

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2010

David R. Schanker
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. 2009AP13
STATE OF WISCONSIN**

Cir. Ct. No. 2008CV998

**IN COURT OF APPEALS
DISTRICT I**

NILIMA MEHRA,

PLAINTIFF-APPELLANT,

v.

**STEVEN I. CHANG, MD, JOHN E. WHITCOMB, MD,
ROBERT C. HARDIE, MD AND ST. LUKE'S MEDICAL CENTER,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Nilima Mehra appeals *pro se* from a corrected order dismissing her medical malpractice claims against Drs. Steven I. Chang, John E. Whitcomb and Robert C. Hardie, and St. Luke's Medical Center ("the

doctors and St. Luke's"). We conclude that Mehra's claims are barred by the three-year statute of limitations. We therefore affirm.

¶2 Mehra sued the doctors and St. Luke's for medical malpractice in their treatment of her following a head injury she suffered on April 1, 2003. She went to the emergency room at St. Luke's Medical Center where she had two CT scans of her brain: one on April 1, 2003, and another on May 12, 2003. Mehra alleged that she suffered a blood clot from her injury that was indicated on the May 12, 2003 CT scan. She further alleged that the May 12, 2003 CT scan results were "'INTENTIONALLY' concealed"¹ by Dr. Whitcomb, the emergency room physician, and Dr. Hardie, the radiologist who read that scan. Mehra's allegations against St. Luke's were limited to its status as the employer of Drs. Whitcomb and Hardie. Mehra also sued Dr. Chang, her personal physician, who she alleged refused to treat her after June of 2003. Mehra alleged that the doctors' negligence resulted in a heart attack that she suffered on December 10, 2006.

¶3 St. Luke's filed an affidavit from its Director of Risk Management, Mary Viergutz, who averred that "[a]t no time during 2003 was St. Luke's Medical Center the employer of Dr. John W. Whitcomb nor Dr. Robert C. Hardie," and that "[a]t all times material to the allegations set forth in the plaintiff's [c]omplaint, both Dr. Whitcomb and Dr. Hardie were independent contractors of St. Luke's Medical Center." Other than her unsubstantiated allegations, Mehra did not contradict the Viergutz affidavit.² See WIS. STAT.

¹ This quoted phrase, including the capitalization, is taken directly from Mehra's amended complaint.

² Mehra apparently does not understand the difference in St. Luke's legal liability depending on the doctors' employment status as St. Luke's employees, or as independent contractors providing services at St. Luke's and other facilities.

§ 802.08(3) (2007-08) (if the adverse party fails to properly substantiate the response, “summary judgment, if appropriate, shall be entered against such party”).³ Because the only allegation against St. Luke’s was its liability pursuant to respondeat superior (as the employer of Drs. Whitcomb and Hardie), and there is uncontradicted evidence that St. Luke’s was not the employer of Dr. Whitcomb or Dr. Hardie, we affirm the order dismissing St. Luke’s from this action.

¶4 In both her complaint and her amended complaint, Mehra alleged that the “act or omission” of malpractice occurred on the date of the second CT scan, May 12, 2003. Mehra contends that the applicable statute of limitations is five years because WIS. STAT. § 893.55(1m)(b) states that “an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.” Mehra is mistaken.

¶5 The applicable statute of limitations for a medical malpractice action is the later of three years from the date of the injury, or one year from when the injury was or should have been discovered. *See* WIS. STAT. § 893.55(1m). Mehra alleged that she was injured on May 12, 2003, when the CT scan was misread or “‘INTENTIONALLY’ concealed.” Her allegations do not implicate the discovery deadline of § 893.55(1m)(b). Because she does not implicate the discovery deadline, the five-year deadline on which she mistakenly relies, does not apply.⁴ Therefore, Mehra’s medical malpractice action filed January 22, 2008, against the

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

⁴ This five-year deadline applies only to actions commenced pursuant to the one-year discovery deadline of WIS. STAT. § 893.55(1m)(b). *See Forbes v. Stoeckl*, 2007 WI App 151, ¶14, 303 Wis. 2d 425, 735 N.W.2d 536.

doctors and St. Luke's for the malpractice she alleged occurred on May 12, 2003 is barred by the three-year statute of limitations. *See* § 893.55(1m)(a).

¶6 The trial court dismissed Mehra's action against the doctors and St. Luke's for additional reasons: namely, that Mehra failed to establish by competent expert evidence that the doctors breached the standard of care, and because Mehra failed to comply with various trial court orders. In defending the trial court's dismissals in those additional regards, the doctors and St. Luke's emphasize that nothing in the appellate record defeats their positions, and that it is Mehra's obligation to provide this court with a complete appellate record on the issues she raises. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (it is appellant's obligation to ensure that all documents required for appellate review of the issues raised are included in the appellate record). Likewise, the doctors and St. Luke's emphasize that Mehra has failed to order transcripts of various trial court hearings that address rulings that she has challenged. In the absence of a transcript, we assume that every fact necessary to support the trial court's exercise of discretion is supported by the record. *See Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Our decision, that Mehra's action is barred by the statute of limitations, renders it unnecessary for us to address the trial court's other bases for dismissal. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues).

By the Court.—Order affirmed.

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

