COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP274 **Cir. Ct. No. 2007CV28**

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

ESTATE OF BETTIE A. BROWN, BY HER SPECIAL ADMINISTRATOR, FRED BROWN AND FRED BROWN, INDIVIDUALLY,

PLAINTIFFS-APPELLANTS,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. AND MEMORIAL MEDICAL CENTER,

DEFENDANTS-RESPONDENTS,

CENTER FOR MEDICARE AND MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

INVOLUNTARY-DEFENDANT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. The Estate of Bettie Brown appeals a judgment, entered on a jury verdict, dismissing its negligence claim against Memorial Medical Center and Physicians Insurance Company of Wisconsin, Inc. The Estate argues the circuit court erred by: (1) modifying the standard jury instruction on the duty of care owed by hospital employees; and (2) refusing to admit certain evidence. We affirm.

BACKGROUND

¶2 This case arises from a fall Bettie Brown suffered while she was a patient at Memorial Medical Center. Brown, age seventy-seven, was admitted to Memorial's intensive care unit on November 10, 2004 due to pneumonia. Because of a stroke she had suffered earlier that year, Brown had difficulty speaking and moving the right side of her body. She was agitated throughout her stay at Memorial, and the nurses caring for her repeatedly administered a sedative to calm her. She tried unsuccessfully to get out of her hospital bed on multiple occasions. She experienced increasing fecal incontinence, with fourteen episodes occurring on November 13, the day she fell. Brown's physician noted these episodes were very upsetting to Brown.

¶3 The hospital bed Brown used was equipped with four side rails, two on each side of the bed. The upper rails began at the head of the bed and ran adjacent to the mattress until about the patient's waist, and the lower rails ran from waist level to the foot of the mattress. There was about a seven-inch gap between the upper and lower rails. Each rail rose to a height of eleven to sixteen inches above the mattress.

¶4 Because Brown was deemed a high fall risk, the top two rails on her bed were kept in the raised position throughout her hospital stay, pursuant to

Memorial's fall risk policy. Hospital protocol dictated that all four rails should not be raised unless ordered by a doctor or requested by the patient's family. According to the nurses who cared for Brown, this was because the use of four rails constitutes a restraint,[1] and under hospital policy, "[t]he patient has a right to be free from restraints of any form that are not medically necessary." Brown's nurses also testified that using four rails poses certain risks, as a patient who wants to get out of bed may attempt to climb over, under, or between the rails. A patient may become tangled in the rails, causing bruising and skin tears.

¶5 On November 13 at 2:10 p.m., Brown's nurse, Christine Wegner, heard a crash and found Brown lying on the floor next to her hospital bed. The fall caused severe bruising on Brown's face and shoulder. Wegner completed a patient occurrence report later that day. Under the heading "Identify what immediate steps were taken to prevent repeat occurrence," Wegner wrote, "4 rails up." Brown died seven days later from unrelated causes.

¶6 Brown's estate sued Memorial for negligence. The case was tried to a jury. At trial, the Estate argued Brown's nurses were negligent for failing to raise all four rails on Brown's bed and also for failing to advise Brown's husband that he could request all four rails be raised. In support of its "failure to advise" theory, the Estate's attorney asked Brown's husband and son whether any Memorial employee had advised them of the option to raise all four rails and whether they would have exercised that option. Memorial objected, arguing the Estate's "failure to advise" theory was tantamount to an informed consent claim.

[1] In a footnote in its brief-in-chief and a footnote in its reply brief, the Estate argues the use of four side rails is not a restraint. This argument is undeveloped, and we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

Memorial noted the Estate had not pled an informed consent claim and asked the circuit court "to dismiss [any informed consent claim] to the extent it is being advanced."

¶7 The court determined it could not dismiss an informed consent claim because no such claim had been pled. However, the court indicated, "My preference is we don't talk anymore about whether anybody informed the Plaintiff or Mrs. Brown's family about the possibility of raising the side rails." The court agreed to issue an instruction informing the jury that "there's no [informed consent] claim in the case … and that it would require medical evidence to prove, which is absolutely absent in this case." The court ultimately gave a version of WIS JI—CIVIL 1385, the instruction on the duty of care owed by hospital employees, adding the following language:

> There is no claim in this case and no evidence in this case that the nurses had any duty to advise Bettie Brown's family that four rails could be put up if the family requested. You may not consider whether or not the family was so advised as a component of negligence in this case.

¶8 The court also precluded the Estate from introducing the patient occurrence report Wegner completed after Brown's fall. Specifically, the Estate sought to introduce Wegner's statement that she put "4 rails up" as an "immediate step[] … to prevent repeat occurrence." The court determined Wegner's statement was evidence of a subsequent remedial measure and therefore inadmissible under WIS. STAT. § 904.07.[2] The Estate argued the statement was admissible for impeachment purposes. However, the court concluded it did not fit into the

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

narrow impeachment exception because it was not offered to contradict a "specific fact" to which Wegner had testified.

DISCUSSION

I. Jury instruction

¶9 A circuit court has wide discretion when instructing a jury. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. We affirm if "the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case ...." ***Id.*** (quoted source omitted). We independently review whether a jury instruction accurately states the law. ***Horst v. Deere & Co.***, 2009 WI 75, ¶17, 319 Wis. 2d 147, 769 N.W.2d 536.

¶10 The circuit court modified WIS JI—CIVIL 1385 because the Estate's "failure to advise" theory was an attempt to "bootstrap" an informed consent claim onto an ordinary negligence claim. We do not agree that a claim based on Memorial employees' failure to advise the Browns about the four-rail option necessarily sounds in informed consent rather than negligence. However, we nevertheless affirm because "the overall meaning communicated by the instruction … was a correct statement of the law." *See* ***Nommensen***, 246 Wis. 2d 132, ¶50 (quoted source omitted); *see also* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990) (we will affirm the trial court even if it reached the right result for the wrong reason). In order to prevail on its "failure to advise" theory of negligence, the Estate would have had to introduce expert testimony showing that the nurses' failure to advise the Browns fell below the standard of care. Because the Estate did not introduce any expert testimony, the circuit court properly instructed the jury that "[t]here is no claim in this case and no evidence in

this case that the nurses had any duty to advise [Brown's] family that four rails could be put up if the family requested."

¶11 The general rule in Wisconsin is that a hospital must exercise such ordinary care as the mental and physical condition of its patients may require. ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 149, 172 N.W.2d 427 (1969). Whether expert testimony is necessary to establish the standard of care depends on the type of care involved. ***Kujawski v. Arbor View Health Care Ctr.***, 139 Wis. 2d 455, 463, 407 N.W.2d 249 (1987). If the care is custodial—that is, nonmedical, administrative, ministerial, or routine—expert testimony is not necessary "because the jury is competent from its own experience to determine and apply … [an ordinary care] standard." ***Cramer***, 45 Wis. 2d at 150. However, "[i]f the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of that type of care is necessary." ***Id.*** at 149; *see also* ***Kujawski***, 139 Wis. 2d at 463 (explaining that expert testimony is limited to instances where the trier of fact is to determine matters requiring knowledge or experience on subjects that are not within the common knowledge of humankind).

¶12 Here, expert testimony would have been necessary to show that Memorial employees breached the standard of care by failing to advise the Browns they could request that all four rails be raised. Whether to advise a patient's family about the option to impose restraints is a discretionary decision that requires a nurse to exercise professional judgment. The proper exercise of this professional judgment is not within the realm of common knowledge or ordinary experience. Thus, expert testimony was necessary for the jury to determine whether Brown's nurses properly exercised their professional judgment when they decided not to advise Brown's family about the four-rail option. *See* ***Cramer***, 45 Wis. 2d at 149 (expert testimony necessary to establish the standard of care for

professional nursing care). Without this testimony, the Estate's "failure to advise" theory of negligence could not have succeeded. The trial court therefore properly instructed the jury it could not find Memorial negligent based on the nurses' failure to advise Brown's family that all four rails could be raised.

¶13 The Estate cites four cases for the proposition that expert testimony is not necessary. *See* ***Kujawski***, 139 Wis. 2d 455; ***Cramer***, 45 Wis. 2d 147; ***Schuster v. St. Vincent Hosp.***, 45 Wis. 2d 135, 172 N.W.2d 421 (1969); ***Snyder v. Injured Patients & Families Comp. Fund***, 2009 WI App 86, 320 Wis. 2d 259, 768 N.W.2d 271. ***Kujawski*** held that expert testimony was not required to establish the standard of care with respect to a nursing home's failure to use a safety belt when transporting a patient in a wheelchair. ***Kujawski***, 139 Wis. 2d at 458-59. In ***Cramer***, expert testimony was not necessary to establish a hospital's negligence in inadequately restraining a patient and leaving him unattended. ***Cramer***, 45 Wis. 2d at 153-54. ***Shuster*** involved an ordinary negligence claim that arose when a patient fell in a hospital bathtub. ***Schuster***, 45 Wis. 2d at 138, 142-43. Finally, ***Snyder*** held that hospital employees were performing custodial, not professional, duties when they negligently failed to perform a routine search of a psychiatric patient who later committed suicide using a weapon she had smuggled into the facility. ***Snyder***, 320 Wis. 2d 259, ¶¶3, 19.

¶14 If the issue on appeal were whether Brown's nurses were negligent for failing to raise all four side rails, the cases cited by the Estate would be on point. However, the issue here is whether Brown's nurses were negligent for failing to advise her relatives about the option to raise all four rails. The cases the Estate cites stand for the proposition that "[o]ne does not need to be an expert to be able to determine whether a person should be in or out of restraints." *See* ***Cramer***, 45 Wis. 2d at 154. Determining whether a nurse must advise a patient's

family about the availability of restraints is a different matter, one that does require expert testimony.

¶15 The Estate apparently argues expert testimony is unnecessary because Memorial's bedside rail policy sets the standard of care. The Estate contends the policy imposes a duty on nurses to inform a patient's family about the option to request four rails. However, regulations adopted by a private organization do not set the standard of care in a negligence case because the standard of care must be set by law. *See* ***Johnson v. Misericordia Cmty. Hosp.***, 97 Wis. 2d 521, 537-38, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981) (citing ***Marolla v. American Family Mut. Ins. Co.***, 38 Wis. 2d 539, 545-47, 157 N.W.2d 674 (1968)). There are exceptions to this general rule if "an entire industry or substantially an entire industry had essentially the same safety regulations," ***Marolla***, 38 Wis. 2d at 547, or if Wisconsin law requires the regulations, ***Johnson***, 97 Wis. 2d at 538. Here, there is no evidence that the entire healthcare industry has the same bedside rail policy as Memorial, or that Memorial's policy is required by Wisconsin law.

¶16 Furthermore, nothing in Memorial's policy *requires* that nurses inform a patient's family about the option to raise all four side rails. The policy merely allows nurses to raise all four rails when a patient's family requests it. Thus, under the policy, whether to advise a patient's family about the availability of the four-rail option is a discretionary decision that requires a nurse to exercise professional judgment. Again, expert testimony would have been necessary for the jury to determine whether Brown's nurses properly exercised their professional judgment in this respect.

II. Patient occurrence report

¶17 The Estate next argues the circuit court erred by refusing to admit the patient occurrence report Wegner filled out after Brown's fall. The admission or exclusion of evidence lies within circuit court's sound discretion. ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). "When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***Id.*** at 45-46.

¶18 The Estate sought to introduce Wegner's statement that she put "4 rails up" as an "immediate step[] … to prevent repeat occurrence." The circuit court determined Wegner's statement was evidence of a subsequent remedial measure and the patient occurrence report was therefore inadmissible under WIS. STAT. § 904.07. Section 904.07 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. *This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11.* (Emphasis added.)

The Estate apparently concedes the patient occurrence report is evidence of a subsequent remedial measure, but it argues the report is nevertheless admissible to impeach Wegner's deposition testimony. Citing ***Ansani***, the circuit court concluded the report was not admissible for impeachment purposes because it did not contradict a specific fact to which Wegner had testified.

¶19 The circuit court properly exercised its discretion. In ***Ansani***, 223 Wis. 2d at 56, we held:

> Based on [the impeachment exception in WIS. STAT. § 904.07], a circuit court should restrict cross-examination when the thrust of the questioning is to admit evidence of post-event remedial measures to show that the defendant was negligent, but not when it is used for impeachment purposes. If this impeachment exception were construed too broadly, any time a defendant controverted an allegation of negligence, a plaintiff could bring in evidence of subsequent remedial measures to prove prior negligence or culpable conduct under the guise of impeachment. However, evidence of subsequent measures is properly admitted under narrow circumstances such as to impeach a witness in regard to a specific fact to which the witness has testified. (Citations omitted.)

Thus, in order for evidence of subsequent remedial measures to be admissible for impeachment purposes, the evidence must contradict a specific fact to which a witness has testified.

¶20 The patient occurrence report's statement that Wegner put "4 rails up" as an "immediate step[] … to prevent repeat occurrence" does not contradict any specific fact to which Wegner testified. Wegner never testified that putting four rails up would not have prevented Brown's fall. When asked at her deposition what she could have done differently to keep Brown from falling, Wegner testified, "I could have—I could have sat in the room the whole day. That would have prevented it from happening …. But that's an impossibility. I have … things to do." This does not amount to testimony that putting four rails up would not have prevented Brown's fall. Wegner was simply responding to an open-ended question about preventative measures by listing one thing she could have done differently.

¶21 Moreover, the patient occurrence report only asks what "immediate steps were taken to prevent [Brown from falling again]." The patient occurrence report does not state that the use of all four bedside rails would have prevented Brown from falling in the first place. Accordingly, even if Wegner had testified that the use of four rails would not have prevented Brown's fall, the patient occurrence report would not contradict that testimony.

By the Court.—Judgment affirmed.

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