

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2584

Cir. Ct. No. 2005CV328

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LISA J. STELLMACHER AND ROBERT STELLMACHER,

PLAINTIFFS-APPELLANTS,

v.

**PREFERRED PROFESSIONAL INSURANCE CO., PAUL A. BOEDER, MD, AFFINITY
HEALTH SYSTEM AND WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS,

ABC INSURANCE CO.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Lisa and Robert Stellmacher appeal from a judgment dismissing their medical malpractice claims against Dr. Paul Boeder. After a trial on just liability, the jury returned a no negligence verdict. The Stellmachers argue that it was error to bifurcate liability and damages for separate jury trials. We agree and reverse the judgment and remand for further proceedings.

¶2 We first address Boeder's argument that the claim of error is waived. The possibility of bifurcating liability and damages arose at a pretrial conference. At a motion hearing a few days later, the trial court brought it up again and reiterated that it would look favorably at bifurcation to first determine if there was negligence by the doctor before presenting and determining damages. It noted that the Stellmachers had expressed some objection to that procedure when it was raised during the pretrial conference.¹ The Stellmachers explained that damage evidence was necessary to present their informed consent claim. The trial court disagreed and ordered that liability be tried first. It set a three-day trial date. No date was set for the damage portion of the bifurcated trial.

¶3 Boeder contends the Stellmachers waived the right to claim error with respect to bifurcation because they did not move for reconsideration in the six-month period between the trial court's decision to bifurcate and the trial date and because they failed to move for a mistrial prior to the jury's verdict. Boeder offers nothing in support of his contention that a motion for reconsideration or petition for interlocutory appeal was a necessary precondition to raising the claim on appeal. Where a trial error is so serious a nature that it may warrant a mistrial,

¹ The record does not include a transcript of the pretrial conference.

a litigant must not only object but must also demand a mistrial and the failure to demand a mistrial is an acknowledgement that the error is harmless. *Lobermeier v. General Tel. Co.*, 119 Wis. 2d 129, 136, 349 N.W.2d 466 (1984). The principle aptly applies to rulings made during trial.² In *State v. Bergeron*, 162 Wis. 2d 521, 529, 470 N.W.2d 322 (Ct. App. 1991), we held that the defendant's failure to object at trial to evidence admitted after the denial of the defendant's motion in limine did not constitute waiver. "A defendant who has raised a motion in limine generally preserves the right to appeal on the issue raised by the motion without also objecting at trial." *Id.* at 528. If the trial court's pretrial ruling invites further consideration or a renewed objection, the failure to renew the objection waives the claim of error. *State v. Joseph P.*, 200 Wis. 2d 227, 233, 546 N.W.2d 494 (Ct. App. 1996). Otherwise, a definitive pretrial ruling made in the face of an objection preserves the issue for appeal. See *State v. Venema*, 2002 WI App 202, ¶25 n.6, 257 Wis. 2d 491, 650 N.W.2d 898.

¶4 The record reflects that the Stellmachers objected to the trial court's proposal to bifurcate liability and damages. The trial court made a firm ruling to bifurcate. A motion for reconsideration or a mistrial was not necessary because the Stellmachers made a pretrial objection. The issue is not waived.

¶5 *Waters v. Pertzborn*, 2001 WI 62, ¶35, 243 Wis. 2d 703, 627 N.W.2d 497, holds that under WIS. STAT. §§ 805.05(2) and 805.09(2) (2007-08),³

² A motion for a mistrial is not always necessary even when the ruling is made during trial. For example, in *Pophal v. Siverhus*, 168 Wis. 2d 533, 544, 484 N.W.2d 555 (Ct. App. 1992), the court observed that a motion for mistrial was not necessary where the trial court had made a firm procedural ruling.

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the trial court cannot bifurcate the issues of liability and damages for separate trials before different juries. In *Waters*, the defendants moved to bifurcate liability and damages. *Id.*, ¶11. Over the plaintiffs' objection the trial court bifurcated the trial because of time and expense that might be saved and the potential that bifurcation would facilitate settlement. *Id.* The two trials would be heard by different juries. *Id.* Although a constitutional argument was advanced, the court decided strictly as a matter of statutory construction that liability and damages could not be tried to different juries. *Id.*, ¶17. *Waters* controls here.

¶6 Boeder argues that the Stellmachers have not shown any prejudice from the bifurcation. *Waters* does not suggest that such a showing is necessary. It is enough that the statutes prohibit the very thing the trial court did here.⁴ *See Waters*, ¶31 (a trial court's discretion to control the presentation of evidence at trial is not unfettered and must give way to statutory provisions that are not discretionary). A new trial is required.

¶7 We need not address the Stellmachers' claim that the trial court erroneously exercised its discretion in admitting an abstract and manufacturer's information on the device used during surgery. It is not known whether the same evidence will be necessary or offered at the new trial. *See State v. Lucarelli*, 157 Wis. 2d 724, 728, 460 N.W.2d 439 (Ct. App. 1990) ("A fundamental precept of

⁴ *Waters v. Pertzborn*, 2001 WI 62, ¶14 n.3, 243 Wis. 2d 703, 627 N.W.2d 497, did not address the possibility of separate trials before the same jury. There is no suggestion in this record that the trial court intended to try damages to the same jury if negligence was found. When the decision to bifurcate was made the court inquired how many days were needed to try just liability. At a motion hearing approximately three months before the scheduled trial date, it was confirmed that the three days were set aside for trial of liability only. At the start of jury selection the trial court indicated to the potential jurors that the jury would only be asked to decide negligence and causation. There was no suggestion that the jurors would be brought back another day to hear the damage aspect of the case.

appellate review holds that an appellate court generally will not decide questions not necessary or material to the determination of the cause.”).

By the Court.—Judgment reversed and cause remanded.

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

