STATE OF MICHIGAN

COURT OF APPEALS

LISA ORNELAS, Individually and as Next Friend of BRIAN GREENWELL, JR., a Minor,

Plaintiffs-Appellants,

v

IAN LITTLE, DEBBIE LITTLE and TIMOTHY LITTLE,

Defendants-Appellees.

UNPUBLISHED
May 26, 1998

No. 199957
Wayne Circuit Court
LC No. 95-507173 NO

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

This negligence action arises out of an incident in which thirteen-year-old defendant Ian Little shot his friend, thirteen-year-old plaintiff Brian Greenwell, Jr., in the abdomen while cleaning a BB gun. Plaintiffs appeal as of right from a judgment of no cause of action entered following a jury trial. We affirm.

Shortly after school let out on May 13, 1994, and while his parents were at work, Little unlocked his parents' bedroom door to look for some money. Instead, he discovered his father's BB gun under his parents' bed. Little took the gun to the kitchen and started to clean it with the hope that when his parents returned home from work, he would be able to target practice in the back yard. Little first put on the safety and then checked the stock for any BBs. Two or three BBs fell out. Little also unloaded a BB that was held in place by a pin. He then breeched the gun and found no BBs in the magazine. He pulled back the bolt and discovered nothing there. Finally, Little shook the gun. When he heard no rattling, he was convinced that there were no BBs left in the gun. The shooting occurred when Little decided to release the air pressure from the gun and Greenwell, at the same time, entered the kitchen. Whether Little knew that Greenwell was in the house immediately before the shooting was in dispute. However, it is undisputed that Little knew that Greenwell was on his way to the house so that the two youths could go to a baseball card shop.

On the verdict form, the jury responded in the negative when asked if any of the three defendants were negligent. Despite being instructed that if its "answer is 'no,' do not answer any further questions," the jury proceeded to complete the remainder of the verdict form. In doing so, the jury found that Greenwell had sustained injury, that his mother had not, that defendants' negligence was not a proximate cause of injury to plaintiffs, that Greenwell's mother sustained damages for medical expenses in the amount of $10,136.71, and that Greenwell sustained damages totaling $6,700. For their first claim of error, plaintiffs contend that they are entitled to a new trial because the jury's verdict was inconsistent. We disagree.

The proper remedy for a defective verdict depends on the kind of defect present. *Association Research & Development Corp v CNA Financial Corp*, 123 Mich App 162, 167; 333 NW2d 206 (1983). In *Association Research, supra*, pp 167-168, this Court explained:

> Where a verdict is defective because it contains mere surplusage the court may remedy the problem by deleting the surplusage from the final judgment. [Citation omitted.] Even if the defect is not due to the presence of surplusage, the court may still alter the verdict itself so long as the court can ascertain the intent of the jury and the court's final judgment implements that intent. [Citation omitted.] In other situations, however, such as where the verdict is inconsistent [citation omitted] or contains a remedy not authorized by law, [citation omitted] the trial court must either reinstruct the jury or order a new trial.

Verdicts are deemed inconsistent when they are contradictory or incongruous, or when more than one verdict is returned in the same action and they are inconsistent and irreconcilable. *Beasley v Washington*, 169 Mich App 650, 657-658; 427 NW2d 177 (1988). Every attempt must be made to harmonize a jury's verdict. *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987). Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Id.*

In this case, we reject plaintiffs' contention that they are entitled to a new trial by reason of an inconsistent verdict. After the trial judge recognized that there might be a defect in the verdict, he asked the jury "did you decide none of the Defendants were negligent?'' and was informed that "[w]e agreed that they were not negligent because each one of them did what a reasonably careful person would have done and it was an unfortunate accident." Based on this exchange, it is apparent that the verdict form contained mere surplusage; the jury simply acknowledged that, even in the absence of negligence, damages were incurred. It did not attribute responsibility for those damages to defendants, but did just the opposite in finding no negligence and no proximate cause. The trial court properly remedied the problem by ascertaining the jury's intent and deleting the surplusage from the final judgment. *Association Research, supra.* Consequently, denying plaintiffs' motion for new trial was not an abuse of discretion.

Plaintiffs next challenge a comment by defendants' attorney during his opening statement and closing argument that "an entire industry [revolves] around the idea if an accident occurs it must be somebody's fault." Plaintiffs made no objection to the remarks on either occasion. On review of the

record, we conclude that any prejudice plaintiffs may have suffered from the comments could have been prevented by timely objection and a request for a curative instruction. *Watkins v Manchester,* 220 Mich App 337, 340; 559 NW2d 81 (1996). Therefore, we find no error requiring reversal.

Plaintiffs also contend the trial court abused its discretion in denying their motion for new trial because the verdict was against the great weight of the evidence. We disagree. The testimony showed that prior to cleaning the gun, Little engaged the safety, checked the various compartments for BBs, and shook the gun for the same purpose. Having concluded that there were no BBs in the gun, and to avoid breaking the seal with the pressure valve, he then released the air pressure by pulling the trigger. Little testified that he was unaware that Greenwell had arrived at the house and denied that he responded to Greenwell's knock by telling him to "come in." From this evidence, the jury could have reasonably concluded that Little complied with the standard of care applicable to a thirteen-year-old. The fact that Little may have been disobedient by retrieving the gun from his parents' locked bedroom is not dispositive. As this Court stated in *Farm Bureau Ins Group v Phillips,* 116 Mich App 544, 550; 323 NW2d 477 (1982), a case involving a fire started by an eight-year-old child: "We are not persuaded that defendant was negligent simply because he was doing something that he knew he should not have been doing."

With respect to Little's parents, we are similarly unable to conclude that the jury's verdict was against the great weight of the evidence. Plaintiffs' theory of liability was premised upon negligent parental supervision. Little testified that he was routinely home alone after school for approximately forty-five minutes until his mother arrived from work. The gun was locked in the parents' bedroom and was under a bed. Little was prohibited from using the gun without parental supervision and he had not done so in the past. Based upon the foregoing, we cannot conclude that the jury's verdict was against the overwhelming weight of the evidence. *Heshelman v Lombardi,* 183 Mich App 72, 76; 454 NW2d 603 (1990).

Next, plaintiffs claim that the trial court's instruction with respect to the standard of care required of Little was improper and mandates reversal. Over plaintiffs' objection, the trial court gave the following instruction:

> When I use the words 'ordinary care' with respect to Ian Little, I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of Ian Little would use under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful minor would do or would not do under such circumstances.

Plaintiffs contend that, because the use of a BB gun is an adult activity, Little should have been charged with the same standard of care as an adult. We disagree.

In the context of negligence actions, the capability of minors seven years of age or older is not determined on the basis of an adult standard of conduct, but rather is determined on the basis of how a minor of similar age, mental capacity, and experience would conduct himself. *Stevens v Veenstra,* 226

Mich App 441, 443; 573 NW2d 341 (1997). However, when minors engage in an adult activity that is dangerous, they are charged with the same standard of conduct as an adult. *Constantino v Wolverine Ins Co*, 407 Mich 896; 284 NW2d 463 (1979). Consequently, whether the court properly instructed the jury turns upon whether the use of a BB gun is an "adult activity." Because the use of a BB gun is not normally engaged in by adults only, we decline to impose an adult standard of care in this case. *Farm Bureau Ins Group v Phillips*, 116 Mich App 544, 547-549; 323 NW2d 477 (1982).

Relying on *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), plaintiffs next claim that error requiring reversal occurred when the trial court denied their motion for new trial without making any finding regarding the credibility of the evidence supporting the judgment in favor of defendants. *Herbert* was recently overruled by our Supreme Court in *People v Lemmon*, 456 Mich 625; ___ NW2d ___ (1998), however. Because *Herbert*'s so-called "thirteenth juror" standard is no longer permissible, we reject this claim.

Finally, plaintiffs argue that the trial court erred in awarding attorney fees. The only basis for plaintiffs' objection is that, because of the alleged errors outlined above, they are entitled to a new trial. Since we have found that no errors requiring reversal occurred, and plaintiffs have not contested the actual amount of fees awarded, we decline to address this issue further.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff