

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1246

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

**DAVID HULL, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF KELLY HULL, AND
DAVID LEE HULL, A MINOR, BY HIS
GUARDIAN AD LITEM, DAVID M. SKOGLIND,**

**PLAINTIFFS-RESPONDENTS-
CROSS-APPELLANTS,**

v.

**MEDICAL ASSOCIATES OF MENOMONEE FALLS, LTD.,
A DOMESTIC CORPORATION, AND
PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,
A DOMESTIC CORPORATION,**

**DEFENDANTS-APPELLANTS-
CROSS-RESPONDENTS,**

**FAMILY HEALTH PLAN COOPERATIVE,
A DOMESTIC CORPORATION,
WISCONSIN HEALTH CARE LIABILITY
INSURANCE PLAN, A DOMESTIC CORPORATION, AND
WISCONSIN PATIENTS COMPENSATION FUND,
A DOMESTIC CORPORATION,**

DEFENDANTS-CO-APPELLANTS-

CROSS-RESPONDENTS,

**ST. PAUL FIRE & MARINE INSURANCE COMPANY,
A FOREIGN CORPORATION, AND
CONTINENTAL CASUALTY COMPANY,
A FOREIGN CORPORATION,**

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Family Health Plan Cooperative, Wisconsin Health Care Liability Insurance Plan (collectively FHP), Medical Associates of Menomonee Falls, Ltd., Physicians Insurance Company of Wisconsin, Inc. (collectively Medical Associates), and the Wisconsin Patients Compensation Fund (Fund) appeal from a judgment entered in favor of David Hull, individually, and as personal representative of the estate of his deceased wife, Kelly Hull, and David Lee Hull (collectively Hull) following a trial to the court in a medical malpractice case. Hull cross-appeals from that portion of the judgment denying him double costs and interest pursuant to § 807.01, STATS.

FHP claims: (1) the trial court erred when it held that Hull's action was timely filed under the medical malpractice statute of limitations; (2) the trial court erred when it denied FHP's right to a jury trial; (3) the trial court erred when it failed to rule on FHP's motions in limine; (4) the trial court erred when it permitted Hull's expert witnesses to alter opinions on the eve of trial; (5) the

record does not support a finding that FHP's agent, Dr. Michael Nelson, was negligent; and (6) the damage award was excessive and unsupported by evidence.

Medical Associates claims: (1) the evidence does not support a finding that Medical Associates's agent, Dr. Thomas Roberts, was negligent; (2) the trial court erroneously exercised its discretion when it prohibited Dr. Roberts from testifying about his custom and standard practice for treating patients who complain of rectal bleeding; (3) Kelly Hull's contributory negligence exceeded any negligence of Medical Associates as a matter of law and, therefore, the action should be dismissed; or in the alternative, a new trial should be granted because the trial court failed to apportion any negligence to Kelly; (4) reversal is required because the real controversy was not tried; and (5) the trial court's damage award was erroneous.

The Fund joins in these arguments, but briefs only one issue: whether the trial court's allocation of responsibility and damages was erroneous. Specifically, the Fund contends that: (1) the trial court failed to address Kelly's contributory negligence; (2) the trial court failed to consider Kelly's pre-existing condition when it awarded damages; and (3) imposing joint and several liability on Medical Associates and FHP was erroneous.

Because the trial court's decision failed to consider or address the issue of Kelly's contributory negligence, we must reverse the judgment and remand for a new trial on both liability and damages. Because of this conclusion, we need address only the following additional issues: (1) whether Hull's claim is barred by the statute of limitations; and (2) whether FHP was entitled to a jury trial. Because Hull's claim was timely filed, and because FHP waived its right to a jury trial, we affirm those rulings.

Because of our disposition of this case, it is not necessary for us to address any of the additional issues raised by the parties, including the cross-appeal. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 664 (1938). We deem it appropriate to allow the trial court the discretion to address these issues during the new trial.

I. BACKGROUND

On March 6, 1987, Kelly's mother telephoned FHP regarding her daughter's complaint of rectal bleeding. She was told by FHP's nurse to go to the emergency room at St. Michael Hospital. The emergency room physician diagnosed Kelly as having pelvic inflammatory disease and she was instructed to return to FHP for follow-up. On March 10, 1987, Kelly returned to FHP and was seen by Dr. Nelson. Dr. Nelson's note from that visit reflects that Kelly thought she passed some blood and was seen at St. Michael. Dr. Nelson did not attempt to identify the source of her bleeding, assuming that it was vaginal. No tests to rule out colorectal cancer were ordered.

Kelly thereafter withdrew from FHP and began treatment at Medical Associates. In October 1989, Kelly contacted her obstetrician at Medical Associates, Dr. Thomas Hofbauer, to report bright red rectal bleeding. Kelly was pregnant with her son at the time. Dr. Hofbauer referred her to Dr. Roberts, a surgeon at Medical Associates. Kelly saw Dr. Roberts on October 26, 1989. His records note that Kelly reports a history of "intermittent rectal bleeding with BM." He performed an anosopic exam and found "rather generous" internal hemorrhoids. He instructed Kelly to return for a follow-up visit in three to four weeks. Kelly made an appointment for November 16, 1989. She failed to show up for this appointment and she did not call to cancel or re-schedule.

At a subsequent visit, Dr. Hofbauer told Kelly to make another appointment with Dr. Roberts to follow-up. Kelly never did so. On March 30, 1990, Kelly phoned FHP to re-enroll herself and her family with FHP. On May 22, 1990, Kelly reported to Dr. Nelson at FHP with complaints of constipation. Dr. Nelson did not order any tests to determine if the constipation was attributable to colorectal cancer.

Kelly delivered her son on January 30, 1990. It is undisputed that in the year following his birth, Kelly experienced more than twenty episodes of rectal bleeding. Kelly did not report the severity of her bleeding to any physician.

Kelly returned to FHP on May 2, 1991, reporting “bright red blood per rectum and on toilet paper.” No testing to rule out colorectal cancer was ordered.

In January 1992, Kelly was diagnosed with colorectal cancer and a malignant tumor was removed. She died in October 1992.

This lawsuit was commenced on June 11, 1993. Although FHP requested a jury trial in its answer, no jury fee was paid. Accordingly, the trial court ruled FHP waived its right to a jury trial; a trial to the court was conducted in July 1996. The trial court issued findings of fact, conclusions of law and an order for judgment on January 17, 1997. In pertinent part, the trial court concluded that FHP and Medical Associates were causally negligent for the death of Kelly Hull. It apportioned 50% negligence to each. The trial court’s decision does not address whether Kelly was contributorily negligent. The trial court awarded David Lee Hull \$250,000 for the loss of society and companionship of his mother. It awarded David \$320,000 for the loss of personal services and pecuniary loss, and it awarded the estate of Kelly \$750,000 for pain, suffering, disability and loss of

enjoyment of life. It denied Hull's request for pre-judgment interest, ruling that the settlement offers were invalid.

FHP, Medical Associates and the Fund appeal from the judgment; Hull cross-appeals from the judgment.

II. DISCUSSION

A. *Statute of Limitations.*

We first address FHP's statute of limitations claim. It argues that Hull's claim is barred by the statute of limitations governing medical malpractice claims, § 893.55(1), STATS., which provides:

[A]n 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.

FHP argues that the critical date relative to the claim against it was the office visit with Dr. Nelson on March 10, 1987. Because the lawsuit was not filed within three years of this date pursuant to sub. (a), or within five years from this date pursuant to the statute of repose under sub. (b), FHP argues, the claim was untimely and should be dismissed on statute of limitations grounds.

The trial court ruled that although Kelly discovered she had colorectal cancer in January 1992, she did not "discover" that she was misdiagnosed in March 1987 at any time. Accordingly, the trial court ruled that

the lawsuit filed in June 1993 was filed within one year from the date of discovery. The trial court also ruled that the continuum of negligent treatment doctrine applied, which extended the five-year statute of repose because FHP's last act of continuing negligent treatment occurred in May 1991. Accordingly, the June 1993 filing fell within the five-year time limit of § 893.55(1)(b), STATS. We agree with the trial court's ruling in this regard.

We review the trial court's findings of fact under the clearly erroneous standard. See § 805.17(2), STATS. However, application of § 893.55(1), STATS., to the facts is a question of law that we review independently. See *DOR v. Exxon Corp.*, 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979), *aff'd*, 447 U.S. 207 (1980).

Wisconsin has adopted the continuum of negligent treatment doctrine, which provides: “[W]here it is alleged ... that there is a continuing course of negligent treatment, but one cause of action or claim is stated; ... if any portion of the continuing course of negligent treatment falls within the period of limitations, the entire cause of action is timely brought.” *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis.2d 536, 539, 327 N.W.2d 55, 56 (1982). The doctrine applies in instances where the continuum involves successive health care providers, such as in this case. See *Robinson v. Mount Sinai Med. Ctr.*, 137 Wis.2d 1, 20-21, 402 N.W.2d 711, 719 (1987).

Here FHP's causal negligence occurred in March 1987. Nevertheless, a continuum of alleged negligent treatment continued at Medical Associates in October 1989, and again at FHP in May 1990 and May 1991. There was evidence at trial that FHP is under a continuing duty to review patients' complete medical history each time they are seen for whatever reason. Thus, the

trial court's finding that Dr. Nelson was under a continuing duty to assess Kelly's complaints was not clearly erroneous.¹ Kelly reported to FHP with complaints of rectal bleeding as late as May 2, 1991. Employing this date as the last date of continuing negligent treatment, the June 1993 complaint was filed within the five-year statute of repose. FHP argues that the five-year statute of repose cannot be extended by the continuum of negligent doctrine. FHP does not provide any legal support for this argument and we are not aware of any case that so holds. Moreover, the statute of repose refers to the date of the "act or omission." It does not specify that the five years run from the *first* negligent act. Under the continuum of negligent care doctrine, a cause of action cannot be divided and does not accrue until the last negligent act or omission in a series of negligent acts or omissions.²

Moreover, we cannot conclude that the trial court's finding with respect to Kelly's discovery of her injury was clearly erroneous. The injury to

¹ FHP relies on *Westphal v. E.I. du Pont de Nemours & Co., Inc.*, 192 Wis.2d 347, 531 N.W.2d 386 (Ct. App. 1995), to argue that the trial court's finding of a continuum of negligence was erroneous. FHP argues that under *Westphal*, a two-year span between negligent treatment prevents a finding that the negligent acts represent a continuum. This case is distinguishable. *Westphal* involved three alleged negligent acts, each of which was more than two years from the others, and was dismissed on summary judgment because the plaintiff failed to show a continuum of negligence. In the instant case, the only significant gap was between the alleged negligent act in March 1987 and the office visit with Dr. Roberts at Medical Associates in October 1989. The other alleged negligent acts were closer in time. Moreover, there was evidence in the instant case that FHP was under a continuing duty to review Kelly's complete medical history each time they saw her for whatever reason. Because of these distinguishing factors, we are not persuaded that the holding in *Westphal* renders the trial court's finding in the instant case clearly erroneous.

² We acknowledge that the legislature has evidenced an intent to cut off liability in certain actions after a set period of time. See *Castellini v. Bailey*, 218 Wis.2d 245, 578 N.W.2d 166 (1998) (holding statute of repose for surveyors not subject to discovery rule even if this eliminates injured person's remedy). However, that is not the case here. The medical malpractice statute has a discovery rule built into the statute itself and our supreme court has found that this statute of repose is unconstitutional when it eliminates an injured person's remedy. See *Makos v. Wisconsin Masons Health Care Fund*, 211 Wis.2d 41, 564 N.W.2d 662 (1997).

Kelly was the misdiagnosis, not the cancer itself, because if Kelly's colorectal cancer had been diagnosed earlier, she would have had a better chance to cure the cancer. FHP does not proffer any evidence that Kelly had "an objective belief of her injury and its cause" *see Claypool v. Levin*, 209 Wis.2d 284, 300, 562 N.W.2d 584, 590 (1997), by June 11, 1992. Kelly was diagnosed with colorectal cancer in January 1992. There is no evidence that on that date or immediately thereafter, or anytime prior to her death in October 1992, she objectively believed that Dr. Nelson had failed to diagnose her cancer in March 1987, or May 1990 or 1991. FHP argues that because Kelly discussed bringing a lawsuit in December 1991, and her attorney sent authorizations for release of medical records in January 1992, that Kelly had an objective belief as to her injury and its cause. We do not agree. The fact that Kelly was investigating her case to determine whether a cause of action exists does not translate into knowledge that FHP failed to diagnose her colorectal cancer in 1987.

B. Jury Trial.

FHP also contends that the trial court erred when it refused FHP's request for a jury trial. The trial court ruled that because FHP failed to timely pay the jury fee, it waived its right to a jury trial. Whether the trial court's decision violated FHP's constitutional and statutory right to a jury trial is a question of law that we review independently. *See Wagner Mobil, Inc. v. City of Madison*, 190 Wis.2d 585, 591, 527 N.W.2d 301, 303 (1995).

FHP argues that the plaintiffs initially requested a jury trial at the first scheduling conference on October 21, 1993, and then failed to pay the jury fee or notify any other party of such failure. FHP did not discover that no jury fee had been paid until shortly before the scheduled trial date of September 11, 1995. FHP contends that as a result of these factors, the trial court should have allowed it to pay the jury fee late and have a jury trial. The trial court disagreed with FHP. The trial court did not err.

It is undisputed that the right to a jury trial, both statutory and constitutional, can be waived. *See* § 805.01(3), STATS.; WIS. CONST. art. I, § 5. Rules governing payment of the jury fee and waiver are contained in local court rule 371, which provided:

Any party who has made a demand for jury trial pursuant to Sec. 805.01(2), Stats., shall have no more than 30 days following the first scheduling/pre-trial conference to pay the jury fee. Such party shall notify all counsel of record and/or parties not represented by counsel of record of payment of the jury fee. A party who has originally demanded a jury trial and fails to timely pay the jury fee constitutes that party's waiver of the right to jury trial. However, any other party shall have an additional 30 days to demand a jury trial and pay the jury fee. If no other party demands a jury trial and pays the jury fee within this 30-day period, it shall constitute a waiver of the right of

jury trial and consent by all parties to a trial to the court sitting without a jury.

FHP argues that Hull's demand for a jury trial and then failure to pay the fee without notifying any of the parties prejudiced its right to a jury trial. We are not persuaded. Hull denies that he ever requested a jury trial. But even if he did, the rule only requires notice to other parties *when the fee is paid*. The rule does not require the party who requested a jury trial to notify the other parties if it decides not to pay the fee. Rather, FHP had a responsibility to monitor the file to see whether, in fact, Hull would pay the fee within the thirty-day time period. If FHP wanted to exercise its right to a jury trial, it should have requested such and paid the fee after Hull's thirty-day time period expired and Hull had not paid the fee. FHP waited almost two years after the time requirements of the rule to notice that the jury fee had not been paid and to request that a jury trial take place. This delay constitutes a waiver of FHP's right to a jury trial. The trial court did not err in so ruling.

C. Contributory Negligence.

The next issue we address involves the contention that the judgment must be reversed because the trial court failed to consider whether Kelly was contributorily negligent. Medical Associates argues that Kelly's negligence, as a matter of law, exceeded Dr. Roberts's negligence and, therefore, the action should be dismissed altogether. The Fund argues that the trial court erred in failing to attribute any negligence to Kelly.

The record demonstrates certain facts that suggest Kelly failed to take responsibility for her own well-being. She failed to describe a three-week episode of rectal bleeding to Dr. Nelson in March 1987; she failed to report to any

physician that she was passing blood frequently during the next two and one-half years; she minimized the duration of the rectal bleeding; she failed to follow-up with Dr. Roberts; she failed to re-schedule the follow-up appointment with Dr. Roberts even after Dr. Hofbauer instructed her of the importance of doing so; and she failed to report to any physician the more than twenty episodes of rectal bleeding she experienced in 1990.

Despite this evidence, the trial court failed to even address the issue of Kelly's contributory negligence when it rendered its decision in this case. It did not apportion any percentage of responsibility to Kelly. Hull argues that the trial court did consider the defense argument that Kelly was contributorily negligent and rejected it and that is why it is not specifically referred to in the decision.

Having reviewed the trial court's decision, we must conclude that either the trial court did not consider this issue at all in rendering its decision or that the trial court's decision is unclear as to whether this issue was considered and resolved. There is no explicit or implicit finding on this material issue in the trial court's decision. Based on the facts of record, we cannot say that Kelly's actions could not have had any effect on the course of her disease. Accordingly, the trial court should have addressed this issue in its decision.

It also appears from the trial court's decision that it rendered findings that were either inaccurate or the result of confusion. Thus, certain findings are clearly erroneous and affect the integrity of the decision as a whole. Specifically, the trial court found, "From March of 1987 through October of 1992 Kelly was a patient of [FHP]." In fact, Dr. Nelson treated Kelly from October 1986 until March 1987, at which time Kelly switched health care providers and did not return to FHP until two and one-half years later. The trial court also found,

“When Kelly became a patient of Family, Family did not obtain her records from Associates.” But, as noted, Kelly was a patient of FHP, and then switched over to Medical Associates. The trial court’s findings imply the reverse, evidencing that the trial court may have confused FHP with Medical Associates in rendering its decision. The trial court also found, “Despite the complaint of rectal bleeding, Nelson, in March of 1987, did not identify the source of bleeding and ordered no tests or evaluations.” Actually, the record indicates that Dr. Nelson attributed the bleeding to be vaginal based on the emergency room doctor’s diagnosis of pelvic inflammatory disease.

Similarly, the trial court’s findings with respect to Medical Associates were also erroneous in part. Contrary to the trial court’s finding, Kelly did not receive medical care from Medical Associates from “September, 1987 through May, 1990,” nor did she receive care at Medical Associates from July 1990 through April 1991, and she did not report “persistent claims of rectal bleeding and constipation” when presenting to Medical Associates. Kelly saw Dr. Roberts only once on October 26, 1989, for a complaint of rectal bleeding.

These inaccurate findings, combined with the trial court's failure to even consider the material issue of Kelly’s contributory negligence, compel reversal of the judgment and require us to remand for a new trial *in toto*. See *Walber v. Walber*, 40 Wis.2d 313, 319, 161 N.W.2d 898, 901 (1968).

III. CONCLUSION

In sum, we conclude that the trial court did not err in ruling that Hull’s claim was timely filed, and that FHP waived its right to a jury trial. We also determine that the factual inaccuracies in the trial court’s decision and its complete failure to consider the issue of contributory negligence requires a

reversal of the judgment. Accordingly, the case is remanded for a new trial on the issue of liability and damages.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

