

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP971

Cir. Ct. No. 2005CV1375

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ESTATE OF WILLIAM Y. RADLEY, SR., DECEASED,
BY KERRY RADLEY, PERSONALLY AND AS PERSONAL
REPRESENTATIVE, KELLY RADLEY, RANDALL
RADLEY AND REX RADLEY,**

PLAINTIFFS-APPELLANTS,

WALLACE RADLEY, BY HIS GUARDIAN, NANCY KRIEWALDT,

INVOLUNTARY-PLAINTIFF,

v.

SANDRA IVES,

DEFENDANT,

ROSALIND SEVERSON, MARGARET WICKHAM AND CATHERINE SEVERIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Kerry, Kelly, Randall, and Rex Radley and the estate of William Radley (collectively, the Radleys) appeal a summary judgment order dismissing nurses Rosalind Severson, Margaret Wickham, and Catherine Severin from a medical negligence and wrongful death suit. The issue is whether the Radleys should be excused from noncompliance with the notice of claim statute either because they had attached certain documents to their notice or because at the time they filed their notice of claim they had not yet learned the names of all the nurses involved and should have been allowed time for discovery. We reject both excuses for noncompliance, and affirm the circuit court.

BACKGROUND

¶2 William Radley died while a patient at the Wisconsin Veterans Home in King, Wisconsin. The Radleys filed a lawsuit alleging that the death was caused by the negligent failure of several nurses to properly chart a medical directive, monitor the effects of various anticoagulants, and report symptoms of excessive bleeding to attending physicians. The initial complaint identified only one nurse by name, and called each of the others “Jane Doe,” pursuant to the fictitious name statute, WIS. STAT. § 807.12 (2003-04).¹ The Radleys

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

subsequently amended their complaint to identify the Jane Doe nurses as Severson, Wickham, and Severin.

¶3 Prior to filing suit, the Radleys served a notice of claim on the Attorney General pursuant to WIS. STAT. § 893.82. The notice summarized a set of medical treatment notes that the Radleys claimed showed negligence by several nurses. The notice then stated:

The identities of the nursing staff/employees of the State of Wisconsin who made/recorded these observations are reflected by these notes and are, in some cases, illegible. However, they are believed to be: “RP Scasm,” “LL Nelson,” “JA Steinberg,” and “J Caravean.”

The Radleys also attached to the notice of claim copies of the referenced treatment notes and the State’s own investigative report which referred to the staff members as A, B, C, and D. Following discovery, the Radleys filed an amended notice of claim identifying Severson, Wickham, and Severin.

¶4 Severson, Wickham, and Severin filed summary judgment motions to dismiss the claims against them based on the failure of the initial notice of claim to properly identify them and the untimeliness of the amended notice. The circuit court granted their motions, and the Radleys appeal.

STANDARD OF REVIEW

¶5 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24,

241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the non-moving party to a trial. *Id.*, ¶24.

DISCUSSION

¶6 No medical malpractice action may be brought against a state employee for acts arising out of his or her duties unless, within 180 days after the injury was discovered or should have been discovered, “the claimant ... serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.” WIS. STAT. § 893.82(3) and (5m). Strict compliance with the notice of claim statute is required. WIS. STAT. § 893.82(2m). Thus, “[a] state employee must be identified by name, not by job title.” *Modica v. Verhulst*, 195 Wis. 2d 633, 647, 536 N.W.2d 466 (Ct. App. 1995).

¶7 The Radleys first argue that attaching to their initial notice of claim medical records with the signatures of the three nurses and the State’s own investigative report was sufficient to identify the nurses by name. We disagree. As we have previously noted: “The attorney general’s efforts to investigate would be hindered if it were necessary to sift through medical records to determine who attended [the patient] and then speculate as to which employees were potential defendants.” *Protic v. Castle Co.*, 132 Wis. 2d 364, 369, 392 N.W.2d 119 (Ct. App. 1986), *abrogated on other grounds by Bicknese v. Sutula*, 2003 WI 31, 260 Wis. 2d 713, 726 & n.3, 660 N.W.2d 289. That assessment is all the more true where, as here, the notice of claim actually listed incorrect names for the nurses at issue. The fact that it had already conducted some investigation into the matter does not mean that the State should need to guess which defendants the

plaintiffs intended to name. In short, we agree with the circuit court that compliance with the notice of claim statute requires identifying potential defendants by name within the body of the notice.

¶8 The Radleys alternatively contend that their amended notice of claim should be deemed timely in light of the general tort discovery rule that tolls the time to file a cause of action until after the identity of the defendant has been or reasonably could have been discovered, in conjunction with the statutory provision that the time to file a notice of claim does not begin to run until after discovery of the injury. *See Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989) (discovery-of-injury rule for accrual of tort cause of action encompasses discovery of defendant's identity); WIS. STAT. § 893.82(5m) (tolling time to file notice of claim until after injury is or should have been discovered). However, even assuming for the sake of argument that there could be circumstances in which the time to file a notice of claim is tolled because the claimant had not had a reasonable opportunity to discover the identity of the defendant, the Radleys have not adequately explained why they could not have discovered the names of the nurses involved here with reasonable diligence.

¶9 First, our review of the records attached to the initial notice of claim reveals several instances where the signatures of nurses "C. Severin," "R.P. Severson," and "M. Wickham" are at least mostly legible. Although the task is admittedly easier already knowing the actual names of the nurses, the Radleys have not explained why they could not have obtained a list of names of nurses who had cared for the patient before the time to file a notice of claim had expired and compared this list with the records. They inform us that opposing counsel provided the names to them after the suit was pending, but they do not allege that they ever asked the Veterans Home for a list of personnel who had cared for the

patient. Nor have the Radleys made any other allegations regarding what steps they took to ascertain the names of the nurses mentioned in the medical records. We conclude, as did the court in *Modica*, that, at the very minimum, reasonable diligence required some inquiry. *Modica*, 195 Wis. 2d at 648. Therefore, the Radleys' summary judgment materials failed to establish a material factual dispute as to the adequacy of the amended notice of claim.

By the Court.—Order affirmed.

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

