COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2831 **Cir. Ct. No. 2001CV3513**

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

DEE VAN RUYVEN,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND KRISTEN A. GILBERTSON,

DEFENDANTS-RESPONDENTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Dee Van Ruyven appeals a judgment awarding her personal injury damages. In granting judgment, the trial court upheld a less than unanimous jury verdict. The issue is whether the judgment on the verdict violated WIS. STAT. § 805.09, Wisconsin's five-sixths rule. We conclude it does not and therefore affirm.

¶2 The facts relevant to this appeal are not in dispute. Van Ruyven sued Kristin Gilbertson and her insurer, American Family Mutual Insurance Company, on a personal injury claim. Liability was conceded and the case went to trial on damages. The verdict question asked the jury to award sums for (a) past medical expense, (b) past wage loss, and (c) past and future pain, suffering and disability.

¶3 The twelve-person jury awarded $1,212.60 for past medical expenses, with jurors Jeff Flashinski and George Dorn dissenting: $266.71 for past wage loss with no dissenters; and $5,000.00 for past and future pain, suffering and disability with jurors Flashinski and Terence Sheldon dissenting.

¶4 Because three jurors dissented from at least one part of the verdict, Van Ruyven contends it is invalid under the five-sixths rule. However, one of the dissenters, Sheldon, dissented in the defendant's favor because he believed the pain and suffering award should not have exceeded $3,000. This court has stated "[I]f a dissent supports the verdict for the winner, the dissent is not counted when applying the five-sixths rule. The dissent is regarded as favoring the verdict for the winner 'only more so,' and is ignored because it is not essential to a complete verdict." ***Bittner v. American Honda Motor Co., Inc.***, 181 Wis. 2d 93, 102, 511 N.W.2d 325 (Ct. App. 1993), *reversed on other grounds*, 194 Wis. 2d 122, 533 N.W.2d 476 (1995) (citation omitted). The defendants were the winners in that

Van Ruyven received far less in damages than she claimed.[1] Sheldon voted in favor of the defendants, only more so.

¶5 Our conclusion makes it unnecessary to decide, alternatively, whether the verdict was valid because at least ten jurors agreed to an amount for each of the separate categories of damages.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

[1] Van Ruyven did not accept a pre-trial settlement offer of $14,000.