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DISTRICT IV

December 7, 2017

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

2017AP1161 Lori L. Sheetz v. Bohdan K. Wasiljew, M.D., and Zurich American Insurance Company (L.C. # 2016CV1008)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lori Sheetz appeals an order that dismissed her medical malpractice action against Dr. Bohdan Wasiljew based on her failure to file the action before the statute of limitations expired. The sole issue on appeal is how long the statute of limitations should have been tolled under the discovery rule and a medical mediation statute. Wasiljew moves for an award of costs and attorneys' fees on the grounds that the appeal is frivolous. After reviewing the record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the circuit court's decision, declare the appeal frivolous, and remand to the circuit court for a determination of the amount of Wasiljew's attorneys' fees.

The following facts from the parties' briefs are undisputed for purposes of this appeal. Wasiljew injured Sheetz's right laryngeal nerve while performing thyroidectomy surgery on Sheetz on July 8, 2011. By August 31, 2011, Sheetz learned of her injury. Also by August 31, 2011, Sheetz learned that laryngeal nerve damage was a known risk of thyroidectomy surgery that should have been disclosed to her prior to the surgery. Sheetz sought medical mediation on June 24, 2016, and filed this lawsuit on October 21, 2016.

The pertinent alleged injury is Wasiljew's alleged failure to disclose the known risks of nerve damage. The relevant statute of limitations provides:

> [A]n 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.

WIS. STAT. § 893.55(1m). The medical mediation statute provides that a statute of limitations is tolled when a timely request for mediation has been filed. *See* WIS. STAT. § 655.44(4).

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Sheetz contends that WIS. STAT. § 893.55 established a five-year period to commence an action that began when she discovered her injury in August 2011, and was tolled when she filed for mediation on June 24, 2016. Her arguments are premised on a misreading of the statutes. The five-year period set forth in § 893.55(1m)(b) is not a separate statute of limitations; it is a restriction upon how long after an actual injury has occurred that the discovery rule can be used to extend the three-year time period.

Under the plain language of WIS. STAT. § 893.55, Sheetz was required to file her lawsuit either within three years from the date of her actual injury—that is, by July 8, 2014—or within one year after she had discovered the injury—that is, by August 31, 2012. Because the statute of limitations had already expired before Sheetz sought mediation, WIS. STAT. § 655.44 has no application here. Thus, the circuit court correctly determined that Sheetz's action was time barred.

The rules of appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction for a frivolous appeal when the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or when the party or the party's attorney knew or should have known that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c). The test is whether, under all of the circumstances, "'the claim is so indefensible that the party or his attorney should have known it to be frivolous.'" *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶¶28, 30, 277 Wis. 2d 21, 690 N.W.2d 1 (quoted source omitted).

We conclude that Sheetz and her attorney should have known that the sole issue raised on appeal was entirely without basis in law after the circuit court clearly explained how the statute works, according to its plain language. Because this court cannot make factual findings, we must remand to the circuit court for a determination of the amount of attorneys' fees that Wasiljew incurred in defending this appeal. We will award Wasiljew the standard statutory costs available to the prevailing party upon the filing of a statement of costs.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1); the appeal is declared frivolous; and the matter is remanded to the circuit court for a determination of the amount of attorneys' fees to be awarded to Wasiljew.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals