COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2292

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

CAROL ANN SCHAIDLER,

PLAINTIFF-APPELLANT,

V.

MERCY MEDICAL CENTER OF OSHKOSH, INC.,
A WISCONSIN CORPORATION, AND
JOHN B. MCANDREW, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Judgment affirmed; judgment affirmed in part, reversed in part and cause remanded; order affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Carol Ann Schaidler appeals from judgments dismissing her complaint against Mercy Medical Center of Oshkosh, Inc. and

Dr. John B. McAndrew and from an order denying her request for attorney's fees relating to an earlier phase of this litigation. We affirm the summary judgment dismissing Schaidler's claims against Mercy and McAndrew relating to restraint and seclusion and Schaidler's claims against Mercy relating to forcible administration of medication. We reverse the dismissal of Schaidler's toileting and taunting claims against Mercy and remand for further proceedings consistent with this opinion. We affirm the circuit court's order denying Schaidler attorney's fees.

¶2 This case is making its second appearance in this court. The proceedings from which Schaidler appeals occurred on remand following our decision in ***Schaidler v. Mercy Medical Center of Oshkosh, Inc.***, 209 Wis.2d 457, 563 N.W.2d 554 (Ct. App. 1997) (***Schaidler I***). On February 23, 1992, Schaidler was admitted to Mercy's inpatient psychiatric ward on an emergency detention order. She remained at Mercy until March 3. Two years after her discharge, she commenced an action against Mercy, McAndrew, her attending psychiatrist, and a Mercy nursing assistant alleging, inter alia, violations of her § 51.61, STATS., 1991-92,[1] patients rights, negligence and intentional torts. *See* ***Schaidler I***, 209 Wis.2d at 463-64, 563 N.W.2d at 556.

¶3 Section 51.61, STATS., the "Patients rights" statute, outlines rights afforded to mental health patients who are admitted to a treatment facility. *See* § 51.61(1); *see also* ***Schaidler I***, 209 Wis.2d at 465, 563 N.W.2d at 557. If a patient has been denied any of these guaranteed rights, the patient may bring an action pursuant to § 51.61(7)(b), which provides:

[1] All future references will be to the 1991-92 version of the statutes unless otherwise indicated.

> Any patient whose rights are protected under this section may bring an action against any person, including the state or any political subdivision thereof, which *wilfully, knowingly and unlawfully denies or violates any of his or her rights protected under this section.* The patient may recover such damages as may be proved together with exemplary damages of not less than $500 nor more than $1,000 for each violation, together with costs and reasonable actual attorney fees. It is not a prerequisite to an action under this paragraph that the plaintiff suffer or be threatened with actual damages. [Emphasis added.]

¶4 In ***Schaidler I***, we affirmed the dismissal of Schaidler's negligence and false imprisonment claims. *See* ***Schaidler I***, 209 Wis.2d at 477, 563 N.W.2d at 562. We reversed and remanded to the circuit court to address Schaidler's claims under § 51.61(7)(b), STATS., relating to Mercy's restraint and seclusion policy,[2] whether Mercy "forcibly administered medication in nonemergency situations despite the absence of a court order allowing involuntary treatment," whether Schaidler was given adequate access to toilet facilities, and whether Schaidler was taunted by members of Mercy's staff. ***Schaidler I***, 209 Wis.2d at 471-72, 563 N.W.2d at 559. On remand, the circuit court dismissed all of Schaidler's claims on summary judgment.

¶5 In reviewing decisions on summary judgment, we apply the same methodology as the circuit court. *See* ***id.*** at 464, 563 N.W.2d at 556-57. Summary judgment is appropriate if there is no genuine issue as to any material fact. *See* ***id.*** at 475, 563 N.W.2d at 561. A factual issue is genuine "if the evidence is such that

[2] In her reply brief, Schaidler argues that the remand may also have encompassed her forcible medication, toileting and taunting claims under § 51.61(7)(a), STATS. Regardless of the decision in ***Schaidler v. Mercy Medical Center of Oshkosh, Inc.***, 209 Wis.2d 457, 563 N.W.2d 554 (Ct. App. 1997) (***Schaidler I***), Schaidler's appellant's brief argues the summary judgment record with reference to § 51.61(7)(b). Schaidler's argument relating to § 51.61(7)(a) is raised for the first time in her reply brief, and we therefore will not consider it. *See* ***Bilsie v. Swartwout***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981).

a reasonable jury could return a verdict for the nonmoving party." ***Id.*** (quoted source omitted).

¶6 Mercy and McAndrew sought summary judgment on Schaidler's claimed violation of her statutory rights relating to her placement in restraints and seclusion on numerous occasions without the physician's written authorization as required by § 51.61(1)(i)1, STATS.[3]

¶7 McAndrew stated that Schaidler required restraint and seclusion due to her behavior and that he approved of this practice even if the medical record does not reflect consultation with him or contain signed orders. McAndrew stated that he was unaware that the statute required contemporaneous written authorization of restraint and seclusion. McAndrew further stated that the absence of written orders in the medical record was an oversight and not an intentional disregard of the statutory requirement of a physician's written order. In deposition excerpts, McAndrew stated that it was the practice during Schaidler's hospitalization for him to have telephone contact with the staff within one hour of the emergency restraint and seclusion and he signed the order within twenty-four hours. McAndrew and the resident were aware of Schaidler's restraint and seclusion even if Schaidler's chart does not reflect it. McAndrew stated that he had approved the restraint and seclusion policies which did not comply with the statute.

[3] Section 51.61(1)(i)1, STATS., requires written authorization for emergency use of isolation or restraint "except that isolation or restraint may be authorized in emergencies for not more than one hour, after which time an appropriate order in writing shall be obtained from the physician or licensed psychologist.… Emergency isolation or restraint may not be continued for more than 24 hours without a new written order." Mercy has conceded that its restraint and seclusion policies in this case did not comply with § 51.61(1)(i)1.

¶8 Ann Marshall, a Mercy clinical social worker, stated in her affidavit that the practice at Mercy was to contact the physician regarding restraint and seclusion and to obtain the physician's approval shortly after such placement of the patient. In deposition excerpts, Dr. Edward Orman stated that the restraints were necessary and there was proper contact between McAndrew and the staff even if there were no written orders.

¶9 Dr. Darold Treffert, Mercy's expert psychiatrist, stated that Mercy employed appropriate restraint during emergency situations and that these steps were necessitated by Schaidler's medical condition. While Mercy's restraint and seclusion policies were out of compliance with the statute due to the absence of a contemporaneous written order, Schaidler's medical record substantiated that the restraint and seclusion were clinically necessary when they were employed. Treffert stated that the medical records reveal that McAndrew personally reviewed Schaidler's case daily. Treffert opined that the absence of restraint and seclusion orders did not mean that the staff was recklessly or frivolously restraining and secluding Schaidler or using restraint and seclusion in a punitive or careless manner. Treffert found nothing wrong with Schaidler's care.

¶10 Mercy also submitted excerpts from the deposition of Schaidler's expert, Dr. Gregory Winter, a psychiatrist. Winter stated that from his review of the medical records, there were no instances in which the staff lacked a basis to restrain or seclude Schaidler. However, he observed that one could not conclude from the record whether restraint and seclusion were appropriate because the record was poorly documented on this point. In a May 1994 written report on the case, Winter stated that there was no discussion in the medical record chart of the need for active supervision during restraint and seclusion. The medical record

contains only two written orders for restraint and seclusion even though Schaidler was subject to such placement on numerous occasions during her hospitalization.

¶11 Susan Coenen, a Mercy registered nurse, stated in her affidavit that Schaidler intimidated the staff, was at times out of control and created a potential for injury. Schaidler was placed in restraint and seclusion to address the urgent situation and the physician was contacted thereafter. The failure to document the restraint and seclusion order was an oversight and not an intentional failure to obtain approval for the placement. The physicians involved in Schaidler's care knew that she was being restrained and secluded.

¶12 In opposition to Mercy's and McAndrew's summary judgment motion, Schaidler submitted other excerpts from McAndrew's deposition in which he stated that it is standard practice to review the nursing notes on rounds. McAndrew conceded that the nurses' restraint and seclusion notes did not establish the need for and the type of restraint employed.

¶13 Schaidler also submitted excerpts from Winter's deposition. Winter stated that the medical record does not reflect a discussion between the staff and McAndrew regarding restraint and seclusion and there is no evidence of active supervision relating to that aspect of Schaidler's hospitalization. For this reason, Winter concluded that McAndrew's care fell below the standard of care. Winter was generally critical of the state of the medical record because it did not reveal the thinking process of those who directed Schaidler's treatment, did not indicate that a physician was involved in the restraint and seclusion decisions prior to those decisions being made, did not contain any analysis of the effect, adverse or otherwise, of the restraint and seclusion placement, and indicated that those decisions apparently were left to the nursing staff. Neither the physician nor the

nursing notes indicate any discussion between the two regarding the use of seclusion and restraint.

¶14 Finally, Schaidler submitted the affidavit of Loa Wadzinski, a Mercy registered nurse and former manager of Mercy's psychiatric unit. Wadzinski stated that she was involved in formulating Mercy's restraint and seclusion procedures. She was unaware of the statutory requirement that restraint and seclusion orders had to be documented within one hour and relied instead on the guidelines of the Joint Commission on Accreditation of Hospitals which required a written physician's order within twelve hours of restraint or seclusion. She stated that it was the usual practice to contact the physician shortly after a patient was placed in restraint or seclusion.

¶15 The circuit court concluded that there were no material facts in dispute as to whether Mercy and McAndrew acted willfully, knowingly and unlawfully under § 51.61(7)(b), STATS., in failing to document the orders for restraint and seclusion. The court concluded that it was undisputed that Schaidler was restrained and secluded in emergency situations, and McAndrew was aware of Schaidler's restraint and believed that the nursing staff contacted him. The court concluded that expert testimony was required to show a statutory violation and that Schaidler's summary judgment materials did not create a factual dispute as to whether Mercy's and McAndrew's conduct was willful, knowing and unlawful. Rather, the court concluded, Schaidler's submissions addressed a negligence standard and merely raised credibility challenges to Mercy's submissions. This, the court concluded, was not sufficient to defeat summary judgment.

¶16 Our independent review of the summary judgment record leads us to agree with the circuit court. Schaidler did not offer expert testimony to create a

factual dispute regarding willfulness in light of the contention of McAndrew and Mercy's staff that their conduct in Schaidler's case was not a willful violation of § 51.61(7)(b), STATS., and that Mercy's policies on restraint and seclusion were not willfully out of compliance with § 51.61(1)(i)1, as evidenced by the Wadzinski affidavit. Winter, Schaidler's expert, merely pointed out that the medical record on restraint and seclusion was incomplete but did not offer an opinion as to whether willful conduct or improper treatment was shown from the record. The necessity and propriety of medical treatment are not matters within the realm of ordinary experience of a lay person. *See* ***Dean Medical Ctr., S.C. v. Frye***, 149 Wis.2d 727, 733, 439 N.W.2d 633, 635 (Ct. App. 1989). Therefore, expert testimony was required. *See* ***id.*** Merely discounting the movant's summary judgment submission as lacking in credibility will not defeat summary judgment. *Cf.* ***Schaidler I***, 209 Wis.2d at 475-76, 563 N.W.2d at 561 (a reasonable jury could not return a verdict for Schaidler merely by discounting Mercy's expert testimony).

¶17 We turn to Schaidler's claim that Mercy violated her rights when she was forcibly medicated without a court order in violation of § 51.61(1)(g)1, STATS. (patient has the right to refuse medication except where court-ordered or where necessary to prevent serious physical harm to the patient or others). In seeking summary judgment on this claim, Mercy relied upon Treffert's affidavit. According to Treffert, the medical record indicates that appropriate medication was given either with Schaidler's consent or on an emergency basis. Susan Coenen stated that Schaidler was medicated in urgent situations. Winter stated that the medications were appropriate, but the medical record does not reveal how they were administered.

¶18 The circuit court again concluded that Schaidler had not presented expert testimony on the question of forcible administration of medication to counter Mercy's presentation. Schaidler did not create a factual issue that medications were administered on other than an emergency basis in a willful, knowing and unlawful manner. Again, we agree with the circuit court that the lack of expert testimony on Schaidler's behalf resulted in a summary judgment record without genuine factual dispute.

¶19 We turn to Schaidler's claim that Mercy's staff did not meet her toileting needs. Section 51.61(1)(i)1, STATS., requires that a patient be provided with "frequent monitoring by trained staff to care for bodily needs as may be required." The circuit court also decided this claim against Schaidler on summary judgment. Our review of the summary judgment record relating to Schaidler's toileting claim reveals the following.

¶20 Treffert, Mercy's expert, opined that the hospital and nursing staff met the standards of care for monitoring and providing access to facilities for bodily needs and provided Schaidler with frequent monitoring to care for bodily needs within the requirements of the patients rights statute.

¶21 Schaidler submitted excerpts from her deposition in which she claimed that while she was in seclusion she was denied adequate access to toileting facilities. Schaidler stated that her medication caused frequent urination. She pounded on the seclusion room door for access to the toilet during her entire stay in seclusion.[4] While staff would sometimes check on her when she pounded on the door, they did not respond as often as she needed to use the toilet. In

[4] The seclusion room did not have a toilet.

particular, Schaidler claimed that on February 25, Mercy offered her the toilet at 8:45 a.m. and not again until 11:30 p.m. Schaidler believes she was fully restrained in her bed during this period and ultimately urinated in the bed. She remembers often being wet and cold from urine.

¶22 Even though the medical record indicates that the nurses checked on Schaidler every fifteen minutes, Schaidler believes that the staff did not enter the room with the degree of regularity that staff claimed to have checked on her to see if she needed to use the bathroom or had other comfort needs. When she pounded on the door and asked to use the bathroom, she would be returned to restraints rather than taken to the toilet. Schaidler also cited an instance when she was in occupational therapy, felt an attack of diarrhea coming on, expressed her need to use the toilet and was denied the opportunity to do so.

¶23 Schaidler also claims that the presence of Mercy staff with her in the bathroom caused bowel incontinence. She stated that a male orderly would remain in the very small bathroom or require her to use the bedpan in front of him, despite her requests for privacy. Schaidler found this lack of privacy embarrassing, she was unable to void and she later suffered incontinence.

¶24 In his deposition, McAndrew acknowledged a nurse's note that Schaidler had voided large amounts of urine incontinently.

¶25 The court found no support in the summary judgment record for Schaidler's claim that the toileting problems were a result of Mercy's willful conduct. The court concluded that it was undisputed in the summary judgment record that Schaidler required safeguarding and the presence of an attendant for her own safety while she used the toilet. The court also perceived a need for

expert testimony to address toileting practices when a patient has been deemed in need of seclusion and restraint.

¶26 Our review of the summary judgment record reveals a material factual dispute relating to Schaidler's toileting claim. Schaidler concedes that she was monitored while in the seclusion room. However, she claims that even though she was monitored, her toileting needs, as she expressed them, were not accommodated. The record does not contain an adequate showing by Mercy to convince us that there are no material factual issues relating to Schaidler's toileting claims. We therefore reverse the summary judgment granted to Mercy on Schaidler's toileting claim.

¶27 Schaidler also claimed that Mercy's staff violated § 51.61(1)(m), (p) and (x), STATS., by taunting her.[5] The circuit court found no support in the summary judgment record that the taunting, in any form alleged by Schaidler, occurred because the claimed conduct did not rise to the level of an affront to Schaidler's dignity as contemplated by the patients rights statute.

¶28 In her deposition, Schaidler claimed that her possessions were dumped out of her duffel bag when she was accused of stealing someone else's deodorant, and that a nurse named "Gillian" repeatedly told her that she was mentally ill, that she would be hospitalized for a long time and that her husband did not want to care for her at home. Staff yelled at her for soiling her bed and

[5] Section 51.61(1)(m), STATS., requires that facilities "be designed to afford patients with comfort and safety, to promote dignity and ensure privacy." Section 51.61(1)(p) states that patients are "permitted to make and receive telephone calls within reasonable limits." Section 51.61(1)(x) first appears in the 1993-94 statutes, although both parties seem to agree that it applies in this case. That section states that patients have the right to be treated with respect and to have their dignity and individuality recognized.

upbraided her for not using the toilet. She was repeatedly told that if she asked to use the nurse's desk telephone to call her husband or her lawyer she would be placed in restraints. Schaidler also complained that she was repeatedly told by various staff members that if she asked to be transferred to another hospital she would be put in seclusion and restraint. Schaidler acknowledged that she was desperate to be transferred but did not feel she was being intrusive in her repeated inquiries.

¶29 Coenen stated that to her knowledge, no one taunted Schaidler. Schaidler was delusional during her hospitalization. Coenen occasionally informed Schaidler that the hospital staff was acting in response to her illness but these statements were never intentionally or willfully designed to demean or belittle Schaidler.

¶30 In her affidavit, Gillian Halliday, a registered nurse at Mercy during Schaidler's hospitalization, stated that she probably discussed Schaidler's mental illness with her. Halliday did not tell Schaidler she would be in the hospital for a very long time. Rather, Halliday stated that Schaidler needed to be hospitalized while she was acutely ill. Schaidler was delusional during her hospital stay and Halliday's statements were misconstrued by her. Halliday denied taunting or belittling Schaidler and did not see any other staff member knowingly, willfully or unlawfully deny Schaidler her dignity or fail to recognize her individuality.

¶31 We conclude that there is a material factual dispute relating to the taunting claim. The hospital and its staff deny that taunting occurred; Schaidler contends that it did. We reject Mercy's appellate argument that because Schaidler was hospitalized for mental health reasons, we must reject her testimony regarding these incidents. Mercy does not cite any authority for this proposition. We further

reject Mercy's contention that expert testimony was necessary to support the alleged statutory violations. This argument is premised upon Mercy's suggestion that we disregard Schaidler's testimony due to her mental condition.

¶32 Schaidler sought attorney's fees under § 51.61(7)(c), STATS.,[6] because she prevailed in her attempt to force Mercy to change its illegal policies regarding seclusion and restraint.[7] Mercy never contested that its policies were illegal. Schaidler argued that there was a nexus between her suit and the changing of Mercy's policies. Mercy and McAndrew argued that Schaidler's attorney's fees request did not fall under § 51.61(7)(c).

¶33 The circuit court denied Schaidler attorney's fees because § 51.61(7)(c), STATS., does not provide for attorney's fees unless the patient sought injunctive relief. Here, Schaidler sought a declaratory judgment that Mercy's policies violated § 51.61. The court also ruled that Schaidler was not the prevailing party at this stage of the litigation because Mercy was in the process of changing its policies before Schaidler commenced suit. Therefore, the filing of Schaidler's action did not compel Mercy to change its policies.

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[6] Section 51.61(7)(c), STATS., provides:

> Any patient whose rights are protected under this section may bring an action to enjoin the unlawful violation or denial of rights under this section and may in the same action seek damages as provided in this section. The individual may also recover costs and reasonable actual attorney fees if he or she prevails.

[7] Motions and affidavits submitted on the attorney's fees issue are not included in the record on appeal, although the hearing transcript is included. From that transcript, we conclude that Schaidler sought attorney's fees under § 51.61(7)(c), STATS.

¶34 We agree with the circuit court's construction of § 51.61(7)(c), STATS., on the question of when attorney's fees may be awarded. Due to the absence of the motions and affidavits in the record, we must conclude that the missing material supports the circuit court's findings as to when Mercy began changing its restraint and seclusion policies. *See* ***Schaidler I***, 209 Wis.2d at 469-70, 563 N.W.2d at 559.

¶35 In summary, we affirm the summary judgment dismissing Schaidler's claims against Mercy and McAndrew relating to restraint and seclusion and Schaidler's claims against Mercy relating to forcible administration of medication. We reverse the dismissal of the toileting and taunting claims against Mercy and remand for further proceedings consistent with this opinion. We affirm the circuit court's order denying Schaidler attorney's fees.

¶36 Because we affirm in part and reverse in part as to Mercy, no costs on appeal to either Mercy or Schaidler. However, because we affirm as to McAndrew, McAndrew may seek his RULE 809.25(1), STATS., costs on appeal.

By the Court.—Judgment affirmed; judgment affirmed in part, reversed in part and cause remanded; order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.