**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

NOVEMBER 28, 1995

**NOTICE**

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

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

**No. 95-1034-FT**

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

**MARGO BENNETT,**

**Plaintiff-Appellant,**

**v.**

**PICCADILLY APARTMENTS and AETNA INSURANCE COMPANY,**

**Defendants-Respondents.**

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Margo Bennett appeals from a summary judgment granted to Piccadilly Apartments and its insurer, Aetna Insurance Company (together "Aetna"). Pursuant to this court's order dated May 23, 1995, this case was submitted to the court on the expedited appeals calendar. We conclude that a genuine issue of material fact remained unresolved at the time

of the hearing and, therefore, that summary judgment should not have been granted.

On October 13, 1994, Bennett filed suit against Piccadilly Apartments, claiming that she suffered injuries when she stepped into a hole in Piccadilly's parking lot. The accident occurred on May 29, 1986.

Aetna denied liability in its answer. In a subsequent request for summary judgment, Aetna conceded that it had made voluntary payments to Bennett after the accident for her medical treatment. Aetna alleged, however, that it had made its last payment to Bennett in 1990, and that Bennett's action, filed more than three years after its final payment to her, was, therefore, time-barred pursuant to § 893.12, STATS.[1]

In opposition to summary judgment, Bennett challenged Aetna's assertion that it had made its last payment to her or on her behalf in 1990. Bennett maintained that the last payment Aetna had made on her behalf was a payment to Dr. William A. Stewart in October 1991. Bennett alleged that Aetna had requested that she be evaluated by Dr. Stewart. She complied with that request on September 18, 1991. Aetna then issued a check to Dr. Stewart on

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[1] Section 893.12, STATS., provides:

> The period fixed for the limitation for the commencement of actions, if a payment is made as described in [§] 885.285(1),[STATS.], shall be either the period of time remaining under the original statute of limitations or 3 years from the date of the last payment made under [§] 885.285(1), whichever is greater.

Section 885.285(1), STATS., provides:

> No admission of liability shall be inferred from the following:
>
> (a) A settlement with or any payment made to an injured person, or to another on behalf of any injured person, or any person entitled to recover damages on account of injury or death of such person; or
>
> (b) A settlement with or any payment made to a person or on the person's behalf to another for injury to or destruction of property.

October 10, 1991, and Bennett alleged that Dr. Stewart's records showed that his office had processed the check on October 16, 1991. Bennett claimed that Aetna's payment to Dr. Stewart was a payment on her behalf within the meaning of § 885.285(1), STATS., and that the limitation on filing an action against Aetna was therefore October 16, 1994. She contended that her claim was not time-barred because she had filed her action on October 13, 1994.

In support of her contention that Aetna's payment to Dr. Stewart in 1991 was, at least in part, on her behalf, Bennett noted that Aetna had made payments to her for medical treatment in the past. She pointed out that she had been referred by Aetna to Dr. Stewart, and that Dr. Stewart not only evaluated her injury and condition, but recommended a course of treatment for her injury. In his report, Dr. Stewart recommended that Bennett be referred to a "chronic pain management program," and that her "multifactoral [*sic*] behavior issues should be addressed in the setting of a team approach in a time limited and goal directed fashion." Dr. Stewart stated that he would "discourage ... the use of continued passive modalities or passive manipulation types of treatments due to their tendency to discourage patients taking an active role in their own healing process and the tendency to foster long term dependence." He further noted that Bennett "may benefit from appropriately titrating her antidepressant medication," and that she should "taper off and discontinue use of narcotic medications." Dr. Stewart also stated that Bennett "deserve[d] a full behavioral evaluation by a trained pain psychologist."

The trial court agreed with Aetna's argument that Bennett's action was time-barred. It reasoned that Aetna's payment to Dr. Stewart had not been on Bennett's behalf. It noted that Dr. Stewart's report was labeled an "Independent Medical Evaluation" and that the report itself indicated that Dr. Stewart's "activities ... were an evaluation on behalf of [Aetna] and not on behalf of [Bennett]." The trial court noted that Bennett had not requested the evaluation and was not required to pay Dr. Stewart. It noted that Aetna had requested the evaluation and had paid Dr. Stewart. Thus, it concluded that there was "no payment to [Bennett] or on her behalf arising out of [Aetna's] October, 1991 payment to Dr. Stewart."

The trial court also held that ***Riley v. Doe***, 152 Wis.2d 766, 449 N.W.2d 83 (Ct. App. 1989), supported summary judgment to Aetna. It held that Aetna's payment to Dr. Stewart had been a payment to "a stranger," and that,

under ***Riley***, it "would be anomalous to apply the protection of [§§] 885.285(4) and 893.12, [STATS.] to a stranger to a settlement or advance payment." *See* ***id***. at 771, 449 N.W.2d at 84-85. The trial court concluded that by seeking Dr. Stewart's evaluation of Bennett, Aetna was "just evaluating its responsibilities and exposure." The trial court determined that Bennett's action was time-barred because Aetna's October 1991 payment to Dr. Stewart had not been on Bennett's behalf, and Bennett had not begun her lawsuit within three years of the last payment Aetna had made on her behalf.

On appeal, Bennett argues that the trial court erred when it granted summary judgment to Aetna. We agree. The record does not conclusively demonstrate that Aetna's payment to Dr. Stewart was made solely on its behalf, and was not intended to be on Bennett's behalf. In addition, we disagree with the trial court that ***Riley*** requires summary judgment to Aetna.

Summary judgment is governed by § 802.08, STATS. In reviewing summary judgment determinations, we apply the same standards as the trial court. ***Posyniak v. School Sisters of St. Francis***, 180 Wis.2d 619, 627, 511 N.W.2d 300, 304 (Ct. App. 1993). Under summary judgment methodology, the trial and appellate courts:

> first examine[] the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint ... states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn

> from the undisputed facts, and therefore a trial is necessary.
>
> Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment.

***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983) (citations omitted).

We are satisfied that, given the materials before the trial court in regard to the summary judgment motion, a genuine issue of material fact remained as to whether Aetna's payment to Dr. Stewart was, at least in part, "on behalf of" Bennett within the meaning of § 885.285(1), STATS. Although the trial court concluded that Dr. Stewart's report was solely for Aetna's benefit, there is nothing in the record to support this conclusion except Dr. Stewart's labelling of the report as an "independent medical examination," and the fact that Aetna paid for the evaluation. Although counsel for Aetna submitted an affidavit in support of summary judgment noting that Dr. Stewart's report was an "independent medical examination," nothing in the record indicates that Aetna's counsel had personal knowledge of the purpose of Dr. Stewart's examination of Bennett. *See* § 802.08(3), STATS. (Affidavits in support of or opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence."). Aetna submitted nothing from Dr. Stewart or its own employees as to the purpose of the report.

The purpose of Dr. Stewart's evaluation was a disputed issue of fact that went to the heart of the question of whether Aetna's payment to Dr. Stewart was "on behalf of" Bennett. The record at the time of the summary judgment motion was insufficient to support the trial court's conclusion that Dr. Stewart's report was commissioned by Aetna solely for its benefit. Although Dr. Stewart's report was labelled an "independent medical evaluation," that label does not, in and of itself, answer the crucial question. Therefore, a genuine issue of material fact remained that precluded granting summary judgment.

As we have noted above, the trial court, in granting summary judgment to Aetna, relied on this court's opinion in ***Riley***. That reliance was misplaced. In ***Riley***, the plaintiff was a passenger in an automobile when she was injured. ***Riley***, 152 Wis.2d at 768, 449 N.W.2d at 83. Riley filed suit more than three years after the accident, but she maintained that the statute of limitations had been extended by operation of § 893.12, STATS., because the insurance company had made a payment to the owner of the automobile in which she had been injured less than three years before commencement of her action. ***Id***. This court rejected Riley's argument because the advanced payment had not been between the parties to the litigation, *see* § 885.285(3), STATS. ("[a]ny settlement or advance payment under sub. (1) shall be credited against any final settlement or judgment between the parties), and was not on Riley's behalf. ***Id.*** at 771, 449 N.W.2d at 84.

In ***Riley***, the payment was made to a stranger whose claim was unrelated to the plaintiff's. Therefore, it was not on the plaintiff's behalf. Here, Aetna's payment to Dr. Stewart, although not made directly to Bennett, was allegedly made on Bennett's behalf for treatment of the injuries she claims she suffered. The payment to Dr. Stewart, if made on Bennett's behalf, would, unlike the payment to the owner of the vehicle in ***Riley***, be credited against a final settlement or judgment between Bennett and Aetna. If it is ultimately determined that Dr. Stewart was retained by Aetna to benefit Bennett, the payment to Dr. Stewart extended the deadline for Bennett to file suit for three years after the date of the payment pursuant to § 893.12 and 885.285(1)(b), STATS.

*By the Court*.--Judgment reversed and cause remanded.

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