COURT OF APPEALS
DECISION
DATED AND FILED

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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. 96-3137

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

JANIS PETERS-DOERING,

PLAINTIFF-RESPONDENT,

V.

AMERICAN CONTINENTAL INSURANCE COMPANY AND ST. JOSEPH'S HOSPITAL OF FRANCISCAN SISTERS,

DEFENDANTS-APPELLANTS,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

DEFENDANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. American Continental Insurance Company and St. Joseph's Hospital of Franciscan Sisters (collectively, St. Joseph's) appeal from a judgment entered in Janis Peters-Doering's favor in a "slip and fall" case brought by Peters-Doering against St. Joseph's. St. Joseph's claims that a new trial is warranted because: (1) the same five-sixths of the jurors did not agree on all questions essential to support the judgment; (2) the jury impermissibly found that Peters-Doering's contributory negligence was not the cause of her injuries; (3) the jury impermissibly and inconsistently awarded Peters-Doering $25,000 in future medical expenses in addition to awarding no damages for future pain, suffering and disability; and (4) the trial court erred by instructing the jury that the safe place statute applied. We disagree with St. Joseph's claims and affirm the judgment.

I. BACKGROUND.

On December 10, 1991, Peters-Doering slipped and fell while walking on an icy sidewalk on the premises of St. Joseph's Hospital. Peters-Doering sustained various injuries as a result of the fall, and sued St. Joseph's, claiming negligence. The case was tried to a jury which rendered a verdict in Peters-Doering's favor.

There were five dissents to the verdict. Question 3 stated, "Was Janis Peters-Doering negligent with respect to the care for her own safety on December 10, 1991?" Ten of the jurors answered "yes"; two dissented. Question 4 stated, "If you have answered Question No. 3 'yes' then and only then answer this question: Was the negligence of Janis Peters-Doering a cause of her injuries?" Eleven of the jurors answered "no"; one dissented. Finally, question 6 stated, "What sums of money will reasonably compensate Janis Peters-Doering for

the injuries she sustained as a result of the incident on December 10, 1991 with respect to: a. past pain, suffering and disability; b. past medical expenses; c. future medical expenses; d. future pain suffering and disability?" The jurors answered: part a - $16,701.75l; part b - $8,298.25; part c - $25,000; and part d - $0. Two jurors dissented to question 6.

St. Joseph's brought motions after verdict which were denied. St. Joseph's now appeals.

II. ANALYSIS.

A. Jury verdict – five-sixths rule.

In Wisconsin, in civil cases, the same five-sixths of the jury must agree on all questions necessary to support a judgment on a particular claim. Section 805.09(2), STATS. ("**(2)** VERDICT. 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."); ***Giese v. Montgomery Ward*, *Inc.***, 111 Wis.2d 392, 401, 331 N.W.2d 585, 590 (1983) ("Wisconsin law … requires … that five-sixths of the jury agree … on all questions necessary to support a judgment on a particular claim."). St. Joseph's argues that the jury verdict is defective because the same ten jurors did not agree on all questions essential to support the judgment. St. Joseph's only argues that the dissents to Question 4 and Question 6 make the verdict defective, and specifically claims that the verdict is defective because "[t]en of twelve jurors did not agree that the respondent was not causally negligent [Question 4] and was entitled to the $50,000.00 they awarded in damages [Question 6]."

St. Joseph's argument is fatally flawed for a simple reason—it misstates the applicable law by incorrectly shifting the burden of proof for contributory negligence from St. Joseph's to Peters-Doering. In tort actions, the defendant has the burden of proving that the plaintiff was contributorily negligent, and that the plaintiff's contributory negligence was a cause of the plaintiff's injuries. *See* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 121, 362 N.W.2d 118, 132 (1985). Therefore, instead of Peters-Doering needing five-sixths of the jury to agree that she *was not* causally negligent, St. Joseph's needed five-sixths of the jury to agree that Peters-Doering *was* causally negligent.[1] Thus, proof of Peters-Doering's contributory negligence was a question which was only essential to support a judgment in favor of St. Joseph's. If a verdict had been entered against Peters-Doering, after ten jurors had found that Peters-Doering was negligent, and a different ten had found that she was causally negligent, Peters-Doering may have had a claim that the verdict was defective. In the instant case, however, it makes no sense for St. Joseph's to challenge the verdict in favor of Peters-Doering.

In this case, all twelve jurors agreed that St. Joseph's was negligent and that its negligence was a cause of Peters-Doering's injuries. Ten jurors agreed to award Peters-Doering $50,000 as compensation for her injuries. The fact that one juror would have found Peters-Doering to be causally negligent is irrelevant. Therefore, the same five-sixths of the jury agreed on all questions essential to support the judgment in favor of Peters-Doering and the verdict is not defective.

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[1] Of course, in order for Peters-Doering's negligence to have completely barred her claim, five-sixths of the jury would have also needed to agree that her negligence was greater than St. Joseph's negligence. Section 895.045, STATS.; ***Group Health Coop. of Eau Claire v. Hartland Cicero Mut. Ins. Co.***, 164 Wis.2d 632, 637, 476 N.W.2d 302, 304 (Ct. App. 1991).

B. Jury finding of contributory negligence, but no causation.

St. Joseph's argues that there was no credible evidence to support the jury's findings that Peters-Doering was contributorily negligent, but that her negligence did not cause her injuries. We will not overturn a verdict unless, after considering all the credible evidence, and all the reasonable inferences that can be drawn from that evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. Section 805.14(1), STATS.; ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). St. Joseph's argues that it only alleged that Peters-Doering was contributorily negligent with respect to lookout, and that keeping a negligent lookout must be causally negligent as a matter of law. We disagree. Even assuming that the jury found Peters-Doering to have been negligent by not keeping a proper lookout, there was ample credible evidence to support its finding that Peters-Doering's negligence did not cause her injuries. As the trial court stated, and as St. Joseph's does not dispute, there was evidence that Peters-Doering slipped on a very small, clear patch of ice which "probably was very hard to see." Therefore, the jury easily could have concluded that Peters-Doering would not have seen the ice patch even if she had kept a proper lookout. Thus, this portion of the jury's verdict was supported by credible evidence and will not be overturned.

C. Jury award of future medical expenses, but no future pain and suffering.

St. Joseph's also argues that there is no credible evidence to support the jury's award of $25,000 for future medical expenses, in light of the fact that the jury awarded no damages for future pain, suffering or disability. St. Joseph's claims that the verdict is impermissibly inconsistent because without future pain or suffering, Peters-Doering will not require medical treatment. However, as St. Joseph's acknowledges, a verdict is not necessarily defective merely because the jury has awarded damages for medical expenses, but not for pain and suffering. *See* ***Jahnke v. Smith***, 56 Wis.2d 642, 653, 203 N.W.2d 67, 73 (1973). It is perfectly reasonable to infer that the jury awarded Peters-Doering $25,000 for future medical expenses in order to prevent any future pain and suffering, and believed that as long as Peters-Doering used the award to pay for medical treatment, she would not suffer any pain or disability. Therefore, this portion of the jury verdict is also not defective.

D. Safe place instruction.

Finally, St. Joseph's claims the trial court erred by instructing the jury that the safe place statute, § 101.11, STATS., was applicable. The safe place statute places a duty on every employer "to furnish a safe place of employment for employees and frequenters," and applies to categories of potential defendants: "owners of public buildings" and "owners of places of employment." Section 101.11(1), STATS. In ***Baldwin v. St. Peter's Congregation***, 264 Wis. 626, 629, 60 N.W.2d 349, 351 (1953), the Wisconsin Supreme Court stated:

> [T]he duty under the [safe place] statute with respect to the [owner of a] place of employment is very broad and is not merely concerned with the question of whether or not the place of employment is a structure, while the duty placed by statute on the owner of a public building is much

> narrower. The duty of the latter is to maintain the structure, and this relates to the structure and not to a temporary condition which is not a part thereof.

St. Joseph's claims that it is not an owner of a place of employment and, therefore, that it had no duty under the safe place statute relative to the temporary condition of the accumulated ice and snow on the sidewalk. St. Joseph's argues that it is not an owner of a place of employment because it is a non-profit hospital. However, in ***Leitner v. Milwaukee County***, 94 Wis.2d 186, 287 N.W.2d 803 (1980), the Wisconsin Supreme Court held that the Milwaukee County Zoo, also a non-profit organization, was a place of employment under the safe place statute, because the plaintiff's employer, Wisconsin Industrial Police, Inc., was a for-profit guard service which was under contract with the zoo and conducted its business on the zoo premises. As the supreme court noted, for purposes of the safe place statute, a place of employment is defined as:

> [E]very place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit,…

Leitner, 94 Wis.2d at 189-90, 287 N.W.2d at 805 (quoting § 101.01(2)(a), STATS. 1979-80, subsequently renumbered as § 101.01(11), STATS.). The court stated that the zoo was a place of employment because the plaintiff "was employed there and his employer, Wisconsin Industrial Police, Inc., was in business for profit or gain." ***Leitner***, 94 Wis.2d at 190, 287 N.W.2d at 805. In the instant case, although St. Joseph's Hospital is a non-profit organization, many of the physicians whose offices are located on the hospital premises, including the doctor whom Peters-Doering was trying to visit on the day of the accident, are obviously in business

for profit or gain. St. Joseph's fails to explain why it should be treated differently than the Milwaukee County Zoo was treated in ***Leitner***, and, therefore, we conclude that the trial court properly instructed the jury that the safe place statute applied.

By the Court.–Judgment affirmed.

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