

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP541

Cir. Ct. No. 2006CV352

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ESTATE OF ROBERT V. GENRICH AND KATHY GENRICH,

PLAINTIFFS-APPELLANTS,

BLUE CROSS BLUE SHIELD OF MASSACHUSETTS,

INVOLUNTARY-PLAINTIFF,

v.

**OHIC INSURANCE COMPANY, WISCONSIN INJURED PATIENTS & FAMILY
COMPENSATION FUND, MERITER HOSPITAL, INC., MARGARET BJELDE, R.N.,
SHELLY WHITE, O.R.T., KIMBERLY A. BROWN, O.R.T., DAVID MELNICK,
M.D., BRENDA SATCHIE, M.D., UNIVERSITY OF WISCONSIN HOSPITAL AND
CLINICS AUTHORITY AND DAWN M. SHAW, O.R.T.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Kathy Genrich and the Estate of Robert Genrich (collectively “Genrich”) appeal from an order granting summary judgment dismissal of Genrich’s medical malpractice claims against OHIC Insurance Company, Wisconsin Injured Patients & Families Compensation Fund, Meriter Hospital, Inc., Margaret Bjelde, R.N., Shelly White, O.R.T., Kimberly A. Brown, O.R.T., David Melnick, M.D., Brenda Satchie, M.D., University of Wisconsin Hospital & Clinics Authority and Dawn M. Shaw, O.R.T. Genrich argues that the circuit court erred by dismissing her claims as time-barred. Alternatively, Genrich contends the circuit court erred by not applying equitable estoppel to preclude OHIC and its insureds from asserting a statute of limitations defense. We reject Genrich’s arguments and affirm the judgment.

BACKGROUND

¶2 On July 23, 2003, Kathy’s husband, Robert, underwent an abdominal surgical procedure at Meriter Hospital. A sponge was left inside Robert’s body during the surgery. Shortly thereafter, Robert developed a fever and other signs of infection. Consequently, on August 8, 2003, a second surgery was performed to remove the sponge. After the sponge removal surgery was completed, Robert’s condition deteriorated and he died on August 11, 2003.

¶3 Meriter and its personnel were insured by OHIC Insurance Company. During pre-suit settlement discussions, an OHIC claims adjuster, Rickie Rennie, allegedly told Genrich’s counsel on two occasions that the statute of limitations expired on August 13, 2006. In any event, on August 9, 2006, Genrich brought both survivorship and wrongful death claims arising from allegations of medical negligence. The named defendants moved to dismiss the complaint as time-barred under the three-year statute of limitations period set forth

in WIS. STAT. § 893.55(1m)(a) (2005-06).¹ The circuit court granted summary judgment dismissal and this appeal follows.

DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 In challenging the summary judgment dismissal of her claims as time-barred, Genrich emphasizes that the complaint alleged two distinct causes of action—a wrongful death action and a survival action. Genrich argues that the wrongful death action could not accrue until August 11, 2003, the date of death. Genrich also contends that the survival claim did not accrue until Robert suffered an “irreversible” injury, the date of which Genrich contends is in dispute and, thus, not properly a matter for summary judgment. We are not persuaded.

¶6 Citing *Miller v. Luther*, 170 Wis. 2d 429, 436, 489 N.W.2d 651 (Ct. App. 1992), Genrich contends that a wrongful death claim cannot accrue until the death occurs. *Miller*, however, is distinguishable on its facts. There, Lloyd Miller claimed that his physicians negligently diagnosed and treated his cancer. *Id.* at 434. Miller filed a medical malpractice action more than three years after his

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

claim accrued. *Id.* He died shortly after filing suit and his wife, Elaine, commenced a wrongful death action. *Id.* The circuit court granted Luther's motion for summary judgment on the medical malpractice claim because the statute of limitations had passed, but denied Luther's motion for summary judgment on the wrongful death claim. *Id.* at 434-35. Luther appealed. *Id.* at 435.

¶7 This court focused on the language of the wrongful death statute, WIS. STAT. § 895.03, to hold that Elaine's wrongful death claim was time-barred as well. As the *Miller* court noted, the statute provided "that an action for wrongful death may be brought only if the decedent's death was caused by a wrongful act and the act would have entitled the decedent to maintain an action and recover damages if death had not ensued." *Id.* at 437. The *Miller* court ultimately concluded that Elaine could not maintain a wrongful death claim because Lloyd would not have been able to maintain a cause of action for medical malpractice had he lived. *Id.* at 438-39. In the context of that case, the *Miller* court noted, "a wrongful death action cannot be brought unless the decedent, at the time of his death, was entitled to maintain an action and recover damages." *Id.* at 441. The factual distinctions between *Miller* and the present case notwithstanding, Genrich cites this language to support the proposition that as long as Robert had a claim at the time of his death, Genrich's wrongful death claim accrued on the date of his death. We disagree. If Robert had lived and commenced his action one day after the statute of limitations had expired, his claim would likewise have been time-barred. We do not interpret *Miller* to support Genrich's contention that Robert's death tolled or restarted the time for commencing suit.

¶8 *Estate of Hegarty v. Beauchaine (Hegarty I)*, 2001 WI App 300, ¶21, 249 Wis. 2d 142, 638 N.W.2d 355, clarifies that all claims resulting from medical malpractice, whether they be injury or death claims, are subject to the statute of limitations governing medical malpractice. Under the correct statute of limitations, WIS. STAT. § 893.55(1m)(a), an action must be commenced within three years from the date of the injury. To the extent Genrich argues that Robert’s death was the triggering injury, we are not persuaded. The *Hegarty I* court acknowledged that “there is no logical distinction between injury and death claims arising out of medical malpractice ... [and] [o]nce medical malpractice produces a loss, a remedy exists regardless whether the consequence is injury or death.” *Hegarty I*, 249 Wis. 2d 142, ¶19 (citing *Rineck v. Johnson*, 155 Wis. 2d 659, 671, 456 N.W.2d 336 (1990), *overruled in part by Chang v. State Farm Mut. Auto Ins. Co.*, 182 Wis. 2d 549, 514 N.W.2d 399 (1994)). This language suggests that where, as here, there was an injury before the date of death, the injury, not the death, triggers the statute of limitations time. Moreover, “a later injury from the same tortious act does not restart the running of the statute of limitations.” *Fojut v. Stafl*, 212 Wis. 2d 827, 832, 569 N.W.2d 737 (Ct. App. 1997) (citing *Segall v. Hurwitz*, 114 Wis. 2d 471, 482, 339 N.W.2d 333 (Ct. App. 1983)). We therefore conclude that Robert’s death was not the triggering injury.

¶9 With respect to identifying which “injury” triggered the statute of limitations for Genrich’s claims, the parties dispute whether the injury had to be irreversible and what might constitute the last actionable event in a sequence of events. Because the date of injury is seemingly in dispute, Genrich contends the circuit court erred by dismissing her claims on summary judgment. Under these facts, however, a dispute over the date of injury does not amount to an issue of *material* fact. See *Green Spring Farms*, 136 Wis. 2d at 315. Viewing the facts in

the light most favorable to the non-moving party, the last actionable event occurred on April 8, 2003, when the doctors performed surgery to remove the sponge. We therefore conclude that the circuit court properly dismissed Genrich's claims as time-barred under the statute of limitations governing medical malpractice.

¶10 Alternatively, Genrich contends the circuit court erred by not applying equitable estoppel to preclude OHIC and its insureds from asserting a statute of limitations defense. Whether to apply estoppel to preclude a party from raising a defense is within the circuit court's discretion. *Gonzalez v. Teskey*, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990). We affirm the circuit court's discretionary determinations if it applied the correct law to the record and, through a logical process, reached a result a reasonable judge could reach. *See Rodak v. Rodak*, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989). "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

¶11 Here, Genrich's counsel argues that to his detriment, he reasonably relied on the OHIC claims adjuster's representations regarding the date on which the statute of limitations expired. The claims adjuster, a non-attorney working in Ohio, allegedly told Genrich's counsel on two occasions that the statute of limitations expired on August 13, 2006. August 13, however, does not appear to relate to any relevant event. We conclude it was not reasonable for counsel to rely on the representations of the claims adjuster, especially when the date given by the adjuster did not relate to any possible statute of limitations date. The circuit court,

therefore, did not erroneously exercise its discretion determining that OHIC and its insureds were not equitably estopped from asserting the statute of limitations defense.

By the Court.—Order affirmed.

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

