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DISTRICT II

November 12, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2014AP810

Marilyn A. Davis v. Paul E. Seifert, M.D. (L.C. #2013CV895)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

The Estate of Charles Davis (“the Estate”) appeals from a circuit court order dismissing on summary judgment its claims against Waukesha Memorial Hospital, Inc., the Medical Protective Company, Paul E. Seifert, M.D., West Suburban Cardio Thoracic Surgery, S.C., and ProAssurance (collectively, “the respondents”). Based on our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the order of the circuit court.

On January 9, 2010, Charles Davis passed away at Waukesha Memorial Hospital following complications from a surgery. On December 26, 2012, Marilyn Davis, Charles' spouse, filed a request for medical mediation pursuant to WIS. STAT. § 655.44, identifying herself as the claimant. Ultimately, the mediation period expired without resolution on March 24, 2013.

On March 28, 2013, Marilyn filed a petition of special administration, creating the Estate. The petition stated that a medical malpractice claim existed in favor of the Estate and asked the probate court to authorize Marilyn as special administrator to pursue the claim. The court granted Marilyn the authority to pursue the claim on behalf of the Estate on April 12, 2013.

On April 17, 2013, Marilyn and the Estate commenced the present action against the respondents, alleging that the medical care provided to Charles by Waukesha Memorial Hospital and Seifert fell below the applicable standard of care and caused Charles' death. Marilyn sought damages for loss of society and companionship as well as the pain and suffering she experienced by witnessing her husband's death. Meanwhile, the Estate sought damages for the pain and suffering Charles experienced prior to his death.

The respondents subsequently moved for summary judgment on the Estate's claims, arguing that the claims were barred by the expiration of the three-year statute of limitations

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

under WIS. STAT. § 893.55(1m). Following a hearing on the matter, the circuit court granted the respondents' motions and issued an order dismissing the Estate's claims. This appeal follows.

We review a grant of summary judgment de novo, using the same methodology as the circuit court. *Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See id.*; WIS. STAT. § 802.08(2).

On appeal, the Estate contends that the circuit court erred in granting the respondents' motions for summary judgment. Citing WIS. STAT. § 655.44(4),² the Estate submits that Marilyn's request for medical mediation tolled the statute of limitations on its claims, permitting it to timely file its claims. We disagree.

We conclude that the tolling provision of WIS. STAT. § 655.44(4) is irrelevant to this case because the Estate did not exist at the time of Marilyn's request for medical mediation. The Estate was created on April 12, 2013, over three months after the statute of limitations expired on its claims. Thus, by the time the Estate was formed, its claims against the respondents were extinguished by operation of WIS. STAT. § 893.55(1m). In reaching this conclusion, we find the

² WISCONSIN STAT. § 655.44(4), which relates to requests for mediation filed prior to a court action, provides:

Any applicable statute of limitations is tolled on the date the director of state courts receives the request for mediation if delivered in person or on the date of mailing if sent by registered mail. The statute remains tolled until 30 days after the last day of the mediation period under 655.465(7).

case of *Schilling v. Chicago, North Shore & Milwaukee R. Co.*, 245 Wis. 173, 13 N.W.2d 594 (1944) instructive.

In *Schilling*, the decedent's wife initiated a lawsuit in her individual capacity for claims arising out of her husband's death. *See id.* at 174-75. Thereafter, she was appointed the special administrator of her husband's estate. *Id.* at 175. However, the appointment came after the statute of limitations expired as to the estate's claim. *See id.* at 175, 179. The wife moved to substitute the estate for herself but the circuit court denied the request. *Id.* at 174. The Wisconsin Supreme Court affirmed, ruling that

[n]o one had a right to bring this action except the representative of the deceased and no such action was brought within the two-year period. [The wife] had no right to bring the action as an individual, and if she had no right to bring an action it cannot be said that an action was commenced within the period required.

Id. at 179.

Applying *Schilling* to the case at hand, we conclude that the circuit court properly dismissed the Estate's claims on summary judgment because Marilyn did not create the capacity to sue on behalf of the Estate until after the statute of limitations expired. Accordingly, we affirm.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals