

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2018

Sheila T. Rieff
Clerk of Court of Appeals

NOTICE

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Appeal No. 2017AP982

Cir. Ct. No. 2015CV1176

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**THE ESTATE OF IRENE A. PELT, BY RAYMOND PELT, SPECIAL
ADMINISTRATOR AND RAYMOND PELT, INDIVIDUALLY,**

PLAINTIFFS-APPELLANTS,

**SYLVIA MATHEWS BURWELL, SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,**

INVOLUNTARY-PLAINTIFF,

v.

**CRL SERVICES LLC, D/B/A NORTHFIELD MANOR, ABC 1-5 INSURANCE
COMPANIES, NORTHFIELD CRL LLC, DEF 1-5 INSURANCE COMPANIES
AND WEST BEND MUTUAL INSURANCE CO.,**

DEFENDANTS-RESPONDENTS,

**GHI 1-5 INSURANCE COMPANIES AND JKL 1-5 INSURANCE
COMPANIES,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. This appeal stems from a wrongful death action brought by the Estate of Irene Pelt (the Estate). The Estate alleged that Pelt died as a result of injuries incurred while a resident at Northfield Manor, a memory-care facility (Northfield). At issue in this appeal is whether the trial court erred in *sua sponte* amending the special verdict to reflect only one potential date of injury: Sunday, July 8, 2012. The Estate contends that the trial court's amendment likely confused the jury because the Estate presented evidence of multiple alleged incidents of neglect occurring on multiple days, specifically, both Saturday, July 7, 2012, and Sunday, July 8, 2012.

¶2 In June 2012, Pelt was admitted to Northfield for long-term care. Pelt was ninety years old at the time and was confined to a wheelchair. At the time of her admission, Pelt was suffering from dementia, behavioral disturbances, and depression. On the evening of July 8, 2012, Pelt was admitted to Community Memorial Hospital after Northfield staff noticed Pelt's left knee was swollen and Pelt was crying in pain. Doctors diagnosed Pelt with a left femur fracture. Because of Pelt's age, the doctors were unwilling to operate on Pelt's leg and instead recommended immobilizing the leg. The fracture led to an open wound, which became infected. Pelt died on October 1, 2012.

¶3 The Estate filed suit against Northfield and multiple other defendants, alleging that Northfield was negligent in its care and supervision of Pelt and that Northfield's negligence was a cause of Pelt's death. Specifically, the complaint alleged that on July 7, 2012, Pelt twice pulled a fire extinguisher out of

its wall-mounted enclosure onto her lap, resulting in a leg fracture that was not discovered by Northfield staff until the following day.

¶4 The matter proceeded to trial on the question of whether Northfield was negligent in its care and supervision of Pelt and whether that negligence led to injuries which ultimately contributed to Pelt's death.

The Trial

¶5 Throughout the course of the trial, the jury heard testimony and saw evidence suggesting that Pelt, in her wheelchair, could have sustained a leg fracture either on July 7th or July 8th. The evidence suggested that in addition to the two fire extinguisher incidents of July 7th, Pelt also pulled a television onto her lap on July 7th, and twice pulled fire extinguishers onto herself again on July 8th. Indeed, during opening statements, the Estate's counsel told the jury that it would hear "a lot of dates in this case," because the period of time Pelt was a resident at Northfield was central to the case. Specifically, counsel discussed the weekend beginning on Friday, July 6, 2012, telling the jury:

During that time, I think what we're going to establish and what all the evidence is going to show is that [Pelt] pulled the fire extinguisher down on herself twice and a television onto herself a third time.

So there's at least three incidents over that weekend where she was allowed to pull objects down onto herself. What we think we're going to establish beyond any doubt is that these heavy objects falling onto her lap caused her leg fracture

Now, let me take you through some of the record why I say that injury is most likely caused by the episodes involving either the fire extinguisher or the television I've got a note from [Saturday] July 7, 2012, by an aide who identifies there on the a.m. of July 7[th], [Pelt] had knocked a TV onto herself.

Same thing on the p.m. shift. An aide notes that [Pelt] grabs the fire extinguisher out from the box on the wall twice onto herself

Now, it's hard to tell exactly what happened to [Pelt] and when it happened ... because of the conflicting documentation.

Defense counsel, in his opening statements, also remarked that on “July 7[th] or July 8[th], something happened. Yes, we’re not quite sure which date, I’ll admit.”

¶6 Multiple witnesses testified and multiple exhibits were admitted indicating that Pelt’s injury could have occurred on either day. Among the many witnesses were:

- Jacqueline Philips, an aide at Northfield at the time of Pelt’s injury, who testified that on the night of July 8, 2012, she was alerted by another caregiver that Pelt’s left leg was swollen. She stated that she witnessed Pelt pull a fire extinguisher on herself twice that weekend, but could not recall which day.
- Jamie Moran, the nurse administrator at Northfield, testified that an investigation was made into the cause of Pelt’s injuries. On July 9, 2012, Moran noted in an investigation report that “[r]esident noted to pull out fire extinguisher from the Great Room, times two, on 7/7/12 and knocked TV over in the bedroom, both landing on resident left leg.” Moran stated that based on the investigation, she concluded that the cause of Pelt’s injury was either one of the fire extinguisher incidents or the television incident. Moran stated that there was no other possible explanation for Pelt’s injury.

- Pretoria Brooks, a caregiver at Northfield at the time of Pelt’s injury, testified about the administration of Pelt’s medications on July 7th and July 8th, stating that her records simply indicate that the medications were “passed” to Pelt, but not that Pelt actually took them.
- Eileen Dyer, a nursing home administrator and registered nurse, reviewed Pelt’s case and stated that throughout the course of the weekend of July 6, 2012, Northfield failed to meet the standard of care necessary for Pelt. Dyer testified that: Pelt was somehow able to pull a fire extinguisher onto herself on July 7th that landed on her left leg; Northfield had significant staffing issues that weekend where Northfield was short-staffed and certain employees worked double shifts; and that the relevant hospice care agency was not timely notified about Pelt’s escalating behavioral issues and the fire extinguisher/television incidents. Hospice was not contacted until the night of July 8, 2012, when Northfield staff noticed swelling in Pelt’s left leg.
- Dr. Jeffrey Jentzen, a forensic pathologist and former medical examiner for Milwaukee County, testified via video deposition. Dr. Jentzen testified that he reviewed multiple records, including, but not limited to: Pelt’s numerous hospital records, hospice records, Northfield’s records, the medical examiner’s report and Pelt’s death certificate. Dr. Jentzen stated that based on his review of the records, Pelt’s “fracture was attributed to a fall from either a fire extinguisher or a TV.” Dr. Jentzen stated that based on his review of Pelt’s x-rays, Pelt sustained a “blow” that impacted the

“lateral portion of the femur.” Dr. Jentzen opined that the injury likely occurred on July 8, 2012, but that he could not be certain because injuries incurred at long-term care facilities are not always identified on the day they occur. Dr. Jentzen also stated that injuries do not always appear immediately and patients may not immediately verbalize their pain.

- Doreen Reitmeyer, the on-call hospice nurse who responded to Pelt on the night of July 8, 2012, also testified via video deposition. Reitmeyer stated that when she responded to Northfield, she was informed that Pelt dropped fire extinguishers and a television onto herself the previous day. Reitmeyer stated that Pelt’s leg and knee sustained a “major trauma” likely incurred as a result of the fallen television or fire extinguishers.
- Dr. Craig Wilson, a geriatric specialist, stated that it is unlikely Pelt sustained a fracture on July 7th that went unreported for a day. However, Dr. Wilson could not rule out the possibility that either the fire extinguisher incidents from July 7th or July 8th caused Pelt’s injury.

¶7 In addition to testimony, multiple exhibits were admitted noting the fire extinguisher incidents of both July 7th and July 8th, as well as the television incident of July 7th.

Jury Instructions Conference and Special Verdict

¶8 Following the close of testimony, the parties and the trial court discussed the proposed jury instructions and the proposed special verdict. The

Estate’s first question on its proposed special verdict form asked “Were CRL Services, LLC and Northfield-CRL, LLC, negligent in providing care and related services to Irene Pelt at Northfield Manor from June 29, 2012 until July 8, 2012?” Northfield’s proposed first question asked: “Was Northfield Manor negligent in its care and treatment of Irene Pelt on July 7 or 8, 2012?” The trial court provided the parties with a special verdict form that identified both July 7, 2012, and July 8, 2012, as potential dates of Pelt’s injury, thus essentially adopting Northfield’s proposed question. The following day, however, prior to the start of closing arguments and outside of the presence of the jury, the court distributed a new special verdict form which identified only July 8, 2012, as a potential date of injury. Counsel for the Estate objected. The trial court overruled the objection, stating “I only got the 8[th] was involved. So I chose to go only with the 8th because that was the definitive time that there was an injury in this case that I heard.”

¶9 As relevant to this appeal, the following questions were then submitted to the jury:

QUESTION NUMBER 1: Was Northfield Manor negligent in its care and treatment of Irene Pelt on July 8, 2012?

....

QUESTION NUMBER 2: *If you answered “yes” to question 1, then answer this question:* Was Northfield Manor’s negligence a cause of injury to Irene Pelt?

¶10 After hours of deliberation and one report by the jurors of being deadlocked, the jury found Northfield negligent in its care of Pelt on July 8th. The jury also found that the negligence *did not* cause Pelt’s injury. Two jurors dissented.

Motions After Verdict

¶11 The Estate filed motions after verdict, asking the trial court to either: (1) change the jury’s answer to special verdict question number two (the negligence question) from “no” to “yes,” or (2) to order a new trial on liability because the court’s decision to limit Pelt’s date of injury to July 8th likely confused the jury. The trial court denied the motions, stating that there “wasn’t substantial credible evidence” to support the possibility of an injury on July 7th. The court continued: “That is why I felt that July 8th was the only date that should be in there to avoid the guesswork because there was nothing to support the July 7th injury date.” This appeal follows.

DISCUSSION

¶12 On appeal, the Estate essentially raises the same arguments raised in its postverdict motion. We agree with the Estate that the trial court’s decision to limit Pelt’s date of injury to July 8, 2012, on the special verdict created confusion because the jury heard a great deal of admissible evidence about possible injuries incurred on July 7th. Accordingly, we reverse and remand for a new trial on both liability and damages.

¶13 As a general matter, “the existence of negligence is a question of fact which is to be decided by the jury.” *Ceplina v. South Milwaukee Sch. Bd.*, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976) (footnote omitted). Accordingly, it is for the jury to determine the credibility of evidence and to draw the ultimate conclusions as to the facts. *American Family Mut. Ins. Co. v. Dobzynski*, 88 Wis. 2d 617, 630, 277 N.W.2d 749 (1979). “[W]hen conflicting evidence is pointed out to the jury, the weight to be given to the conflict and the determination

of which version should be believed are matters for the finder of fact to resolve.” *Rabata v. Dohner*, 45 Wis. 2d 111, 117, 172 N.W.2d 409 (1969).

¶14 From the first day of trial, the jury was informed that the actual date of Pelt’s injury was unknown. All throughout the trial, admissible evidence showed that Pelt was injured during the weekend of July 6, 2012. The jury heard from multiple witnesses who testified that Pelt dropped a fire extinguisher on herself twice on July 7, 2012, and also pulled a television onto her lap. Dr. Jentzen testified that Pelt’s injury could have been sustained as a result of one of those incidents.

¶15 The jury also heard testimony suggesting that Pelt’s injury occurred on July 8, 2012, as a result of either pulling fire extinguishers onto herself again, or as a result of agitated behavior. Witnesses attested to staffing issues on both July 7th and July 8th, to Pelt’s medication distributions on both July 7th and July 8th, and to Pelt’s behavioral issues over the entire weekend. Documents detailed various factual and medical findings from both July 7th and July 8th. Pelt’s death certificate—a document considered by the jury—lists Pelt’s date of injury as July 7, 2012. In short, the jury was presented with evidence from which it could have found that Pelt’s injury occurred either on July 7th or July 8th, depending on what it found most reasonable from the evidence presented.

¶16 The trial court specifically instructed the jury that it was only to consider whether the injury occurred on July 8th. Thus, the trial court essentially disregarded all of the evidence that Pelt could have sustained her leg fracture on July 7, 2012. During the postverdict hearing the trial court candidly admitted that it, not the jury, decided that the evidence pointing to July 7th was not “substantial[ly] credible.” Neither party asked the trial court to limit the date of

consideration to July 8th. In fact, both parties presented their cases relative to events over the entire weekend and the Estate objected to limiting the date of consideration to July 8th.

¶17 We acknowledge that a trial court has wide discretion in framing a special verdict, *see Runjo v. St. Paul Fire & Marine Insurance Co.*, 197 Wis. 2d 594, 602, 541 N.W.2d 173 (Ct. App. 1995); however, we may reverse a trial court’s decision to formulate a special verdict that “does not fairly present the material issues of fact to the jury for determination.” *See Z.E. v. State*, 163 Wis. 2d 270, 276, 471 N.W.2d 519 (Ct. App. 1991). The trial court’s discretion does not extend to invading the province of the jury by determining evidence credibility and resolving evidentiary conflicts meant for a jury.

¶18 Because the jury’s determination of both negligence and damages was constrained by its ability to *only* consider July 8th as the date of Pelt’s injury, we conclude that a new trial on the question of both liability and damages is required.

¶19 For the foregoing reasons, we reverse the trial court and remand for a new trial.

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

Not recommended for publication in the official reports.

