COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 30, 1996

No. 95-2644

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

ROSEMARY OWEN, RODERICK OWEN AND GREAT WEST LIFE AND ANNUITY INSURANCE COMPANY,

Plaintiffs-Respondents,

v.

THRESHERMEN'S MUTUAL INSURANCE COMPANY, N/K/A A SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. A Society Insurance appeals a judgment on a jury verdict finding it liable for damages Rosemary Owen suffered in an automobile accident with Society's insured, John Hajewski. Society requests (1) a new trial

due to various discovery and evidentiary errors; (2) sanctions against the Owens' counsel for a frivolous post-verdict motion and, alternatively, (3) a reduced judgment equal to Society's policy limits plus costs and interest. We conclude that any trial court errors were non-prejudicial, that the case must be remanded to determine whether the Owens' post-verdict motion was frivolous and that the judgment must be reduced to the amount of Society's policy limits in the interest of justice. Therefore, we affirm in part, reverse in part and remand for proceedings consistent with this opinion.

This dispute arose from a two-car accident when Hajewski pulled out from a stop sign into Rosemary's right-of-way on October 22, 1990. Rosemary was on her way to a clinic for a follow-up visit regarding a prior head injury. She did not experience any immediate pain from the accident and did not seek medical treatment for any accident-related injuries at her clinic visit. Three weeks after the accident, Rosemary called Dr. Eileen Winckler, a chiropractor, due to neck pain and headaches. Rosemary subsequently complained of lower back pain. The lower back pain allegedly became so severe that she was unable to continue her employment and was limited in her household work and leisure activities. In August of 1992, Rosemary left chiropractic treatment, went to a physical therapist and was eventually referred to a surgical consultant. In June 1993, Dr. Kirkham Wood performed back surgery on Rosemary to relieve her pain. After surgery, Rosemary experienced significantly less pain. However, Wood testified that she will have a certain amount of permanent pain and physical restrictions that will prevent her from performing physically active labor.

Rosemary and her husband, Roderick, filed a direct action against Society on September 1, 1993.[1] *See* § 632.24, STATS. Society was originally represented by attorney Charles Brady, and trial was scheduled for January 4-6, 1995. When Brady's firm dissolved in mid-December 1994, attorney Nancy Sixel took over the case and the trial court granted Society a continuance to May 17-19, 1995, to allow Sixel to familiarize herself with the case.

[1] The Owens also joined Great West Life and Annuity Insurance Company as a subrogated, involuntary party plaintiff. Great West never responded. The trial court granted the Owens' motion for default judgment against Great West.

Trial commenced on May 17, 1995. A jury awarded a total of $320,908.87 in damages. The trial court entered judgment against Society for the total verdict plus statutory costs and interest, despite the fact that Society had introduced its policy into evidence showing that its policy limit was $300,000. Society filed motions after verdict requesting a new trial for alleged discovery and evidentiary errors. The trial court denied these motions. The Owens filed a post-verdict motion compelling Sixel's supervisor to appear to be questioned whether the real reason for the continuance was the dissolution of the firm. The supervisor filed an affidavit stating the dissolution was the real reason, so the Owens withdrew their motion. The trial court denied Society's motion for costs associated with the motion.

Society also moved to reduce the judgment to its policy limit of $300,000. The trial court signed an "AMENDED ORDER AND AMENDED JUDGMENT" more than ninety days after the jury verdict, reducing the judgment to $300,000 plus costs and interest. According to § 805.16(3), STATS., if a trial court does not rule on a trial related motion within ninety days after verdict, the motion is considered denied. ***Gorton v. American Cyanamid Co.***, 194 Wis.2d 203, 230, 533 N.W.2d 746, 757-58 (1995). Society appeals the court's ruling on its motions for a new trial and costs on the Owens' motion. Society also argues that we should either enforce the amended judgment even though it was not entered within ninety days of the jury verdict, or reduce the first judgment to $300,000 plus costs and interest.

MOTIONS FOR A NEW TRIAL

Society raises numerous alleged discovery related and trial court errors to support a new trial.

1. Alleged Discovery Errors

The trial court's scheduling order closed discovery on December 4, 1994. When the court continued the trial date to May 1995, it would not reopen discovery. In the interim, Rosemary received a report from the Division of Vocational Rehabilitation and another from the Social Security Administration and also saw Wood.[2] Society filed motions to compel discovery of the report, the application and the medical record from Wood. In March and April, the trial court denied these motions and Society's motion to reconsider the issue.[3] The decision whether to modify a scheduling order is within the circuit court's discretion, and we will not reverse that decision absent an erroneous exercise of discretion. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis.2d 296, 305, 470 N.W.2d 873, 876 (1991). A trial court in an exercise of its discretion may reasonably reach a conclusion that another judge or another court may not reach, but it must be a decision a reasonable judge or court could arrive at by the consideration of the relevant law, the facts and a process of logical reasoning. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). "[T]o be invested with discretion means that the trial judge has what might be termed a limited right to be wrong in the view of the appellate court, without incurring reversal." M. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 176 (1979), *cited with approval in* ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

First, Society contends that the court erred by not ordering the Owens to turn over the documents from the DVR and the SSA. However, before the December discovery deadline, the Owens had turned over a report from a vocational expert that referred to Rosemary's contact with the DVR and application for SSA benefits. Thus, before the close of discovery, Society had notice that the documents would likely come into existence. We conclude that this notice blunts the contention that the trial court was compelled to reopen discovery.

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[2] Society also claims it was entitled to records from Rosemary's visit with a psychologist. The Owens claim that they did not have any records from the psychologist. Because it is unclear from the record and briefs whether Rosemary visited the psychologist before the close of discovery and which interrogatory request required the Owens to disclose this information, we will not address Society's argument. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (court of appeals may decline to review an issue inadequately briefed).

[3] On May 9, 1995, at a pretrial conference, the Owens gave Society the report from the Department of Vocational Rehabilitation. On May 12, Society also received Wood's notes from Owen's visit.

Next, Society contends that the trial court erred in exercising its discretion by denying a request to receive medical records for visits Rosemary made after close of discovery.[4] In response, the Owens assert the only medical doctor Rosemary saw was Wood on May 3, 1995, and that Society received the notes from this visit on May 12, 1995. The Owens also assert the other medical records Society sought were created before the discovery deadline. We will accept these assertions as true because Society does not deny them and the discovery requests are not part of the appellate record. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Because Society reasonably could have obtained the remaining disputed records during the discovery period, we conclude that the trial court did not erroneously exercise its discretion by refusing to reopen discovery.

Next, Society contends that it was denied copies of medical records from Rosemary's visits with Dr. Jack L. Dunn at the Costa Chiropractic Clinic who treated Rosemary in the late 1970s for a back injury she sustained in a prior auto accident. In their January 19, 1994, answer to an interrogatory on the subject, Rosemary gave the correct description of the treatment and address of the clinic, but incorrectly listed Dr. Jack D. Lastlay as the treating chiropractor. Rosemary's partial illiteracy and mild retardation may explain her error in naming the doctor. When Society contacted the clinic, it denied having any records by a Dr. Lastlay or about Rosemary. The Owens' counsel was able to obtain records from the clinic, even though Rosemary also gave him the incorrect name of the chiropractor. When the Owens' counsel obtained the records, he became aware that Dunn was the name of the treating chiropractor. We agree with Society that § 804.01(5)(b), STATS.,[5] required the Owens to amend their interrogatory response to reflect this.

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[4] Society argues that its request for the updated medical records was not a "discovery" request, so the trial court's order requiring completion of discovery by December 4, 1994, did not bar the request. Society asserts that § 804.01(1), STATS., limits the definition of discovery to "the use of depositions, interrogatories, requests for documents; medical examinations; and requests for admission ...." Even if we accept Society's definition of discovery, we conclude that the request for updated medical records was a discovery request because it was a request for a document.

[5] Section 804.01(5), STATS., provides in part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response

Pursuant to § 804.12(4), STATS.,[6] a violation of § 804.01(5)(b), STATS., gives the trial court discretion to impose the sanctions listed in § 804.12(2)(a) 1, 2 and 3, STATS.[7] The trial court erred because it did not recognize that the Owens violated § 804.01(5)(b) and therefore did not consider the specific sanctions listed in § 804.12(2)(a). The statute gives the trial court

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> to include information thereafter acquired, except as follows:
>
> ....
>
> (b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made ....

[6] Section 804.12(4), STATS., provides in part:

> If a party ... fails ... seasonably to supplement or amend a response when obligated to do so under s. 804.01 (5), the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2) (a) 1., 2. and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01 (3).

[7] Subsection 804.12(2)(a), STATS., provides in part:

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party ....

discretion to impose such sanctions as deeming factual matters established, disallowing the disobedient party from supporting designated claims or dismissing the complaint.

An error is harmless if it does not prejudice the complaining party's case. ***Vogel v. Grant-Lafayette Elec. Coop.***, 195 Wis.2d 198, 216, 536 N.W.2d 140, 147 (Ct. App. 1995). When the court discovered that the Owens had failed to update their interrogatory with the correct name of the doctor, it stated: "This is not grounds for a mistrial. [Society] had the availability to get it. [Society] didn't. ... [Society has] only a superficial ground for [its] motion for mistrial based on the name change or successors or whatever." Society also fails to establish that the Owens' failure to timely inform it of Dunn's correct name substantively prejudiced its case. Society argues that it was prejudiced because Dunn's records revealed that Rosemary had spondylolisthesis, a preexisting back condition. However, Wood testified in his discovery deposition six months before trial that Rosemary had spondylolisthesis. Society should have been aware of the preexisting condition based on this testimony. Further, the trial court briefly adjourned the trial to allow Society's counsel to review the records. For the foregoing reasons, and because the trial court considered the violation not egregious and rejected other sanctions, its failure to reference and consider the sanctions in the proper statutory subsection was harmless error.

Section 804.12(4), STATS., also requires the trial court to determine whether the party who fails to supplement its interrogatory should pay the reasonable expenses caused by the failure. *See supra* note 5. As previously noted, the trial court concluded that the violation was minimal and that Society did not make an adequate effort to obtain the records on its own. The court noted that Society's counsel had the same opportunity to obtain the information as the Owens' counsel because Rosemary gave the incorrect name to her own counsel. The court stated to Society's counsel "I'm going to further remind you that in your opening you said something about being an investigator. This is what an investigator does. You take the information and you follow through and you finish it up as best as you can. If you can't do it, get somebody else to do it for you." The court questioned an assistant to Society's counsel on whether the assistant checked with the state chiropractic board to locate these records and the assistant answered that she did not. These comments illustrate that the court would have used its discretion to deny costs.

Other factors also mitigate against a remand for consideration of costs. The amount involved would seem nominal. Her original mistake was not shown to be intentional. Society had an opportunity to get the information as had the Owens' counsel. Finally, Society had difficulty contacting the chiropractor in July of 1994, yet did not notify the Owens of the problem until the week before trial in May of 1995.

Next, Society argues that it did not receive a complete copy of all the records generated by Wood's hospital. Wood treated Rosemary as part of a University of Minnesota Hospital grant program that prohibited full disclosure of the records. The trial court denied Society's motion to have the hospital produce the documents on grounds the court had no jurisdiction to compel a Minnesota hospital to release the records. On appeal, Society argues that it was prejudiced by this decision, but offers no legal argument why the court did have jurisdiction to compel production of these records.[8] We need not review issues that are inadequately briefed. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

2. Alleged Errors During Trial

A trial court has broad discretionary authority as to evidentiary rulings and the orderly administration of trials; we will not reverse such rulings unless the trial court has abused that discretion. ***State v. Wollman***, 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979). "As long as the court's discretion represents a proper application of the law and is a determination that a reasonable judge could have reached, it must be affirmed on appeal even if the decision is one that would not have been made by the reviewing court." ***Sentry Ins. v. Royal Ins. Co.***, 196 Wis.2d 907, 914, 539 N.W.2d 911, 914 (Ct. App. 1995).

First, Society argues that it should have been permitted to read portions of the Owens' depositions to the jury to prove

[8] Section 804.09(3), STATS., provides: "This rule [for production of documents] does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

> that [Rosemary] was suffering from headaches before the accident; that she may have been in a hurry at the time of the accident; that she made no complaints of pain to the police officer; that she had been lifting weights beyond the recommendation of her doctor; that the chiropractor had told Mrs. Owen she had back pain; and that she felt completely recovered from the surgery at the time of her deposition.

We agree that exclusion of this evidence was error because § 804.07(1)(b), STATS., provides that "[t]he deposition of a party ... may be used by an adverse party for any purpose." However, this error was harmless because Society had the opportunity to elicit this information from the Owens at trial. Society argues that Rosemary was essentially unavailable for a fair examination on these issues because she could not answer questions intelligibly. Society did not ask Rosemary whether she made complaints of pain to the police officer, whether she lifted weights beyond the recommendation of her doctor, whether the chiropractor planted the idea of back pain in her mind, or whether she felt completely recovered from the surgery at the time of her deposition. The only question Society asked Rosemary on cross-examination relating to the subjects it intended to prove with the deposition concerned whether Rosemary may have been contributorily negligent because she was suffering from a headache, which impaired her driving at the time of the accident. Society asked Rosemary, "And you were on your way to the doctor because of headaches and fuzzy vision on the day of this accident?" Rosemary intelligibly answered "I didn't have fuzzy vision, I had a headache."

Because Society did not give Rosemary the opportunity to answer these questions at trial, and because we conclude that she was "available" to answer them, the trial court's failure to admit the Owens' deposition testimony was harmless error.

Society also objects to a "time line" exhibit the Owens introduced, which summarized Rosemary's medical history but allegedly unfairly abridged her treatment history. Society argues that the exhibit was misleading, so Society assumably concludes that the exhibit should have been excluded under § 904.03, STATS.[9] The trial court concluded that the time line was not misleading

[9] Section 904.03, STATS., provides in part: "Although relevant, evidence may be excluded if its

and noted that Society could make a similar time line in rebuttal. The trial court has discretion regarding the receipt of demonstrative evidence. *See* ***Walker v. Baker***, 13 Wis.2d 637, 651, 109 N.W.2d 499, 507 (1961). We conclude that the trial court did not erroneously exercise its discretion because the exhibit was a reasonable representation of Rosemary's treatment history and she testified that it was not intended to include every medical treatment.

Next, Society argues that the trial court erred by prohibiting it from reading portions of medical records on which the Owens based the treatment history exhibit into evidence. Reading the records would have been cumulative because the records were already available for the jury's inspection.

Society argues that the trial court erred by refusing to receive testimony from the records custodian at the River Falls Clinic so that it could introduce Rosemary's medical records from that clinic. Section 908.03(6), STATS., provides a hearsay exception for records kept of a regularly conducted activity if a custodian or other qualified witness testifies to their authenticity.[10]

The trial court refused to receive the custodian's testimony on grounds that the evidence was closed when Society offered the custodian's testimony. Immediately before Society attempted to introduce the custodian's testimony, the parties agreed on the record to close the evidence, subject to Society's desire to make a record "outside the presence of the jury."[11] We

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probative value is substantially outweighed by the danger of ... misleading the jury ...."

[10] Society was not required to have a custodian testify to the authenticity of other medical records in the case because it followed the procedures of § 908.03(6m)(b), STATS. Society did not follow this procedure with respect to the River Falls Clinic records.

[11] The agreement to close the evidence proceeded as follows:

THE COURT: ... Anything else?

[SOCIETY'S COUNSEL]: That closes the evidence for the jury.

THE COURT: Okay. All right. Any rebuttal?

[OWENS' COUNSEL]: No. I don't think so, Judge.

[SOCIETY'S COUNSEL]: Excuse me. I didn't mean to misspeak. I do have

conclude that this statement allowed the court to preclude the introduction of further testimony.

Society contends that even if the time for taking evidence was closed, the trial court abused its discretion by failing to reopen it. After the court refused to reopen evidence, it noted "[Society's] problem is they weren't filed according to statute. ... And additionally, it is prudent practice to look through the Court file prior to trial to ascertain whether or not all medical records are here."[12] Section 906.11(1), STATS., gives the trial court wide discretion in controlling the method of presenting evidence. Society had the opportunity to introduce the custodian's testimony throughout the course of the three-day trial and did not do so. Nor did it authenticate the documents before

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> some *other exhibits* but we can do that outside the presence of the jury.
>
> THE COURT: All right. We have to look over the exhibits to make sure that was all done properly. So then the evidence is closed, [Owens' counsel]?
>
> [OWENS' COUNSEL]: Yes, Your Honor.
>
> THE COURT: [Society's counsel], the evidence is closed?
>
> [SOCIETY'S COUNSEL]: I would like to make a record before I close the evidence.
>
> THE COURT: All right. Subject to making a record, the evidence here in court while the jury is present is over with?
>
> [SOCIETY'S COUNSEL]: Yes.
>
> THE COURT: All right. Subject to that. All right. Take the jury out then. (Emphasis added.)

[12] Society argues that the trial court's reference to "filing" is a misstatement of the law because § 908.03(6m), STATS., does not allow a party to authenticate a document by "filing" the document; rather, a document can be authenticated under that section by having the records custodian certify it and either serving the other parties with copies or making the document available for inspection. We conclude that the trial court's reference to "filing" was merely a shorthand way of describing this process, not a misstatement of the law. The gist of the trial court's statement accurately represents the law: Society could have authenticated the documents before trial by following the procedure in § 908.03(6m).

trial, using § 908.03(6m), STATS. We conclude that the trial court acted within the bounds of its broad discretion by refusing to reopen evidence.

Next, Society objects to the admission of a job description giving the physical requirements of Rosemary's cleaning job at the time of her back injury. The exhibit states that the job requires stretching, twisting, kneeling, crawling, and lifting up to thirty pounds. The Owens sought to establish that Rosemary could not perform this job after the accident because of her back pain. Society argues that the description is not relevant because Rosemary's former employer created it after Rosemary's employment. The trial court concluded that the description was relevant and minimized the possibility of unduly confusing the jury by stating that it was created after Rosemary's employment. We conclude that there was a reasonable inference that the exhibit stated the same physical requirements required of Rosemary during her employment.

Next, Society argues that the trial court erred by denying Society's post-verdict motion to provide it with a copy of an alleged agreement between its insured, Hajewski, and the Owens' counsel. According to the motion, the Owens' counsel agreed not to sue Hajewski personally in exchange for representation of Hajewski in an unrelated matter. The trial court ruled that the alleged agreement was not relevant and, even if it were relevant, it would be too prejudicial to admit during trial. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. Society fails to demonstrate how the agreement tends to prove or disprove a fact related to the issues of this case, whether Hajewski was negligent, whether his negligence caused the accident and the amount of the Owens' damages. We conclude that the trial court properly exercised its discretion when it denied this motion.

Next, Society contends that the trial court erred by instructing the jury that Dr. Binder, an independent medical examiner not called as a witness at trial, was a "missing witness." *See* WIS J I—CIVIL 410. Society does not provide any legal argument why this instruction was error or cite any legal authority to

support its conclusion.[13] Therefore, we will not address its argument. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Finally, Society invites us to grant a new trial based on the cumulative effect of these alleged errors and the "impatient and derogatory demeanor" of the opposing counsel and trial judge during trial. We have discretion to reverse the judgment "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 ...." Section 752.35, STATS. We have reviewed the record and conclude that the controversy was fully tried and that justice was not miscarried.

WHETHER THE OWENS' MOTION WAS FRIVOLOUS

The Owens moved the court to inquire about Society's required appearance of its executives to explain why it substituted counsel leading to a continuance. Although the court originally granted this motion, the Owens withdrew it when an executive from Society averred that her decision to change attorneys was based solely on the fact that the original counsel left the law firm.

Society moved for its costs in defending the motion under § 802.05(1)(a), STATS.[14] Society argued that the motion is not warranted by

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[13] At the jury instruction conference, Society's counsel objected to this instruction on grounds that it should be read for the other doctors who did not appear. The trial court agreed and gave the missing witness instruction as a general instruction. Society did not specify any other grounds for objecting to the instructions. Society waived the right to object to the jury instructions on appeal. *See* § 805.13, STATS. (requiring objections at jury instruction conference *with particularity* to preserve right to appeal).

[14] Section 802.05(1)(a), STATS., provides in part:

> Every pleading, motion or other paper of a party represented by an attorney ... shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. ... The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good

existing law and the Owens' counsel filed the motion for the purpose of harassment. The trial court denied Society's motion for costs on grounds that the case created animosity between counsel involved and that granting the motion for costs would only prolong that animosity. The trial court has discretion in determining whether to impose sanctions. ***Johnson v. Allis Chalmers Corp.,*** 162 Wis.2d 261, 470 N.W.2d 859 (1991). An error of law is an abuse of discretion. ***Mathias v. Mathias***, 188 Wis.2d 280, 286, 525 N.W.2d 81, 84 (Ct. App. 1994).

We conclude that the trial court's reason for denying costs did not reflect the legal standard provided in § 802.05(1)(a), STATS. The Owens do not explain why they had a right to this information and did not allege that they were prejudiced by the trial court's decision to grant a continuance. We therefore reverse the order dismissing the request for costs of defending the motion and remand for further consideration of the request.

JUDGMENT IN EXCESS OF THE INSURER'S LIABILITY LIMITS

Society's insurance contract with Hajewski shows liability limits of $300,000. The trial court originally entered a judgment against Society for the entire jury verdict of $320,908.87 plus costs and interest. Society moved to reduce the judgment to its policy limits of $300,000. However, Society's motion made no reference to costs and interest. Society may be liable for costs and interest, even if payment of those expenses requires it to pay more than the amount of its policy limits. *See* ***McPhee v. American Motorists Ins. Co.***, 57

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> faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may ... impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

Wis.2d 669, 677, 205 N.W.2d 152, 157 (1973). The trial court reserved ruling on Society's motion, apparently due to confusion about whether the motion would require Society to pay costs and interest. The trial court later filed an amended judgment reducing the judgment to $300,000 plus costs and interest.

On appeal, the parties agree that we should limit the judgment to $300,000 plus costs and interest, but they note that the amended judgment may be void because it was not signed within ninety days of the jury verdict. *See* § 805.16(3), STATS. We need not address whether a motion to modify the amount of a judgment is a "trial related motion" included within the scope of § 805.16, STATS., *see* ***Gorton***, 194 Wis.2d at 230, 533 N.W.2d at 757-58, because justice would be miscarried unless we reduce the judgment to $300,000 plus costs and interest. Therefore, using our discretionary power under § 752.35, STATS., we reverse the original judgment and order the entry of the amended judgment of $300,000 plus costs and interest.

CONCLUSION

Society is not entitled to a new trial based on any of the trial court's alleged discovery or evidentiary errors. Most of the decisions Society complains of were within the trial court's discretion, and the errors the court did make were harmless. However, we reverse the part of the judgment denying Society costs incurred as a result of the Owens' post-verdict motion and remand for a determination whether that motion was frivolous based on the standard provided in § 802.05(1)(a), STATS. Finally, we reverse the part of the judgment in the amount of $320,908.87 plus costs and interest and order entry of the amended judgment in the amount of $300,000 plus costs and interest.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

Not recommended for publication in the official reports.