COURT OF APPEALS
DECISION
DATED AND RELEASED

August 24, 1995

No. 95-0571

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

ROBERT D. HARMON,

Plaintiff-Appellant,

v.

JULIE FIERS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

DYKMAN, J. This is an appeal from an order dismissing Robert D. Harmon's claim on summary judgment motion against Julie Fiers, a nurse employed by the University of Wisconsin Hospitals and Clinics (Hospital). The trial court dismissed Harmon's claim because he failed to comply with § 893.82(2m) and (3), STATS. These subsections require Harmon to serve the Attorney General with a notice of claim containing the name of the employee who injured him. Harmon's notice of claim asserted: "The [names of the]

various nursing personnel responsible for avoiding [a bed sore are unknown, but are] mentioned in Dr. Harmon's medical records." We conclude that Harmon's failure to name the nurse or nurses in his notice of claim required the trial court to dismiss his complaint. We therefore affirm its order.

The methodology used to decide motions for summary judgment is well known and we need not repeat it here. The parties agree that the legal issue is whether Harmon must comply with § 893.82(2m), (3) and (5m), STATS. Harmon filed an affidavit of a physician who stated that he had reviewed Harmon's medical records from the Hospital. The physician concluded that Harmon's bed sore was caused by the negligence of the nurses who treated Harmon but:

> It is my further opinion to a reasonable degree of medical certainty that, based upon my own search of the medical records which pertain to plaintiff's operation on March 17, 1991, said records do not disclose the identity of the individual nurse whose negligence caused plaintiff's injury and that the naming of any individual nurse under such circumstances would be pure speculation.

The physician also noted that nursing care for any patient is provided by a number of nurses with rotating schedules so that no single nurse or nurses could be identified as the nurse or nurses who caused Harmon's injury.

Harmon argues that it was impossible for him to identify the name of the nurse or nurses involved, and asks that we follow our decision in ***Daily v. University of Wisconsin, Whitewater***, 145 Wis.2d 756, 762, 429 N.W.2d 83, 85 (Ct. App. 1988), where we concluded that despite the plaintiff's failure to name the state employee who caused his injury, the plaintiff substantially complied with § 893.82(3), STATS. But we have recently explained that 1991 Wis. Act 39, §§ 3580 and 3582, negated our ruling in ***Daily***. ***Modica v. Verhulst***, No. 94-2756, slip op. at 8 (Wis. Ct. App. June 29, 1995, ordered published July 25, 1995). In ***Modica***, we said: "Since the 1991 amendment, strict compliance has been required, as § 893.82(2m) plainly states." ***Id.*** (citation omitted).

Even were we free to countermand the legislative requirement that a notice of claim contain the name of the state employee responsible for an injury, we note that the physician did not state that the nurses' names were not contained in Harmon's medical records. The physician only stated that no single nurse or nurses could be identified as causing Harmon's injury. That begs the question. Had Harmon named all treating nurses listed in the medical reports, he would have included the names of any nurses who may have negligently treated him. Harmon does not assert that the names were not in the medical reports. Indeed, his notice of claim provided: "The various nursing personnel responsible for avoiding [a bed sore] are similarly mentioned in Dr. Harmon's medical records."

What is more, as we said in ***Modica***:

> Throughout 1991, it was the policy and practice of UWH [University of Wisconsin Hospitals and Clinics] to disclose to a patient and to a patient's authorized representative, upon request, the name of the individual health care provider involved in the care of the patient. Plaintiffs did not make such a request.

Modica, slip op. at 15. Harmon does not assert that he asked for the names of the nurses who treated him during the time that he developed a bed sore. Had he done so, the Hospital would have provided the names, and he could have included those names in his notice of claim.

We conclude that the trial court properly dismissed Harmon's claim because he failed to identify the name of the state employee who caused his injury, as required by § 893.82(2m) and (3), STATS. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*concurring*). The result herein is unfair. However, I must reluctantly concur in our decision. I write separately to call this unfairness to the attention of the Revisor of Statutes who may refer this matter to the Law Revision Committee of the Joint Legislative Council. Sections 13.93(2)(j) and 13.83(1)(c), STATS.

I suggest that there are several approaches to cure this defect in the claims procedure. Section 807.12, STATS., permits a plaintiff to designate a defendant by a fictitious name or as an unknown person. The claims statute could permit a claimant the same right. Second, the legislature could permit pre-notice discovery where the plaintiff or claimant satisfies the court that the identity and name of the alleged responsible party is unknown and cannot be determined with due diligence. Finally, if the governmental entity is known, the legislature could require that the entity provide the names of potentially responsible persons after the claimant has filed a notice of claim. I believe the latter procedure makes the most sense in terms of judicial economy.