

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2003

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. 02-0860

Cir. Ct. No. 01-CV-359

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JODI HURLBURT AND ERIC HURLBURT,

PLAINTIFFS-APPELLANTS,

v.

**OHIC INSURANCE COMPANY, F/K/A OHIO HOSPITAL
INSURANCE COMPANY, MEDICAL PROTECTIVE CO.,
SACRED HEART HOSPITAL, IHLE ORTHOPEDIC CLINIC,
EDGAR O. HICKS, M.D., PETER IHLE, M.D., AND
TRUSTMARK INSURANCE CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Jodi and Eric Hurlburt appeal a judgment dismissing their medical malpractice action and an order denying their motion for

reconsideration. The circuit court dismissed the case because it determined there was another identical action pending, and because the statute of limitations had expired. The Hurlburts argue that dismissal was erroneous because (1) the earlier lawsuit was not properly commenced and therefore was not pending, and (2) a request for mediation tolled the statute of limitations. We agree and reverse the judgment and order.

BACKGROUND

¶2 Jodi Hurlburt underwent knee surgery on February 6, 1998 at Sacred Heart Hospital under the care of Drs. Peter Ihle and Edgar Hicks. On February 20, Jodi discovered she had severe thermal burns and permanent injuries allegedly caused by the doctors' negligence. The statute of limitations for a medical malpractice action is three years, giving the Hurlburts until February 20, 2001 to file an action. *See* WIS. STAT. § 893.55(1)(a).¹

¶3 On January 29, 2001, the Hurlburts filed a medical malpractice action against the hospital, the doctors, and their insurance companies (collectively, hospital).² However, unauthenticated copies of the summons and complaint were served, rather than authenticated copies as required by WIS. STAT. § 893.02.

¶4 On January 31, the Hurlburts mailed a letter to the administrator of the Medical Mediation Panels for the State of Wisconsin requesting mediation

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² There were also two other parties, which were subsequently dismissed.

pursuant to WIS. STAT. § 655.44. There are two ways to request mediation. First, a party may request mediation under § 655.44 prior to commencing an action. Second, a party may request mediation under WIS. STAT. § 655.445 in conjunction with court action. A significant distinction between the two is that under § 655.44, the statute of limitations is tolled during the mediation period, while under § 655.445 it is not. A mediation period lasts ninety-three days when the request is made in writing. *See* WIS. STAT. § 655.465(7).

¶5 In April, the administrator contacted the parties to schedule mediation. However, not all of the defendants were available on the proposed dates. The administrator then sought to schedule mediation at a later date, which would be beyond the ninety-three-day mediation period. After speaking to all parties, the administrator sent a notice of mediation to the parties advising them that the mediation was rescheduled for May 30. No one objected or attempted to have the date changed.

¶6 On May 24, the administrator informed the parties he had to cancel the May 30 session because there was no mediator available. He stated they could either reschedule or close the file and proceed with court action. Several defendants requested the file be closed. The administrator notified the parties on June 11 that he had closed the file.

¶7 On July 9, the Hurlburts filed a new, though identical, action. This time they served authenticated copies of the summons and complaint. The hospital filed a motion requesting that the new action be dismissed because another action was still pending and because the statute of limitations had expired. The court granted the hospital's motion on both grounds.

¶8 Then, in the first action, the parties stipulated that the hospital was never served with authenticated copies of the summons and complaint. As a result, the first action was dismissed.

¶9 The Hurlburts then filed a motion for reconsideration in the new action arguing the first action was no longer pending and that the statute of limitations had not expired because it was tolled during the mediation period. The court denied the motion. The Hurlburts appeal.

STATUTE OF LIMITATIONS

¶10 The issues in this case involve statutory interpretation, which we review independently. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

DISCUSSION

I. Another Action Pending

¶11 Under WIS. STAT. § 802.06(2)(a)10, it is a defense to an action if another action is pending between the same parties for the same cause. Here, the first action was between the same parties for the same cause. The parties dispute, however, whether the first action was pending.

¶12 The Hurlburts argue that the first action was never pending because it was never commenced. The hospital, on the other hand, contends the first action was pending because the summons and complaint had been filed, a file number had been assigned to the case, and a judge had been assigned.

¶13 WISCONSIN STAT. § 801.02(1) states:

A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

WISCONSIN STAT. § 893.02 further states “no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 90 days after filing.”

¶14 We conclude that an action cannot be pending unless it is properly commenced. In *Pulchinski v. Strnad*, 88 Wis. 2d 423, 427, 276 N.W.2d 781 (1979), only a summons was filed before the statute of limitations expired. A complaint was not filed. *Id.* at 426-27. Our supreme court determined that there was no action pending because the action was never properly commenced. *Id.* at 427. The hospital argues that *Pulchinski* does not apply because here the summons and complaint were timely filed. However, as the Hurlburts correctly point out, *Pulchinski* holds that a party must follow the prescribed requirements for commencing an action. If it does not, the action is not pending.

¶15 WISCONSIN STAT. §§ 801.02(1) and 893.02 provide that an action is commenced when a summons and complaint is filed *and* authenticated copies of the summons and complaint are served within ninety days of the filing. Because authenticated copies were not served in the first action, the case was never commenced and so was not pending. Therefore, dismissal of the new action was in error.

II. Statute of Limitations

A. Mediation Request

¶16 The hospital nonetheless contends that the statute of limitations had expired by the time the Hurlburts filed their new action on July 9, 2001. Originally, the statute would have expired on February 20, 2001—three years after Jodi Hurlburt discovered her injury. The Hurlburts maintain, however, that the statute was tolled by their mediation request. They claim the request was made prior to court action pursuant to WIS. STAT. § 655.44. The hospital disagrees, arguing the request was made after the first court action was filed. Therefore, the hospital reasons, the request was made under WIS. STAT. § 655.445—the section identifying mediation in conjunction with court action. The distinction is critical. Mediation requested prior to court action under § 655.44 tolls the statute of limitations. Mediation requested in conjunction with court action under § 655.445 does not toll the statute.

¶17 The hospital might be correct if the Hurlburts had properly commenced the first action. However, as we have already determined, because authenticated copies of the summons and complaint were not served, the first action was not commenced. Because it was not commenced, the request could not be in conjunction with court action. Rather, the request was made prior to the new court action filed on July 9, 2001. As a result, the request tolled the statute of limitations pursuant to WIS. STAT. § 655.44.

B. Tolling of the Statute of Limitations

¶18 The hospital argues that even if the mediation request was filed prior to court action, the statute of limitations expired before the Hurlburts filed the new

action. When a party files a request for mediation prior to court action, the statute of limitations is tolled during the mediation period. WISCONSIN STAT. § 655.465(7) states:

The period for mediation shall expire 90 days after the director of state courts receives a request for mediation if delivered in person or within 93 days after the date of mailing of the request to the director of state courts if sent by registered mail, or within a longer period agreed to by the claimant and all respondents and specified by them in writing for purposes of applying [§] 655.44 (4)

¶19 The hospital contends that if the Hurlburts' request for mediation was prior to court action, the statute of limitations still expired before the filing of the second action on July 9, 2001. Because the Hurlburts' request was in writing, the mediation period would be ninety-three days. Under WIS. STAT. § 655.44(4), the Hurlburts would then have thirty days to file an action. Because the request was mailed on January 31, 2001, the hospital reasons that the mediation period expired on May 4. The Hurlburts then had thirty days to commence the action, which gave them until June 5, 2001. Therefore, the hospital argues, the statute of limitations had expired when the summons and complaint were filed on July 9.

¶20 The Hurlburts respond that the hospital agreed to an extension of the mediation period, thereby extending the ninety-three-day limitation. Although there was nothing in writing, they argue that a writing is not required. Instead, they claim a verbal agreement can operate to extend the mediation period.

¶21 The Hurlburts are correct. In *Seaquist v. Physicians Ins. Co.*, 192 Wis. 2d 530, 547-48, 531 N.W.2d 437 (Ct. App. 1995), we held that when a respondent requests or agrees to rescheduling, the mediation period does not terminate until after the rescheduled session is completed. *Id.* at 547-48. Our concern was that a party should not be able to agree to extend the mediation

period, and later claim that the mediation period could not be extended. *Id.* at 549. Ultimately in *Seaquist*, no mediation actually took place and the administrator closed the file. *Id.* at 548. We determined that the mediation period closed on the date the administrator closed the file. *Id.*

¶22 A similar scenario occurred here. After one or more of the defendants were unable to attend mediation on any of the proposed dates before the ninety-three days passed, the parties all agreed to reschedule the session for May 30, effectively extending the mediation period until that date. Ultimately, here, as in *Seaquist*, no mediation actually took place, and the administrator closed the file on June 11. The mediation period therefore closed on June 11.

¶23 The Hurlburts then had thirty days to commence a civil action plus the twenty days that remained on the statute of limitations when they filed the request for mediation. This extended the statute of limitations until July 31, 2001. Because the Hurlburts filed the summons and complaint on July 9 and timely served an authenticated copy on the hospital, the second action was timely commenced.

By the Court.—Judgment and order reversed and cause remanded.

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