COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1810

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

JOSEPH J. PAUL; JUDITH E. PAUL; AND THE ESTATE OF JENNIFER JO PAUL,

PLAINTIFFS-APPELLANTS,

V.

FREDERICK C. SKEMP, JR., M.D.; ABC INSURANCE COMPANY; VIRGINIA A. UPDEGRAFF, M.D.; DEF INSURANCE COMPANY; SKEMP CLINIC, LTD.; AND GEH INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN A. DAMON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 ROGGENSACK, J. Joseph Paul, Judith Paul and the Estate of Jennifer Paul, appeal from the circuit court's dismissal of their medical malpractice claims. The circuit court granted summary judgment to the defendants because it concluded that the Pauls' action was barred by the statute of limitations. We agree because we conclude that the date of the injury and the date of the last act which could constitute negligence both occurred more than three years from the date the Pauls commenced the action. Accordingly, this action is barred by the statute of limitations and we affirm the circuit court's dismissal of the Pauls' claims.

BACKGROUND

¶2 Joseph Paul, Judith Paul, and the Estate of Jennifer Paul (collectively "Pauls") sued Dr. Frederick Skemp, Dr. Virginia Updegraff and the Skemp Clinic (collectively "Skemp") for medical malpractice. The Pauls' complaint alleges that Skemp misdiagnosed the cause of Jennifer's headaches, which misdiagnosis resulted in a fatal hemorrhage in her brain. Jennifer died as a result of cerebellar and occipital hemorrhages on May 23, 1995, which hemorrhages were caused by an arteriovenus malformation in the right cerebellum.

¶3 Jennifer was seen by the doctors at the Skemp Clinic on numerous occasions for reoccurring headaches. These contacts started in 1984 and continued off and on for many years. Jennifer complained about severe headaches during her November 20, 1994 visit with Skemp and only one month later, on December 20, 1994, Jennifer also saw Updegraff and complained about

headaches.[1] No doctor ever connected her headaches to the vascular malformation which caused the fatal hemorrhage.

¶4 This lawsuit was commenced on March 16, 1998. Skemp answered and moved for summary judgment, contending that the Pauls' suit was not timely filed. Skemp argued that the last alleged negligent act occurred on December 20, 1994, when Jennifer complained about her headaches to Updegraff. Skemp contends that the statute of limitations requires a malpractice action to be filed within three years of the December 20, 1994 visit or, alternatively, within one year of discovering the injury.

¶5 In response, the Pauls relied on Judith Paul's deposition in which she testified that Jennifer told her that she discussed her headache problems with Habel during her March 17, 1995 visit. Additionally, Kevin Mason, Jennifer's boyfriend, filed an affidavit stating that: (1) prior to her March 17, 1995 visit with Habel, Jennifer told him that she was going to complain about her headaches at her appointment; and (2) after her appointment, Jennifer told him that the doctor did not tell her what was causing the headaches and did not look into the problem with any depth. The circuit court concluded that Judith's testimony and Mason's affidavit were inadmissible hearsay and barred by the dead man's statute. The court also concluded that the last possible date of injury was December 20, 1994, and the parties stipulated that discovery of Jennifer's injury occurred no later than the date of Jennifer's death, May 23, 1995. Therefore, the court dismissed the lawsuit as untimely filed. The Pauls appeal.

[1] On March 17, 1995, Jennifer was seen at the Skemp Clinic by Dr. Habel, who is not a party to this lawsuit. Habel's medical record for this visit indicates that Jennifer complained of a sore throat and some coughing. There was no mention in the medical record that Jennifer discussed her headaches with Habel.

DISCUSSION

Standard of Review.

¶6 This court applies the same summary judgment methodology as the circuit court. *See* ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. *See* ***id.*** If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. *See* ***id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. *See* ***id.*** at 233, 568 N.W.2d at 34.

¶7 Statutory construction and the application of a statute to undisputed facts are questions of law. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). Admissibility of hearsay evidence is also a question of law which we decide *de novo*. *See* ***State v. Stevens***, 171 Wis. 2d 106, 111-12, 490 N.W.2d 753, 756 (Ct. App. 1992).

Statute of Limitations.

¶8 Under the medical malpractice statute of limitations, WIS. STAT. § 893.55(1) (1993-94),[2] there are two markers for determining when a cause of action for medical malpractice accrues. The statute provides that:

[2] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

> [A]n 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 ….

¶9 The Pauls first contend that their medical malpractice claim was timely because it was filed within three years of Jennifer's death, which they claim as the date of Jennifer's injury. Alternatively, they contend that Judith's testimony and Mason's affidavit about Jennifer's March 17, 1995 visit with Habel create a genuine issue of material fact as to whether a negligent act occurred within three years of the lawsuit's filing.

1. The Date of Injury.

¶10 WISCONSIN STAT. § 893.55(1)(a) requires a litigant to file a medical malpractice claim within three years of the date of injury. The Pauls argue that the date of injury is the date that Skemp's negligence resulted in physical injury to Jennifer, the date of her death: May 23, 1995. Therefore, they assert that their action, which was filed on March 16, 1998, was timely because it was filed within three years of Jennifer's date of injury. We disagree.

¶11 The Pauls rely on ***Fojut v. Stafl***, 212 Wis. 2d 827, 569 N.W.2d 737 (Ct. App. 1997). In ***Fojut***, Helen Fojut brought a medical malpractice action when she became pregnant after undergoing a bilateral tubal ligation. The date of the injury for purposes of the statute of limitations was an issue. The physician argued that the date of the injury was either the date of the surgery or the date of

conception. Fojut argued that the date of the injury was the date that she discovered she was pregnant.

¶12 The parties agreed in ***Fojut*** that the date of the negligent act was the date of the surgery; however, we concluded that the date of the negligent act and the date of the injury could be different. *See* ***id.*** at 830, 569 N.W.2d at 739. We then rejected the physician's claim that the date of the injury was the date of the surgery. We reasoned that on the date of the surgery, there was no "physical injurious change" to Fojut's body. *See* ***id.*** at 831, 569 N.W.2d at 739. Rather, the physical injurious change to her body occurred on the day she became pregnant. Thus, we concluded that the date of conception was the date of injury for purposes of WIS. STAT. § 893.55(1).

¶13 In ***Fojut***, we distinguished ***Olson v. Saint Croix Valley Memorial Hospital, Inc.***, 55 Wis. 2d 628, 201 N.W.2d 63 (1972), *overruled on other grounds*, ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). There, a plaintiff was given a blood transfusion which impaired her ability to have children. After several unsuccessful pregnancies, the plaintiff learned that she had been given blood with an incompatible Rh factor during the transfusion. We held that the date of injury was the date of the transfusion and not the dates of her lost pregnancies because the blood she was negligently given immediately caused injurious changes to Olson. *See* ***Olson***, 55 Wis. 2d at 633, 201 N.W.2d at 65.

¶14 However, neither ***Olson*** nor ***Fojut*** involved identifying the date of injury within the context of a failure to diagnose claim, which is a claim based on an omission, not on an affirmative act which is alleged to be negligent. However, we have previously considered this issue in ***Elfers v. Saint Paul Fire & Marine Insurance Co.***, 214 Wis. 2d 499, 571 N.W.2d 469 (Ct. App. 1997). Elfers

suffered an injury when she fell from her bike in 1985. The physician who treated her failed to diagnose a right elbow dislocation. In 1989, Elfers discovered the dislocation when her arm was x-rayed. At that time, she felt no pain nor had she experienced any motion limitation or other problems. In 1993, Elfers began to suffer symptoms stemming from the dislocation. She filed a malpractice claim in 1996.

¶15 Elfers's physician argued that her claim was untimely; the circuit court agreed and granted summary judgment to the defendants. On appeal, Elfers argued that the date of the injury was the date she began developing symptoms because until that time, it was not reasonably certain that she would suffer adverse consequences from the dislocation. The physician argued that the date of the injury was either in 1985 when the dislocation was not diagnosed, or in 1989 when she discovered that the dislocation had been missed; and that either way, Elfers's action was untimely.

¶16 We reversed the circuit court's grant of summary judgment because we concluded that the record was incomplete as it failed to reveal "when it became *reasonably certain* that [Elfers] would suffer compensable damages as a result of the negligent act." ***Id.*** at 505, 571 N.W.2d at 472 (emphasis in the original). We also explained that:

> This does not mean that we agree with [Elfers's] apparent contention that an asymptomatic dislocated elbow is not an injury. *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.* Our 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. Unfortunately, the record is silent as to whether the dislocation could be benign for an entire lifetime, or whether the dislocation is reasonably certain to result in future disabilities. We therefore reverse and remand for further proceedings.

Id. at 506, 571 N.W.2d at 472 (emphasis added).

¶17 The Pauls assert that up until the day the malformation ruptured, Jennifer was not harmed; and therefore, the date of her injury is the date of her death. However, unlike Elfers, Jennifer's medical condition was not asymptomatic or benign. She continued to have headaches throughout the repetitive missed diagnoses. As the Pauls admit in their brief, the severity of Jennifer's headaches increased over time and the frequency of those headaches increased as well. Therefore, she was continuously disabled as a result of the missed diagnoses of the cause of her headaches and accordingly, her last date of injury was the last day on which a failure to diagnose occurred.[3]

¶18 Additionally, the Pauls' interpretation of the statute has the effect of asking this court to extend the discovery rule to three years. WISCONSIN STAT. § 893.55(1)(b) allows a party to bring a claim within one year from the date the injury was discovered or should have been discovered, as an alternate marker of when a cause of action for medical malpractice occurs under subsection (1)(a). The Pauls discovered the missed diagnoses shortly following Jennifer's death. Therefore, under subsection (1)(b), the Pauls' action would have been timely if brought within one year of Jennifer's death. By arguing that Jennifer's death is the date of injury, the Pauls are essentially converting discovery rule principles of subsection (1)(b) into the three-year limitation set out in § 893.55(1)(a). Such an interpretation is contrary to the plain wording of the statute. Therefore, we

[3] Contrary to the assertion in the dissent, we do not conclude that Jennifer's injury was her headaches. As we have explained, her injury was the misdiagnosis of the cause of her headaches.

conclude that § 893.55(1) required the Pauls to file their action within three years of the missed diagnoses or within one year of Jennifer's death.

2. The Date of the Negligent Act.

¶19 Wisconsin has adopted the continuum of negligent treatment doctrine, which provides that if any portion of the continuing course of negligent medical treatment falls within the period of limitations, the entire cause of action is timely brought. *See* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 539, 327 N.W.2d 55, 56 (1982). The Pauls also claim that it was error for the circuit court to grant summary judgment because their medical malpractice claim was filed within three years of the last negligent omission. The Pauls argue that Judith Paul's testimony and Kevin Mason's affidavit create a genuine issue of material fact about whether the March 17, 1995 visit with Habel was the last negligent contact Jennifer had with the Skemp Clinic. Therefore, they contend the action was timely filed.

¶20 The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *See* ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318, 321 (Ct. App. 1999). "A party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial." ***Id.*** The circuit court determined that both Judith's testimony and Mason's affidavit would be inadmissible at trial based on the dead man's statute and hearsay; and without these items, there was nothing to controvert the factual allegation that Jennifer last complained of headaches to a physician on December 20, 1994. Therefore, it concluded that the action was untimely.

¶21 The Pauls rely on Judith's deposition testimony in which Judith was asked about Jennifer's March 17, 1995 visit with Habel. The transcript of her deposition shows the following questions and answers:

> Q. Okay. And that was in March of 1995. Do you know whether she had any complaint of headache attached with [pharyngitis] at all?
>
> A. Yes.
>
> Q. Okay. And how do you know that?
>
> A. She said.
>
> Q. Okay. She said what?
>
> A. She said she had [a] headache and bad throat and stuff.
>
> …
>
> Q. … Assuming that the medical record for that date, which was dictated by Dr. Habel, assuming that it fails to address anything regarding headache, do you have any information to the contrary that Jennifer said something to Dr. Habel?
>
> A. I don't know.
>
> …
>
> Q. … March 17th, 1995 for the walk-in clinic visit, do you have any information that Jennifer told Dr. Habel about headache problems at the walk-in clinic visit?
>
> A. Yes. She said she did.
>
> Q. When did she say that?
>
> A. Sometime afterwards when we were visiting at home.
>
> …
>
> Q. You know, you said you became aware that she had a complaint of a headache and a sore throat because she came over to your house after the visit of the walk-in clinic?
>
> A. It wasn't directly after. It was like the next day.

¶22 The Pauls also rely on Kevin Mason's affidavit. In it, he avers:

> 5. Prior to going to Skemp Clinic on March 17, 1995, Jenny told me that she was going to complain to the doctor about her headaches again ….
>
> 6. After the appointment on March 17, 1995, Jenny told me that the doctor did not tell her what was causing the headaches. She complained that the doctor did not look into the problem with any depth. The doctor thought that she merely had a cold …. Jenny was upset that the doctors had still not given her an answer for the [sic] what was causing the ongoing headaches.

Kevin's affidavit was somewhat inconsistent with what he had previously testified at his deposition.[4] At the deposition, he stated that he did not remember Jennifer ever seeking treatment for a cold.

> Q. Do you recall Jennifer having any bad colds in the time that you and she were together from November, December of 1994 to May of 1995?
>
> A. I suppose I maybe remember her having a cold. I don't remember anything really bad—
>
> …
>
> Q. Okay. And do you have any recollection whether she had any complaints for which she had to seek medical treatment, such as a sore throat or I guess runny nose, anything like that?
>
> A. When?

[4] In ***Yahnke v. Carson***, No. 99-0056, unpublished slip op. (Wis. Ct. App. Sept. 2, 1999) *review granted* (Jan. 18, 2000), we considered whether a party could create a genuine issue of material fact sufficient to defeat summary judgment with affidavits which conflict with prior deposition testimony. We recognized that the federal courts have adopted a rule that allows a court to disregard the affidavit and grant the motion for summary judgment in such circumstances. However, we concluded that we were not at liberty to adopt the federal rule because the supreme court in ***Morris v. Juneau County***, 219 Wis. 2d 543, 579 N.W.2d 690 (1998), stated that it was the proper forum for determining whether to adopt the rule. Accordingly, we held in ***Yahnke*** that we could not disregard the affidavits. The supreme court accepted certification of ***Yahnke*** but has not yet released its decision. Accordingly, despite the inconsistency, we do not disregard Mason's affidavit.

Q. In the time that you were together.

A. Medical treatment?

Q. Right. Where she had to go in and see a doctor?

A. Not that I remember.

We consider the testimony of Judith Paul and the affidavit of Kevin Mason under both the dead man's statute and hearsay.

a. The dead man's statute.

¶23 WISCONSIN STAT. § 885.16 (1997-98),[5] often referred to as the dead man's statute, provides:

> No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased … person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased … person ….

It is designed, in part, to prevent a party or a person who seeks liability against another party, which liability is derived from the deceased person, from testifying about communications with the deceased person. *See* ***Hunzinger Constr. Co. v. Granite Resources***, 196 Wis. 2d 327, 335, 538 N.W.2d 804, 807 (Ct. App. 1995).

¶24 Wisconsin courts, however, have been cautious about extending the dead man's statute to bar the testimony of those who are not parties to the litigation. For example, in ***Bethesda Church v. Menning***, 72 Wis. 2d 8, 239

[5] All references to the dead man's statute and the hearsay rules are to the 1997-98 version of the Wisconsin Statutes.

N.W.2d 528 (1976), the supreme court considered whether the dead man's statute barred the testimony of a party's husband. The decedent had signed a will leaving all of her assets to Bethesda Church. The decedent's living relatives objected to the will on the grounds of undue influence. Theiler, husband of one of the nieces, was permitted to testify about various conversations he had with the decedent. The Bethesda Church claimed that it was error for the court to allow the testimony because Theiler was barred from testifying by the dead man's statute.

¶25 The supreme court stated "[t]he dead man's statute renders a witness incompetent to testify on transactions or conversations with a deceased only when the witness is a party, or is a person from, through or under whom a party derives his interest …." ***Id.*** at 11-12, 239 N.W.2d at 530. The court concluded that the testimony was not precluded by the dead man's statute because "Theiler was neither a party nor a person from, through or under whom his wife (a party) derived her interest." ***Id.*** at 12, 239 N.W.2d at 530. The court further stated that "'the true test of the disqualifying interest of the witness is whether he will gain or lose by the direct legal operation and effect of the judgment ….'" ***Id.*** (citation omitted).

¶26 Despite the fact that the dead man's statute is often narrowly construed, we know of no cases, and the parties have not called our attention to any, in which a *party* who would gain by the direct effect of the judgment was allowed to testify to a conversation with a deceased. It is true that Wisconsin courts have held that relatives of the claimant do not fall under the dead man's statute because their interests are too remote and contingent. *See, e.g.,* ***Vargo v. Buban***, 68 Wis. 2d 473, 228 N.W.2d 681 (1975). Here, however, Judith Paul is a party who seeks financial remuneration for her daughter's death, and her proffered testimony about a conversation with the deceased goes to the heart of this

litigation. Further, Skemp's liability is completely derived from the deceased. Therefore, we conclude that her testimony is barred by the dead man's statute.

¶27 Mason's affidavit, however, presents different concerns. He is not a party to this litigation. Nor is he a person from whom a party derives his or her interest. Furthermore, he does not stand to gain or lose by the effect of the judgment. His interest would be too remote and contingent to justify its exclusion given our long-standing rule that the dead man's statute should be construed narrowly. Accordingly, we conclude that Mason's affidavit is not barred by the dead man's statute. However, Mason's affidavit is also subject to a hearsay objection.

b. Hearsay.

¶28 Hearsay is an out of court statement offered to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). The Pauls seek to use Mason's statement that Jennifer told him that she talked to Habel about her headaches to prove that she did in fact do so. By definition, Jennifer's statements to Mason are hearsay because the Pauls intend to use them for the truth of the matter asserted.[6]

¶29 "Statements constituting hearsay are admissible only if they fall within a statutory exception to the hearsay rule." ***Roebke v. Newell Co.***, 177 Wis. 2d 624, 637, 503 N.W.2d 295, 299 (Ct. App. 1993). The Pauls argue that the statements made by Jennifer fall into four possible exceptions: (1) recent perception; (2) present sense impression; (3) then existing mental, emotional or

[6] Actually the proffered testimony constitutes double hearsay, as Jennifer's statements to Habel are hearsay and Mason's subsequent repeating of what Jennifer allegedly told Habel is hearsay repeating hearsay. However, we deal with only the most immediate level of hearsay in this opinion.

physical condition; and (4) the catch-all category for testimonies that have circumstantial guarantees of trustworthiness. We conclude that Jennifer's statements do not fall within any of these exceptions.

¶30 The recent perception exception and the present sense impression exception are similar doctrines. The recent perception exception, found in WIS. STAT. § 908.045(2), permits a statement by an unavailable declarant if it involves "[a] statement … which narrates, describes, or explains an event or condition recently perceived by the declarant … and while the declarant's recollection was clear." The present sense impression exception permits hearsay statements if the declarant is "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." WIS. STAT. § 908.03(1). Therefore, in both cases, the declarant must be describing an event or condition. The statements made by Jennifer and averred to by Mason in his affidavit address whether Jennifer told Habel about her headaches. Thus, we must determine whether her statements describe a recently perceived event. We conclude that they do not.

¶31 We considered a similar argument that a person's conversation with another constituted a recently perceived event in ***Stevens***, 171 Wis. 2d at 106, 490 N.W.2d at 753. There, Strzyzewski testified that while she and Stevens were walking to school, Stevens said her stepfather told her that he had stolen some stereo equipment. Strzyzewski then testified that she saw new stereo equipment at the Stevens' house less than a month later. We concluded that the circuit court erred in admitting this testimony because the recent perception exception to hearsay did not apply to "the aural perception of an oral statement privately told to a person." *See* ***id.*** at 119, 490 N.W.2d at 759. We reasoned that corroboration was "the key to reliability" of a statement that falls under this exception, and that

events are subject to corroboration because generally there will be no doubt that an event occurred, whereas statements or conversations are not subject to corroboration in a similarly objective fashion. *See* ***id.*** at 119, 490 N.W.2d at 759-60.

¶32 In ***Tim Torres Enterprises, Inc. v. Linscott***, 142 Wis. 2d 56, 416 N.W.2d 670 (Ct. App. 1987), we again considered the admissibility of a conversation that took place between Torres and a third party. Torres testified that a third party told him that the defendant, Linscott, "was very unhappy" with Torres's actions and that Torres "could expect something to happen." Linscott argued that it was error to admit the statement as a recent perception because the statement primarily concerned Linscott's state of mind. We agreed and stated that "[t]he statement [did] nothing more than reflect Linscott's reaction to the contractual dispute he was having with Torres …." ***Id.*** at 77, 416 N.W.2d at 678. To be admissible as hearsay, however, Torres was required to demonstrate that the statement related to a recently perceived event or condition. We concluded that the statement was inadmissible because the statement did not relate a recently perceived event. *See* ***id.*** at 78, 416 N.W.2d at 678-79.

¶33 Similarly, Jennifer's statement that the physician did not tell her what was causing her headaches does not describe an event or condition. Mason's affidavit seeks to relate a private conversation between Jennifer and Habel to prove that Jennifer told Habel about her headaches. However, neither the recent perception exception nor the present sense impression exception apply to "the aural perception of an oral statement privately told to a person." *See* ***Stevens***, 171 Wis. 2d at 119, 490 N.W.2d at 759. Accordingly, we conclude that Mason's affidavit is not admissible under either exception because it describes a statement, not an event.

¶34 The Pauls also argue that Jennifer's statements to Mason are admissible under the mental, emotional, or physical condition exception. WISCONSIN STAT. § 908.03(3) permits hearsay if it involves "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition …." Without citing to any authority to support the application of this exception, the Pauls claim that Jennifer's statement fits within this exception and therefore, Mason's affidavit is admissible. We disagree.

¶35 Jennifer's state of mind was not at issue in this case. *See, e.g.,* ***State v. Jackson***, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994) (witness's hearsay testimony was admissible under WIS. STAT. § 908.03(3) where victim's state of mind was a key issue in the State's case). Rather, the Pauls seek to use Jennifer's statement to prove that she had a conversation with Habel about her headaches. Therefore, we cannot conclude that the Pauls have met their burden of demonstrating that the proffered testimony fits within § 908.03(3).

¶36 Finally, the Pauls assert that Jennifer's statements are admissible under the residual hearsay exception found in WIS. STAT. § 908.045(6). Section 908.045(6) permits a hearsay statement that is not covered by another exception if that statement has "comparable circumstantial guarantees of trustworthiness." We have previously explained, however, that this exception is not "a 'catch-all' or 'near miss' category that permits the admissibility of otherwise unacceptable hearsay." *See* ***Stevens***, 171 Wis. 2d at 120, 490 N.W.2d at 760. Instead, "[i]t is for the novel or unanticipated category of hearsay" that although not falling under one of the named exceptions, is as reliable as those exceptions. *See* ***id.*** Further, the residual hearsay exception was intended to be used rarely and only under exceptional circumstances. *See* ***id.*** Finally, the key to using the residual exception is the circumstances of trustworthiness that surround the statement.

¶37 We conclude that the hearsay found in Mason's affidavit is not the type of novel or unanticipated category of hearsay that the statute was designed to address. Furthermore, we do not think there are sufficient guarantees of trustworthiness to justify its admittance. In his deposition taken on September 25, 1998, Mason stated that he did not remember Jennifer suffering from a severe cold or ever receiving treatment for a cold. However, on March 31, 1999, after Skemp filed a motion for summary judgment, Kevin signed an affidavit stating that on the day that Jennifer sought treatment for a cold, she told him that she talked to Habel about her headaches. Although these statements are not directly contradictory, they are somewhat inconsistent. Therefore, we conclude there were insufficient guarantees of trustworthiness to warrant admitting Jennifer's alleged statements to Mason.

¶38 Because both Judith's testimony and Mason's affidavit are inadmissible to show that Jennifer spoke with Habel about her headaches, there exists no genuine issue of material fact to combat Skemp's contention that the last day Jennifer sought medical care for headaches was December 20, 1994. Because this action was not commenced until March 16, 1998, we conclude that the Pauls' claims are barred by the statute of limitations.

CONCLUSION

¶39 We conclude that the date of the injury and the date of the last act which could constitute negligence both occurred more than three years from the date the Pauls commenced the action. Accordingly, this action is barred by the statute of limitations and we affirm the circuit court's dismissal of the Pauls' claims.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶40 DYKMAN, P.J. *(dissenting).* If the Skemp Clinic is to be held liable to the estate of Jennifer Paul, the clinic must have breached a duty of care, the breach must have been causal to Paul's injuries and must have resulted in actual loss or damage. *See* ***Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.***, 209 Wis. 2d 457, 474, 563 N.W.2d 554 (Ct. App. 1997). In negligence cases, the term "cause" is used in its popular sense. *See* ***Fischer v. Ganju***, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992). The popular sense of causation has its basis in the idea of responsibility, in contrast to the philosophic sense, which would encompass even the most insignificant event without which the end result would not have occurred. *See* ***Retzlaff v. Soman Home Furnishings***, 260 Wis. 615, 620, 51 N.W.2d 514 (1952). The majority concludes that Paul's injury was her headaches. But the clinic's failure to diagnose Paul's arteriovenus malformation was not the cause of Paul's headaches. The headaches were caused by a physical problem, not by anything the clinic did or did not do. Paul's estate is not suing the clinic for the pain caused by the headaches, it is suing for damages resulting from Paul's death. I conclude that the injury for which the estate sued the clinic is Paul's death, and that the suit was brought within three years of her death. Accordingly, I would reverse the trial court's grant of summary judgment and remand for trial. I therefore respectfully dissent.