COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1397 **Cir. Ct. No. 01CV003554**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LINDA J. LEHNERTZ,

PLAINTIFF-APPELLANT,

V.

CUNA MUTUAL INSURANCE SOCIETY,

DEFENDANT-RESPONDENT,

UNITY HEALTH PLANS INSURANCE CORP.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Linda J. Lehnertz appeals from the circuit court judgment granting summary judgment and dismissing her action against CUNA

Mutual Insurance Society. She argues that the court erred in concluding that the applicable statute of limitations was one year, under WIS. STAT. § 893.55(1) (2001-02),[1] rather than three years, under WIS. STAT. § 893.54.[2] We affirm.

I. BACKGROUND

¶2 Lehnertz, an attorney, was employed by CUNA. As a CUNA employee, she participated in CUNA's health screening program in which nurses employed in CUNA's medical department provided physical exams and blood testing. The CUNA medical director, who was a physician, or CUNA registered nurses evaluated the health screening and blood testing and communicated the results to the employees.

¶3 As part of the screenings, Lehnertz had her blood drawn in 1987, 1990, 1993, and 1996. In her brief in opposition to CUNA's motion for summary

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 893.55(1) provides, in relevant part:

> 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.

[2] WISCONSIN STAT. § 893.54 provides, in relevant part:

> **Injury to the person.** The following actions shall be commenced within 3 years or be barred:
>
> **(1)** An action to recover damages for injuries to the person.

judgment, Lehnertz alleged that she was "provided with [the] 'Health Screen Report' in 1993 and 1996, but was not provided with a copy of the results of the various blood tests." As summarized in her brief to this court, she maintained:

> [T]he blood test results from every one of [her] health screenings reflected an abnormal hematology profile. The abnormal results can indicate a vitamin B12 deficiency, which if left untreated can cause permanent neurological damage. [She] was not informed of these abnormal results, even though the abnormal results were clearly indicated with an asterisk.

¶4 Lehnertz alleged that she began to experience severe dizzy spells in 1998, was diagnosed with a vitamin B12 deficiency, and subsequently suffered increasingly severe symptoms resulting in disability preventing her return to work. She did not, however, bring a medical malpractice claim against the CUNA doctor or nurses. Instead, Lehnertz filed her action against CUNA claiming negligence in several respects, including CUNA's failure to adequately design and implement health screening policies and procedures; CUNA's failure to adequately select, train and supervise the personnel responsible for the screening; and CUNA's agents' and employees' failure to exercise appropriate care, skill and judgment in reviewing, assessing and screening the test results and communicating necessary information about the associated risks.

¶5 Granting CUNA summary judgment, the circuit court concluded that although Lehnertz's claims were not medical malpractice ones in name, they were so in fact and, therefore, were not timely filed under WIS. STAT. § 893.55(1). The court explained: "Certainly CUNA is a potential party as the employer of the nurses and doctor. However, the injury alleged arises out of health care provided to Lehnertz by health care providers." The court then quoted § 893.55(1) and explained:

> The legislature clearly intended to bring all medical malpractice actions under WIS. STAT. § 893.55—thus the language "regardless of the theory on which the action is based" and its emphasis on individuals as health care providers. Additionally, the existence of WIS. STAT. § 893.55 evinces an unambiguous intent of the legislature to bring all medical malpractice actions within a tighter statute of limitations than the general personal injury cases.
>
> The Plaintiff contends that in October of 1996 she had her last health screening while an employee of CUNA. Furthermore, the Plaintiff argues that the misdiagnoses by a health care provider at this screening (and earlier ones as well) resulted in her injuries; there is no way of sidestepping the obvious—this is a medical malpractice action. As such, December 2, 1998 is when the injury became actionable.

¶6 Lehnertz does not dispute that if the one-year statute of limitations applies, her action is barred. In reply, she clarifies that she "has not argued that her suit was filed within the time limits" of WIS. STAT. § 893.55. She argues, however, that CUNA is not a "health care provider" under § 893.55; that the statute "only applies to medical malpractice actions **against** health care providers"; and that her action was for personal injury due to negligence, not medical malpractice. She maintains, therefore, that the appropriate statute of limitations was three years, under WIS. STAT. § 893.54.

II. DISCUSSION

¶7 The standards governing summary judgment are well known and need not be repeated here. *See, e.g.*, ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). As we recently explained: "In reviewing a trial court's grant of summary judgment, we first consider which statute of limitations applies. Determining which statute of limitations applies to an action is a question of law which we review *de novo*." ***Hegarty v. Beauchaine***, 2001 WI App 300, ¶14, 249

Wis. 2d 142, 638 N.W.2d 355 (citations omitted), *review denied*, 2002 WI 23, 250 Wis. 2d 556, 643 N.W.2d 93 (Feb. 19, 2002) (No. 00-2144).

¶8 The statute of limitations under WIS. STAT. § 893.55 applies to any "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." WIS. STAT. § 893.55(1). CUNA does not contend that it is a health-care provider as defined by statute. It posits the obvious, however—that the doctor and nurses involved in Lehnertz's exams were health-care providers and her action arises from their alleged acts or omissions. Thus, CUNA contends: "[§ 893.55(1)] plainly applies to actions arising from acts or omissions '**by**, a person who is a health care provider, **regardless of the theory on which the action is based**….' The statute focuses on the way the alleged injury occurred, not the identity of the defendant." CUNA is correct.

¶9 In ***Clark v. Erdmann***, 161 Wis. 2d 428, 468 N.W.2d 18 (1991), the supreme court clarified, "Unlike sec. 893.54, [WIS. STAT. § 893.55] concerns itself not only with injury to the person, but also with a particular way in which the injury arises, i.e., resulting from an act or omission of a 'health care provider.'" ***Id.*** at 436-37. Similarly, in ***Doe v. American National Red Cross***, 176 Wis. 2d 610, 500 N.W.2d 264 (1993), the supreme court commented that § 893.55 is "the more specific of the two statutes and applies only when the injury arises as the result of an act or omission of a 'health care provider.'" ***Id.*** at 615.

¶10 Although not directly on point, ***Webb v. Ocularra Holding, Inc.***, 2000 WI App 25, 232 Wis. 2d 495, 606 N.W.2d 552, *overruled, in part, on other grounds by* ***Paul v. Skemp***, 2001 WI 42, 242 Wis. 2d 507, 625 N.W.2d 860, is

instructive. There, Webb sued Oculara, d/b/a Pearle Vision Express, alleging that a Pearle Vision optometrist was negligent in conducting his eye examination. ***Webb***, 232 Wis. 2d 495, ¶8. Specifically, Webb claimed that Pearle Vision's optometrist failed to detect evidence of his brain tumor and that this failure delayed his treatment. ***Id.*** Pearle Vision brought a summary judgment motion, arguing that under the medical-malpractice-statute of limitations, Webb's suit was untimely. ***Id.***, ¶5. As Lehnertz argues here, Webb argued that the statute of limitations found in WIS. STAT. § 893.54, not WIS. STAT. § 893.55, applied to his action. ***Id.***, ¶6. This court rejected his argument and concluded that the optometrist was a "health care provider" because "optometrists provide medical care, and they are required to be licensed." ***Id.***, ¶15 (citations omitted).[3] Consequently, this court applied § 893.55 and concluded that Webb's claim for damages from Pearle Vision was time-barred. ***Id.***, ¶15.

¶11 CUNA's reliance on the case law is sound and its rationale is convincing. Were we to reject CUNA's theory, nothing would prevent a patient from circumventing the strict statute of limitations under WIS. STAT. § 893.55 by suing any hospital for its failure to adequately design a system or train and supervise employees when their alleged acts or omissions lead to injuries. The statutory language—"arising from acts or omissions" and "regardless of the theory on which the action is based"—precludes such circumvention.

[3] Although we chose not to address Pearle Vision's status, *see* ***Webb v. Oculara Holding, Inc.***, 2000 WI App 25, ¶10 n.4, 232 Wis. 2d 495, 606 N.W.2d 552, *overruled, in part, on other grounds by* ***Paul v. Skemp***, 2001 WI 42, 242 Wis. 2d 507, 625 N.W.2d 860, nothing suggests that it was a "health care provider."

¶12 Clearly, at the time of Lehnertz's blood testing, CUNA was not a "health care provider" but its medical director/doctor and nurses were. Clearly, her allegations "aris[e] from acts or omissions" of the doctor and nurses "regardless of the theory"—whether grounded in the employer's negligence or its agents' medical malpractice—"on which the action is based." *See* WIS. STAT. § 893.55(1). Accordingly, the circuit court correctly concluded that Lehnertz's action was barred by the statute of limitations under § 893.55(1).[4]

By the Court.—Judgment affirmed.

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

[4] Lehnertz also argues that her claim is not barred by the exclusivity provision of the worker's compensation act, *see* WIS. STAT. § 102.03(1)(c)3. On appeal, the parties brief that subject at length. The circuit court, however, did not decide it and, given our resolution of this appeal on the first issue, we need not address it. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).