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SUPREME COURT OF WISCONSIN

APPEAL NO. 2020AP000876

KELLY BRELLENTHIN AND JOSEPH BRELLENTHIN,
Plaintiffs-Appellants-Petitioners

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.

RESPONSE TO PETITION FOR REVIEW OF
DEFENDANTS-RESPONDENTS
DR. GREGORY GOBLIRSCH, WESTERN WISCONSIN
MEDICAL ASSOCIATES, S.C. d/b/a VIBRANT HEALTH
FAMILY CLINICS, AND MMIC GROUP

On Appeal from Wisconsin Court of Appeals, District 3,
and the Circuit Court of Pierce County,
Civil Division, No. 2018CV000219
The Honorable Thomas W. Clark, Presiding Judge.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

ARGUMENT 3

I. PLAINTIFFS-APPELLANTS-PETITIONERS’ PETITION MEETS NONE OF THE CRITERIA FOR REVIEW AND SHOULD BE DENIED 3

 A. Information contained in documents received pursuant to an exception of the hearsay rule are accepted for the truth of the matter asserted therein and, accordingly, are admissible evidence of those facts..... 5

 B. Ms. Brellenthin’s medical records did not need to be supplemented by the testimony of a physician in order to be considered by the trial court in support of a motion for summary judgment 10

CONCLUSION 12

FORM AND LENGTH CERTIFICATION 14

ELECTRONIC FILING CERTIFICATION 15

CERTIFICATION OF SERVICE 16

TABLE OF AUTHORITIES

Cases

<i>Estate of Genrich v. OHIC Insurance Co.</i> , 2009 WI 67, 17, 318 Wis. 2d 553, 769 N.W.2d 481	2,9
<i>Cramer v. Theda Clark Memorial Hospital</i> , 45 Wis. 2d, 147, 172 N.W.2d 427 (1969).....	10
<i>Doe 56 v. Mayo Clinic Health System-Eau Claire Clinic, Inc.</i> , 2016 WI 48, 369 Wis. 2d 351, 880 N.W.2d 681.....	2,3
<i>Tews v. NHI, LLC</i> , 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860.....	12

Statutes

Wis. Stat. sec. 893.55(1m).....	2
Wis. Stat. sec. 809.62(1r)	3
Wis. Stat. sec. 809.62(1r)(a)	3
Wis. Stat. sec. 809.62(1r)(b)	3
Wis. Stat. sec. 809.62(1r)(c)1.....	3
Wis. Stat. sec. 809.62(1r)(c)2	4
Wis. Stat. sec. 809.62(1r)(c)3	4
Wis. Stat. sec. 809.62(1r)(c)4	4
Wis. Stat. sec. 809.62(1r)(c)5	4
Wis. Stat. sec. 809.62(2)(d)	3
Wis. Stat. sec. 908.01(3)	5
Wis. Stat. sec. 809.01(4)(b)1.....	11
Wis. Stat. sec. 908.03(6m).....	5,9

STATEMENT OF THE ISSUE

Question presented: Was the submission of uncontested medical records, which facially document that plaintiff was experiencing adverse medical consequences as a result of alleged negligent conduct more than three years prior to the filing of a lawsuit, sufficient to establish a *prima facie* statute of limitations defense under well-established summary judgment methodology?

Answer of the Trial Court: Yes.

Answer of the Court of Appeals: Yes.

STATEMENT OF THE CASE

This is a medical malpractice action based on the theory that Defendants-Respondents' prescribing practices for oral corticosteroid medication (Prednisone) caused Plaintiff-Appellant-Petitioner's Kelly Brellenthin, injury. In their Complaint, the Plaintiffs-Appellants-Petitioners draw particular attention to alleged injuries of bilateral avascular necrosis and migraine headaches which they attribute to corticosteroid toxicity. Ms. Brellenthin's uncontested medical records demonstrate that she was experiencing multiple problems, including but not limited to avascular necrosis and migraine headaches,

attributed to corticosteroid toxicity, more than three years prior to the filing of this action.

The Brellenthins commenced suit on November 2, 2018. These Defendants-Respondents moved for summary judgment on statute of limitations grounds pursuant to Wis. Stat. sec. 893.55(1m). In support of their motion, they submitted 110 pages of Ms. Brellenthin's certified medical records. The records contain at least ten separate entries between March 25 and October 28, 2015, in which her medical providers noted she was having adverse consequences from corticosteroids. These include references to the things cited in Plaintiffs-Appellants-Petitioners' Complaint, namely migraine headaches and radiographic evidence diagnosing bilateral avascular necrosis. The Plaintiffs-Appellants-Petitioners similarly submitted some of Ms. Brellenthin's medical records and used those to argue against the motion. Neither party challenged the authentication, substantive accuracy or any aspect of any of the medical records.

The trial court received the parties' briefing and took oral argument on February 13, 2020. Applying the applicable statute and the holdings set forth 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, 369 Wis.

2d 351, 880 N.W.2d 681, which, respectively, articulated and confirmed the "physical injurious change rule" for the accrual of medical malpractice actions, the Court found the action was untimely and granted summary judgment in favor of Defendants-Respondents.

Plaintiffs-Appellants-Petitioners filed for appeal of the trial court ruling on May 7, 2020. The Court of Appeals filed its Decision affirming the trial court on May 25, 2021. This Petition followed.

The Court of Appeals sets forth all facts necessary for this Court's understanding of the issue presented at paras. 2-13 of its Opinion; accordingly, these respondents do not need to supplement those findings. Wis. Stat. § 809.62(2)(d).

ARGUMENT

I. PLAINTIFFS-APPELLANTS-PETITIONERS' PETITION MEETS NONE OF THE CRITERIA FOR REVIEW AND SHOULD BE DENIED.

The criteria for review by this Court are set forth in Wis. Stat. sec. 809.62(1r). Plaintiffs-Appellants-Petitioners seem to agree that this case does not implicate questions of federal or state constitutional law (Wis. Sta. sec 809.62(1r)(a); the need to establish, implement or change a policy within this Court's authority (Wis. Stat. Sec. 809.62(1r)(b); the application of a new doctrine (Wis. Stat. sec. 809.62(1r)(c)1); the presentation of a novel question which will have

statewide impact (Wis. Stat. sec. 809.62(1r)(c)2); the Court of Appeals' decision is in conflict with any other precedent (Wis. Stat. sec 809.62(1r)(c)4); or requires reexamination of any existing precedent (Wis. Stat. sec. 809.62(1r)(c)5). *See* Petition for Review at p. 1. Rather, Plaintiffs-Appellants-Petitioners' contend that this case presents a question of law that is likely to recur without Supreme Court guidance (Wis. Stat. sec. 809.62(1r)(c)3). *See* Pet. for Rev. at p. 1. Plaintiffs-Appellants-Petitioners are incorrect.

Though the argument is somewhat difficult to follow, Plaintiffs-Appellants-Petitioners appear to raise two distinct issues. First, they contend that because a defendant moving for summary judgment must establish a *prima facie* case through admissible evidence, the opinions contained in records admissible through a hearsay exception are insufficient generally. *See* Pet. for Rev. at p. 8. Second, and closely related, they contend that if the relevant evidence are medical causation opinions, even when those opinions are clearly stated in medical records there must also be accompanying testimony from a physician in order to make them admissible. *See* Pet. for Rev. at p. 6-7.

A. Information contained in documents received pursuant to an exception of the hearsay rule are accepted for the truth of the matter asserted therein and, accordingly, are admissible evidence of those facts.

Plaintiffs-Appellants-Petitioners contend that documents accepted pursuant to a hearsay objection are not admissible evidence on issues of fact. Specifically, they argue that their “objection was not to the medical records per se but the causal opinions contained therein.” *Id.* at 7. Appellants are both incorrect and fail to recognize that they are challenging well settled principles that this Court does not need to consider. Plaintiffs-Appellants-Petitioners’ argument entirely ignores the import of how the records came before the court. Medical records are admissible into evidence as an exception to the hearsay rule. Wis. Stat. sec. 908.03(6m). The very definition of hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, **offered in evidence to prove the truth of the matter asserted.**” Wis. Stat. sec. 908.01(3)(*emphasis supplied*). Those records were before the trial court to substantiate the truth of the following facts.

- Ms. Brellenthin first contacted Dr. Goblirsch complaining of a severe allergic reaction on March 3, 2015. After a failed trial of a less aggressive medicine, Dr. Goblirsch,

at Ms. Brellenthin's request, agreed to prescribe her corticosteroids on March 4, 2015. (P. App. 2.)

- Over the next two months Ms. Brellenthin's allergic symptoms were intractable and several different providers prescribed different corticosteroid regimens for her to follow. (P. App. 3.)

- The last date on which Dr. Goblirsch prescribed Ms. Brellenthin any corticosteroids was May 11, 2015, with a course that would last ten days. (P. App. 4.)

- On June 3, 2015, Ms. Brellenthin returned to Dr. Goblirsch with complaints of myopathy, arthralgia, weakness, fatigue, nausea, vomiting and constipation. Dr. Goblirsch declined to resume corticosteroid therapy and referred Ms. Brellenthin to the Mayo Clinic where she had also been receiving treatment. (P. App. 4.)

- On June 12, 2015, Ms. Brellenthin saw a Mayo Clinic rheumatologist who noted that her prior complaints of 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." He ordered tests which were

subsequently reviewed by a Mayo Clinic endocrinologist who noted that the test demonstrated “suboptimal response of the adrenal gland to the (test). The most likely cause is chronic exogenous high-dose steroid, which have led to secondary adrenal insufficiency. . . .” (P. App. 4.)

- On July 8, 2015, Ms. Brellenthin saw a Mayo Clinic neurologist who noted that he was seeing her “to address her headaches which arose in March/April 2015. Those 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.” (P. App. 5.)

- On July 21, 2015, Ms. Brellenthin saw a psychiatrist at Mayo Clinic who noted that she was experiencing “[a]drenal insufficiency secondary to exogenous steroid treatment” and “[h]eadaches and vestibular symptoms associated with steroid treatment withdrawal.” (P. App. 5.)

- On September 15, 2015, Ms. Brellenthin returned to the Mayo Clinic psychiatrist and reported having headaches on a

“daily basis” and “no day without at least some cephalgia.” (P. App. 5.)

- On September 16, 2015, Ms. Brellenthin wrote to one of her Mayo Clinic providers that she was experiencing pain in her hands and commented that “[i]t feels like the symptoms I have in my hands from the steroid poisoning are now in my feet and toes. I have a great amount of pain, grinding and popping in my knees.” (P. App. 5.)

- On October 6, 2015, Ms. Brellenthin underwent a vestibular evaluation for what was described by her provider as “daily unsteadiness, waxing and waning head pressure, and brief spontaneous episodes of vertigo following an adverse response to steroid treatments initiated in April, 2015.” (P. App. 5.)

- On October 26, 2015, Ms. Brellenthin was seen at the Mayo Musculoskeletal Clinic where she described knee pain that had “been bothering her for a couple of months.” Her physician ordered an MRI which was completed on October 28, 2015 which demonstrated that she had “[a]vascular necrosis of

the femoral heads, left greater [than] right, without evidence of articular surface collapse at this time.” (P. App. 5.)

These records were put before the court to establish the truth of the observations therein asserted, namely that Ms. Brellenthin was experiencing physical injurious changes, as that phrase was described in *Estate of Genrich, supra*, well before November 2, 2015. These records were both admissible and more than sufficient to establish a *prima facie* argument that appellants’ case was not timely filed. Plaintiffs-Appellants-Petitioners do not explain why the trial court was not allowed to consider the content of these medical records for the truth of the matters asserted therein as specifically allowed by Wis. Stat. sec. 908.03(6m). Critically important to the instant Petition, they do not explain why this Court needs to provide guidance on how to interpret the law allowing hearsay evidence, such as medical records, when that evidence is submitted for the truth of the matters asserted. The law on this issue is well settled and is not something on which the Court needs to provide guidance.

B. Ms. Brellenthin's medical records did not need to be supplemented by the testimony of a physician in order to be considered by the trial court in support of a motion for summary judgment.

Plaintiffs-Appellants-Petitioners did not challenge the accuracy of any of the observations contained in Ms. Brellenthin's records. Rather, they now contend that this evidence must also have been accompanied by testimony from a physician in order to make it admissible. Plaintiffs-Appellants-Petitioners' key argument is that medical opinions require the observation of a trained physician in order to be admissible into evidence. Specifically, they argue that "(C)ausation, in particular, in a medical negligence case requires expert testimony because it entails specialized knowledge" *citing Cramer v. Theda Clark Memorial Hospital*, 45 Wis.2d 147, 150, 172 N.W.2d 427, 428-429 (1969). Accepting the premise that medical opinions need to come from medical professionals, that is exactly what was provided to the trial court.

As noted above, the medical records were submitted to the court in order to prove the truth of the matters asserted therein. With only one exception, the individuals making the assertions contained in the medical records considered by the court, i.e., the declarants in hearsay parlance, were medical doctors. The only statement

considered by the court that was not authored by a doctor was Ms. Brellenthin's own observation that "[i]t feels like the symptoms I have in my hands **from the steroid poisoning** are now in my feet and toes. I have a great amount of pain, grinding and popping in my knees." (P. App. 5.)(*emphasis supplied.*) This statement is an admission by a party opponent and not even hearsay. Wis. Stat. sec. 908.01(4)(b)1. Every other statement in the medical records relied on by the court were the observational opinions of physicians. Inasmuch as these declarations were made by individuals with the very sort of specialized knowledge that Plaintiffs-Appellants-Petitioners contend was required, then appellant have no legitimate concern regarding the court's reliance on those opinions.

Ultimately, Plaintiffs-Appellants-Petitioners seek to create an issue for this Court's consideration where there is none. Courts and litigants have been relying on the accuracy of information contained in medical records for time in memoriam. Trial courts do not have a problem understanding basic hearsay principles. This case does not present an unusual issue of law in any respect. Defendants-Respondents put forth clear admissible evidence in the form of her own medical records that Ms. Brellenthin was experiencing a physical injurious change from corticosteroids more than three years prior to

her initiation of this action. This was more than adequate to make out the prima facie case required by well accepted summary judgment methodology. *See Tews v. NHI, LLC*, 2010 WI 137, ¶ 4, 330 Wis. 2d 389, 793 N.W.2d 860. At that point, the burden shifted to Plaintiffs-Appellants-Petitioners to create an issue of fact by saying the declarations contained in the medical records were in error or did not mean what they appeared to mean; this they could not do. Accordingly, the trial court was correct in granting summary judgment and the Court of Appeals was correct in upholding that decision. Regardless of the correctness of these rulings, Plaintiffs-Appellants-Petitioners here fail to identify an actual issue of law that is likely to recur without this Court's guidance and their Petition should be denied.

CONCLUSION

For all the reasons set forth herein, Defendants-Respondents Dr. Gregory Goblirsch, Western Wisconsin Medical Associates, S. C. d/b/a Vibrant Health Family Clinics and MMIC Insurance, Inc.

(misidentified as MMIC Group) respectfully request that the Court deny Plaintiffs-Appellants-Petitioners' Petition for Review.

Dated this 7th Day of July, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response to Petition for Review conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a brief produced with a proportional serif font (Georgia 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief, including the statement of the case, the argument, footnotes, and the conclusion (and excluding other content) is 2,185 words.

Dated this 7th day of July, 2021

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ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f), that the text of the electronic copy of this Response to Petition for Review is identical to the text of the paper copy of the Response to Petition for Review.

Dated this 7th day of July, 2021

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CERTIFICATE OF SERVICE

Guy DuBeau certifies that on July 7th, 2021, ten (10) true and correct copies of the Response to Petition for Review of Defendants-Respondents Dr. Gregory Goblirsch, Western Wisconsin Medical Associates, S.C. d/b/a Vibrant Health Family Clinics, and MMIC Group (more properly identified as MMIC Insurance, Inc.) were hand delivered to the Office of the Clerk of the Wisconsin Supreme Court and three (3) true and correct copies of the same were placed in the U.S. mail first-class, postage paid to the following:

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