COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1371 **Cir. Ct. No. 1998CV57**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

SHERI J. STORM, TIFFANY J. STORM AND JUSTIN S. STORM,

PLAINTIFFS-APPELLANTS,

JOE LEEAN, SECRETARY OF THE DEPARTMENT OF HEALTH AND FAMILY SERVICES,

SUBROGATED-PLAINTIFF,

V.

LEGION INSURANCE COMPANY, KENNETH C. OLSON, M.D. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Sheri, Tiffany and Justin Storm (hereafter Storm) appeal from a circuit court order dismissing their medical malpractice action against Dr. Kenneth Olson, Legion Insurance Company and the Wisconsin Patients Compensation Fund. Storm did not establish that she timely commenced her action against Dr. Olson. Therefore, we affirm the circuit court's dismissal of Storm's claims.

¶2 This case has a long history, including a prior appeal to the supreme court, ***Storm v. Legion Ins. Co.***, 2003 WI 120, 265 Wis. 2d 169, 665 N.W.2d 353. We recite only the history that is relevant to this appeal. Storm sued Dr. Kenneth Olson, a psychiatrist, claiming that he negligently treated her by using hypnosis to recover memories of nonexistent childhood sexual abuse. ***Id.***, ¶10. Storm alleged that "these false memories formed the basis of a multiple personality disorder…." ***Id.*** Olson treated Storm until August 3, 1992. Storm alleged that her treatment in Olson's office continued with social worker Valerie Hamilton until September 9, 1992. Storm filed a medical malpractice action against Olson on September 9, 1997. The question for the supreme court was whether Storm timely commenced her action against Olson when she filed her complaint five years after her last treatment in September 1992.

¶3 The supreme court held that the three-year limitation period for medical malpractice claims under WIS. STAT. § 893.55(1)(a) (2001-02)[1] can be

[1] All subsequent references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

extended by application of the § 893.16(1)[2] disability tolling provision. ***Storm***, 265 Wis. 2d 169, ¶4. If Storm was eligible for the § 893.16(1) tolling provision, she would have had until August 3, 2000 to sue Olson if she was mentally ill at the time Olson last treated her on August 3, 1992. ***Storm***, 265 Wis. 2d 169, ¶25 n.10. The ***Storm*** court defined mental illness under WIS. STAT. § 893.16(1) as "a mental condition that renders a person functionally unable to understand or appreciate the situation giving rise to the legal claim so that the person can assert legal rights or appreciate the need to assert them." ***Storm***, 265 Wis. 2d 169, ¶5. The court elaborated on functional inability:

> A person is functionally unable to appreciate the situation giving rise to the legal claim when the person is unable to make a rational assessment of his or her own circumstances. If a person does not realize that he or she is delusional or mentally unstable or does not understand and appreciate that he or she has been wronged, the person cannot be expected to protect his or her interests. A person that is mentally ill may have a basic grasp of lawyers, lawsuits, and the legal process but not recognize that his or her own situation requires the invocation of legal rights.

Id., ¶49.

¶4 Recognizing that mental illness can toll the limitation period, the supreme court remanded for fact finding on the question of whether Storm's mental illness caused her to fail to understand her claim so as to timely file it

[2] WIS. STAT. § 893.16(1) provides:

> If a person entitled to bring an action is, at the time the cause of action accrues, either under the age of 18 years, except for actions against health care providers; or mentally ill, the action may be commenced within 2 years after the disability ceases, except that where the disability is due to mental illness, the period of limitation prescribed in this chapter may not be extended for more than 5 years.

within the three-year limitation period of WIS. STAT. § 893.55(1)(a). ***Storm***, 265 Wis. 2d 169, ¶5. The supreme court directed the circuit court "to permit the submission of evidence regarding (1) whether Storm suffered from a functionally debilitating mental illness; (2) if she did, when such an illness commenced; (3) whether the illness ever ceased; and (4) if the illness ceased, when it ceased." ***Id.*** If Storm was mentally ill at the time her cause of action accrued against Olson "and if her illness did not cease more than two years before she filed [her] claim," then Storm timely filed her medical malpractice action against Olson. ***Id.***, ¶6.

¶5 On remand, the circuit court scheduled a trial to address whether Storm was mentally ill during the relevant time frame: August 3, 1992 to September 9, 1995 ("the time frame"), from the end of Storm's treatment with Olson until two years before she filed suit.

¶6 Olson moved the court to bar evidence, including medical records, for periods outside the time frame. Olson argued that Storm had to prove her mental illness without referring to mental health records before and after the time frame. Storm countered that barring these medical records would preclude her from establishing that she was mentally ill during the relevant period for tolling the limitation period. The circuit court granted Olson's motion in limine, restricted evidence of Storm's alleged mental illness to the time frame and ruled that Olson's records could not be used to prove Storm's mental condition for the two-year period after Storm ceased treatment with Olson. However, if during the trial on Storm's claim of mental illness, Olson opened the door to the records, the court would revisit the ruling. The court denied subsequent reconsideration requests.

¶7 Once the circuit court barred Olson's records, Storm did not offer any other evidence of mental illness during the time frame as required by the supreme court in ***Storm***. Although Storm retained an expert, Dr. Spiro, Storm argued that he needed to be able to refer to Olson's records during his testimony. The court ruled that Spiro could testify that he reviewed all of Storm's medical records and that he based his opinion on those records. The court also permitted Storm and her children to testify without restriction as to time period. In lieu of pursuing these avenues, Storm took the position that the court's evidentiary rulings precluded her from meeting her burden under WIS. STAT. § 893.16(1) to show mental illness. The court granted Olson's motion to strike Storm's use of § 893.16(1) and dismissed Storm's claims.

¶8 On appeal, Storm argues that the circuit court misapplied the supreme court's directions for proceedings on remand. We disagree. The court directed the circuit court "to permit the submission of evidence regarding (1) whether Storm suffered from a functionally debilitating mental illness; (2) if she did, when such an illness commenced; (3) whether the illness ever ceased; and (4) if the illness ceased, when it ceased." ***Storm***, 265 Wis. 2d 169, ¶5. This was the proceeding the circuit court scheduled and in which it made the evidentiary rulings challenged on appeal.

¶9 Storm argues that the circuit court's evidentiary rulings prejudiced her ability to present her case. This is often the effect of evidentiary rulings. The question is whether the court's evidentiary rulings were a proper exercise of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

¶10 Olson's records are not in the record before us, and there was no offer of proof that the excluded records would have established Storm's mental

illness. Therefore, we cannot determine whether the circuit court properly exercised its discretion in excluding these records, and we have no basis to reverse the circuit court's decision to exclude Olson's medical records.

¶11 In her reply brief, Storm contends that she did identify which evidence was necessary to show her mental illness during the time frame. At the September 9, 2009 hearing on the motion in limine, Storm referred to specific medical records of Olson setting out Storm's belief that she had more than one hundred personalities as listed within Olson's treatment records. Storm continued to believe she had these personalities after August 3, 1992, when she last treated with Olson. Olson's notes also set out her belief that she was raped by a satanic cult and forced to kill and eat babies. While these beliefs are bizarre and disturbing, Storm could have testified to them as the circuit court was prepared to let her do. More importantly, these beliefs are not a diagnosis of mental illness and do not require a conclusion that Storm was functionally unable to recognize her legal claim. Finally, Spiro could have opined on the significance of these beliefs after he reviewed Olson's records. Instead, Storm conceded that she could not meet her burden to show mental illness under ***Storm***.

¶12 The circuit court also granted Dr. Olson's motion to exclude evidence of iatrogenic multiple personality disorder, i.e., that the activity of a physician caused Storm's multiple personality disorder. Storm wanted to present evidence that she became aware of another explanation for her multiple personalities in March 1997 when she attended a well-publicized trial in which the plaintiff claimed that psychiatric treatment induced her multiple personality

disorder.[3] The circuit court found that when Storm learned that a claim could arise from iatrogenically induced mental illness was not relevant to whether she was functionally unable to appreciate her own claim, the Wis. Stat. § 893.16(1) test. The circuit court reiterated that the issue to be determined on remand was whether during the time frame, August 3, 1992 to September 9, 1995, mental illness rendered Storm functionally unable to appreciate the situation giving rise to her legal claim so that she could, at that time, assert her legal rights. We conclude that what Storm came to know or believe about iatrogenic multiple personality disorder after the time frame did not resolve the question posed on remand: whether Storm was mentally ill during the time frame and could therefore toll the limitation period for bringing her claim.

¶13 Storm next argues that the circuit court should have allowed her continuum of negligent treatment claim to go to trial. To establish a continuum of negligent treatment, a plaintiff must prove a continuum of negligent care related to a single condition and that the precipitating factor in the continuum is the original neglect. ***Robinson v. Mount Sinai Med. Ctr.***, 137 Wis. 2d 1, 28-29, 402 N.W.2d 711 (1987). All the treatment about which Storm complains ceased on September 9, 1992, and Storm did not bring suit until September 9, 1997. Because Storm did not meet her burden on remand to toll the limitation period, the court did not err in dismissing this claim as well.

[3] ***Cool v. Olson***, Outagamie County circuit court case No. 1994CV707.

¶14 Given the charge to the circuit court on remand and the status of the record, the circuit court did not err in dismissing Storm's claims as untimely brought.[4]

By the Court.—Order affirmed.

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

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

Dr. Olson's motion to strike Storm's reply brief is denied.