

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 1998

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. 98-0676-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BRUCE W. BADER AND TRACY BADER,

PLAINTIFFS-APPELLANTS,

v.

WESTFIELD INSURANCE COMPANY AND JEFF A. BADER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

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

PER CURIAM. Bruce and Tracy Bader (hereafter “Bruce”) appeal a judgment dismissing their negligence complaint against Bruce’s brother, Jeff.¹ The jury found Jeff not negligent when he hurt Bruce in a family volleyball game.

¹ This is an expedited appeal under RULE 809.17, STATS.

The trial court set aside the verdict and granted Bruce a directed verdict, seeing no credible evidence for the no-negligence verdict and finding Jeff negligent as a matter of law. As an alternative ruling, the trial court also granted Bruce a conditional new trial under § 805.15(4), STATS., holding that the no-negligence verdict stood against the weight of the evidence. In a prior appeal by Jeff, we concluded there was credible evidence to support the no-negligence verdict and directed the trial court to reinstate the verdict. See *Bader v. Westfield Ins. Co.*, No. 96-2643, slip op. at 5 (Wis. Ct. App. May 13, 1997). We did not expressly address Bruce's claim that the no-negligence verdict, if resting on credible evidence, still stood against the weight of the evidence.

On remand, Bruce asked the trial court to enforce its alternative conditional ruling, relying on our failure to expressly address that issue or explicitly overturn that ruling. The trial court, however, denied Bruce's motion on the basis of our May decision and dismissed the action based on the verdict.

Bruce now argues that the trial court misread our May decision and that the trial court should have enforced its initial ruling for a conditional new trial. Bruce states that our May decision, by not mentioning the trial court's alternative ruling for a new trial, had the effect of letting that ruling stand. Bruce notes that this view of our May decision comports with the law; a no-negligence verdict may both rest on credible evidence yet stand against the weight of the evidence. See *Sievert v. American Family Mut. Ins. Co.*, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993); see also § 805.15(4), STATS. In response, Jeff argues that our earlier decision overturned the trial court's new trial ruling *sub silentio*, if not expressly. We agree with Jeff that our May decision had the effect of overturning the trial court's new trial ruling. We therefore affirm the trial court's judgment dismissing the complaint.

The trial court correctly read our May 13, 1997, decision. While we did not specifically address the court's grant of a new trial,² we examined the nature of the evidence submitted and concluded that the evidence was such that a reasonable jury could conclude that the plaintiff's injuries were not the result of the negligence of these defendants. This analysis is consistent not only with a reversal of the judgment granting the directed verdict, but also precludes the granting of a new trial. Our analysis is inconsistent with the trial court's granting judgment that the evidence was such that no other reasonable jury could find that the injuries did not result from the defendants' negligence. It is also inconsistent with the court's order for a new trial that the jury's findings that these injuries did not result from the defendants' negligence was contrary to the great weight of evidence. We further note that on remand we directed that the jury verdict be reinstated. Such direction is inconsistent with the court's order for a new trial.

Because each of the bases upon which the court granted relief is inconsistent with the analysis made in our decision, the trial court correctly concluded that our decision also disposed of the court's granting a new trial even though the decision did not specifically address that issue. Accordingly, we affirm the trial court's judgment dismissing the plaintiff's complaint and the court's order denying the defendants' motion for a new trial.

By the Court.—Judgment affirmed.

² In hindsight, we should have made our opinion clearer by specifically addressing the trial court's alternative holding when it concluded that the jury's verdict was against the great weight of the evidence. Unfortunately, we did not, causing this confusion.

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

