**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 17, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP594** **Cir. Ct. No. 2010CV63**

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

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**SUSAN PULS,**

**PLAINTIFF-APPELLANT,**

**STATE OF WISCONSIN DEPARTMENT OF HEALTH & FAMILY SERVICES AND FORWARD: MEDICAID/BADGERCARE,**

**INVOLUNTARY-PLAINTIFFS,**

**V.**

**MARSHFIELD CLINIC, DR. ROBERT LEGGON, M.D., MARSHFIELD HEALTH CARE AND LIABILITY INSURANCE PLAN,**

**DEFENDANTS-RESPONDENTS,**

**DR. NED G. NORDIN, M.D.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Susan Puls appeals a summary judgment dismissing her medical negligence claims based on the statute of limitations. Puls argues the circuit court erroneously determined her amended complaint did not relate back to the original complaint.[1] We disagree and affirm.

## BACKGROUND

¶2 Puls sued Robert Leggon, M.D., Marshfield Clinic, and Marshfield Healthcare and Liability Insurance Plan on March 3, 2010.[2] As relevant, Puls' complaint alleged the following, in the order presented here. Puls underwent a preoperative examination at Marshfield Clinic on April 5, 2006. On April 12, Leggon performed a total knee replacement on Puls. Leggon was "negligent with respect to the services performed upon" Puls. Leggon was negligent because he "failed to properly remove all appropriate aspects of her patella[,]" "failed to apply a patellar component (button) to the knee[,]" and "failed to adequately resurface affected areas of the ... patella."

¶3 The complaint further alleged as follows. Puls "began to experience a severe grinding/cracking in her knee, along with continuous pain." On March 16, 2008, independent x-rays showed that Puls' patella had fractured. "[I]t was discovered that [Puls'] patella was un-resurfaced following her [surgery.]" A

[1] The circuit court also granted summary judgment on an alternative ground, which Puls also challenges on appeal. Because we affirm based on the court's primary rationale, we need not address the alternative. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[2] Puls also sued an anesthesiologist, but her claim against that doctor was dismissed for purposes of this appeal, by order dated July 20, 2011.

new doctor at a different location performed surgery on the knee on June 2, 2008, and further remedial surgery was scheduled. "[O]ther employees [or agents] of the Marshfield Clinic provided care and treatment to [Puls] on and around April 12, 2006." "[A]s a result of the actions and conduct set forth above, [Leggon and others] failed to provide appropriate informed consent throughout the time they provided care to [Puls]."

¶4 Approximately two months after Puls filed her complaint, Leggon moved for summary judgment, arguing the statute of limitations had expired. Leggon asserted that the three-year limitations period, *see* WIS. STAT. § 893.55,[3] including credit for 123 days of tolling due to mandatory mediation provisions, expired on August 13, 2009.

¶5 About four months later, just under six months after filing the complaint, Puls filed a response brief and an amended complaint.[4] Puls presented two arguments. First, she argued the tolling period should have been longer based on her interpretation of a letter from the mediator. Second, Puls argued her amended complaint was timely filed within the statute of limitations because it alleged a continuum of negligent treatment occurring beyond the initial surgery date. Puls contended that her claim in the amended complaint related back to the original, and that the statute of limitations would have commenced later on her continuum of treatment theory. The circuit court rejected Puls' arguments and granted summary judgment dismissing her claims. Puls now appeals.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] "A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed ...." WIS. STAT. § 802.09(1).

## DISCUSSION

¶6 Puls abandons her first circuit court argument, that the medical mediation tolling should have further extended the statute of limitations' expiration date beyond August 13, 2009. Thus, the only issue is whether her amended complaint was timely filed because her continuum of negligent treatment claim related back to the original complaint and delayed commencement of the limitations period.

¶7 It is undisputed that under Puls' original complaint, the three-year limitations period commenced on April 12, 2006, the date of her knee surgery. Puls' amended complaint, however, alleged a continuum of negligent care by Leggon through November 6, 2006. If the three years plus 123 tolled days commenced on that later date, the limitations period would have instead expired on or about March 9, 2010—six days after Puls filed her original complaint. Because Puls' amended complaint was filed after March 9, 2010, it only saves her from the statute of limitations if it "relates back" to the original complaint.

¶8 Where, as here, the plaintiff was not required to obtain permission to file an amended complaint, *see* WIS. STAT. § 802.09(1), we independently apply WIS. STAT. § 802.09(3) to the undisputed facts.[5] *See* ***Wiley v. M.M.N. Laufer Family Ltd. P'ship***, 2011 WI App 158, ¶8, 338 Wis. 2d 178, 807 N.W.2d 236; ***Eau Claire Cnty. v. Softscape, Inc.***, No. 2009AP2610, unpublished slip op. ¶¶3, 19-22 (WI App July 14, 2011).[6] As relevant to a "new claim" relation-back

[5] The parties both incorrectly assert that we should apply an erroneous exercise of discretion standard of review.

[6] 2011 WI App 121.

issue—as opposed to amendment to include a new party—§ 802.09(3) provides: "If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading."

¶9 The relation-back statute is a "fair notice" provision; it fulfills the purpose of statutes of limitations by requiring that parties be given "formal and seasonable notice that a claim is being asserted against them. If a party is given fair notice within the statutory time limit of *the facts out of which the claim arises*, ... it is not deprived of any protections the statute of limitations was designed to afford." ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 196, 199, 344 N.W.2d 108 (1984) (emphasis added).

¶10 "The basic test for whether an amendment should be deemed to relate back is the identity of transaction test, i.e., did the claim ... asserted in the amended pleading arise out of the same transaction[,] occurrence[,] or event set forth in the original pleading." ***Id.*** at 196. Similarly, addressing the federal counterpart to WIS. STAT. § 802.09(3), FED. R. CIV. P. 15(c), we have observed:

> [I]f the alteration of the original statement is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction or occurrence that forms the basis of the claim or defense, then the amendment will not relate back and will be time barred if the limitations period has expired.

***Biggart v. Barstad***, 182 Wis. 2d 421, 429–30, 513 N.W.2d 681 (Ct. App. 1994) (quoting 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1497, 76-79 (2d ed. 1990)).

¶11 Finally, the relation-back test must be considered "in light of the underlying aims and philosophy of Wisconsin's liberal civil procedure rules."

***Korkow***, 117 Wis. 2d at 192. Under our "'notice' pleading rules ... pleading is not to become a 'game of skill in which one misstep by counsel may be decisive of the outcome.'" ***Id.*** at 193 (citations omitted).

¶12 We have already set forth the operative allegations in Puls' original complaint. In her amended complaint, Puls added numerous factual assertions regarding multiple follow-up appointments with Leggon after the surgery, including statements concerning his treatment advice and his disclosures regarding the surgical procedure. Puls also asserted for the first time that, "until at least November 6, 2006, [she] was under the direct care of ... Leggon with respect to the surgical procedure performed on her knee on April 12, 2006." Puls further alleged that "the conduct of the Defendants amounts to a continuum of negligent care in the provision of medical services to the Plaintiff, including ... negligent diagnosis, negligent provision of surgical ... services, negligent medical advice, and negligent follow-up care and treatment ...."

¶13 We hold that Puls' continuum of negligent care claim in her amended complaint does not relate back to the claims stated in her original complaint. Even giving Puls the benefit of Wisconsin's liberal notice pleading policy, we cannot conclude that Puls' original complaint provided adequate notice of the conduct, event, or occurrence that formed the basis of her new claim. While the allegedly negligent follow-up care clearly flowed from the preoperative care and surgery cited in the original complaint, that complaint offered not so much as a hint of a claim for any acts or omissions after the April 12, 2006 surgery date. The complaint neither referenced subsequent dates nor mentioned any follow-up appointments with, or care from, Leggon. Because Puls' continuum of negligent care claim relies on distinct causational events occurring well after the events giving rise to the claims in her original complaint, she fails the relation-back test.

Stated otherwise, Leggon and the other defendants did not receive timely fair notice of the continuum of negligent care claim.

*By the Court.*—Judgment affirmed.

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