COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-3609

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

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94 CV 380
EVELYN J. FRASER,

PLAINTIFF-APPELLANT,

GROUP HEALTH COOPERATIVE OF SOUTH CENTRAL WISCONSIN AND THE TRAVELERS INSURANCE COMPANY,

PLAINTIFFS,

V.

DANIEL R. MARCUSSEN AND MILWAUKEE GUARDIAN INSURANCE, INC.,

DEFENDANTS-RESPONDENTS.

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94 CV 3562
EVELYN J. FRASER,

PLAINTIFF-APPELLANT,

GROUP HEALTH COOPERATIVE OF SOUTH CENTRAL WISCONSIN, THE TRAVELERS INSURANCE COMPANY,

PLAINTIFFS,

V.

MICHAEL J. WARD AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Evelyn Fraser brought two actions for personal injuries arising out of two separate automobile accidents, one occurring on February 3, 1991, with Daniel Marcussen as the driver, and one occurring on December 2, 1991, with Michael Ward as the other driver. The actions were consolidated and tried together. The jury found Ward not negligent. They also found that Fraser's damages as a result of the accident with Marcussen were $2,970.50, which was reduced by 15 percent because the parties had stipulated that Fraser was 15 percent negligent and Marcussen was 85 percent negligent.

Fraser appeals from the judgments entered on the verdicts and the denial of her post-verdict motions, raising these claims: (1) the trial court erroneously exercised its discretion with respect to motions relating to discovery; (2) the judge erred in failing to disqualify himself; (3) the trial court erred in denying Fraser's motion for a directed verdict against Ward; and (4) the trial court erroneously exercised its discretion with respect to a curative jury instruction.

We conclude that the trial court properly exercised its discretion in deciding the motions relating to discovery. With respect to the curative jury instruction, we conclude that Fraser waived this issue by not raising it in her post-verdict motions and we decline to exercise our discretionary review. We also conclude that the trial court did not err in its ruling on disqualification or denial of the directed verdict. We affirm.

DISCOVERY ISSUES

Fraser challenges the trial court's exercise of its discretion in granting the defendants' motion to compel discovery and amend the pretrial order, and in denying her motion to vacate that order and further amend the pretrial order. Most of the relevant facts are not disputed.

Fraser filed the action regarding the February 3, 1991 accident on February 2, 1994, and the action regarding the December 2, 1991 accident on November 22, 1994. A consolidation order and a pretrial order were issued on June 16, 1995. The pretrial order scheduled trial for March 4, 1996, and required Fraser to disclose expert witnesses by August 15, 1995, and defendants to disclose their experts by September 15, 1995. An amended pretrial order, entered on February 20, 1996, rescheduled the trial for September 16, 1996, and moved back the dates for disclosure of experts to April 19, 1996, for plaintiff and June 21, 1996, for the defendants, with September 1, 1996, the completion date for discovery. The court's minute sheet states that "counsel stipulate to [this] adjournment" of the trial date.

On June 7, 1996, Ward moved to compel discovery or, in the alternative, to amend the pretrial order. The affidavit of Ward's counsel, Stephen Murray, accompanied the motion and averred that Fraser listed nine expert

witnesses for trial; on May 31, 1996, Murray wrote to Fraser's counsel, Gary Miller, requesting the opportunity to depose her experts and asking Miller to call to discuss a telephone scheduling conference with all counsel; as of June 7, 1996, none of plaintiff's experts were scheduled for deposition.

The court heard the motion on June 18, 1996. Miller was reached by telephone at home. When the court asked Miller why he was not at court, he stated that he had not received a notice. The court stated that it had a copy of the notice that was sent to him on June 7, 1996, and asked Murray to explain the motion. Murray summarized what was in his affidavit and motion, adding that he still had not had a response to his May 31, 1996 letter. Marcussen's counsel, John Markson, joined in the motion to compel production of plaintiff's experts with "final opinions in hand" and to extend defendants' deadline for disclosing experts. Markson stated that he wrote Miller when Fraser first disclosed her experts in April asking for the reports and asking that Miller call him if the reports were not available by May 15, 1996. Markson also said that he spoke with Miller the day before this hearing and Miller agreed to extend the deadline for naming defense experts.

Miller explained that the problem was that Fraser's treatment was ongoing, and he had asked whether there was any report from a new doctor she had recently consulted and was told no. He acknowledged receiving the letters from defendants' counsel, repeated that he had not received the motion to compel, and stated he had no problem with extending the defendants' deadline. Miller also noted that the defendants received preliminary opinions in the form of medical records and that he was not going to call all nine of the experts he listed at trial. He agreed with the court that the defendants were entitled to depose Fraser's experts even if they had not prepared final reports.

The court decided that an order to produce was needed and that Murray's proposal that Fraser be required to produce her experts by July 15, 1996, ready to give the opinions they would testify to at trial, was a fair one. The court also decided that the defendants would have until August 15, 1996, to disclose their experts, and discovery would not close until September 15, 1996, the day before trial. After the court decided on these dates, Miller stated that he did not know if he could get final opinions, and that if the defense wanted to telephone the main treating physician, Dr. Paul Searles, they could do so and schedule a deposition. Murray responded that because of the case law, he did not want to have direct contact with the plaintiff's experts. The court advised Miller that it was his responsibility to produce his experts and that if the experts were not deposed and did not give an opinion, they might not be allowed to testify at trial.[1] The written order issued by the court, dated June 20, 1996, provided that Fraser had to produce her experts by July 15, 1996; that they had to have final trial opinions by their depositions; and any expert not deposed in accordance with the order would be barred from testifying. It also provided that defendants had until August 15, 1996, to disclose their expert witnesses and that discovery would remain open until trial.

[1] There was further discussion, initiated by Miller, about the fact that he had not received notice of the hearing. Murray offered to obtain an affidavit from his secretary that it was mailed, but the court concluded this topic by stating that they had to "get moving," with the trial date set for September 16, there had been written requests for this information, and the court's ruling on the motion would stand. Although Fraser emphasizes the lack of notice of the hearing in her recitation of the facts, she does not argue on appeal that the trial court erred by proceeding with the hearing or by not resolving the question of whether proper notice had been given. We observe that Miller did not ask for a postponement of the hearing and did not state or indicate in any way that he was unprepared to proceed on the motion. Although he raised the topic of lack of notice again toward the end of hearing, he did not ask the court to do anything about it.

Fraser argues on appeal that the trial court erroneously exercised its discretion in granting the defendants' motion because she had not violated a discovery statute and good cause had not been shown to amend the scheduling order. Fraser contends that it was the recent substitution of counsel for both Ward and Marcussen that created a time bind for them, not anything she or her counsel did, and that the trial court did not take into account the difficulty Fraser would have in producing her experts with opinions by the required date. According to Fraser, the trial court assumed the trial date should not be rescheduled but did not explain why.

The decision whether to modify a scheduling order is within the discretion of the trial court, ***Schneller v. St. Mary's Hospital Medical Center***, 162 Wis.2d 296, 305, 455 N.W.2d 250, 254 (1991), as is the decision whether to grant a motion to compel discovery. ***Franzen v. Children's Hospital***, 169 Wis.2d 366, 376, 485 N.W.2d 603, 606 (Ct. App. 1992). We sustain a trial court's discretionary determination if the court considered the relevant facts of record, applied the proper standard of law, and using a demonstrable rational process, reached a conclusion that a reasonable judge could reach. ***Schneller***, 162 Wis.2d at 306, 455 N.W.2d at 254. We conclude the trial court's decision to grant the motion to compel discovery and amend the pretrial order demonstrated a proper exercise of discretion.

Miller agreed at the hearing that the defense had the right to depose Fraser's experts before trial. He stated that he had no objection to extending the time for defendants' to produce their experts, and no objection to extending the discovery deadline until the day before trial. After Murray proposed July 15, 1996, as the date by which Miller had to produce experts for deposition, Miller did not state that he could not do so by that time. The only difficulty he related to the

court was that he did not know when his experts would have final opinions. Murray argued that, since the case had been filed in 1994 and the trial had been postponed once, plaintiff's experts should by now have the opinions they would testify to at trial in three months.

In the absence of any concrete reason offered by Miller beyond the statement that Fraser's treatment was continuing, it was reasonable for the court to conclude that her experts should by now be prepared to give the opinions they would present at trial. The court could also reasonably conclude from the submissions of Ward, and the statements of all counsel at the hearing, that Miller had not been responsive to efforts to depose Fraser's experts and that an order setting a deadline by which he had to produce them was necessary. In the absence of any statement by Miller that he could not produce the experts by July 15, it was reasonable for the court to impose that deadline to assure that the trial would go forward on September 16. The trial court was not required to consider postponing the trial when no party was requesting postponement.

On July 11, 1996, Fraser brought a motion to vacate or amend the June 18, 1996 order.[2] In his affidavit accompanying the motion, Miller averred that he would produce Dr. Christopher J. Stevens' final report and deposition on or before July 15; the report and deposition of Mr. Louis Fortes, Ph.D., was completed on July 10, 1996; he called defense counsel's office on July 2, 1996, to advise that Dr. Searles would be providing a deposition but would be unavailable for deposition until July 23, 1996; and he wrote a letter to Murray on July 3, 1996, stating this, providing dates on and after July 23, 1996, on which Dr. Searles was

[2] Although the written order was entered on June 20, 1996, we will refer to it as the June 18 order since that is the date the court orally made the order.

available for deposition and asking Murray to call when he returned from vacation. He also averred that he contacted Sue Mengling and she had difficulty making herself available for deposition before July 15, 1996; there had not been sufficient time for him to make arrangements for the witnesses to produce reports and be available for depositions before July 15, 1996; and defense counsel had not contacted his office until the morning of July 10, 1996, to schedule depositions.

The hearing on Fraser's motion took place on July 12, 1996. Miller asserted that defense counsel was responsible for "the time crunch" and defense counsel asserted that Miller was. Much of Miller's argument in support of vacating the June 18 order was that it had been improperly entered as "a sanction" because there had been no violation of the pretrial order or discovery statutes, and his failure to respond to Murray's May 31, 1996 letter did not warrant the June 18 order. Murray objected to vacating or amending the June 18 order, contending that Miller had not shown that he made efforts to comply with the June 18 order but could not comply for reasons beyond his control. Murray asserted that the two depositions that had been taken were taken as a result of a call he and Markson made to Miller on the morning of July 10, 1996, and the defense counsel agreed to take those depositions on short notice, demonstrating their good faith.

The court declined to reconsider its June 18 order. The court stated that it intended to keep the September trial date because the cases were over two years old. The court repeated its view that it was reasonable to require Fraser to produce her experts with final opinions: "This is not a game of sabotage or hiding cards. This is discovery and we are trying to find out." Later in the hearing, after another matter was decided, Miller brought up the matter of Dr. Searles' deposition in particular, asking the court to allow that deposition on or after July 23, when Dr. Searles returned to the state. Murray opposed this, arguing that

Fraser's submissions showed no contact with Dr. Searles, and no efforts to get in touch with him or set up his deposition, from June 18 until July 2, 1996.[3] The court asked Miller why he had not written Dr. Searles on June 18, right after the hearing, and Miller responded that he had called him. The court decided that was not a sufficient explanation for not having made contact with Dr. Searles until July 2, 1996, and again declined to vacate or modify the June 18 order.

Fraser's challenge to the trial court's denial of this motion mentions only Dr. Searles' deposition, and that is the only one we address.[4] The trial court's decision to grant relief from the scheduling order is also a matter within the trial court's discretion. ***Loy v. Bunderson***, 107 Wis.2d 400, 415, 320 N.W.2d 175, 184 (1982). In reviewing the court's denial of this request, we do not ask ourselves whether we would have made the same decision, but rather whether the decision is one a reasonable judge could reach based on the record and the applicable law. *See* ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). Although we acknowledge that the trial court's decision is a strict enforcement of the June 18 order, we cannot conclude that it is unreasonable. The trial court had already determined that Miller had not been responsive in producing experts for discovery before June 18, 1996, and we have held that was supported by the

[3] The letter Miller wrote to Murray dated July 3, 1996, states that, "On Tuesday, July 2, 1996, I was finally able to discuss the matter with Dr. Searles."

[4] The only other person mentioned in the affidavit by name was Sue Mengling, and no argument was presented to the trial court, or to this court, on when Miller contacted her, why she was unavailable before July 15, 1996, or when she would be available. Other experts and their unavailability within the time frame were referred to only generally in Miller's affidavit. If Fraser does intend to argue on appeal that the trial court erroneously exercised its discretion in denying a modification of the July 15 deadline as to any expert other than Dr. Searles, we conclude such an argument is without merit. Since we have concluded that the trial court did not erroneously exercise its discretion in entering the June 18 order, Fraser would have to present some factual basis to justify an extension of the July 15 deadline as to a particular expert in order to have an arguably meritorious basis for a modification of the July 18 order as to that expert.

record. The court made clear on June 18 that it intended to keep the September 16 trial date and that Fraser had to produce her experts for depositions, prepared to testify on their final opinions, by July 15, or face the possible consequence of not having that expert testify at trial. The written order expressly stated this. Miller was therefore fully warned about the significance the court attached to compliance with the order. The court could reasonably expect that Miller would begin immediately to arrange for depositions, would make every effort to schedule them before July 15, and, if that were not possible, would make a detailed showing to the court about why it was impossible to meet the July 15 deadline.

Most of Miller's argument to the court on July 12, and most of the submission, related to events before June 18. The court could properly consider those to be irrelevant to a modification of the July 15 deadline. Miller's response was vague even when he knew that the court was looking for a detailed explanation of the efforts he made to contact Dr. Searles before July 2, 1996. Miller stated only that he called Dr. Searles, without saying when or how many times, and that he "was finally able to get [Dr. Searles] to call [him] back" on July 2, 1996. Miller wanted to focus on the fact that defense counsel was on vacation for some period between July 2 and July10, but the court considered the more significant issue to be what Miller did to comply with the order between June 18 and July 2. The court's conclusion that Miller had not taken seriously his responsibility to comply with the July 18 order does have support in the record. We recognize that sometimes an opposing counsel's failure to fully cooperate may contribute to the other counsel's failure to comply with discovery deadlines, but it is the trial court's role, not ours, to sort out such tangles. Our review is limited to whether the decision was a reasonable one based on the law and the facts, and we

conclude the decision denying a modification to the July 15 deadline met this standard.

MOTION TO DISQUALIFY JUDGE

On September 16, 1996, just before jury selection was to begin, Fraser's counsel made an oral motion for the judge to disqualify himself under § 757.19(2)(g), STATS. That section requires a judge to disqualify himself or herself when the judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Fraser argued that the following actions of the judge showed he was biased against Fraser and that she would not be able to get a fair trial: (1) the judge denied, without a hearing, Fraser's motion to prevent defendants from calling an expert witness on the ground that defendants had not produced him for deposition at a reasonable time or place prior to trial; (2) some statements made in the response submitted on behalf of the judge to Fraser's petition for a supervisory writ in this court were inaccurate;[5] and (3) the judge's rulings were repeatedly adverse to Fraser.

The judge denied the motion to disqualify himself. He stated that Fraser was entitled to a fair trial and she was going to get one. He stated that he was not aware of what statements the assistant attorney general made on his behalf in this court. He explained that any rulings he made were based on the scheduling

[5] On July 29, 1996, Fraser filed a petition for a supervisory writ in this court seeking relief from the trial court's order of June 18 which required Fraser to produce her experts for deposition, with final opinions, on or before July 15, 1996. Case No. 96-2167W, ***State ex rel. Evelyn J. Fraser v. Richard J. Callaway, et. al***, L.C. # 94 CV 380; 94 CV 3562. We denied the petition on the ground that there was no showing that the trial court clearly violated a plain duty in entering the June 18 order or in denying Fraser's motion to vacate or modify that order. The three "inaccurate statements" that Fraser refers to in her appellate brief were contained in the response to the petition submitted by an assistant attorney general on the judge's behalf.

order and trying to get discovery completed. He explained in some detail the reason for denying the motion in limine.

Appellate review of a decision on disqualification under § 757.19(2)(g), STATS., is limited to determining whether the judge went through the required exercise of making a subjective decision regarding disqualification. ***State v. Harrell***, 199 Wis.2d 654, 663-64, 546 N.W.2d 115, 119 (1996). The trial court did so and that is all that is required. Our review on this issue extends no further.

MOTION FOR A DIRECTED VERDICT AGAINST WARD

The accident involving Ward took place on East Washington Avenue, Madison, Wisconsin, on December 2, 1991, in the middle of the day when it was snowing. Fraser was headed west on East Washington Avenue. When she stopped for a red light at the Zeier Road intersection, Ward's vehicle, which was traveling in the same direction in the same lane behind Fraser's, collided with her vehicle from the rear. At the close of the evidence, Fraser moved for a directed verdict on the ground that Ward was negligent as a matter of law in causing the collision and the trial court denied the motion. The jury returned a verdict finding Ward not negligent. Fraser again raised this issue in her motions after verdict. The court ruled that the issue of Ward's negligence was properly submitted to the jury because case law did not impose on Ward a duty to avoid an accident but only to use ordinary care to that end.

When a trial court considers a motion for a directed verdict, it must view the evidence most favorably to the party against whom the verdict is sought and should deny the motion if there is any credible evidence which under a reasonable view would support a contrary verdict. ***Millonig v. Bakken***, 112

Wis.2d 445, 450, 334 N.W.2d 80, 83 (1983). Even if the evidence is not disputed, if it permits different or conflicting inferences, a verdict should not be directed. ***Id.*** We apply the same standard when reviewing the trial court's decision. ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). However, we must also give substantial deference to the trial court's better ability to assess the evidence. ***Id.*** at 388-89, 541 N.W.2d at 761.

We agree with the trial court that common law does not contemplate that all accidents or mishaps must arise as a consequence of fault. *See* ***Millonig***, 112 Wis.2d 452, 334 N.W.2d at 84. Rather, a driver has a duty to use ordinary care to avoid an accident and this involves a determination as to what a reasonable and prudent person would do in the same circumstances. ***Id.*** at 450, 334 N.W.2d at 83. We also agree with the trial court that the evidence, viewed most favorably to Ward, did not warrant a directed verdict against him.

The following is the testimony most favorable to Ward. Police officer Phillip Anderson testified that the posted speed limit on that section of East Washington Avenue was forty-five miles per hour. He testified that the road was wet, slippery and icy from the snow and that it was more than likely that a number of accidents occurred that day due to the weather. Fraser testified that as she started driving into Madison, the roads got slippery and the snowfall increased. She did not see Ward approach, never saw him slide, and could not estimate his speed. She heard Anderson say that there had been a lot of accidents that day, and she believed he was kind of angry because of all the accidents.

Ward testified that it started snowing on his way to Madison and the snowfall got heavier as he approached Madison. He was traveling twenty-five miles an hour on East Washington Avenue when he saw the plaintiff's stopped

vehicle. At that time he was sixty yards behind Fraser and began to pump his brakes. By the time he was ten to fifteen yards from the rear of her car, he had reduced his speed to five-miles per hour. He continued to pump his brakes as he approached; however, when he was about five yards behind her, the brakes locked and he slid into her vehicle. He had good tires on his car, a clean windshield and functioning lights. He had consumed no drugs or alcohol prior to the accident; he was driving to class that morning and was not in a hurry. He was traveling the same speed or slower as the traffic around him. After the accident, he got out of his car and approached Fraser's vehicle but had trouble walking on the road surface because it was slippery.

Fraser argues that Ward had a duty to know the road conditions and to be able to stop in time to avoid striking other objects or vehicles. But this is not a correct statement of his duty, as we have indicated above. Fraser also points to her own testimony that she had no problem stopping her vehicle and to Ward's admission that he had not tested to see how slippery the road surface was. This argument is based on drawing different inferences and conclusions from the evidence, but that is not the test for granting a directed verdict. There was evidence from which a reasonable jury could find that Ward slowed his speed due to adverse weather conditions and slowed his speed even more upon seeing Fraser. The jury could also reasonably infer that there was a slippery place on the road at the spot where his brakes locked and he slid into her vehicle. The trial court properly denied the motion for a directed verdict against Ward.

CURATIVE JURY INSTRUCTION

Fraser challenges the curative instruction the court gave during closing argument regarding Dr. Manalo's testimony, contending that it was an

erroneous exercise of discretion requiring reversal. Dr. Manalo was a physician who had treated Fraser. During cross-examination of Fraser, Murray asked questions concerning Dr. Manalo's notes and treatment, commenting that Dr. Manalo could perhaps interpret the notes and would know the answers to some of the questions he was asking her. The trial court later ruled that Dr. Manalo could not testify as an expert for Fraser because he had not been produced for deposition pursuant to the June 18 order. However, at Miller's request, the court did permit Dr. Manalo to testify, not as an expert, concerning the meaning of certain abbreviations in his notes. The trial court was very specific about exactly what lines and notations Dr. Manalo could explain, and emphasized more than once that he could testify to nothing else and he could not testify as an expert. Miller questioned Dr. Manalo briefly on the specific points permitted, and there was no cross-examination.

During closing argument, Miller stated:

> You will also note that Dr. Manalo was on the stand, and I was allowed to ask him the one question, 'What does that line mean?' and he said, 'I was considering it as a possible diagnosis.'
>
> Counsel for the defense had every right to ask him any question they wanted, and they didn't ask him about the March 27, 1989 note, and you know and I know why they didn't.

Murray immediately objected, stating that he was going to ask for a curative instruction, and the court excused the jury. Murray argued to the court that Miller's comments were improper because they suggested to the jury that the reason Dr. Manalo had not testified further was that the defendants thought his testimony would hurt their case, when the true reason was that the court had excluded his testimony because of Fraser's failure to produce him for deposition

pursuant to the June 18 order. Miller's response was that the court had not barred the defense from questioning Dr. Manalo, so his comments were proper.

The court decided that Miller had tried to give the jury the impression that the defense was not "playing fair" when, in fact, Fraser's failure to comply with the court order was the reason Dr. Manalo was not permitted to testify further. The court then gave the following instruction to the jury:

> Ladies and gentlemen, the motion by [defense counsel] has been granted. The Court is going to give a curative instruction to the jury, that Dr. Manalo was not allowed to testify except for certain enumeration of a question, and that order was an order of the Court, and the order of the Court that he not be permitted to testify was based upon Mr. Miller's conduct prior to the trial.

Later, at a break in closing argument, Miller asked the court to give another instruction that simply stated that Dr. Manalo was not testifying because of an order of the court and corrected the impression that it was Miller's misconduct that resulted in Dr. Manalo not testifying. Miller argued that the record did not support the statement that his conduct kept Dr. Manalo from testifying, or that he refused to produce the physician, as opposed to being unable to do so. The court denied the motion. Fraser did not raise this issue in her motions after verdict.[6]

On appeal, Fraser contends that the instruction the court gave was not supported by the record because there was no order preventing defense counsel from questioning Dr. Manalo and the court made no finding as to why Dr. Manalo was not produced for deposition. Fraser also argues that the court's reference to

[6] Fraser raised a number of other issues in her motions after verdict, including those issues already addressed in this opinion.

his conduct in the instruction was irrelevant and was for the purpose of damaging his credibility before the jury. The respondents counter with a number of arguments, but we consider only one because it is dispositive: Ward argues that Fraser has waived the right to appeal this issue because she did not raise it in her motions after verdict. Fraser replies that it would have been futile to do so because the trial court denied her motions on all the issues she did raise post verdict.

Failure to include an alleged error in a post-verdict motion, even where an objection is made during the course of trial, constitutes a waiver of an appeal as of right as to that error. ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 417, 405 N.W.2d 354, 362 (Ct. App. 1987). Although we still have jurisdiction to decide that issue on appeal in the exercise of our discretion under § 752.35, STATS.,[7] *see* ***Hartford Ins. Co. v. Wales***, 138 Wis.2d 508, 517, 406 N.W.2d 426, 430 (1987), we are to do so only when we are convinced that, on the record as a whole, there has been a probable miscarriage of justice. ***Ford Motor Co.***, 137 Wis.2d at 418, 405 N.W.2d at 362.

We are unable to conclude that there has been a miscarriage of justice because of the court's curative instruction. As Fraser recognizes, a trial

[7] Section 752.35, STATS., provides:

> Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

court's decision whether to give an instruction, and, if so, the wording of the instruction, is a discretionary one. *See* ***D'Huyvetter v. A.O. Harvestore***, 164 Wis.2d 306, 334, 475 N.W.2d 587, 597 (Ct. App. 1981). The record supports the trial court's decision that a curative instruction was necessary on the ground that Miller's comments suggested that Dr. Manalo did not testify further because the defense was afraid of what he would say, whereas the true reason was that Fraser had not produced him for deposition by the deadline established in the June 18 order. The precise issue, then, is whether the court erroneously exercised its discretion in the wording of the curative instruction. Because we are not persuaded that the wording of the instruction resulted in a probable miscarriage of justice, we decline to exercise our discretion to reach this issue.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.