COURT OF APPEALS
DECISION
DATED AND RELEASED

May 13, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2643

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

BRUCE W. BADER AND TRACY BADER,

PLAINTIFFS-RESPONDENTS,

V.

WESTFIELD INSURANCE COMPANY,

DEFENDANT-CO-APPELLANT,

JEFF A. BADER,

DEFENDANT-APPELLANT,

TRAVIS V. THOMPSON,

DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Fox, JJ.

PER CURIAM. Jeff Bader appeals a judgment against him in this personal injury action. Jeff argues that the trial court erroneously overturned the jury's finding of no negligence. Because the record contains credible evidence supporting the jury's finding of no negligence, we reverse and remand with directions to reinstate the jury's verdict.

Bruce Bader initiated this action against his brother, Jeff, their thirteen-year-old nephew, Travis Thompson, and Westfield Insurance Company, Jeff and Travis's insurer. Bruce claimed damages as a result of injuries to his knee sustained during horseplay after a family volleyball game. The jury returned a verdict finding neither Jeff, Travis, nor Bruce negligent. On motions after verdict, the trial court determined that Jeff was negligent as a matter of law. It determined as a matter of law that Jeff's negligence was a cause of Bruce's injuries and entered judgment in favor of Bruce in the sum of $134,444.29.

Jeff argues that the trial court erroneously determined the issue of negligence. We agree. The rule to guide the trial court and this court, when requested to change an answer in a jury verdict, is the evidence will be viewed in the light most favorable to the verdict and the verdict will be affirmed if supported by any credible evidence. Section 805.14(1), STATS. In negligence cases, "only in the most apparent situations, where the facts are undisputed and the duty is absolutely clear, a court should take a case from the jury." ***Millonig v. Bakken,*** 112 Wis.2d 445, 450, 334 N.W.2d 80, 83 (1983). The jury determines the weight and credibility of testimony. ***Nowatske v. Osterloh,*** 201 Wis.2d 497, 511, 549 N.W.2d 256, 261 (Ct. App. 1996). "[W]hen more than one inference may be drawn from the evidence [this court must] accept the inference drawn by the jury."

Id. at 509, 549 N.W.2d at 260. We search the record for evidence to sustain the verdict, not for evidence to sustain a verdict that the jury could have but did not reach. ***Id.*** at 511, 549 N.W.2d at 261.

In July 1993, the Bader family got together for a regular Fourth of July outing. At the park where they were camping, they decided to play volleyball on the sand/dirt court. There were about six people on each team. Bruce was on one team and Travis and Jeff were on the other. It had been rainy and the ground was wet and muddy.

Bruce was about thirty years old and weighed about 175 pounds. Travis was about nineteen and smaller than Bruce. Bruce was playing volleyball in bare feet. During the game, there was good natured competition between the players. Tori Hanson testified that she joined the volleyball game with Travis, Jeff, Bruce and the others. She testified that the game lasted about an hour or two. During the game, Bruce would scoop mud up with his feet and playfully throw it across to the other side of the court in Travis's direction. Everyone but Bruce was splashed with mud or water by the end of the game. Bruce was being cocky and teasing Jeff about being shorter and having a harder time spiking the ball.

Toward the end of the game, Jeff and Travis conceived a plan to get Bruce wet. Jeff would go behind Bruce and get down on all fours, and Travis would go in front of Bruce and push him over Jeff. As Travis approached Bruce, Bruce was smiling and laughing and said, "don't do it, Travis[]" in a cocky teasing tone. Bruce took a step back and fell to one side. Tori did not see Travis actually push Bruce; she did not see any contact at all. There was conflicting evidence as

to whether Travis actually pushed Bruce. As soon as Bruce hit the ground, he grabbed his knee in pain.

Jeff testified that he never had any thought that Bruce might get hurt by this stunt. He testified that others were getting wet, diving for the ball and landing in the mud puddles and splashing. The plan was to push Bruce into a puddle in the sand at the side of the volleyball court. He said that he did not see any contact between Bruce and Travis, and as Bruce took a step back with his right foot, it slipped and Bruce fell down. Bruce did not fall on Jeff, but fell in front of him. Travis and Jeff could see that Bruce was hurt and went to get help. When the ambulance arrived, Bruce told the emergency medical technician that he had injured his knee while "goofing around."

In ***LePoidevin by Dye v. Wilson,*** 111 Wis.2d 116, 126, 330 N.W.2d 555, 560 (1983), our supreme court held that whether the "perpetration of a joke constitutes negligence" is a question for the jury. Here, the jury was instructed that a person is negligent when he or she fails to exercise ordinary care. The court instructed the jury that

> A person fails to exercise ordinary care when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonably prudent person would foresee that by his or her action or failure to act he or she will subject a person or property to an unreasonable risk of injury or damage.

Here, there is credible evidence to permit the jury to reasonably conclude that Jeff's plan to have Travis push Bruce over him into a puddle would not subject Bruce to an unreasonable risk of injury. Jeff and Travis were younger and smaller than Bruce. The jury could have reasonably found that the volleyball game involved splashing and jostling one another and that this stunt was no more

than an extension of the playing and splashing that went on during the game. It could have concluded that Bruce saw Travis approaching, and injured his knee when he stepped back and slipped in the mud. The jury could have weighed the testimony and found that the stunt was not so dangerous or imprudent so as to have involved an unreasonable risk considering the sizes and ages of the participants and the circumstances of the game.

Bruce argues that Jeff was negligent as a matter of law, because to accept the jury's verdict requires us to conclude that: "A jury can find that intentionally knocking an unsuspecting person down, or attempting to knock them down, by shoving them over a stationary object is not negligence." We are unpersuaded. This argument ignores certain facts, such as testimony that Bruce said "don't do it, Travis[]" in a teasing way and admitted to "goofing around" with his brother. Second, Bruce's argument would require us to hold that such rough play between brothers results in civil liability as a matter of law. Such a holding would ignore ***LePoidevin***'s admonition that the issue whether a practical joke is negligence is a question of fact for the jury.

In view of this disposition, we do not reach other issues concerning insurance coverage and causation that the parties raise on appeal. Because we conclude that credible evidence supports the jury's verdict, we reverse the judgment and remand with directions to reinstate it.

By the Court.—Judgment reversed and cause remanded with directions.

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