COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1694

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

CHRISTINA R. FORSTER, A MINOR,
BY ATTORNEY PAMELA RESNICK,
HER GUARDIAN AD LITEM,
AND NANCY L. MONROE,

PLAINTIFFS-APPELLANTS,

V.

MUTUAL SERVICE CASUALTY INSURANCE COMPANY,
RICHARD KUETHER AND DESIREE KUETHER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Christina Forster, her guardian ad litem, and her mother, Nancy Monroe, (collectively, the Forsters) appeal the judgment

dismissing their personal injury suit against Richard Kuether and his insurance company following a jury trial. The Forsters argue that the trial court erred when it: (1) dismissed Kuether's wife, Desiree, from the suit; (2) refused to permit the Forsters to call a rebuttal witness; (3) gave jury instruction WIS JI—CIVIL 1105A, over the Forsters' objection; (4) failed to give Forsters' requested jury instruction WIS JI—CIVIL 1045; and (5) denied the motions after verdict. We conclude that the Forsters waived their right to challenge the trial court's dismissal of Desiree Kuether because they failed to raise this issue in their motions after verdict. Further, we are satisfied that the trial court properly exercised its discretion when, after finding that a discovery violation had occurred concerning a rebuttal witness, it refused to allow the Forsters to call this witness. We also conclude that the trial court's jury instructions were appropriate. Finally, we are satisfied that the trial court's denial of the motions after verdict and the request for a new trial was a proper exercise of its discretion. Thus, we affirm.

I. BACKGROUND.

¶2 On May 16, 1992, when Christina Forster was almost six years old, Nancy Monroe, Christina's mother, took her to stay with her grandparents, who lived next door to the Kuethers. Christina was going to stay with her grandparents while her mother went on her honeymoon. Shortly after arriving, Christina was seriously and permanently injured when she fell off her bike on the Kuether property and the blades of the riding lawnmower being operated by Richard Kuether struck her left hand, causing severe damage and severing her index finger. Christina, her guardian ad litem and her mother commenced suit against the Kuethers and their insurance company.

¶3 At trial, the parties disputed many of the details of the accident, including the dynamics of how the accident occurred and the location of Richard Kuether and the lawnmower when he first noticed Christina on her bike. However, the parties did not dispute that Christina retrieved her new bicycle from her grandparents' garage where her mother had put it, and rode the bicycle onto the Kuethers' property where she fell off in front of the riding lawnmower. The parties also agreed that, prior to the day of the accident, Christina occasionally came over to play with the Kuethers' young children, but she had never before ridden a bicycle on the Kuethers' property.

¶4 During the jury trial, after the plaintiffs rested, the trial court dismissed Desiree Kuether from the action, telling the jury that "Desiree Kuether had no duty or responsibility under the law to control the manner of Christina Forster on the day of the accident. Therefore the claims against Desiree Kuether have been dismissed." Later, the trial court also refused the Forsters' request to call Marlene Mikesell, an investigator for Christina's attorney, as a rebuttal witness. It was alleged that Mikesell would have impeached Richard Kuether's account of how the accident happened. The trial court decided Mikesell could not testify because Christina's counsel violated the discovery rules by failing to name Mikesell as a witness in response to an interrogatory requesting the name of anyone who had information about the accident, even though she had taken a statement from Richard Kuether a couple of weeks after the accident. The trial court also found that Christina's counsel failed to list Mikesell pursuant to the trial court's scheduling order requiring the exchange of witnesses' names. The trial court concluded that Mikesell could not testify because it would constitute unfair surprise to opposing counsel.

¶5 At the jury instruction conference, the trial court, over the objection of the Forsters, decided to give WIS JI—CIVIL 1105A, which embodies the emergency doctrine, and refused to give WIS JI—CIVIL 1045, requested by the Forsters, which discusses a driver's duty of increased vigilance when the driver knows that children are likely to come into the driver's course of travel. The jury returned a verdict finding that neither Richard Kuether nor Christina's mother was negligent.

¶6 The Forsters filed motions after verdict asking the trial court to change the answers on the verdict. In the alternative, the Forsters asked for a new trial in the interest of justice. The trial court denied both requests.

II. ANALYSIS.

A. Dismissal of Desiree Kuether was waived because the Forsters failed to raise this claim in their motions after verdict.

¶7 The Forsters argue that the trial court erred in finding that Desiree Kuether owed no duty to Christina and in dismissing the claims against Desiree Kuether at the close of the testimony concerning her actions. Further, the Forsters contend that the trial court "compounded" this error by telling the jury that Desiree Kuether had been dismissed from the case because she owed no duty to Christina.

¶8 Desiree Kuether testified that on the day of the accident she was mowing the front yard, while at the same time supervising her two young children. She admitted that her children were not always directly visible to her and, as a consequence, even though Christina had been riding her bike near the Kuether children, she never saw Christina prior to the accident. The Forsters contend that, under these facts, a jury should have decided whether Mrs. Kuether, had she been properly exercising her duty to supervise her own children, should have seen

Christina and, thus, would have owed her the duty of ordinary care. The respondents argue that the Forsters have waived these issues by failing to raise them in the motions after verdict. We agree.

¶9 It is well settled law that:

> "Motions after verdict must state with particularity the alleged error so as to apprise the trial court of the alleged error and give it an opportunity to correct it, thereby avoiding a costly and time consuming appeal." It is also clear that the failure to include alleged errors in the motions after verdict constitutes a waiver of the errors. This rule applies where a proper objection is made during the course of trial, but the error is not included in the motions after verdict.

Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 417, 405 N.W.2d 354, 362 (Ct. App. 1987) (citations omitted).

¶10 The Forsters, for whatever reason, failed to raise the issue of Desiree Kuether's dismissal or the manner in which the trial court communicated her dismissal to the jury in their motions after verdict. Thus, the Forsters have waived this claim. In the alternative, the Forsters urge us to exercise our discretion under WIS. STAT. § 752.35 (1997-98), and address these claims. Although we have the ability to override the waiver rule if we are convinced that, in the exercise of our discretion, the real controversy has not been fully tried or there has been a miscarriage of justice, we are not satisfied that this case falls within the ambit of the statute.

¶11 WISCONSIN STAT. § 752.35, reads:

> **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.

The Forsters urge us to decide these issues on the merits, despite their failure to raise these claims in their motions after verdict. The issues under consideration, Desiree Kuether's dismissal out of the action and the trial court's communication to the jury discussing the reasons for the dismissal, do not merit exercising our powers pursuant to § 752.35. Here, the real controversy was tried. After all, the dismissal came after the presentation of the plaintiff's entire case in chief. Further, our review of the record persuades us that justice has not miscarried. Under the circumstances presented here, Mrs. Kuether was dismissed from a negligence suit because the evidence at trial revealed that she did not know of the presence of the injured person on her property. The trial court's determination that there were insufficient facts to demonstrate a duty on behalf of Mrs. Kuether to Christina does not, in our view, amount to a miscarriage of justice. Consequently, we decline to exercise our discretionary powers.

B. The refusal to permit the Forsters' rebuttal witness to testify was proper.

¶12 The Forsters next argue that the trial court erroneously exercised its discretion when it refused to permit a rebuttal witness to testify. We disagree.

¶13 After the close of the defense's case, the Forsters sought to call Marlene Mikesell, who had interviewed Richard Kuether a couple of weeks after the accident. The offer of proof made by the Forsters alleged that Mikesell, who worked in Christina's attorney's office, would have testified that Richard Kuether

told her that the accident occurred in a manner significantly different from the account Richard Kuether related to the jury. This new version of the events would have impeached Richard Kuether on many of the crucial points to which he testified concerning the manner in which the accident occurred and his location when he first saw Christina. Opposing counsel objected to the calling of this witness, arguing that he was unaware of the witness's existence, despite his discovery request for this type of information. Kuether's attorney argued that Mikesell had never been listed in the response to an interrogatory sent to the plaintiffs, which asked if there were any witnesses who were aware of the facts surrounding the accident, nor was she listed as a possible witness in the trial court's required exchange of witness lists.

¶14 The trial court concluded that the interrogatory obligated Christina's attorney to reveal this communication between his investigator and Richard Kuether. Further, the trial court observed that, given the importance of the witness's testimony to the plaintiff's case, she was not a mere rebuttal witness and she should have been listed as a possible witness. Additionally, the trial court noted that at Richard Kuether's deposition, no questions were ever asked of him concerning any conversation he had with Mikesell. Thus, neither Kuether nor his attorney were put on notice that such a communication might be introduced at trial. As a result, the trial court determined that the witness could not testify because, in the trial court's words, it would be "unfair surprise" to the other side.

¶15 We review the decision to disallow a rebuttal witness in light of the court's duty to exercise its discretion reasonably on the basis of the circumstances and the facts of record. *See* ***Lobermeier v. General Tel. Co.***, 119 Wis. 2d 129, 143, 349 N.W.2d 466, 473 (1984). The trial court generally enjoys broad discretion when "controlling evidence to be admitted in rebuttal." ***King v. State***,

75 Wis. 2d 26, 42, 248 N.W.2d 458, 466 (1977). Here, the trial court determined that one of the parties failed to comply with a discovery demand. WISCONSIN STAT. § 804.12(2) (1997-98),[1] gives the trial court several options when a party has failed to comply with a discovery order. Under § 804.12(2)(a)2, a trial court can prohibit the disobedient party from introducing the matter into evidence.

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[1] WISCONSIN STAT. § 804.12(2) (1997-98), reads:

> **Failure to make discovery; sanctions.**
>
> ….
>
> **(2)** FAILURE TO COMPLY WITH ORDER. (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the 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;
>
> 4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.
>
> (b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order 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.

Although Christina's lawyer contended that his refusal to reveal the communication was due to his belief that the witness's statement was "work product," and that he did not have a duty to list rebuttal witnesses, the trial court found that the discovery rule had been violated. We agree.

¶16 The interrogatory specifically asked the plaintiffs to "list names and last known addresses of all persons who were witnesses to the accident in question or have knowledge of facts leading up to and immediately following the accident." After receiving this interrogatory, Christina's attorney should have notified opposing counsel of the existence of the communication between Kuether and Mikesell. Moreover, the trial court, in its scheduling order, requested the parties to name their possible trial witnesses. The trial court noted that Mikesell was not a true rebuttal witness because, given her important communication with Richard Kuether, she should have been called in the plaintiff's case in chief. Thus, the trial court ruled that the failure to name her as a witness was also a violation of the scheduling order.

¶17 Supporting the trial court's decision is the fact that, as a result of the violations, the opposing attorney had no knowledge that his client had communicated with Forster's investigator. The record reveals that Richard Kuether never told his trial counsel of the meeting because he believed that Mikesell was a relative of Nancy Monroe, not an investigator for the plaintiffs. Trial counsel was also never alerted to the communication with Mikesell as Kuether was never asked in his deposition about his statements to the investigator. The trial court's decision, that permitting the witness to testify so late in the trial would not afford opposing counsel sufficient time to either investigate the truthfulness of the statement or to counter the testimony's effect on the jury, was a reasonable exercise of its discretion. The trial court's concern that this witness's

testimony would constitute unfair surprise is supported by the record. Crucial to the jury's assessment of whether Richard Kuether was negligent was his explanation of how the accident happened. To permit the jury to hear a witness on rebuttal who, for the first time, would claim that Richard Kuether gave a version of the events totally inconsistent with the defense theory of the case, would have been unfair. As the trial court noted, "trial by ambush" has been outlawed in this state. Therefore, we are satisfied that the trial court correctly determined that the rebuttal witness could not testify because the Forsters violated the discovery requests.

C. The trial court properly instructed the jury.

¶18 A trial court has wide discretion in deciding what instructions it will give to a jury. *See* ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107, 112 (1988). The instructions must fully and fairly inform the jury as to applicable principles of law and, as long as the instructions adequately advise the jury as to the law it is to apply, the trial court has the discretion to decline to give other instructions, even though they may properly state the law to be applied. *See* ***Ellsworth v. Schelbrock***, 229 Wis. 2d 542, 561, 600 N.W.2d 247, 255 (Ct. App. 1999). "If an instruction is erroneous or [if] the [trial] court erroneously refused to give a proper instruction, a new trial will not be ordered unless the [trial] court's error was prejudicial." ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 345, 564 N.W.2d 788, 792 (Ct. App. 1997). An error is prejudicial only if it appears that, but for the error, the result would have been different. *See* ***id.***

¶19 The Forsters first assert that the trial court improperly instructed the jury when it read an instruction which embodied the emergency doctrine. The trial court ruled that WIS JI—CIVIL 1105A was proper and instructed the jury that:

> When considering negligence as to management and control, bear in mind that the operator of a lawn tractor may suddenly be confronted by an emergency not brought about or contributed by his or her own negligence. If that happens and [sic] the operator of a lawn tractor is compelled to act instantly to avoid collision. The operator of the lawn tractor is not negligent if he or she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that his or her choice was not the best or safest course. This rule does not apply to any person whose negligence wholly or in part creates the emergency. A person is not entitled to the benefit of this emergency rule unless he or she is without fault in the creation of the emergency. This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

The Forsters argue that the giving of this instruction was prejudicial error. They assert that the facts in this case did not warrant the giving of the instruction and they were prejudiced by it because it caused jury confusion and "provided [the jury] with an excuse to find Kuether not negligent as to lookout." The Forsters further argue that this instruction was improper because it was meant to apply to moving vehicles and is inappropriate in this bike/riding lawnmower accident. The Forsters also contend that since Kuether created the emergency, the instruction was not relevant under the facts. Finally, the Forsters assert that the instruction confused the jury and it must have applied the emergency doctrine when deciding whether Kuether kept a proper lookout rather than confining the consideration of the doctrine to whether Kuether properly managed and controlled his lawnmower. We disagree.

¶20 First, we are satisfied that this instruction is not limited to motor vehicle accidents. In ***McCrossen v. Nekoosa Edwards Paper Co.***, 59 Wis. 2d 245, 208 N.W.2d 148 (1973), our supreme court determined that the failure to give the

emergency instruction in a case involving a worker injured when he was exposed to poison gas was reversible error. The supreme court observed that:

> While the emergency rule in Wisconsin has had its greatest development in the area of automobile accident cases, its application is by no means limited to negligence on the road. The earliest Wisconsin case applying the doctrine appears to have been *Schultz v. Chicago & Northwestern Ry. Co.* (1878), 44 Wis. 638, in which a railroad worker injured in a switchyard was given the benefit of the rule. More recently, in *Ivy v. Tower Ins. Co.*, [32 Wis. 2d 231, 145 N.W.2d 214 (1966)], the doctrine was considered in the context of an action brought by a construction worker who had been injured by a piece of concrete thrown from a backhoe.

Id. at 259, 208 N.W.2d at 156. The supreme court also instructed:

> Whether plaintiff [is] entitled to application of the emergency doctrine depends on whether he negligently contributed to the creation of the emergency.… In such situation, where there is a jury question as to the cause of the emergency and the time element is so short as to make the doctrine otherwise applicable, a party is entitled to the emergency instruction and it is for the jury to determine its application.

Id.

¶21 Another supreme court case, ***Edeler v. O'Brien***, 38 Wis. 2d 691, 158 N.W.2d 301 (1968), adopted a three-prong test to apply before giving the emergency instruction:

> (1) The party seeking its benefits must be free from the negligence which contributed to the creation of the emergency; (2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action; and (3) the element of negligence inquired into must concern management and control.

Id. at 697-98, 158 N.W.2d at 304.

¶22 A review of the record reveals that Richard Kuether testified that Christina hit the parked van and fell from her bike. He claimed that he had successfully stopped the lawnmower, but Christina's hand went under the blades of the lawnmower as the force of striking the van threw her forward. If this testimony was believed, Kuether would be free of negligence. There was also evidence that, just prior to the accident, Christina and Kuether were traveling towards one another and, as a result, the gap between them was closed within several seconds. A time span of several seconds satisfies the second prong of the test set forth in ***Edeler***. In ***Edeler,*** our supreme court established that a time span of less than five seconds, while not creating an emergency as a matter of law, did require the question to be decided by the jury. *See* ***id.*** at 698-99, 158 N.W.2d at 305. Further, a trial court, in determining whether the emergency doctrine instruction is appropriate, should view the evidence in the light most favorable to the person requesting it. *See* ***Gage v. Seal***, 36 Wis. 2d 661, 667, 154 N.W.2d 354, 358 (1967). Here, if the jury chose to believe Richard Kuether's account of how the accident occurred, he was entitled to the instruction. Thus, there was evidence in the record to support the giving of the instruction.

¶23 Moreover, the instruction specifically advised the jury that it was to consider the emergency doctrine only in regards to whether Kuether had properly managed and controlled his lawnmower. There is nothing in the record to suggest that the jury was confused by the instruction. Thus, we conclude that the trial court properly exercised its discretion in giving the instruction.

¶24 The Forsters next argue that the trial court erroneously exercised its discretion in refusing to give WIS JI—CIVIL 1045. This instruction reads:

> Drivers of motor vehicles are chargeable with the knowledge that children of tender years do not possess the

> traits of mature deliberation, care, and caution of adults. The driver must increase vigilance if the driver knows, or in the exercise of ordinary care should know, that children are in, or are likely to come into, the driver's course of travel.

The trial court refused to give the instruction, stating that this instruction is "meant for circumstances where children are present like schools, where there is actual knowledge that children are present."

¶25 The Forsters contend that the trial court should have given this instruction because Kuether had knowledge that his own children were playing in the front of his house, and because Kuether had seen Christina on the patio of her grandparents' home before the accident. Further, the Forsters claim that the failure to give this instruction was prejudicial. The Forsters argue that "[t]here can be little doubt that if Appellant's enhanced duty instruction [WIS JI—CIVIL 1045] had been submitted the jury would have found Kuether negligent." After reviewing the record, we are satisfied that, under the facts presented here, the failure to give this instruction did not result in prejudicial error.

¶26 In ***Lisowski v. Milwaukee Automobile Mutual Insurance Co.***, 17 Wis. 2d 499, 502-03, 117 N.W.2d 666, 668 (1962), our supreme court found that the giving of this instruction is error unless "the driver had actual notice that children were playing in the area" or there were special facts which would make the presence of children likely. The wording of the instruction states that the driver must increase his or her vigilance if the driver knows that children are likely to come "into the *driver's course of travel*." WIS JI—CIVIL 1045 (emphasis added). Pictures admitted into evidence show that the Kuethers' house is situated in the middle of a large suburban lot. The house, the garage and the parking slab take up almost the entire middle portion of the lot. Kuether was in the process of

mowing his backyard, which is behind the house, except for one grassy portion next to the slab where a boat, a van and a car were parked. The house and the parked boat, van and car separated the front yard from the back. Kuether knew his children were confined to the front yard and he believed they were being supervised by his wife. Kuether could reasonably assume that his children would not be coming into his course of travel. Further, with respect to Christina, although he saw her standing on her grandparents' porch, he did not see her on his property, nor did he have any reason to suspect she would be entering his course of travel on a bicycle as she had never before ridden a bicycle while at her grandparents' home. Consequently, the trial court properly exercised its discretion when it refused to give the instruction as the record did not support the giving of the instruction because Kuether had no reason to believe that children would be or were likely to be coming into his lawnmower's course of travel.

D. The trial court properly denied the Forsters' motions after verdict.

¶27 The Forsters brought motions after verdict seeking several remedies. First, the Forsters urged the trial court to change the jury's answer to the question concerning Kuether's negligence. In the alternative, the Forsters sought a new trial in the interest of justice.

¶28 The Forsters' primary argument in requesting that the trial court change the jury's answer to the question inquiring into Kuether's negligence was that Kuether was negligent as a matter of law. The Forsters contend both that Kuether failed to keep a proper lookout when he had actual knowledge of Christina's presence, and that he failed to manage and control his lawnmower. We do not agree.

¶29 Generally, the question as to whether a party was negligent is a factual one to be decided by a jury. *See* ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342, 243 N.W.2d 183, 185 (1976). Further, a trial court should reverse a jury's verdict only when the facts are undisputed and the required verdict is absolutely clear. ***Leatherman v. Garza***, 39 Wis. 2d 378, 387, 159 N.W.2d 18, 22 (1968). "The proper test to be applied in determining whether a jury's answer should be changed is 'whether there is any credible evidence which supported the jury's answer.'" ***Id.*** at 386, 159 N.W.2d at 23.

¶30 Much of the Forsters' argument regarding Kuether's negligence is a rehashing of issues already discussed. The Forsters contend that Kuether should have been found negligent as to lookout because he knew that children were in the vicinity, and he failed to keep a proper lookout when he directed his attention to the rock garden where he was cutting the grass. The Forsters also contend that the accident would not have happened had Kuether properly managed and controlled his lawnmower.

¶31 After applying the ***Leatherman*** test, we are satisfied that credible evidence exists in the record to support the jury's answers. Evidence was introduced that Christina was a young, inexperienced bicycle rider who rode her bike onto the Kuether's property where she collided with the Kuether's van. In turn, she was catapulted towards the lawnmower which had been moving toward her. Kuether's testimony was that he was traveling toward Christina and was so close to her that only seconds passed before the gap between them was closed. Kuether testified that he was mowing next to a rock garden, and thus, his attention was primarily on the rock garden prior to Christina's fall; however, he also claimed he saw Christina and that he was able to stop the lawnmower in time to avoid striking her. He contended that her injury occurred when the force of her

collision with the van threw her into the path of the mower and her hand slid under the blades of the lawnmower as she braced her fall. The jury was entitled to give this version of the events more credence than the versions submitted by the Forsters. Thus, the trial court properly determined that the jury's answer should not be changed.

¶32 The Forsters' last argument consists of their belief that the trial court should have ordered a new trial in the interest of justice. The Forsters, relying on ***Sievert v. American Family Mutual Insurance Co.***, 180 Wis. 2d 426, 509 N.W.2d 75 (Ct. App. 1993), argue that the jury's decision to find that Richard Kuether was not negligent is contrary to the great weight and clear preponderance of the evidence. The trial court refused to grant a new trial in the interest of justice.

¶33 The standard of review when reviewing a decision not to grant a new trial in the interest of justice is to determine if the trial court erroneously exercised its discretion. *See* ***id.*** at 431, 509 N.W.2d at 78.

¶34 WISCONSIN STAT. § 805.15(1) (1997-98) permits a party to seek a new trial in the interest of justice. Section 805.15(1) states:

> **(1)** MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

In denying the motion for a new trial in the interest of justice, the trial court remarked that what happened was a tragic accident which the jury apparently

believed was not the result of anyone's negligence. The trial court surmised that when the jury found that neither the child's mother nor Richard Kuether was negligent, the jury determined that what occurred here was simply "an act of God." While it is apparent from the trial court's remarks that the trial court felt that the jury's money damages figures were low, the trial court also determined that the jury had a reasonable basis to answer the negligence questions in the manner in which they did. Thus, the trial court refused to order a new trial. When reviewing a trial court's decision not to grant a new trial in the interest of justice, "[o]ur role is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court." ***Sievert***, 180 Wis. 2d at 431, 509 N.W.2d at 78. The trial court gave a reasoned explanation as to why the request was being denied. Thus, we are satisfied that the trial court's denial of the motion was a proper exercise of discretion.

¶35 Because of our decision on these issues, it is not necessary for us to address the Forsters' remaining argument requesting a new trial on the damages awarded. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed). Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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