COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2026

Samuel A. Christensen
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. 2024AP1283 **Cir. Ct. No. 2021CV980**

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

JENNIFER KROLL,

PLAINTIFF-RESPONDENT,

NETWORK HEALTH AND SOCIETY FOR HUMAN RESOURCE MEDICAL AND PRESCRIPTION DRUG PLAN, BY ITS CLAIMS ADMINISTRATOR, CIGNA HEALTH AND LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

ASCENSION NE WISCONSIN, INC., TYLER BURTON AND GABRIELLE MCKEEVER,

DEFENDANTS-APPELLANTS,

INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANT-RESPONDENT,

PROASSURANCE CASUALTY COMPANY, ABC INSURANCE COMPANY, JOHN DOE, DEF INSURANCE COMPANY, JANE DOE AND XYZ INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County: YADIRA REIN, Judge. *Affirmed*.

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

¶1 HRUZ, J. Ascension NE Wisconsin, Inc., Tyler Burton, and Gabrielle McKeever (collectively, "the Ascension defendants") appeal an order that granted summary judgment in favor of the Injured Patients and Families Compensation Fund ("the Fund") and dismissed the Fund from this case. The circuit court concluded that the Fund was entitled to summary judgment because the claims asserted in plaintiff Jennifer Kroll's complaint arose from "routine care for [Kroll's] safety, not medical malpractice," and "recovery from the Fund is only available in medical malpractice actions under" WIS. STAT. ch. 655 (2023-24).[1] We agree and, therefore, affirm.

BACKGROUND

¶2 On January 21, 2019, Kroll underwent a right total knee replacement surgery at Ascension NE Wisconsin—St. Elizabeth Hospital. Following the surgery, Kroll's surgeon entered an order placing Kroll on fall precautions and

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

containing instructions to "[o]ffer toileting to patient regularly" and to not leave Kroll unattended in the restroom.

¶3 Later that day, Burton, a physical therapist, entered Kroll's hospital room to perform a physical therapy assessment. McKeever, a certified nursing assistant (CNA), also entered Kroll's room. Kroll testified at her deposition that she was awoken by Burton and McKeever entering her room, that she felt "very groggy," and that she told Burton and McKeever she was "very loopy."

¶4 Kroll needed to use the restroom, so Burton and McKeever helped her walk to the restroom using a gait belt and a walker. Once Kroll was seated on the toilet, Burton and McKeever told Kroll not to stand up without assistance, and they then left her alone in the restroom. McKeever stood outside the restroom's sliding door, which was left open approximately seven or eight inches. Burton was about ten feet away from the restroom door. After Kroll finished using the toilet, while she was in the process of wiping herself and disposing of the toilet paper, she fell to the restroom floor and suffered a fractured femur.

¶5 Kroll subsequently filed the instant lawsuit against the Ascension defendants and the Fund. She pled two causes of action against the Ascension defendants: ordinary negligence and, in the alternative, negligent provision of professional medical services. She further alleged that, pursuant to WIS. STAT. § 655.27, the Fund was "responsible for the payment of any portion of a medical malpractice claim in excess of the limits expressed in" WIS. STAT. § 655.23(4).

¶6 Kroll later moved for a declaratory judgment, asking the circuit court to declare that WIS. STAT. ch. 655 does not apply to this case because "the negligent conduct of [Ascension's] employees occurred during the performance of routine custodial care" and "did not occur in providing any medical treatment to"

Kroll. The Ascension defendants filed a brief opposing Kroll's motion, and the Fund took no position on it.

¶7 The circuit court granted Kroll's declaratory judgment motion, concluding that "the incident at issue here involve[d] routine care for [Kroll's] safety, not medical malpractice," as a result of which WIS. STAT. ch. 655 "is inapplicable." The court reasoned that the alleged negligent conduct involved Burton and McKeever "leaving … Kroll alone in the bathroom" and that the Ascension defendants had not shown that there was "any therapeutic benefit or therapeutic value in the decision to do so." The court also noted that there was no evidence that either Burton or McKeever was aware of Kroll's surgeon's orders regarding fall precautions. Additionally, while McKeever had testified regarding a "standard for safety" requiring her to remain within an arm's length of Kroll, the court noted McKeever had clarified that this was a safety standard "that she learned during her orientation at Ascension, not a professional CNA standard." The court further reasoned that the record did not support the Ascension defendants' argument that Burton was performing a physical therapy assessment of Kroll at the time of her fall.

¶8 Kroll filed a notice of entry of declaratory judgment, which the Ascension defendants moved to strike on the grounds that the order granting Kroll's declaratory judgment motion was not final. In the meantime, to preserve their right to appeal, the Ascension defendants also filed a notice of appeal from the declaratory judgment order. This court dismissed the appeal for lack of jurisdiction, concluding that the declaratory judgment order was not final because it "merely grant[ed] a motion for declaratory judgment without including language that dispose[d] of the entire matter in litigation as to any party."

¶9 The Fund then moved for summary judgment, arguing that it should be dismissed from the case because the circuit court had ruled that WIS. STAT. ch. 655 was inapplicable, and "[i]t is well-established that recovery from the Fund is only available in medical malpractice actions under Chapter 655." The Ascension defendants opposed the motion, arguing that there were disputed factual issues that should have prevented the court from granting Kroll's motion for declaratory judgment; that further discovery was required before the Fund's summary judgment motion could be heard; and that summary judgment was inappropriate because the court's declaratory judgment order was not a final order.

¶10 In May 2024, the circuit court issued a written order granting the Fund's motion for summary judgment and dismissing it from the case. The court reiterated that the deposition testimony of Kroll, Burton, and McKeever "supports the Court's … Decision and Order for Declaratory Judgment finding that because this incident involves routine care for [Kroll's] safety, not medical malpractice, [WIS. STAT.] ch. 655 does not apply." As such, the court accepted the Fund's argument that it should be dismissed from the case because "recovery from the Fund is only available in medical malpractice actions under … ch. 655, and [is] not available in ordinary negligence claims." The Ascension defendants now appeal the court's order granting summary judgment in favor of the Fund.[2]

[2] An appeal as of right can be taken only from a final order or judgment. WIS. STAT. § 808.03(1). "A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties." ***Id.*** Here, the circuit court's order granting summary judgment in favor of the Fund is a final order because it dismissed the Fund from this case and therefore disposed of the entire matter in litigation as to the Fund. *See* ***Wambolt v. West Bend Mut. Ins.***, 2007 WI 35, ¶34, 299 Wis. 2d 723, 728 N.W.2d 670 (explaining that an order is final when it "explicitly dismiss[es] or adjudg[es] the entire matter in litigation as to one or more parties"). Thus, the Ascension defendants may appeal the summary judgment order as a matter of right, even though the underlying litigation between Kroll and the Ascension defendants remains pending.

DISCUSSION

¶11 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). The interpretation of a statute and its application to a set of facts are also questions of law that we review independently. ***State v. Keith***, 175 Wis. 2d 75, 78, 498 N.W.2d 865 (Ct. App. 1993).

¶12 In this case, it is undisputed that if WIS. STAT. ch. 655 is inapplicable, then the circuit court properly granted summary judgment in favor of the Fund and dismissed it from the case. Chapter 655 "'constitutes the exclusive procedure and remedy for medical malpractice in Wisconsin' against health care providers … and their employees." ***Phelps v. Physicians Ins. of Wis.***, 2009 WI 74, ¶64, 319 Wis. 2d 1, 768 N.W.2d 615 (citation omitted). "Each health care provider who is subject to the provisions of ch. 655 … is required to participate in the Fund by paying an annual assessment." ***Wisconsin Med. Soc'y, Inc. v. Morgan***, 2010 WI 94, ¶12, 328 Wis. 2d 469, 787 N.W.2d 22 (citing WIS. STAT. § 655.27(3)(a)). The Fund then "pays out that portion of any medical malpractice claim in excess of the amount of insurance that the health care provider is required to maintain, or the maximum liability of the health care provider's insurance, whichever is greater." ***Id.*** (citing § 655.27(1)). Consequently, if ch. 655 does not apply, the Fund has no potential liability for Kroll's claims.

¶13 As such, the disputed issue on appeal is whether the circuit court properly determined that WIS. STAT. ch. 655 is inapplicable in this case.[3] Chapter 655 applies to claims "against a health care provider or an employee of the health care provider, for damages for bodily injury or death due to acts or omissions of the employee of the health care provider acting within the scope of his or her employment and providing health care services." WIS. STAT. § 655.005(1). In this case, it is undisputed that Ascension NE Wisconsin is a health care provider and that Burton and McKeever were employees of a health care provider at the time of Kroll's fall. The parties dispute, however, whether Kroll's damages were the result of "health care services" provided by Burton and McKeever.

[3] The Fund suggests that the issue of whether WIS. STAT. ch. 655 applies to this case is not properly before us because the Ascension defendants have appealed the circuit court's order granting summary judgment in favor of the Fund, and the applicability of ch. 655 "was not addressed by the circuit court when deciding [the Fund's] motion for summary judgment." According to the Fund, while the Ascension defendants purport to appeal from the circuit court's summary judgment ruling, "they are actually seeking to appeal the circuit court's [prior] decision on Kroll's [motion for] declaratory judgment." The Fund asserts that it is "improper" for the Ascension defendants "to appeal the circuit court's declaratory judgment ruling that the case is to be governed by ordinary negligence principles, under the guise of challenging the circuit court's [order] granting the Fund summary judgment dismissal." Kroll similarly asserts that the Ascension defendants "conflate the issue decided on summary judgment with the issue decided in the Motion for Declaratory Judgment."

We reject any suggestion that the applicability of WIS. STAT. ch. 655 to this case is not properly before us on appeal. As discussed above, the Ascension defendants attempted to appeal the circuit court's ruling on Kroll's declaratory judgment motion, but this court dismissed the appeal because the order in question was not final. The Fund then moved for summary judgment, relying on the circuit court's declaratory judgment ruling that ch. 655 was inapplicable. The circuit court subsequently determined that the Fund was entitled to summary judgment "based upon the analysis in the Court's … Decision and Order for Declaratory Judgment"—that is, based upon the court's prior ruling that ch. 655 does not apply to this case. Under these circumstances, our review of the court's summary judgment ruling necessarily requires us to review the court's prior determination regarding the applicability of ch. 655. Moreover, we note that "[a]n appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." *See* WIS. STAT. RULE 809.10(4).

¶14 Our supreme court has clarified that WIS. STAT. ch. 655 "applies only to negligent medical acts or decisions made in the course of rendering professional medical care." ***McEvoy by Finn v. Group Health Co-op. of Eau Claire***, 213 Wis. 2d 507, 530, 570 N.W.2d 397 (1997). In contrast, ch. 655 does not apply to claims alleging negligence in the provision of "routine care" or "custodial care" to a patient. *See* ***Snyder v. Injured Patients & Fams. Comp. Fund***, 2009 WI App 86, ¶19, 320 Wis. 2d 259, 768 N.W.2d 271. "Courts generally make a distinction between medical care and custodial or routine hospital care," and, with respect to the latter, "[t]he 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." ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 149, 172 N.W.2d 427 (1969); *see also* ***Schuster v. St. Vincent Hosp. of Hosp. Sisters of Third Ord. of St. Francis Sisters***, 45 Wis. 2d 135, 140, 172 N.W.2d 421 (1969) ("The duty of a hospital in regard to its … custodial functions toward a patient is simply one of ordinary care under the circumstances."). "[O]rdinary care involves care and attention to the patient's safety rendered by a hospital which is 'nonmedical, administrative, ministerial or routine care.'" ***Snyder***, 320 Wis. 2d 259, ¶11 (quoting ***Cramer***, 45 Wis. 2d at 149-50).

¶15 Here, we agree with the circuit court that the undisputed facts show that Burton and McKeever's alleged negligence—i.e., their leaving Kroll alone in the restroom following her surgery, after she had just woken up and while she was still groggy—occurred during their custodial or routine care of Kroll and did not involve the provision of "health care services." *See* WIS. STAT. § 655.005(1). Three prior cases provide particular support for this determination: ***Cramer***;

Kujawski v. Arbor View Health Care Center, 139 Wis. 2d 455, 407 N.W.2d 249 (1987); and ***Snyder***.

¶16 The plaintiff in ***Cramer*** was in a hospital's intensive care unit following a surgery and was "in cloth restraints." ***Cramer***, 45 Wis. 2d at 148. When a nurse brought him supper, she untied the restraint on one of his arms to allow him to eat, watched him eat for a short period of time, and then left the room. ***Id.*** The plaintiff subsequently untied the restraint on his other arm and slid off of his bed, sustaining injuries. ***Id.*** He later sued the hospital, alleging that it was negligent in several respects. ***Id.*** at 149.

¶17 On appeal, our supreme court was asked to determine whether the plaintiff was required to present expert testimony in order to prove his negligence claim against the hospital.[4] ***Id.*** The court answered that question in the negative, explaining that "the allegations concerning negligence in leaving [the plaintiff] unattended and under inadequate restraint and removing the cloth restraint of one hand in order to allow him to feed himself are matters of routine care and do not require expert testimony." ***Id.*** at 153-54. The court further noted, "One does not

[4] Although ***Cramer v. Theda Clark Memorial Hospital***, 45 Wis. 2d 147, 172 N.W.2d 427 (1969), did not involve a determination of whether WIS. STAT. ch. 655 applied to the plaintiff's negligence claim, this court has recognized that "case law addressing the need for expert testimony, while not determinative of whether a claim falls under … ch. 655, provides useful guidance in determining the type of care involved." ***Snyder v. Injured Patients & Fams. Comp. Fund***, 2009 WI App 86, ¶10, 320 Wis. 2d 259, 768 N.W.2d 271. "Namely, the degree of care, skill and judgment required of a health care provider must typically be proved by the testimony of experts in order to determine the standard of care at issue in a medical malpractice claim." ***Id.*** Conversely, "[i]n actions against a hospital for negligent conduct that does not amount to malpractice, the standard of conduct is ordinary care, the compliance or breach of which can be determined by a jury without resort to expert opinion evidence or to the standards of practice of the community." ***Id.*** (alteration in original; citation omitted).

need to be an expert to be able to determine whether a person should be in or out of restraints." ***Id.*** at 154.

¶18 After ***Cramer***, our supreme court addressed a similar issue almost two decades later in ***Kujawski***. There, a patient sustained injuries when she fell out of her wheelchair while being pushed to a recreation room at a nursing home. ***Kujawski***, 139 Wis. 2d at 457-58. She alleged that the nursing home, through its employee, was negligent in several ways, including by failing to securely tie or strap her to the wheelchair. ***Id.*** at 458. As in ***Cramer***, the issue on appeal was whether the plaintiff was required to present expert testimony to prove her negligence claim. ***Kujawski***, 139 Wis. 2d at 462. Citing ***Cramer***, the court stated that "the determination of negligence, where a nurse leaves a patient unattended and under inadequate restraint, involves matters of routine care and does not require expert testimony." ***Kujawski***, 139 Wis. 2d at 463. Stated differently, "the decision regarding the use of a restraint under the circumstances does not involve a situation so complex or technical that a jury would need expert testimony to determine the appropriate standard of care." ***Id.*** at 464.

¶19 After approximately two more decades, this court issued its decision in ***Snyder***. In that case, a patient in a hospital's locked behavioral health unit died by suicide after shooting herself with a gun that she brought into the hospital following a five-hour unsupervised pass. ***Snyder***, 320 Wis. 2d 259, ¶¶1-2. The patient's husband sued the hospital, alleging that its employees were negligent by "fail[ing] to conduct a possessions check, or to check [the patient's] body, as required by procedure" upon her return to the hospital. ***Id.***, ¶¶1, 3. On appeal, we affirmed the circuit court's ruling that WIS. STAT. ch. 655 "d[id] not apply as to the 'custodial' actions of [the hospital's] staff." ***Snyder***, 320 Wis. 2d 259, ¶5. We agreed with the plaintiff that "like the use of restraints, conducting a 'safety

check,' or search, of a patient entering the inpatient psychiatric facility was a routine procedure at [the hospital] and is 'not at all outside the realm of ordinary and lay comprehension.'" ***Id.***, ¶14.

¶20 We agree with Kroll that Burton and McKeever's actions in leaving her unattended in the restroom are similar to the respective defendants' actions in ***Cramer***, ***Kujawski***, and ***Snyder***. In each of those cases, the defendants' alleged negligence pertained to actions that they took, or failed to take, with respect to the patients' safety and did not involve the exercise of professional medical judgment. Similarly, in this case, the decision whether to leave Kroll unattended in the restroom pertained to her safety—a matter of routine or custodial care—and did not involve the exercise of professional judgment by Burton or McKeever.

¶21 In arguing to the contrary, the Ascension defendants assert that Burton and McKeever must have been providing "health care services" to Kroll under WIS. STAT. § 655.005(1) at the time of her fall because the fall occurred "in the midst of a physical therapy assessment." The undisputed facts, however, do not support this assertion. Specifically, Burton testified at his deposition that he assisted Kroll in walking to the restroom solely because she needed to use the toilet; that he was not planning to provide any sort of treatment or therapy to Kroll while she was in the restroom; that Kroll was left alone in the restroom; that he was approximately ten feet away from the restroom door when Kroll fell; that from his location, it appeared to him that the restroom door was closed; and that the closed door would have prevented him from seeing Kroll inside the restroom. The Ascension defendants do not point to evidence disputing Burton's testimony on any of these points. Based on these undisputed facts, we agree with Kroll and the circuit court that Burton was not "in the midst of" performing a physical therapy assessment of Kroll when her fall occurred. Instead, Burton and

McKeever's actions in helping Kroll to the restroom and then leaving her alone in the restroom were part of their custodial or routine care of Kroll.[5]

¶22 The Ascension defendants also place significant emphasis on the fact that, following Kroll's surgery, her physician entered an order placing her on fall precautions and containing instructions to "[o]ffer toileting to patient regularly" and to not leave Kroll unattended in the restroom. Citing our supreme court's decision in ***Payne v. Milwaukee Sanitarium Foundation, Inc.***, 81 Wis. 2d 264, 260 N.W.2d 386 (1977), the Ascension defendants argue that Burton and McKeever "were following [a] physician's orders" at the time of the fall, which "removes this case from ordinary negligence."

¶23 As an initial matter, we note—as did the circuit court—that there is no evidence in the record establishing that either Burton or McKeever was actually aware of Kroll's surgeon's order regarding fall precautions at the time of Kroll's fall. McKeever testified that as a CNA, she did not believe she would have had access to orders placed by a physician, and she did not think she would have been aware of any orders related to fall precautions. Burton testified that although he would typically review a surgeon's orders before doing an assessment of a patient, he could not specifically recall whether he did so in Kroll's case, and he could not say "for sure" whether he was aware of Kroll's surgeon's orders at the time of her

[5] In further support of this conclusion, we note Burton's testimony that, at the time of Kroll's fall, he was unaware of any policy, procedure, or guideline promulgated by the National Association of Physical Therapists that would have required him to remain in the room with Kroll while she used the restroom. Additionally, and as the circuit court noted, McKeever testified that a standard requiring her to remain within an arm's length of Kroll was a "standard for safety" that she learned during her orientation at Ascension, as opposed to a professional CNA standard. These facts provide additional support for a conclusion that Burton and McKeever's actions in leaving Kroll in the restroom unattended were part of their custodial or routine care of Kroll and did not constitute the provision of "health care services."

fall. Thus, the Ascension defendants' premise that Burton and McKeever "were following physician's orders" is not supported by the record.

¶24 Moreover, ***Payne*** is materially distinguishable from this case. In ***Payne***, a psychiatrist made a professional medical decision to move a suicidal patient out of a high-security hospital unit and into a lower-security unit because he believed the added freedom would be therapeutic for her. ***Payne***, 81 Wis. 2d at 270-71. As a result of that decision, the patient was permitted to have matches and light her own cigarettes, and she was also allowed to "be unattended about the hospital and grounds." ***Id.*** at 271. Based on the psychiatrist's orders, the patient was allowed to go into a restroom by herself for approximately ten minutes, during which time she set herself on fire. ***Id.*** at 268.

¶25 On appeal, our supreme court concluded that the patient's claim that the hospital's employees were negligent in failing to properly supervise her required expert testimony to prove. ***Id.*** at 275-76. The court acknowledged that "[i]n some cases the supervision and custodial care of mental patients is a subject within the realm of the ordinary experience of mankind." ***Id.*** at 276. The court reasoned, however, that expert testimony was required in the case at bar because "the supervision ordered by the treating psychiatrist related to *therapy* as well as security." ***Id.*** (emphasis added).

¶26 According to the Ascension defendants, ***Payne*** compels a conclusion that any time a hospital employee is alleged to have been negligent in his or her implementation of a physician's order, the case sounds in medical negligence under WIS. STAT. ch. 655. As the circuit court correctly recognized, however, ***Payne*** is distinguishable because the physician's orders in that case related to both therapy and security—in other words, they related to both the psychiatric care of

the patient and her safety. We agree with the circuit court that here, in contrast, the fall precaution order issued by Kroll's surgeon related to her safety only and had no "therapeutic benefit." As such, ***Payne*** does not support a conclusion that Kroll's claims against the Ascension defendants sound in medical negligence, rather than ordinary negligence.[6]

¶27 The Ascension defendants also assert that whether Burton and McKeever were negligent by leaving Kroll unattended in the restroom is a matter "beyond the knowledge of lay persons," such that expert testimony is required, which "place[s] this case in WIS. STAT. ch. 655." We are not convinced, however, that the alleged negligence in this case—i.e., leaving a patient alone in a restroom a few hours after a total knee replacement surgery when she had just awoken and reported feeling "loopy"—is so outside the realm of a layperson's understanding

[6] Notably, both ***Kujawski*** and ***Snyder*** distinguished ***Payne*** on this basis. *See* ***Kujawski v. Arbor View Health Care Ctr.***, 139 Wis. 2d 455, 407 N.W.2d 249 (1987); ***Snyder***, 320 Wis. 2d 259; ***Payne v. Milwaukee Sanitarium Found., Inc.***, 81 Wis. 2d 264, 260 N.W.2d 386 (1977). The ***Kujawski*** court stated that the circuit court's reliance on ***Payne*** was "misplaced" because "the decision to leave the patient [in ***Payne***] unattended was a matter of therapy" and "involved a medical decision requiring expert testimony," but "the decision to leave [the patient in ***Kujawski***] unrestrained [did] not involve a matter of therapy and, therefore, [did] not constitute a medical decision requiring expert testimony." ***Kujawski***, 139 Wis. 2d at 468. Similarly, the ***Snyder*** court reasoned that the physician's orders in ***Payne*** were made "as part of a balancing between therapy and protection," whereas the plaintiff's negligence claim in ***Snyder*** was "based solely on the failure of the hospital to adequately search [the patient] pursuant to hospital procedure." ***Snyder***, 320 Wis. 2d 259, ¶19.

that expert testimony is required.[7] *Cf.* ***Cramer***, 45 Wis. 2d at 153-54 ("[T]he allegations concerning negligence in leaving [the patient] unattended and under inadequate restraint and removing the cloth restraint of one hand in order to allow him to feed himself are matters of routine care and do not require expert testimony."); ***Kujawski***, 139 Wis. 2d at 464 ("[T]he decision regarding the use of a restraint under the circumstances does not involve a situation so complex or technical that a jury would need expert testimony to determine the appropriate standard of care.").

¶28 The Ascension defendants next assert that disputed issues of material fact should have precluded the circuit court from determining, as a matter of law, that WIS. STAT. ch. 655 is inapplicable to this case. Specifically, the Ascension defendants fault the circuit court for stating that Burton and McKeever's decision to leave Kroll unattended in the restroom had no "therapeutic benefit or therapeutic value" because the court "ignored" evidence that Burton "was in the midst of conducting a physical therapy assessment at the time … Kroll required use of the bathroom." We have already concluded, however, that the undisputed facts do not support a determination that Kroll was in "the midst of a physical therapy assessment" at the time of her fall. *See supra* ¶21.

[7] In arguing to the contrary, the Ascension defendants cite an Outagamie County Circuit Court judge's ruling on a motion in limine in another case, in which the court concluded that the plaintiff's claim against a hospital sounded in medical negligence, rather than ordinary negligence, because "[t]he crucial act alleged [was] handing a post-partum woman who [was] still under the effects of an epidural a mug of hot water," and "the effects of the epidural implicate[] the specialized knowledge of a nurse who would know that [the patient] was at a greater risk of being burned." Obviously, however, the circuit court's decision in that case is not binding on this court. *See* ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492. Furthermore, while we may rely on a circuit court's reasoning when we find it "persuasive," *see* ***id.***, the limited reasoning provided in the circuit court decision cited by the Ascension defendants does not convince us that this case, which involves a different set of facts, falls under WIS. STAT. ch. 655.

¶29 The Ascension defendants also assert that the circuit court improperly "assessed the credibility of" their expert witnesses. We agree with Kroll, though, that what the court actually did was to disregard statements made by the expert witnesses that were unsupported by the evidentiary record.

¶30 For instance, the Ascension defendants' nursing expert, Dr. Michelle Collins, averred that McKeever "followed" Kroll's physician's orders "to offer toileting regularly to [Kroll] and to not leave [Kroll] unattended in the bathroom." The Ascension defendants' physical therapy expert, Daryl Lamprey, similarly averred that Burton followed Kroll's surgeon's orders. The circuit court noted, however, that contrary to those averments, "McKeever testified that she was not aware of, nor did she have access to, those orders," and Burton "was unable to confirm that he reviewed, or was even aware of, the orders." Additionally, the court noted that while both Collins and Lamprey averred that Burton "was in the middle of assessing" Kroll at the time of her fall, those averments were inconsistent with Burton's and McKeever's testimony, which confirmed that Burton was not even in the same room as Kroll when the fall occurred. We agree with Kroll that "[n]o expert witness can change the underlying facts of this case" and that the court was not required to accept assertions of fact in the expert witnesses' affidavits that were clearly contrary to the evidence.

¶31 Finally, the Ascension defendants assert that it was improper for the circuit court to grant summary judgment in favor of the Fund because "very little discovery" had occurred prior to that point, and "[t]he only depositions that [had] taken place" were those of Burton, McKeever, and Kroll. (Formatting altered.) We reject this argument for two reasons.

¶32 First, as Kroll notes, the Ascension defendants did not raise any argument that additional discovery was needed before the circuit court ruled on Kroll's motion for declaratory judgment, which specifically asked the court to determine whether WIS. STAT. ch. 655 was applicable to this case. If the Ascension defendants believed that additional discovery was necessary for the court to address that issue, they should have raised that argument in their briefing on the declaratory judgment motion, rather than waiting to do so until after the court had granted the declaratory judgment motion and the Fund had moved for summary judgment based on that ruling.

¶33 Second, over 14 months elapsed between the time the Ascension defendants answered Kroll's complaint and the time Kroll filed her declaratory judgment motion. During that time, Kroll, Burton, and McKeever—the only witnesses with direct knowledge of the circumstances leading to Kroll's fall—were deposed, and the parties exchanged written discovery. The Ascension defendants do not explain what additional discovery they believe was needed, nor do they explain how such additional discovery would have affected the circuit court's rulings on Kroll's motion for declaratory judgment and the Fund's subsequent motion for summary judgment. This court need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.