

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2001

Cornelia G. Clark
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. 01-1551-FT

Cir. Ct. No. 99 CV 685

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CAROL A. BOLEY AND RICHARD BOLEY,

PLAINTIFFS-APPELLANTS,

V.

**THOMAS V. RANKIN, M.D., WISCONSIN HEALTH CARE
LIABILITY INSURANCE PLAN, SACRED HEART HOSPITAL
OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF
ST. FRANCIS, OHIC INSURANCE COMPANY AND
WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire
County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶1 PER CURIAM. Carol Boley appeals a summary judgment dismissing her medical malpractice claim.¹ Boley argues that the circuit court erred as a matter of law by finding that her claim was barred by the statute of limitations. We disagree and affirm.

BACKGROUND

¶2 Boley had back surgery performed by Dr. Thomas Rankin on December 8, 1995. After surgery, Boley continued to have back pain and experienced urinary incontinence and constipation. Sometime in 1996 or 1997, Boley's regular physician, Dr. Nicola McLean, told her that Rankin had failed to repair two of her disks.

¶3 In June of 1999, Boley claimed she read a newspaper article that led her to question Rankin's competence. She then contacted an attorney. On September 13, 1999, she filed a request for mediation pursuant to WIS. STAT. § 655.44. On December 6, 1999, she filed a medical malpractice claim against Rankin.

¶4 Both parties moved for summary judgment on the statute of limitations issue. The circuit court granted summary judgment in Rankin's favor after determining that as a matter of law, a reasonable person would have discovered the injury during Boley's visit to McLean in 1996 or 1997. The court held that the one-year statute of limitations in WIS. STAT. § 893.55(1)(b) had expired. This appeal followed.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. (1999-2000).

STANDARD OF REVIEW

¶5 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). Where both parties move for summary judgment, the case is put in a posture where the parties waive their right to a full trial of the facts and permit the circuit court to decide the legal issue. *Duhame v. Duhame*, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989).

DISCUSSION

¶6 WISCONSIN STAT. § 893.55(1)(b) provides that a malpractice claim must be filed within one year “from the date the injury was discovered or in the exercise of reasonable diligence should have been discovered”

¶7 Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief of her injury and its cause. *Clark v. Erdmann*, 161 Wis. 2d 428, 448, 468 N.W.2d 18 (1991). In other words, “discovery occurs when a potential plaintiff has information that would give a reasonable person notice of her injury and its cause. ... This standard also does not require that the potential plaintiff know with certainty the cause of her injury.” *Claypool v. Levin*, 209 Wis. 2d 284, 300, 562 N.W.2d 584 (1997). Reasonable diligence “means such diligence as the great majority of persons would use in the same or similar circumstances.” *Spitler v. Dean*, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989).

¶8 Boley had information that would give a reasonable person notice of her injury and its cause during her visit to McLean sometime in 1996 or 1997.

After the back surgery, the nature of Boley's incontinence problem had changed for the worse. There was also a new bowel problem and ongoing back pain. McLean then told her that she had additional bulging disks that were not repaired in the surgery by Rankin. McLean also told her that this was the reason for her back pain.

¶9 However, Boley claims she did not discover her injury until June 1999 when she reviewed a newspaper article about Rankin. She then contacted an attorney, who reviewed her records, consulted an expert and discussed the injury with the expert. However, all that was required was that Boley knew or should have known that the injury existed and that it may have been caused by the surgery Rankin performed. *See Erdmann*, 161 Wis. 2d at 446. A reasonable person would have acquired this knowledge after Boley's visit with McLean.

¶10 Last, Boley argues that she did not subjectively believe that McLean was being critical of Rankin during her visit. Nevertheless, the statute of limitations is an objective inquiry. *Id.* at 448. Once the potential plaintiff has information that would give a reasonable person notice of his or her injury and its cause, she must use reasonable diligence and act upon that information. *See WIS. STAT. § 893.55(1)(b).*

¶11 Boley was experiencing new and worsening symptoms and was told that she had a medical problem. McLean told her that the medical problem was the result of an omission by Rankin. We conclude that the circuit court did not err by determining that as a matter of law, had Boley exercised reasonable diligence, she would have discovered her alleged injury during her visit to McLean. As a result, the statute of limitations under WIS. STAT. § 893.55(1)(b) has expired and bars Boley's claim.

By the Court.—Judgment affirmed.

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

