

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2009

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. 2007AP2964

Cir. Ct. No. 2007CV6201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STEVEN R. SCHMIDT, REPRESENTING STEVEN A. SCHMIDT, JR., DECEASED,

PLAINTIFF-APPELLANT,

V.

**FROEDTERT MEMORIAL LUTHERAN, MONICA ZIEBERT, CAROL A. WOOD,
GAMP HEALTH SERVICES, COMMONWEALTH FUND, AURORA ST. LUKE'S
HOSPITAL AND ABBOTT LABORATORIES,**

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN J. DI MOTTO, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Steven R. Schmidt appeals from the orders of the circuit court that dismissed his claims against Froedtert Memorial Lutheran

Hospital, Inc., Dr. Monica Ziebert, Dr. Carol A. Wood, GAMP (General Assistance Medical Plan) Health Services, The Commonwealth Fund, Aurora St. Luke's Hospital, and Abbott Laboratories.¹ Schmidt argues that the statute limiting medical practice liability, WIS. STAT. ch. 655 (2007-08),² is unconstitutional. Because we conclude that the circuit court properly dismissed this action, we affirm.

¶2 Schmidt brought this action on behalf of his deceased son, alleging that the various defendants had engaged in medical malpractice that led to his son's death. The underlying facts as alleged in the complaint are tragic. Schmidt's adult son, Steven A. Schmidt, died apparently of liver and kidney failure. Schmidt alleges that his son was suffering from a non-threatening, but painful bladder condition, for which he received painkillers. He further alleges that in the days and hours preceding his son's death, both Schmidt and his son attempted to obtain medical treatment, but that his son was told to wait for a scheduled appointment. Schmidt's son died in his home during the early morning hours of the date of the scheduled appointment.

¶3 After the complaint was filed, the various defendants moved to dismiss. Each asserted slightly different grounds. The circuit court held a hearing on the motions. At that hearing, the court explained that the defendants moved to dismiss because Schmidt purported to bring the claims on behalf of his adult son's estate, and in order to do this, Schmidt needed to have been appointed the personal

¹ GAMP Health Services is how Schmidt identified it in the complaint. Its attorney identifies it as GAMP.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

representative of the estate. Because the estate was never probated, and because Schmidt was not appointed the personal representative of the estate, he did not have standing to bring this action. Schmidt stated that he did not know that he needed to start the probate action and be appointed personal representative in order to bring this action. The circuit court acknowledged the tremendous grief Schmidt had suffered, as well as Schmidt's efforts to honor his son's memory by creating a foundation in his name. The court also explained, however, that as a court, it was bound by the law, and the law required that the case be dismissed.

¶4 “Whether a claim for relief exists is a question of law which an appellate court decides independently without deference to the trial court, and by taking facts stated in the complaint as true.” *Dziadosz v. Zirneski*, 177 Wis. 2d 59, 62, 501 N.W.2d 828 (Ct. App. 1993). Froedtert Memorial Lutheran Hospital, Dr. Monica Ziebert, Dr. Carol A. Wood, and Aurora St. Luke's Hospital are all health care providers. The claims that Schmidt alleged against them all involve medical malpractice for the death of his son. Claims for wrongful death from medical malpractice are governed by WIS. STAT. ch. 655. *See id.* at 62-63.

¶5 Under WIS. STAT. § 655.007, a patient or a patient's representative has a direct claim for medical malpractice against a health care provider. In this case, Schmidt brought the action on behalf of his son's estate. Schmidt does not dispute, however, that he was never appointed the personal representative of his estate. Consequently, we agree with the circuit court that he does not have standing under ch. 655 to bring a direct claim for his son's estate against the health care providers.

¶6 Although the complaint purports only to bring a claim on behalf of the estate, because Schmidt is acting *pro se*, we will also address whether he could

bring a derivative claim for loss of society and companionship against the health care providers. The statute allows derivative actions to be brought by “spouse, parent, minor sibling or child.” WIS. STAT. § 655.007. This list is exclusive. *See Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶24, 236 Wis. 2d 316, 613 N.W.2d 120. The word “child” does not include an adult child. *Id.* The statute also does not include a parent of an adult child. We conclude, therefore, that the circuit court properly determined that Schmidt, as the parent of an adult child, did not have a derivative claim against these defendants for medical malpractice.

¶7 The circuit court also dismissed the claims against GAMP, The Commonwealth Fund, and Abbott Laboratories. The circuit court did not specifically address the issues raised by these defendants. In his brief to this court, Schmidt challenges only the constitutionality of WIS. STAT. ch. 655. As noted above, this chapter applies to health care providers. WIS. STAT. § 655.02. Because the remaining defendants are not health care providers as defined under § 655.02, Schmidt has waived any argument that the circuit court erred when it dismissed his claims against them. *See Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue not briefed is deemed waived).

¶8 Even had Schmidt not waived the arguments against the remaining respondents, we would affirm the decision to dismiss on the merits. In its brief, and in its motion to the circuit court, GAMP states that it is a program operated by the Milwaukee County Department of Health and Human Services, and as such is not an entity capable of being sued, and that Schmidt did not comply with the notice of claim statute for bringing an action against it. Construing the complaint broadly to assume that Schmidt intended to sue Milwaukee County, the record is undisputed that Schmidt did not timely file a notice of claim as required by WIS.

STAT. § 893.80(1). Because Schmidt did not comply with this statute, his claim against the County must be dismissed.

¶9 The Commonwealth Fund argues that Schmidt’s claim against it were properly dismissed or, in the alternative, that it is entitled to summary judgment. The Commonwealth Fund states that while the precise basis for Schmidt’s claim against it is difficult to discern from the complaint, it appears to be based on Schmidt’s assumption that The Commonwealth Fund is an insurer. The Commonwealth Fund argues that the undisputed evidence before the circuit court established that it is not an insurer, and does not have any relationship to this case. We agree. Consequently, the circuit court properly dismissed the case against it as well.

¶10 The final defendant is Abbott Laboratories. Abbott argues that it was properly dismissed from the case because Schmidt did not state a cause of action against it. Schmidt alleged that all of the defendants were jointly and severally liable by virtue of their duty to provide healthcare to his son. Specifically as to Abbott, he alleged that it manufactures the drug Vicodin, a painkiller, and that his son died from the “effects of the long term pain medications prescribed to [his] son—mainly Vicodin.” Schmidt has not alleged that Vicodin was defective or unreasonably dangerous, or that Abbott failed to provide adequate warnings about any danger associated with the use of the drug. Schmidt has not alleged any specific cause of action against Abbott, and his claim against it was properly dismissed. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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

