COURT OF APPEALS DECISION DATED AND FILED

April 7, 2009

David R. Schanker
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. 2008AP1982

Cir. Ct. No. 2006CV675

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

WAYNE BAHN,

PLAINTIFF-APPELLANT,

V.

CRAIG J. SANTOLIN, M.D., THE MONROE CLINIC HOSPITAL AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANIES AND DEF INSURANCE COMPANIES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed in part; reversed in part, and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wayne Bahn appeals a summary judgment dismissing as time-barred his suit for the wrongful death of his wife against Dr. Craig Santolin and related health providers and insurers. Bahn argues the court erred by applying the medical malpractice statute of limitations to his action. In the alternative, he argues he timely filed within a year of discovering the injury. We disagree with Bahn's first argument. However, we conclude Bahn raised a question of material fact regarding when he knew or should have known of the injury. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 Bahn's wife was Santolin's cardiology patient at the Monroe Clinic. In May 2003, Mrs. Bahn had heart valve replacement surgery by a cardiac surgeon in Rockford, Illinois. After the surgery, the surgeon started Mrs. Bahn on an anticoagulant medication, discharged her, and instructed her to follow up with Santolin to monitor her blood levels. A week after the surgery, Santolin noticed a problem with Mrs. Bahn's blood levels, so he took her off the anticoagulant and started her on a different medication. Soon after, Mrs. Bahn began experiencing nausea, dizziness, and fatigue. An echocardiogram revealed bleeding within the chest cavity. Santolin performed an emergency procedure. He then arranged for Mrs. Bahn to be transported immediately to Rockford, where she was transferred to her cardiac surgeon's care. She died on July 20, 2003 from pneumonia related to aspiration and hypoxic encephalopathy.

¶3 In June 2004, Bahn's nephew contacted an attorney and asked the attorney to seek a medical opinion about the cause of Mrs. Bahn's death. The attorney secured Mrs. Bahn's medical records and mailed them to Dr. James

Rossen in February 2005. In August 2005, Rossen advised Bahn's attorney that, in Rossen's opinion, Santolin was negligent in his postoperative care of Mrs. Bahn, particularly in managing her medication. Rossen opined this negligence was the cause of Mrs. Bahn's death.

¶4 On July 13, 2006, Bahn filed a request for mediation with Santolin pursuant to WIS. STAT. ch. 655.[1] Santolin moved for summary judgment, arguing that Bahn had failed to comply with the three-year statute of limitations for medical malpractice claims. This statute provides:

> Except as provided by subs. (2) and (3), an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:
>
> (a) Three years from the date of the injury, or
>
> (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered ….

WIS. STAT. § 893.55(1m). Bahn countered that his action was timely because his claim was governed by the wrongful death statute of limitations, which runs three years from the death of the individual for whom the action is brought.

¶5 The circuit court held the medical malpractice statute applied and that Bahn therefore had three years from the date of the injury, not the date of death. But it denied summary judgment, concluding there was a genuine issue of material fact about when the injury occurred.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 After obtaining testimony from Rossen that Mrs. Bahn had been injured by Santolin's negligence by June 3, 2003, Santolin again moved for summary judgment. Bahn responded by asserting he did not discover the injury until August 2005, when his attorney received Rossen's opinion that Mrs. Bahn's death was caused by Santolin's negligence. Thus, he argued, he filed his claim within one year of discovering the injury as permitted by the discovery rule articulated in WIS. STAT. § 893.55(1m)(b).

¶7 The circuit court granted summary judgment in favor of Santolin. It concluded the alleged injury occurred no later than June 3, 2003, and that Bahn's claim was filed more than three years after the statute of limitations had run. It also rejected Bahn's discovery argument, concluding the date Bahn discovered the injury was the date of Mrs. Bahn's death.

DISCUSSION

¶8 This is a review of a summary judgment. Summary judgment is appropriate when there are no genuine issues of material fact, and a party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶9 Bahn raises two issues on appeal. First, he argues the circuit court applied the wrong statute of limitations because his claim is actually governed by the wrongful death statute. Second, he contends that even if the medical malpractice statute applies, the court erred by granting summary judgment because he raised a genuine issue of material fact about when he discovered, or should have discovered, the injury.

1. Statute of limitations for wrongful death based on medical malpractice

¶10 Bahn argues there is a split in appellate authority on which statute of limitations applies to wrongful death claims based on medical malpractice. He claims our decision in ***Miller v. Luther***, 170 Wis. 2d 429, 489 N.W.2d 651 (Ct. App. 1992), holds that the wrongful death statute applies, whereas another case indicates to the contrary. *See* ***Paul v. Skemp***, 2001 WI 42, 242 Wis. 2d 507, 625 N.W.2d 860. He argues ***Miller*** correctly pronounces that a wrongful death action may be brought within three years of an individual's death, as long as a decedent had an actionable medical malpractice claim when he or she died.

¶11 There is no split in authority as Bahn proposes. Rather, we clarified in ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, 249 Wis. 2d 142, 638 N.W.2d 355, that the medical malpractice statute of limitations governs actions such as this. In ***Hegarty***, we determined that statutory language evinced the legislature's intent to bring wrongful death actions based on medical malpractice within the scope of the medical malpractice statute. ***Id.***, ¶¶16, 18.

¶12 We concluded this intent was clear because the medical malpractice statute "encompasses 'damages for injury arising from any treatment or operation performed by … a health care provider, *regardless of the theory on which the action was based*.'" ***Id.***, ¶18. We then noted that decisions by our supreme court "clearly stand for the proposition that 'by singling out medical malpractice claims … the legislature intended to set medical malpractice cases involving death apart from other death cases to which the general wrongful death statute applies.'" ***Hegarty***, ¶21 (citing ***Czapinski v. St. Francis Hosp.***, 2000 WI 80, 236 Wis. 2d 316, 613 N.W.2d 120, and ***Rineck v. Johnson***, 155 Wis. 2d 659, 671, 456 N.W.2d 336 (1990) (internal quotation omitted)).

¶13 Further, Bahn's emphasis on ***Miller*** is misplaced. In that case, Miller sued Luther for medical malpractice five years after Luther treated him. Miller died shortly after filing the suit, and his wife filed a wrongful death suit. The court dismissed the medical malpractice suit as time-barred. We concluded the wrongful death suit was barred as well because "an action for wrongful death may be brought only if the decedent's death was caused by a wrongful act and *the act would have entitled the decedent to maintain an action and recover damages if death had not ensued.*" ***Id.*** at 437. Since Miller had no actionable claim when he died, his wife had no basis upon which to bring a wrongful death action.

¶14 Similarly, here, Mrs. Bahn's death did not restart the running of the statute of limitations. A wrongful death suit based on medical malpractice depends on the action giving rise to the medical malpractice claim. Had Mrs. Bahn lived and filed a medical malpractice suit when Bahn filed his, her suit would have been time-barred under WIS. STAT. § 893.55(1m)(a). It follows that Bahn's suit, based on the same action, is barred as well. The circuit court therefore properly applied the law articulated in ***Hegarty*** that wrongful death claims based on medical malpractice are subject to the limitations of WIS. STAT. § 893.55(1m).

2. Discovery

¶15 Bahn argues the circuit court erred by concluding as a matter of law that Bahn discovered his wife's injury no later than the date of her death. He asserts he had no reason to know his wife's death was caused by Santolin's negligence until he received an expert medical opinion, and that he exercised reasonable diligence in discovering the injury. Accordingly, he contends he timely filed his action under WIS. STAT. § 893.55(1m)(b), which extends the

medical malpractice statute of limitations for "[o]ne year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered."

¶16 Whether a plaintiff knew of an injury, and whether a plaintiff exercised reasonable diligence to learn of an injury, are ordinarily questions of fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 161, 465 N.W.2d 812 (1991). Only when the facts and reasonable inferences that can be drawn from these facts are undisputed may courts determine as a matter of law whether a plaintiff knew or, through the exercise of reasonable diligence, should have known of an injury. ***Id.***

¶17 The death of an individual, alone, is not sufficient to trigger the discovery rule as a matter of law. *See* ***Groom v. Professionals Ins. Co.***, 179 Wis. 2d 241, 248, 507 N.W.2d 121 (Ct. App. 1993) (wife's cause of action arising out of husband's death accrued on the date her husband's medical records were sent to her at her request). The discovery rule requires the individual to possess some knowledge of the injury's cause. ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 404, 388 N.W.2d 140 (1986). A plaintiff need not have expert confirmation of his or her injury in hand before the discovery rule is triggered. *See* ***Claypool v. Levin***, 209 Wis. 2d 284, 301, 562 N.W.2d 584 (1997). But an "unsubstantiated lay belief" is not enough either. ***Clark v. Erdmann***, 161 Wis. 2d 428, 448, 468 N.W.2d 18 (1991).

¶18 Here, the circuit court inferred that Bahn knew by the time Mrs. Bahn died that she had been injured, and that "it would have been reasonable for him to have some question about its relationship to the acts of the health care providers." It also inferred that Bahn's nephew's decision to contact an attorney to seek an opinion about the cause of Mrs. Bahn's death indicated Bahn "knew

[Mrs. Bahn] had significant injuries and had questions about the medical care giving rise ultimately to Mrs. Bahn's death."

¶19 These are reasonable inferences. But they are not the only reasonable inferences. One could also reasonably infer that Bahn had no reason to question the relationship of his wife's death to the actions of her health care providers, and that Bahn's nephew contacted an attorney as a protective measure. In light of the disparity of expertise between physicians and lay people, an individual's decision to seek a second opinion regarding any health issue—much less the death of a loved one—can hardly be construed as an indication the person has discovered an injury and its cause as a matter of law.

¶20 We conclude Bahn raised a genuine issue of material fact regarding when he knew, or through the exercise of reasonable diligence, should have known of the injury. The record indicates Bahn did not suspect negligence when his wife died. It also indicates certain steps were taken on Bahn's behalf to investigate whether negligence caused his wife's death. Whether these actions constituted reasonable diligence on the part of Bahn to discover the injury, and whether he discovered, or should have discovered, the injury earlier than he now claims, are questions of fact we leave to the jury.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded for further proceedings.

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