

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1035

Cir. Ct. No. 2002CV2768

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**VIRGINIA BAUMGARTEN, AS SPECIAL ADMINISTRATOR OF THE ESTATE
OF RALPH A. BAUMGARTEN,**

PLAINTIFF-RESPONDENT,

MEDICARE PART A, MEDICARE PART B AND MEDICAID,

SUBROGATED-PLAINTIFFS,

v.

**CITY VIEW NURSING HOME AND WEST BEND MUTUAL INSURANCE
COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN III, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 LUNDSTEN, P.J. This is a negligence case brought by Ralph Baumgarten’s estate against City View Nursing Home, where Baumgarten was living just prior to his death. Liability and damages were tried before a jury. City View and West Bend Mutual Insurance Company appeal a judgment imposing awards for pain and suffering, loss of society and companionship, and medical and funeral expenses after the trial court found City View negligent in Baumgarten’s death. On appeal, City View alleges several trial court errors and asserts that the damages awards are excessive. City View does not contest liability on appeal, but seeks reduced damages awards or a new trial on damages. We affirm the verdicts, except the award for medical expenses, which we conclude must be reversed as a matter of law.

Background

¶2 Ralph Baumgarten became a resident of City View Nursing Home in May 2000. When he arrived, he was unable to walk because of several knee problems and related surgeries. Baumgarten’s health began a steady decline in July 2001. He developed a cold, complained of being tired, and became increasingly dehydrated. On July 25, 2001, there was an entry in Baumgarten’s chart directing that he be seen by his physician the next day. That order was not followed. Over the next several days, Baumgarten complained of weakness and cold symptoms. By August 1, 2001, he developed a fever and rectal bleeding. Baumgarten was transferred to St. Mary’s Hospital on August 2, 2001.

¶3 When he was admitted to St. Mary’s, Baumgarten was able to respond to questions with head motions but was not “conversant.” Baumgarten was diagnosed as suffering from several serious medical conditions, including

pneumonia, severe dehydration, and hypernatremia. On August 6, 2001, Baumgarten was sedated and intubated for a period of eleven days. The parties presented conflicting evidence as to whether Baumgarten regained consciousness again while he remained at St. Mary's following intubation.

¶4 Baumgarten was discharged to a hospice care facility on August 30, 2001. On August 31, Baumgarten appeared to have regained full consciousness and spoke to family members. Baumgarten died of toxic metabolic encephalopathy on September 2, 2001.

¶5 Baumgarten's estate sued City View¹ for negligence in causing Baumgarten's death. A jury found City View negligent, and imposed damages as follows: \$132,157.17 for medical expenses; \$650,000 for Baumgarten's pain and suffering; \$3,965.31 for funeral and burial expenses; and \$225,000 for Virginia Baumgarten's loss of society and companionship claim.

¶6 City View filed post-verdict motions seeking either reduced awards or a new trial on damages. For reasons not disclosed in the record, the trial court missed the statutory deadline for deciding the motions, and they were denied by operation of law. *See* WIS. STAT. § 805.16 (2003-04).² The trial court, however, issued a late decision reducing two of the awards. The court's order reduced the award for medical expenses to \$82,157.17, and also offered Baumgarten's estate the option of either accepting a reduced award for pain and suffering in the amount

¹ City View Nursing Home and West Bend Mutual Insurance Company are both defendants-appellants here. For convenience, we refer to both parties as "City View."

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of \$300,000 or accepting a new trial on the issue of damages for pain and suffering. Because the trial court's late order is void, City View appeals the judgment only.

Discussion

¶7 City View does not contest liability on appeal. Rather, City View's challenges on appeal are directed at the jury's damages awards for medical expenses, pain and suffering, and loss of society and companionship. City View raises challenges to these awards in a variety of contexts, several of which substantively overlap.

¶8 City View seeks reduced damages awards or a new trial on damages for these reasons: (1) Baumgarten's estate is legally entitled to only \$7,735.02 in medical expenses; (2) the trial court erred in excluding certain testimony from one of City View's medical experts; (3) the damages awards are excessive because they are the result of prejudicial error and are not supported by the evidence; (4) justice has miscarried; and (5) the damages awards are the result of "prejudice and perversity."

¶9 For the reasons set forth below, we affirm the jury's damages awards in all respects except for the medical expenses award. We decline to exercise our discretionary authority to change the awards or to grant a new trial on damages.

The Effect Of City View's Settlement With Baumgarten's Health Insurer On The Award For Medical Expenses

¶10 Baumgarten's health insurance carrier, Wisconsin Physicians Service, paid \$124,422.15 in medical expenses on Baumgarten's behalf. Trial testimony showed that the "reasonable value" of Baumgarten's medical services

was \$132,157.17. When Baumgarten's estate sued City View, Wisconsin Physicians Service became an involuntary plaintiff. City View settled the insurance company's \$124,422.15 claim for \$50,000 prior to trial. Although Baumgarten's estate is not out-of-pocket any of the cost of his medical expenses, the estate was awarded \$132,157.17.

¶11 City View concedes that it is liable for the reasonable value of medical expenses (\$132,157.17), but argues that the estate is entitled only to the difference between the reasonable value for medical expenses and the amount paid by Baumgarten's insurance company (\$124,422.15). City View asserts that it has, in effect, already satisfied the \$124,422.15 claim by way of its settlement with Baumgarten's health insurer and, therefore, any award over \$7,735.02 for medical expenses amounts to a double recovery prohibited by *Paulson v. Allstate Insurance Co.*, 2003 WI 99, 263 Wis. 2d 520, 665 N.W.2d 744. We agree.

¶12 In *Paulson*, a tortfeasor damaged Paulson's car in an accident. The tortfeasor was fully liable for the cost of repairing Paulson's car. *Id.*, ¶2. Paulson's insurer paid the repair bill and then negotiated a settlement with the tortfeasor's insurer, whereby the tortfeasor's insurer paid Paulson's insurer 70% of the cost of the repairs. *Id.* The supreme court was asked to decide whether Paulson could recover from the tortfeasor's insurer the additional 30% that the insurer did not have to pay because of its settlement. *Id.*, ¶18. The *Paulson* court held that Paulson was not entitled to recover that money. *Id.*, ¶33. The court concluded that allowing Paulson to recover the 30% would constitute double recovery—because Paulson's car repair had already been fully covered—and that a rule permitting Paulson this type of double recovery would needlessly discourage otherwise desirable settlements. *Id.*, ¶¶34, 39, 43.

¶13 The portion of *Paulson* we describe above squarely covers City View's double recovery argument. Here, as in *Paulson*, the victim's damages have been fully covered and the tortfeasor has settled with the victim's subrogated insurer for less than the subrogated insurer was owed. *Paulson* holds that the victim of a tort is not entitled to the money a tortfeasor saves by settling with the victim's subrogated insurer.

¶14 Thus, despite the fact that City View settled Baumgarten's insurer's claim for \$50,000 (\$74,422.15 less than the insurer had paid to cover Baumgarten's medical expenses), Baumgarten's estate is not entitled to the money City View saved by settling. At the same time, City View correctly acknowledges that it is liable to the estate for the difference between the reasonable value of Baumgarten's medical expenses, \$132,157.17, and the portion of that claim it has already satisfied, 124,422.15, or \$7,735.02. This is in keeping with the reasonable value holding in *Koffman v. Leichtfuss*, 2001 WI 111, ¶56, 246 Wis. 2d 31, 630 N.W.2d 201. Therefore, we direct that the trial court amend the medical expenses award to \$7,735.02.

The Exclusion Of Cause-Of-Death Testimony From A Medical Expert

¶15 One of City View's expert witnesses, Dr. Robert Graebner, was prepared to testify that Baumgarten had a neurological condition that contributed to his death. The trial court excluded this testimony on two alternate grounds: first, that it was not relevant; and second, if relevant, the probative value of the testimony was outweighed by the danger of confusing the jury. *See* WIS. STAT. § 904.03.

¶16 City View argues that the trial court mistakenly assessed the relevance of Dr. Graebner's testimony. City View argues that the testimony was

relevant for three reasons: (1) it would have “raised doubts as to the estate’s testimony on cause of death”; (2) it would have “suggested that Mr. Baumgarten was going through a neurological decline for years prior to contracting pneumonia and that these neurological conditions were part of a process that led ultimately to Mr. Baumgarten’s death”; and (3) it would have “demonstrated that regardless of the exact cause of death, Mr. Baumgarten would have died anyway due to this slow neurological decline.”

¶17 City View’s first two reasons do not persuade us. On appeal, City View does not contest its liability for Baumgarten’s death and, therefore, the only question is the relevance the disputed testimony might have regarding damages. City View’s first two arguments address only the cause of Baumgarten’s death.

¶18 City View’s third relevance argument is that Dr. Graebner’s testimony, if believed, supports the factual inference that Baumgarten would not have lived much longer even had City View not been negligent. This, in turn, may have affected the jury’s award for loss of society and companionship, and perhaps its award for pain and suffering. But City View did not make this argument with sufficient clarity before the trial court to preserve it.

¶19 City View’s appellate brief argues that Dr. Graebner’s testimony “was related *directly to damages*, not just causation” (emphasis added). City View asserts that Dr. Graebner would have testified that the “neurological decline that was part of the process of Mr. Baumgarten’s death was irreversible,” and that Dr. Graebner’s testimony was “necessary to contradict [the estate’s expert’s] testimony that Mr. Baumgarten would have lived for ‘years’ had this incident not occurred.” However, our review of the trial transcript shows that this argument was not made to the trial court. The relevant exchange during trial is this:

MR. LIDDLE [counsel for City View]: And I'm going to ask [Dr. Graebner] whether this process was reversible.

THE COURT: Okay. What process?

MR. LIDDLE: The process that got him into the hospital.

THE COURT: He has already testified that it would be reversible if it was TME [Toxic Metabolic Encephalopathy]. That's why he said it wasn't TME if I understand his testimony.

MS. ZYLSTRA [also counsel for City View]: Your Honor, I think he testified that pneumonia generally and the sodium level would have been reversible.

THE COURT: That's what he testified to, about.

MS. ZYLSTRA: But I think Mr. Liddle was talking about the neurological problems, that that wasn't reversible.

THE COURT: I've ruled that the neurological problems extending back over years which cannot be linked to being a cause of death are not relevant, so to talk about them further is pointless.

City View points to this exchange as showing that it made its evidentiary theory clear to the trial court. But the trial court spoke in terms of "cause of death," and we find no effort on City View's part to direct the court's attention to the testimony's relevance on any damages topic.

¶20 "[A]n offer of proof need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." *State v. Robinson*, 146 Wis. 2d 315, 327-28, 431 N.W.2d 165 (1988). Additionally, where evidence is understood by the trial court to be offered for a particular purpose and is rejected, and its proponent "had any other purpose in view in making the offer, it was their duty so to have informed the

court.” *Beard v. Dedolph*, 29 Wis. 136, 143 (1871). The offer of proof and the argument here did not meet this standard. We affirm the trial court’s decision to exclude the testimony.

*Whether The Jury’s Damages Awards For Pain And Suffering
And Loss Of Society And Companionship Are Excessive*

¶21 City View contends the jury’s damages awards for pain and suffering and for loss of society and companionship are excessive because the awards are the result of trial court error and because they reflect an allowance for effects of the injury not sufficiently proven, thereby evincing compensation beyond reason. City View asks that we reduce the awards and offer Baumgarten’s estate the option of either accepting the reduced awards or accepting a new trial on damages.

¶22 In *Roach v. Keane*, 73 Wis. 2d 524, 243 N.W.2d 508 (1976), the court succinctly laid out the standard of review for an excessive damages award claim:

The general rule for appellate review of damage awards, as for other factual questions, is that any credible evidence of the damage claimed is sufficient to sustain the jury’s award. However, where the award reflects injuries not proved or a rate of compensation beyond reason, this court can find the damages excessive even in the absence of jury perversity. In such cases the court will offer the plaintiff a reasonable amount of damages and the option of a new trial on the issue of damages, pursuant to *Powers v. Allstate Ins. Co.* (1960), 10 Wis. 2d 78, 90, 102 N.W.2d 393

Id. at 539-40 (citations and footnote omitted).³

A. *Whether The Damages Awards Are Excessive Due To Trial Court Error*

¶23 City View argues that the trial court erred by denying its request to withhold the question of the reasonable value of Baumgarten’s medical expenses from the jury. City View contends that, because it did not dispute that the reasonable value was \$132,157.17, the court should have kept that question from the jury. City View asserts that both the damages awards for pain and suffering and for loss of society and companionship are excessive as a result of this error.

¶24 We fail to see why submitting this question to the jury would have caused prejudice. City View argues that “given the amounts in the verdict for pain and suffering and loss of society and companionship, it is apparent that the jury was influenced and swayed by its belief that City View had refused to pay for the medical bills in this case.” But before the jury, City View argued that it should not have to pay *any* medical expenses because it was not liable. Thus, even if the jury

³ The rule in *Powers v. Allstate Insurance Co.*, 10 Wis. 2d 78, 91-92, 102 N.W.2d 393 (1960), is codified at WIS. STAT. § 805.15(6). *Wester v. Bruggink*, 190 Wis. 2d 308, 325-26, 527 N.W.2d 373 (Ct. App. 1994). That statute provides, in pertinent part:

EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines 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), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount.

WIS. STAT. § 805.15(6). Although the statute refers only to the power of a trial court, case law demonstrates that the same power is available to appellate courts. *See Herman v. Milwaukee Children’s Hosp.*, 121 Wis. 2d 531, 544-45, 361 N.W.2d 297 (Ct. App. 1984) (appellate court may engage in independent review of evidence to determine whether it supports award).

thought City View had so far refused to pay Baumgarten's medical bills, that refusal was consistent with City View's position that it was not liable. And, there is no indication that any refusal on City View's part to pay Baumgarten's medical expenses harmed Baumgarten. It follows that no reasonable juror would have increased any damages award because the reasonable value of Baumgarten's medical expenses was submitted as a jury question.

*B. Whether The Damages Awards Are Supported By Sufficient Evidence
And Are Within Reason*

1. The Award For Pain And Suffering

¶25 The jury's award for pain and suffering was \$650,000. City View does not argue that this award is excessive if the evidence supports a factual finding that Baumgarten experienced significant pain for a significant period of time.⁴ Rather, City View effectively argues that the credible evidence does not support such a finding.

¶26 City View's sufficiency argument rests primarily on the notion that the estate's evidence of pain and suffering is so weak that it amounts to a total failure of proof. City View points out that the estate did not introduce evidence

⁴ More accurately, City View does not present developed argument on this topic. What we find in City View's brief is this single sentence:

Even accepting [the estate's medical expert's testimony], the \$650,000 award still reflects an allowance of effects of injury not established.

This is simply a conclusory assertion. If the estate's experts are believed, Baumgarten suffered excruciating pain for significant periods of time over a five-week period before his death, pain that could have been avoided if City View had not been negligent. City View may make the best possible argument, but does not explain *why* the jury's pain and suffering award is excessive.

that Baumgarten complained about pain or that witnesses saw him acting as if he were experiencing pain. City View also notes that Baumgarten's family did not testify that he responded to or recognized them while at St. Mary's, thus suggesting that Baumgarten was not sufficiently conscious to experience pain. Finally, City View argues that there was no direct testimony of pain or suffering at the hospice care facility where Baumgarten was transferred after leaving St. Mary's.

¶27 We agree that the estate's evidence on this topic is lean to say the least, but the standard we apply requires that we search the record for any credible evidence sufficient to sustain the jury's damages award. *See Roach*, 73 Wis. 2d at 539. We conclude that Baumgarten's estate identifies several pieces of testimony that, if believed, would have supported a jury finding that Baumgarten consciously experienced substantial pain.

¶28 Dr. Mark Steven Lachs gave his opinion that Baumgarten experienced "conscious pain and suffering." Dr. Lachs based that opinion on the fact that Baumgarten exhibited signs of awareness when he was on a ventilator in the intensive care unit, that there was "a note or two after hospitalization in which [Baumgarten is] described as recognizing his doctor, and he says, 'I feel ornery,'" and that Dr. Lachs previously had patients who told him they were aware of being on a ventilator despite being sedated. Dr. Lachs testified:

The reason we sedate patients on ventilators is after they get off, they recall being on ventilators and they tell us that when they have awareness of the room – and Ralph did during that episode, if you look at the nurses' notes, he tracked people in the room, he wiggles his toes – during those periods, when the sedation had to be weaned so that he could be gotten off the ventilator, he had the experience of being on a ventilator awake.

Dr. Lachs testified that he could “think of no greater suffering than being on a ventilator in the intensive care unit.” Baumgarten was on a ventilator for an eleven-day period.

¶29 Dr. Leon Terry opined that Baumgarten’s awareness waxed and waned during the weeks before he died. Dr. Terry based his opinion on medical records indicating that Baumgarten was unresponsive in early August but, by August 16, 2001, he was wiggling his toes and squeezing his hand on command, and that he was “improving clinically.” Dr. Terry testified that Baumgarten exhibited these signs of consciousness directly before he was sedated and intubated on August 4, 2001, and directly after, on August 15, 16, and 18, 2001. Dr. Terry also testified that it was his opinion that Baumgarten experienced conscious pain and suffering “because he complained about it at least towards the end of his hospitalization.”

¶30 City View argues that Dr. Terry’s opinion regarding Baumgarten’s pain should be disregarded because it was based on Baumgarten’s complaints of pain during his stay at St. Mary’s. City View asserts the medical records do not support this opinion. The trial transcript indicates that Dr. Terry did communicate to the jury his opinion that there were “some complaints at least on two occasions of where [Baumgarten] actually complained of pain, and then one where he was actually given morphine sulfate for the pain.” However, Dr. Terry also testified that he based his opinion on hospital records that, in his opinion, indicated Baumgarten’s consciousness, and on hospice records indicating the same. City View does not argue that these other bases for Dr. Terry’s opinion are inadequate.

¶31 In any event, City View did not object to Dr. Terry’s testimony that there were “some complaints” of pain while Baumgarten was at St. Mary’s.

Rather, on cross-examination, City View’s attorney asked Dr. Terry whether it was true that, at a prior deposition, Dr. Terry was unable to point out where in the medical records Baumgarten had complained of experiencing pain. Dr. Terry answered, “[t]hat’s right. That’s because I forgot it.” City View has not indicated that it pursued the matter further at trial. If City View had an objection to the basis for Dr. Terry’s testimony, or believed that cross-examination was insufficient to address the matter, it should have pursued an objection at the time. It should not raise the issue first before this court.

¶32 Finally, jurors are able to employ their own “common knowledge and judgment” when deciding damages awards. *See Redepinning v. Dore*, 56 Wis. 2d 129, 136, 201 N.W.2d 580 (1972). Here, the jury was entitled to take into account Baumgarten’s condition between the July 25, 2001 order for Baumgarten to be seen by his physician—the order City View did not follow—and August 2, 2001, when Baumgarten was transferred to St. Mary’s Hospital. During this period, Baumgarten’s condition deteriorated into what Dr. Lachs described as “about as sick as you can be.” Combining this information with the testimony of Dr. Lachs and Dr. Terry, we conclude that the jurors, employing their own knowledge and judgment, could find that Baumgarten suffered substantial pain during that period of time. In sum, the jury’s award for pain and suffering is supported by the evidence.

2. *The Award For Loss Of Society And Companionship*

¶33 City View argues that the evidence was insufficient to support the jury’s award of \$225,000 for Virginia Baumgarten’s loss of society and companionship. Specifically, City View argues there was “precious little testimony” about the nature of the “love, affection, or conduct between [Ralph and

Virginia Baumgarten],” and there was “no evidence of marital relations.” City View also asserts that Ralph Baumgarten’s physical limitations made it unlikely he would ever return to live with Virginia, but instead would need to live at an assisted care center.

¶34 “The amount that a jury awards in a wrongful-death action for loss of society and companionship lies peculiarly within the province of the jury.” *Steffes v. Farmers Mut. Auto. Ins. Co.*, 7 Wis. 2d 321, 334, 96 N.W.2d 501 (1959). The “‘jury must be left a large discretion in determining the sum to be allowed.’” *Ballard v. Lumbermens Mut. Cas. Co.*, 33 Wis. 2d 601, 614, 148 N.W.2d 65 (1967) (citation omitted).

¶35 The jury instruction given here for awarding damages for loss of society and companionship indicated what the jury was to consider in making the award:

Society and companionship includes the love, affection, care, and protection Mrs. Baumgarten would have received from Ralph Baumgarten had he continued to live. It does not include the loss of monetary support or the grief in mental suffering caused by the spouse’s death.

In determining Virginia Baumgarten’s loss of society and companionship, you should consider the age of Ralph Baumgarten and the age of Virginia Baumgarten; the past relationship between the spouses; the love, affection, and conduct of each toward the other; the society and companionship that had been given to Virginia by Ralph Baumgarten; and the personality, disposition, and character of Ralph Baumgarten. The amount inserted by you should reasonably compensate the spouse for any loss of society and companionship she has sustained since the death of Ralph Baumgarten and the amount you are reasonably certain she will sustain in the future.

Although the law provides that a party cannot recover more than \$350,000 for the loss of a spouse for society and companionship, this dollar amount is not a measure of damage. It is a limit on recovery. Therefore,

you should determine the amount that you believe will reasonably compensate Virginia Baumgarten for any loss of society and companionship.

See WIS JI—CIVIL 1870.

¶36 Ralph and Virginia Baumgarten were married for twenty-nine years. Two Baumgarten family members testified at trial that Ralph and Virginia had a loving and good relationship, and that Ralph was good to Virginia. Virginia testified that while Ralph was living at assisted living facilities she visited him every weekend and sometimes during the week.

¶37 We conclude there is sufficient evidence that would allow a jury to find that Virginia will suffer a loss of society and companionship. The jury has wide latitude in the amount of an award for loss of society and companionship. We therefore defer to the jury’s valuation of that loss and conclude that the award for loss of society and companionship is not excessive.

City View’s Request That We Invoke Our Discretionary Authority

¶38 City View asks us to reduce the damages awards or grant a new trial “in the interest of justice.” The primary focus of City View’s interest-of-justice argument seems to be our longstanding authority to order a new trial under WIS. STAT. § 752.35. But City View also relies on cases holding that we may use § 752.35 to accomplish the same result the trial court attempted to accomplish in its void order. Thus, it is unclear to us whether City View is seeking a new trial on all disputed damages issues in the interest of justice, or merely for this court to reach the same result as the trial court attempted to reach in its void order. We will analyze City View’s argument as though it had asked for both.

A. *Whether To Invoke Our Discretion Under WIS. STAT. § 752.35
To Order A New Trial On Damages*

¶39 We may grant a new trial in the interest of justice under WIS. STAT. § 752.35 where the real controversy has not been fully tried or it is probable that justice has miscarried. With respect to the pain and suffering and loss of society and companionship awards, City View argues that justice has miscarried or that the real controversy was not fully tried for four reasons. We address each below.⁵

¶40 First, City View argues the damages awards were excessive, against the great weight of the evidence, and a “shock to the judicial conscience.” However, we have already determined that the evidence supports the awards for pain and suffering and loss of society and companionship and that the awards are not excessive. Although City View does point to testimony from Baumgarten’s attending physician at St. Mary’s Hospital that contradicts the estate’s evidence concerning Baumgarten’s level of consciousness, it is the jury’s duty to weigh conflicting evidence and determine which is more credible. We cannot say that the evidence that City View points to is so overwhelming that allowing the jury awards to stand would constitute a miscarriage of justice. Nor can we say that the amount of the award is a “shock to the judicial conscience.” If Baumgarten’s estate’s experts are believed, Baumgarten underwent extreme pain. City View fails to persuade us that the amount awarded would shock the conscience of reasonable people when given as compensation for such pain.⁶

⁵ City View includes its argument that the jury’s award for medical expenses should be reduced within this section of its brief. Because we determined above that the award must be reduced as a matter of law, we do not revisit the issue here.

⁶ City View cites *Quick v. American Legion 1960 Convention Corp.*, 36 Wis. 2d 130, 152 N.W.2d 919 (1967), for the proposition that the award in this case is a shock to the judicial

(continued)

¶41 Second, City View argues that the damages awards were arrived at improperly because the jury was prejudiced by the introduction of the question of medical expenses. We have already determined that, if it was error to submit this question to the jury, City View suffered no prejudice as a result.

¶42 Third, City View argues that it was prejudicial for the estate's attorney to pursue a claim for punitive damages and then effectively abandon that claim when City View moved to dismiss the punitive damages claim after the estate's case-in-chief. We first provide some background information and then address the argument.

¶43 Before trial, City View moved the trial court for partial summary judgment on the issue of punitive damages. At the motion hearing, Baumgarten's estate argued that all it had to do at that point was allege facts sufficient to support a claim for punitive damages. The trial court determined that it would postpone a ruling on whether to submit the issue of punitive damages to the jury until evidence had been taken at trial. The court, however, warned the estate's attorney against submitting argument or evidence that would be admissible only to prove a claim for punitive damages until the court later ruled that the evidence was sufficient to meet the standard articulated in WIS. STAT. § 895.85. At the close of the estate's case-in-chief, City View moved to dismiss the punitive damages

conscience. City View's reliance on *Quick* is misplaced. The *Quick* court held that it could not say it was a clear abuse of discretion for the trial court to order a new trial based on the trial court's conclusion that the damage award was excessive. *Id.* at 136. The supreme court did not explore the evidence itself, but instead pointed out that there was competing evidence to support both the plaintiff's and the defendant's cases. *Id.* Rather than fully examine the issue, the court relied on the trial court's two other reasons to conclude that a new trial was justified. *Id.*

claim. The estate acquiesced to the motion without argument, and the claim was dismissed.

¶44 Rather than summarize City View’s specific argument, we choose to quote it:

[Baumgarten’s estate’s attorney] told the jury in his initial closing argument that he was not claiming that City View acted intentionally. However, he opposed City View’s motion for partial summary judgment to dismiss the punitive damages claim vigorously. He pursued a punitive damage claim throughout plaintiffs’ case-in-chief. When City View again moved at the close of plaintiffs’ evidence for dismissal of the punitive damages claim, plaintiffs capitulated without offering any argument at all. Then, on rebuttal, [the estate’s attorney] told the jury:

It seems to me that it is okay, it is okay to defend yourself if you didn’t do anything wrong. But three years after the death of Mr. Baumgarten City View’s attorney comes in here now and tells you now for the first time, for the first time I guess we made some mistakes....

The import of this was that [the estate’s attorney] forced the defendants to defend on punitive damages (not to mention compensatory damages), and after throwing in the towel, he, in effect, blamed City View for defending itself, asserting it was wrong to not come clean until the trial. In essence, [the estate’s attorney] appealed to the jury to punish City View for legitimately defending this case, a position he put City View in. It was a blatant pitch to prejudice the jury against City View. This was classic “sandbagging.”

It worked. That the jury decided to punish City View for providing a defense is evident from the excessiveness of the [awards for pain and suffering and loss of society and companionship]—an excessiveness that even [the estate’s attorney] admits.

(Citations omitted.)

¶45 To begin with, we do not agree that the estate’s attorney admitted that the damages awards were excessive. City View based this statement on a newspaper article from the Wisconsin State Journal on October 26, 2004. The article states that the estate’s attorney “said his research indicates the verdict could be the largest of its kind against a nursing home in Wisconsin.” Ed Treleven, *Jury: Nursing Home Must Pay Widow*, WIS. ST. J., Oct. 26, 2004, at B1. We think it self-evident that this is not an admission by the estate’s attorney that the awards are excessive. For that matter, we reject the argument that City View must have been prejudiced because the awards for pain and suffering and loss of society and companionship were excessive. That argument presupposes that the awards are demonstrably excessive, an argument we have rejected elsewhere in this opinion.

¶46 City View asserts that the estate’s counsel “vigorously” pursued the punitive damages claim at trial, but City View fails to detail specifics that might permit a conclusion that this pursuit affected the amount of damages awarded. In particular, City View does not allege that the estate’s attorney disregarded the trial court’s order prohibiting evidence pertinent only to punitive damages unless and until the court specifically ruled that such evidence was admissible.

¶47 Also, in the portion of rebuttal closing argument City View quotes, the estate’s attorney is not arguing that City View intentionally harmed Baumgarten. Rather, the estate’s attorney says that City View defended itself but now admits that it made “mistakes.” This was accurate. The estate points out that during closing argument one of City View’s trial attorneys did admit a mistake:

We know now that Dr. Hermus suggested that Mr. Baumgarten see his primary physician on July 26th, and we know now that the family requested an appointment on July 29 and July 30. We know these events did not occur.

That was a mistake. It was plain and simple. But that's not the test of negligence.

¶48 Therefore, City View has not shown that the estate's counsel acted improperly or that the damages awards were affected by such behavior. Nor has City View shown how it was forced to do anything other than what it would have done absent a claim for punitive damages.

¶49 Fourth, City View argues that the trial court erred in precluding Dr. Graebner's testimony as to cause of death. We determined above that City View failed to demonstrate to the trial court that this testimony was being offered as relevant to the damages award for loss of society and companionship. However, we must now determine whether its exclusion demonstrates that the real controversy was not fully tried in this case. *See* WIS. STAT. § 752.35.

¶50 City View argues on appeal that Dr. Graebner's testimony was necessary to rebut Dr. Lachs' testimony that Baumgarten would have lived for "years" absent City View's negligence. But the only support for this claim is City View's contention that "Dr. Graebner's testimony would have established that Mr. Baumgarten would have died from the neurological problems." City View does not claim that the testimony would have established *when* Baumgarten would have died from the neurological problems.

¶51 Furthermore, City View's other medical expert, Dr. Matthew Hanna, testified that, in his opinion, Baumgarten "was in a progressive decline" prior to July 2001. Dr. Hanna based that opinion on his conclusion that Baumgarten "had had progressive inabilities to perform his own activities of daily living, to interact consistently, to retain information, to swallow, to speak clearly." He testified that some of those problems could have been the result of "a neurologic disease

process.” Dr. Hanna also testified that earlier intervention by City View could have prolonged Baumgarten’s survival only for “perhaps weeks.”

¶52 Thus, despite the exclusion of the disputed portion of Dr. Graebner’s testimony, City View was able to introduce expert opinion testimony that Baumgarten was suffering from conditions that would have led to his death regardless of City View’s negligence. Additionally, the admitted testimony indicated that Baumgarten’s life would have been prolonged only for weeks absent City View’s negligence. That is a level of preciseness Dr. Graebner’s testimony did not contain.

¶53 We are “reluctant to grant a new trial in the interest of justice and [we] exercise [our] discretionary power only in exceptional cases.” *State v. Cuylar*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). City View has not demonstrated the necessity of this portion of Dr. Graebner’s testimony. In effect, City View’s only argument is that if at trial it had offered the evidentiary theory it presents to us, Dr. Graebner’s testimony may have helped City View’s position on damages. We do not consider this an exceptional circumstance warranting our exercise of discretion to grant a new trial.

¶54 None of City View’s arguments, either individually or in combination, persuade us to exercise our discretion to grant City View a new trial.

B. The Effect Of The Trial Court’s Void Order

¶55 In its post-verdict motions, City View sought reduced awards for medical expenses, pain and suffering, and loss of society and companionship, or a new trial on damages. The trial court issued an order reducing the jury’s award for medical expenses, and gave Baumgarten’s estate the option of accepting a reduced

award for pain and suffering or accepting a new trial on damages for pain and suffering. The order denied City View's other motions. That order was void because it was issued beyond the statutorily required time limit. *See* WIS. STAT. § 805.16. However, the void order gives rise to another framework for reviewing City View's challenges.

¶56 When a trial court rules late on post-verdict motions, the order is void, but we may invoke our discretion under WIS. STAT. § 752.35 "to accomplish the same result that the trial court attempted to accomplish but was unable to because of its loss of the capacity to exercise jurisdiction." *Joseph P. Jansen Co. v. Milwaukee Area Dist. Bd.*, 105 Wis. 2d 1, 10, 312 N.W.2d 813 (1981). We invoke our discretion to accomplish such a result under the same circumstances that we would traditionally exercise our discretion under § 752.35; in other words, where there has been a probable miscarriage of justice or the case has not been fully tried. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 422, 405 N.W.2d 354 (Ct. App. 1987). However, in addition, we may consider the trial court's reasoning in its void order. *Jansen Co.*, 105 Wis. 2d at 11-12.

¶57 Thus, because the trial court's void order attempted to modify the awards for medical expenses and pain and suffering, we consider whether to invoke our discretion to reach the trial court's result as to those two issues. *See Lyons*, 137 Wis. 2d at 422. We have already determined that City View has not demonstrated that there has been a miscarriage of justice or that the case has not been fully tried. Therefore, the only question that remains is whether our analysis changes when we consider the trial court's void order. It does not.

1. The Award For Medical Expenses

¶58 The jury awarded Baumgarten's estate \$132,157.17 in medical expenses. In its void order, the trial court reduced the jury's award for medical expenses by \$50,000. The court apparently assumed that Baumgarten's estate was entitled to the difference between the reasonable value of medical services and what City View settled the subrogated insurer's claim for. As we explain above, however, under *Paulson*, Baumgarten's medical expense award must be reduced to \$7,735.02. Thus, in this regard, City View has already obtained greater relief than provided in the trial court's void order.

2. The Award For Pain And Suffering

¶59 The jury awarded Baumgarten's estate \$650,000 in damages for pain and suffering. In its void order, the trial court offered the estate the option of accepting a reduced award of \$300,000 for pain and suffering or accepting a new trial on damages for pain and suffering. The court found the pain and suffering award excessive primarily because there was no "direct evidence" of Baumgarten's pain and suffering. We rejected City View's argument to the same effect above, and find it no more persuasive in this context.

¶60 The trial court seems to have based its opinion that there was no direct evidence of pain and suffering on its conclusion that the estate's experts were less credible. The court, without further explanation, dismisses Dr. Lachs' testimony regarding the pain associated with intubation as "incomplete." The court also notes that the evidence of Baumgarten's periods of consciousness created only the "possibility" that Baumgarten experienced pain, apparently disregarding the estate's experts' testimony that Baumgarten would have experienced pain during those periods.

¶61 The trial court's reasoning does not persuade us. The court seemingly takes the position that the estate failed to prove Baumgarten suffered any pain resulting from City View's negligence, not that Baumgarten's suffering merited a lesser award. Thus, there is a disconnect between the trial court's reasoning and its decision to cut the pain and suffering award in half. If the court believed that the jury's implicit finding that Baumgarten suffered pain was contrary to the weight of the evidence, the court should have granted City View's request to order a new trial under WIS. STAT. § 805.15(1), as opposed to offering the estate a reduced award under § 805.15(6).

¶62 We have already concluded that the evidence is sufficient to support a jury finding that Baumgarten suffered substantial pain during the relevant time period. The trial court's void order does not explain why halving the award is justified. We therefore decline to exercise our discretion to reach the result the trial court attempted to reach in its void order.

*Whether A New Trial Is Warranted Because The Verdict
Was The Result Of Prejudice And Perversity*

¶63 City View argues that we should order a new trial on damages because the damages awards were the result of prejudice and perversity. "A verdict is 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." *Redepinning*, 56 Wis. 2d at 134 (footnote omitted).

¶64 City View’s “prejudice and perversity” arguments are the same arguments we have rejected under other labels. We were not persuaded by those arguments under different labels, and we are not persuaded by them here.

Conclusion

¶65 We affirm the jury verdicts in this case, with the exception of the award for medical expenses. We conclude that, under *Paulson*, Baumgarten’s estate is entitled to only \$7,735.02 in medical expenses. We therefore reverse the jury’s award of \$132,157.17 for medical expenses, and remand with directions that the trial court amend that portion of the judgment to \$7,735.02.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

