COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 03-0702

Cir. Ct. No. 01CV003344

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MARK KYPKE,

PLAINTIFF-APPELLANT,

V.

ATTERBURY, RILEY & LUEBKE, S.C. N/K/A ATTERBURY & RILEY, S.C., J. MICHAEL RILEY A/K/A MICHAEL RILEY, LEE R. ATTERBURY, SALLY A. ATKINSON, ALAN G. B. KIM, JR., TAMMY J. LISKA N/K/A TAMMY LISKA JAHNS, AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Mark Kypke appeals a judgment dismissing his legal malpractice claim against the law firm of Atterbury, Riley & Luebke, S.C., its insurer, and individual members of the firm (Atterbury). The issue is whether he filed his action outside the six-year statute of limitations for tort actions. *See* WIS. STAT. § 893.52 (2001-02).[1] We affirm.

¶2 In 1992, Kypke retained Atterbury to pursue a medical malpractice claim against the University of Wisconsin Hospital, and physicians and employees there who treated Kypke. As a prerequisite to suing state facilities or employees, the claimant must file a notice of claim with the state. WIS. STAT. § 893.82(3). In October 1992, Atterbury filed a notice of claim against the hospital and Drs. Messing and Bruskewitz. After the State Claims Board denied the claim, Kypke retained new counsel and commenced an action in circuit court naming as defendants the hospital, Drs. Messing, Bruskewitz, and McDermott, and four unidentified physicians.

¶3 In ***Modica v. Verhulst***, 195 Wis. 2d 633, 647, 536 N.W.2d 466 (Ct. App. 1995), released in June 1995, this court held that a notice of claim did not convey the right to sue a state employee unless the notice identified the employee by name. On December 5, 1995, the trial court dismissed the action against Dr. McDermott, based on ***Modica***, because the notice of claim Atterbury prepared and served did not identify him by name. On December 4, 2001, Kypke filed a legal malpractice action against Atterbury, alleging that it was liable for its failure to identify Dr. McDermott by name in the notice of claim. This appeal results from

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the trial court's holding, on summary judgment, that the six-year statute of limitations for torts barred Kypke's claim. The dispositive issue is whether Kypke knew or should have known of the rules set forth in ***Modica*** more than six years before December 4, 2001.[2]

¶4 Summary judgment is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). On review of a summary judgment, we use the same methodology as the trial court, ***M&I First National Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995), without deference to the trial court's decision. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985).

¶5 The discovery rule applies to tort actions. *See* ***Estate of Merrill v. Jerrick***, 231 Wis. 2d 546, 552, 605 N.W.2d 645 (Ct. App. 1999). Under the discovery rule, "a cause of action accrues when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered his injury, its nature, its cause and the identity of the allegedly responsible defendant." ***Id.*** (quoting ***Carlson v. Pepin County***, 167 Wis. 2d 345, 353, 481 N.W.2d 498 (Ct. App. 1992)). The "reasonable diligence" test is objective. We therefore consider when a reasonable person in the same or similar circumstances as the plaintiff should have discovered the injury and its cause. ***Id.***

¶6 No later than September 1995, Kypke knew or should have known that the omission in his notice of claim barred his suit against Dr. McDermott. On

[2] The trial court also dismissed Kypke's contractual claim against Atterbury, on Kypke's concession that it was untimely filed.

several occasions between June and September 1995, Dr. McDermott's attorneys presented arguments to the court based on the ***Modica*** rule. It is undisputed that Kypke knew of those arguments. It is undisputed that in September 1995 he received a trial brief from Dr. McDermott that cited the ***Modica*** decision and plainly explained its holding and its consequences. He received a copy of that decision to read for himself, attached to the brief. A reasonable person, exercising reasonable diligence, would have read and understood the brief and the decision, and understood that the action against Dr. McDermott was not viable. We therefore deem Kypke to have known, no later than September 1995, that the notice of claim was defective. At that point, the cause of action against Atterbury for its alleged omission accrued. *See* ***Smith v. Herrling, Myse, Swain & Dyer, Ltd.***, 211 Wis. 2d 787, 792, 565 N.W.2d 809 (Ct. App. 1997) (legal malpractice claim may accrue before conclusion of proceeding in which it occurs). The cause of action therefore expired in September 2001.

By the Court.—Judgment affirmed.

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