COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3298

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

LAWRENCE H. DECLERC AND CLAIRE DECLERC,

PLAINTIFFS-APPELLANTS,

V.

BELLIN MEMORIAL HOSPITAL AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

INVOLUNTARY-DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Lawrence and Claire DeClerc appeal a judgment dismissing their complaint. They argue that the trial court erroneously concluded that the jury's verdict satisfied the five-sixths rule of § 805.09(2), STATS. We reject their argument and affirm the judgment.

The DeClercs initiated this negligence action against Bellin Memorial Hospital and its insurer for damages sustained during an enema Lawrence received prior to a routine colorectal screening procedure. After trial to the jury, a special verdict was submitted containing two liability questions. First, the verdict asked whether Bellin was negligent in providing Lawrence's care and treatment. The jury answered this question affirmatively, with two dissents. Second, the verdict inquired whether Bellin's negligence was a cause of Lawrence's injuries. To this question the jury answered "no," with two different jurors dissenting.

On motions after verdict, the DeClercs moved for a new trial on liability, arguing that § 805.09(2), STATS., requires the same ten jurors must agree on the two liability questions to render a valid verdict. The trial court denied their motion and entered judgment dismissing their complaint. This appeal followed.

The DeClercs argue that in order for the verdict to be valid, the same ten of twelve jurors must agree on both the negligence and causation questions. We disagree. Section 805.09(2), STATS., provides:

> A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. 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.

This issue requires statutory interpretation and application, questions of law that we review de novo. ***In re Michelle A.D.***, 181 Wis.2d 917, 922-23, 512 N.W.2d 248, 249 (Ct. App. 1994). "It is well established in Wisconsin law that [§ 805.09(2), STATS.,] requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim." ***Giese v. Montgomery Ward, Inc***., 111 Wis.2d 392, 401, 331 N.W.2d 585, 590 (1983). We conclude that the reasoning in ***Giese*** applies not only to claims, but also to defenses. Thus, when ten of twelve jurors agree to a question that disposes of plaintiff's claim, the rule is satisfied.

Our application of this statute is consistent with ***Augustin v. Milwaukee Elec. Ry. & Transp. Co.***, 259 Wis. 625, 49 N.W.2d 730 (1951). In that action for personal injuries against the transport company, our supreme court observed: "Having determined that no causal negligence was established on the part of the transport company by the agreement of ten jurors on all questions in regard thereto, the verdict was complete as to the appellant [defendant transport company]. All the essential elements of the plaintiff's case against the transport company were determined in its favor by five-sixths of the jury." ***Id***. at 632-33, 49 N.W.2d at 734. It ruled that the trial court, therefore, should have granted the motions made by appellant transport company for judgment on the verdict dismissing the complaints against it. ***Id***.

Here, ten of twelve jurors agreed that Bellin's negligence was not causal. Absent causation, the DeClercs' negligence claim cannot stand. *See* ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis.2d 250, 261-64, 580 N.W.2d 233, 238-39 (1998). Consequently, agreement of five-sixths of the jurors on the causation question defeats the DeClercs' claim.

Nonetheless, the DeClercs maintain that the same ten of twelve jurors must agree on those questions necessary to arrive at the verdict on the same claim, and that because negligence and causation make up a single claim, the same jurors must agree on both questions. This argument misses the point. Here, the judgment was not entered in favor of the claim. It was entered in favor of the defense. While a positive verdict on a claim requires findings of the three elements: negligence, cause and damages, *see* ***Giese***, 111 Wis.2d at 402, 331 N.W.2d at 590-91, a successful defense merely needs a negative answer with respect to one of those elements. Absent a finding of negligence, causation *or* damages, the plaintiff may not recover. *See* ***Miller***, 219 Wis.2d at 261-64, 580 N.W.2d at 238-39. Because the same ten jurors agreed on lack of causation, unanimity on that one question was sufficient to arrive at a verdict favorable to Bellin.

Next, the DeClercs argue that the trial court's application of § 805.09(2), STATS., in such a way that favors the defense is unconstitutional, citing ***Christensen v. Petersen,*** 198 Wis. 222, 223 N.W. 839 (1929). We disagree. First, we note that the DeClercs did not raise this issue at trial and accordingly did not preserve it for appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). Second, the ***Christensen*** case supports the trial court's application.

Christensen held: "When the Constitution was adopted, one of the essential elements of the jury trial was that the jurors should all agree upon all questions essential to establish liability." ***Id***. at 226, 223 N.W. at 840. It further explained that to determine whether a judgment may be entered when members of the jury disagree as to their answers to special verdict questions, the test "is to

apply the rule which would have been applied if the case had been submitted on a general verdict." ***Id***. at 225, 223 N.W. at 839.

Here, if the case had been submitted on a general verdict, the same ten jurors would have agreed that there was no causal negligence and would have rendered a verdict against the DeClercs' claim. Because the same jurors would have agreed on the question essential to determine a lack of liability, the verdict is valid under the ***Christensen*** test and § 805.09(2), STATS.

By the Court.—Judgment affirmed.

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