COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1678

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

PARK MANOR LIMITED, A WISCONSIN LIMITED PARTNERSHIP, D/B/A PARK MANOR,

PETITIONER-RESPONDENT,

V.

DEPARTMENT OF HEALTH AND FAMILY SERVICES AND DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. The Wisconsin Department of Health and Family Services and the Division of Hearings and Appeals appeal a judgment reversing the division's assessment of forfeitures against Park Manor Limited, a nursing home. The division concluded that Park Manor created a condition dangerous to

the safety of other residents when it continued to care for an Alzheimer's patient, M.K., and failed to have or use sufficient resources to prevent M.K. from endangering other patients contrary to § 50.04(4)(b)2, STATS., and WIS. ADM. CODE § HFS 132.51(2)(c). The trial court reversed, deciding the division misinterpreted the relevant law. The division argues that the trial court misconstrued its decision, that its ruling was a finding of fact and that this court should search the record for evidence that would sustain the finding. In the alternative, the division requests a remand to allow it an opportunity to make findings based on a correct legal theory. We reject these arguments and affirm the circuit court's judgment.

Park Manor admitted seventy-nine-year-old M.K. on July 29, 1994. She had been found wandering in the community due to her Alzheimer's-type dementia. Five weeks later, she was protectively placed at Park Manor by a court order that specified that she be placed in an unlocked unit. Soon after her admission, M.K. began exhibiting behaviors that were intrusive and disturbing to other residents. One week after the protective placement, Park Manor's psychiatrist, Dr. Heinz Vogel, prescribed medication to assist in managing M.K.'s behavior. Over time, that medication was adjusted and other medications were prescribed to manage her behavior and reduce the side effects of the initial medication. Vogel's subsequent evaluation found M.K. to be less aggressive and intrusive.

In addition to medication, Park Manor carefully monitored M.K.'s activities and kept detailed nurses' notes. The staff utilized redirection, validation therapy and diversional activities to manage her behavior. Her room was changed on two occasions, moving her closer to the nurses' station and day-room. The director of nursing and social services director had nearly daily contact with her.

The staff used alarms to assist it in determining M.K.'s whereabouts and activities at all times. Eventually, Park Manor instituted close surveillance of M.K. to prevent her from injuring herself or others. As a last resort, with the permission of M.K.'s personal physician, the staff physically restrained M.K. as needed.[1] Despite 2,600 incidents of inappropriate behavior by M.K. from January through June 1995, the only injury reported was a scratch to a patient's nose.

The division imposed forfeitures for twenty incidents that occurred after Park Manor began to utilize restraint as a treatment option. It denominated as both a finding of fact (No. 10) and a conclusion of law (No. 4) substantially identical statements that by retaining M.K. for approximately seven months after her tendency to disturb other residents became known, Park Manor created a condition threatening to the health, safety and welfare of other residents, and that retaining her without having or using sufficient resources to prevent her inappropriate behavior constitutes a violation under § 50.04(4)(b)2, STATS.

The essence of the division's decision is contained in the "discussion" portion of its order:

> The Department suggested a variety of alternatives available to Park Manor to manage and care for M.K. The most drastic alternative suggested was discharging M.K. The facility questions whether any of these alternatives was viable or would have been any more effective than the care and treatment provided by Park Manor. Ultimately, however, the Department relies on the fact that the facility resorted to the use of restraints as conclusive evidence that Park Manor did not have or did not use sufficient resources to appropriately manage or care for M.K.
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> ....

[1] WIS. ADM. CODE § HFS 132.31(k), permits a facility to use restraints to control inappropriate behavior if approved by the resident's physician.

> The use of a Geri chair restraint for M.K. was authorized in her care plan: however, this authorization evidences either a lack of resources or a refusal to use additional resources for the management and care of M.K.
>
> M.K.'s behavior fluctuated during the twelve and a half months she was a resident of Park Manor. *It is difficult to second guess the facility's care and treatment of her*, especially considering that she was protectively placed at Park Manor. However, *the decision to use restraints to protect her and other residents from her is an implicit admission on the part of Park Manor that it did not have the resources to appropriately manage and care for M.K.* After the point in time that M.K.'s care plan was amended to provide for the use of restraints 'when [her] behavior puts [M.K.] and other residents at risk and other approaches per care plan fail[ed],' the facility should have realized that it either needed to allocate more resources to the management and care of M.K. or it did not have the resources to appropriately manage and care for her. (Emphasis added.)

The division argues that its decision involves a question of fact[2] and that the courts are required to give deference to its findings of fact. It also contends that if it is a question of law, the courts should give deference to its conclusions because of its history in interpreting the law. We first observe that it makes little difference whether the division's ruling constitutes a conclusion of law or a finding of fact based on an erroneous view of the law.[3] The deference accorded to the division's findings and conclusions does not extend to upholding its rulings when they reflect an erroneous and unreasonable view of the law. *See*

[2] Again: retaining M.K. for approximately seven months after her tendency to disturb other residents became known, Park Manor created a condition threatening to the health, safety and welfare of other residents, and that retaining her without having or using sufficient resources to prevent her inappropriate behavior constitutes a violation under § 50.04(4)(b)2, STATS.

[3] For an example of a finding predicated upon an erroneous view of the law, see ***State v. Rogers***, 70 Wis.2d 160, 165, 233 N.W.2d 480, 483 (1975).

Nehm v. Dept. of Agr. Trade & Consumer Protection, 212 Wis.2d 107, 116-17, 567 N.W.2d 640, 643 (Ct. App. 1997).

A finding of fact asserts that a phenomenon has or will happen, without reference to any legal effect. *See,* Comment, *Judicial Review of Workmen's Compensation Cases,* 173 WIS. L. REV. 576, 579 (quoting L. Jaffe, *Judicial Control of Administrative Action* 548 (1965)). A conclusion of law goes farther and assigns a legal effect to the fact. Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1328-29. Thus, a finding of fact refers to what happened and a conclusion of law states the legal significance of what happen. In this case, we perceive that the division made one principal, material finding of fact, that Park Manor resorted to using restraints. We agree with the trial court that this finding served as the basis for the division's *conclusion* that Park Manor's lawful use of restraints in compliance with WIS. ADM. CODE § HFS 132.31(k), in and of itself, contravened its duty to have and use sufficient resources to appropriately care for a patient as required by WIS. ADM. CODE § HFS 132.51(2)(c).[4]

We similarly agree with the trial court's holding that the foregoing conclusion was derived from an erroneous application of the law. The division's decision, after noting the parties' arguments and the law relating to the use of

[4] The division's finding no. 10 might be viewed as an ultimate fact, that is, an issuable fact. *See* ***Cointe v. Congregation of St. John the Baptist***, 154 Wis. 405, 418, 143 N.W. 180, 186 (1913). Ordinarily we search the record to find evidence to support an agency's finding of ultimate fact. In this instance, however, the agency specifically reveals the exclusive basis for this finding; a misapplication of the law. As discussed more fully below, in viewing the use of a permissible care modality as conclusive proof of the violation, the division reveals finding no. 10 as a conclusion of law. In any event, even if it is considered an ultimate fact, it is based upon an erroneous view of the law and is therefore not entitled to deference. ***Nehm v. Dept. of Agr. Trade Consumer Protection***, 212 Wis.2d 107, 116-17, 567 N.W.2d 640, 643 (Ct. App. 1997).

physical restraints, found that "it is difficult to second-guess the facility's care and treatment of her." To justify its ruling, however, it adopted the department's argument that the decision to use restraints "is an implicit admission" that Park Manor did not have or use appropriate resources. This holding is contrary to law. Park Manor is not accused of violating any law or regulation restricting the use of restraints. The lawful use of restraints would constitute evidence of inadequate resources only if such use was not an appropriate method for controlling behavior. That suggestion is contrary to WIS. ADM. CODE § HFS 132.31(k), which allows the nursing home to use restraints to control behavior, under closely prescribed conditions. Thus, the division's ruling lacks a rational basis because it would render § HFS 132.31(k) a nullity if the lawful use of restraints were deemed conclusive evidence of a violation of § HFS 132.51(2)(c).

The division argues that it did not rely exclusively on the use of restraints to reach its decision, but that it accepted the department's other proof of deficiencies in which the department suggested alternative treatment for M.K.[5] The record belies this contention. The division's statement that "it is difficult to second-guess Park Manor's treatment of M.K.," constitutes an implicit rejection of the department's alternative suggestions. More importantly, the division reveals that its decision relies exclusively on the fact of restraint:

[5] The department's alternatives mostly involved consulting with others and getting second opinions in an effort to find a solution to M.K.'s problems. The department did not establish that any better solution existed. Its expert witness, Dr. Braus, suggested other medications, but acknowledged that the response rate to these medications was low, the frequency of side effects was high, and frequent alterations of medication is problematic. Other than closer supervision, the department's specific remedy was to transfer M.K. to another facility. Its suggestions and Braus's opinions reflect their belief that lawful use of restraints does not constitute a legitimate treatment option.

> The Department suggested a variety of alternatives available to Park Manor to manage and care for M.K. ... *Ultimately*, however, the Department relies on the fact that the facility resorted to the use of restraints as *conclusive* evidence [of the violation].
>
> ... It is difficult to second-guess [Park Manor's treatment]. However, the decision to use restraints to protect her and other residents from her is *an implicit admission* on the part of Park Manor that it did not have the resources to appropriately manage and care for M.K.

The division's written decision affords no reasonable interpretation but that it predicated its erroneous legal conclusion that there was a violation of law upon Park Manor's use of restraints.

Finally, the trial court properly declined the division's request for a remand to make new findings based on a correct view of the law. The division has already found it difficult to second-guess Park Manor's response to M.K.'s behavior. That finding constitutes a rejection of the department's other evidence. A new decision unfavorable to Park Manor on remand would require contradictory findings. Under these circumstances, a remand for new findings would be unnecessary and unjust.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.