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SUPREME COURT

NO. 2020AP000876

State of Wisconsin
In Supreme Court

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.

BLUE CROSS BLUESHIELD OF MINNESOTA,
Subrogated-Party.

RESPONSE TO PETITION FOR REVIEW OF RESPONDENT ALLINA HEALTH SERVICES

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INTRODUCTION

This Court should deny review. The appeal presents no issue of statewide significance, nor would a decision in this matter develop, clarify or harmonize the law. The Petition makes limited reference to the Wis. Stat. § 809.62(1r) criteria, and provides virtually no analysis in terms of why a decision by the Supreme Court in this matter is necessary. Indeed, to a large extent the Petition complains about an evidentiary analysis that rests well within the Circuit Court's discretion. Moreover, the construct applied by the Court of Appeals followed well-established and uncontroversial Wisconsin precedent. There is simply no issue that warrants Supreme Court review, and this Court should deny the Petition.

STATEMENT OF THE CASE

Plaintiff-Appellant Kelly Brellenthin presented to Defendant-Respondent Dr. Gregory Goblirsch following an allergic reaction in March 2015. (Court of Appeals Opinion ("Op.") ¶ 2, P-App. 2.) Dr. Goblirsch prescribed a steroid to treat hives which were spreading to Ms. Brellenthin's face and hands. (*Id.*) As the symptoms continued, Ms. Brellenthin was transferred to Allina's United Hospital on March 11, 2015, where she remained until March 16, 2015. (*Id.* ¶ 3, P-App. 3.) While a patient at United Hospital, Ms. Brellenthin continued on the same steroid medications. (*Id.*) She was discharged with instructions to begin the process for weaning the use of those steroids. She did not return to Allina for any care that is pertinent to this case. (*Id.*)

Following her discharge, Ms. Brellenthin saw Dr. Goblirsch on March 18, 2015, and several additional times that month until March 30, 2015, when another provider advised her to try to decrease her steroid prescription. (*Id.* ¶ 4, P-App. 3.) Other providers, who are not parties to this action, continued to administer the steroid medication. (*Id.* ¶ 5, P-App. 3.)

On April 1, 2015, Ms. Brellenthin was already complaining about "a lot of pain in her joints" and questioning whether the pain was "possibly [a] side effect to all the prednisone" she was receiving. (*Id.*) Her provider at the Mayo Clinic noted that her leukocytosis "is due to high-dose steroids." On April 9, 2015, Ms. Brellenthin's physicians at the Mayo Clinic extended the time to taper from the steroids. (*Id.*)

Both the Circuit Court and the Court of Appeals reviewed evidence of the development of symptoms related to Ms. Brellenthin's steroid use.

- **June 3, 2015:** Ms. Brellenthin told Dr. Goblirsch that "joint pains have been a problem for her." (*Id.* ¶ 7, P-App. 4; R. 18, p. 3.)

- **June 12, 2015:** Ms. Brellenthin told a Mayo provider that she had experienced increased frequency and severity of migraine headaches and indicated that she was experiencing "bilateral hip pain on the lateral aspect." This led the provider to determine that she was "feeling now the effects of exogenous steroid use causing excessive weight gain which are affecting her joints—in particular her knees and also hips." (*Id.* ¶ 8, P-App. 4; R. 18, p. 86 (emphasis added).)

- **July 1, 2015:** After Ms. Brellenthin's "suboptimal" results from the June 29, 2015 tests came back, the Mayo doctors charted: "The most likely cause is chronic exogenous high-dose steroids, which have led to secondary adrenal insufficiency." (*Id.*; R. 18, p. 81 (emphasis added).) The provider ultimately rendered a diagnosis

of "secondary adrenal insufficiency from exogenous corticosteroids and impaired adrenal reserve." (*Id.*; R. 18, p. 82 (emphasis added).)

- **July 8, 2015:** Ms. Brellenthin told a neurologist at Mayo that "probably either during the corticosteroid treatment or shortly thereafter, she developed head pressure." The neurologist charted that Ms. Brellenthin arrived "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, during which she gained 26 pounds of weight." (*Id.* ¶ 9, P-App. 5; R. 18, p. 78 (emphasis added).)

- **July 21, 2015:** During a consultation with a psychiatrist, Ms. Brellenthin was experiencing "adrenal insufficiency secondary to exogenous steroid treatment" and "headaches and vestibular symptoms associated with steroid treatment withdrawal." (*Id.*; R. 18, p. 70 (emphasis added).)

- **September 15, 2015:** A Mayo physician noted "Adrenal insufficiency secondary to exogenous steroid treatment, now off exogenous steroids." (*Id.* ¶ 10, P-App. 5; R. 18, p. 66.) Ms. Brellenthin also reported having headaches on a daily basis. (*Id.*)

- **September 16, 2015:** Ms. Brellenthin wrote one of her Mayo doctors about pain she was experiencing in her hands, noting that "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." (*Id.*; R. 18, p. 65 (emphasis added).)

- **October 6, 2015:** Ms. Brellenthin underwent testing for "daily unsteadiness, waxing and waning head pressure and episodes of vertigo following adverse response to steroid treatment." (*Id.* ¶ 11, P-App. 5; R. 18, p. 61 (emphasis added).)

- **October 26, 2015:** Ms. Brellenthin visited the Mayo Musculoskeletal Clinic where she described knee pain that "has been bothering her for a couple of months." Her physician ordered

> an MRI which showed Ms. Brellenthin had "avascular necrosis bilaterally, left greater than right." (*Id.*; R. 18, p. 59.)

At no point in the course of this case have Plaintiffs-Appellants challenged the truthfulness of Ms. Brellenthin's medical records. Likewise, Plaintiffs-Appellants never offered any expert testimony to even begin to refute the documentation set forth in Ms. Brellenthin's own medical records. Finally, at no point during this case have Plaintiffs-Appellants claimed the records are false, inaccurate, or incomplete.

Based on this record, the Court of Appeals affirmed the Circuit Court's decision to grant summary judgment because Plaintiffs-Appellants did not commence this lawsuit within three years of Ms. Brellenthin's date of injury under Wis. Stat. § 893.55(1m). As the parties agreed, this Court has defined a plaintiff's 'date of injury' as the point in which the plaintiff experiences "physical injurious change" as set forth by the seminal case of *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 2, 318 Wis. 2d 553, 769 N.W.2d 481.

Plaintiffs-Appellants do not challenge the applicability of Wis. Stat. § 893.55(1m) nor do they challenge the applicability of the *Genrich* decision. They do not point to any decision which is contrary to the Court of Appeals' decision below, nor do they point to any authority to indicate that a Court of Appeals' decision creates conflict or confusion in Wisconsin state courts. Instead, Plaintiffs-Appellants complain (incorrectly) that the Court of Appeals' well-reasoned opinion baldly creates a lack of consistency in Wisconsin law. But Plaintiffs-Appellants

provide no indication in terms of what that inconsistency or mistaken question of law might be in the unpublished decision below. Absent proof the Petition satisfies the criteria of Wis. Stat. § 809.62(1r), this Court should deny the Petition.

ARGUMENT

Wisconsin statutes clearly define the limited situations in which this Court should accept review. The Petition provides no evidence that these criteria have been met. Moreover, the Court of Appeals' analysis is completely consistent with well-established Wisconsin law that has been applied in evaluating the statute of limitations for many years. For these reasons, the Petition should be denied.

I. The Criteria for Wis. Stat. § 809.62(1r) Have Not Been Satisfied.

Under Wisconsin law, judicial review by this Court is a matter of judicial discretion, not of right, and should be granted "only when special and important reasons are presented." Wis. Stat. § 809.62(1r). The statute sets forth five circumstances (none of which have been shown in this case) when this Court may accept review. The only criteria cited in the Petition is found in Wis. Stat. § 809.62(1r)(c)(3). That provision states the Court may consider a case under the following circumstances:

> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and . . .
>
> > 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. § 809.62(1r)(c)(3) (emphasis added).

The Petition never explains how or why this criterion is satisfied. Instead, the Petition claims the Courts below erred in evaluating undisputed medical records which formed the basis for the court's conclusion about when "physical injurious change" occurred. (Petition ¶ 4.) The Petition alleges that while the records are admissible, they contain information which should not have been considered. (*Id*.) But Plaintiffs-Appellants' argument sets forth exactly the opposite type of question the Supreme Court should consider. Indeed, contrary to Wis. Stat. § 809.62(1r)(c)(3), the question Plaintiffs-Appellants present is factual in nature and presents no meaningful legal question requiring this Court's insight. This is not at all the type of case this Court should review and, indeed, Plaintiffs-Appellants point to no justification for Supreme Court intervention.

The Petition does not point to any conflicting decisions, nor does it explain how or why this issue will supposedly recur. Indeed, the Petition goes on to present an argument about the facts of this particular case, without providing any evidence of statewide impact that this unpublished decision might have in the future. This bare argument falls far short of satisfying the criteria for granting review this Court applies under Wis. Stat. § 809.62(1r). For this reason, the Petition should fail from the outset.

II. The Circuit Court and the Court of Appeals Correctly Applied Well-Established Wisconsin Law.

The Circuit Court and the Court of Appeals held the Brellenthins did not commence this lawsuit within three years of the date of injury as is required by

Wis. Stat. § 893.55(1m). In analyzing when the date of injury occurred under Wis. Stat. § 893.55(1m), the courts below applied the holdings of *Estate of Genrich v. OHIC Ins. 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, the same cases all parties agree set forth the applicable analysis.

As the Court of Appeals correctly noted, there also is no dispute about the summary judgment methodology Wisconsin Courts must apply in considering a motion for summary judgment. (Op. ¶ 15, P-App. 7.) Under that construct, the moving party must only show a *prima facie* case that would defeat the Plaintiff's claim. *Id.* (citing *Tews v. NHI, LLC*, 2010 WI 137, ¶ 4, 330 Wis. 2d 389, 793 N.W.2d 860). In citing Supreme Court precedent, the Court of Appeals explained that a *prima facie* case is established when evidentiary facts which, if they remain uncontradicted, resolve all factual issues in the moving party's favor. *Id.* (citing *Walter Kassuba, Inc. v. Bauch*, 38 Wis. 2d 648, 655, 158 N.W.2d 387 (1968)). After such a showing is made, then the Court will examine affidavits and other proof of the opposing party to determine whether a disputed issue of fact exists. *Id.* (citing *Tews*).

Both at the Circuit Court and at the Court of Appeals, the Defendants submitted Ms. Brellenthin's very own medical records to establish the *prima facie* case that "physical injurious change" began more than three years prior to commencement of this lawsuit on November 2, 2018. This shifted the burden to

Plaintiffs to overcome that *prima facie* showing. When Plaintiffs failed to submit any evidence in the form of expert testimony, other medical records, or anything else to refute the *prima facie* showing, the lower courts held that no disputed issues of material fact existed in terms of when physical injurious change occurred and that, therefore, the claim was time barred.

Throughout its opinion below, the Court of Appeals pointed out the Brellenthin's failure to offer any evidence to create a disputed issue of material fact needed to rebut the *prima facie* evidence presented by Defendants. Indeed, the Court of Appeals noted:

- "[T]he Brellenthins do not contest the accuracy or content of any of those medical records." (Op. ¶ 19, P-App. 9);
- "As mentioned, the Brellenthins do not contest the accuracy or content of any of those medical records." (*Id.* ¶ 23, P-App. 10-11);
- "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." (*Id*. ¶ 24, P-App. 11);
- "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." (*Id.*);
- "[T]hey provide no evidence to support [the assertion that the negative effects were a natural result of taking corticosteroids], either in the form of opposing expert opinion or via medical records." (*Id.* ¶ 25, P-App. 12);
- "[T]he 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." (*Id.* ¶ 26, P-App. 12);

- "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." (*Id.* ¶ 27, P-App. 12-13).

The thorough analysis of the record performed by the Court of Appeals is not challenged in the Petition, nor does the Petition provide any explanation as to how the decision below creates a question or law that must be resolved by the Supreme Court. Indeed, the Court below applied the exact methodology utilized by this Court for many years, a methodology that Plaintiffs-Appellants did not challenge. Rather than presenting an important question of law for the Supreme Court to resolve, the Petition is merely "factual in nature", which is not a question for this Court to review.

As the Court of Appeals made clear, once the Defendants submitted Ms. Brellenthin's medical records, they created a *prima facie* case for summary judgment, shifting the burden to the Plaintiffs to create a disputed issue of material fact. The Court of Appeals correctly noted that the use of expert testimony at trial is different from the standard to establish a *prima facie* case. (*Id.* ¶ 22, P-App. 10.) The Petition offers no legal argument to challenge this fundamental framework. Once the burden shifted back to the Plaintiffs, they needed to submit expert testimony or otherwise challenge the content of those medical records. But, as the lower courts observed, the Brellenthins presented no evidence. Instead, they now

argue that key aspects of the medical records which helped form the *prima facie* case should have simply been ignored. In short, if there were aspects of the medical records that were inaccurate or not based on sound medicine, then the Brellenthins needed to present evidence to challenge those statements. But they never did. Thus, the Petition does not create a problem with the law, but the decision points out the realities of the facts. Namely, the facts remain that the Plaintiffs did not produce any evidence to challenge the *prima facie* proof offered by the Defendants.

This is not a case which satisfies the criteria of Wis. Stat. § 809.62(1r). The Petition provides no analysis of a legal issue this Court needs to resolve, but instead presents factual complaints that have no pertinence to future cases. As a result, the Petition of Review should be denied.

CONCLUSION

Petitioners had a full opportunity to present evidence challenging the medical records which were considered by the Circuit Court and the Court of Appeals. They failed to do so. This case does not create the need for any resolution of an important legal issue by this Court. The decision below did not create or modify existing precedent and, in fact, the analysis by the Court below was repeatedly agreed upon by the parties. There is nothing here for this Court to review. The Court should deny the Petition.

Respectfully submitted,

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Dated: July 7, 2021

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this Response to Petition of Review of Respondent Allina Health Services conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and § 809.62 (4) (a) for a brief produced with a proportional Times New Roman 13-point font. The length of the brief contains 2,654 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19 (12) (f)

I hereby certify that I have submitted an electronic copy of this Response to Petition of Review of Respondent Allina Health Services, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19 (12) (f).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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