

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP805

Cir. Ct. No. 2014CV155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CAROL WALKER,

PLAINTIFF-APPELLANT,

V.

**SACRED HEART HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD
ORDER OF ST. FRANCIS,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire
County: KRISTINA M. BOURGET, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Carol Walker appeals a summary judgment dismissing her personal injury claim against Sacred Heart Hospital of the Hospital Sisters of the Third Order of St. Francis (Sacred Heart). Walker contends the circuit court

erred by dismissing her negligence claim due to her failure to disclose an expert liability witness to testify about the standard of care required for the security of patients in the psychiatric ward of Sacred Heart. Walker further contends that the doctrine of *res ipsa loquitur* applies, and for that reason, no expert testimony is required. We conclude Walker was required to have an expert witness testify concerning Sacred Heart's standard of care and *res ipsa loquitur* does not apply. We therefore affirm the judgment.

BACKGROUND

¶2 Walker commenced this action against Sacred Heart alleging that on April 10, 2012, she was sexually assaulted while a patient in Sacred Heart's psychiatric ward by John Lizan, another patient in the same ward. Walker claims Sacred Heart was negligent in failing to adequately supervise both her and Lizan so as to prevent the assault.¹

¶3 On April 7, 2012, police officers were dispatched to Lizan's residence because they were informed he was possibly contemplating suicide. When they arrived outside, they observed Lizan through a window place a handful of pills into one of his hands and walk into another room. The officers then forcibly entered Lizan's residence to ensure his safety. Once the officers entered his residence, Lizan "hissed" and "barked" at them, and even bit one of them. As

¹ Initially, one of Walker's allegations of negligence was Sacred Heart's failure to warn her about Lizan. The failure-to-warn claim was not pursued on appeal. Issues raised in the circuit court, but not raised on appeal, are deemed abandoned. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

a result, Lizan was admitted to Sacred Heart later that day on an emergency detention “hold” under WIS. STAT. ch. 51.²

¶4 When Lizan was first admitted to Sacred Heart, Dr. Kevin Hess noted that Lizan “has poor insight and judgment, seems to be responding to internal stimuli, has pressured speech, [and] admits to social stressors.” Lizan’s sister informed Dr. Hess that Lizan had been previously diagnosed with “either bipolar or paranoid schizophrenia.” Although Lizan was uncooperative at first, he became more cooperative as Dr. Hess examined him. Based on this examination, Dr. Hess’s plan was for Lizan “to be admitted to behavioral health for further evaluation, monitoring, and treatment.”

¶5 On April 8, 2012, Dr. Emil Ibrahim conducted an initial psychiatric evaluation on Lizan. Dr. Ibrahim noted that during the previous day “in the emergency room [Lizan] was very uncooperative” and “was given some Ativan to calm him down” Dr. Ibrahim also noted Lizan was currently “displaying pressured speech, hyperactivity, labile affect, delusional thinking, and paranoia.” Based on his examination of Lizan, Dr. Ibrahim’s plan was to try and “schedule [Lizan] for [a] probable cause hearing and forced medication[.]” However, in the interim, Dr. Ibrahim concluded Lizan “will be managed by using as-needed medication to calm him down and control him, *his behavior will be monitored for safety*, and collateral information from other sources will be requested.”

² WISCONSIN STAT. ch. 51 generally covers state treatment and rehabilitation services for all persons with mental disorders and developmental disabilities, including emergency detention and involuntary commitment for treatment. See WIS. STAT. §§ 51.15, 51.20. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(Emphasis added.) Dr. Ibrahim did not specify with any particularity how, to what degree, or where Sacred Heart personnel were to monitor Lizan for safety.

¶6 On the same day as Lizan’s initial psychiatric evaluation, Walker voluntarily admitted herself to Sacred Heart. She was quite depressed and was cared for by a psychiatrist at Sacred Heart who medicated her to treat her depression. Lizan and Walker were both placed in rooms, basically directly across the hall from each other.

¶7 On April 9, 2012, Sacred Heart nursing staff informed Dr. Ibrahim that Lizan “continued to be manic, continued to refuse medication, [and] continued to display paranoia and delusion.” Dr. Ibrahim himself noted Lizan: (1) “continued to be hyperactive and circumstantial in his speech”; (2) “laughs inappropriately and becomes loud at times”; and (3) displays “flight of ideas, looseness of association, and pressured speech, in addition to grandiose and paranoid delusions.” Dr. Ibrahim planned to keep Lizan at Sacred Heart, and forcibly medicate Lizan after a probable cause hearing was held in Lizan’s ch. 51 action.

¶8 On April 10, 2012, hospital staff reported Lizan “continues to be refusing medication [and] acting in a manic and psychotic state.” Dr. Ibrahim noted that Lizan would sometimes become hostile and was “intrusive to other patients and staff and approaching people with very bizarre speech.” Lizan also informed Dr. Ibrahim that Lizan’s “name is Dr. Mickey Mouse.” Dr. Ibrahim’s plan remained to have Lizan monitored until the probable cause hearing, but the method, degree, and location of monitoring were not specified.

¶9 That evening, Lizan left his room and entered Walker’s room, where he sexually assaulted her. At that time, Walker was on medication and sedated. A

Sacred Heart employee observed on a video monitor that Lizan was in Walker's room in her bed on top of her. Two employees immediately went to the room and restrained Lizan.

¶10 Walker alleges Sacred Heart was negligent in supervising Lizan because he was left unmonitored by Sacred Heart staff until he was subsequently discovered assaulting Walker in her room. She contends that, while there was a bank of video monitors to observe patients, the monitors were not being watched at the time the assault began.

¶11 Sacred Heart filed a motion to compel mediation under WIS. STAT. ch. 655,³ contending that Walker's allegations constituted a claim of medical negligence. Sacred Heart maintained Walker's claim dealt with the appropriateness of medical care as well as hospital judgment and decision-making regarding the safety and security of patients within its facility, and Walker was required to support her claim with expert testimony. In contrast, Walker argued that mediation under ch. 655 was inappropriate because her allegations related to routine, nonmedical care, and an expert witness was not necessary to address Sacred Heart's standard of care.

¶12 Based upon *Payne v. Milwaukee Sanitarium Foundation, Inc.*, 81 Wis. 2d 264, 260 N.W. 2d 386 (1977), the circuit court concluded mediation was required under WIS. STAT. ch. 655:

As I reviewed the cases both of you cited in your submissions, I think that decisions regarding placement of

³ WISCONSIN STAT. ch. 655 generally covers health care facility liability for injury to patients in its care.

patients on psychiatric units in terms of their location on the floor, restraints on their freedom, on their mobility, and oversight necessarily involves medical judgments and consideration of not only that particular patient but also patients -- other patients on the floor in terms of threats that they may be to themselves or to other patients on the floor.

I think this is different than *Snyder [v. Injured Patients and Families Comp. Fund]*, 2009 WI App 86, 320 Wis. 2d 259, 768 N.W.2d 271] and some of those other cases where they [sic] were blanket policies regarding safety checks or use of restraints that applied generally to all patients. Although it may not be identical to the situation in *Payne*, I think it's more akin to the decisions made by the physician in that case in terms of balancing the care of the patient and their safety, and so I do think it involves medical judgment and falls within the purview of [ch.] 655.

¶13 The circuit court's scheduling order required Walker to disclose her expert witnesses by November 30, 2014. Walker did not name an expert witness to address Sacred Heart's standard of care. As a result, Sacred Heart moved for summary judgment, arguing expert testimony was required to support Walker's negligence claim, and because Walker had not named an expert witness to address Sacred Heart's standard of care, her claim must be dismissed. In a February 20, 2015 motion to amend the scheduling order, Walker stated: "Plaintiff did not name any experts as to [Sacred Heart]'s duty or standard of care with regard to monitoring Mr. Lizan, a known safety risk, or protecting Ms. Walker from Mr. Lizan, as no expert testimony is required." At a March 20, 2015 hearing on Sacred Heart's motion, Walker sought leave to name a liability expert witness if the circuit court were to grant the summary judgment motion. The circuit court rejected that request, concluding Walker's decision not to have a liability expert was tactical and failed to meet the excusable neglect standard under WIS. STAT. § 801.15(2)(a).⁴ The circuit court reaffirmed its earlier decision that Walker's

⁴ Walker has not appealed the denial of her motion for leave to name expert witnesses.

claim involved an issue related to Sacred Heart's professional judgment and medical care. Expert testimony was therefore required, and as Walker did not timely name an expert on that issue, the court granted summary judgment dismissing her complaint. Walker now appeals.

DISCUSSION

¶14 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Walker acknowledges the sole issues on appeal are legal and not factual disputes: namely, whether she was required to provide expert testimony as to Sacred Heart's standard of care and whether the doctrine of *res ipsa loquitur* applies. We independently review a grant of summary judgment, using the same methodology as the circuit court. *Malzewski v. Rapkin*, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156.

I. Expert testimony

¶15 We begin with a review of prior Wisconsin cases addressing the standard of care in patient claims of negligent care against hospitals. Our supreme court provided the general rules on whether expert testimony is required concerning patient care in a hospital in *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 172 N.W.2d 427 (1969):

Courts generally make a distinction between medical care and custodial or routine hospital care. The general rule is that a hospital must in the care of its patients exercise such ordinary care and attention for their safety *as their mental and physical condition, known or should have been known, may require*. ... If the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of that type of care is necessary. This is usually done by establishing the care given in similar circumstances by hospitals in the area. But it does not

follow that the standard of all care and attention rendered by nurses or by a hospital to its patients necessarily require proof by expert testimony. The standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard.

Id. at 149-50 (emphasis added; citation omitted).

¶16 Some years later, the Wisconsin Supreme Court decided *Payne*. There, a patient was admitted to the hospital after attempting suicide, where she was diagnosed with clinical depression. *Payne*, 81 Wis. 2d at 266. The patient's treating physician decided to move her to a limited security unit where she could light her own cigarettes and ordered that she be allowed to move about the hospital unaccompanied. *Id.* at 271-72. The patient then lit her clothes on fire, and her estate sued the hospital, contending it was negligent in permitting her, a known suicidal patient, to have access to matches and in failing to adequately supervise her. *Id.* at 268.

¶17 Our supreme court determined that expert testimony was required to determine whether the hospital provided inadequate supervision so as to breach its standard of care. *Id.* at 276. The *Payne* court pointed out the distinguishing factor from cases such as *Cramer* was "the attending psychiatrist's order giving the patient freedom to move about without supervision." *Id.* at 274-75. It thus concluded expert testimony was required to explain the supervision required by the hospital in light of the physician's judgment in the treatment of the patient, which standard of care would not be within the lay juror's competence. *Id.* at 275-76. In concluding, the court noted:

In establishing the negligence of a hospital the necessity for expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning

those matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study or experience.

Id. at 275-76 (footnote omitted).

¶18 The most recent published appellate decision on these matters appears to be this court’s decision in *Snyder*. There, Snyder, while an inpatient in a hospital’s psychiatric unit, “committed suicide with a gun she brought into the hospital following a five-hour unsupervised pass.” *Snyder*, 320 Wis. 2d 259, ¶1. The Estate of Snyder sued the hospital, claiming the hospital’s staff failed to adequately search her upon return to the inpatient psychiatric unit. *Id.*, ¶¶4, 7. At issue was whether the alleged negligence occurred in the performance of custodial care, or constituted medical malpractice governed by WIS. STAT. ch. 655. *Id.*, ¶1.

¶19 The *Snyder* court concluded a safety check or search of a patient was a routine procedure not outside ordinary lay understanding, involving a question of routine care, and not professional medical judgment. *Id.*, ¶19. As a result, the Estate was not required to provide expert medical testimony on the hospital’s standard of care. *Id.*, ¶14. In reaching this conclusion, this court provided the following analysis and gloss on the state of the law:

Here, in contrast to the medical decisions and doctor’s orders at issue in *Payne*, Snyder’s claim of negligence is based solely on the failure of the hospital to adequately search Wendy pursuant to hospital procedure. The hospital staff’s search was not the result of special orders involving Wendy nor did it involve the exercise of professional medical judgment. Rather, plaintiff alleges the search of a patient entering an inpatient facility was to be conducted as a matter of providing routine care to all of the patients. *There was nothing particular about Wendy or the medical care provided to her that would have changed the application of that custodial duty.*

Id., ¶19 (footnote omitted) (emphasis added).

¶20 Walker relies mainly on *Snyder* in contending her claim involves only routine safety and security, and not medical care that must be addressed through expert testimony. She contends “the issue is that [Sacred Heart] itself, prior to the assault, recognized that it needed to be monitoring Mr. Lizan because of his unpredictable, hostile and intrusive behavior toward others.” Thus, according to Walker, the issue boils down to routine monitoring of Lizan. She argues:

a jury is competent from its own experience to determine whether a patient who is a known threat and is to be monitored should be left unmonitored to wander into the room of a patient who cannot protect herself because she is sedated. This is a situation where common knowledge of laymen affords a basis for finding negligence.

In further support of her position that no expert testimony is required to support her negligence claim, Walker cites *Hofflander v. St. Catherine’s Hospital, Inc.*, 2003 WI 77, 262 Wis. 2d 539, 664 N.W.2d 545. However, *Hofflander* did not involve a question about whether expert testimony was required to address the hospital’s standard of care.

¶21 Conversely, relying mainly on *Payne*, Sacred Heart maintains the nature of the care and supervision provided to Lizan and Walker in the context of their being in a hospital psychiatric ward “is not administrative, non-medical, ministerial or routine care.” Sacred Heart argues it considered both therapy and security in determining Lizan’s and Walker’s placement in Sacred Heart’s psychiatric ward and the level of supervision each of them required, and therefore expert testimony is required to establish the degree of care and skill required of the hospital.

¶22 The instant case does not fall squarely within the ambit of either *Snyder* or *Payne*. Unlike *Snyder*, Sacred Heart personnel did not violate a blanket hospital rule or policy. Unlike *Payne*, Walker does not challenge a doctor's specific supervision order. The doctor's treatment plan involved monitoring Lizan until a probable cause hearing could be held so as to permit Lizan's lawful involuntary medication. However, the doctor did not specify how, where, or to what degree Sacred Heart personnel should supervise Lizan.

¶23 When Walker was admitted to Sacred Heart for treatment, she was placed in a room near Lizan. Lacking specific directions by the attending physician, it was necessary for Sacred Heart's staff to exercise its professional judgment in determining the nature and extent of supervision required for Lizan and Walker. Expert testimony was therefore required for a jury to determine whether Sacred Heart met the requisite standard of care in supervising Lizan and Walker, taking into consideration the particular medical condition and mental health of the patients, their known risks to themselves and others, the close proximity of Lizan to Walker in the hospital, and the hospital's policies and procedures for supervision, including the frequency staff was to watch the monitors. In short, expert testimony would be particularly important to address Sacred Heart's standard of care as to how to properly manage and supervise a sedated patient in close proximity to another patient who was unpredictable and potentially hostile. This was not a simple matter of nonmedical, administrative, ministerial, or routine care in a hospital for which expert testimony was not needed because the jury is competent from its own experience to determine and apply a reasonable-care standard. See *Cramer*, 45 Wis. 2d at 149-50.

¶24 In addition, we note that Lizan was admitted to Sacred Heart on an emergency detention "hold" under WIS. STAT. ch. 51. Consequently, expert

testimony was required to address Sacred Heart's standard of care given this "hold" and applicable restrictions under ch. 51. In particular, as a ch. 51 detained patient, Lizan had certain rights, including the right "to refuse all medications and treatment except ... in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." *See* WIS. STAT. § 51.61(1)(g). Lizan also had the right (with some exceptions not relevant here) to "the least restrictive conditions necessary to achieve the purposes of admission." *See* WIS. STAT. § 51.61(1)(e). Expert testimony was necessary to address how, where, and to what degree Sacred Heart could control Lizan in light of those statutory restrictions. Therefore, Sacred Heart's standard of care involved "complex facts and circumstances outside the common knowledge and ordinary experience of an average juror" ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 374, 541 N.W.2d 753 (1995).

II. Res ipsa loquitur

¶25 Alternatively, Walker asserts the doctrine of *res ipsa loquitur* applies such that no expert testimony was required. *Res ipsa loquitur* is a rule of circumstantial evidence that permits, but does not require, a permissible inference of negligence to be drawn by the jury. ***Millonig v. Bakken***, 112 Wis. 2d 445, 457, 334 N.W.2d 80 (1983). "[W]here evidence of the defendant's negligence is lacking or virtually nonexistent, the jury is allowed to 'fill in the blanks' by drawing an inference of negligence from the happening of the event and the defendant's relationship to it." ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). Generally, therefore, no expert testimony is required when *res ipsa loquitur* applies. ***Richards v. Mendivil***, 200 Wis. 2d 665, 673-74, 548 N.W.2d 85 (Ct. App. 1996).

¶26 In *Lecander v. Billmeyer*, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992), this court set forth the prerequisites for a *res ipsa loquitur* instruction:

[T]he *res ipsa loquitur* doctrine should be applied and the instruction given when (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which has occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

¶27 Walker cannot meet these prerequisites. We have already determined that expert testimony was required on the issue of Sacred Heart's duty of care and possible negligence. Consequently, a lay juror is not able to say as a matter of common knowledge that the consequences of Sacred Heart's treatment are not those which ordinarily result if due care is exercised. Walker has provided no expert testimony to that effect.

¶28 An additional requirement for application of *res ipsa loquitur* is that Walker would have to prove Sacred Heart had exclusive control of the "instrument or agency" causing the harm. The "instrument or agency" causing the harm was Lizan. Sacred Heart certainly had no exclusive control over Lizan, and he was subject to WIS. STAT. ch. 51 protocols. *See supra* ¶24. Specifically, under ch. 51, Lizan had certain limited rights to refuse all medications and treatment, and to have the least restrictive conditions necessary to achieve the purposes of admission. *See* WIS. STAT. § 51.61(1)(e) and (g). Thus, even if Sacred Heart could have physically medicated, confined or restrained Lizan, it could do so only in a manner consistent with the statutory mandates. We therefore reject Walker's argument that *res ipsa loquitur* applies in this case.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

