COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 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. 98-1619

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

HAROLD J. SHEEHY, JOAN G. SHEEHY AND AMY SHEEHY,

PLAINTIFFS-RESPONDENTS,

V.

FRANZ M. KRALER, M.D., AND HOLY FAMILY MEMORIAL MEDICAL CENTER, INC.,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, WISCONSIN PATIENTS COMPENSATION FUND, WISCONSIN PHYSICIANS SERVICE INS. CORP., DONNA SHALALA, SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES AND PROTECTIVE LIFE INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Reversed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Franz M. Kraler, M.D., and Holy Family Memorial Medical Center, Inc. (collectively Kraler) appeal from an order denying a motion to dismiss the medical malpractice action brought by Harold, Joan and Amy Sheehy.[1] The issue is whether the claim that Kraler misdiagnosed a biopsy is barred by the statute of limitations and repose in § 893.55(1)(b), STATS. We conclude that the action is time barred and reverse the order.

On January 30, 1984, Harold J. Sheehy had a growth removed from his chest at Holy Family Memorial Medical Center. Dr. Kraler examined the biopsy of the growth and diagnosed it as benign. On March 24, 1989, Sheehy learned that the growth on his chest had in fact been a malignant melanoma. The diagnosis resulting from a new biopsy was that there were "two out of nineteen lymph nodes containing metastatic malignant melanoma." On April 3, 1995, Sheehy was diagnosed with malignant melanoma. This action was commenced on March 15, 1996.[2]

Section 893.55(1)(b), STATS., provides that a medical malpractice action may not be brought more than "[o]ne 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." Sheehy's action is barred

[1] On July 30, 1998, this court granted Kraler's petition under RULE 809.50, STATS., for leave to appeal the nonfinal order denying the motion to dismiss. On our own motion, the appeal was accelerated for disposition.

[2] Harold Sheehy died on February 3, 1998, and the Estate of Harold Sheehy was substituted as a party. *See* § 803.10(1), STATS.

by the five-year statute of repose since it was not brought by January 30, 1989. Sheehy contends that the five-year limit in § 893.55(1)(b) is unconstitutional as applied to him because the time for filing the action expired before he even discovered his injury. He relies on the "mandate" of ***Estate of Makos v. Wisconsin Masons Health Care Fund***, 211 Wis.2d 41, 49, 564 N.W.2d 662, 664-65 (1997). However, as Kraler points out, ***Makos*** has no precedential value because no majority supported a single reason for the outcome of that case. *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 334-45 n. 11, 565 N.W.2d 94, 102 (1997). *See also* ***Castellani v. Bailey***, 218 Wis.2d 245, 280, 578 N.W.2d 166, 181 (1998) (Geske, J., concurring). We need not decide what, if any, application ***Makos*** has in this case because we additionally conclude that Sheehy's action was barred because it was not brought within one year of discovery of the injury on March 24, 1989.[3]

In ruling on Kraler's motion to dismiss, the circuit court considered matters outside of the pleadings. Thus, the motion is treated as a motion for summary judgment. *See* § 802.06(3), STATS. Our review on summary judgment applies the same methodology utilized by the circuit court without deference to the circuit court's conclusions. *See* ***Elfers v. St. Paul Fire & Marine Ins. Co.***, 214 Wis.2d 499, 502, 571 N.W.2d 469, 471 (Ct. App. 1997), *petition for review*

[3] We do not address Sheehy's argument which attempts to distinguish between the mandate and the required majority rationale for the purpose of creating binding precedent. It may be that but for Sheehy's discovery of the injury on March 24, 1989, this case would give the Wisconsin Supreme Court an opportunity to make a precedential decision about the constitutional issues Sheehy raises by his reliance on ***Estate of Makos v. Wisconsin Masons Health Care Fund***, 211 Wis.2d 41, 564 N.W.2d 662 (1997). We do not consider the issues independently of ***Makos*** because that would require that we overrule or modify the holdings in ***Miller v. Kretz***, 191 Wis.2d 573, 531 N.W.2d 93 (Ct. App. 1995), and ***Halverson v. Tydrich,*** 156 Wis.2d 202, 456 N.W.2d 852 (Ct. App. 1990). We may not overrule, modify or withdraw language from a published opinion of the court of appeals. *See* ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997).

denied, 216 Wis.2d 613, 579 N.W.2d 45 (1998). Thus, we independently review the record to see if a material fact is in dispute. *See* ***id.*** at 503, 571 N.W.2d at 471.

Sheehy argues that the date of discovery of his injury is a material disputed fact which precludes summary judgment dismissing the action. Although Sheehy acknowledges that he learned of the misdiagnosis in March 1989, he contends that he was not injured at that time because it was not reasonably certain that he would suffer ill consequences from the misdiagnosis.

An injury under a statute of limitations requires a claim capable of enforcement; that exists only when it is reasonably certain that future expenses will occur. *See* ***id.*** at 504-05, 571 N.W.2d at 472. However, "[o]ur law does not permit a claimant who possesses a cause of action to wait until the full effect of the injury has developed before filing a claim." ***Id.*** at 506, 571 N.W.2d at 472.

On March 14, 1989, two biopsies were taken due to an ulcerated, brown-pigmented, horseshoe-shaped lesion around the previous biopsy scar. The pathology report listed the diagnosis as "infiltrating malignant melanoma, nodular stage." On March 20, 1989, Sheehy underwent a surgical procedure described as including a "wide excision of the left pectoral lesion," and "a complete axillary node dissection." The course of treatment revealed that two out of nineteen lymph nodes contained metastatic cancer. Sheehy was not discharged from the hospital until March 24, 1989, following the operative procedure. While Sheehy may have been hopeful that the cancer would not spread further, he had already experienced a consequence of the misdiagnosis—additional medical intervention at the same site Kraler had examined before and the development of metastatic cancer in two of the surrounding nodes. *Cf.* ***id.*** ("If this medical condition will inevitably result

in some disability, the plaintiff has sustained an injury as of the date the failure to diagnose occurred.").

The facts here are vastly different than those in ***Elfers*** where the misdiagnosis remained asymptomatic for many years.[4] Here Sheehy experienced nodule involvement with cancer. Moreover, the potential consequences of the misdiagnosis of cancer, including the lost chance for early treatment, are more readily foreseeable than the misdiagnosis of the dislocated elbow in a young child at issue in ***Elfers***. As a matter of law, Sheehy was injured when the misdiagnosis was discovered on March 24, 1989. The action is barred by Sheehy's failure to commence this suit within one year of that date.

By the Court.—Order reversed.

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

[4] In ***Elfers v. St. Paul Fire & Marine Insurance Co.***, 214 Wis.2d 499, 505, 571 N.W.2d 469, 472 (Ct. App. 1997), *petition for review denied*, 216 Wis.2d 613, 579 N.W.2d 45 (1998), the court held that summary judgment under the statute of limitations was improper because the record failed to establish when it became reasonably certain that Elfers would suffer compensable damages as a result of the misdiagnosis of a dislocated elbow.