COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0124

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

ELIZABETH WILSON,

PLAINTIFF-RESPONDENT,

STATE OF WISCONSIN MEDICAL ASSISTANCE PROGRAM - TITLE 19,

INVOLUNTARY-PLAINTIFF,

V.

WISCONSIN PATIENTS COMPENSATION FUND, BOSCOBEL AREA HEALTH CARE, AND WISCONSIN HOSPITAL ASSOCIATION LIABILITY INSURANCE PLAN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Wisconsin Patients Compensation Fund, Boscobel Area Health Care (BAHC), and Wisconsin Hospital Association Liability Insurance Plan appeal from a judgment on a hospital malpractice claim. The plaintiff, Elizabeth Wilson, recovered damages for injuries suffered while she was a BAHC patient, after the trial court granted judgment on the jury's verdict. The issues are whether the trial court properly denied the appellants' motion for summary judgment, whether events that occurred during the trial prejudiced them such that the trial court should have granted a new trial in the interest of justice and whether the trial court properly instructed the jury. We affirm on all issues.

BACKGROUND

¶2 Wilson had a long history of mental disorders resulting in periods of confinement in hospitals, suicide threats and alcohol abuse. After one incident of excessive drinking, she voluntarily confined herself in the BAHC facility, where she had had several previous confinements. During the admission process she was searched and personal items were confiscated, including five packs of cigarettes. When Wilson later became highly agitated, she was placed in arm, leg and waist restraints and given a sedative.

¶3 Wilson calmed down considerably over the next few hours and all but the left wrist, right ankle and waist restraints were removed. The next morning she asked to be released from those restraints so she could go outside to smoke. A nurse told her to wait a few minutes, and left her alone. Wilson then produced a lighter and cigarette that BAHC personnel had failed to discover while searching her. A few minutes after she lit the cigarette, a fire broke out in her bed and she was severely burned.

¶4 Wilson subsequently offered different accounts concerning the fire's origin. Shortly after the fire she described it as an accident. Moments earlier, however, she had attributed it to voices in her head instructing her to light it and kill herself. At trial, she testified she could not remember anything after she lit her cigarette. There were no other witnesses to the fire, and it was never established which version was correct.

¶5 In this action Wilson alleged that BAHC personnel caused the fire to occur by negligently failing to control her behavior, most egregiously by failing to discover and remove her lighter during the admissions search. On summary judgment, appellants asserted that whatever negligence was attributable to BAHC personnel, Wilson's negligent behavior was greater as a matter of law. The trial court denied summary judgment, concluding that a factual dispute existed concerning Wilson's mental state at the time of the fire, and whether she caused it accidentally or as a deliberate suicide attempt.

¶6 Joyce Clark, a nurse who attended Wilson after her BAHC admission, testified at length during the trial. On three occasions Wilson's attorney objected to questions asking Clark to amplify her written assessment of Wilson that night. In the jury's presence, the trial court sustained the objections on all three occasions, first noting "I'll sustain the objection because [Clark is] now going back into the record … to reconstruct [her comments]," a second time noting "you can go with what's in the [written] record, but you're not going to be allowed to add to it. So I'll allow her testify as to the record she made. Not as to anything that isn't in the record," and the third time stating "I am not going to let her testify as to something in addition to this assessment because now she has thought it over." Appellants argued that these comments impermissibly and

prejudicially assessed Clark's credibility, and moved for a mistrial. The trial court denied that motion, and gave no curative instructions at the time.

¶7 Some of Wilson's testimony appeared inconsistent with the physical evidence of the fire and of her injuries. Consequently, at the close of evidence the appellants requested WIS JI—CIVIL 325, which instructs jurors to disregard testimony if physical facts contradict it beyond any reasonable doubt. The trial court denied that request. The appellants also requested an instruction stating:

> Elizabeth Wilson contends that she lacked the capacity to control or appreciate her conduct at the time she lit her cigarette because of borderline personality disorder. She has the burden of proof on this issue. Unless Ms. Wilson convinces you by the greater weight of the credible evidence that she lacked the capacity to control or appreciate her borderline personality disorder, she is to be held to the same standard of care as one who has normal mentality, and in the determination of the question of her negligence, you will give no consideration to her borderline personality disorder.

The trial court denied that requested instruction as well, and, over the appellants' objection, gave the following instruction:

> An involuntarily confined person who does not have the capacity to control or appreciate her conduct because of her mental illness or disability cannot be contributorily negligent. The plaintiff has the burden of proof as to this fact. If you find that Elizabeth Wilson did not have the capacity to control or appreciate her conduct at or immediately before the fire because of a mental illness or disability while she was involuntarily confined, then you cannot find her negligent. However, if you find she had the capacity to control or appreciate her conduct at or immediately before the fire in spite of a mental illness or disability, then you must judge her by the standard of a reasonable person and her mental condition cannot be given any consideration.

¶8 The jury returned a verdict finding BAHC causally negligent in its care and treatment of Wilson, and Wilson not negligent with respect to her own safety. On postverdict motions, BAHC raised the issue of jury and attorney misconduct. In support, BAHC presented testimony from a juror that, during the trial, juror Langmeier had commented "doesn't she ever shut up" about the BAHC counsel, "that's the smartest one I have heard so far" about one of Wilson's expert witnesses, and muttered a comment ending "right" after a defense witness described himself and Clark as "partners in crime." The juror added that Wilson's counsel, seated very close to Langmeier, responded to the comments with smiles, snickers and approving looks. The juror observing this was so disturbed by counsel's non-verbal communication that she reported it to the bailiff during the trial. However, the bailiff recalled just a mild, general complaint about counsel's glances toward the jury box, with no specific reference to Langmeier. Counsel denied any intentional, non-verbal communication with Langmeier, or any other improper conduct. The trial court denied BAHC a new trial in the interest of justice, and entered judgment on the verdict.

SUMMARY JUDGMENT

¶9 We review summary judgment motions *de novo*, applying the same methodology used in the trial court. ***Jankee v. Clark County***, 2000 WI 64, 235 Wis. 2d 700, 729, 612 N.W.2d 297. Summary judgment is proper when the pleadings and the evidentiary submissions show that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. ***Id***. at 48. On review of the trial court's denial of summary judgment, we review only the documents and facts of record when the motion was decided. *See* ***Writt v. Dental Care Associates, S.C.***, 199 Wis. 2d 48, 71 n.9, 543 N.W.2d 852 (Ct. App. 1952).

¶10 The trial court properly denied summary judgment because material facts were in dispute. ***Jankee*** held that with limited exceptions a mentally disabled plaintiff can be held contributorily negligent under a reasonable person standard of care.[1] ***Jankee***, 235 Wis. 2d at ¶¶8-9. BAHC contends here that the undisputed facts on summary judgment established that Wilson's contributory negligence exceeded any negligence by BAHC as matter of law, and that Wilson offered no evidence that she was exempt from the ***Jankee*** rule. We disagree. Hospitals assume enhanced responsibilities in protective or custodial situations. ***Id***. at ¶92. This enhanced duty "may absolve the protected person from the ordinary obligation of self-care, shift responsibility to the caregiver, and thereby expunge the affirmative defense of contributory negligence." ***Id***. Therefore, contributory negligence is not available as a defense if the plaintiff shows: (1) a special relationship creating an enhanced duty of care, and (2) that the defendant caregiver could have foreseen the particular injury that is a source of the claim. ***Id***. at ¶93. Here, BAHC concedes its special relationship with and enhanced duty to Wilson. Consequently, summary judgment in favor of BAHC was not appropriate because factual disputes remained as to the cause and circumstances of the fire, and whether BAHC could have foreseen that Wilson would accidentally or intentionally set herself on fire.

NEW TRIAL IN THE INTEREST OF JUSTICE

¶11 The trial court's comments about witness Clark do not warrant a new trial in the interest of justice. The court suggested that it was excluding some

[1] The decision in ***Jankee v. Clark***, 2000 WI 64, 235 Wis. 2d 700, 612 N.W.2d 297, postdated the trial. However, Wilson does not dispute ***Jankee's*** retroactive application to the summary judgment proceeding.

testimony from Clark because it doubted her credibility on certain issues. This was error because Clark's credibility was an issue for the jury to decide. *See* ***Finley v. Culligan***, 201 Wis. 2d 611, 631, 548 N.W.2d 854 (Ct. App. 1996). The trial court had no authority to withhold testimony from the jury based on its own doubts about that testimony.

¶12 Nevertheless, the court's comments did not affect BAHC's substantial rights, and were therefore harmless. *See* WIS. STAT. § 805.18(2) (1999-2000). The comments were short and indirect. They would not have caused a reasonable jury to discredit the testimony Clark was permitted to give. Additionally, the jury received an instruction to disregard the trial court's opinions in the matter. We presume that the jury follows the trial court's instructions. ***Frayer v. Lovell***, 190 Wis. 2d 794, 812, 529 N.W.2d 236 (Ct. App. 1995).

¶13 The trial court properly denied a new trial based on allegations of juror and counsel misconduct. The court discounted any prejudicial impact of Langmeier's comments, which apparently only one other juror heard. The court also determined that counsel did not intentionally communicate with Langmeier during the trial. The latter is a credibility determination, not subject to review.

¶14 The former is, BAHC contends, a matter reviewed under the standard set forth in ***After Hour Welding, Inc. v. Laneil Mgt. Co.***, 108 Wis. 2d 734, 324 N.W2d 686 (1982). Under that case, the trial court may in the exercise of its discretion order a new trial upon "clear and convincing proof that extraneous prejudicial information was improperly brought to the jury's attention or … any outside influence was improperly brought to bear upon any juror." ***Id***. at 744. ***After Hour*** also stresses that jury verdicts should not be impeached easily. ***Id.*** The prejudice and extraneous information in ***After Hour*** concerned preconceived

notions of "race, religion, gender or national origin." ***Id***. at 739-40. Here, Langmeier's comments were of a different category, essentially verbal expressions of thoughts any juror might have during a trial. Consequently, the trial court reasonably concluded that they did not prejudicially affect the proceedings such that a new trial was necessary.

JURY INSTRUCTIONS

¶15 The trial court did not err in the instructions it gave to the jury. BAHC contends that it was prejudicial error not to instruct the jury to disregard testimony in conflict with physical facts. The trial court has broad discretion in choosing the jury instructions as long as they fully and fairly inform the jury of the rules and principals of law applicable to the particular case. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). Here, BAHC contended that the physical evidence from the fire, including Wilson's burns, contradicted her version of events beyond a reasonable doubt. Even if that were true, and we concur with the trial court's determination that it is not, the instruction does nothing more than advise the jury to use its common sense. Counsel for BAHC acknowledged as much during argument on the instruction. "A strength of our jury system is that 'jurors … bring their experiences, philosophies, and common sense to bear in their deliberations.'" ***State v. Alexander***, 214 Wis. 2d 628, 648, 571 N.W.2d 662 (1997). BAHC cannot reasonably contend that jurors would not apply common sense unless instructed to do so.

¶16 BAHC also asserts error in rejecting its version of the instruction on Wilson's mental capacity as it pertained to her contributory negligence. Both BAHC's version and instruction as given are quoted in ¶7. We discern no significant difference between the proposed instruction and the one given.

Consequently, BAHC essentially received the instruction it requested, and cannot now claim error.

¶17 Finally, BAHC contends that this court should exercise its discretion to grant a new trial in the interest of justice because the controversy was not fairly tried or, alternatively, set aside the verdict on public policy grounds. In our view the controversy was fully and fairly tried. BAHC has not demonstrated otherwise. As for BAHC's public policy argument, the public policy issues concerning a mentally disabled plaintiff's duty of care have been resolved by the supreme court's ***Jankee*** decision.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.