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**SUPREME COURT OF WISCONSIN**  
**Appeal No. 2020AP876**

Kelly Brellenthin and Joseph Brellenthin,

Plaintiffs-Appellants,

v.

Dr. Gregory Goblirsch,  
Western Wisconsin Medical Associates, S.C.,  
d/b/a Vibrant Health Family Clinics,  
Allina Health Services, and  
MMIC Group,

Defendants-Respondents,

and

BlueCross BlueShield of Minnesota,

Subrogated Party.

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**APPENDIX TO PETITION FOR REVIEW**

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**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 25, 2021**

Sheila T. Reiff  
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. 2020AP876  
STATE OF WISCONSIN

Cir. Ct. No. 2018CV219

**IN COURT OF APPEALS  
DISTRICT III**

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**KELLY BRELLENTHIN AND JOSEPH BRELLENTHIN,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**DR. GREGORY GOBLIRSCH, WESTERN WISCONSIN MEDICAL  
ASSOCIATES, S.C. D/B/A VIBRANT HEALTH FAMILY CLINICS,  
ALLINA HEALTH SERVICES AND MMIC GROUP,**

**DEFENDANTS-RESPONDENTS,**

**BLUECROSS BLUESHIELD OF MINNESOTA,**

**SUBROGATED-PARTY.**

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APPEAL from a judgment of the circuit court for Pierce County:  
THOMAS W. CLARK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Kelly and Joseph Brellenthin appeal a summary judgment granted in favor of Dr. Gregory Goblirsch, Western Wisconsin Medical Associates, S.C. d/b/a Vibrant Health Family Clinics, Allina Health Services, and MMIC Group (collectively “Goblirsch”), dismissing their complaint alleging medical negligence in Goblirsch’s treatment of Kelly. The Brellenthins argue that the medical records filed in support of Goblirsch’s motion were insufficient to support a prima facie case for summary judgment on statute of limitations grounds. Additionally, the Brellenthins contend that expert testimony was required to support Goblirsch’s prima facie case for dismissal. We reject the Brellenthins’ arguments and conclude that the medical records submitted in support of Goblirsch’s summary judgment motion were sufficient to present a prima facie case for summary judgment of dismissal, which the Brellenthins did not sufficiently rebut. We therefore affirm.

### BACKGROUND

¶2 Kelly Brellenthin contacted Goblirsch’s office on March 3, 2015, because she had developed a significant allergic reaction, which she attributed to food she had eaten. On that same day, Goblirsch prescribed Benadryl and instructed her to follow up with him if her symptoms worsened. The following day, Kelly contacted Goblirsch complaining that her symptoms had worsened and asked about being prescribed prednisone, a corticosteroid, which she had used in the past. After Goblirsch reviewed her symptoms, he prescribed 20 mg per day of prednisone for Kelly to use orally for seven days.

¶3 Over the next several days, Kelly's symptoms continued to worsen, prompting her to go to the emergency department at River Falls Hospital. On March 11, 2015, she was transferred to Allina's Health United Hospital in Minnesota, where she remained until March 16, 2015. At the time of her discharge from United Hospital, Kelly was placed on a prednisone regimen designed to taper her prednisone use. This taper included taking 60 mg twice a day for three days (March 17-19, 2015); 60 mg once a day for three days (March 20-22, 2015); 40 mg once a day for three days (March 23-25, 2015); then 20 mg once a day for three days (March 26-28, 2015).

¶4 Following Kelly's discharge from United Hospital, she followed up with Goblirsch on March 18, 2015. Goblirsch continued Kelly on her medication regimen prescribed at United Hospital, including prednisone. On March 23, 2015, Kelly contacted Goblirsch reporting that her symptoms were returning and not under control with her current 40 mg per day dose of prednisone. After Goblirsch recommended returning Kelly to her previous dosage of 60 mg per day, she requested more steroids. In response, Goblirsch agreed to try an increased prescription of 80 mg per day of prednisone.

¶5 Kelly continued to experience discomfort, so she saw several other physicians, including an allergist in early April 2015 at Mayo Clinic, and she was admitted to the Mayo Clinic for observation and management. While hospitalized at Mayo Clinic, her providers made a slight modification to her existing medication regimen and initiated another tapering of the prednisone by decreasing the dosage to 50 mg per day and then weaning by 10 mg every day for five days. Kelly was discharged from Mayo Clinic on April 9, 2015.

¶6 On May 11, 2015, Kelly contacted Goblirsch reporting that she had completed the prednisone taper but had been “sicker than a dog,” and she wondered if she was experiencing withdrawal. At that time, Goblirsch agreed to extend the taper, approving an additional 5 mg per day for five days and decreasing to 2.5 mg per day for five days thereafter with no refills, and instructions to follow up if no improvement.

¶7 On June 3, 2015, Kelly saw Goblirsch for follow up. She described experiencing myopathy and arthralgia, weakness, fatigue, nausea, vomiting and constipation. At that time, Goblirsch made clear he was not in favor of resuming prednisone for Kelly and advised her to follow up with her Mayo Clinic physicians. This was the last time Goblirsch saw Kelly as a patient, as she later transferred her care to Mayo Clinic. In the following months, a number of Mayo Clinic physicians documented Kelly’s complaints and attributed them to her corticosteroid use.

¶8 On June 12, 2015, Kelly saw a Mayo Clinic rheumatologist, who noted that during his first meeting with her on April 3, 2015, “[her difficulty breathing] was thought to be steroid-induced abdominal fluid retention which altered her respiratory mechanics. ... She was diagnosed with iatrogenic Cushing’s as a result of the high-dose steroids.” Kelly’s Mayo Clinic rheumatologist ordered a cosyntropin stimulation test because of a “concern for secondary adrenal insufficiency” related to her high-dose corticosteroid use. On July 1, 2015, this test was reviewed by a Mayo Clinic endocrinologist, who noted that there was a “suboptimal response of the adrenal gland to [the cosyntropin test]. The most likely cause is chronic exogenous high-dose steroids, which have led to secondary adrenal insufficiency ....”

¶9 On July 8, 2015, Kelly saw a Mayo Clinic neurologist, who noted:

[Kelly] has been referred ... for a neurologic consultation principally to address her headaches which arose in March/April 2015. These arose in the context of high dose corticosteroid therapy for about three weeks in March .... She did develop iatrogenic Cushing's syndrome as a result of the prednisone treatment for urticaria.

During a consultation on July 21, 2015, a psychiatrist noted that Kelly was experiencing “[a]drenal insufficiency secondary to exogenous steroid treatment” and “[h]eadache and vestibular symptoms associated with steroid treatment withdrawal” (emphasis omitted).

¶10 On September 15, 2015, Kelly returned to see a Mayo Clinic doctor for a psychiatry consult and reported that she had continued headaches on a “daily basis” and that she “has had hours free of headache but no day without at least some cephalalgia.” A day later, Kelly wrote to one of her Mayo Clinic doctors about pain she was experiencing in her hands, noting that “[i]t feels like the symptoms I have in my hands from the steroid poisoning are now in my feet and toes. I also have a great amount of pain, grinding and popping in my knees.”

¶11 On October 6, 2015, Kelly underwent a vestibular evaluation at Mayo Clinic for what was described as “daily unsteadiness, waxing and waning head pressure, and brief spontaneous episodes of vertigo following an adverse response to steroid treatments initiated in April of 2015.” On October 26, 2015, Kelly visited the Mayo Musculoskeletal Clinic, where she described knee pain that “ha[d] been bothering her for a couple of months.” Her physician ordered an MRI, and on October 28, 2015, the imaging showed that Kelly had “[a]vascular necrosis of the femoral heads, left greater [than] the right, without evidence of articular surface collapse at this time.”

¶12 On November 2, 2018, the Brellenthins commenced this lawsuit against Goblirsch, alleging that Goblirsch negligently prescribed Kelly high doses of corticosteroids causing bilateral avascular necrosis of her hips and vestibular migraine headaches. Goblirsch moved for summary judgment, arguing the Brellenthins had failed to file suit within the three-year time limit set forth in WIS. STAT. § 893.55(1m) (2019-20).<sup>1</sup> In support of the motion, Goblirsch acknowledged that he had treated Kelly with corticosteroids until June 3, 2015. Goblirsch also filed an affidavit attaching certified copies of Kelly's medical records, which showed that her health care providers had documented her adverse reactions to the corticosteroids more than three years before the suit.

¶13 The court applied WIS. STAT. § 893.55(1m) and the holdings in *Estate of Genrich v. OHIC Insurance Co.*, 2009 WI 67, ¶17, 318 Wis. 2d 553, 769 N.W.2d 481, and *Doe 56 v. Mayo Clinic Health System-Eau Claire Clinic, Inc.*, 2016 WI 48, ¶6, 369 Wis. 2d 351, 880 N.W.2d 681, both of which confirmed the “physical injurious change” rule for the time of accrual of medical malpractice actions. The court found that the Brellenthins' lawsuit was untimely and granted summary judgment in favor of Goblirsch. The Brellenthins now appeal.

### DISCUSSION

¶14 We independently review a grant of summary judgment, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the circuit court's summary judgment ruling turned on questions of statutory interpretation and application, which we also review independently. *See McNeil v. Hansen*, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

¶15 The parties agree that the summary judgment methodology under WIS. STAT. § 802.08(2) requires the moving party to put forth a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. *See Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860. A prima facie case is established only when evidentiary facts are stated which, if they remain uncontradicted by the opposing party's affidavits, resolve all factual issues in the moving party's favor. *Walter Kassuba, Inc. v. Bauch*, 38 Wis. 2d 648, 655, 158 N.W.2d 387 (1968). If such a showing has been made, the court must examine the affidavits and other proof of the opposing party to determine whether a genuine issue exists as to any material fact or whether reasonable conflicting inferences may be drawn from undisputed facts. *Tews*, 330 Wis. 2d 389, ¶4.

¶16 The Brellenthins contend that Kelly suffered injuries as a result of Goblirsch's negligence. As relevant to our analysis, the statute of limitations for medical malpractice actions under WIS. STAT. § 893.55(1m) provides that:

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.

Sec. 893.55(1m).<sup>2</sup> The Brellenthins contend that Kelly's injuries did not occur until November 4, 2015, and their lawsuit was therefore timely filed on November 2, 2018, under § 893.55(1m)(a). Accordingly, the timeliness of the Brellenthins' action hinges on when Kelly's alleged injuries due to corticosteroid toxicity occurred and whether this action was commenced within three years of that date.

¶17 Wisconsin case law has over time developed a consistent test for determining the date of injury in medical malpractice claims, which is the date of the "physical injurious change." *Doe 56*, 369 Wis. 2d 351, ¶17. The "physical injurious change" test has "withstood the test of time," and it has been applied to determine the expiration of the statute of limitations "in a variety of factual scenarios." *Id.*

¶18 In order to constitute a "physical injurious change," an injury does not need to be untreatable. *Genrich*, 318 Wis. 2d 553, ¶16. Rather, an "actionable injury arises when the [negligent act or omission] causes a greater harm than [that which] existed at the time of the [negligent act or omission]." *Paul v. Skemp*, 2001 WI 42, ¶25, 242 Wis. 2d 507, 625 N.W.2d 860. 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).

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<sup>2</sup> There is no argument in this case that either WIS. STAT. § 893.55 (1m)(2) or (3) applies.

¶19 The Brellenthins agree that Goblirsch provided medical records pursuant to affidavit in support of his summary judgment motion and the Brellenthins do not contest the accuracy or content of any of those medical records. They argue, however, that the medical records were insufficient to support a prima facie case for summary judgment. In particular, they argue that expert testimony was required to prove whether Kelly suffered a physical injurious change as a result of Goblirsch's alleged negligent prescription of corticosteroids, or whether changes to her condition were merely ordinary and natural responses to the medication she was taking. The Brellenthins also argue expert testimony was necessary to establish when any physical injurious change caused by Goblirsch's alleged negligence occurred. Without such testimony, the Brellenthins contend there was a material question of fact "concerning whether Ms. Brellenthin had 'physical injurious changes,' and, if so, the nature of those, and ultimately the cause of those changes ...."

¶20 The Brellenthins emphasize that this case involves the effects of a prescription drug taken over a period of time, that some of those effects were or could have been normal side effects of the drug, and that some of the effects may have abated while others did not. Under these circumstances, the Brellenthins argue that Kelly's medical records alone cannot prove when she first suffered a physical injurious change as a result of Goblirsch's alleged overprescription of the corticosteroids. While there is evidence in the record that Kelly experienced negative side effects from the corticosteroids more than three years before this action was commenced, including the effects claimed in her complaint, the Brellenthins contend a reasonable inference from the medical records could be that those adverse effects did not arise from Goblirsch's actions, but rather were merely natural side effects of taking steroids. The Brellenthins therefore assert

that expert testimony was necessary to establish when any physical injury caused by Goblirsch's alleged negligence took place.

¶21 The Brellenthins' arguments fail for several reasons. First, the Brellenthins argue, without citation to any authority, that Goblirsch's medical records submission would be insufficient evidence for Goblirsch to prevail at trial and, therefore, it "should not pass muster at this stage of the proceedings."

¶22 Here, the Brellenthins incorrectly apply summary judgment procedure and conflate the need for expert testimony at trial with the need for expert testimony on summary judgment, where Goblirsch was only required to establish a prima facie case. To pursue summary judgment, Goblirsch was not required to submit the same proof that would have been required at trial, but only to make a prima facie case. As explained above, a prima facie case is characterized as one established ... when evidentiary facts are stated which, if they remain uncontradicted by the opposing party's affidavits, resolve all factual issues in the moving party's favor. *Kassuba*, 38 Wis. 2d at 655. Once a claimant brings forward evidence sufficient to establish a prima facie case, the burden is on the opponent to produce sufficient evidence to go forward with its case. *See Tews*, 330 Wis. 2d 389, ¶4.

¶23 The medical records submitted in support of Goblirsch's summary judgment motion were sufficient to support a prima facie case for summary judgment.<sup>3</sup> As mentioned, the Brellenthins do not contest the accuracy or content

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<sup>3</sup> The Brellenthins also make the argument that the medical records at issue are hearsay. Medical records fall under a well-known exception to the hearsay rule. *See WIS. STAT. § 908.03(6m)*.

of any of those medical records. They acknowledge that the injuries Kelly sustained from Goblirsch's alleged negligent prescription of high doses of corticosteroids were avascular necrosis of her hips bilaterally and vestibular dysfunction resulting in migraine headaches. The medical records unequivocally show that Goblirsch prescribed corticosteroids to Kelly from March 4 through May 11, 2015. During and after that time, and before November 4, 2015, the records show that Kelly experienced multiple negative side effects—i.e., “physical injurious changes”—related to the corticosteroid use. These effects include the diagnosis of “[a]vascular necrosis of the femoral heads, left greater [than] the right, without evidence of articular surface collapse ...” on October 28, 2015, and symptoms of vestibular dysfunction on October 6, 2015. These are the very injuries that the Brellenthins claim were caused by Goblirsch's alleged negligent prescription of high doses of corticosteroids and the resulting steroid toxicity.

¶24 The burden then shifted to the Brellenthins to overcome Goblirsch's prima facie showing. The Brellenthins, however, failed to provide an expert opinion or any counter affidavit that the mismanagement of Kelly's corticosteroids was not the cause of any physical injurious change to her—that is, avascular necrosis and migraine headaches—prior to November 4, 2015. In fact, the Brellenthins failed to put forth any proof to contradict the facts in the medical records demonstrating that Kelly experienced multiple negative side effects related to the corticosteroid use prior to November 4, 2015, and that those side effects were due to mismanagement of Kelly's corticosteroids. The Brellenthins present no disputed issue of material fact, nor do they raise an alternative inference from uncontroverted evidence entitling Kelly to a trial. We therefore reject the Brellenthins' argument.

¶25 While the Brellenthins assert we could reasonably infer that some of the negative effects Kelly suffered were the natural result of taking corticosteroids, they provide no evidence to support that assertion, either in the form of opposing expert opinion or via medical records. As the circuit court correctly observed when reviewing the medical records, Kelly experienced the very adverse medical conditions that she claims resulted from Goblirsch's alleged negligence prior to November 4, 2015. There is nothing in the appeal to permit a reasonable inference that Kelly's conditions, or other physically injurious conditions she experienced prior to November 4, 2015, were from another cause, including side effects that could reasonably be expected to accompany the use of corticosteroids.

¶26 Goblirsch provided admissible evidence to make a prima facie showing that the Brellenthins' claim was untimely. As set forth above, Kelly's medical records submitted in support of Goblirsch's summary judgment motion contain numerous examples of physical injurious changes that she experienced more than three years before the Brellenthins filed suit. In response to Goblirsch's motion, the Brellenthins did not submit evidence, in the form of affidavits or otherwise, to create a disputed issue of material fact as to whether Kelly experienced a physical injurious change more than three years before this lawsuit was filed. Thus, even if we do not know precisely when Kelly first experienced a physical injurious change sufficient to cause her claim to accrue, we do know that she experienced the medical issues that she claims arose from Goblirsch's alleged negligence by at least July 8, 2015, for the headaches, and by October 28, 2015, for the avascular necrosis. Both of those dates occurred more than three years prior to the commencement of the Brellenthins' lawsuit.

¶27 The Brellenthins offered nothing from the medical records to rebut the above facts. There is nothing in the records to indicate that all of the adverse

reactions Kelly had to the corticosteroids prior to November 4, 2015, were unrelated to Goblirsch's alleged negligence, while at the same time his alleged negligence would have caused those exact same negative physical responses after November 4, 2015. In fact, the record shows that Goblirsch had stopped treating Kelly by June 3, 2015.

¶28 Ultimately, the undisputed facts establish that Kelly suffered a physical injurious change as a result of Goblirsch's alleged negligence no later than October 28, 2015. The Brellenthins did not file the instant lawsuit until November 2, 2018—more than three years after that date. Accordingly, the Brellenthins' claims are time barred under WIS. STAT. § 893.55(1m)(a), and the circuit court properly granted Goblirsch summary judgment.

*By the Court.*—Judgment affirmed.

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



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Pierce County, WI  
2018CV000219

DATE SIGNED: April 7, 2020

Electronically signed by Thomas W. Clark  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

PIERCE COUNTY

Kelly Brellenthin and Joseph Brellenthin,  
  
Plaintiffs,

Court File No.: 2018CV219  
Chapter: 655  
Classification Code: 30103

vs.

Dr. Gregory Goblirsch, Western Wisconsin  
Medical Associates, S.C. d/b/a Vibrant Health  
Family Clinics, Allina Health Services, MMIC  
Group,

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER OF DISMISSAL**

Defendants.

This matter came on for hearing before the undersigned, on joint motions by the Defendants for summary judgment on the grounds that the claim is barred by the applicable statute of limitations. Each of the Defendants submitted initial and reply briefs in support of their motions and the Plaintiffs submitted a brief in opposition to the motion. The Court heard oral argument at the Pierce County Courthouse on February 13, 2020. Attorney Joseph Crosby appeared on behalf of the Plaintiffs. Attorney Guy DuBeau appeared on behalf of Defendants Dr. Gregory Goblirsch, Western Wisconsin Medical Associates, S.C. d/b/a Vibrant Health Family Clinics and MMIC Group. Attorney Mark Whitmore appeared on behalf of Allina Health Services. After analyzing the complete file, reviewing the briefs and related submissions

and hearing the arguments of counsel, the Court **GRANTED** the Defendants' motions for summary judgment.

### **FACTUAL BACKGROUND**

This case arises out of the prescription of cortico-steroid medications to the Plaintiff Kelly Brellenthin by the Defendants in this case. Those prescriptions allegedly began in early 2015 and continued through June 3, 2015. Defendant Gregory Goblirsch, M.D. was the primary care physician for Ms. Brellenthin during the relevant times and wrote most of the prescriptions at issue. During the relevant times, Dr. Goblirsch worked for the Defendants Western Wisconsin Medical Care Associates d/b/a Vibrant Health Services. During the relevant times, Ms. Brellenthin also received care at United Hospital in St. Paul, Minnesota which is part of Allina Health Services. Ms. Brellenthin was hospitalized at United Hospital from March 11, 2015 through March 16, 2015. In addition to Dr. Goblirsch, Ms. Brellenthin saw a number of physicians from several health care systems following her discharge from United.

According to the Complaint, Ms. Brellenthin contends that "On or about November 4, 2015, (she) was diagnosed with bilateral vascular [sic]<sup>1</sup> necrosis of her hips and subsequently with vestibular migraine headaches, both of which conditions are the direct result of corticosteroid toxicity." (Complaint at ¶ 23). The Complaint contends the Defendants were negligent in the manner in which they prescribed corticosteroids and that these prescriptions supposedly caused Ms. Brellenthin's avascular necrosis and additional injuries. (Complaint, ¶¶ 24-41). This action was filed on November 2, 2018.

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<sup>1</sup> The Complaint refers to Ms. Brellenthin experiencing "vascular necrosis". The Court presumes that the Complaint is intended to refer to "avascular necrosis" and will refer to Ms. Brellenthin's condition as "avascular necrosis" throughout this memorandum.

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Defendants each move the Court for summary judgment on the grounds that this action was not commenced within the mandatory time parameters set forth by Wis. Stat. § 893.55(1m) which provides:

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 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 the action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

For the reasons set forth below, the Court grants the Defendants' motions.

#### FINDINGS OF FACT

For purposes of this motion, the Court is able to draw all of the facts it needs to decide the pending issues from the allegations in the Complaint and in the information in Plaintiff's medical records. As a result, the facts pertinent to this motion are undisputed. For the sake of clarity, the Court breaks down its Findings of Fact into a section regarding the Defendants' prescription of Prednisone and a section regarding the Plaintiff's symptoms of complications from her corticosteroids.

##### **A. Findings of Fact Regarding the Prescription of Prednisone to Plaintiff.**

1. Ms. Brellenthin contacted Dr. Goblirsch's office on March 3, 2015 because she had developed a significant allergic reaction, that she attributed to some food she had eaten. Dr. Goblirsch saw Ms. Brellenthin the same day and prescribed Benadryl and asked her to follow up if symptoms did not improve. No steroids were prescribed on March 3, 2015. (DuBeau Aff., Ex. A, pp. 64-66).

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2. When Ms. Brellenthin's symptoms worsened, she contacted Dr. Goblirsch on March 4, 2015 requesting Prednisone, a medication she had used before, to treat her allergic reaction. This prescription was intended to last seven days. This was the first time Dr. Goblirsch prescribed corticosteroids to Ms. Brellenthin for this condition. (DuBeau Aff., Ex. A, pp. 61-63).
3. When the symptoms continued and she developed chest tightness and shortness of breath, Ms. Brellenthin contacted Dr. Goblirsch's clinic on March 7, 2015. She was advised to go to emergency department where her prescriptions were reviewed, and she was continued on Prednisone. (DuBeau Aff., Ex. A., pp. 54-57).
4. Ms. Brellenthin was admitted to River Falls Area Hospital on March 8, 2015, where she continued to receive Prednisone and was then transferred to United Hospital on March 11, 2015. (DuBeau Aff., Ex. A, pp. 223-226).
5. Ms. Brellenthin remained at United Hospital from March 11, 2015 through March 16, 2015. At the time of her discharge, Ms. Brellenthin was placed on a Prednisone regimen designed to taper her prednisone use. (DuBeau Aff., Exh A., pp. 223-226).
6. Following Ms. Brellenthin's discharge from United Hospital, she followed up with Dr. Goblirsch on March 18, 2015. Dr. Goblirsch continued the patient on her medication regime, including Prednisone. (DuBeau Aff., Exh A., pp. 51-53)
7. Ms. Brellenthin saw Dr. Goblirsch again on March 23, 2015 with worsening symptoms. After Dr. Goblirsch recommended returning Ms. Brellenthin to her prior dosage, Ms. Brellenthin requested more steroids and Dr. Goblirsch agreed to try an increased prescription. (DuBeau Aff., Ex. A, pp. 220-222).

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8. As Ms. Brellenthin continued to experience discomfort from the Prednisone, she saw several physicians within the Mayo Clinic system, including an allergist in early April 2015. She also was admitted to the Mayo Clinic, which initiated another tapering of the patient's Prednisone. (DuBeau Aff., Ex. A., pp. 210-213) Following her discharge, Ms. Brellenthin had contacted Dr. Goblirsch via telephone on April 20, 2015, April 27, 2015 and on May 4, 2015 for prescription-related issues that did not involve Prednisone. (DuBeau Aff., Exh A., pp. 20-28)
9. Dr. Goblirsch extended the Prednisone tapering on May 11, 2015. He saw the patient for the last time on June 3, 2015, at which time the patient transferred her care to the Mayo Clinic. (DuBeau Aff., Ex. A., pp. 6-9).

**B. Findings of Fact Regarding Plaintiff's Injuries.**

10. The Complaint alleges that "On or about November 4, 2015, (Ms. Brellenthin) was diagnosed with bilateral vascular [sic] necrosis of her hips and subsequently with vestibular migraine headaches, both of which conditions are the direct result of corticosteroid toxicity." (Complaint at ¶ 23).
11. In reviewing the undisputed facts as set forth in Plaintiff's own medical record, the Court finds numerous references to Plaintiff experiencing worsening symptoms arising from Plaintiff's use of cortico-steroids in general, and Prednisone in particular. Plaintiff has not submitted any evidence creating a material issue of fact as to any of the following entries from her medical records. The pertinent undisputed facts are set forth in the following chronological order:
- a. June 3, 2015: In her visit with Dr. Goblirsch, Ms. Brellenthin described myopathies and arthralgias, including joint pain, muscle pain, weakness, fatigue,

nausea, vomiting and constipation, all potentially related to corticosteroid use. (DuBeau Aff., Ex. A., pp. 6-9).

- b. June 12, 2015: Ms. Brellenthin saw a rheumatologist who noted that at his first meeting with the patient she complained of difficulty breathing that “was thought to be steroid-induced abdominal fluid retention” as well as “thrush due to steroid use”, and “iatrogenic Cushing’s as a result of the high-dose steroids.” (DuBeau Aff., Ex. B., p. 341). The rheumatologist further noted that the patient complained of “migraine headaches that have become more severe and will get them several times a day.” (*Id.* at 342)
- c. June 29, 2015: The rheumatologist ordered tests because of “concern for secondary adrenal insufficiency related to steroid use.” (DuBeau Aff., Ex. B., p. 338) A Mayo Clinic endocrinologist reviewed those tests which showed a suboptimal response of the adrenal gland, “the most likely cause is chronic exogenous high-dose steroids, which have led to secondary adrenal insufficiency.” (*Id.* at 336) The rheumatologist diagnosed Ms. Brellenthin with “secondary adrenal insufficiency from exogenous corticosteroids and impaired adrenal reserve.” (*Id.* at 337)
- d. July 8, 2015: Ms. Brellenthin saw a Mayo Clinic neurologist who charted that the patient was referred for a neurologic consultation to address her headaches which “arose in the context of high dose corticosteroid therapy for about three weeks in March, during which she gained 26 pounds of weight.” (DuBeau Aff., Ex. B at 332)

- e. July 9, 2015: Ms. Brellenthin returned to the Mayo Clinic neurologist who discussed strategies to manage Plaintiff's head pressure and headaches. (DuBeau Aff., Ex. B. at 326)
- f. July 21, 2015: Ms. Brellenthin saw Dr. Staab for a psychiatry consult focused on:
- i. Adrenal insufficiency secondary to exogenous steroid treatment;
  - ii. Mood disorder secondary to steroid treatment withdrawal;
  - iii. Headaches and vestibular symptoms associated with steroid treatment withdrawal.
- (DuBeau Aff., Ex. B., p. 317)
- g. September 16, 2015: Ms. Brellenthin wrote one of her physicians (Dr. Adams) about new symptoms in her knee, foot and toes that began on August 16, 2015, stating "It feels like the symptoms I have in my hands from the steroid poisoning are now in my feet and toes. I also have a great amount of pain, grinding and popping in my knees." (DuBeau Aff., Ex. B., p. 306)
- h. October 6, 2015: Ms. Brellenthin underwent a vestibular evaluation for "daily unsteadiness, waxing and waning head pressure, and brief spontaneous episodes of vertigo following an adverse response to steroid treatment initiate in April of 2015." (DuBeau Aff., Ex. B., p. 296)
- i. October 26, 2015: Ms. Brellenthin was seen in the Mayo Clinic Musculoskeletal Clinic for knee pain which had "been bothering her for a couple of months", and her physician noted her history of "high doses of corticosteroids with iatrogenic Cushing's syndrome." (DuBeau Aff., Ex. B, p. 279).

- j. October 26, 2015: During her appointment at the Mayo Clinic Musculoskeletal Clinic, an MRI was performed. The MRI noted “avascular necrosis bilaterally, left greater than right.” (DuBeau Aff., Ex. B., p. 281).
- k. November 4, 2015: Ms. Brellenthin saw Dr. Ernste of the Mayo Clinic who informed her that her tests revealed avascular necrosis, bilateral femoral heads, left greater than right, a problem with her hips. (Crosby Aff., Ex. A, Mayo Clinic p. 319)
- l. November 2, 2018: Plaintiff filed the Complaint with Pierce County Circuit Court.

#### CONCLUSIONS OF LAW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08; *see also M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 536 N.W.2d 175 (Wis. Ct. App. 1995). The purpose of summary judgment is not to try issues of fact but to “eliminate unnecessary trials” when there is “no triable issue of fact presented.” *Maynard v. Port Publ’ns, Inc.*, 297 N.W.2d 500, 504 (Wis. 1980). Summary judgment “obviate[s] the need for a trial where there is no genuine issue as to any material facts. It is a judgment rendered on the merits without a trial.” *Heck & Paetow Claim Serv., Inc. v. Heck*, 286 N.W.2d 831, 834 (Wis. 1980) (citation omitted).

Where a motion for summary judgment is properly supported, the non-moving party “may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response, by affidavits or as otherwise provided in this section, must set forth specific facts

showing that there is a genuine issue for trial. Wis. Stat. § 802.08; *see also Fyfer v. Dix*, 608 N.W.2d 740, 745 (Wis. Ct. App. 2000).

Wis. Stat. § 893.55(1m) provides:

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 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 the action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

The “medical malpractice statute of limitations was enacted to promote prompt litigation of claims, to put the alleged wrongdoer on notice to defend a claim within a specified time period, and to avoid stale or fraudulent claims ‘brought after memories have faded or evidence has been lost.’” *Doe 56 v. Mayo Clinic Health Sys.—Eau Claire Clinic, Inc.*, 369 Wis. 2d at 366, 880 N.W.2d at 687–88 (internal citation omitted). Indeed, “defendants have a constitutional right to rely upon statutes of limitations to limit the claim against them.” *Westphal v. E.I. duPont de Nemours & Co.*, 192 Wis.2d 347, 373, 531 N.W.2d 386 (Wis. Ct. App. 1995).

The Wisconsin Supreme Court has set forth a specific test for courts to apply in determining whether an action has been commenced within three years from the date of injury as is required by Wisc. Stat § 893.55(1m)(a).<sup>2</sup> Specifically, in terms of the three-year statute of

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<sup>2</sup> Ms. Brellenthin was diagnosed with avascular necrosis of the hips on November 4, 2015. Accordingly, the one-year “discovery rule” deadline set forth in Wis. Stat. § 893.55, subd. (1m) would have expired on November 4, 2016. That provision of the statute is not at issue in this motion. Rather, the issue before the Court is whether Plaintiffs commenced this action within three years from the date of injury.

limitations “Wisconsin case law has over time developed a consistent test for determining the date of injury in medical malpractice claims....it is the date of the ‘physical injurious change.’” *Doe 56 v. Mayo Clinic Health Sys.—Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 363–64, 880 N.W.2d 681, 687–88 (Wis. 2016)(quoting *Estate of Genrich v. OHIC Ins. Co.*, 318 Wis.2d 553, ¶ 17, 769 N.W.2d 481, 487 (Wis. 2009)). The “physical injurious change” test has “withstood the test of time,” and has been applied to determine the expiration of the statute of limitations “in a variety of factual scenarios.” *Id.*

In order to qualify as a “physical injurious change,” an injury does not need to be “untreatable.” *Estate of Genrich*, 318 Wis.2d at 564, 769 N.W.2d at 487 (quoting *Paul v. Skemp*, 242 Wis.2d 507, ¶ 25, 625 N.W.2d 860 (Wis. 2001)). Rather, an “actionable injury arises when the [negligent act or omission] causes a greater harm than [that which] existed at the time of the [negligent act or omission].” *Id.* Moreover, “a later injury from the same tortious act does not restart the running of the statute of limitations.” *Fojut v. Staffl*, 212 Wis.2d 827, 832, 569 N.W.2d 737 (Wis. Ct. App. 1997). This is in keeping with the principle that “once a claimant has sustained an injury and has an enforceable claim, that claimant cannot sit on that claim until all consequential damages have come to fruition.” *Paul v. Skemp*, 242 Wis.2d 507, ¶ 39, 625 N.W.2d 860 (Wis. 2001).

The Court finds, as a matter of law, that Plaintiffs did not commence this action within three years of the date of injury as is required by Wisc. Stat. § 893.55 (1m)(a) and as interpreted by the Wisconsin Supreme Court by *Estate of Genrich v. OHIC*, 769 N.W.2d 481 (Wis. 2009) and its progeny. As noted in the Court’s Findings of Fact set forth above, the record is replete with simple and undisputed signs that Ms. Brellenthin was experiencing manifestations arising

from her corticosteroid use.<sup>3</sup> The record includes numerous references to physical injurious change such as headaches, thrush, hip pain, joint pain, weight gain, adrenal insufficiency, vestibular symptoms and unsteadiness. These undisputed facts are taken directly from Ms. Brellenthin's own medical records and are undisputed.

Both in their briefing and at oral argument, Plaintiffs sought to differentiate the *Genrich* analysis by claiming that the date of "physical injurious change," is not when the patient experiences symptoms but when the patient receives a formal diagnosis and the diagnosis becomes "manifest". In this case, Plaintiffs contend the formal diagnosis occurred on November 4, 2015 and that, therefore, by commencing this action on November 2, 2018, their claims are timely. The Court disagrees. There is nothing within *Genrich* or any of the cases cited by Plaintiffs to support Plaintiffs' argument that an injury must manifest in order for a cause of action to accrue. As stated throughout this memorandum, the test is "physical injurious change", not "manifestation" or a formal diagnosis.

The record is replete with evidence demonstrating that Ms. Brellenthin was complaining of numerous symptoms that she and her physicians related to her corticosteroid use, long before November 2, 2015. Those records unequivocally establish the "physical injurious change" necessary to satisfy the *Genrich* standard. Moreover, even to the extent that there is some merit to Plaintiffs' "manifestation theory", which the Court rejects, the undisputed factual record itself still shows there is no merit to Plaintiffs' argument. Indeed, on October 26, 2015 Ms. Brellenthin underwent an MRI at the Mayo Clinic. According to Ms. Brellenthin's own

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<sup>3</sup> In reaching its findings, the Court does not intend to imply that any Defendant acted negligently or not negligently. Rather, solely for purposes of this motion, the Court presumes negligence. The critical issue is whether the *alleged* negligence caused "physical injurious change" as set forth in *Genrich*. For the reasons stated throughout this memorandum, the Court finds numerous examples of "physical injurious change" between the initial steroid prescription in March 2015 and November 2, 2015, thereby satisfying the *Genrich* test.

physician, that MRI revealed “avascular necrosis bilaterally, left greater than right.” (DuBeau Aff., Ex. B., p. 281). Thus, the Court finds that Plaintiff’s “manifestation theory” fails both legally and factually.

### CONCLUSIONS

The Court finds that Plaintiffs failed to commence this action within three years from the date of injury as the record clearly and unequivocally shows evidence of “physical injurious change” occurring to Ms. Brellenthin on numerous occasions in the months before November 2, 2015. For this case to survive summary judgment, there could not have been physical injurious change between March 2015 and November 2, 2015. The undisputed record contains considerable evidence of multiple physical injurious changes related to corticosteroid use that occurred throughout that timeframe. Because the case was not commenced within three years of Ms. Brellenthin experiencing injury, the Defendants are entitled to summary judgment and the Court’s Order of March 19, 2020 stands.



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1           *(Whereupon, the Proceedings began at 10:58 a.m.)*

2                           THE COURT: 18-CV-219, Kelly  
3           Brellenthin versus Gregory Goblirsch, et al. Mr.  
4           Crosby appears on behalf of Kelly and Joseph  
5           Brellenthin. Mr. DuBeau appears on behalf of Mr.  
6           Goblirsch, Western Wisconsin, and other named  
7           defendants. And Mr. Whitmore appears on behalf of  
8           Allina.

9                           Both Mr. Goblirsch, et al, and Allina  
10          have filed motions for summary judgment. And  
11          responses have been received from Mr. Crosby. And  
12          replies have been received from Mr. DuBeau and Mr.  
13          Whitmore. Today is set for oral argument. We have  
14          an hour and it seems to be, to me, the most fair  
15          that we allow 15 minutes to Mr. DuBeau, 15 to Mr.  
16          Whitmore, and then 30 to Mr. Crosby as there are two  
17          competing motions. Is that reasonable, gentlemen?

18                          MR. CROSBY: Yes, Your Honor.

19                          MR. WHITMORE: Yes.

20                          THE COURT: All right. Mr. DuBeau, go  
21          ahead.

22                          MR. DuBEAU: Oh, sure. Thank you, Your  
23          Honor. As the Court is well aware, this is a claim  
24          of medical malpractice. It's a medical negligence  
25          claim. And we're here on a motion based on statute

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1 of limitations and seeking summary judgment based on  
2 that.

3 It's statutorily governed by section  
4 893.55(1m), which has two distinct parts. One is a  
5 three-year statute of limitations just based on the  
6 general accrual of the claim. There's also a one-  
7 year discovery rule built into that statute, and  
8 I'll circle back to those as well. It's straight  
9 forward enough to, you know, to count forward three  
10 years or count backwards three years.

11 One of the things that folks noticed  
12 probably about 20 years or so ago is really the  
13 sticking point in the application of the statute was  
14 making a determination as to when a cause of action  
15 accrued. And through a series of cases that really  
16 culminated about 10 years or so ago in the *Genrich*  
17 case, our Supreme Court developed a standard that is  
18 known of as the physical injurious change rule.

19 In other words, because you're dealing  
20 with medical issues where sometimes causation can be  
21 kind of tricky, the idea is to see when the first  
22 period that can be determined that the alleged  
23 negligence caused some physical change in the  
24 patient making the claim. And it has to be  
25 something different than what existed previously.

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1                   You know the *Estate of Genrich* case is  
2                   sort of worth emphasizing a little bit, the facts of  
3                   that case. It involved a gentleman who underwent  
4                   surgery. And he underwent surgery on a July 23 of  
5                   one year, and initially he seemed to be doing just  
6                   fine. As time went on, he started to show signs of  
7                   sickness, weakness, he developed an infection. And  
8                   finally, about two weeks later on August 8, it was  
9                   diagnosed that someone had left a sponge inside of  
10                  him. And they did immediate surgery to remove the  
11                  sponge.

12                  Unfortunately, the efforts were not  
13                  successful and Mr. Genrich then died on August 11,  
14                  and he bought a claim for wrongful death. Now, the  
15                  suit was filed roughly three years later on August  
16                  9. So the anniversary date actually fell between  
17                  the date of his diagnosis with the retained sponge  
18                  and his death.

19                  Even though it was a wrongful death  
20                  claim, the Supreme Court looked at that and looked  
21                  at the three possible dates on which the claim could  
22                  have accrued: the date that it was left inside of  
23                  him, the date that he was diagnosed with the  
24                  problem, or the date that he died. And the Supreme  
25                  Court decided very clearly that it was the date that

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1 it was left inside of him, the day of the original  
2 surgery. And that was because there was a physical  
3 change that occurred to his body that was something  
4 different than what was otherwise the case prior to  
5 --

6 THE COURT: I don't want to interrupt,  
7 but I just want to note that as I understand it in  
8 *Genrich*, at paragraph 16, what I understand the  
9 issue to be is an actual injury or a physical  
10 injurious change arises when the negligent act or  
11 omission causes a greater harm to that to which  
12 existed at the time the negligent act or omission.

13 MR. DuBEAU: That's correct.

14 THE COURT: Is that -- that is the  
15 standard, I believe, that's being espoused?

16 MR. DuBEAU: Exactly. That is the  
17 standard being espoused. And in application to the  
18 facts of that case I believe is in paragraph 19, the  
19 court was very clear that it was the date the sponge  
20 was left behind. So now I point that out. It will  
21 be important in a minute when I make some comment on  
22 the arguments that Plaintiff has posited in response  
23 to our motion here.

24 So you know for now, though, the  
25 question really is what is the date of the accrual

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1 of the case? Now, this case was filed on, I believe  
2 it was November 2 of 2018. So the question was, is  
3 there clear evidence of a physical injurious change  
4 related to the alleged conduct prior to November 2  
5 of 2015? And I would pose it to the Court that  
6 that's really not even a close call.

7 The allegation in this case has to do  
8 with the management of some drugs, corticosteroids,  
9 specifically prednisone, in relationship to a rash  
10 that Ms. Brellenthin had. This is not your typical  
11 sort of rash; it's fairly severe. It's the type  
12 that you know was actually interfering with her  
13 breathing, could cause all manner of problems.

14 So a little bit of the factual history,  
15 she first came in with the symptoms in March of  
16 2015. Dr. Goblirsch saw her that day and originally  
17 didn't prescribe any steroids at all. He wanted to  
18 try a more conservative approach. She came back the  
19 very next day saying she got no relief from that.  
20 So at that point, Dr. Goblirsch prescribed a seven-  
21 day course of 20 milligrams a day, fairly modest  
22 dose as these things go. She didn't have any  
23 improvement. She saw a doctor a few days later. He  
24 looked at it, this is a different doctor, said,  
25 just, you know, keep on the course, see if it

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1 approves.

2 By March 8, she wasn't getting any  
3 better and she was hospitalized. Now again in the  
4 initial hospitalization, they again kept her on the  
5 same course that Dr. Goblirsch had prescribed, but  
6 she wasn't improving. And on March 11, she was  
7 transferred to Allina. And in the course of that  
8 hospitalization, she was given a new prescription.

9 And as is common with corticosteroids,  
10 it was what is called a tapering prescription. So  
11 at that point, she was to take 120 milligrams a day  
12 for three days; so in other words, six-times the  
13 dose that Dr. Goblirsch had prescribed, then retreat  
14 back to 60 a day for three days, then down to 40 a  
15 day for three days, then down to 20 a day for three  
16 days. Well, during that course, she again went back  
17 to Dr. Goblirsch who encouraged her to follow the  
18 directions that she had been given. And again, it  
19 was apparently not satisfactory to her.

20 She returned to him on March 23. At  
21 this point by her taper, she would have been on 40  
22 milligrams a day. And she was saying, look, this  
23 isn't doing any good, my symptoms are still  
24 terrible, I need more. He suggested, I'd like --  
25 we'll go ahead and up it to 60 milligrams a day,

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1 we'll -- and then continue to taper. She said,  
2 that's not going to do the trick, only 120 a day  
3 will make any difference in my symptoms. He wasn't  
4 going to buy that, and they ended up with a  
5 compromise where she would get 80 milligrams a day  
6 and then resume the taper thereafter.

7 She calls back the very next day after  
8 being given this, asked for more. Dr. Goblirsch  
9 said, no, I'm not going to do that. And again,  
10 throughout it all, you know, let the record reflect  
11 that he is discussing with her why he didn't want to  
12 do that.

13 Now, she returns the very next day to  
14 him and she's now complaining of symptoms. She's  
15 got a hard bloated stomach. She was showing signs  
16 of what's referred to as Cushing syndrome, it is one  
17 of the things that is known to cause a problem -- be  
18 a secondary effect of steroid. Dr. Goblirsch told  
19 her at that point, this is now March 25 of 2015,  
20 that it's likely steroid related and he wasn't going  
21 to change her doses or give her anymore.

22 Apparently unsatisfied with that, she  
23 then saw a Dr. Zimmerman a little over a week later.  
24 And Dr. Zimmerman was filling in for Dr. Goblirsch,  
25 who I think was out of town at that time, again

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1 asked for -- explained the symptoms. Dr. Zimmerman  
2 told her at that time, you need to decrease your  
3 steroid usage and recommended tapering. At that  
4 point, it would have been from I think 60 to 40,  
5 something like that, or maybe 40 to 20.

6 Two days later, she returns to Dr.  
7 Zimmerman, admits that she has not been following  
8 his advice to reduce her steroid consumption, and  
9 complains that she wasn't having any additional  
10 relief. Couple days later, she ends up going to  
11 Mayo Clinic where she's hospitalized for a period of  
12 about a week. At that point, they put her again on  
13 another steroid taper where 40 milligrams a day for  
14 five days, 30 for another five days, 20 for another  
15 five days, 10 for another five days.

16 At the end of that period, it's now May  
17 11, she returns to Dr. Goblirsch and says, you know,  
18 I'm still not getting relief. He -- and she's  
19 requesting again high doses. And he says, no, I  
20 will continue the steroid taper. He prescribed her  
21 five milligrams a day, so half of her last dose, for  
22 five days and then another two and a half for an  
23 additional five days in order to provide her what's  
24 called a soft landing and hopefully diminish any of  
25 the secondary effects from the steroids. So if

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1 assuming that she followed that, the last time she  
2 took any steroids prescribed by Dr. Goblirsch was on  
3 May 22.

4 She returns to see him on June 3  
5 complaining of muscle weakness, general myopathies,  
6 fatigue, nausea and vomiting. And he again tells  
7 her at that point in time, this is related to the  
8 steroid usage, I am not going to give you any  
9 additional steroids, period. If, you know, if your  
10 other providers feel different, please return to  
11 Mayo Clinic and see what they want to do with you.  
12 So she does. This is when we start to see a very  
13 consistent documentation of effects that she's  
14 having secondary to steroid usage. On June 12, she  
15 sees a rheumatologist who notes how -- and she had  
16 been diagnosed with Cushing's disease, quote, as a  
17 result of the high-dose steroids.

18 Then on June 29, she undergoes a test  
19 because it appears that her adrenal glands are not  
20 functioning correctly, which is, again, a possible  
21 use -- a possible consequence of steroid usage. The  
22 test comes back on July 1 saying that she is  
23 suffering from adrenal insufficiency, quote, the  
24 most likely cause is chronic exogenous high-dose  
25 steroids.

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1                   On June -- or excuse me. On July 8,  
2                   she sees a neurologist because she's having  
3                   headaches. Again, I would note headaches are one of  
4                   the things she's specifically refers to in her  
5                   complaint as being caused by steroids. And he notes  
6                   that these arose in the context of high-dose  
7                   corticosteroids.

8                   In September, she reports she's having  
9                   headaches on a daily basis. And one of the ones  
10                  that really stands out to me, on September 16, she  
11                  actually writes to one of her providers. She's been  
12                  complaining of muscle-skeletal weakness and  
13                  problems. She writes to one of her providers on  
14                  September 16 that she thinks that that's spreading,  
15                  quote, from the steroid poisoning. So at this  
16                  point, it's very clear that she has understanding  
17                  that she's having secondary effects related to  
18                  steroids.

19                  October comes around. At one point,  
20                  she falls. She's complaining of pain in her joints.  
21                  And on October 26, she has an MRI that finds  
22                  avascular necrosis in one of her hips, which again  
23                  is one of the very specific things she puts in her  
24                  complaint.

25                  Now all these things have occurred

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1 prior to November 2 of 2015, the date with the sort  
2 of the reverse anniversary date of the filing of  
3 this. It is I think beyond any legitimate argument  
4 that she was suffering some physical injurious  
5 change related to her steroid use well before  
6 November 2 of 2015. Bloating, nausea, vomiting,  
7 Cushing syndrome, adrenal insufficiency, headaches,  
8 joint pain, and avascular necrosis are all described  
9 in her medical records. There's been no suggestion  
10 that the medical records are incorrect; I believe  
11 they are undisputed.

12 Her doctor telling her and warning her  
13 about the consequences of steroid uses and she  
14 herself characterizes herself as suffering from  
15 steroid poisoning all before the anniversary date of  
16 the filing of this complaint. On that alone, I  
17 would say that this case is fairly straight forward.  
18 It falls right within the physical injurious change  
19 rule.

20 I do want to just touch on a few of the  
21 things that we saw in Plaintiff's response to our  
22 motion here. One is this repeated notion that the  
23 -- well, the disease had to be manifest in which I  
24 understand means that it is plain and obvious to  
25 someone. That's wrong on multiple levels, because

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1 the argument is made with respect to the diagnosis  
2 of avascular necrosis.

3 And there was some argument that, oh,  
4 well, it was sort of uncertain because there was one  
5 finding that was, you know, where you couldn't quite  
6 see the entirety of her hip. The point being that  
7 that was an x-ray. It has nothing to do with the  
8 MRI that clearly indicated that she had avascular  
9 necrosis. It ignores all the other symptoms that I  
10 just bored the Court talking about that existed  
11 prior to that date. And part of me would argue that  
12 it has to be manifest to the Plaintiff when she  
13 herself is arguing that she is suffering from  
14 steroid poisoning.

15 THE COURT: Are you aware of any case  
16 law, and I'm going to ask the same for Mr. Crosby,  
17 that either overrules or questions the *Genrich*  
18 standard?

19 MR. DuBEAU: No. As a matter of fact,  
20 it was most recently reaffirmed actually in a case  
21 that I had the pleasure of arguing to the Supreme  
22 Court, the *Doe versus Mayo Clinic* case, which again  
23 reaffirmed the *Genrich* standard. Now I'm happy to  
24 discuss that case if you're interested in it.

25 THE COURT: I --

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1 MR. DuBEAU: It came up on some very  
2 odd facts so --

3 THE COURT: Well, I would note for the  
4 record that the case he's referring to is 2016 WI  
5 48. And the standard, the *Genrich* standard, as I  
6 understood it, was reaffirmed at paragraph 17 in  
7 that case.

8 MR. DuBEAU: Yeah.

9 THE COURT: So, okay. I'm sorry to  
10 interrupt.

11 MR. DuBEAU: Oh, no. Not at all. And,  
12 please, if you have any questions at any point in  
13 time, I prefer to be interrupted. It allows me to  
14 catch my breath.

15 The other thing that strikes me as  
16 troublesome with this notion that we have to look at  
17 when something is manifested is that it really  
18 conflates two different concepts. It conflates the  
19 concept of when a physical problem exists and when  
20 the person learns the problem.

21 When the problem exists is what's  
22 covered by the physical injurious change rule. And  
23 by 893.55(1m)(a), that's three years. If you want  
24 to look at when a plaintiff actually learns about an  
25 issue, that's covered in (b) of that same section,

14

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1 the discovery rule part. Well, the discovery rule  
2 only extends at a year beyond the discovery or --  
3 and only if it is longer than the three years. So  
4 that really just sort of falls out of the equation.

5 But this notion to adopt this what the  
6 Plaintiff knows and put it into physical injurious  
7 change rule in (a) simply makes no sense. It's just  
8 wrong. It doesn't follow the statute. I'd also  
9 note that, you know, in the response brief, there  
10 are several things that are -- I can only  
11 characterize as incorrect interpretation of the law.  
12 It -- page 7, Plaintiffs argue that *Genrich* says the  
13 claim accrued when it developed infection; that's  
14 just not right. Paragraph 19 of that decision  
15 contradicts that. That's just misreading that case.

16 And there's also, implied through the  
17 argument, this notion, well, we really need to look  
18 at just at that avascular necrosis. Another thing  
19 that *Genrich* went on to discuss at length is how one  
20 subsequent malady does not restart the statute of  
21 limitations from running. The statute of  
22 limitations runs when the first claim is capable of  
23 being brought, the first injury is recognized, the  
24 first physical injurious change. And as I pointed  
25 out, that goes way back with a number of maladies

15

1 about which Ms. Brellenthin was complaining.

2 THE COURT: That would be -- as I would  
3 understand your argument to be, that would be a  
4 known worsening of the situation from when Dr.  
5 Goblirsch worked with her?

6 MR. DuBEAU: Exactly, yeah. And  
7 that's, you know, it's -- if you think about it in  
8 terms of *Genrich*, there was a period of time when he  
9 was sick. There was a separate period of time when  
10 he died. And even though it was a wrongful death  
11 claim, the date of death did not restart the statute  
12 of limits running. That was discussed at some  
13 length in that case. It was the first physical  
14 injurious change.

15 Same thing applies here even if one  
16 were to focus just on avascular necrosis, which  
17 clearly predates the November 2 deadline. But even  
18 if one were to say that that developed after the  
19 fact, after November 2, it still does not negate the  
20 fact that she was complaining of all these other  
21 maladies, which her providers clearly relate to  
22 corticosteroids.

23 THE COURT: So if she's relating, for  
24 example, her headaches to steroids, if she didn't  
25 have the headaches before Goblirsch did the

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1 corticosteroid treatment, and she's saying, this is  
2 from steroids, and that's what seems to, you know,  
3 that's born out in the medical record, that --  
4 wouldn't that not be one of the incidence that you  
5 could take?

6 MR. DuBEAU: Absolutely, absolutely.  
7 And I was just going to say it wasn't just her  
8 saying it. It was confirmed by her neurologist at  
9 Mayo Clinic that that was the culprit that she was  
10 dealing with. These were not things that she had  
11 before. They were not pre-existing conditions.

12 So that -- the last thing that I will  
13 point out, and I did point it out in the brief,  
14 there is at one point what I would characterize as a  
15 fairly clear misstatement of the record. And again,  
16 this is on page 3 of Plaintiff's brief and the  
17 argument is made that Defendants have failed to meet  
18 their burden to show the possible beginnings of AVN  
19 where the result of Defendant's negligent  
20 prescription of high-dose corticosteroids. The Mayo  
21 doctors were not able to determine the cause of  
22 Plaintiff's multi-symptom issue.

23 And then it quotes from the record from  
24 one of the Mayo physicians directly from that  
25 record. And the physician at that time wrote, well,

17

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1           it's hard to pin down what the cause of her problems  
2           is. I'm profoundly troubled by that citation.  
3           Because if you read the medical records, that  
4           citation from that Mayo doctor predates everything  
5           else that we're talking about. That goes back to  
6           March.

7                               And it just feels like someone is  
8           either not paying attention to what the medical  
9           record actually says or trying to create an  
10          impression of something other than what the medical  
11          record said. Because every other thing that I have  
12          quoted to you so far, all the other medical records,  
13          came after that where, yeah, right at first, we  
14          don't know if it's steroids. That sort of makes  
15          sense. But subsequently, physician after physician  
16          after physician is pointing to some malady that she  
17          has that does relate to the steroids. So with that,  
18          that's the summary of all that I have to say.

19                              THE COURT: All right. Because we  
20          started five minutes late, I'm going to allow Mr.  
21          Whitmore to go to twenty to, and then we would pick  
22          up with Mr. --

23                              MR. WHITMORE: I'm not going -- thank  
24          you, Judge. I'm not going to come close to needing  
25          all that time.

18

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1 THE COURT: Okay. Go ahead, Mr.

2 Whitmore.

3 MR. WHITMORE: I think you misspoke. I  
4 think it's May 1, was that record.

5 MR. DuBEAU: Okay.

6 MR. WHITMORE: I just wanted to clean  
7 up Mr. DuBeau. I think he misspoke. That record is  
8 May 1 of 2018.

9 MR. DuBEAU: I believe you're correct.

10 MR. WHITMORE: And it's marked Mayo  
11 418. And Mr. DuBeau is absolutely right in terms of  
12 representation of the content of that. And it  
13 doesn't change the analysis, but I just want to make  
14 certain that the record is clear.

15 THE COURT: Okay.

16 MR. WHITMORE: Judge, I'm going to be  
17 really brief, because the issues with respect to my  
18 client are identical as those to which Mr. DuBeau  
19 has articulated.

20 Just so the Court is clear, my client's  
21 involvement in this case was -- Dr. Goblirsch was  
22 involved early and at the end, and I was involved  
23 for about seven days in between, from March 7 to  
24 March 16. So that's the window of which we were  
25 there. And I think that we only gave one

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1 prescription. That's not really that relevant to  
2 this motion, but I just want to make certain that  
3 that's clear. I'll be real brief. I'm going to say  
4 about three things and it'll take me probably two of  
5 my fifteen minutes.

6 THE COURT: Go ahead.

7 MR. WHITMORE: Number one, the Court is  
8 exactly right that the *Genrich* standard is the  
9 appropriate standard. And I don't think that's  
10 challenged by anywhere within the Plaintiff's brief.  
11 I think everybody agrees with that. I think  
12 everybody agrees that 893.55 is what we look to to  
13 govern this. And I think, frankly, if I were to  
14 guide the Court in evaluating this issue, I wrote  
15 our reply brief a particular way for a particular  
16 reason, and that is to make it easy for the Court to  
17 see exactly what Mr. DuBeau was talking about.

18 And I would just respectfully refer the  
19 Court to pages 6 and 7 of our reply brief which  
20 provides the record to support what Mr. DuBeau was  
21 correctly talking about, which is all of these  
22 events that clearly fall well before March 2 -- or  
23 excuse me, November 2 of 2018. And I think that  
24 very clearly shows all of the problems that she  
25 attributed, Ms. Brellenthin attributed, to the

20

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1 corticosteroids.

2 The one exception I didn't include, I  
3 should have included her letter that Mr. DuBeau  
4 referenced. But you'll see as you go through that  
5 the doctors are repeatedly talking about things  
6 related to her high-dose corticosteroid use. And I  
7 think that just provides hopefully a nice, easy way  
8 for the Court to see that just stacked up. So I  
9 would refer that -- the Court to there.

10 For purposes of the motion, that,  
11 again, *Genrich* is the law. The facts that we look  
12 at right on reply pages 6 and 7. And I think that  
13 will very clearly show that she did have the  
14 physical injurious change that the Court set forth  
15 in *Genrich*, which applies to this case. And for  
16 that reason, my client is entitled to dismissal  
17 under the statute of limitations as is Mr. DuBeau's.  
18 Thank you.

19 THE COURT: Thank you, Mr. Whitmore.  
20 Mr. Crosby, go ahead, sir.

21 MR. CROSBY: Thank you, Your Honor.  
22 The Defense wants the Court to dismiss this case  
23 based on a summary judgment motion, and yet they  
24 have not indicated when the Defendant's diagnosis of  
25 avascular necrosis was, which wasn't until November

21

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1 4.

2 The Defense wants the Court to believe  
3 that these symptoms that -- occur anytime  
4 corticosteroids can be given, even in a normal dose,  
5 in a proper dose. The basis of this claim for the  
6 Brellenthins is that this was high-dose and it was a  
7 negligent dose for -- this woman had hives. She  
8 just could have been given Benadryl. Instead she  
9 was given high-dose corticosteroids which are not  
10 good to be prescribed.

11 Some of the symptoms, Your Honor, that  
12 you've heard, they talk about Cushingoid. That  
13 happens -- can happen even when the smallest dose of  
14 corticosteroids is given. There are many temporary  
15 reactions to high-dose -- excuse me, many temporary  
16 reactions to corticosteroids even in the proper  
17 doses. And that's why we see in the medical records  
18 references that the -- her multi-system problems are  
19 improving and that was way back in May of 2015. To  
20 say that these existed there and forever is just not  
21 true, Your Honor.

22 Cushingoid comes and then leaves. The  
23 reason that they had to taper it down is because if  
24 you don't taper it down, then the person can have a  
25 psychotic breakthrough. Those are all temporary

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1 reactions. The avascular necrosis, which is the --  
2 what happens is the corticosteroids prevent the  
3 blood from going into the bones of the hips. And it  
4 may or may not occur when high-dose corticosteroids  
5 are given.

6 The pains that she was having, the  
7 multi-systems, not only her headaches but she had  
8 multiple full-body pains well before that. There's  
9 no definitive date until November 4, when it's  
10 determined without any dispute, that she has  
11 avascular necrosis. This lawsuit was started on  
12 November 6.

13 Defense cites October 26 as the date  
14 that avascular necrosis was first determined and  
15 that's just not true, Your Honor. Even in the  
16 doctor's own words it says -- he says, this MRI and  
17 CAT scan aren't used to determine her hips. We need  
18 to get an MRI for her hips to see if she does have  
19 avascular necrosis because it's possible, we don't  
20 know, it's possible, the manifestation of this  
21 injury. Ergo, on October 28 is when the MRI was  
22 taken, and it showed that there was avascular  
23 necrosis.

24 It was read on October 29, and the very  
25 first time it was checked was on November 4. And

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1 November 4 is when it was determined she did indeed  
2 have avascular necrosis. But we don't know if at  
3 that point in time if there was any structural  
4 damage to the hips if there's any manifestation of  
5 an injury.

6 So what they do on the 4<sup>th</sup>, is they  
7 contact the orthopedist who actually handles the  
8 appointment with Kelly Brellenthin. Within a week  
9 of that November 4 MRI -- or excuse me, the November  
10 4 chart review by the doctor, they call up Kelly and  
11 say, you need to come in and see Dr. Sierra. So on  
12 -- not until December 15, does she have an  
13 appointment with Dr. Sierra. And it's at that point  
14 in time, the very first time, that any information  
15 has been given to Kelly that she has avascular  
16 necrosis. But still, there's no indication that the  
17 heads of the femur that there's been a structural  
18 change to her bones. So for Defense counsel to come  
19 in and say that it's undisputed as to when this  
20 injurious change occurred is just -- it's just not  
21 accurate, Your Honor.

22 THE COURT: Well, let me ask you this  
23 though.

24 MR. CROSBY: Sure.

25

24

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1 THE COURT: The same question I asked  
2 to the Defense: if a person doesn't have headaches,  
3 they're given corticosteroids, then they have  
4 headaches, and those headaches are attributed to the  
5 steroids, isn't that a physical injurious change?

6 MR. CROSBY: No, I don't believe so,  
7 Your Honor. I think that Defense has the burden to  
8 establish to this Court that it's unequivocal that  
9 that's a physical change, as opposed to they need  
10 not these two fine gentleman testifying that this is  
11 a change due to corticosteroids. It could be a  
12 result of the treatment of the hives for the past  
13 month that she's be incurring.

14 THE COURT: Okay. Fair enough. But if  
15 the record reflects opinions that it is -- those  
16 headaches are from the steroids, isn't that  
17 sufficient?

18 MR. CROSBY: If we use *Genrich* and we  
19 look at it, and they have -- they leave the sponge  
20 in, immediately after surgery he begins to have  
21 elevated white-blood count and problems. But the  
22 Court didn't go back to that, which is a result of  
23 surgery, which could arguably have been the time  
24 that the first physical change occurred. Because  
25 then the elevated blood count -- white-blood count

25

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1           turned into an infection, which turned into his  
2           death. So it's the same analogy, but the Court  
3           didn't take it back to things that normally can  
4           happen under circumstances.

5                         What we're looking at is she sought  
6           medical treatment from Goblirsch and United Hospital  
7           for a problem she was having that changed her body.  
8           They haven't -- they haven't unequivocally told this  
9           Court the basis for the physiological injurious  
10          change. They don't have the experts to do that, and  
11          we can't rely on their testimony, Your Honor.

12                        THE COURT: But can we rely on the  
13          medical record as it exists?

14                        MR. CROSBY: The med -- well, that's  
15          our argument, Your Honor, is we can't. Because we  
16          know on the 26<sup>th</sup>, when an MRI was done to determine  
17          if there was avascular necrosis, they said, you know  
18          we can't rely on this because it's possible -- it's  
19          possible, maybe, but let's do an MRI specifically  
20          for avascular necrosis.

21                        THE COURT: But what I'm trying to get  
22          at is there seems to be other issues in the medical  
23          record, in history, other than the AVN. That's what  
24          I'm trying to say. Is that not true?

25                        MR. CROSBY: I agree with you on that,

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1 Your Honor. But the Cushingoid reaction occurs from  
2 the treatment, not from negligent treatment, just  
3 from treatment. Simply because she has a reaction  
4 of Cushingoid, which is a reaction to  
5 corticosteroids, doesn't mean that there's a  
6 physical change. Just because she has headaches,  
7 doesn't mean -- they haven't proved that this was  
8 due to corticosteroid overdose and that that's when  
9 it should have started. They haven't proved that,  
10 Your Honor. They have to undisputedly prove that to  
11 this Court, and they haven't. They have no experts.

12 THE COURT: Okay. I'm -- go ahead.

13 MR. CROSBY: And we see that same  
14 thing, Your Honor, not only in *Fojut* with the tubal  
15 ligation and the pregnancy and the basis for *Genrich*  
16 is what we hold onto today. The difference between  
17 Defense counsel and us is that they can't  
18 definitively state to this Court when a physical  
19 change, injurious change occurred as opposed to just  
20 the normal process of the underlying disease problem  
21 that she had before the negligence occurred.

22 THE COURT: Okay. So if I can try to  
23 burp back what you're saying is that the record -- I  
24 should not be convinced from the record that the  
25 treatment from Goblirsch or anybody from Allina

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1 wasn't necessary negligent until the AVN issues were  
2 not found in November. The -- what I think you're  
3 saying is that side effects such as headaches are  
4 common and not necessarily negligent from negligent  
5 treatment. Even in low doses, they occur. Is that  
6 what I'm supposed to understand? Right?

7 MR. CROSBY: Correct.

8 THE COURT: Okay.

9 MR. CROSBY: Correct. And it's not the  
10 negligence that -- because the negligence occurred  
11 well bef-- long before the physical injurious change  
12 occurred. That was determined to be in November.

13 THE COURT: Okay. I mean, I want to  
14 make sure that you know that I'm listening and the  
15 record knows that I'm listening too.

16 MR. CROSBY: It's exceptional to be in  
17 front of a Court that does ask questions. The  
18 records support the fact that the manifestation of  
19 those avascular necrosis didn't occur until the  
20 earliest would be November 4, and for the client to  
21 have found out about it would have been Septem-- not  
22 September, December 15, Your Honor.

23 THE COURT: Okay. Now do you agree  
24 that the standard that I posed to Mr. DuBeau of an  
25 injury occurs rather an actual injury arises when

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1 the negligent act or omission causes a greater harm  
2 in that which existed at the time the negligent act  
3 or omission? Do you agree that is the standard for  
4 which I should be gathering or deciding this summary  
5 judgment motion?

6 MR. CROSBY: Would you read it to me  
7 again, please?

8 THE COURT: This is citing from *Genrich*  
9 at paragraph 16, an actionable injury arises when  
10 the negligent act or omission causes a greater harm  
11 than that which existed at the time of the negligent  
12 act or omission. Do you agree that that is the  
13 standard by which this summary judgment motion  
14 should be determined?

15 MR. CROSBY: I do. It's when that  
16 injury is manifested.

17 THE COURT: I und-- well, okay. Now  
18 manifested is not a word that I'm aware of is in the  
19 standard anywhere. Now I know from reading the  
20 reply briefs and hearing it today that the issue is  
21 not the manifestation. Now, what I want to know is,  
22 do you have any definitive case law or specific case  
23 law that says when the injury manifests itself, that  
24 that's part of the *Genrich* equation? Do you have  
25 case law to support that argument? And if so, what

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1 is it?

2 MR. CROSBY: Well, we cite -- when we  
3 address that, Your Honor, it's on page 5 and 6 of  
4 our brief.

5 THE COURT: Well, you cited *Paul*.

6 MR. CROSBY: Right. And --

7 THE COURT: And *Fojut*. I get that, I  
8 know that, which are cited in *Genrich*. But no where  
9 in *Genrich* or in *Mayo Clinic* is a manifestation  
10 discussed. And what I want to know is, do you have  
11 case law to back up that assertion? If so, what is  
12 it?

13 MR. CROSBY: To use the word manifest,  
14 Your Honor, I don't have that. But in regards to  
15 hand in hand with the summary judgment standard of  
16 no genuine issue of material fact and under the  
17 citation, we say the rule that recovery for damages  
18 may be had for reasonable certain injurious  
19 consequences of the tortfeasor's negligent conduct,  
20 not for merely possible injurious consequences.

21 They're asking you to look at these  
22 possible injurious consequences: the headaches, the  
23 -- she had problems with her knees, the pain in her  
24 knees, Cushingoid which is a kind of -- your face  
25 gets fat. Those are possible injurious consequences

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1 that may or may not lead to a lawsuit. In this  
2 case, they didn't. But they want you to focus on  
3 that when it's not the focus. The focus is  
4 avascular necrosis that occurred as a result of the  
5 negligence.

6 THE COURT: Okay. Anything else that  
7 you would wish to argue, Mr. Crosby?

8 MR. CROSBY: No, Your Honor. Thank  
9 you.

10 THE COURT: All right. Let's get my  
11 scheduling clerk on the line. What we're going to  
12 do, gentlemen, you won't have to come back to  
13 Ellsworth. We'll hook up by phone and I'll just do  
14 an oral reading or an oral of my decision. And the  
15 reason I'm going to do it that way quite frankly is  
16 that I don't have the staff to type up some of the  
17 windy things that I write. I'm just going to read  
18 my notes. We'll get her on the line here.

19 *(Off the record for scheduling.)*

20 THE COURT: Go back to March 18, Renee.

21 THE JUDICIAL ASSISTANT: Okay. Any  
22 certain time? I have the whole day open.

23 THE COURT: Somebody was limited. Mr.  
24 Whitmore?

25 MR. WHITMORE: Yeah, that's the day we

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1 leave for Europe.

2 THE COURT: So you --

3 MR. WHITMORE: We leave in the  
4 afternoon, so if we do at 9:00 in the morning.

5 THE COURT: If we did it in the  
6 morning?

7 MR. WHITMORE: Yeah, that'd be fine.

8 THE COURT: I don't want to squeeze  
9 your vacation, Mr. Whitmore. Does that work for  
10 sure?

11 MR. WHITMORE: Well, it should be fine.

12 THE COURT: All right.

13 MR. WHITMORE: If my wife disagrees  
14 with me, I will call you tomorrow. But I think it  
15 will be okay.

16 THE COURT: All right. Let's book the  
17 18<sup>th</sup> at 9:00.

18 THE JUDICIAL ASSISTANT: Okay.

19 THE COURT: And all of -- Mr. Whitmore  
20 can do it from an airport bar if he wants to. So  
21 all opposing counsel can appear by telephone.

22 THE JUDICIAL ASSISTANT: Do you want  
23 them to use that conference number to call in?

24 THE COURT: Yeah. We'll -- in the  
25 notice, Renee will send out a how to access

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1 freeconferencecall.com and there will be access  
2 codes and stuff.

3 THE JUDICIAL ASSISTANT: Okay.

4 THE COURT: All right. Yeah. So,  
5 yeah, 45 minutes most, Renee.

6 THE JUDICIAL ASSISTANT: Okay. Sounds  
7 good.

8 THE COURT: Thank you. Bye now.

9 MR. DuBEAU: Your Honor, can I make one  
10 comment just for the record in response to something  
11 that Mr. Crosby said?

12 THE COURT: We'll give two-minute  
13 responses. Go ahead.

14 MR. DuBEAU: It won't even take that  
15 long. He made the point of whether or not there's a  
16 material issue of fact in dispute. He posited a  
17 large portion of his argument on the notion that  
18 things like headaches, Cushing syndrome and alike  
19 are normal simple responses to steroid use. That  
20 sounds to me like a medical opinion. Had he wanted  
21 to respond and join issue on that, he would have  
22 needed to support that with some form of medical  
23 opinion. He has not done so. That is actually a  
24 failure to join an issue of material fact. That's  
25 all I needed to say. Thank you.

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1 MR. WHITMORE: I'll be less than my two  
2 minutes. Beyond what counsel -- it's a fundamental  
3 misunderstanding in terms of what the law is. But  
4 even the record doesn't support what he's saying  
5 about the rash business and just the headaches. If  
6 you look, it's in my list of things on page 7 of our  
7 reply, as early as June 12, I can specifically  
8 reference discussion of pain in the knees and hips.  
9 That's completely inconsistent with their argument,  
10 which is wrong in the first place. So I just need  
11 to -- I just don't want that to inadvertently slip  
12 past the Court.

13 And I would finally refer the Court to  
14 the *Fojut* case. There's language that we've cited  
15 in our materials which I think it is important and  
16 it hits very consistent with the questions that Your  
17 Honor was asking. Worsening of symptoms does not  
18 restart the clock if they arose from the same  
19 action, the *Fojut* case, 569 N.W.2d. 737. That's the  
20 case that Counsel is talking about and the language  
21 within that. It undercuts exactly what their  
22 argument is. And I think beyond that, I think we've  
23 talked about it, but I wanted to throw those out to  
24 you.

25 THE COURT: Mr. Crosby?

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1 MR. CROSBY: Defense counsel wants me  
2 to provide it a medical opinion to dispute what  
3 they're providing to this Court as nonmedical expert  
4 opinions. It's their burden, Your Honor, to prove  
5 to this Court that there is no disputed fact in  
6 regards to that. They want this Court to believe  
7 that there's -- all of her problems stem from and  
8 represent a physical injurious change.

9 It's out of the negligence, Your Honor,  
10 that the physical injurious change -- and there's a  
11 clausal nexus to what we're bringing forward of the  
12 avascular necrosis and the vestibular migraines.  
13 It's not Cushingoid, it's not hips -- excuse me,  
14 it's not pain in the lower extremities or the ankles  
15 or the knees. And that's what they want this Court  
16 to do, and that's not right. It's not undisputed,  
17 Your Honor, by anybody other than us three  
18 attorneys.

19 THE COURT: All right. Thank you all,  
20 gentlemen. Well-argued and well-briefed, I  
21 appreciate that. For an old DA who has no  
22 experience in these matters, that was important and  
23 we'll do our best to get it right. So we'll talk to  
24 you all on the 18<sup>th</sup> of March.

25 MR. DuBEAU: Thank you, Judge.

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MR. CROSBY: Thank you, Judge.

MR. WHITMORE: Thank you, Your Honor.

*(Whereupon, the Proceedings adjourned at 11:48 a.m.)*

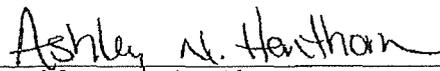
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I, Electronic Court Reporter for Buffalo County, Wisconsin, do hereby certify that I have carefully transcribed from and compared the foregoing pages with the original digital audio recording from said proceeding and that this transcript is true and correct to the best of my ability.

I further certify that I am neither counsel for nor related to any party to said action, nor in any way interested in the outcome thereof; and that I have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, or that requires me to provide any service not made available to all parties to the action.

Dated this 29<sup>th</sup> day of June, 2020 in Alma, Wisconsin.



Ashley N Henthorn  
Official Digital Court Reporter

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Pierce County, WI

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STATE OF WISCONSIN      CIRCUIT COURT      PIERCE COUNTY      2018CV000219

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Kelly Brellenthin, et al.,

Plaintiffs,

ORAL ARGUMENTS

vs.

2018 CV 000219

Dr. Gregory Goblirsch, et al.,

Defendants.

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HONORABLE THOMAS CLARK

PRESIDING JUDGE

A P P E A R A N C E S

JOSEPH M. CROSBY, Attorney of Law, St. Paul,  
Minnesota, appeared as counsel for and on behalf of  
Plaintiffs Kelly and Joseph Brellenthin.

MARK R. WHITMORE, Attorney of Law,  
Minneapolis, Minnesota, appeared as counsel for and on  
behalf of Defendant Allina Health Services.

GUY DuBEAU, Attorney of Law, Madison,  
Wisconsin, appeared as counsel for and on behalf of  
Defendants Gregory Goblirsch, MMIC Group, and Western  
Wisconsin Medical Associates, S.C.

*All parties appeared by telephone.*

Date of Proceedings: **March 18, 2020**

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1           *(Whereupon, the Proceedings began at 9:12 a.m.)*

2                   THE REPORTER: If the attorneys could  
3 please state their names and test so that I can  
4 hear, I would greatly appreciate it.

5                   MR. CROSBY: Joe Crosby on behalf of  
6 the Plaintiffs, Brellenthins.

7                   MR. DuBEAU: This is Guy DuBeau on  
8 behalf of Dr. Goblirsch, et al.

9                   MR. WHITMORE: Mark Whitmore on behalf  
10 of Allina Health Services.

11                   THE REPORTER: Thank you, gentlemen.

12                   THE COURT: All right. This is  
13 2018CV219, Brellenthin, et al, versus Goblirsch, et  
14 al. The attorneys have just announced their  
15 appearances. Here now the ruling of the Court.  
16 And, gentleman, I'm going to warn you; there's a lot  
17 of things that you already know. I don't mean to  
18 lecture experienced attorneys, but what I'm doing is  
19 simply creating a record.

20                                 Summary judgment is appropriate when  
21 there are no genuine issues of material fact and the  
22 moving party --

23                   THE REPORTER: I'm sorry. There is an  
24 interference. I don't know if the parties can mute  
25 their lines so that we can just hear the Judge, but

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1           there is some other interference going on when the  
2           Judge is speaking.

3                         THE COURT: Do we still have Mr.  
4           DuBeau?

5                         MR. DuBEAU: Yes, Judge. This is Guy  
6           DuBeau. I am still here.

7                         THE COURT: Do we still have Mr.  
8           Crosby?

9                         MR. CROSBY: Yes, sir.

10                        THE COURT: Do we still have Mr.  
11           Whitmore?

12                        MR. WHITMORE: Yes, Your Honor.

13                        THE COURT: Do we still have Ashley?

14                        THE REPORTER: Yes.

15                        THE COURT: All right. I'll start over  
16           again. Summary judgment is appropriate when there  
17           are no genuine issues of material fact that the  
18           moving party is esta -- is entitled a judgment as a  
19           matter of law. When deciding if there are genuine  
20           issues of material fact, the Court should review the  
21           evidence and draw all reasonable inferences in the  
22           light most favorable to the non-moving party. The  
23           defense shown must defeat Plaintiff's claims as a  
24           matter of law. That is from *Preloznik, P-r-e-l-o-z-*  
25           *n-i-k, v Madison*, 113 Wis.2d. 112 at page 116, Court

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1 of Appeals 1983.

2 Any reasonable doubt as to the  
3 existence of a genuine issue of material fact must  
4 be resolved against the moving party. *Heck versus*  
5 *Heck*, 93 Wis.2d. 349 at 356, 1979. Both Defendant's  
6 claims for summary judgment are grounded from the  
7 fact that the Plaintiff's claims are barred by the  
8 statute of limitations in a medical malpractice  
9 action which is stated in Wisconsin Statute  
10 893.55(1m).

11 For this matter, a relevant portion of  
12 the statute indicates that an action to recover  
13 damages in such an action must be commenced within  
14 three years of the date of injury. The standard to  
15 determine whether a medical malpractice claim was  
16 timely filed was agreed by the parties to this  
17 action as to determine the date of a physical  
18 injurious change as defined by the case of *Estate of*  
19 *Genrich v O-H-I-C Insurance Company*, 2009 WI 67,  
20 paragraph 17; 318 Wis.2d. 553 at 565, and *Doe 56 v*  
21 *Mayo Clinic*, 2016 WI 48, paragraph 17; 369 Wis.2d.  
22 351 at 363.

23 Plaintiff in the *Genrich* case argued  
24 that the injuries triggering the limitation period  
25 does not occur until the patient's conditions become

1           untreatable or irreversible. That position was  
2           rejected by the Supreme Court who stated that an  
3           actionable injury arises when a negligent act or  
4           omission causes a greater harm than that which  
5           existed at the time of the negligent act or  
6           omission, *Genrich* at paragraph 16.

7                       The point to determine in this matter  
8           is when did the physical injurious change occur by  
9           utilizing the content of when did the negligent act  
10          or omission cause a greater harm than that which  
11          existed at the time of the negligent act or  
12          omission. Plaintiff cites *Fojut v. Staf1*, 212  
13          Wis.2d. 827, for the assertion that the key to the  
14          analysis is to determine factually when the injury  
15          became manifest. Citing *Paul v Skemp*, 242 Wis.2d.  
16          507, *Paul* states the negligence must cause an injury  
17          before there is an accrual of a claim, *Paul* at  
18          paragraph 34. This question -- or this quotation  
19          was cited by the Plaintiff in their brief at page 5.

20                      The Plaintiff, in their brief, states  
21          the key to any legal analysis of the timeliness of  
22          suit commencement, therefore, is to ascertain  
23          factually when the injury became manifest and  
24          creates the legal rule that recovery may be had for  
25          reasonably certain injurious consequences of the

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1 tortfeasor's negligent conduct, not for merely  
2 possible injurious consequences, page 6. The  
3 Plaintiff must add the element of reasonable  
4 certainty of the present of injurious circumstances  
5 to the *Genrich* analysis. The Court notes that  
6 nowhere is it stated that the timeliness of suit  
7 commencement is factually based when the injury  
8 becomes manifest.

9 At page 8 of their brief, Plaintiff  
10 states that under *Genrich* and *Fojut*, the claims  
11 accrual date must await the actual physical  
12 manifestation of a harm that develops more gradually  
13 from the wrongful act. This manifestation  
14 characterization is not supported in case law, nor  
15 was it defended at oral argument. The *Pauls*  
16 standard was explained in *Genrich* to create the  
17 standard for when 893.55(lm)(a) triggered. That  
18 clearly is explained by when a greater harm exists  
19 after the negligent act or omission.

20 In the complaint, Plaintiff alleges  
21 that Dr. Goblirsch treated Kelly Brellenthin with  
22 high doses of corticosteroids for her hives on March  
23 of 2015, at paragraph 12. The complaint also states  
24 Allina's involvement for treatment of Kelly  
25 Brellenthin with corticosteroids occurred in March

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1 of 2015, paragraph 16 and 17. The complaint alleges  
2 at paragraph 14, that their treatment caused the  
3 condition to worsen to the point she was  
4 hospitalized and treated by Goblirsch and then  
5 others associated with Allina in March of 2015.  
6 That's between 14 and 18.

7 Paragraph 19 states that Allina's  
8 doctors prescribed a tapering of the treatment and  
9 Goblirsch should have been aware of that. Kelly  
10 Brellenthin was admitted to Mayo in Rochester where  
11 their doctors said to taper the treatment but,  
12 instead, Goblirsch increased the dosage, paragraph  
13 21 and 22. The claimed consequences of these  
14 actions is the diagnosis of bilateral vascular  
15 necrosis of her hips and vestibular migraine  
16 headaches from corticosteroid toxicity, the  
17 Plaintiff page (sic) 27.

18 The Plaintiff's complaint said the  
19 malpractice alleged is the over-prescription and  
20 administration of a high dose of corticosteroid to  
21 treat the Plaintiff, from paragraph 24 to 41.  
22 Examples cited in the complaint of the deviation  
23 from the standard of care is that Goblirsch failed  
24 to appropriately reduce corticosteroid which  
25 resulted in corticosteroid toxicity, paragraph 26.

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1                   The complaint ties the development of  
2                   bilateral vascular necrosis and vestibular migraine  
3                   headache to that corticosteroid toxicity. In their  
4                   brief, the Plaintiff states her cause of action  
5                   matured or accrued when the injury was manifest.

6                   THE REPORTER: Judge, I apologize.  
7                   Judge, I apologize. Your connection is getting  
8                   either really crackly, and there is still some kind  
9                   of beeping or interference in the background. I  
10                  don't know what party is not muted, but I would just  
11                  appreciate if they could.

12                  THE COURT: Gentlemen, we need to fix  
13                  this. Otherwise, I'm just going to have to have you  
14                  in Pierce County. Everybody mute their phone.

15                  MR DuBEAU: Yes, sir.

16                  MR. CROSBY: Say again, Judge. What do  
17                  you need from each one of us?

18                  THE COURT: Everyone mute their phone.

19                  MR. CROSBY: Okay.

20                  THE REPORTER: Thank you.

21                  THE COURT: Can I pick up where I left  
22                  off?

23                  THE REPORTER: Yes, sir.

24                  THE COURT: In their brief, the  
25                  Plaintiff states her cause of action matured or

8

1 accrued when the injury was manifest. Only when  
2 this date is conclusively shown by expert testimony  
3 will the Plaintiff's action been deemed to have no  
4 merit. Similarly in oral argument, the Plaintiff  
5 argues that the headache, Cushing-like symptoms, the  
6 knee and hip pain are only possibly injurious  
7 consequences but not the focus of a lawsuit which is  
8 avascular necrosis.

9 Again, legally, the standard is when  
10 did a physical injurious change occur? It is not  
11 speculative when the change has occurred. It is not  
12 nearly the Defense attorney's asserting when the  
13 physical injurious change is occurred. It is the  
14 Mayo Clinic doctors citing all of the issues of  
15 headache, development of Cushing syndrome, steroid-  
16 induced myopathy which arose in the context of  
17 corticosteroid therapy in March by Goblirsch and  
18 Allina physician. All of these symptoms were  
19 related by Ms. Brellenthin to Mayo Clinic doctors,  
20 who established the causation referred to in the  
21 report.

22 Goblirsch's motion for summary judgment  
23 indicates that there are several possible choices to  
24 the date of the physical injurious change  
25 experienced by Kelly Brellenthin. The claim is that

1 on any of these dates, the greater harm was present  
2 and existed at the time of the negligent act which  
3 would entitle Defendant to summary judgment if the  
4 claim was not filed within the three-year statute of  
5 limitation. As many of the dates occurred prior to  
6 the November 2 anniversary of the filing date of the  
7 Defendant's complaint, summary judgment is  
8 warranted.

9 Plaintiff's affidavit shows a diagnosis  
10 of avascular necrosis of the femoral head, left  
11 greater than right, was made by Dr. Ernste on 11/04  
12 of '15, from Crosby Affidavit of Mayo Clinic records  
13 at page 319 from Plaintiff's Exhibit A. However, on  
14 October 26 of 2015, a Mayo Clinic record from page  
15 324 of the Crosby affidavit and page 332 of the  
16 DuBeau affidavit, Exhibit A, indicate unequivocally  
17 that the review of the MRI of Kelly Brellenthin's  
18 pelvis does show avascular necrosis bilaterally,  
19 left greater than right, continuing on page 332 of  
20 Exhibit A, is there a possible treatment for  
21 osteonecrosis.

22 Plaintiff relies on the fact that the  
23 October 26<sup>th</sup> MRI is not set to look at the hip per  
24 say as discussed in Mayo Clinic Exhibit A, page 332.  
25 However, the rule is what date the physical

1 injurious change occur. On the 26<sup>th</sup> of October, Mayo  
2 Clinic Dr. Duck had found pain in the hip of Ms.  
3 Ritchie, page 332 of Exhibit A, and stated for that  
4 reason the avascular necrosis was shown. That  
5 demonstrated the distinct physical injurious change  
6 by the time of the October 26 (inaudible).

7 Crosby affidavit, Plaintiff's Exhibit  
8 A, page 330, also demonstrates that she had high  
9 doses of corticosteroid with iatrogenic Cushing  
10 syndrome. This also was documented in October 26.  
11 This fact, as well, would demonstrate a physical  
12 injurious change as of October 26 of 2015.

13 The Plaintiff's Exhibit A of the Crosby  
14 affidavit clearly points to the period of four to  
15 five months prior to December of 2015 when she was  
16 experiencing pain in her hip. The Mayo Clinic  
17 record at page 308 of the Crosby affidavit, Exhibit  
18 A, clearly states she had no prior history of pain.  
19 And after she was treated with prednisone for about  
20 five weeks in March of 2015, did she start to have  
21 pain in her leg. That passage also provides clear  
22 indication of the relationship between use of  
23 corticosteroids and the pain she was experiencing.  
24 That indicates clear physical injurious change  
25 possibly as early as March of 2015.

1                   After the claim of vestibular migraine  
2                   headache in the complaint, the Defendant, at Exhibit  
3                   A of the DuBeau affidavit, page 342, from June of  
4                   2015, documents that her occasional migraine  
5                   headache had been more severe and she will have them  
6                   for several times a day. This was after being on  
7                   high doses of steroids for five weeks.

8                   In the July 8, 2015, Mayo Clinic care  
9                   note from the DuBeau affidavit at page 332, the  
10                  doctor from Mayo, Dr. Swanson, diagnosed frequent  
11                  headache and episodic nausea arising in the context  
12                  of iatrogenic Cushing syndrome. The medical record  
13                  at page 332 states, in speaking with the patient,  
14                  probably either during the corticosteroid treatment  
15                  or shortly thereafter, she developed head pressure.  
16                  The report indicates that she does not have any  
17                  previous history of headache.

18                  In the DuBeau affidavit, page 317 from  
19                  the report on July 21 of 2015, Dr. Staab of Mayo  
20                  Clinic indicated that she had no history of headache  
21                  or vestibular symptoms prior to the onset of  
22                  occurred illness in the spring of 2015. That report  
23                  indicates she was treated with intravenous steroids  
24                  and oral steroids. She said she experienced the  
25                  onset of head pressure, vestibular symptoms as she

1 was treated with and then withdrawn from the  
2 steroids.

3 In the DuBeau affidavit, page 307 on  
4 the report, in an appointment on September 15, 2015,  
5 Dr. Staab at Mayo Clinic indicates that Ms.  
6 Brellenthin continues to have difficulties with  
7 headache and vestibular symptoms which would --  
8 which were part of the picture this past summer.  
9 She has a continuing headache which is present on a  
10 daily basis but not throughout the day.

11 Other issues were discussed in the  
12 DuBeau affidavit, page 343 on June 12 of 2015. Dr.  
13 Ernste of Mayo Clinic stated she has gained over 30  
14 pounds while on steroids. She is feeling now the  
15 effects of exogenous steroid use causing excessive  
16 weight gain which is effecting her joints, in  
17 particular her hip and her knee.

18 Lastly, from the DuBeau affidavit,  
19 Exhibit A, page 337 from a July 1, 2015, report from  
20 a Dr. A. Y. Chang, she was diagnosed with secondary  
21 adrenal insufficiency from exogenous corticosteroids  
22 and impaired adrenal reserve.

23 Individually and collectively, these  
24 records demonstrate a physical injurious change at  
25 least as of the time of each individual report. The

1 factual assertion from the DuBeau affidavit and  
2 Hoffman affidavit are not contradicted in the Crosby  
3 affidavit. No issues of material fact are presented  
4 by the competing affidavits of the party. As such,  
5 the claims of the Plaintiffs will be time barred  
6 because of not being filed within the three years of  
7 physical injurious change, in this case, several of  
8 them.

9 A motion for summary judgment in favor  
10 of Defendants Allina, Goblirsch, Western Wisconsin  
11 Medical Associates, and MMI is granted. This case  
12 is dismissed. I would ask that an order be prepared  
13 by Mr. DuBeau.

14 MR. DuBEAU: I've just gone off mute.  
15 I'm happy to do so, Your Honor. This is DuBeau.

16 THE COURT: All right. Then we're  
17 adjourned, gentlemen. Thank you.

18 MR. CROSBY: Thank you, everyone.

19 MR. WHITMORE: Thank you.

20

21 *(Whereupon, the Proceedings were concluded at 9:33 a.m.)*

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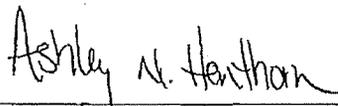
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STATE OF WISCONSIN )  
COUNTY OF BUFFALO ) §

I, Electronic Court Reporter for Buffalo County, Wisconsin, do hereby certify that I have carefully transcribed from and compared the foregoing pages with the original digital audio recording from said proceeding and that this transcript is true and correct to the best of my ability.

I further certify that I am neither counsel for nor related to any party to said action, nor in any way interested in the outcome thereof; and that I have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, or that requires me to provide any service not made available to all parties to the action.

Dated this 6<sup>th</sup> day of April, 2020 in Alma, Wisconsin.



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Ashley N. Henthorn  
Official Digital Court Reporter