COURT OF APPEALS
DECISION
DATED AND RELEASED

August 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 94-1245

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

ESTATE OF LYNN BOXHORN,
by personal representative,
ELLEEN L. RIETH,

Plaintiffs-Respondents,

LOUIS C. BOXHORN,

Plaintiff-Respondent-Cross Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant-Cross Respondent,

HANS H. MEVES,
AMERICAN FAMILY MUTUAL
AUTOMOBILE INSURANCE COMPANY
and WISCONSIN PHYSICIANS
SERVICE,

Defendants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Hans Meves' automobile struck Lynn Boxhorn as she was walking to her car. The jury found Meves 100% negligent in causing Lynn's death and awarded her father, Louis C. Boxhorn, $525,000 for past pain and suffering, loss of society and companionship, and for pecuniary loss occasioned by Lynn's death. State Farm Mutual Automobile Insurance Company appeals from the judgment in favor of Boxhorn. It argues that it was error to refuse to give the right-of-way instruction, that a claim for negligent infliction of emotional distress should not have been submitted to the jury, that damages were excessive, and that the verdict was perverse and warrants a new trial in the interest of justice. Boxhorn cross-appeals, claiming that because of his offer of settlement, double costs and interest should have been allowed. We affirm the judgment except for the damages award for past pain and suffering; we reverse that portion of the judgment and order a new trial on the issue of damages for past pain and suffering.

For the purpose of visiting a garage sale, Lynn parked her car facing west on the shoulder of the westbound side of the road. Boxhorn waited in the car for Lynn to return. As Lynn was walking westerly toward the driver's side of her car, she was struck by Meves' westbound automobile. The trial court instructed the jury on lookout using WIS J I—CIVIL 1055, 1070, and 1095.[1] State

[1] Together the trial court's instructions provided:

> A driver has a duty to exercise ordinary care to keep a careful lookout ahead and about him or her for the presence or movement of other vehicles, objects or pedestrians that may be within or approaching the driver's course of travel. In addition, the driver has a duty to use ordinary care to look out for the condition of the highway ahead and for traffic signs, markers, obstructions to vision and other things that might warn of possible danger.
>
> To satisfy this duty of lookout, the driver must use ordinary care to make observations from a point where the driver's observations would

Farm argues that the jury should have been instructed on right-of-way to make clear that Lynn had the duty to yield the right-of-way to vehicular traffic on the road. *See* ***Staples v. Glienke***, 142 Wis.2d 19, 31-32, 416 N.W.2d 920, 925-26 (Ct. App. 1987) (whether crossing or walking alongside the highway, pedestrian had an absolute duty to yield the right-of-way to traffic and the failure to do so constitutes negligence as a matter of law).

The trial court has wide discretion in issuing jury instructions. ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). If the instructions adequately cover the law, there is no erroneous exercise of discretion when the court refuses to give a requested instruction, even if the proposed instruction is correct. ***Id.*** We will affirm the trial court's exercise of discretion if the determination is one a reasonable judge would reach

(..continued)

> be effective to avoid the accident. Additionally, having made the observation, the driver must then exercise reasonable judgment in calculating the position or movement of persons, vehicles or other objects.
>
> When approaching an intersection where a marked or unmarked crosswalk for pedestrians exists, a driver must maintain such a lookout as is reasonably necessary to avoid striking them and to yield the right-of-way to pedestrians when they have the statutory right-of-way.
>
> When hazards exist because of highway conditions, volume of traffic, obstructions to view, weather, visibility or other conditions, care must be exercised consistent with the hazards.
>
> A person who has the duty to keep a lookout must look with such attention and care as to see what is in plain sight. If a person looks and does not see what is in plain sight, the person did not keep a proper lookout, and the person is just as negligent as if the person did not look at all. A duty to look means to look efficiently. A person who looks and fails to see what is in plain sight is in precisely the position that he or she would be in if he or she did not look at all.
>
> A pedestrian who enters the roadway must use ordinary care to observe timely the presence, location and movement of motor vehicles that may be approaching. When a pedestrian is in the roadway at a place other than a crosswalk, it is the pedestrian's duty to maintain such a lookout as is reasonably necessary to enable the pedestrian to yield the right-of-way to the motor vehicles.

and consistent with applicable law. ***Id.*** at 454-55, 523 N.W.2d at 280. Ultimate resolution of the appropriateness of giving a particular instruction turns on a case-by-case review of the evidence, with each necessarily standing on its own factual ground. ***State v. Vick***, 104 Wis.2d 678, 690-91, 312 N.W.2d 489, 495 (1981).

The only right-of-way instruction offered by State Farm was WIS J I—CIVIL 1250.[2] That instruction deals with a pedestrian's obligation to yield the right-of-way when attempting to solicit a ride from the operator of a motor vehicle.[3] The trial court correctly determined that the factual circumstances here did not involve an attempt to solicit a ride. The proposed instruction was not warranted.

The trial court explained that right-of-way considerations were covered by the combined lookout instructions. By the lookout instructions the jury was told that a driver must maintain a sufficient lookout to yield the right-of-way to pedestrians with the statutory right-of-way in a marked or unmarked crosswalk. Conversely, the jury was told that when a pedestrian is in the roadway at a place other than a crosswalk, it is the pedestrian's duty to maintain lookout so as to yield the right-of-way to cars. "Error cannot be predicated upon a refusal to give a requested instruction, even though it correctly states the law, where the substance of the requested instruction is embodied in another instruction." ***Peot v. Ferraro***, 83 Wis.2d 727, 732, 266 N.W.2d 586, 589 (1978).

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[2] At the beginning of the instruction conference, the trial court informed the parties of the proposed instructions removed from consideration. WISCONSIN J I—CIVIL 1250 was among those the court removed. There was no discussion of any other proposed language to instruct on right-of-way.

[3] WISCONSIN J I—CIVIL 1250 provides:

> The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway and, further provide, that no person shall be on a roadway for the purpose of soliciting a ride from the operator of any vehicle other than a public passenger vehicle.
>
> If you find that (*pedestrian*) was on the roadway for the purpose of soliciting a ride from the operator of any vehicle other than a public passenger vehicle, then it was (*pedestrian*)'s duty to yield the right of way to an automobile approaching on the roadway.

A factual dispute existed as to whether Lynn was in the roadway when she was struck. Given the evidence, we conclude that the instructions given adequately advised the jury of the corresponding duties to yield the right-of-way. On the instructions given, the jury was able to make a reasonable analysis of evidence. The trial court did not erroneously exercise its discretion in refusing to give the right-of-way instruction.

State Farm contends that the jury failed to follow the jury instructions. It points out that the jury awarded $100,000 for loss of society and companionship despite the fact that it was instructed that a person may only recover $50,000 for such a claim. State Farm argues that the jury's answer suggests that the verdict is perverse and that the jury was incited by passion. Perversity cannot be inferred from the jury's $100,000 award for loss of society and companionship. While the jury was instructed that the law limits recovery to $50,000, it was also advised that the dollar limit is not a measure of damage. The jury followed the instruction to determine a fair amount of compensation without regard to the limitation.

State Farm also argues that the jury's initial inconsistency in answering the liability questions and the subsequent changes it made to those questions confirms that the jury was driven by passion and prejudice. The initial verdict returned by the jury found that Lynn was not causally negligent but, contrary to the instructions in the verdict not to answer the apportionment question, the jury apportioned liability 99% against Meves and 1% against Lynn. After being instructed by the trial court to read the introductory portions of the verdict questions carefully, the jury returned to deliberations. The jury then sent out a note asking if it could change its answer to the question as to whether Lynn was negligent. The trial court instructed the jury to decide its answers in accordance with the evidence and instructions. After further deliberation, the jury returned a verdict finding that Lynn was not negligent.

We conclude that the difficulties the jury experienced in answering the verdict questions was not the result of its inability to follow the jury instructions. The trial court handled the entire matter impartially and reinstructed the jury appropriately. Potential prejudice is presumptively erased when admonitory instructions have been properly given by the trial court. ***Sommers v. Friedman***, 172 Wis.2d 459, 467-68, 493 N.W.2d 393, 396 (Ct. App. 1992). Ultimately, the jury was able to complete the verdict without

inconsistency. The trial court polled the jurors and there is no suggestion that the panel was confused as to the answers. No grounds exist for a new trial in the interest of justice.

We next address State Farm's argument that Boxhorn did not suffer any compensable pecuniary loss because Boxhorn now performs for himself the household services Lynn had provided.[4] State Farm also argues that the $300,000 award for pecuniary loss was excessive.

The jury heard how Lynn, age forty-six, maintained a household with her father, age eighty-one. She took over all the household chores when her mother died and changed to third-shift employment so she could be at home to care for Boxhorn. She cleaned house, did snow removal, cut the grass, helped with the garden, did the grocery shopping, paid for groceries out of her own money, cooked, did laundry and did all the driving. Lynn had nursed her father through seventeen operations, made sure he returned to the doctor for necessary check-ups and monitored his medications. A vocational expert testified that if Boxhorn purchased such services it would cost approximately $16,000 to $18,000 a year.

At the time of trial, Boxhorn had not yet hired anyone to perform the services Lynn had provided. However, we reject State Farm's notion that this precludes an award of pecuniary loss. Pecuniary injury can be measured as "such sum as will equal the value of such support and protection of the [surviving family member] as the [deceased] would have furnished during the time [the deceased] probably would have lived." ***Schaefer v. American Family Mut. Ins.***, 182 Wis.2d 380, 385-86, 514 N.W.2d 16, 19 (Ct. App. 1994), *aff'd as modified*, ___ Wis.2d ___, 531 N.W.2d 585 (1995) (quoting ***Maloney v. Wisconsin Power, Light Heat Co.***, 180 Wis. 546, 547, 193 N.W. 399, 399 (1923)). The household services provided by Lynn have economic value even though no

[4] State Farm contends that the services Lynn performed were akin to the services rendered by one spouse to another and could only be compensated for as loss of society and companionship. We summarily reject this claim because the two did not stand in the relationship of husband and wife. In the absence of that relationship, there would be no cause to instruct the jury on the definition of loss of consortium as it includes "the rendering of material services." *See* ***Lambert v. Wrensch***, 135 Wis.2d 105, 124-26, 399 N.W.2d 369, 377-79 (1987) (discussing how a homemaker's earning capacity is subsumed in the consortium claim).

compensation is paid among family members. *See* ***Boles v. Milwaukee County***, 150 Wis.2d 801, 816-17, 443 N.W.2d 679, 685 (Ct. App. 1989).

"Pecuniary injury" as used in § 895.04(4), STATS., is broadly defined and permits the jury to consider a very wide range of factors in determining the amount of pecuniary loss. ***Estate of Holt v. State Farm***, 151 Wis.2d 455, 460, 444 N.W.2d 453, 455 (Ct. App. 1989). Nothing requires the jury's function to be limited by the actual expenditure of money. The critical question was whether Boxhorn had a "reasonable expectation of pecuniary advantage" by Lynn remaining alive. ***Id.*** at 459, 444 N.W.2d at 454. Lynn's services could constitute a pecuniary advantage. A jury question existed and there was no error in submitting the claim to the jury.

In reviewing damages awarded by a jury, we may not substitute our judgment for that of the jury, but rather must determine whether the award is within reasonable limits. ***Badger Bearing v. Drives & Bearings***, 111 Wis.2d 659, 670, 331 N.W.2d 847, 854 (Ct. App. 1983). Where, as here, the trial court has sustained the verdict over a claim of excessiveness, the question is "whether there is any credible evidence that under any reasonable view supports the verdict and removes the issue from the realm of conjecture." ***Coryell v. Conn***, 88 Wis.2d 310, 315, 276 N.W.2d 723, 726 (1979). We must view the evidence in the light most favorable to the damages award. ***Badger Bearing***, 111 Wis.2d at 670, 331 N.W.2d at 854.

The vocational expert testified to the base value of Lynn's services. He explained that additional expenses would be incurred for benefits, taxes or agency fees. He also indicated that a live-in companion would be paid a greater amount of money and be afforded rent-free accommodations. The jury could infer that Lynn spent a great deal more time caring for Boxhorn than the minimum hours calculated by the vocational expert. The jury also heard that Lynn expended $2100 annually for household groceries. At the time of trial, Boxhorn's life expectancy was 6.8 years. However, the jury was free to evaluate Boxhorn's life expectancy in view of the fact that he had successfully recovered from a number of surgeries and was able to minimally care for himself in his own home. As we have already noted, in determining pecuniary loss the jury may assess a wide variety of factors. Even though the award is in excess of that

requested in Boxhorn's closing argument, credible evidence exists to support the award and we must sustain it.[5]

We turn to the remaining issue in the appeal upon which we reverse the award of damages for past pain and suffering. We first note that the parties agree that the jury award of $125,000 for past pain and suffering included damages for emotional distress occasioned by Boxhorn's bystander status at the accident scene. There is no doubt that Boxhorn sought to recover such damages. It was a separate claim in the complaint. Boxhorn does not attempt to defend the award as solely based on pain and suffering occasioned by his own injuries.[6] Thus, even though the jury was not specifically instructed on the elements of a claim for the negligent infliction of emotional distress, it was litigated here.

Damages for negligent infliction of emotional distress arise from a bystander's observance of the circumstances of the death or serious injury of a loved one, either when the incident occurs or soon after. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 660, 517 N.W.2d 432, 445 (1994). Recovery is permitted if the claimant witnessed an "extraordinary event"—that is, either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs. ***Id.*** at 657-58, 517 N.W.2d at 444-45. State Farm argues that Boxhorn failed to establish that he observed the death of his daughter.

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[5] State Farm suggests that Boxhorn had a pecuniary gain because he was the beneficiary of his grandchildren's disclaimer of Lynn's bequest of one-half interest in the residence. We reject State Farm's contention that the value of one-half ownership in the residence must be offset against the award of pecuniary loss. Not only is the argument underdeveloped, it lacks merit. Tortfeasors are not to gain the advantage of gratuities which an injured party receives from a third party. ***Estate of Holt v. State Farm***, 151 Wis.2d 455, 461, 444 N.W.2d 453, 455 (Ct. App. 1989).

[6] Boxhorn makes a substantially underdeveloped argument that because he was injured in the accident, he need not satisfy the elements necessary to recover for emotional distress as a "bystander." The argument fails because there is no correlative argument that the award, if only for emotional distress caused by his own injuries, is supported by credible evidence. We could not sustain the award on that basis alone.

The testimony established that Boxhorn hit his head on the doorjamb when Meves' vehicle struck Lynn's car. He believed he was unconscious for a short period of time because when he came to, people were at the car and would not let him get out of the car. Boxhorn remained in the car until dispatched to the hospital. He testified that he knew his daughter had been hit and that she was lying in the ditch but he did not know her condition. A witness on the scene testified that Boxhorn was hollering for his daughter. Another testified that Boxhorn asked if his daughter was alright.

We need not decide whether the evidence was sufficient to permit the jury to conclude that Boxhorn had witnessed an "extraordinary event" because his claim fails on another evidentiary gap. Boxhorn failed to establish that his brief bout with mild depression after the death of his daughter was caused by witnessing the accident or the distress associated with his fear for his daughter's well-being after she was struck by the car. Boxhorn's physician testified that during an examination about a month after the accident, Boxhorn was tearful as he described the loss of his daughter. The doctor thought Boxhorn was somewhat depressed and prescribed an antianxiety, antidepression drug. A month later Boxhorn seemed better. The doctor attributed Boxhorn's depression to the death of his daughter. On cross-examination, he acknowledged that the depression resulted from Boxhorn missing his daughter's companionship.

We conclude that the doctor's testimony was insufficient to establish that Boxhorn suffered emotional distress as a result of witnessing the accident or its gruesome aftermath. The doctor's testimony only supports an inference that Boxhorn suffered depression because of loneliness upon the death of his daughter.[7] The shock and grief growing out of the death of a close family member is not compensable emotional distress independent of a claim for loss of society and companionship. ***Id.*** at 658, 517 N.W.2d at 445. Thus, a claim for the negligent infliction of emotional distress was not supported by the evidence. Because an award for that claim was incorporated in Boxhorn's damages for past pain and suffering, that damages award is reversed.[8] On

[7] Boxhorn's other daughter gave testimony about the change in Boxhorn's emotional well-being since Lynn's death. Her testimony is not sufficient to establish a causal connection between witnessing the incident which caused Lynn's death and Boxhorn's emotional distress. Her testimony is only suggestive of Boxhorn's loneliness.

[8] Because we reverse the award for past pain and suffering, we need not address State Farm's

remand, the trial court is instructed to grant a new trial on damages for Boxhorn's past pain and suffering as distinguished from a claim of negligent infliction of emotional distress.

We summarily dispose of the cross-appeal. Boxhorn and the estate of Lynn Boxhorn made a joint offer of settlement. Boxhorn sought double costs and 12% interest under § 807.01(4), STATS., when the jury's verdict was in excess of the offer. The trial court correctly ruled that the joint offer of settlement was not in compliance with § 807.01 and that double costs and interest were not recoverable. *See* ***White v. General Cas. Co. of Wis.***, 118 Wis.2d 433, 438-39, 348 N.W.2d 614, 617 (Ct. App. 1984).

No costs to either party.

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

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
arguments that Boxhorn's counsel argued facts not in evidence or that a claim for past pain and suffering should not include a "bystander's" claim for emotional distress. We note that lumping the emotional distress claim with past pain and suffering is problematic, particularly here where the jury was not given instructions tailored to a claim of negligent infliction of emotional distress.