

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

THE ESTATE OF MARY M. LAWSON,	:	
	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-12-340
	:	
	:	<u>O P I N I O N</u>
- VS -	:	9/6/2011
	:	
MERCY HOSPITAL FAIRFIELD, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-03-1201

Kory A. Veletean, 1014 Vine Street, Suite 2200, Kroger Bldg., Cincinnati, Ohio 45202, for plaintiff-appellant

Karen A. Carroll, Suite 400, 1 West Fourth Street, Cincinnati, Ohio 45202, for defendant-appellee, Mercy Hospital Fairfield

James M. Coombe, Suite 400, 221 East Fourth Street, Cincinnati, Ohio 45202, for defendant-appellee, Secretary, United States Department of Health

PIPER, J.

{¶1} Plaintiff-appellant, the Estate of Mary M. Lawson, appeals a decision of the Butler County Court of Common Pleas entering a general verdict in favor of defendant-appellee, Mercy Hospital Fairfield.

{¶2} This action arose from a fall which occurred on May 23, 2007 at Mercy Hospital Fairfield. Appellant alleged that appellee failed to use reasonable care in assisting her as she moved from her hospital bed into a bedside chair. As a result of the fall, appellant suffered a fractured femur.

{¶3} The case was subsequently tried to a jury which returned a verdict in favor of appellee based on a finding in an interrogatory of no proximate cause. Interrogatory No. 1 asked, "[d]o you find, by the greater weight of evidence that [appellee] was negligent in the care and treatment that it rendered to Mary Lawson?" Six of the eight jurors responded yes to this interrogatory. Interrogatory No. 2 asked, "[i]f you found [appellee] to be negligent, do you find, by a greater weight of the evidence, the negligence of [appellee] was a proximate cause of [appellant's] claimed injuries?" Six of the eight jurors responded that appellee was not the proximate cause of the injuries. Two of these six jurors, however, were not part of the six who, in answering the first interrogatory, agreed that appellee was negligent in its care.

{¶4} Appellant argued that the verdict was invalid due to inconsistency in the answers to the interrogatories. The trial court denied appellant's motion for a new trial or in the alternative judgment notwithstanding the verdict and entered judgment in favor of appellee.

{¶5} Appellant now appeals the decision of the trial court, raising the following assignment of error:

{¶6} "THE TRIAL COURT ERRED WHEN IT RENDERED JUDGMENT IN FAVOR OF THE APPELLEE CONSIDERING THE INCONSISTENCIES OF THE JURY'S ANSWERS TO THE INTERROGATORIES"

{¶7} Appellant argues that the interrogatories are inconsistent because the six jurors who found appellee to be negligent in its care and treatment were not the exact same six

jurors who found appellee's failure in this regard was not the proximate cause of appellant's injuries.

{¶8} Whether the "same juror" rule applies and limits who may decide proximate cause to only those jurors who find a breach of the standard of care is a question of law. Questions of law are reviewed by appellate courts de novo. *Turner v. Langenbrunner*, Warren App. No. CA2003-20-099, 2004-Ohio-2814, ¶12.

{¶9} In a civil negligence action, a jury will be composed of eight members. Civ.R. 38(B). The rendering of the verdict in such cases must be by the concurrence of not less than three-fourths of the jury. Section 5, Article I, Ohio Constitution.

{¶10} It is appellant's contention that only those jurors who found that appellee breached its standard of care should have been permitted to participate in determining whether this breach was causal. Appellee in turn argues that any three-fourths majority of the full jury of eight may agree as to each individual interrogatory. Both parties rely on the case of *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, to support their arguments.

{¶11} The Ohio Supreme Court's holding in *O'Connell* was limited to cases involving comparative negligence and the apportionment of fault subsequent to a finding of causal negligence by the jury. Whether a breach in the standard of care and proximate cause of injury are similarly interdependent so as to invoke the "same juror" rule is an issue of first impression in Ohio.

{¶12} In *O'Connell*, six out of eight jurors voted that the defendant was negligent and that this negligence proximately caused the plaintiff's injury. Seven jurors found that the plaintiff was also negligent and that her negligence proximately caused her injury. In apportioning fault, six jurors found that the plaintiff was 70 percent negligent and the defendant was 30 percent negligent. However, two of these six jurors had voted that the

defendant was not negligent at all, and one of these two had found that the plaintiff was not negligent at all. Because the plaintiff was found to be greater than 50 percent negligent, the trial court entered judgment for the defendant. The plaintiff appealed, arguing that the interrogatories were inconsistent because jurors who had voted that there was no negligence were allowed to participate in apportioning fault.

{¶13} The Ohio Supreme Court held that the votes of two of the six jurors who apportioned fault were not valid because they found no negligence by the defendant (and one found no negligence by the plaintiff). Thus, the verdict rendered by the trial court was held to be constitutionally infirm as the jury did not concur by a three-fourths majority as to the apportionment of negligence. *Id.* at 232, citing Section 5, Article I, Ohio Constitution, and Civ.R. 48.

{¶14} The Court analyzed two competing views from other states in reaching this decision: the "any majority" rule and the "same juror" rule. The "any majority" rule reasons that once three-fourths of the jurors have found a party negligent, there is no reason why dissenting jurors cannot accept the majority's finding of such negligence and then participate in the apportionment of negligence amongst the parties. *O'Connell* at 234, citing *Juarez v. Super. Ct. of Los Angeles* (1982), 31 Cal.3d 759. These courts have stated that, "[t]o hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 [8 in Ohio] persons deliberating on all issues." *Id.*

{¶15} The *O'Connell* Court, however, chose to adopt the "same juror" rule for use in comparative negligence cases, holding that the same jurors who found negligence must constitute the three-quarters needed for apportioning the negligence between the parties, and the jurors who found no negligence cannot be part of the three-quarters needed for the

apportionment. *O'Connell* at 235-236. In so holding, the Court found that, "we believe that the determination of causal negligence on the part of one party to be a precondition to apportioning comparative fault to that party. It is illogical to require, or even allow, a juror to initially find a defendant has not acted causally negligently, and then subsequently permit this juror to assign some degree of fault to that same defendant. Likewise, where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party's recovery." *Id.* at 235.

{¶16} In *O'Connell*, the Supreme Court addressed the importance of permitting all members of the jury, or the full jury, to be involved in the determination of certain issues within a claim: "Because the *full jury* undertakes the initial determination as to negligence *and* proximate cause, neither party is deprived of having all the jurors deliberate the material issue of negligence *and* proximate cause." *Id.* at 235-36 (emphasis added). The *O'Connell* Court therefore recognized that a party's right to a full jury would in fact be deprived if the full jury were not permitted to deliberate as to both negligence and proximate cause.

{¶17} In the present case, the full jury of eight members was involved in the initial determination as to Interrogatory No. 1, finding by a three-fourths majority that appellee breached its standard of care in treating appellant ("negligent in the care and treatment that it rendered"). In accordance with the principle outlined above, the full jury of eight then deliberated on Interrogatory No. 2, finding by a three-fourths majority that this breach was not the proximate cause of appellant's injuries. A finding that a party breached its standard of care, but that this breach was not the cause of the injury, is not inconsistent.¹

1. Had the court not utilized interrogatories and simply asked the jury to determine whether appellee was causally negligent, the jury would have come to the same conclusion as we have in the present case. The interrogatories separating the essential elements of the cause of action are not meant to narrow down which jurors may participate in the deliberations, but rather to help guide the jury in reaching its conclusion.

{¶18} A breach in the standard of care is a separate issue from whether the breach was the proximate cause of the injury sustained. The essential elements for a negligence claim consist of duty, breach of duty, and damage or injury that is a proximately caused by the breach. See *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶46. The failure of any of these elements will defeat the action. The apportionment of fault, as was at issue in the *O'Connell* case, is not an essential element of a cause of action for negligence. A party has the right to have a full jury determine all of the essential elements of a claim, and to forbid a juror who voted against a breach of duty from participating in a determination of proximate cause would violate this right. See Civ.R. 38(B) (right to eight jurors). See, also, Section 5, Article I, Ohio Constitution. Because the "any majority" rule emphasizes the importance of the full jury participating in deliberations as to the essential elements of a cause of action, we hold that this rule is properly applied to jury determinations regarding breach of the standard of care and proximate cause. Standard of care and proximate cause of injury are not interdependent pursuant to the analysis provided in *O'Connell*, and therefore we do not invoke the "same juror" rule herein.

{¶19} This holding is consistent with other Ohio courts that have similarly held that a party is entitled to a full jury on the issue of damages, another essential element to a claim of negligence, regardless of how the individual jurors voted on other elements of the claim. See *West v. Curtis*, Belmont App. No. 08 BE 28, 2009-Ohio-3050, ¶121.

{¶20} Accordingly, appellant's assignment of error is overruled.

Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur