COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2007

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. 2006AP1152 **Cir. Ct. No. 2004CV32**

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

JESSICA D. GREENFIELD AND JUSTIN GREENFIELD, A MINOR BY HIS GUARDIAN AD LITEM, JAMES M. FERGAL,

PLAINTIFFS-RESPONDENTS,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., PAUL E. HUEPENBECKER, M.D. AND DEAN HEALTH SYSTEMS, INC.,

DEFENDANTS-CO-APPELLANTS,

CENTRAL CABLE CONTRACTORS, INC. AND TOMMY G. THOMPSON, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

DEFENDANTS,

WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANT-APPELLANT.

APPEALS from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

Before Dykman, Lundsten and Hoover, JJ.

¶1 PER CURIAM. Wisconsin Injured Patients and Families Compensation Fund, Physicians Insurance Company of Wisconsin, Inc., Dean Health Systems, Inc., and Paul Huepenbecker, M.D., appeal the circuit court's amended judgment in favor of Jessica Greenfield. They argue that the circuit court coerced the jury into reaching a verdict. We disagree and affirm.

¶2 This tort action was brought by Jessica Greenfield, who claimed that she sustained injuries as a result of medical malpractice. After lengthy deliberations, the jury returned a verdict in favor of Greenfield, with two jurors dissenting. The jury awarded Greenfield approximately $8 million. The defendants filed post-verdict motions, which the circuit court denied.

¶3 With regard to the issue raised on appeal, the pertinent facts are as follows. The jury recessed to deliberate at 12:55 p.m. on January 30, 2006. At 2:40 p.m., the jurors requested reports from Mayo and Marshfield Clinics. At 3:25 p.m., the jurors again requested the reports and also a brochure given to surgery patients. At 5:25 p.m., the jury requested testimony from two of the doctors. At 6:20 p.m., the jury asked: "Could we receive a list of doctors for both sides and their resumes?" At 6:36 p.m., the jury advised the circuit court by note: "Judge Krueger, Unfortunately we feel that we are unable to proceed any further. We are currently at 9-3 on question one." The defendants moved for a mistrial. Over the objection of the defendants, the circuit court brought the jury back into the courtroom and read WIS JI—CIVIL 195, which is an instruction approved in cases where the jury is unable to agree. The court stated:

> I have been informed that the jury is unable to agree on a verdict. You are not going to be kept here until you do agree. But you jurors are as competent to agree on a verdict as the next jury that may be called to hear the same evidence and arguments that you have heard.
>
> You do not have to violate your individual judgment and conscience. However, you have the duty to be open minded, to discuss the evidence freely and fairly, to listen to the arguments of your fellow jurors, and to examine your own position and to make a conscientious effort to agree on a verdict.
>
> Remember, agreement by ten or more jurors is sufficient to become the verdict of the jury. If you can do so consistently with your duty as a juror, at least the same ten should agree in all the answers as to a particular claim. If possible, I ask you to be unanimous.

¶4 The jury continued to engage in active deliberations, asking the court for testimony and asking the court a clarifying question. Shortly after 10:00 p.m., the court sent a note to the jury, with the approval of counsel, stating:

> I am concerned about the level of fatigue you may be experiencing, therefore I want to give you the choice of ending deliberations for today and returning at 9:00 tomorrow morning or of continuing on this evening. Please advise me as to your preference.

Several minutes later, the jury responded in writing:

> No one wants to return tomorrow. We are willing to stay, however we are not any closer than we were several hours ago.

The defendants again moved for a mistrial.

¶5 At 11:55 p.m., the court sent the jury another note asking: "Are you making any progress?" The jury responded: "No. What would you like us to do?" At 12:10 a.m., the court had the jury returned to the courtroom, and the court asked the foreperson: "And is it your belief that this jury is deadlocked?" The foreperson responded: "Yes." The judge then asked: "Is anyone on the jury

interested in coming back tomorrow to do more deliberating?" Three of the jurors responded verbally that they would be willing to come back, and approximately eight of the jurors indicated by raising their hand that they would be willing to come back.

¶6 The jury returned at 10:00 a.m. the next day to continue deliberations. During this day, the jury asked for certain testimony, but did not send a note to the court indicating that they could not reach a decision or otherwise advise the court that they were at an impasse. At 7:55 p.m., the jury reached a verdict in favor of Greenfield.

¶7 "'[A] verdict cannot stand when the jury ha[s] been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that no influence was thereby exerted.'" ***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631 (1993) (citation omitted). "Whether to declare a mistrial is directed to the trial court's discretion." ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). "The denial of a motion for a mistrial will be reversed only if the trial court erroneously exercised its discretion." ***Id.***

¶8 The appellants argue that the circuit court committed a number of errors in its handling of the jury deliberations that, taken together, rose to the level of jury coercion, and that their motion for mistrial should have been granted. We address each issue in turn.

¶9 The appellants argue that the circuit court's decision to give WIS JI—CIVIL 195 was coercive because the jury had informed the court that it was deadlocked 9 to 3. The appellants contend that the effect of the instruction was to address the three minority members directly, rather than the jury as a whole,

because the court was aware of the 9 to 3 split. The appellants contend that this pressured the minority into agreeing with the majority.

¶10 It is well established that the trial court should not ask a jury how they are split in their deliberations due to the potential coercive effects of such a question. *See* ***State v. McMahon***, 186 Wis. 2d 68, 91, 519 N.W.2d 621 (Ct. App. 1994). The prohibition is on the judge actively asking what the current split on the jury is and then urging the jury to continue deliberating, which places emphasis on those jurors who are in the minority. This does not mean, however, that a trial judge who knows the split by happenstance, as was the case here, is not permitted to direct the jurors to continue deliberating. When a judge is advised that a jury is having trouble reaching a verdict, it is reasonable to assume that most often there is a majority and a minority split. It is well settled that a judge may instruct a jury to keep trying under these circumstances, even though the danger exists that the minority jurors will feel pressure to agree with the majority. We fail to see that the situation differs when a judge happens to learn of the particular split. To repeat, the prohibition is on the judge actively inquiring about the split because this inquiry may be viewed as coercive by the minority jurors. Here the judge made no such inquiry.

¶11 The appellants next argue that the circuit court should not have required the jurors to continue deliberating the next day after the jury had expressed that it was deadlocked on four occasions. We are not persuaded.

¶12 The first time that the jury told the judge of their inability to reach a conclusion was a relatively short time after deliberations began. The total time since the jury had begun deliberating was only five and one-half hours, during which the jury had asked for exhibits or testimony four times, interrupting the time

the jury had available to deliberate. Because not much time had elapsed when the jury first informed the court that it was unable to proceed any further, the circuit court properly exercised its discretion in giving WIS JI—CIVIL 195 at that point in the proceedings.

¶13 From that point forward, the jury never informed the circuit court of its own accord that it could not make a decision. Instead, the circuit court made inquiries into how the jury was doing and they responded. At 10:00 p.m., the jury responded negatively to the court's inquiry about whether they were making progress. At 11:55 p.m., the court sent another note, asking if the jury was making any progress, again getting a negative response. At 12:10 a.m., the court asked the foreperson: "And is it your belief that this jury is deadlocked?" to which the foreperson said: "Yes." However, we interpret the foreman's affirmative response to the court's question to mean that at the present time they were not agreed, not that they would never reach agreement. This interpretation is the most reasonable, particularly because many of the jurors then responded that they would like to continue deliberations in the morning.

¶14 The appellants argue that the circuit court erred in questioning the jurors in open court at 12:10 a.m. about whether they would be willing to continue deliberations the following day because it pressured the minority jurors into agreeing with the majority. We disagree. The fact that the jury spent ten hours the next day deliberating provides persuasive evidence that the judge's question did not tend to coerce the minority jurors into agreeing with the majority.

¶15 In sum, these alleged errors, considered individually or together, did not provide grounds for a mistrial and did not amount to jury coercion. Although

a different court might have declared a mistrial at some point, the circuit court here acted within its discretion in not declaring a mistrial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).