

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2002

Cornelia G. Clark
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. 02-1254-FT
STATE OF WISCONSIN**

Cir. Ct. Nos. 00-TR-14666
01-TR-484

**IN COURT OF APPEALS
DISTRICT II**

CITY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

v.

WENDY A. COMPTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 BROWN, J.¹ WISCONSIN STAT. § 343.305(5)(b) provides that blood for a blood alcohol concentration test “may be withdrawn from the person arrested” for driving while intoxicated “only by a physician, registered nurse,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

medical technologist, physician assistant or person acting under the direction of a physician.” Wendy A. Compton’s sole claim on appeal is that the person who withdrew her blood was not any of the above. We disagree and affirm.

¶2 On December 6, 2000, Compton was observed operating her vehicle at speeds of up to 110 miles per hour. She was stopped by a City of Fond du Lac police officer who smelled intoxicants on her breath. She failed three field sobriety tests and she was arrested for driving while intoxicated. She was transported to St. Agnes Hospital and read the implied consent form. She consented and a blood draw was performed by Rosemarie Herbert at St. Agnes. Compton’s blood alcohol concentration was 0.157 percent. Compton exercised her right to a jury trial and the jury found her guilty.

¶3 Compton argues that Herbert identified herself as a phlebotomist and then backtracked and said she was only a lab assistant. Compton asserts that under either job description, Herbert is not one of the persons authorized to draw blood pursuant to WIS. STAT. § 343.305(5)(b). In particular, she takes exception to the trial court’s having equated Herbert as being similar to a medical technologist.

¶4 The record reveals the following about Herbert:

- She is a phlebotomist.
- She is employed by St. Agnes Hospital, Consultants Lab in Fond du Lac.
- She has been employed at St. Agnes for twenty-two years.
- She is certified by the American Society of Clinical Pathology.

- Her duties include collecting blood samples.
- The way it works is that the police officer provides her with a blood collection kit that the State supplies. The kit contains instructions, two tubes, a needle and the holder for the needle, and the cleansing package.
- She followed the instructions provided in the kit.
- She wipes the arm off with the cleansing package that they give her, makes sure the arm is dry, performs the venipuncture and holds pressure on the patient's arm. She then does the labeling.
- The method used in this case is the standard accepted technique.

¶5 The reasonable inferences from this testimony are that Herbert worked at the hospital, it was her job to draw blood, she was a qualified medical professional in that particular job, and she was under the general supervision of the hospital in doing her job.

¶6 We can take judicial notice that (1) St. Agnes is a reputable, well-regarded hospital in the community, and (2) hospital employees with medical responsibilities, such as the invasive taking of bodily fluids and tissues, are under the general direction of at least one physician. *See* WIS. STAT. § 902.01(2)(a), (6) (courts may take judicial notice of any fact “not subject to reasonable dispute” because it is “generally known within the territorial jurisdiction of the trial court”; “Judicial notice may be taken at any stage of the proceeding.”).

¶7 Although the extent of the general supervision was not proven by testimony here, as it was in *State v. Penzkofer*, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), *Penzkofer* teaches that the “direction,” as that term is used in WIS. STAT. § 343.305(5)(b), need not be over-the-shoulder supervision.

Penzkofer, 184 Wis. 2d at 265-66. The trial court here equated Herbert's position with that of a medical technologist and admitted the evidence on that basis. We may affirm for reasons other than those expressed by the trial court. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We conclude that the trial court's decision to admit the evidence, a discretionary determination, will not be upset because the ultimate decision made in accordance with accepted legal standards and in accordance with the facts of record. See *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶8 We briefly touch upon a subargument made by Compton. She reads the record to say that Herbert retracted her testimony that she was not a phlebotomist, but was instead a lab assistant. First, any difference in her exact title is irrelevant since she has twenty-two years of experience and her job is to draw blood. But second, and more to the point, she never retracted anything. She never said her job title was a phlebotomist. Rather, she specified that this is her occupation—it is what she does—she draws blood. That is the precise definition of a phlebotomist. Later, on cross-examination, she provided her job title, a wholly different matter. That the hospital would give her a job title different than her occupation is completely immaterial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

