

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 98-1361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARSHALL ORRIS,

PLAINTIFF-RESPONDENT,

U-CARE HMO, INC.,

PLAINTIFF,

V.

**NATHAN F. BRAND, FREDERIC E. MOHS, SUZANNE H.
CASE & RICHARD M. HEINS, D/B/A SEED FARM JOINT
VENTURE A/K/A MONTICELLO APARTMENTS, AND AETNA
CASUALTY & SURETY COMPANY,**

DEFENDANTS-APPELLANTS,

**THE BRUCE COMPANY OF WISCONSIN, INC. AND REGENT
INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. The defendants in this personal injury action appeal from a judgment entered after a new trial was ordered on a portion of the plaintiff's compensatory damages. The issue is whether a new trial can be ordered for part of compensatory damages, or whether it must be ordered for all compensatory damages. We conclude that a partial retrial is permitted.

As necessary for this appeal, the facts can be stated briefly. Marshall Orris sought damages for a personal injury allegedly caused by the defendants' negligence. The jury found in Orris's favor and by special verdict set damages for six categories: past and future medical expenses, past and future lost earnings, and past and future pain and suffering. On motions after verdict, the trial court concluded that the award for pain and suffering was too low, and ordered that Orris was entitled to a new trial, on that issue only, unless the defendants agreed to accept judgment of \$100,000. *See* § 805.15(6), STATS. A new trial has been held, and the defendants appeal for the purpose of disputing the order granting the new trial.

The defendants argue that a new trial cannot be granted for only pain and suffering, but instead must be granted for *all* items of compensatory damages. However, the defendants are not arguing that the non-pain and suffering damages were affected by any particular error at the first trial. Rather, the defendants' theory is that damages can be tried separately only if they are "entirely separable" from each other, and that compensatory damages are not entirely separable from each other.

We have previously rejected a similar argument that a retrial on punitive damages necessarily requires retrial of compensatory damages. *See Badger Bearing, Inc. v. Drives & Bearings, Inc.*, 111 Wis.2d 659, 672-75, 331 N.W.2d 847, 855-56 (Ct. App. 1983). We concluded that punitive and compensatory damages are entirely separable. In the present case, the defendants do not argue that any specific facts of this case make Orris's pain and suffering inseparable from the decisions on his lost earnings and medical expenses. They do not argue that this limited retrial prejudiced their ability to present a defense in some fashion. Therefore, the argument appears to be based on the proposition that a partial retrial is never permitted. We see no reason why pain and suffering is not entirely separable from other compensatory damages, as a general matter. A jury's decision on pain and suffering damages would not necessarily be affected by its decisions on other components of damages.

The defendants also argue that partial retrial of compensatory damages should be barred by the rule that if more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions. *See* § 805.09(2), STATS. The defendants acknowledge, however, that the statute allowing retrial of damages, § 805.15(6), STATS., necessarily contemplates that damages may be decided by a different jury than decided liability. The defendants have not provided a basis to conclude that separate components of compensatory damages cannot also be heard by a different jury.

By the Court.—Judgment affirmed.

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

