COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1137 **Cir. Ct. No. 99-CV-656**

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

ROBERT J. MCELWAIN AND COLLEEN L. MCELWAIN,

PLAINTIFFS-APPELLANTS,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, MIDELFORT CLINIC, LTD., LUTHER HOSPITAL AND M. TERRY MCENANY, M.D.,

DEFENDANTS-RESPONDENTS,

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Deininger, J.

¶1 PER CURIAM. Robert and Colleen McElwain appeal a summary judgment dismissing their medical malpractice action against M. Terry McEnany, M.D.; Midelfort Clinic, Ltd.; Luther Hospital and Physicians Insurance Company of Wisconsin.[1] The trial court granted summary judgment because it found as a matter of law that the McElwains did or should have discovered their medical malpractice claims against McEnany and the Hospital when they read a July 1998 article in the Eau Claire Leader Telegram.

¶2 We conclude that whether the McElwains knew or should have known to pursue a medical malpractice action against McEnany and the Hospital after reading the July article is a question of fact for the jury to decide. The article was sufficiently ambiguous that the trial court could not properly conclude as a matter of law that the July article triggered the discovery rule. Because material facts remain in dispute, summary judgment was inappropriate. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 On August 26, 1994, McEnany performed cardiac bypass surgery on Robert McElwain at Luther Hospital. McElwain developed complications after surgery that required him to remain hospitalized until October 12, 1994.

[1] Two respondents' briefs were filed in this case. One was on behalf of M. Terry McEnany, M.D. and Physicians Insurance Company of Wisconsin (McEnany). The other was filed on behalf of Luther Hospital; Midelfort Clinic, Ltd.; Mayo Health System and Physicians Insurance Company of Wisconsin (the Hospital). Their arguments are largely the same, but we note where they differ. Wisconsin Patients Compensation Fund also was a defendant in the circuit court but did not participate in this appeal and has been ordered dismissed from the appeal by the parties' stipulation.

McElwain continued to receive treatment for complications from the surgery even after his release.

¶4 In July 1998, the McElwains saw an article regarding McEnany's departure from Luther Hospital and Midelfort Clinic. The article provided information from named and unnamed sources and both praised and criticized McEnany.

¶5 The Leader Telegram published two follow-up articles in February 1999, which contained more information on McEnany's medical history in California. The final article provided the public with a name and telephone number to call for questions regarding McEnany and the Hospital.

¶6 On November 24, 1999, the McElwains filed a complaint against McEnany and the Hospital alleging negligent care and treatment, lack of informed consent and negligent credentialing. In 2001, the trial court entered summary judgment in favor of McEnany and the Hospital. It ruled that, as a matter of law, under the discovery rule set forth in WIS. STAT. § 893.55(1)(b),[2] a reasonable

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. WISCONSIN STAT. § 893.55 provides in relevant part:

> (1) Except as provided by subs. (2) and (3), an 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, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

person would have discovered their injury when they read the July article. It thus held that the one-year statute of limitations began to run when the McElwains read the article in July 1998 and thus barred their November 1999 complaint. The McElwains now appeal.

SUMMARY JUDGMENT

¶7 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. "Any reasonable doubt as to the existence of a genuine issue of material fact is resolved against the party moving for summary judgment." ***Goff v. Seldera***, 202 Wis. 2d 600, 609, 550 N.W.2d 144 (Ct. App. 1996).

DISCUSSION

¶8 The McElwains contend that the trial court erred when it concluded as a matter of law that discovery occurred when the McElwains saw the July article. McEnany and the Hospital argue that summary judgment was warranted because a reasonable person would have suspected their injury and its cause after reading the article. We conclude that the July article is sufficiently ambiguous so that its impact on a reasonable person is a question of fact for a jury and cannot be found as a matter of law. Accordingly, we reverse the judgment and remand with directions.

¶9 WISCONSIN STAT. § 893.55(1)(b), the discovery rule, permits an extension of the medical malpractice statute of limitations. Under WIS. STAT.

§ 893.55(1)(b), a plaintiff has one year to commence an action from the time that the plaintiff discovered, or in the exercise of reasonable diligence, should have discovered, "not only the fact of injury but also that the injury was probably caused by the defendant's conduct …." ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986). Whether a plaintiff exercised reasonable diligence to discover the cause of injury is ordinarily a fact issue for the jury to resolve. ***Goff***, 202 Wis. 2d at 612. At issue, then, is when the McElwains knew information that would give a reasonable person a basis for an objective belief of injury and cause.

¶10 McEnany and the Hospital contend that the material facts here are undisputed and that only one reasonable inference can be drawn from the July article. As a whole, however, the July article is vague and ambiguous. Unnamed sources and former employees offered conclusions that questioned McEnany's background and the quality of his work while named sources praised McEnany's career with the Hospital. The former employees anonymously shared general conclusions about an arrogant, temperamental doctor. In contrast, two identified

doctors offered positive assessments of McEnany's performance and conceded that any problems were not one person's sole responsibility.[3]

¶11 In fact, it seems the article is balanced more toward lauding McEnany's professional skills and commitment to excellence. The negative information is brief, vague, disputed and identifies medical problems that are not uniformly attributable to McEnany.[4] In contrast, the article described McEnany's education and revealed that he was licensed to practice medicine in six states and served as chief of cardiovascular surgery at Kaiser Foundation Hospital in San Francisco before coming to the Hospital.

¶12 McEnany and the Hospital argue that the objective test for reasonable diligence is satisfied because of what they claim the McElwains

[3] The July article alternates between criticism of and praise for McEnany throughout. The president and chief executive officer of the Hospital "credited McEnany with doing a superb job of starting the program …." Anonymous former employees, however, "said the formal reason for the ouster was related to McEnany's background." After a comparative discussion of heart surgery death rates, another heart surgeon at the Hospital said, "Dr. McEnany is a very experienced heart surgeon, and he behaved like that." The anonymous former employees further mentioned "McEnany's explosive temper—at times reaching the level of throwing instruments around the operating room—and verbally abusive behavior toward co-workers …." Judy Hein, a registered nurse at the Hospital, said she wished her father had had his heart surgery at the Hospital rather than in another city because she would not be afraid to send a relative to the Hospital. One former employee, however, "questioned why it took administrators so long to take action related to McEnany," given his high infection rate. The article then described the case of one patient who developed an infection after heart surgery. The article concluded with a reminder from a heart surgeon at the Hospital that death and other medical complications are a part of heart surgery, a reality in a complex field.

[4] The article describes the case of Raymond Hilson, on whom McEnany performed a bypass operation in 1994. Hilson suffered a severe post-surgical infection that left him hospitalized for over five weeks. According to Hilson, a Luther/Midelfort official visited him at home and offered him a settlement for an undisclosed amount before he even filed a malpractice claim. Hilson's story, however, was followed by the conclusion of another heart surgeon that problems occur in every heart surgery practice. Moreover, in his reply brief, McElwain asserts that there is no evidence in the record that he required hospitalization or medical treatment for post-surgical infection.

subjectively knew after reading the July article.[5] This contention merely recasts the respondents' arguments under the reasonable person standard. *See* WIS. STAT. § 893.55(1)(b). The McElwains' beliefs after reading the article here are not material because they denied discovering the injury upon reading the article. Rather, a jury must answer what a reasonable person would know or should know after reading the article.

¶13 Further, McEnany and the Hospital misconstrue the McElwains' answer to an interrogatory. The McElwains said that, "It was not enough to concern us that Luther/Midelfort and Dr. McEnany had been negligent in their provision of information and care." McEnany and the Hospital interpret this as an admission of concern about the care McElwain received. This construction is, again, immaterial to an objective test. Moreover, McElwain and the Hospital plainly misconstrue the interrogatory answer. The McElwains were responding that the article did not say enough to cause them concern about McEnany's background and care.

¶14 Summary judgment is appropriate only where there are no issues of material fact. WIS. STAT. § 802.08. Here, whether the McElwains discovered or in the exercise of reasonable diligence should have discovered their claims against McEnany and the Hospital is a question of fact that should be determined by a jury. The July article creates competing reasonable inferences. Therefore,

[5] The briefs on behalf of McEnany and the Hospital extensively argue the merits of the facts presented in the July article. The necessity of these arguments to defend the trial court judgment evidences the need for a jury to determine as a question of fact the effect of the article on a reasonable person.

whether the McElwains exercised reasonable diligence after reading the article is a question of fact.[6]

¶15 We conclude that the trial court could not determine from the article's equivocal presentation of McEnany's background that, as a matter of law, the McElwains should have known they had a medical malpractice claim against McEnany when they read the July article. That determination was a question of fact that should not have been taken out of the realm of a fact question for a jury.

By the Court.—Judgment reversed and cause remanded.

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

[6] The parties' intense appellate debate over what inferences reasonable people would draw from the facts in the article supports the conclusion that the article did not create a suspicion of injury and cause so strong as to warrant a decision as a matter of law. This factual debate is more appropriate before a jury that can determine the question of fact and decide whether a reasonable person would glean information from the July article to give them a basis for an objective belief of injury and cause.