COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.**

No. 97-3726

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

LOIS HAPPERSETT, INDIVIDUALLY,
AND AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF ROBERT HAPPERSETT,

PLAINTIFFS-APPELLANTS-
CROSS-RESPONDENTS,

V.

DIXIE BIRD, PENNEY L.M. WEATHERBEE,
ELAINE M. SNYDER, AND THE BOARD OF REGENTS
FOR THE UNIVERSITY OF WISCONSIN SYSTEM,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

DEININGER, J. Lois Happersett appeals the judgment entered following a trial of her medical malpractice claims against the University of Wisconsin Hospital and Clinics and three of its employees. The claims arose out of the circumstances surrounding the death of her husband, Robert, while he was a patient at the hospital.

A jury found the UW Hospital and a clinical nurse manager causally negligent in Robert's death and awarded Happersett substantial damages, and it found two other nurses not negligent in rendering care to Robert. The trial court, however, dismissed the claim against the UW Hospital on sovereign immunity grounds, and it dismissed the claim against the clinical nurse manager because Happersett had not timely served a notice of claim naming the nurse manager. The trial court also denied Happersett's motion to change the jury's answers finding the two nurses not negligent, or in the alternative, to grant a new trial on the issue of the nurses' negligence. Thus, under the judgment as entered, Happersett recovers no damages from any defendant.

Happersett contends on appeal that: (1) the Board of Regents of the University of Wisconsin System, the state agency responsible for the hospital, is not immune from suit; (2) the verdict answers finding the two nurses not negligent are not supported by credible evidence; and (3) the trial court incorrectly instructed the jury regarding the standard of care required of the nurses. The defendants cross-appeal, contending that the amount of damages awarded by the jury for loss of society and companionship should be reduced if we conclude that a verdict against any of them should be ordered or reinstated. We reject Happersett's contentions on appeal and affirm the judgment in all respects. Because we do so, we need not consider the issue raised in the cross-appeal.

BACKGROUND

Robert Happersett underwent a kidney transplant at the UW Hospital in September 1994. During the transplant operation, physicians installed a catheter into a vein in his chest so that blood could be drawn and medication and fluids could be delivered without repeatedly piercing his arm veins during his recuperation. The end of the catheter protruded from Robert's chest near his collarbone.

During his recovery in the hospital, Robert was at times confused and agitated. During one episode of agitation, a nurse observed Robert pulling at his catheter. The nurse restrained Robert with a "posey vest," which, when placed on his torso and fastened to the bed, prevented him from getting out of bed. Robert's arms were also restrained with wrist restraints. Later in the day, Robert's agitation subsided somewhat and the wrist restraints were removed, but the posey vest remained in place. Robert was still restrained in the posey vest when staff nurse Dixie Bird assumed Robert's care late that night.

UW Hospital Policy and Procedure No. 13.23, which had been in effect since August 1993, provided that patients in restraints "will be checked for safety at least every 30 minutes." Not all UW Hospital nurses were aware of this policy, however. At the time of Robert's transplant in September 1994, neither staff nurse Bird, nor Penney Weatherbee, the charge nurse responsible for assigning patients to nurses during that shift, were aware of policy 13.23. According to Elaine Snyder, the clinical nurse manager of the transplant unit, normal practice at UW Hospital would have been to post policy 13.23 near the nurses station for approximately thirty days after its effective date, and then to place it in the hospital policy manual at the nurses station. The UW Hospital had

also provided in-service training on the revised restraint policy, but that training had been poorly attended, and the policy had not been effectively communicated to the nursing staff.

Staff nurse Bird checked Robert hourly, in compliance with the policy that preceded policy 13.23. She last checked Robert at 6:00 a.m. At approximately 6:50 a.m., Robert's catheter broke. The cause of the breakage is unknown. Air entered Robert's bloodstream through the broken catheter, and the resulting air embolism caused a severe brain injury from which Robert did not recover. His family decided to discontinue life-sustaining measures, and Robert died approximately sixty-four hours after the catheter broke.

Lois Happersett, Robert's wife, sued staff nurse Bird, charge nurse Weatherbee, and clinical nurse manager Snyder. Happersett also sued the Board of Regents of the University of Wisconsin System, the state agency responsible for the UW Hospital. Happersett alleged that the defendants were negligent in failing to keep Robert in wrist restraints, in failing to provide a sitter attendant to monitor Robert continuously during his episode of agitation, and in failing to follow UW Hospital Policy 13.23 requiring that patients in restraints be checked every thirty minutes. The jury found staff nurse Bird and charge nurse Weatherbee not negligent. The jury also found, however, that the UW Hospital and clinical nursing manager Snyder were negligent for failing to effectively communicate policy 13.23 to the nursing staff of the transplant unit. The jury awarded damages of $1,381,365, including $1,000,000 for Happersett's loss of Robert's society and companionship during the sixty-four hours between the breaking of the catheter and his death.

On the defendants' motion after verdict, the trial court dismissed the claim against the UW Hospital itself, concluding that the Board of Regents is protected by sovereign immunity. The court also dismissed the claim against clinical nurse manager Snyder, concluding that Happersett had not timely served a notice of claim naming that defendant as required under § 893.82, STATS.[1] The trial court denied Happersett's post-verdict motion to change answers in the verdict or for a new trial, concluding that the verdict answers finding staff nurse Bird and charge nurse Weatherbee not negligent were supported by substantial evidence. The court also denied the defendants' motion to reduce the jury's damages award.

Happersett appeals the judgment as it pertains to her claims against the Board of Regents and the two nurses. She does not challenge the dismissal of her claim against the clinical nurse manager. The Board and the nurses cross-appeal the denial of their motion to reduce the jury's award of $1,000,000 in damages for loss of society and companionship.

ANALYSIS

a. Sovereign Immunity

Article IV, Section 27 of the Wisconsin Constitution provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." Accordingly, the State of Wisconsin, including its arms and agencies, is immune from suit except where the legislature has expressly

[1] Section 893.82, STATS., is quoted, in relevant part, at n.2, below. Happersett does not appeal the trial court's dismissal of her claim against the clinical nurse manager. Thus, the notice of claim statute is relevant to this appeal only because Happersett cites it as a basis for her claim that the Board of Regents is not immune from suit.

consented to be sued. *See* ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). Whether a given entity is protected by sovereign immunity involves constitutional and statutory interpretation, matters which we review de novo. *See* ***Schmeling v. Phelps***, 212 Wis.2d 898, 905, 569 N.W.2d 784, 787 (Ct. App. 1997).

Happersett acknowledges that the Board of Regents is an arm of the state for purposes of sovereign immunity. *See* ***Lister***, 72 Wis.2d at 292-93, 240 N.W.2d at 618 (1976). The University of Wisconsin Hospital and Clinics, like the Board of Regents, is also an arm of the state for purposes of sovereign immunity. *See* ***Walker v. University of Wis. Hosps.***, 198 Wis.2d 237, 242-48, 542 N.W.2d 207, 209-12 (Ct. App. 1995). Happersett contends, however, that the legislature has consented to suits against the Board of Regents and the UW Hospital by enacting § 893.82, STATS.,[2] which provides the procedure for notifying the state of claims against state officers, employees and agents. Happersett argues that the

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[2] Section 893.82(3), STATS., 1995-96, provides:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, and no civil action or civil proceeding may be brought against any nonprofit corporation operating a museum under a lease agreement with the state historical society, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved.

Section 893.82(5m), STATS., provides that for "a claim to recover damages for medical malpractice, the time periods under subs. (3) and (4) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather than 120 days after the event causing the injury."

Board of Regents is an "agent" of the state, and therefore, the legislature has consented to suits against the Board of Regents by specifying the manner in which an agent of the state may be sued. We disagree.

The supreme court has concluded that the legislature did not consent to suits against the state in § 895.45, STATS., 1977-78, a predecessor to § 893.82, STATS. "[I]t is well established that sec. 895.46, STATS. 1977, standing alone or in combination with sec. 895.45, STATS. 1977, fails to provide the 'express legislative permission [consent]' necessary for the state to be sued." ***Miller v. Smith***, 100 Wis.2d 609, 624, 302 N.W.2d 468, 475 (1981) (citing ***Fiala v. Voight***, 93 Wis.2d 337, 347, 286 N.W.2d 824, 830 (1980)). Although the court in ***Miller***, as it had earlier in ***Fiala***, addressed § 895.45, STATS., the statute was amended and renumbered to § 893.82 by Laws of 1979, ch. 323, § 30. The pertinent language of § 895.45(1) is preserved in § 893.82(3): both statutes provide that no suit may be brought against a state "officer, employe or agent" unless written notice of the claim is served on the attorney general within a specified period.[3] Accordingly, we conclude that § 893.82, like its predecessor, does not provide the express legislative consent necessary for the state to be sued.

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[3] Section 895.45(1), STATS., 1977-78, provided:

> Timeliness, definition of claimant, notice and limited liability. (1) No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of such officer's employe's or agent's duties, unless within 90 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved.

The cases Happersett cites involving the limited governmental immunity of municipalities are inapposite, because municipalities do not have sovereign immunity and no longer enjoy common law governmental immunity from tort suits. *See* ***Holytz v. City of Milwaukee***, 17 Wis.2d 26, 115 N.W.2d 618 (1962). Moreover, Happersett's interpretation of the term "agent" in § 893.82, STATS., is unreasonable. If the Board of Regents is an "agent" of the state, and therefore subject to suit by virtue of § 893.82, then virtually all state entities would be subject to suit for the alleged tortious acts of their employees. Thus, under Happersett's interpretation, § 893.82 would amount to a general waiver of sovereign immunity for tort actions. Happersett's argument contradicts the well established principle that the state has not given statutory consent to suit in tort. *See* ***Carlson v. Pepin County***, 167 Wis.2d 345, 356, 481 N.W.2d 498, 503 (Ct. App. 1992) (citing ***Boldt v. State***, 101 Wis.2d 566, 572-73, 305 N.W.2d 133, 137-38 (1981)).

In sum, Happersett's reliance on § 893.82, STATS., as a legislative expression of consent to suit is misplaced, and the Board of Regents and the UW Hospital are protected by sovereign immunity. Accordingly, the trial court properly dismissed the claim against the Board of Regents.

b. Sufficiency of the Evidence

Happersett next contends that the jury's answers finding staff nurse Bird and charge nurse Weatherbee not negligent should be changed because the answers are not supported by sufficient evidence. In reviewing the trial court's decision on a motion challenging the sufficiency of the evidence to support a verdict we apply the same standards as the trial court. *See* ***Weiss v. United Fire & Cas. Co***., 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). "When there is any

credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Id***. at 389-90, 541 N.W.2d at 761-62 (citation omitted); *see also* § 805.14(1), STATS. And, when a "verdict has the trial court's approval," our deference to the verdict is even greater. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984) *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 547 N.W.2d 592 (1996). We must search the record for credible evidence to support the jury's verdict. ***Id***. at 306, 347 N.W.2d at 598.

Happersett argues that undisputed facts proven at trial conclusively establish that staff nurse Bird and charge nurse Weatherbee were negligent. The facts Happersett relies on are: nursing personnel were required to apprise themselves of UW Hospital policy changes and to follow new policies; policy 13.23 was posted near the nurses' desk for at least a month, and was available in a binder thereafter; staff nurse Bird and charge nurse Weatherbee did not apprise themselves of policy 13.23; staff nurse Bird did not check Robert every thirty minutes as required by policy 13.23; and charge nurse Weatherbee did not ensure that staff nurse Bird checked Robert every thirty minutes.

In essence, Happersett argues that she is entitled to judgment against the two nurses because staff nurse Bird and charge nurse Weatherbee were negligent as a matter of law for failing to follow UW Hospital Policy 13.23. We disagree. The violation of UW Hospital Policy 13.23 does not, in itself, constitute negligence. Regulations adopted by a private organization do not set the standard of care applicable to negligence cases. *See* ***Johnson v. Misericordia Community Hosp.***, 97 Wis.2d 521, 537, 294 N.W.2d 501, 510 (Ct. App. 1980) (citing ***Marolla v. American Family Mut. Ins. Co.***, 38 Wis.2d 539, 547, 157 N.W.2d 674, 678

(1968)). The nurses had a duty to provide Robert Happersett with the degree of skill, care and judgment usually exercised by reasonable nurses in similar circumstances. In other words, a nurse's duty is measured by the standards of the nursing profession. A particular hospital's policies may constitute some evidence of those professional standards, but a hospital's policies do not, in themselves, define the standard by which a nurse's alleged negligence is judged. *See* ***Marolla***, 38 Wis.2d at 543-47, 157 N.W.2d at 676-78.

There was ample evidence presented at trial from which the jury could have determined that staff nurse Bird and charge nurse Weatherbee provided care that met applicable professional nursing standards. The defense expert, Linda Briggs, testified that professional nursing standards required assessment of patients in restraints every one to two hours, and that Bird "exercised the degree of skill and care and judgment that a reasonable nurse would have exercised" in checking Robert every sixty minutes. Briggs also testified that Weatherbee "exercised the degree of skill, care, and judgment that a reasonable charge nurse would have exercised in supervising the work of Dixie Bird." According to Briggs, the standard of care and judgment that a reasonable nurse should use might vary from hospital rules, and that a hospital rule could be more stringent than the degree of skill, care and judgment that a reasonable nurse would exercise in similar circumstances.

The jury also heard evidence to suggest that staff nurse Bird's and charge nurse Weatherbee's ignorance of policy 13.23 was not due to their own negligence. Judith Broad, Executive Director of Nursing and Associate Superintendent of the UW Hospital, testified that the training program to introduce the new restraint policy to hospital staff had been ineffective and poorly attended.

Although Happersett's expert, Carol Hamlin, testified that staff nurse Bird and charge nurse Weatherbee did not exercise the degree of skill, care and judgment that a reasonable nurse would usually exercise in similar circumstances, the jury could have credited defense expert Briggs's testimony over Hamlin's. Appraisals of credibility are within the province of the jury. *See* ***Fehring***, 118 Wis.2d at 305, 347 N.W.2d at 598. Accordingly, we conclude that credible evidence supports the jury's answers finding staff nurse Bird and charge nurse Weatherbee not negligent. Thus, we also conclude that the trial court properly denied Happersett's motion to change the jury's answers to those questions.

c. Jury Instructions on Standard of Care

Happersett's final contention is that the trial court improperly instructed the jury regarding the standard of care applicable to the negligence claims against staff nurse Bird and charge nurse Weatherbee. Our review of the trial court's jury instructions is deferential; we inquire only whether the trial court misused its broad discretion to give jury instructions. *See* ***Young v. Professionals Ins. Co.***, 154 Wis.2d 742, 746, 454 N.W.2d 24, 26 (Ct. App. 1990). We will reverse the trial court and order a new trial only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law. *See* ***Miller v. Kim***, 191 Wis.2d 187, 194, 528 N.W.2d 72, 75 (Ct. App. 1995). Whether jury instructions are a correct statement of the law is a question of law that we review de novo. *See* ***State v. Neumann***, 179 Wis.2d 687, 699, 508 N.W.2d 54, 59 (Ct. App. 1993). The choice among requested instructions which correctly state the law, however, is a matter for the exercise of trial court discretion, based upon the facts adduced at trial. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

With regard to the negligence claims against staff nurse Bird and charge nurse Weatherbee, the trial court gave a modified version of WIS J I—CIVIL 1023.7, regarding the duty of registered nurses. The instruction articulates a professional standard of care. As modified by the trial court, the instruction informed the jury that staff nurse Bird and charge nurse Weatherbee had a duty "to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances by registered staff nurses [and] charge nurses." Furthermore, because the degree of skill, care and judgment usually used by staff nurses and charge nurses is not within the common knowledge of laypersons, the instruction informs the jury that the standard of skill, care and judgment must be established by expert testimony.[4]

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[4] The court gave a modified version of WIS J I—CIVIL 1023.7, instructing the jury, in relevant part, as follows:

> As a Registered Staff Nurse, Charge Nurse and Clinical Nurse Manager, respectively, it was Dixie Bird's, Penney Weatherbee's and Elaine Snyder's duty to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances by registered staff nurses, charge nurses and clinical nurse managers having due regard for the state of learning, education, experience, and knowledge possessed by registered staff nurses, charge nurses and clinical nurse managers at the time in question....
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> ....
>
> …[T]he degree of care, skill, and judgment which is usually exercised by a registered staff nurse, a charge nurse or a clinical nurse manager is not a matter within the common knowledge of laypersons. These standards are within the special knowledge of experts in the field of nursing and medicine and can only be established by their testimony. You, therefore, may not speculate or guess what those standards of care, skill, and judgment are in deciding this case but rather must attempt to determine this from the expert testimony that you have heard during this trial.

Happersett acknowledges that WIS J I—CIVIL 1023.7, the professional standard of care instruction, was an accurate statement of the law with regard to some of the allegedly negligent acts of staff nurse Bird and charge nurse Weatherbee. Happersett does not dispute that whether to place Robert in wrist restraints, or whether to provide a sitter attendant, involve questions of nursing judgment that are appropriately evaluated under the professional care standard. Happersett contends that, in addition to their professional duties, the two nurses also had a duty to provide ordinary care, which included learning and following hospital policies, and that the jury should have been told that it could determine whether the nurses provided that ordinary care without the help of expert testimony. Thus, Happersett argues, the trial court should have supplemented WIS J I—CIVIL 1023.7 with WIS J I—CIVIL 1005,[5] the general negligence instruction, and WIS J I—CIVIL 1385,[6] an instruction on the duty of

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[5] The trial court did give a version of WIS J I—CIVIL 1005, but limited its application to the verdict question inquiring whether the hospital itself was negligent. The pattern instruction provides as follows:

> A person is negligent when he or she fails to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind exercises under the same or similar circumstances. A person fails to exercise ordinary care, when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage.

[6] WISCONSIN J I—CIVIL 1385 provides, in relevant part:

> A hospital employee has the duty to provide such services, care, and attention as a patient reasonably requires under the circumstances.
>
> To properly discharge this duty, the employee must exercise ordinary care and act reasonably under the circumstances, taking into consideration the mental and physical condition of the patient known to the employee or which by the

(continued)

hospital employees to provide ordinary care. According to Happersett, by giving only the instruction on a nurse's professional standard of care, the trial court misled the jury into thinking that a nurse could use her professional judgment and disregard UW Hospital Policy 13.23.

Whether expert testimony is required in a negligence case against a nurse, and thus whether the court should give the professional care instruction in WIS J I—CIVIL 1023.7 or the ordinary care instruction in WIS J I—CIVIL 1385, depends on whether the allegedly negligent act involved professional nursing care or custodial hospital care. *See* ***Payne v. Milwaukee Sanitarium Found. Inc.***, 81 Wis.2d 264, 275-76, 260 N.W.2d 386, 392 (1977) (citing ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis.2d 147, 150, 172 N.W.2d 427, 428-29 (1969)). Professional nursing care involves "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." ***Payne***, 81 Wis.2d at 276, 260 N.W.2d at 392. Custodial care, on the other hand, involves "subject[s] within the realm of the ordinary experience of mankind." ***Id***. Expert testimony is required to establish the standard of care for the former, but not the latter.[7]

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exercise of reasonable diligence should have been known to the employee. A failure to perform this duty is negligence.

[7] Happersett suggests that ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis.2d 147, 154, 172 N.W.2d 427, 430-31 (1969), holds that whether a patient should be restrained, and how frequently a restrained patient should be monitored, are matters of ordinary care not requiring expert testimony. We do not read ***Cramer*** so broadly. The risk to the patient in ***Cramer*** was obvious and imminent: A patient had both arms restrained. A nurse released his right arm, placed a meal tray in front of him, and briefly watched him eat. When the nurse left the patient unattended, the patient released his other arm, got out of bed, fell and injured himself. The supreme court held that the allegation that the nurse was negligent in leaving the patient unattended after having partially released him from restraints involved "matters of routine care and do not require expert testimony." ***Id***. at 153-54, 172 N.W.2d at 430.

(continued)

The parties do not dispute that both the instruction given regarding the nurses' standard of care, and those requested by Happersett but not given, are correct statements of the law. Thus, at issue in Happersett's final claim of error is whether the instruction the trial court gave, which directed the jury to evaluate all negligence claims against the nurses according to a standard of professional nursing care, was the appropriate choice based upon the facts adduced at trial. As we have noted above, this choice involves the exercise of trial court discretion. In order to determine whether the trial court erroneously exercised its discretion, we look to its rationale and reasoning for the choices it made. *See* ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 454-55, 523 N.W.2d 274, 279-80 (Ct. App. 1994). We will not disturb the trial court's determination if it "is one a reasonable judge would reach and consistent with applicable law." ***Id***.

In explaining its rationale for giving only WIS J I—CIVIL 1023.7 on the question of the nurses' negligence and not the ordinary care instructions Happersett requested, the trial court stated:

> With respect to Instruction 1005, the instruction which the Court has included with regard to the professional negligence of the named nurses contained an adequate description of the specialized duties of ordinary care which applies to professional persons. Therefore, 1005, if it was given in a general sense, could be misleading because it sounds different than the particularized definition applicable to the named nurses. I therefore modified it since it is the duty of care of the hospital, and there is a question of the hospital's negligence on the verdict, and so I declined to give it in its unmodified form because I think it could potentially be confusing to the jury.

Here, the allegedly negligent act was the failure of the nurses to check on Robert more frequently than once per hour while he was restrained in a posey vest. In ***Payne v. Milwaukee Sanitarium Found. Inc.***, 81 Wis.2d 264, 275-76, 260 N.W.2d 386, 392 (1977), the supreme court, relying on ***Cramer***, held that questions regarding the level of supervision a patient requires may implicate professional medical judgment requiring expert testimony to evaluate.

> ….
>
> With respect to the instructions on hospital policies, ***Cramer v. Theda Clark*** is factually distinguishable. The facts in this case have convinced me, which is the threshold question for the Court to decide[,] that these are issues of nursing judgment rather than issues of routine care. The issue of policies and procedures have been admitted first and primarily because of the alleged breach of duty of the supervisory authority here in communicating those policies or failing to communicate them to the line staff who are the nurses providing care.
>
> Secondarily, there's expert testimony that suggests that they are relevant on the issue of standard of care, although they're not controlling. They're properly here in the record, but they do not change this into a question of routine care. Mr. Happersett was present on the Transplant Unit where the use or withholding of restraints was authorized by a standing doctor's order, but were to be applied in the nursing judgment, and the, the issue of whether or not there were inadequate frequency of checks may implicate indirectly the standard of nursing care, but they do not control it, and this is not a breach of contract action where the nursing policies would be part of the contract duties or employment duties which the nurses agreed to implement. Those issues are not a part of this trial, and Mr. Happersett and his successors would not be entitled to claim the benefit of that contract in any event.
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> The sole issues that are implicated by these facts are issues of nursing judgment, and under the instructions that I have given, there is a full range of argument that can be made by plaintiff's counsel that failing to follow those procedures was a breach of the standard of care, and there is evidence to support that argument. So I decline to give the specific instruction that was given because I think what I have decided to give is an adequate statement of the law.

It is difficult for us to envision a more thorough exposition by a trial court of its rationale in selecting from among proffered instructions. As the passage quoted demonstrates, the court related the applicable law to the facts adduced at trial. The essence of Happersett's claim on appeal, as it was in the trial court, is that staff nurse Bird and charge nurse Weatherbee were negligent because they did not check Robert often enough. We agree with the trial court's conclusion that the question of how frequently Robert should have been checked

while he was restrained in the posey vest involves professional nursing judgment beyond the knowledge of a layperson. The fact that the UW Hospital had a written policy concerning the monitoring of patients in restraints does not convert the question into one within the realm of ordinary experience to be judged without the help of expert testimony. As we have discussed above, staff nurse Bird and charge nurse Weatherbee cannot be found negligent solely because they did not follow UW Hospital Policy 13.23. *See **Johnson***, 97 Wis.2d at 537, 294 N.W.2d at 510 (Regulations adopted by a private organizations do not set the standard of care applicable to negligence cases.).

We therefore conclude that the trial court did not erroneously exercise its discretion by instructing the jury to evaluate the care provided by staff nurse Bird and charge nurse Weatherbee according to professional nursing standards, and that those standards were to be established by expert testimony. Thus, the trial court did not err in giving WIS J I—CIVIL 1023.7, as opposed to WIS J I—CIVIL 1005 and/or 1385, on the question of the nurses' negligence.

CONCLUSION

For the reasons discussed above, we affirm the judgment dismissing Happersett's claims against the Board of Regents and the clinical nurse manager, and sustaining the verdict in favor of the two nurses. Because our disposition of the appeal does not disturb the judgment entered in the circuit court, and hence Happersett will not recover damages from any defendant, we do not consider the issue raised in the cross-appeal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.