COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1177 **Cir. Ct. No. 2013CV608**

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

JOHN DOE 56, JOHN DOE 57, A MINOR AND PARENTS OF JOHN DOES 56 AND 57,

PLAINTIFFS-APPELLANTS,

V.

MAYO CLINIC HEALTH SYSTEM - EAU CLAIRE CLINIC, INC., DAVID A. VAN DE LOO, M.D., PROASSURANCE CASUALTY CO. AND INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. John Doe 56, John Doe 57, and their parents (collectively, the plaintiffs) appeal an order dismissing their medical malpractice

claims against David A. Van de Loo, M.D., and dismissing all of their claims against Mayo Clinic Health System—Eau Claire Clinic, Inc. (Mayo Clinic), ProAssurance Casualty Company, and the Injured Patients and Families Compensation Fund (the Fund). The circuit court concluded the plaintiffs' claims were barred by the applicable statutes of limitations. We agree and affirm.

BACKGROUND

¶2 John Doe 56, John Doe 57, and their parents filed the instant lawsuit against Van de Loo, Mayo Clinic, ProAssurance, and the Fund on October 9, 2013. Because this case is before us on review of the circuit court's decision on a motion to dismiss, the following facts are taken from the plaintiffs' complaint and are accepted as true for purposes of this appeal. *See* ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36.

¶3 John Doe 56 received medical treatment from Van de Loo at Mayo Clinic between 2003 and 2008, when he was ten to fifteen years old. John Doe 57 received medical treatment from Van de Loo at Mayo Clinic between 2003 and 2009, when he was eight to fourteen years old. While providing medical treatment to John Does 56 and 57, Van de Loo touched their genitals.

¶4 In August 2012, Van de Loo was accused of inappropriately touching a different minor male's genitals during a medical examination. As a result, in October 2012, he was criminally charged with one count of sexual assault by an employee of an entity and one count of exposing genitals or pubic area. Van de Loo was ultimately charged with a total of seventeen felony counts based on his treatment of male patients at Mayo Clinic. He denied his conduct was criminal and instead argued it served a medical purpose.

¶5 John Does 56 and 57 "did not discover until recently, nor in the exercise of reasonable diligence should they have discovered, that they had been injured by Van de Loo's conduct." In addition, John Does 56 and 57 "did not discover, nor in the exercise of reasonable diligence should they have discovered, that they were injured or that the cause of their injuries were Defendants [Mayo] Clinic and Van de Loo until recently because of the profound psychological damage that occurred as a result of the Defendants' actions." John Does 56 and 57 "now realize[] that [they have] suffered and will continue to suffer … depression, anxiety, embarrassment, emotional distress, self-esteem issues, and loss of enjoyment of life" as a result of Van de Loo's conduct.

¶6 John Does 56 and 57 each asserted eleven claims against Van de Loo and Mayo Clinic: sexual battery against Van de Loo; vicarious liability for Van de Loo's conduct against Mayo Clinic; medical malpractice against Van de Loo and Mayo Clinic; negligence, negligent hiring, negligent retention, negligent supervision, and negligent failure to warn against Mayo Clinic; and fraud, fraud—intentional nondisclosure, and fraud—negligent misrepresentation against Mayo Clinic. In addition, the parents of John Does 56 and 57 asserted a claim against Van de Loo and Mayo Clinic for loss of society and companionship.

¶7 Mayo Clinic and Van de Loo subsequently moved to dismiss the plaintiffs' claims, arguing they were barred by the applicable statutes of limitations. Following a hearing, the circuit court granted these motions and entered an order dismissing with prejudice all claims against Mayo Clinic, the Fund, and ProAssurance (as its interests related to those of Mayo Clinic) and dismissing with prejudice the medical malpractice claims against Van de Loo and

ProAssurance (as its interests related to those of Van de Loo). This appeal follows.[1]

DISCUSSION

¶8 "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). "Dismissal of a claim is improper if there are any conditions under which the plaintiffs could recover." ***Id.***

¶9 Whether a plaintiff's complaint failed to state a claim is a question of law that we review independently. ***John Doe 1 v. Archdiocese of Milwaukee***, 2007 WI 95, ¶12, 303 Wis. 2d 34, 734 N.W.2d 827. We liberally construe the pleadings and accept as true the facts set forth in the complaint, as well as all

[1] The circuit court did not address the plaintiffs' fraud claims against Mayo Clinic in its oral ruling on the motions to dismiss. In fact, the court specifically stated Mayo Clinic had moved to dismiss "all but the six fraud claims[.]" However, the court's written order dismissed all claims against Mayo Clinic, including the fraud claims.

Nevertheless, the plaintiffs do not raise any argument related to the fraud claims in either their principal appellate brief or their reply briefs. They only develop arguments related to the negligence and medical malpractice claims. Mayo Clinic, in turn, asserts that the fraud claims "are not at issue in this appeal." Because the plaintiffs do not develop any argument related to the fraud claims or assert that the circuit court improperly dismissed them, we do not address them further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for the parties.).

The plaintiffs also fail to develop any argument that the circuit court improperly dismissed their vicarious liability claims against Mayo Clinic. Accordingly, we also decline to address the vicarious liability claims. *See* ***id.***

Finally, it is undisputed that, if the negligence and medical malpractice claims were untimely, the loss of society and companionship claim asserted by the parents of John Does 56 and 57 was also untimely. *See* ***Joseph W. v. Catholic Diocese of Madison***, 212 Wis. 2d 925, 948, 569 N.W.2d 795 (Ct. App. 1997). Consequently, we do not separately address the loss of society and companionship claim.

reasonable inferences from those facts. ***Id.*** However, we are "not required to assume as true legal conclusions pled by the plaintiffs." ***BBB Doe***, 211 Wis. 2d at 331.

¶10 "A threshold question when reviewing a complaint is whether the complaint has been timely filed, because an otherwise sufficient claim will be dismissed if that claim is time barred." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 312, 533 N.W.2d 780 (1995). Here, the circuit court concluded the plaintiffs' claims were time barred by the applicable statutes of limitations. We agree with that conclusion, for the reasons set forth below. We first address the plaintiffs' negligence claims. We then turn to the plaintiffs' medical malpractice claims. Finally, we address and reject the plaintiffs' argument that the circuit court erred by failing to accept as true a factual allegation in their complaint and by improperly drawing an inference in favor of the defendants.

I. Negligence claims

¶11 The plaintiffs' various negligence claims against Mayo Clinic are subject to the three-year statute of limitations in WIS. STAT. § 893.54(1)[2] for "action[s] to recover damages for injuries to the person." In order to determine whether the plaintiffs' negligence claims were timely under this statute, we must first determine when those claims accrued. *See* ***BBB Doe***, 211 Wis. 2d at 333.

¶12 Mayo Clinic argues the plaintiffs were injured by Van de Loo's conduct, at the latest, on the last possible dates the allegedly improper touching

[2] The statutes at issue have not changed since the relevant time period. Accordingly, all references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

could have occurred—December 31, 2008, for John Doe 56 and December 31, 2009, for John Doe 57. Mayo Clinic therefore argues the plaintiffs' respective negligence claims accrued on December 31, 2008, and December 31, 2009. Accordingly, Mayo Clinic asserts the negligence claims were untimely because the plaintiffs' complaint was not filed until October 9, 2013, more than three years after their respective claims accrued.

¶13 Conversely, the plaintiffs argue they did not sustain any injuries when Van de Loo touched their genitals because they did not understand at the time that such contact was improper. Instead, they argue they first sustained injuries in October 2012, when they realized Van de Loo's conduct was improper. As a result, they assert their negligence claims accrued in October 2012. We reject the plaintiffs' argument that their negligence claims did not accrue until October 2012, based on our supreme court's prior decisions in ***Pritzlaff*** and ***BBB Doe***.

¶14 In ***Pritzlaff***, the plaintiff sued her former priest and the Archdiocese of Milwaukee, alleging the priest had coerced her into a sexual relationship twenty-seven years earlier. ***Pritzlaff***, 194 Wis. 2d at 306-08. The plaintiff asserted she suffered severe emotional distress as a result of the relationship, contributing to the break-up of her marriage, separation from her children, and loss of employment. ***Id.*** at 308. She further alleged that, due to the psychological damage caused by the priest's conduct, she had "suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992." ***Id.*** at 309.

¶15 The issue on appeal was whether the discovery rule tolled the three-year statute of limitations in WIS. STAT. § 893.54 for the plaintiffs' claim against

the Archdiocese. ***Pritzlaff***, 194 Wis. 2d at 312. Our supreme court assumed, without deciding, that the discovery rule applied to the claim against the Archdiocese, but the court nevertheless concluded the claim was untimely. ***Id.*** at 312, 315. The court explained that a claim accrues, such that the statute of limitations begins to run, "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." ***Id.*** at 315. "The discovery rule does not change these basic propositions," but it "tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Id.*** Until that time, a plaintiff's claim is unenforceable, either because the plaintiff does not know he or she has been wronged or does not know the identity of the wrongdoer. ***Id.*** at 315-16.

¶16 Applying the discovery rule, the ***Pritzlaff*** court concluded the plaintiff knew the identity of the priest who assaulted her, was aware of the assaults, and therefore "could have alleged a complete cause of action" by the time the assaults ended. ***Id.*** at 316-17. That the plaintiff was unaware of the emotional harm caused by the assaults "only created uncertainty as to the amount of damages and did not toll the period of limitations." ***Id.*** at 317.

¶17 The supreme court subsequently relied on ***Pritzlaff*** in ***BBB Doe***. There, several plaintiffs sued various priests, churches, and the Archdiocese of Milwaukee, alleging they were sexually abused by the defendant priests as minors. ***BBB Doe***, 211 Wis. 2d at 318-19. The plaintiffs claimed the defendant priests negligently misused their positions of authority, and the churches and Archdiocese negligently employed, trained, and supervised the defendant priests. ***Id.*** at 319. The plaintiffs' claims were filed between six and twenty-six years after the alleged

abuse ended. ***Id.*** at 320-21, 323, 327. However, some of the plaintiffs claimed they were "not aware until recently that the sexual assault(s) caused their psychological and emotional injuries." ***Id.*** at 319. Others claimed they had repressed their memories of the assaults and the identities of the abusers until shortly before filing suit. ***Id.*** Consequently, the plaintiffs asserted their claims "accrued not on the date of the assaults, but on the date they discovered their injuries or the date on which, after reasonable diligence, they should have discovered their injuries." ***Id.*** at 333.

¶18 The supreme court rejected the plaintiffs' argument and concluded, as a matter of law, that their claims "accrued at the time of their last assaults[.]" ***Id.*** at 348. The court relied on ***Pritzlaff*** for the proposition that "actionable injury flows immediately from a nonconsensual, intentional sexual touching." ***Id.*** at 343-44.

¶19 The court reasoned that the plaintiffs who did not allege repressed memories "knew the individual priests, knew the acts of sexual assault took place, and knew immediately that the assaults caused them injury." ***Id.*** at 344-45. The court further stated, "In cases where there has been an intentional, non-incestuous assault by one known to the plaintiff, and the plaintiff sustains actual harm at the time of the assault, the causal link [between the assault and the harm] is established as a matter of law." ***Id.*** at 344. The court also explained, "While the plaintiffs may not have known the extent of their injuries at the time of the sexual assaults, in Wisconsin accrual of an action is not dependent upon knowing the full extent of one's injuries." ***Id.*** Thus, the plaintiffs who did not allege repressed memories "discovered, or in the exercise of reasonable diligence, should have discovered all the elements of their causes of action against the individual perpetrators at the time of the alleged assault(s)[.]" ***Id.*** at 345. "As in ***Pritzlaff***,

[these plaintiffs'] causes of action … accrued no later than the last incident of assault during their minority." ***Id.*** The court rejected the plaintiffs' argument that they were incapable of discovering their injuries until adulthood because they were only children when the assaults occurred and because the defendant priests occupied positions of trust and reverence. ***Id.*** at 345-46.

¶20 With respect to the repressed memory plaintiffs, the court held, based on policy considerations, "that a claim of repressed memory of past sexual abuse does not delay the accrual of a cause of action for non-incestuous sexual assault, regardless of the victim's minority and the position of trust occupied by the alleged perpetrator." ***Id.*** at 364. Finally, the court stated it did not need to separately address the plaintiffs' claims against the Archdiocese and the individual churches because those claims accrued at the same time as the underlying claims against the priests and were therefore likewise barred by the statute of limitations. ***Id.*** at 366.

¶21 In a concurrence, Chief Justice Abrahamson explained her view of the scope and breadth of the majority's opinion, stating:

> The majority opinion enunciates a broad rule of law encompassing all children: A plaintiff who while a minor was sexually assaulted by a person in a position of trust (such as a clergyperson) is, as a matter of law, irrebuttably presumed to have discovered the injury and the cause thereof at the moment of the assault, regardless of whether the plaintiff repressed all memory of the assault or the plaintiff did not know and should not have reasonably known of the injury or cause thereof.

Id. at 367 (Abrahamson, C.J., concurring) (footnote omitted). As the plaintiffs correctly observe, a concurrence is not binding authority. *See* ***State v. Setagord***, 211 Wis. 2d 397, 409 n.6, 565 N.W.2d 506 (1997). However, in this instance, we

agree with Mayo Clinic that Chief Justice Abrahamson's concurrence accurately summarized the majority's holding.

¶22 Although ***Pritzlaff*** and ***BBB Doe*** are not directly on point, by logical extension, they are controlling. We therefore conclude the plaintiffs' negligence claims against Mayo Clinic accrued on the last possible dates the allegedly improper touching could have occurred. As in ***BBB Doe***, the plaintiffs here knew at that time that the touching had occurred, and they knew the identity of the perpetrator. Although the plaintiffs allege they were not injured by the touching until they later realized it was improper, as the ***BBB Doe*** court stated, "actionable injury flows immediately from a nonconsensual, intentional sexual touching." ***BBB Doe***, 211 Wis. 2d at 343-44 (citing ***Pritzlaff***, 194 Wis. 2d at 317). That the plaintiffs did not realize the extent of their injuries at the time of the touching does not affect the date when their claims accrued. *See* ***id.*** at 344.

¶23 We find persuasive plaintiffs' argument that ***BBB Doe*** is distinguishable because "[a] pediatrician has a reason to examine an adolescent's genitalia; a priest has no reason to touch an adolescent's genitalia." Thus, unlike the plaintiffs in ***BBB Doe*** and ***Pritzlaff*** who knew they had been assaulted, plaintiffs here allege they did not know they had been wronged at the time of touching. However, relying on ***Pritzlaff***, ***BBB Doe*** made the broad assertion that an actionable injury occurs immediately upon a nonconsensual, intentional sexual touching. ***Id.*** at 343. In other words, as Chief Justice Abrahamson stated, ***BBB Doe*** set forth an irrebuttable presumption that a sexual assault plaintiff who while a minor is sexually assaulted by a person in a position of trust "discovered the

injury and the cause thereof at the moment of the assault[.]"[3] ***Id.*** at 367 (Abrahamson, C.J., concurring). Applying that presumption in this case leads us to conclude the plaintiffs were injured at the time of the alleged touching, and their claims therefore accrued on the last possible dates the touching could have occurred.

¶24 The plaintiffs suggest ***BBB Doe*** is inapplicable because they have not alleged they repressed their memories of the assaults. However, as discussed above, ***BBB Doe***'s holding is not limited to cases involving repressed memory claims.

¶25 The plaintiffs further suggest the fact that they are not seeking damages for any injury prior to October 2012 supports their claim that they were not injured before October 2012. However, they offer no authority for the proposition that they can alter the accrual date of their claims by foregoing any damages sustained before a certain date.

¶26 We therefore conclude the plaintiffs' negligence claims against Mayo Clinic accrued at the time of the allegedly improper touching. As a result, the negligence claims were not timely filed within the applicable three-year statute of limitations, and the circuit court properly dismissed them.

II. Medical malpractice claims

¶27 The plaintiffs' medical malpractice claims against Mayo Clinic and Van de Loo are subject to WIS. STAT. § 893.55(1m), which states:

[3] The plaintiffs do not dispute that Van de Loo qualifies as a person in a position of trust.

> 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, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

Under this statute, a claim accrues either on the date the plaintiff sustained an injury, *see* § 893.55(1m)(a), or on the date the plaintiff discovered or should have discovered an injury, *see* § 893.55(1m)(b). ***Paul v. Skemp***, 2001 WI 42, ¶16, 242 Wis. 2d 507, 625 N.W.2d 860. Here, the plaintiffs do not argue their claims accrued on the date they discovered or should have discovered their injuries. Instead, they once again argue they did not sustain any injuries until October 2012, when they learned of the criminal charges against Van de Loo. They therefore assert their medical malpractice claims, which were filed October 9, 2013, were timely filed within the applicable three-year statute of limitations.

¶28 The circuit court relied on ***Estate of Genrich v. OHIC Insurance Co.***, 2009 WI 67, 318 Wis. 2d 553, 769 N.W.2d 481, to conclude the plaintiffs' medical malpractice claims were untimely. There, Genrich underwent surgery to repair an ulcer on July 23-24, 2003. ***Id.***, ¶3. Following the surgery, he developed symptoms of an infection. ***Id.*** On August 8, 2003, it was determined a sponge had been left inside Genrich's abdominal cavity during the earlier surgery. ***Id.*** A second surgery was performed the same day to remove the sponge, but Genrich's condition did not improve, and he died on August 11, 2003. ***Id.*** On August 9,

2006, Genrich's estate filed medical negligence claims against the physicians and support staff involved in the first surgery. ***Id.***, ¶4.

¶29 On appeal, the estate argued its claims were timely because Genrich did not sustain an injury until August 9, 2003, when his condition became irreversible. ***Id.***, ¶12. In contrast, the defendants argued Genrich sustained an injury on July 24, 2003, when the sponge was left in his abdominal cavity. ***Id.***, ¶15. The supreme court agreed with the defendants. Citing ***Fojut v. Stafl***, 212 Wis. 2d 827, 569 N.W.2d 737 (Ct. App. 1997), the court reasoned that an injury occurs for purposes of WIS. STAT. § 893.55(1m) when the patient suffers a "physical injurious change." ***Genrich***, 318 Wis. 2d 553, ¶¶16-17. The court also cited ***Paul***, 242 Wis. 2d 507, ¶25, for the proposition that an "'actionable injury arises when the [negligent act or omission] causes a greater harm than [that which] existed at the time of the [negligent act or omission].'" ***Genrich***, 318 Wis. 2d 553, ¶16 (alterations in ***Genrich***). Applying these principles, the court reasoned:

> It was the negligence during the first surgery that resulted in an infection-producing sponge being present in [Genrich's] abdomen. Stated otherwise, by leaving the sponge inside of [Genrich], the doctors "cause[d] a greater harm than existed at the time of the [negligent act]." ***Paul***, 242 Wis. 2d 507, ¶25. [Genrich] suffered an injury when the doctors left an infection-producing sponge in his abdominal cavity, and the sponge was not there prior to the doctors' negligent conduct.
>
> Accordingly, the presence of an infection-producing sponge in [Genrich's] abdominal cavity is the type of "physical injurious change" discussed in ***Fojut***, and our conclusion that it constitutes an "injury" is consistent with ***Paul***.

Genrich, 318 Wis. 2d 553, ¶¶19-20.

¶30 Although ***Genrich*** is not directly on point, we conclude it controls the outcome of this case, by logical extension. We further conclude the plaintiffs suffered a "physical injurious change," and were therefore injured, when Van de Loo allegedly improperly touched their genitals. The improper touching is the only *physical* act or harm alleged in the plaintiffs' complaint. The complaint does not allege that any physical injurious change occurred in October 2012, when the plaintiffs learned of the criminal charges against Van de Loo. The only thing that allegedly occurred at that time was an emotional manifestation of the previously completed physical injury.

¶31 The plaintiffs seem to assert that ***Genrich***'s physical injurious change requirement is inapplicable here because their complaint alleges purely emotional injuries. However, ***Genrich*** stated, without reservation, "[T]he determination of a 'physical injurious change' is *the appropriate benchmark* for establishing the date of 'injury' under WIS. STAT. § 893.55(1m)(a)[.]" ***Genrich***, 318 Wis. 2d 553, ¶17 (emphasis added). This broad language suggests the ***Genrich*** court intended to set forth a blanket rule for all medical malpractice cases.

¶32 The plaintiffs also urge us to apply ***Paul*** and ***Fojut***, rather than ***Genrich***. There are two problems with this argument. First, the ***Genrich*** court expressly stated that it was "[a]pplying ***Paul*** and ***Fojut*** to this case," ***Genrich***, 318 Wis. 2d 553, ¶18, and it explained that the three decisions were consistent with one another, ***id.***, ¶¶16-17. Thus, ***Genrich***, ***Paul***, and ***Fojut*** set forth a single rule of law.

¶33 Second, neither ***Paul*** nor ***Fojut*** actually helps the plaintiffs. In ***Paul***, the defendant physicians misdiagnosed an arteriovenous malformation (AVM),

which subsequently ruptured, causing the patient's death. ***Paul***, 242 Wis. 2d 507, ¶¶3-5. The supreme court concluded the patient's injury occurred on the date of the rupture, rather than the date of the misdiagnosis, because "there was no injurious change as a result of [the] misdiagnosis until the AVM ruptured[.]" ***Id.***, ¶¶41, 45. The court explained a misdiagnosis, in and of itself, cannot be an actionable injury. ***Id.***, ¶25. Instead, an actionable injury arises when the misdiagnosis "causes a greater harm than existed at the time of the misdiagnosis." ***Id.***

¶34 In this case, the plaintiffs experienced an injurious change at the time of the allegedly improper touching. The touching caused a harm that did not exist before the touching occurred. It was at that moment a breach of trust occurred, and any claim for humiliation, embarrassment, and other emotional distress arose, regardless of when their full nature and extent were manifested. Accordingly, even under ***Paul***, the plaintiffs' claims accrued at the time of the touching.

¶35 In ***Fojut***, the plaintiff underwent elective tubal ligation surgery in November 1990 to prevent pregnancy, but she subsequently became pregnant in March 1991. ***Fojut***, 212 Wis. 2d at 829. In April 1994, she sued the doctor who performed the surgery. ***Id.*** We concluded the plaintiff's complaint was untimely because she did not suffer any "physical injurious change" until she became pregnant. ***Id.*** at 831. Although the allegedly negligent act occurred on the date of the surgery, the plaintiff did not sustain a "physical injury" on that date. ***Id.*** at 830-31. We further explained it was irrelevant that the plaintiff may have sustained additional injuries after becoming pregnant because "'[a] later injury from the same tortious act does not restart the running of the statute of

limitations.'" ***Id.*** at 832 (quoting ***Segall v. Hurwitz***, 114 Wis. 2d 471, 482, 339 N.W.2d 333 (Ct. App. 1983)).

¶36 As explained above, in this case, the only physical injurious change suffered by the plaintiffs occurred at the time of the allegedly improper touching. It was at that time Van de Loo either met or failed to meet the standard of care applicable to his physically contacting the Does' genitals. And if his actions were outside of that standard, it also was at that time—and only that time—the Does could have sustained a physical injury. The fact that the plaintiffs later became aware of additional mental or emotional injuries did not restart the running of the statute of limitations. *See* ***id.***

¶37 We therefore agree with the circuit court that the plaintiffs' medical malpractice claims accrued at the time of the allegedly improper touching. Accordingly, the claims were not timely filed within the applicable three-year statute of limitations, and the circuit court properly dismissed them.

III. Factual allegations in the complaint

¶38 Finally, the plaintiffs assert the circuit court erred by failing to accept as true the fact that they "did not sustain any injury until October 2012 when [they] first learned that Van de Loo's physical examinations of them were improper." This argument fails for two reasons. First, while a court must accept the factual allegations in a complaint as true for purposes of a motion to dismiss, the plaintiffs' complaint never actually alleged they were not injured until October 2012. Instead, the plaintiffs asserted they "did not discover until recently … that they *had been injured* by Van de Loo's conduct." They also asserted they "did not discover … that they *were injured* or that the cause of their injuries were [Mayo] Clinic and Van de Loo until recently because of the profound psychological

damage that occurred as a result of the Defendants' actions." Thus, the plaintiffs' theory on appeal—that they did not suffer any injury until October 2012—is not supported by the allegations in their complaint.

¶39 Second, when the historic facts are undisputed, the date a medical malpractice plaintiff suffered an injury is a question of law. *See* ***Genrich***, 318 Wis. 2d 553, ¶18 n.6, ¶20 n.7. Here, it is undisputed that Van de Loo's last alleged touching of the Does' genitals occurred no later than December 31, 2008, for John Doe 56 and December 31, 2009, for John Doe 57. It is also undisputed that the plaintiffs learned of the criminal charges against Van de Loo in October 2012. Determining when the plaintiffs were injured, based on these undisputed facts, is a question of law. We need not accept as true legal conclusions pled in a plaintiff's complaint. ***BBB Doe***, 211 Wis. 2d at 331. Consequently, even if the plaintiffs' complaint did allege they were not injured until October 2012, neither the circuit court nor this court would be required to accept that legal conclusion.

¶40 The plaintiffs also argue the circuit court erred by inferring that they must have realized they were harmed at the time Van de Loo touched their genitals. We agree, given the circuit court's standard of review on a motion to dismiss the complaint. However, the circuit court's statement that the plaintiffs must have realized they were harmed was not essential to its holding. The court expressly stated that comment reflected an "additional reason" to dismiss the plaintiffs' claims.

¶41 We independently review a circuit court's decision on a motion to dismiss. ***Doe 1***, 303 Wis. 2d 34, ¶12. Here, without relying on the improper inference drawn by the circuit court, we nevertheless conclude the court properly dismissed the plaintiffs' claims because the claims accrued, as a matter of law, at

the time of the allegedly improper touching. Thus, even though the circuit court improperly drew an inference in favor of the defendants, that fact does not prevent us from affirming its decision to dismiss the plaintiffs' claims.

By the Court.—Order affirmed.

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