, 229 Wis. 2d 44, 48-49, 599 N.W.2d 67 (Ct. App. 1999) (quoting ***Dunn v. Fred A. Mikkelson, Inc.***, 88 Wis. 2d 369, 377, 276 N.W.2d 748 (1979)). Whether to grant or deny a motion for dismissal under § 805.04(2) is committed to the trial court's discretion. *See* ***Clark***, 229 Wis. 2d at 49. On review, "we will sustain a trial court's discretionary decision as long as the court 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." ***Estate of Engebose v. Moraine Ridge Ltd. Ptshp.***, 228 Wis. 2d 860, 864, 598 N.W.2d 584 (Ct. App. 1999) (quotations omitted).

¶54 When determining whether to grant or deny a motion for voluntary dismissal, a trial court may consider the following factors: "(1) the plaintiff's diligence in bringing the motion; (2) any 'undue vexatiousness' on the plaintiff's part; (3) the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; (4) the duplicative expense of relitigation; and (5) the adequacy of plaintiff's explanation for the need to dismiss." ***Clark***, 229 Wis. 2d at 49.

¶55 Here, it is undisputed that the Stabenows sought to voluntarily dismiss their claim and refile it in order to benefit under the increased damages cap. In denying the Stabenows' motion, the trial court stated, in part:

> [T]he … defendant's policy limits and premiums were based upon the law in effect at the time of the accident, back in 1996, wherein there was the $150,000 limitation for loss of society and companionship….
>
> [T]he Court is of the opinion that prejudice would result to the defendant … in that her … purchase of the policy was on the basis of a $150,000 limit, not the $500,000 limit.

¶56 The Stabenows argue that the trial court improperly relied on its finding of prejudice to Jacobsen, based on her financial exposure under the increased damages cap. In ***Engebose***, this court held that an estate's "recourse to the benefit of an available statutory amendment is not an element of prejudice that precludes the trial court from granting the estate's motion to voluntarily dismiss the originally filed claim without prejudice." ***Id***. at 867. The ***Engebose*** court noted: "While it is true that [the defendant] faces the prospect of higher wrongful death limits, the legislature specifically provided for the existence of higher limits and the application of those limits measured by the date of filing." ***Id***. at 865. Consequently, the court concluded that the disadvantages flowing from the legislature's decision to amend the wrongful death statute to provide for higher limits is "not the concept of prejudice that is inherent in the cases analyzing § 805.04(2)." ***Id***. Accordingly, Jacobsen's financial exposure under the increased damage cap was an improper consideration. The trial court also found prejudice to Jacobsen based on her inability, in a subsequently filed action, to mount a

contributory negligence defense.[16] Because it is undisputed that Jacobsen was "totally at fault for the accident," prejudice to Jacobsen based on the possibility of a contributory negligence defense in a subsequently filed action was an inappropriate basis on which to deny the Stabenows' motion to voluntarily dismiss their claim without prejudice. Because the trial court did, however, properly consider other factors prejudicing Jacobsen, we conclude that it did not err by denying the Stabenows' motion to voluntarily dismiss.

¶57 "The type of prejudice the trial court must consider when evaluating a motion for voluntary dismissal is the detriment to a defendant of being put through the expense of a lawsuit without the ability to obtain a final determination on the merits." ***Id***. Here, the trial court additionally stated:

> This action was filed on February 27th, 1997 …. This matter has been scheduled since … last December [and] the effective date [of the statute was] April 28, 1998. However, no motion [to voluntarily dismiss] was filed until the end of July, nearly – just a little over … five weeks before trial.
>
> The Court is going to deny the plaintiff's motion. The Court feels that it is so close to trial. We do have trial dates set for September 9th, 10th and 11th. We do have a courtroom reserved at the Dunn County Courthouse that has been confirmed several times since … the time this was scheduled ….

¶58 We conclude that the trial court properly considered the prejudice Jacobsen would have suffered had the action been dismissed so close to the scheduled trial. Although the trial had been scheduled since December 1997 and the statute went into effect in April 1998, the Stabenows did not move the court to

[16] The court stated: "[A]ny potential defense of contributory negligence is somewhat hurt by the fact that the vehicle is now gone …. [T]hey would not be able to do a reconstruction in time [n]or would they ever be able to locate the vehicle."

voluntarily dismiss their claim until approximately five weeks before trial was to begin. The Stabenows do not dispute that much of the discovery and trial preparation had occurred. We therefore conclude that the trial court's denial of the Stabenows' motion to voluntarily dismiss their claim without prejudice was a reasonable exercise of the court's discretion.

¶59 Accordingly, we reject both Jacobsen's and the Stabenows' arguments on the appeal and cross-appeal and affirm the judgment.

By the Court.—Judgment affirmed. No costs are awarded to either party.

Not recommended for publication in the official reports.