COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1333

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

ANDREE GENTRY, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF LAVENA GENTRY, TEDI GENTRY, CHERYL GILLESPIE, CYNTHIA GILLESPIE AND COMPCARE HEALTH SERVICES INSURANCE CORPORATION,

PLAINTIFFS-RESPONDENTS,

V.

SUSAN J. WILSON, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC. AND PATIENTS COMPENSATION FUND,

DEFENDANTS-APPELLANTS,

YONG W. KIM, M.D. AND WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Susan J. Wilson, M.D., Physicians Insurance Company of Wisconsin, Inc., and the Patients Compensation Fund (collectively, "Wilson") appeal from a non-final order denying their motion seeking summary judgment in a medical malpractice claim filed against Dr. Wilson for treatment provided to Lavena Gentry on March 18, 1996.[1] Dr. Wilson claims that the trial court erred when it denied her motion, which alleged that the statute of limitations barred the Gentrys' claim against Dr. Wilson. Because the Gentrys' medical malpractice claim against Dr. Wilson is barred as a matter of law by the statute of limitations, the trial court should have granted Dr. Wilson's motion; therefore, we reverse and remand the matter to the trial court with directions to enter judgment dismissing Dr. Wilson from the lawsuit.

I. BACKGROUND

¶2 On March 18, 1996, Lavena Gentry was brought to the emergency room at St. Mary's Hospital with complaints of a headache and poor responsiveness. A CAT scan was performed. Dr. Yong W. Kim, the radiologist who interpreted the scan, indicated that it was negative, although the report noted that the "lateral ventricles were moderately dilated." Dr. Wilson gave Lavena some medication and discharged her with instructions to follow-up with her regular physician.

[1] We granted Dr. Wilson's petition for leave to appeal from the non-final order on June 26, 2000.

¶3 Lavena returned to the emergency room on March 22, 1996, complaining of a continued headache, altered mental status, and problems with gait and balance. She was admitted into the hospital. Dr. Kim interpreted a second CAT scan as suspicious for progressive acute obstructive hydrocephalus and for a colloid cyst. Brain surgery was performed, but Lavena died on March 25, 1996.

¶4 Suspecting that Dr. Kim's treatment may have contributed to Lavena's death, Lavena's four children filed a request for medical mediation against Dr. Kim on March 16, 1999. Dr. Wilson was not named as a party to the mediation. During the mediation session, the physician panel member advised the participants that Dr. Wilson may have been negligent for failing to act on the radiologist's notation in the CAT scan report that the "lateral ventricles were moderately dilated." On June 9, 1999, the Gentrys filed this lawsuit against Dr. Kim, Dr. Wilson, St. Mary's, and their insurers. The Gentrys alleged that they did not discover the negligence of Dr. Wilson until the mediation session on June 2, 1999.

¶5 Dr. Wilson and St. Mary's moved for summary judgment on statute of limitations grounds. The Gentrys voluntarily dismissed their claims against St. Mary's before the motions for summary judgment were heard. Dr. Wilson refiled her motion seeking summary judgment, and a hearing occurred on April 24, 2000. The trial court denied the motion, ruling that there was an issue of fact as to when the Gentrys could have discovered their injury. The trial court reasoned that because a medical malpractice plaintiff needs expert testimony, and because the Gentrys alleged that no expert told them that Dr. Wilson was negligent until June 2, 1999, diligent discovery was a disputed issue.

¶6 Dr. Wilson filed a petition seeking to appeal from the non-final order denying the motion for summary judgment. We granted the petition.

II. DISCUSSION

¶7 Dr. Wilson contends that the Gentrys did not, as a matter of law, exercise reasonable diligence to discover Lavena's injury; and that, as a result, the statute of limitations bars their action against Dr. Wilson. The Gentrys respond that because no medical expert told them that Lavena was injured by Dr. Wilson until the date of the mediation session, there is a material issue of fact as to whether their discovery was diligent. Based on the case law governing this matter, we conclude that the statute of limitations barred the Gentrys' claim against Dr. Wilson and, therefore, the trial court erred when it denied Dr. Wilson's motion seeking summary judgment. We reverse the summary judgment ruling and remand this matter to the trial court with instructions to enter an order dismissing Dr. Wilson and her insurers from the lawsuit.

¶8 When reviewing a grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08, just as the trial court applies those standards. ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Our review is *de novo*. ***Id.***

¶9 The following facts are undisputed. The date of injury was March 25, 1996, when Lavena died. The three-year statute of limitations found in WIS. STAT. § 893.55(1) ran on March 25, 1999. Section 893.55(1) also permits a claim to be filed within one year from "the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered." ***Id.*** The Gentrys obtained Lavena's medical records from the March 22 admission at St. Mary's and met with an attorney to determine whether a lawsuit could be pursued. The Gentrys received a

medical opinion in February 1999, that Dr. Kim was negligent when he interpreted the March 18, 1996 CAT scan as normal.

¶10 The Gentrys filed a request for medical mediation against Dr. Kim on March 16, 1999. During the scheduled mediation on June 2, 1999, the physician member of the panel advised that Dr. Wilson may have been negligent for not acting on the notation in the CAT scan report that the "lateral ventricles were moderately dilated." The Gentrys were advised that this indicated a serious condition, hydrocephalus, and that Lavena should have been admitted to the hospital. Shortly thereafter, the Gentrys filed a summons and complaint against Dr. Kim, Dr. Wilson and St. Mary's, alleging that they were relying on the "discovery" provision of the medical malpractice statute of limitations.

¶11 We must decide whether the facts surrounding the Gentrys' "discovery" that Dr. Wilson was negligent presents an issue of fact, or whether, as a matter of law, in the exercise of reasonable diligence, Lavena's injury should have been discovered before the expiration of the three-year statute of limitations. Case law is clear on this issue: an expert medical opinion is not required to trigger the running of the statute of limitations. ***Fritz v. McGrath***, 146 Wis. 2d 681, 690, 431 N.W.2d 751 (Ct. App. 1988). All that is required is that the claimant knew or should have known that an injury existed and that it may have been caused by the defendant's conduct. ***Id.***

¶12 Here, the injury was readily apparent. Lavena was treated and released on March 18, 1996. Her symptoms worsened, and she returned to the hospital four days later. Three days after that, she died. The cause and effect relationship was not obscure, hidden or latent. ***Id.*** at 691. Both Dr. Kim and Dr. Wilson provided care to Lavena during the first visit. A person exercising

reasonable diligence would have suspected negligence early on, and would have concluded that either physician, or both, probably caused the injury. The Gentrys knew that Dr. Kim misinterpreted the initial CAT scan, but they also knew that Dr. Wilson was responsible for whether or not Lavena should have been admitted or discharged. Under these circumstances, "discovery" of the injury was not dependent upon an opinion from a medical expert that Dr. Wilson was negligent. *See* ***Awve v. Physicians Ins. Co.***, 181 Wis. 2d 815, 824-25, 512 N.W.2d 216 (Ct. App. 1994) (initial suspicions of negligence trigger an obligation to exercise reasonable diligence).

¶13 Here, the Gentrys' suspicions of negligence were triggered early on. They knew from the second CAT scan that the first CAT scan was erroneously interpreted as normal. They knew that Lavena was treated and discharged from the emergency room by Dr. Wilson. At that point, they had an obligation to exercise reasonable diligence to access information. ***Id.***

¶14 In an analogous case, ***Groom v. Professionals Ins. Co.***, 179 Wis. 2d 241, 507 N.W.2d 121 (Ct. App. 1993), we held that the plaintiff did not exercise reasonable diligence as a matter of law. ***Id.*** at 251. Groom timely filed a medical malpractice case against one of the physicians who treated her husband, but did not file suit against a second physician, who was also involved in the care and treatment. ***Id.*** at 247-48. We held that because the names of both physicians were contained within the medical records, which were sent to Groom within months of her husband's death, and because Groom believed that medical negligence caused her husband's death, the only reasonable inference was that Groom should have discovered the injury long before a medical expert pointed the finger at the second physician. ***Id.*** at 250-51.

¶15 It is undisputed that the Gentrys believed that medical negligence caused the death of their mother, Lavena. They obtained medical records, consulted with an attorney, and obtained a medical review.[2] The discovery of Lavena's injury occurred long before the medical mediation occurred in this case. As a matter of law, we conclude that, in the exercise of reasonable diligence, the Gentrys should have discovered that Dr. Wilson was negligent at or about the same time they discovered that Dr. Kim was negligent. The Gentrys had access to the records, which supported that conclusion. An expert opinion was not required before the statute of limitations began to run. ***Fritz***, 146 Wis. 2d at 690.

¶16 Accordingly, the statute of limitations bars the Gentrys from asserting a claim against Dr. Wilson; therefore, the trial court should grant summary judgment to Dr. Wilson and her insurers and dismiss them from the lawsuit.

By the Court.—Order reversed and cause remanded with directions.

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

[2] There is some suggestion that the Gentrys had a difficult time obtaining the medical records from the March 18, 1996 emergency room visit. That does not alter our conclusion. The Gentrys had the right to access those records, and their belief that Lavena was injured by medical negligence triggered an obligation to investigate further into the matter.