

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 9, 1996

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. 95-1945-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JO ANNE M. (HOLL) KLINE,

Plaintiff-Appellant,

v.

**RALPH A. KLOEHN, M.D., F.A.C.S.
and WISCONSIN HEALTH CARE
LIABILITY PLAN,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. JoAnne Kline appeals from a summary judgment in favor of Ralph Kloehn. The trial court granted summary judgment dismissing the case because it concluded that the statute of limitations had expired. We conclude that summary judgment should not have been granted

because there is a factual dispute as to the date on which the statute of limitations began to run. Accordingly, we reverse the trial court's judgment and remand for further proceedings.

Kline brought this action alleging negligence and breach of warranty against Dr. Kloehn, a plastic surgeon, based on the liposuction surgery he performed on her. The date of the last surgery was January 8, 1991.

Kloehn brought a motion for summary judgment, arguing that the action was barred by § 893.55, STATS., which provides that there is a three-year statute of limitations "to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based." The trial court granted the motion for summary judgment and dismissed the case.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Section 802.08(2), STATS. When reviewing a summary judgment decision, we follow the same methodology as the trial court. We first "examine the pleadings to determine whether a claim for relief has been stated and a material issue of fact presented." See *Clark v. Erdmann*, 161 Wis.2d 428, 441, 468 N.W.2d 18, 23 (1991). Summary judgment is not appropriate where there are issues of disputed material fact which would entitle the party opposing the motion to a trial. *Id.* at 441-42, 468 N.W.2d at 23.

The statute of limitations in a medical malpractice action begins to run when "the plaintiff knew or should have known that the injury existed and that it may have been caused by the defendant's conduct." *Id.* at 446, 468 N.W.2d at 25 (quoting *Fritz v. McGrath*, 146 Wis.2d 681, 690, 431 N.W.2d 751, 755 (Ct. App. 1988)). Although a party need not be "specifically advised by an expert that, in the expert's opinion, he or she received negligent treatment from a physician before the injury may be considered to have been 'discovered,'" there must be more than "an unsubstantiated lay belief" on the plaintiff's part that he or she has been injured before the statute will start running. *Id.* at 446-47, 468 N.W.2d at 25.

We conclude that there is an issue of material fact which precludes summary judgment. The pleadings, affidavits, and other materials do not conclusively establish when Kline "knew or should have known" that her injury existed. Kloehn's medical notes dated January 17, 1991, state that Kline's "progress is satisfactory and she is doing self care as directed. [She will] come back in about a month for a *progress* check (emphasis added)." Kloehn's medical notes dated March 12, 1991, state that Kline has "some folding of the skin back there which I feel will improve by [her next appointment in June] further." These medical notes suggest that Kloehn informed Kline that her appearance would continue to change after surgery for a period of time. Therefore, there is an issue of fact as to when Kline knew that she had sustained permanent injury. We need not reach the other issues raised by the parties because we conclude that summary judgment should not have been granted.

By the Court. — Judgment reversed and cause remanded.

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