COURT OF APPEALS
DECISION
DATED AND RELEASED

August 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1938

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

KEVIN D. NELSON,

Plaintiff-Appellant,

STATE OF WISCONSIN,
DEPARTMENT OF SOCIAL SERVICES,

Involuntary Plaintiff,

v.

KARL HEICHLER,
KATHERINE HEICHLER and
WILSON MUTUAL INSURANCE
COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Kevin D. Nelson appeals from a judgment dismissing his claims against Karl Heichler, Katherine Heichler and their

insurer, Wilson Mutual Insurance Company. We conclude that: (1) Nelson did not successfully impeach the jury verdict; (2) the trial court properly instructed the jury; and (3) the trial court properly crafted the special verdict. Therefore, we affirm.

The following facts are undisputed on appeal. The Heichlers kept a variety of animals on their farm, including horses and goats. Katherine hired Kevin Nelson and his assistant, Corey Schultz, to repair a fence on the farm. While Nelson and Schultz were working on the fence, Karl asked them to catch a goat, "Rambo," which had escaped from the barn.[1] Schultz and Nelson chased the goat through a pasture in which other animals, including a mare named "Sugar," were located. The goat apparently ran up to the mare and rammed its horns into the mare's side. This caused the horse to kick Nelson just below the knee, fracturing his leg. Karl stipulated that Nelson was injured in this manner, although he did not observe the incident occur. Neither Karl nor Katherine supervised Nelson and Schultz as they attempted to capture the goat.

Katherine saw the goat escape from the barn. Believing that Nelson and Schultz would be able to capture the goat, she prepared to leave the farm. However, when she saw Nelson, Schultz and the animals running in the pasture, she was concerned that the animals were exerting themselves in the extreme heat. She yelled at the men to stop chasing the animals, but they did not hear her. She followed the two men over the crest of the hill and when she reached the top of the hill, she saw Nelson lying face down in the pasture, injured.

Katherine testified that the goat never exhibited threatening behavior and she has never been informed of any incident where the goat injured someone. Karl testified that the goat liked to break free from his restraints, jump fences and eat flowers. He denied that the goat was mean, although he conceded that it was mischievous. He testified that the mare never exhibited threatening behavior or injured anyone.

[1] Karl required assistance because he was unable to exert himself due to health reasons. The day before, Nelson and Schultz captured a goat on the Heichlers' farm without incident.

Schultz testified that while he and Nelson were chasing the goat, he saw the goat approach the mare. Schultz could not remember if Nelson had grabbed the goat or if he was in the process of grabbing the goat when the goat spooked the horse, causing it to rear up and kick Nelson.

The jury found Karl was not negligent in managing and controlling the animals at or about the time of Nelson's accident and that Nelson was not negligent with respect to his own care and safety. The trial court concluded that the evidence did not warrant Katherine's inclusion on the special verdict. Consistent with the instructions on the special verdict, the jury determined Nelson's damages ($143,338).

The trial court rejected Nelson's attempt to impeach the verdict as the product of a juror's improper influence. Nelson's attempt to impeach the jury's verdict is governed by § 906.06(2), STATS., which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

In order to determine whether a party is entitled to a new trial on the grounds that jurors were prejudiced by extraneous information, the party must demonstrate that a juror's testimony is admissible under § 906.06(2), STATS., by establishing that: (1) the juror's testimony concerns extraneous

information, not the deliberative process of the jurors; (2) the extraneous information was improperly brought to the jury's attention; and (3) the extraneous information was potentially prejudicial. ***Castaneda v. Pederson,*** 185 Wis.2d 199, 209, 518 N.W.2d 246, 250 (1994) (quoted source omitted). Section 906.06(2) prohibits juror testimony regarding statements made during deliberations or about the deliberative processes of the jurors. ***Id.***

The trial court must first decide whether to admit or exclude the juror's testimony at a hearing on the motion for a new trial. ***Id.*** at 208-09, 518 N.W.2d at 249-50. Questions regarding the admissibility of evidence are entrusted to the trial court's discretion. *See* ***Gonzalez v. City of Franklin,*** 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987).

In support of his motion for a new trial, Nelson offered the affidavits of ten jurors stating that they were influenced by a juror who had prior jury experience and led them to believe that their answers to the negligence questions were immaterial and Nelson would recover damages if they awarded them. For example, juror Schmidt's affidavit stated that not only did she intend for Nelson to receive the entire amount of damages set forth in the special verdict, she also believed Karl was negligent and that his negligence caused Nelson's injuries. Had she not been misled by another juror as to the significance of the first five questions on the special verdict dealing with negligence and causation, she would have apportioned negligence so that Nelson's negligence did not exceed Karl's.

> "Extraneous" information is information which a juror obtains from a non-evidentiary source, other than the "general wisdom" we expect jurors to possess. It is information "coming from the outside." The term does not extend to statements which simply evince a juror's subjective mental process.

State v. Messelt, 185 Wis.2d 254, 275, 518 N.W.2d 232, 241 (1994) (citations and quoted sources omitted).

In ***Castaneda,*** the supreme court ordered a new trial on damages because a juror researched and brought into the jury room information about average medical malpractice awards. ***Castaneda***, 185 Wis.2d at 206-07, 518 N.W.2d at 249. The court found that the jurors' affidavits detailing this occurrence concerned extraneous information, i.e., information which was "neither of record nor the `general knowledge' we expect jurors to possess." ***Id.*** at 209, 518 N.W.2d at 250 (quoted source omitted). The ***Castaneda*** court noted that the extent of damages was a material evidentiary issue at trial and the juror's outside information about average medical malpractice awards was irrelevant to the determination of the plaintiff's damages. ***Id.*** at 213, 518 N.W.2d at 251-52. Therefore, the verdict was impeached and a new trial on damages was necessary.

In ***State v. Eison,*** Nos. 93-3144-CR, 93-3145-CR, 93-3146-CR, 93-3147-CR, slip op. at 1 (Wis. June 22, 1995), the court held that a juror provided extraneous information when he brought wrenches to the jury room. The wrenches were not evidence in the case and the jurors' experiments with them did not draw upon the general knowledge or wisdom that jurors are expected to bring to their deliberations. ***Id***. at 9.

In this case, in contrast, the jurors' affidavits described the subjective mental processes of the jury during deliberation and did not demonstrate that the jury had been exposed to extraneous information. *See* ***Messelt***, 185 Wis.2d at 275, 518 N.W.2d at 241. We conclude that the trial court properly exercised its discretion in denying Nelson's motion for a new trial on the basis of juror misconduct because there was no evidentiary basis for granting the motion. *See* ***After Hour Welding, Inc. v. Laneil Mgmt. Co.,*** 108 Wis.2d 734, 740, 324 N.W.2d 686, 690 (1982).

Nelson's second claim on appeal is that the trial court erroneously failed to give his requested instruction to the jury. Because this issue is inadequately briefed, we will not address it. *See* ***Post v. Schwall,*** 157 Wis.2d 652, 657, 460 N.W.2d 794, 796 (Ct. App. 1990).

We turn to Nelson's claim that the trial court erroneously declined to give the entire text of WIS J I—CIVIL 1391, "Liability of Owner or Keeper of Animal: Common Law." It is within the trial court's discretion to instruct the

jury and if its instructions adequately cover the law, we will not disturb the exercise of discretion. ***Wingad v. John Deere & Co.,*** 187 Wis.2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). A trial court may not instruct the jury on an issue which finds no support in the evidence. ***Lutz v. Shelby Mut. Ins. Co.,*** 70 Wis.2d 743, 750, 235 N.W.2d 426, 431 (1975). The evidence must be viewed in the light most favorable to the party requesting the instruction. *See* ***id.*** at 754, 235 N.W.2d at 433.

Nelson asked the trial court to read Instruction 1391 in its entirety. The instruction states:

> An owner (keeper) of a(n) (*insert name of animal*) is deemed to be aware of the natural traits and habits which are usual to a(n) (*animal*) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.
>
> In addition, if an owner (keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the owner (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.
>
> (A person is said to be a keeper of an animal if, even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of (his) (her) family or household to maintain the animal on (his) (her) premises.)

The trial court gave the jury the first paragraph of the instruction but declined to give the rest due to a lack of evidence. Nelson's appellate argument focuses on the second paragraph of the instruction. The court found no evidence that the goat and the horse were different from any other goat or

horse or that either animal had ever injured anyone. On appeal, Nelson does not point to any evidence that either Karl or Katherine was aware, or in the exercise of ordinary care should have been aware, that the animals possessed any unusual traits or habits which would likely result in injury or damage. Nelson relies upon Karl's statement that he was aware of the *natural* trait of horses to kick and possibly injure human beings. However, this does not answer the question posed by the second paragraph of the jury instruction.[2] There was no evidence warranting the second paragraph of the instruction.

Nelson's third issue is whether the trial court should have determined as a matter of law that both Karl and Nelson were negligent, leaving the jury to decide comparative negligence. The trial court should not direct a verdict unless "the evidence gives rise to no dispute as to the material issues or when the evidence is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion." ***Holloway v. K-Mart Corp.***, 113 Wis.2d 143, 150, 334 N.W.2d 570, 574 (Ct. App. 1983) (citation omitted). Here, the evidence as to whether Nelson and Karl exercised ordinary care was in dispute and susceptible to competing inferences. Therefore, it was for the jury to decide whether Karl exercised ordinary care in having Nelson retrieve the goat and whether Nelson exercised ordinary care in attempting to catch the goat.

Finally, Nelson argues that because Katherine owned the goat and the horse, she should have been included on the special verdict or held strictly liable for Nelson's injuries under § 172.01, STATS. On motions after the verdict, the trial court ruled that simply owning the animal did not make Katherine liable at common law for Nelson's injuries. The trial court further concluded that § 172.01 did not apply.

Section 172.01, STATS., prohibits stallions and billy goats from running at large and imposes liability upon the owner or keeper of such an animal. We agree with the trial court that § 172.01[3] does not apply to this case.

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[2] We reject the respondents' suggestion that Nelson waived his right to object to the jury instructions in this case. Nelson submitted a proposed instruction, which was rejected, and also asked the trial court to read all of WIS J I—CIVIL 1391. The trial court's refusal to use a proposed instruction is tantamount to an objection to the instruction which is actually given.

[3] Section 172.01, STATS., states:

First, the horse which kicked Nelson was a mare, not a stallion.[4] Second, "running at large" means that an animal has escaped from its enclosure and entered another's property. *See* ***Reuter v. Swarthout,*** 182 Wis. 453, 455-56, 196 N.W. 847, 848 (1924); *see also* ***Fringer v. Venema,*** 26 Wis.2d 366, 369-70, 132 N.W.2d 565, 568 (1965). Here, the horse and the goat were on the Heichlers' fenced-in property. Therefore, they were not running at large. Accordingly, § 172.01 did not apply, and the trial court properly excluded Katherine from the special verdict. ***Fiumefreddo v. McLean,*** 174 Wis.2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993) (formulating a special verdict is within the trial court's discretion).

The trial court also properly excluded Katherine from the special verdict. As stated earlier, there was no evidence adduced at trial that the goat and the horse possessed any unusual trait or habit which would be likely to result in injury or damage or that Katherine was aware of any natural trait of the horse or goat which would cause injury or damage of the type suffered by Nelson. Katherine's knowledge that the goat ate flowers and broke his chain did not require her inclusion on the special verdict because that behavior was unrelated to Nelson's injury.

By the Court.—Judgment affirmed.

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

(..continued)

No stallion over one year old, nor bull over six months old, nor boar, nor ram, nor billy goat over four months old shall run at large; and if the owner or keeper shall, for any reason, suffer any such animal to do so the owner or keeper shall forfeit five dollars to the person taking it up and be liable in addition for all damages done by the animal while so at large, although the animal escapes without the fault of such owner or keeper.

[4] A stallion is a male horse. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2221 (1976).