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Article 8

Code Practice - Five Sixths Jury Verdict

Joan Moonan

RECENT DECISIONS

Code Practice—Five-Sixths Jury Verdict.—Plaintiff's automobile collided with a bus belonging to the defendant company at a blind T-shaped intersection when plaintiff had almost completed a left turn into the street on which the bus was approaching from the opposite direction. In reaching a verdict the jury was unanimous in its finding that the defendant was negligent in several respects and that such negligence was the cause of the collision. The jury was also unanimous as to the plaintiff's contributory negligence on all items except that of "lookout." As to that item, two jurors found the plaintiff not negligent. On the question of damages, one juror, other than the two dissenting on the item of "lookout," dissented as to the amount. *Held* that the verdict was fatally defective in that the same ten jurors did not agree as to negligence, contributory negligence, and damages. 5 N.W. (2d) 750 (Wis. 1942). In reaching its decision the court followed the rule as laid down in *Biersach* v. *Wechselberg,* 238 N.W. 905, 206 Wis. 113 (1931) that there must be an identity of ten jurors not only on the question of the defendant's causal negligence, but also as to the amount of damages and as to the plaintiff's contributory negligence. The Biersach case was an action against an automobile driver for injuries to a guest in the verdict of which there was an identity of ten concurring jurors as to failure to exercise ordinary care and as to such failure being the proximate cause of the plaintiff's injuries, but not as to negligence on the part of the plaintiff contributing to the injuries. Judgment for the plaintiff was reversed on the ground that in order to complete a verdict in favor of the plaintiff the same ten jurors had to agree upon all questions necessary to sustain the judgment, including that of assumption of risk or contributory negligence. The court in this case explained the seeming conflict between its decision and the language in *Will* v. *Chicago, M. & St. P. Ry. Co.,* 210 N.W. 717, 191 Wis. 247 (1926), that "One set of ten jurors might find defendant negligent and that such negligence was the proximate cause of the injury; another set of ten might, however, find that there was negligence by plaintiff proximately contributing to the same injury. That defendant was thus found negligent and proximately contributing to the injury would then become immaterial, so far as plaintiff's ultimate right to recover was concerned, because ten jurors having found that plaintiff himself was negligent, then it follows as a matter of law, that the plaintiff cannot recover." The court explained in the *Biersach* case that this language would be inapplicable in a situation where, as in the Biersach case, the jury found no contributory negligence on the part of the plaintiff. In the *Will* case, also a personal injury action, all twelve jurors were unanimous in finding that the defendant could be charged with failing to exercise ordinary care in learning of the danger to which the plaintiff was subjected, although one juror, *A,* then dissented from the finding that the defendant did not have actual knowledge of the danger. Two jurors, *B* and *C,* dissented as to the time when the plaintiff was overcome by the gas while working in the defendant's employ, and two jurors, *A* and *D,* dissented to the finding of contributory negligence on the part of the plaintiff. 50% of the negligence was found to be attributable to the plaintiff. On appeal by the defendant the order for new trial because the verdict was defective in that the same ten jurors had not agreed upon all the findings was reversed. The Court however indicated that the trial court had been justified in ordering a retrial in view of the decisions reached in the cases of *Kosak* v. *Boyce,* 201 N.W. 757, 185 Wis. 513 (1925); *Stevens* v. *Montfort State Bank,* 198 N.W. 600, 183 Wis. 621 (1924); *Bentson* v. *Brown,* 203 N.W. 380, 186 Wis. 629, 38 A.L.R. 1417 (1925); and

Hobbs v. *Nelson,* 205 N.W. 918, 188 Wis. 108 (1925), the rule being stated in the last case to be that a special verdict is defective unless the same ten jurors agree upon their answers to each and every question of the special verdict. The language used in the last case was, as the court expresses it in *Will* v. *Chicago, supra,* "unfortunate" and has led to mistakes by trial courts. The basis for the ruling in these cases is found in *Dick* v. *Heisler,* 198 N.W. 734, 184 Wis. 77 (1924), one of the first cases to construe the statute on five-sixths jury verdict. "As we construe the statute ten members of the jury must agree before a question can be answered; but the same ten must agree to each question before it can be answered." The *Dick* and *Hobbs* cases are overruled by the *Will* case so far as identity of jurors on all the answers is concerned and the only problem remaining is: Upon what answers must the same ten jurors agree?

The key to this problem is to be found in the words used in *Biersach* v. *Wechselberg, supra,* that the same ten jurors must agree upon *all questions necessary to sustain the judgment.* What these questions may be will vary somewhat with the case. As the court explains the situation in the *Will* case, each lawsuit presents two sets of issues, one as to the plaintiff's attack and the other as to the defendant's defense. If the plaintiff fails to prove his attack and ten jurors find that he has so failed, the defendant's defense is immaterial, and the same ten jurors need not reach a decision on that point. The same is true when contributory negligence on the part of the plaintiff is found. No great problem is raised by the comparative negligence statute. If the plaintiff is found to be more than 50% negligent then as a matter of law he cannot recover and the question of the defendant's negligence is immaterial. On the other hand, if the plaintiff is found to be not negligent or is found to be less than 50% negligent then the verdict must also decide whether the defendant was negligent, whether such negligence was the proximate cause of the plaintiff's injuries, and the amount of the damage sustained by the plaintiff. The same set of ten jurors must concur on all these questions in order to sustain the judgment.

The rule as stated above was apparently followed in the cases of *Lefebvre* v. *Autoist Mut. Ins. Co.,* 236 N.W. 684, 205 Wis. 115 (1931) and *Fraundorf* v. *Schmidt,* 256 N.W. 699, 216 Wis. 158 (1934). In the former case the same ten jurors did not agree on any two of the questions of the special verdict. It was held that the verdict was not imperfect since only the answer to the first question was essential to support the judgment and it then became immaterial as to how the other questions were answered. In the latter case, an instruction that at least the same ten jurors must agree to all of the answers in the verdict was held to be erroneous although not prejudicial since three jurors had dissented, showing that the jurors had not followed the instruction. A verdict returned as the result of the consensus of opinion of at least ten jurors on all questions necessary to sustain recovery by the plaintiff was there held sufficient to warrant the entry of judgment.

The question as to when an identity of jurors is necessary in a special verdict is interesting more from a technical than from a practical viewpoint. During the past twenty years, as far as the writer has been able to ascertain, the question has gone to the Supreme Court of Wisconsin only ten times. Four of these cases followed exactly the rule as laid down in the case first construing the statute allowing a five-sixths jury verdict in civil cases. These were followed by the *Will* case narrowing the rule as originally laid down. The *Biersach* case followed the same rule and explained the apparent conflict with the previous

case. The instant case then cites the *Biersach* case as ruling its decision; and the *Fraundorf* and *Lefebvre* cases fall directly in line with both the reasoning and the rule of the *Biersach* case. Thus it would seem that a definite and harmonious construction of the five-sixths jury verdict statute has been attained.

JOAN MOONAN.

Municipal Corporations—Limitations on the Power to License.—By an ordinance of the respondent city, transient photographers were forbidden to engage in the business of photography, or the sale of photographs, enlargements, or coupons without first obtaining a license from the city at a cost of ten dollars per business day. The defendant was arrested, tried in municipal court, and found guilty of violating the ordinance. On the trial, it appeared that the defendant was engaged in taking snapshots and forwarding the film to an out of state photography house which paid the defendant a flat fee for each sales prospect with an additional bonus if sales exceeded a given total. The defendant's average income was $11.33 per day, while the firm for which he worked derived a profit of between six and seven per cent. The circuit court on appeal affirmed the sentence of the municipal court, sustaining the city's contention that the ordinance was valid as a revenue measure. Defendant appealed to the Supreme Court on the ground that the ordinance was invalid as discriminatory and the fee was unreasonable and confiscatory. The Supreme Court reversed the conviction on the ground that the ordinance was invalid as amounting to the suppression of a lawful business and as an imposition which could not be sustained under the taxing power of the municipality. *City of Racine* v. *Wayhe,* 5 N.W. (2d) 747, Wis. 1942.

The power of a municipality to require a license of those engaged in a designated trade or profession within its boundaries and to demand a fee for such license is recognized generally to have two sources: the police power and the power to raise revenue. Since municipal corporations are totally the creatures of the state, neither power can be exercised unless authorized by the charter of the municipality or by a charter ordinance having the same effect. The granting of one power does not confer the other, and if either the power to tax or the power to regulate a vocation is given specifically, the courts will not infer the existence of the other. *City of Tucson* v. *Stewart,* 45 Ariz. 36, 40 P. (2d) 72, 1935; *City of Creston* v. *Mezvinsky,* 213 Ia. 212, 240 N.W. 676 (1932); *License Tax Cases,* 5 Wall. 471, 18 L.Ed. 497 (1867). Nevertheless, the state may grant to a municipal corporation both the power to regulate and to license for revenue, and an ordinance passed under such authorization will not be held invalid because justified by several provisions in a charter. *Gundling* v. *City of Chicago,* 176 Ill. 340, 52 N.E. 441 (1898); *City of Monroe* v. *Endelman,* 150 Wis. 621, 138 N.W. 70 (1912).

Where the business sought to be regulated bears no reasonable relation to the health, safety, or morals of the community ,ordinances imposing a license can not be justified as a valid exercise of the police power. *Fetter* v. *City of Richmond,* 142 S.W. (2d) 6 (Mo. 1940); *City of Creston* v. *Meszinsky, supra.*

Moreover, the same result will be reached if, though, as in the instant case, the business might be subject to reasonable regulation, the ordinance itself shows a contrary intention; for instance, by demanding as a condition of the license a fee so grossly in excess of the expense of issuing the license and enforcing the