COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2404

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

STEVEN J. SATTLER,

PLAINTIFF,

BECKY A. SATTLER,

PLAINTIFF-APPELLANT,

V.

ELLIOT G. GOLDIN, M.D. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN PATIENTS COMPENSATION FUND AND PARTNERS MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

Before Vergeront, Deininger and Nowakowski,[1] JJ.

VERGERONT, J. Becky A. Sattler appeals a summary judgment granted in favor of Elliot Goldin, M.D., and his insurer, St. Paul Fire and Marine Insurance Company (collectively Dr. Goldin), dismissing her loss of consortium claim. The complaint alleged that her husband, Steven, suffered injuries as the result of surgery performed before their wedding. Becky contends that she is entitled to bring her claim if it did not accrue until after the wedding, and that there are genuine issues of material fact concerning the date of the discovery of her husband's injury and its cause and, thus, the date of accrual of her claim. We conclude that summary judgment was proper because there are no issues of material fact and, as a matter of law, her loss of consortium claim accrued before the date of the marriage, and therefore is not permitted under Wisconsin law. We affirm.

BACKGROUND

Since this case comes to us following a grant of summary judgment, we present the facts in the light most favorable to Becky. Becky and Steven were married on September 25, 1993. Before their marriage, Becky and Steven lived together beginning in March 1991, and became formally engaged in September 1991. On October 26, 1992, while Becky and Steven were engaged and living together, Steven suffered a groin injury at work. He went to see his family doctor, Dr. Gubitz, and Dr. Gubitz referred him to Dr. Goldin. Dr. Goldin examined

[1] Circuit Judge Michael Nowakowski is sitting by special assignment pursuant to the Judicial Exchange Program.

Steven and advised him that he had a bilateral hernia inguinal that would require surgery.

Dr. Goldin performed the surgery on November 11, 1992. Soon after his surgery, Steven began experiencing pain and swelling of the scrotum. The pain and swelling continued, and when he saw Dr. Goldin on November 20, 1992, Steven expressed concerns about the swelling. Dr. Goldin told him that it was natural to be swollen like that and it would last approximately a week to ten days.

Because the swelling persisted, Steven went to see Dr. Gubitz on November 27, 1992. Dr. Gubitz grew concerned and suggested that Steven see Dr. Goldin as soon as possible. After Steven became aware of blood in his semen, Steven called Dr. Gubitz, and he referred him to Dr. Leikness since Steven said that he was uncomfortable with Dr. Goldin.

Steven saw Dr. Leikness for the first time on January 18, 1993. During that visit he expressed concern about blood in his semen. Steven also talked about his difficulties with pain and swelling of the scrotum. Dr. Leikness diagnosed Steven with seminal vesiculitis (inflammation of a seminal vesicle) and recommended antibiotic therapy as a treatment. Steven raised questions about fertility and Dr. Leikness explained to him that once the inflammation was cleared up they would be able to do a semen analysis and see if there were any sperm present in the ejaculation.

On February 23, 1993, Steven saw Dr. Leikness again. The swelling and tenderness in Steven's scrotum improved; however, he continued to have problems with blood in his semen. Dr. Leikness suggested that Steven switch to a different antibiotic and gave him antibiotic samples for twelve-days' use. Steven

saw Dr. Leikness on March 29, 1993, and although he no longer had blood in his semen, he was concerned that his testicles were getting smaller and that the amount of semen that he ejaculated had decreased. He told Dr. Leikness about a split urinary stream and felt that at times when he ejaculates "the ejaculate hang[s] … up in the urethra." Dr. Leikness suggested that Steven undergo a cystoscopic exam to check for a urethral stricture (narrowing in the urethra caused by scar tissue) or meatal stenosis (narrowing of the opening of the urethra). She also suggested that Steven undergo a semen analysis.

On April 2, 1993, Steven underwent a cystoscopic exam during which Dr. Leikness found evidence of anterior urethral stricture. During the exam, Dr. Leikness noticed that Steven's testicles were small, hard and firm; and that they had definitely changed from the previous exam. The consistency of Steven's testicles were significantly different from that which Dr. Leikness had previously noted. Dr. Leikness concluded that the testicles probably had some type of healing process or reaction that resulted in scarring and testicular atrophy. She also concluded that Steven had suffered some significant scarring in both of his spermatic cord structures[2] as well as his testicles, and that may have compromised his fertility. Dr. Leikness discussed this with Steven and discussed a semen analysis. Since he had to recuperate from the cystosopic exam, she suggested that he return in two and one-half weeks for the semen analysis.

At the next visit to Dr. Leikness on April 23, 1993, Steven expressed concerns about the quality of his semen, and they discussed performing the semen analysis within the next couple of weeks. Dr. Leikness allows the patient to make

[2] According to Dr. Leikness, spermatic cord structures include the artery, vein and the vas deferens. The vas deferens transport sperm from the testicle into the urethra.

the decision about when to have the semen analysis done because it is not something that can easily be obtained in the office and it requires some coordination with the lab. According to Dr. Leikness, as of the April 23, 1993 visit, the primary concern was with Steven's fertility.

Becky and Steven got married on September 25, 1993. On October 29, 1993, Steven had a semen analysis at the Berlin Hospital and the result showed an absence of sperm in his semen. At an office visit on November 1, 1993, Dr. Leikness reviewed the result of the semen analysis with Steven. Dr. Leikness told Steven that the volume of his ejaculation was very low and that the report showed that no sperms were seen in his semen. Dr. Leikness subsequently checked Steven's hormone levels and concluded that there was end organ failure—Steven's testicles were unable to produce testosterone. She then contacted Dr. Reginald Bruskewitz at the University of Wisconsin Fertility Clinic to discuss Steven's case. They were both concerned about the change in Steven's libido and his inability to achieve a full erection and thought that testosterone injections would normalize his testosterone level, although Dr. Leikness realized that this would not change Steven's semen analysis.

In January 1994, Dr. Leikness met with both Steven and Becky. At that meeting, she informed them that Steven was sterile and impotent. Subsequently, Steven and Becky filed a medical malpractice action against Dr. Goldin and his insurer St. Paul Fire and Marine Insurance Company. Steven sought relief for his personal injuries and Becky claimed loss of consortium. Relying on ***Denil v. Integrity Mutual Insurance Company,*** 135 Wis.2d 373, 401 N.W.2d 13 (Ct. App.1986), Dr. Goldin moved for summary judgment to dismiss Becky's claim. The trial court granted the motion concluding that it was

undisputed that Becky was unmarried at the time the cause of action accrued to Steven and therefore her claim was not recognized under ***Denil***.

DISCUSSION

We review motions for summary judgment de novo, and employ the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). A party is entitled to summary judgment if the party's pleadings and affidavits show that there is no genuine issue as to any material fact and the party is entitled to a judgment as a matter of law. Section 802.08(2), STATS. After examining the pleadings, we examine the submissions of proof to determine whether the moving party has made a prima facie case for summary judgment under § 802.08(2). ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If the moving party has demonstrated that it is entitled to summary judgment and the opposing party has failed to introduce evidence sufficient to raise a disputed issue of material fact, or undisputed material facts from which reasonable alternative inferences may be drawn, the trial court should grant summary judgment to the moving party. ***Id***.

Becky argues that she has a viable claim for loss of consortium because Steven's sterility and impotency were undiscovered until after they were married. Citing cases from other jurisdictions, Becky argues that the holding in ***Denil*** that loss of consortium claims of unmarried individuals are not compensable under Wisconsin law is inapplicable here because Steven's premarital injuries manifested themselves only after the September 25, 1993 wedding.

Dr. Goldin interprets ***Denil*** as requiring that Becky be married to Steven at the time of his surgery—the act allegedly causing the injury—in order to have a viable loss of consortium claim. Alternatively, he argues that Becky had to

be married to Steven before his cause of action accrued and contends that the undisputed evidence shows that was not the case.

In ***Denil***, the plaintiff and his financee became involved in a motor vehicle accident in which both were injured. ***Denil,*** 135 Wis.2d at 376, 401 N.W.2d at 14. They married two months after the accident. ***Id***. The husband brought an action after the wedding against the other driver and the driver's insurer, seeking damages for his personal injuries and the loss of consortium of his wife. ***Id***. The trial court granted the defendants' motion to dismiss the loss of consortium claim. The court concluded that because the plaintiff was not married when the accident occurred, Wisconsin law and public policy precluded such a claim. ***Id***. at 376-77, 401 N.W.2d at 14. On appeal, the plaintiff asked this court to recognize a cause of action for loss of consortium for those engaged individuals whose prospective spouses are injured and who subsequently marry. We declined to do so on public policy grounds, because the extension of loss of consortium claims to include unmarried individuals would destroy the certainty of who is entitled to prosecute such a claim, and would involve costs beyond those society can afford. ***Id***. at 378-79, 401 N.W.2d at 15.

Becky argues that ***Denil*** did not involve the issue of when the wife's cause of action accrued, and she asserts, that is an issue in this case. In ***Denil***, the couple knew the extent of their injuries before their marriage since they were both injured in the same motor vehicle accident and did not marry until two months after the accident. The date of the accrual of the cause of action for loss of consortium was therefore not an issue. In contrast, Becky argues, Steven's premarital injuries manifested themselves only after they married and her cause of action did not accrue until then. Therefore, Becky asserts, ***Denil*** does not prohibit her claim.

We will assume without deciding that if Becky's cause of action accrued after the marriage, she is not barred by ***Denil*** from pursuing her claim. We therefore turn to the question of when her cause of action accrued.

Becky contends that she was unaware of Steven's impotency and infertility until after their marriage. She further argues that her claim accrued no earlier than November 9, 1993, when Dr. Leikness gave Steven the results of his semen analysis which was conducted in October. Becky acknowledges that Steven suspected fertility problems prior to their marriage but points out that Steven first became aware that there was no sperm in his ejaculate on November 9, 1993, after their wedding. According to Becky, Steven did not discover either the nature of his injuries or the cause of those injuries until November 9, 1993, and therefore his cause of action did not accrue until then.

A claim for loss of consortium is a derivative claim flowing from the injured spouse's cause of action for personal injury. *See* ***Schwartz v. City of Milwaukee***, 54 Wis.2d 286, 293, 195 N.W.2d 480, 484 (1972). In ***Joseph W. v. Catholic Diocese of Madison***, 212 Wis.2d 925, 569 N.W.2d 795 (Ct. App.1997), we considered the accrual date of the parents' derivative and other claims arising from injuries their child suffered as a result of sexual abuse by a priest. The parents did not discover the abuse until their son told them, a number of years later. We held that their claim accrued on the same date on which their child's claim accrued. ***Id.*** at 948, 569 N.W.2d at 803. Following this reasoning, we conclude that Becky's claim accrued on the same date as did Steven's, and we now consider when his claim accrued.

A cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a

present right to enforce it. *See* ***Meracle v. Children's Serv. Soc'y***, 149 Wis.2d 19, 437 N.W.2d 532 (1989); ***Barry v. Minahan***, 127 Wis. 570, 107 N.W. 488 (1906). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future. ***Hennekens v. Hoerl***, 160 Wis.2d 144, 152, 465 N.W.2d 812, 815 (1991).

The discovery rule does not change these basic propositions; it simply defines some of the elements. Under the discovery rule, the cause of action accrues when the plaintiff discovers, or, in the exercise of reasonable diligence should have discovered, that he or she was injured and the cause of that injury. ***Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 340, 565 N.W.2d 94, 105 (1997). In applying this rule, we recognize that plaintiffs have a duty to inquire into the injury that results from tortious activity and that they may not ignore means of information reasonably available to them, but must in good faith apply their attention to those particulars which may be inferred to be within their reach. ***Id.*** at 340-41, 565 N.W.2d at 105. Ordinarily, reasonable diligence is a question of fact for the fact-finder, but, when the facts and reasonable inference that can be drawn from them are undisputed, it is a question of law. ***Id.*** at 341, 565 N.W.2d at 105. Whether an inference is reasonable is a question of law. ***Id.***

We conclude that it is undisputed that Steven discovered, or in the exercise of reasonable diligence should have discovered, that he was injured and the cause of his injury before he was married on September 25, 1993. Before the close of 1992, Steven was aware of certain physical signs that indicated he had suffered some injuries as a result of his surgery—pain and swelling in the scrotum and blood in his semen. Although those symptoms improved with antibiotics, on March 29, 1993, he was aware that his testicles had shrunk in size, he had

decreased ejaculate, and he had a split urinary stream. Steven expressed concern about infertility as early as January 1993, and, after the cystoscopic exam, Dr. Leikness told him on April 2, 1993, that the significant scarring to both his spermatic cord structures and his testicles may have compromised his fertility. Steven knew then that a semen analysis was necessary to test the amount and quality of his sperm and it was his choice when to schedule it, but he did not do so until after the September wedding, on October 29, 1993.

Becky argues that Steven was never unequivocally informed about his condition until January 1994, and that his claim did not accrue based upon his own beliefs, suspicions, or hunches, but only when he received the medical diagnosis from Dr. Leikness after their marriage. We disagree. Diligence does not require expert opinion as to the plaintiff's injury, its cause or the relation between the injury and its cause. ***Doe***, 211 Wis.2d at 340, 565 N.W.2d at 105. A plaintiff has discovered the injury and its cause if the plaintiff has information forming the basis for an objective belief as to the claimed injury and its cause. ***Id***. Steven had this objective basis as early as April 2, 1993, when he learned the results of the cystoscopic exam and knew his fertility may have been affected. Although he may not have known the full extent of his injuries before his marriage, that is not required for the accrual of a cause of action. *See* ***Pritzlaff v. Archdiocese***, 194 Wis.2d 317, 533 N.W.2d 780 (1995). Moreover, the timing of the semen analysis was up to him, and his decision not to have that done until after the marriage does not postpone the date of accrual of his claim.

Because Steven's cause of action accrued prior to his marriage, so did Becky's claim for loss of consortium. Therefore, even if a loss of consortium claim accruing after the marriage (where the act allegedly causing the injury

occurred before the marriage) is not barred by ***Denil***, that is not the case here.[3] The facts we found significant in ***Denil*** exist here: an engaged person is injured, the cause of action accrues before the marriage, the couple marries, and the non-injured spouse seeks to bring a loss of consortium claim. We are bound by ***Denil***, *see* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Accordingly, we conclude the trial court properly dismissed Becky's claim.

By the Court.—Judgment affirmed.

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[3] We emphasize that we do not decide here whether a loss of consortium claim accruing after a marriage, which is the result of an injury that occurred prior to the marriage, is barred by ***Denil***.