COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 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. 2008AP1549 **Cir. Ct. No. 2007CV1525**

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

ELNA E. BEDUHN,

PLAINTIFF-RESPONDENT,

V.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, MUTUAL OF OMAHA INSURANCE COMPANY AND ABC INSURANCE COMPANY,

DEFENDANTS,

AUTO-OWNERS INSURANCE COMPANY AND DONNA SCHETTL,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

DOUGLAS YEATMAN, M.D., AMY YEATMAN, D.O., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., MERCY MEDICAL CENTER OF OSHKOSH, INC. AND DEF INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed and cause remanded with directions*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 BROWN, C.J. A lady, who was 102 years old at the time of the court hearing on this action, was a passenger in her daughter's vehicle when she was injured due to the alleged negligence of her daughter. On top of that, her doctors were allegedly negligent in treating her injuries, resulting in paralysis. The centigenarian elected to sue only her daughter because Wisconsin law allows the doctors' alleged malpractice to be rolled into the injuries from the auto accident since, without the accident, the malpractice would not have occurred. But the daughter's insurer wanted subrogation from the allegedly negligent doctors and filed a cross-complaint against them and the hospital. The circuit court dismissed the cross-complaint because the insurer did not comply with WIS. STAT. ch. 655 (2007-08),[1] our state's malpractice statute, requiring mediation. We uphold that, but remand on the issue of whether the statute of limitations prevents the insurer from now going the ch. 655 route.

¶2 Elna Beduhn is the plaintiff. She sued her daughter, Donna Schettl, and her daughter's motor vehicle liability insurer, Auto-Owners Insurance Company. As we stated, she did not sue her doctors or the hospital. This is, no doubt, because under long-held Wisconsin law, an original tortfeasor (her daughter, in this case) may also be liable for the total damages suffered by the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

injured person, including the malpractice of a subsequent tortfeasor doctor. ***Selleck v. City of Janesville***, 100 Wis. 157, 163, 75 N.W. 975 (1898). A more contemporary case, ***Butzow v. Wausau Memorial Hospital***, 51 Wis. 2d 281, 285-86, 187 N.W.2d 349 (1971), explained that the original tortfeasor is responsible for a subsequent tortfeasor's negligence where the additional harm was the natural and probable consequence of the original injury.

¶3 Faced with this increased exposure to risk, Auto-Owner's brought its cross-claim as a species of legal subrogation, otherwise known as equitable subrogation, because it obviously felt that the doctors and the hospital would be unjustly enriched if, as part of a jury verdict, it ended up paying a debt that in equity and good conscience the doctors should be responsible to pay. *See* ***Houle v. School Dist. of Ashland***, 2003 WI App 214, ¶8, 267 Wis. 2d 708, 713, 671 N.W.2d 395.

¶4 But Beduhn moved to dismiss the cross-complaint. For good measure, the doctors, Douglas Yeatman, M.D., and Amy Yeatman, D.O., and their insurer, Physicians Insurance Company of Wisconsin, Inc., Mercy Medical Center of Oshkosh, Inc. and DEF Insurance Company all joined together in support of Beduhn's motion. They argued, inter alia, that the cross-complaint alleged medical malpractice and, as such, Auto-Owners had the obligation to use the procedure contained in WIS. STAT. ch. 655. Because Auto-Owners did not, they asserted that the complaint had to be dismissed.

¶5 The trial court, as we said at the outset, agreed that WIS. STAT. ch. 655 applies and dismissed the cross-claim. We also need to explain other background with regard to the secondary issue of whether the statute of limitations

interdicts Auto-Owners back-up plan to now avail itself of the ch. 655 procedure. But we will relate that background when we get to the issue.

WHETHER WIS. STAT. CH. 655 APPLIES

¶6 Auto-Owners claims that it did not have to go the WIS. STAT. ch. 655 route because only patients and patient's representatives need do so. It cites WIS. STAT. § 655.006, which provides in part that "every patient [and] patient's representative … shall be conclusively presumed to have accepted to be bound by this chapter." This argument is simply wrong. In ***Wisconsin Patients Compensation Fund v. Continental Casualty Co.***, 122 Wis. 2d 144, 150, 361 N.W.2d 666 (1985), the Fund made the same argument in trying to maintain a suit in the circuit court rather than using ch. 655. The supreme court acknowledged that the Fund was neither a patient nor a patient's representative, but held that the intent of the legislature was to funnel *all* malpractice allegations into ch. 655 because that was the procedure set up to "protect health care providers and patients from the hazards of the traditional, lengthy tort litigation." ***Wisconsin Patients Comp. Fund***, 122 Wis. 2d at 155 (citation omitted).

¶7 Auto-Owners recognizes the existence of this case, but tries to distinguish it in two ways. First, it argues that while the supreme court did agree that WIS. STAT. § 655.007 confines the chapter to patients and patients' representatives, the court also found that WIS. STAT. § 655.065 (1981-82) demands compliance with the chapter whenever the negligence of the health care provider is in question, thus making the two WIS. STAT. ch. 655 statutes contradictory with each other and rendering the chapter ambiguous. It was in that context that the court adopted the broad view and held that the Fund had to use ch. 655. Auto-Owners asserts that, in this case, there is no such issue regarding the

negligence of the health provider since the action is merely a subrogation action. And it also asserts that the supreme court opinion should be limited on its facts because it had to do with the Fund, which is a creature of ch. 655.

¶8 Auto-Owners arguments leave us scratching our heads. We are at a loss to figure out how its cross-claim is not an action asserting negligence of the treating health care providers here when that is exactly Auto-Owners' claim. Of course, Auto-Owners is claiming malpractice. It would not otherwise have a valid claim for relief. As well, the fact that the Fund was the party in interest in ***Wisconsin Patients Compensation Fund*** is a distinction without a difference. The purpose of WIS. STAT. ch. 655 is to channel all claims alleging malpractice into its midst. It casts that wide a net. Auto-Owners' cross-claim was caught in the net and, therefore, the trial court properly dismissed the cross-claim for failure to adhere to ch. 655.

WHETHER THE STATUTE OF LIMITATIONS PREVENTS AUTO-OWNERS FROM YET USING WIS. STAT. CH. 655

¶9 Auto-Owners contends that if it is a WIS. STAT. ch. 655 claimant and is required to submit to mediation pursuant to WIS. STAT. § 655.43, it may still submit the matter to mediation before a lawsuit. We take Auto-Owners' argument to be that the lawsuit, along with the cross-claim, should be kept in abeyance while Auto-Owners submits this to mediation and then, if mediation does not resolve the claim, its cross-claim has renewed vitality and when the lawsuit is finally tried by the jury, the cross-claim can be tried with it.

¶10 The doctors, the hospital, their insurers and Beduhn all say "no." On appeal, they submit that Auto-Owners is in this lawsuit by reason of a subrogation theory; that the subrogated party's statute of limitations is measured by the same

statute of limitations that the plaintiff has; that the auto accident occurred on October 19, 2004; that the statute of limitations on actions arising out of such accident is three years; that the statute of limitations ran on October 19, 2007; and that the cross-claim was filed too late—January 25, 2008. They therefore contend that the trial court correctly dismissed the cross-claim with prejudice.

¶11 We wish the issue were that simple. But the record is muddy and that which appears to be simple ends up being doubly complicated. First, while the written order of the trial court tells the world that the cross-claim was dismissed with prejudice,[2] the oral pronouncement by the court tells a somewhat different story. The oral pronouncement states that the court was dismissing Auto-Owners' cross-claim, *but* "[w]ith the understanding that the Auto-Owners Insurance is not left out in the wind. If after there is some decision made one way or another in respect to damages, they could institute, if necessary, their own independent action against the Third-Party Defendants." So, we must first determine which decision controls.

¶12 When the judge's oral and written decisions conflict, the intent of the trial judge governs which decision controls. *See* ***State v. Lipke***, 186 Wis. 2d 358, 364-65, 521 N.W.2d 444 (Ct. App. 1994). If an unambiguous oral pronouncement clearly contradicts a written judgment, the oral pronouncement controls. *See* ***State v. Perry***, 136 Wis. 2d 92, 113-15, 401 N.W.2d 748 (1987). These principles apply in both civil and criminal cases. *See* ***Jackson v. Gray***, 212

[2] The written order states that Auto Owners' "third-party complaint is dismissed, on the merits, with prejudice, and without costs to any party."

Wis. 2d 436, 444, 569 N.W.2d 467 (Ct. App. 1997) (applying the principles used in ***Lipke*** to a civil case).[3]

¶13 We conclude that the oral pronouncement and written judgment clearly conflict. We also conclude that they are both unambiguous. The intent of the oral pronouncement was to dismiss Auto-Owners' third-party claim *without* prejudice. Whereas, the written decision dismissed it *with* prejudice.

¶14 We note that the written decision was drafted by one of the party's attorneys. Judges have a superior practical knowledge of the meaning of their decision. *See* ***Cashin v. Cashin***, 2004 WI App 92, ¶12, 273 Wis. 2d 754, 681 N.W.2d 255. While the court did sign the written judgment as its own, the record supports the conclusion of the oral pronouncement that the court intended to dismiss Auto-Owners' cross-claim without prejudice, so that Auto-Owners could renew its claim once it paid damages and showed compliance with WIS. STAT. ch. 655. Therefore, we conclude that the court dismissed Auto-Owners' cross-claim without prejudice.

¶15 Second, the parties raise and discuss statute of limitations arguments on appeal, but the circuit court did not address the issue. Indeed, it appears from the hearing transcript that the circuit court assumed the statute of limitations had

[3] We note that the ***Cashin v. Cashin***, 2004 WI App 92, 273 Wis. 2d 754, 681 N.W.2d 255; ***Washington v. Washington***, 2000 WI 47, 234 Wis. 2d 689, 611 N.W.2d 261; and ***Schultz v. Schultz***, 194 Wis. 2d 799, 535 N.W.2d 116 (Ct. App. 1995), decisions provide an alternate analysis for courts to follow when determining whether the oral or written decision controls. However, we conclude that their reasoning does not affect the application in this case of the principle that the oral pronouncement controls when the oral and written decisions are both unambiguous and contradictory.

not yet run and that Auto-Owners' would be able to renew their claim at a later date.

¶16 Wisconsin courts have repeatedly held that an insurer's right of subrogation, including the statute of limitations, is measured by the insured's ability to recover. ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶6, 246 Wis. 2d 385, 630 N.W.2d 772. This is because the right of subrogation, and therefore indemnity, is derivative of the original plaintiff's right to recover from the tortfeasor. ***Id.***, ¶¶6, 17. As our supreme court stated in ***General Accident Insurance Co. v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 109, 549 N.W.2d 429 (1996), "[T]he statue of limitations for subrogation claims is the statute of limitations on the underlying tort, because the running of that statute of limitations extinguishes the rights of the original plaintiff."

¶17 Here, Beduhn's (had she chosen to do so), and thus Auto-Owners', right to recover from the Yeatmans and Mercy is grounded in medical malpractice. Therefore, it would appear that the statute of limitations for medical malpractice is what must be applied, not the statute of limitations for a personal injury action. WISCONSIN STAT. § 893.55(1m)(a)-(b) provides the statute of limitations for medical malpractice actions. The time limit is the later of (1) three years from the date of injury or (2) one year from the date of discovery (or the date that a reasonable person would have discovered the injury), but no more than five years from the act. ***Id.***

¶18 But the parties never really got to this step. Thus, we do not know the correct date from which to measure because the record below is undeveloped on this issue. The parties did not brief the application of the statute of limitations to the circuit court, and the court did not determine the correct date. Our search of

the record also provided little guidance on when the pertinent events occurred. Therefore, we must remand to the trial court any and all issues related to the statute of limitations. On remand, the parties should brief this and the surrounding issues to the court, paying particular attention to the issues raised in the ***Schwittay*** and ***General Accident*** cases.[4] The trial court must then address and determine the effect of the statute of limitations on Auto-Owners' cross-claim.

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

Not recommended for publication in the official reports.

[4] In ***Schwittay v. Sheboygan Falls Mutual Insurance Co.***, 2001 WI App 140, ¶14, 246 Wis. 2d 385, 630 N.W.2d 772, the insurer claimed that plaintiff's eleventh-hour pleadings prevented it from mounting a subrogation action due to the statute of limitations. It cited article I, section 9 of the Wisconsin Constitution: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character…." ***Schwittay***, 246 Wis. 2d 385, ¶14. The supreme court nixed the argument, not on substantive grounds, but because the insurer had fifty days to mount its claim after being served, and thus could have come within the statute of limitations had it been more observant. ***Id.***, ¶15. Here, Auto-Owners asserts that Beduhn's complaint was served on Auto-Owners at virtually the last moment, giving it only approximately three to eight days to raise its cross-claim against the health providers. Thus, the facts here may be very different than those in ***Schwittay***. We leave it up to the parties on remand to debate the issue. But we cannot leave this opinion without stating, albeit in dicta, that defendants who have a viable third-party action should not be at the mercy of a plaintiff who files so late that the statute of limitations looms. This should not be a game. The parties' significant interests are all at stake, and so is the public policy goal of properly putting the onus of financial exposure on the appropriate party. We leave it to the trial court to ferret the statute of limitations issues on remand.