

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

APRIL 30, 1995

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(1), STATS.

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

No. 95-2845-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DEBRA A. LUDKA,

Plaintiff-Appellant,

v.

**JANET O'BRIEN-BRICK,
F/K/A JANET O'BRIEN and
SACRED HEART HOSPITAL,**

Defendants-Respondents,

PATRICK J. BRICK,

Plaintiff-Appellant,

v.

**JANET O'BRIEN-BRICK,
F/K/A JANET O'BRIEN and
SACRED HEART HOSPITAL,**

Defendants-Respondents,

**WISCONSIN HEALTH CARE
LIABILITY INSURANCE PLAN,**

Defendant.

APPEAL from judgments of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Patrick Brick and Debra Ludka appeal summary judgments dismissing their negligence claims against their former therapist, Janet O'Brien-Brick, and her former employer, Sacred Heart Hospital, and its insurer.¹ The trial court ruled that the statute of limitations had expired. Because disputed issues of fact preclude summary judgment, we reverse and remand for further proceedings.

Patrick and Debra, two former clients, filed separate lawsuits against Janet. Because the suits involved the same defendant and overlapping facts, the actions were consolidated for trial purposes. The record before us consists of affidavits, portions of depositions, medical records and learned treatises submitted to the court on summary judgment. From this scanty record, we glean the following.

¹ This is an expedited appeal under RULE 809.17, STATS.

FACTS

After Patrick's wife died at age forty from cystic fibrosis in January 1991, he sought grief counseling at The Healing Place, a free service of Sacred Heart Hospital. Janet, who has a degree in guidance and counseling from UW-Stout, was employed by Sacred Heart at The Healing Place from 1989 to August of 1994, and provided counseling services to Pat. The last day she counseled Pat at The Healing place was October 23, 1991.

Debra claims she also received grief counseling services from Janet between March 1990 and November 25, 1991, relative to the recent death of her father and childhood abuse. Her last appointment at The Healing Place was September 16, 1991. At her deposition, Debra testified: "After some time—I'm not sure how long of a time span, but Janet would call me on the phone, and we would discuss her problems as well as mine. Counseling then ended up taking place at her home, and that went on for some time." The time frame of the counseling at Janet's home is unclear.

Debra met Patrick at The Healing Place. After Patrick's wife passed away, he needed someone to help care for his two young sons. Debra was looking for a job, and Janet arranged for the two to meet. Debra worked for Patrick from the fall of 1991 until the spring of 1992. Patrick and Debra met during the same time frame that Debra's telephone calls and home visits with Janet started. Debra would also stay overnight at Janet's house "quite a few times a week." Debra testified: "At the beginning I ended up staying with Janet because she thought it was best, and then I moved in with all my stuff into Pat's house." After Debra's last appointment at The Healing Place, Janet referred Debra to Midelfort Clinic.

At his deposition, Patrick testified that within days of his final visit to The Healing Place, Janet came to his house, saying that she was looking for Debra. He testified that he was really surprised by this contact from Janet. Shortly thereafter, he, Janet and Debra went to a movie together. He testified that Janet became interested in him romantically, and that prior to Thanksgiving, she asked him to go for a walk with her, and halfway down the road she stopped him and kissed him.

After Thanksgiving, Janet moved into his home. Debra was living at his home at that time also, helping with the care of his sons. Shortly before Christmas, Janet told Debra that she and Patrick planned to marry. In May 1992, Janet and Patrick were married.

Debra testified that before Thanksgiving, she told Janet that she was attracted to Patrick. Janet and Debra would argue, and Janet frequently told Debra she deserved the abuse she received as a child and would bring up her past. There is no allegation that these arguments were within the hearing of others. However, Debra testified that Janet violated her trust and caused her emotional harm, exacerbating the problems she already had. The last of these arguments was in the spring of 1992, about the time Debra moved out of Patrick's house.

Patrick testified that after his last appointment at The Healing Place, Janet referred him to eight or nine different mental health professionals. She diagnosed him as passive aggressive, an alcoholic, a dry drunk, and "when that one didn't pan out ... I don't remember what the next ones were." Patrick testified that Janet's diagnosis of him being an adult child of an alcoholic led to his ten-day inpatient hospitalization at an alcoholic treatment center. Janet's diagnosis of post-traumatic stress and possible manic-depression led to a seven-day hospitalization on the psychiatric floor of Sacred Heart Hospital in November or December of 1993. He asked one therapist he was seeing why he was placed in their program. He claims the therapist said: "I don't know, 'cause Janet told me to." Patrick testified that his appropriate diagnosis would be "[p]osttraumatic stress due to bad counseling with Janet O'Brien." The record suggests that at least one of the hospitalizations resulting from Janet's diagnoses took place in December 1993.

When asked: "Did you think that was bizarre that she would have all these different things for you?" Patrick answered, "Now I do" but at the time, "No, because I trusted Janet. Janet, you know kinda brought me out of hell, I thought, and she told me—I mean, she was my therapist. She knew better. She knew. I mean, who else could I—I mean, I trusted this woman." He also

testified, "Janet ... had me wrapped around her finger. She was my therapist. She could do whatever she wanted."²

Debra filed her complaint against Janet on October 12, 1994, alleging that Janet caused her injuries due to negligent counseling between October 22, 1990, and November 25, 1991. On February 13, 1995, Patrick filed his complaint, alleging that between July 25, 1991, and May 31, 1994, Janet caused him injuries as a result of her negligent counseling.

The defendants moved for summary judgment, claiming that calculated from the dates of their last appointments at The Healing Place, the three-year statute of limitation, § 893.55, STATS., barred Debra's and Patrick's claims. The trial court agreed and entered a summary judgment dismissing the complaints. Debra and Patrick appeal the judgments of dismissal.

Our review of summary judgment is de novo. *Grosskopf Oil, Inc. v. Winter*, 156 Wis.2d 575, 581, 457 N.W.2d 514, 517 (Ct. App. 1990). Under § 802.08(2), STATS., summary judgment may be entered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

To make a prima facie case for summary judgment, a moving defendant must demonstrate a defense that would defeat the plaintiff. *Clark v. Erdmann*, 161 Wis.2d 428, 441, 468 N.W.2d 18, 23 (1991). If the moving party has made a prima facie case for summary judgment, the court must examine the opposing party's affidavits and other proofs to determine whether there exist disputed issues of material facts, or undisputed facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. *Id.* at 441-42, 468 N.W.2d at 23.

ISSUE

² The record is unclear as to the status of Janet's and Patrick's divorce proceedings.

The only issue presented is whether, on the record before us, § 893.55(1), STATS., bars the claims as a matter of law. We conclude that the defendants failed to demonstrate a prima facie defense that § 893.55(1) bars the claims. Section 893.55(1) provides:

- (1) Except as provided by subs. (2) and (3), an action 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, shall be commenced within the later of:
 - (a) Three years from the date of the injury, or
 - (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

Both Debra and Patrick contend that a question of fact is presented whether their actions fall within three years from the date of injury.³

The defendants argue that subsequent to the last appointment at The Healing Place, Janet's relationship with Patrick and Debra was purely social or marital. They contend that the complaint had to be filed within three years from the last appointment, and, because it was not, § 893.55(1) barred the claims. We are unpersuaded. The defendants' argument does not focus on the dispositive issue presented by § 893.55(1), namely, the "date of the injury." *Id.* We conclude that Patrick's and Debra's testimony gives rise to an inference that their injuries due to negligent treatment did not occur until after the last

³ The parties do not address whether the statute of limitations should be calculated under the three- or potentially 15-year statutes of limitation provided in § 893.585, STATS., 1991-92, for actions arising out of § 895.70(1)(e) and (2)(a), STATS., 1991-92, setting out a civil cause of action for injuries resulting from or arising out of sexual contact with a therapist "who is rendering or *has rendered* to that person ... counseling" for all damages resulting from, arising out of or caused by that sexual contact. (Emphasis added). "Consent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy, counseling, assessment or treatment ended." *Id.*

appointment. Also, the record discloses disputed material facts with respect to (1) what injuries Patrick and Debra suffered; (2) what constitutes treatment; and (3) on what dates the alleged injuries occurred.

PATRICK'S CLAIM

Patrick essentially alleges that Janet exploited a trusting relationship developed through counseling in order to satisfy her own needs. It is well accepted that to benefit from therapy, a patient must develop a trusting relationship with the therapist. *L.L. v. Medical Protective Co.*, 122 Wis.2d 455, 461, 362 N.W.2d 174, 177 (Ct. App. 1984). In *L.L.*, a medical malpractice action against a psychiatrist, we observed that the patient develops extreme emotional dependence on the therapist. *Id.* We noted that if the doctor fails in being trustworthy, "the entire course of treatment may be ruined." *Id.* at 462, 362 N.W.2d at 178 (quoting D. DAWIDOFF, *The Malpractice of Psychiatrists* 6 (1973)). Although Janet was practicing grief counseling, not psychiatry, a factual question is raised whether the same kind of relationship was encouraged.

In addition, Patrick contends that the date of the termination of therapy is disputed, relying on learned treatises he offered into evidence. One treatise asks:

First of all, what actual events must take place between client and therapist to make for a termination of the relationship?

....

Regardless of what happens in that last session with the client, what happens if the therapist stresses that the client can re-contact him or her for more therapy at a later date?

What about follow-up contacts? If any are pre-arranged, whether for a visit, phone call, or mail, it can be argued that the therapy has not terminated. Even if they are not pre-arranged, any follow-up, whether part of the therapist's routine, related to a crisis the

client is experiencing, or a chance meeting, may well revive the relationship.⁴

The defendants argue that because Janet has a degree in guidance and counseling, she is not a psychotherapist, and therefore the treatises do not apply. The defendants, however, offer no legal authority nor evidentiary facts to support the contention that the considerations guiding a psychotherapist's relationship with her clients do not apply to a counselor's relationship with clients. In any event, Patrick's deposition testimony raises the question whether Janet led her clients to believe she was practicing a form of therapy.

The defendants also contend that the learned treatises do no more than point out that there are conflicting views as to when therapy ends. However, to defeat a summary judgment motion, a party needs to do no more than raise conflicting issues of material fact. The trial court is to determine whether a factual dispute exists, not resolve factual disputes on summary judgment. *State Bank of La Crosse v. Elsen*, 128 Wis.2d 508, 511-12, 383 N.W.2d 916, 917-18 (Ct. App. 1986). Although the date of the termination of the client-therapist relationship is not conclusive as to the date of injury, it is relevant.

Patrick's affidavit and deposition testimony permit a number of inferences: (1) Janet continued in her role as therapist after his last meeting with her at The Healing Place; (2) due to their therapist-client relationship, he was very vulnerable to her suggestions; (3) as a result of her professional diagnoses, he was admitted in November or December 1993 to inpatient facilities and was subjected to inappropriate medical treatments; and (4) between the date of his last appointment at The Healing Place and May of 1994, he suffered post-traumatic stress disorder as a result of her negligent counseling.

We conclude that Patrick's deposition testimony raises a number of factual disputes as to what injuries Patrick suffered; when his injuries

⁴ The quoted excerpts are from GARY RICHARD SCHOENER, ET AL., PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION AND PREVENTION, WALK-IN COUNSELING CENTER, MINNEAPOLIS, MINNESOTA, 1989; CH. 24, SEXUAL INVOLVEMENT OF THERAPISTS WITH CLIENTS AFTER THERAPY ENDS: SOME OBSERVATIONS, at 265-301.

occurred and what constitutes treatment. Because Patrick filed his complaint on February 13, 1995, and demonstrates factual disputes whether, within three years of that date he received treatment and suffered injuries resulting from Janet's negligent professional services, we reverse the summary judgment of dismissal.⁵

The defendants also argue that Patrick did not plead an independent claim against Sacred Heart, but only claimed vicarious liability on a theory of respondeat superior. They contend therefore that due to the expiration of the statute of limitations, the trial court correctly dismissed Patrick's claim against Sacred Heart. Because the date of injury resulting from Janet's allegedly negligent treatment while employed at Sacred Heart is disputed, summary judgment against Sacred Heart and its insurer must be reversed. Also, whether at the time of her negligent treatment Janet was acting within the scope of her employment as a therapist raises factual issues not appropriate for summary judgment resolution.

⁵ We observe that the trial court rejected the defendants' affirmative defense that Patrick and Janet's dispute should be relegated to their divorce proceeding based upon *Stuart v. Stuart*, 143 Wis.2d 347, 421 N.W.2d 505 (1988), and that the defendants specifically do not challenge that ruling on appeal.

DEBRA'S CLAIM

Debra claims that she suffered emotional harm due to Janet's negligent treatment after her last visit to The Healing Place. She testified at deposition that Janet continued to counsel her at Janet's home and on the telephone and, in November 1991 and the spring of 1992, used confidences derived from the therapeutic relationship in a harmful way. We conclude that these assertions raise factual questions whether Janet's professional negligence while employed at Sacred Heart caused Debra injuries in November 1991 and spring of 1992, within three years of Debra's October 12, 1994, complaint. We reverse the summary judgment dismissing Debra's claims against Janet, Sacred Heart and its insurer.

By the Court. – Judgments reversed and cause remanded.

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