

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KHARI A. LAMARCA,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-562-S

CHARLES BIRD and MINNESOTA LAWYERS
MUTUAL INSURANCE COMPANY,

Defendants.

Plaintiff Khari LaMarca commenced this legal malpractice action in the Circuit Court for Dane County, Wisconsin alleging that her attorney, defendant Charles Bird, failed to file a timely notice of claim thereby foreclosing her medical malpractice action. The matter was removed to this Court based on diversity of citizenship, 28 U.S.C. § 1332, and is presently before the Court on cross motions for summary judgment. The following is a summary of undisputed facts relevant to the pending motion.

FACTS

Plaintiff was treated by physicians at the University of Wisconsin Hospital and Clinics (UWHC) between October 1997 and May 2000. According to plaintiff, treatment was unsuccessful and she sought further treatment from the Mayo Clinic in June 2000. On

June 4, 2000 plaintiff was admitted to inpatient treatment at Mayo Clinic for iatrogenic drug addiction. She believed her addiction was caused by the negligence of her treating physicians at UW Hospital.

On June 12, 2000 plaintiff called defendant Bird for an appointment to represent her on her claim. The parties first met on June 21, 2000. On about August 22, 2000, after plaintiff advised him that she wanted to proceed with the claim, defendant Bird prepared a notice of a medical malpractice claim against the UWHC doctors based on plaintiff's recollection of events and sent it to plaintiff for her review. Bird had not seen the medical records from UWHC at the time he prepared the notice. On about September 20, 2000 defendant Bird's secretary sent a statutory notice of the medical malpractice claim via express mail, notwithstanding Bird's instruction that it be sent by certified mail in accordance with the requirements of § 893.82, Wis. Stat. Defendant Bird subsequently discovered the error and prepared a second notice of claim and sent it by certified mail on January 5, 2001.

Bird withdrew from representation of plaintiff and was replaced by William Skemp, who commenced a medical malpractice action in the Circuit Court for Dane County, Wisconsin on September 9, 2002. The medical negligence claim alleged that UWHC and all of plaintiff's treating physicians had provided negligent care which

resulted in her drug addiction. The Circuit Court granted summary judgment on the merits in defendants' favor on all claims except the claim against Dr. Thom. The claim against Thom was dismissed solely on the basis that the notice of a claim against him was untimely.

MEMORANDUM

In response to defendants' motion for summary judgment, plaintiff concedes that her only viable claim against defendant Bird is based on his alleged failure to properly and timely notice the medical malpractice claim against Dr. Thom. As to that claim she argues that the state Court decision establishes defendant's negligence as a matter of law. Plaintiff also seeks a summary judgment determination that Dr. Thom was negligent and that she sustained injuries as a result of his negligence. Defendant Bird opposes both contentions.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the

evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

To prevail on her claim for legal malpractice plaintiff must prove: (1) the existence of an attorney client relationship; (2) negligence by defendant Bird; (3) that but for defendant's negligence plaintiff would have prevailed in the malpractice action; (4) the fact and extent of damages. Lewandowski v. Continental Casualty Co., 88 Wis. 2d 271, 276-78, 276 N.W.2d 284, 287 (1978). Defendants concede the existence of an attorney client relationship. Plaintiff seeks summary judgment on the remaining three elements and defendant contends that factual dispute precludes summary judgment on any of them.

Negligence

Plaintiff contends that the state court action preclusively established defendant Bird's negligence. Defendant correctly notes that this is not technically accurate. The circuit court action preclusively established only the issue litigated: that a proper and timely notice of claim in accordance with Wis. Stat. § 893.82(5m) was not filed. It is possible that a claim might be

precluded by the failure to file a timely notice of claim but that such failure was not due to the negligence of counsel.

The undisputed facts here, however, establish that the failure to file a timely notice or claim was the result of defendant Bird's negligence. Defendant Bird was retained by plaintiff well before the expiration of the notice of claim period and plaintiff made clear her intention to pursue the claim. Indeed, because defendant Bird mistakenly believed that notice was required within 120 days after injury was discovered (rather than 180 as provided for medical practice claims) he prepared the notice more than sixty days prior to the deadline. He then failed to serve the notice by certified mail as required by the statute. He subsequently failed to discover the error during the remaining sixty days of the notice period. The conclusion is inescapable that the failure to file the claim properly was the result of defendant Bird's negligence.

The only opposition to this conclusion offered by defendants is that Bird had instructed his secretary to send the notice by certified mail and she failed to properly follow his instructions. However, Bird cannot successfully deflect his negligence onto his secretary because he is vicariously responsible for his employee's conduct in carrying out his assigned tasks. Thiery v. Bye, 228 Wis. 2d 231, 247, 597 N.W.2d 449 (Ct. App. 1999). Furthermore, defendant Bird had a duty to properly supervise his employees to

assure that his professional obligations were satisfied, see SCR 20:5.3, a duty he failed to perform.

Defendant raises one additional casual negligence argument. He suggests that had he been able to review plaintiff's medical records more thoroughly, he would have concluded that her claim was barred before he was consulted. This argument does not withstand scrutiny either as matter of negligence or cause. The time period for filing notice of a malpractice claim begins when the plaintiff's injury is discovered or should have been discovered had reasonable diligence been exercised. Wis. Stat. § 893.82(5m). Plaintiff's alleged injury is iatrogenic drug addiction. Defendant Bird's proposed triggering event is a statement in the medical records of February 2000 that plaintiff was terrified by how she felt after taking narcotic medications.

Defendant does not suggest how this record creates a genuine issue of fact concerning the discovery of plaintiff's injury. He does not offer evidence that plaintiff was addicted in February, 2000, much less that fear of the effects of narcotics proves addiction or knowledge of it. There is no reason to conclude that a patient's report of a reaction to effects of narcotics proves that she was aware of an addiction. There is no genuine dispute of fact which precludes the conclusion that defendant Bird was negligent in failing to timely file a proper notice of claim.

Prevailing in the underlying Action

The facts presently before the Court are insufficient to establish that but for defendant Bird's negligence plaintiff would have prevailed in the medical malpractice action against Dr. Thom.

To prevail on a claim for medical malpractice plaintiff would have had to demonstrate that in prescribing medications for plaintiff, Dr. Thom failed to use the skill, care and judgment which reasonable doctors would exercise under the same or similar circumstances. Nowatske v. Osterloh, 198 Wis. 2d 419, 543 N.W.2d 265 (1996); Wis JI-Civil 1023. Plaintiff makes no effort to provide affidavits on summary judgment which could sustain a finding of negligence by Dr. Thom. Rather, she argues that her iatrogenic addiction is per se evidence of negligence by Dr. Thom. She further contends that defendant Bird is estopped to deny that plaintiff had a causal injury because he is bound by the statement he prepared in the notice of claim. Neither of these positions has merit.

Concerning the first argument, there is no legal support for the proposition that proof of negligence in prescribing medications which lead to addiction is subject to a different legal standard than any other medical negligence. While it is true that the term "iatrogenic" sometimes includes an implication of improper care, it might also simply refer to an injury that results from the effects of medical treatment. See Ross v. Olson, 825 N.E.2d 890, 894-95

(Ind. App. 2005). Certainly, the appearance of the term in medical records is not dispositive of a negligence question. Id. The cases cited by plaintiff stand for the unremarkable proposition that under certain circumstances iatrogenic addiction can result from medical malpractice. See McCarroll v. Reed, 679 P.2d 851, 854 (Okla. App., 1983) (citing Los Alamos Medical Center v. Coe, 58 N.M. 686, 275 P.2d 175 (1954) and Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978) for precisely that proposition). Examination of the underlying cases reveals that in each case the question of negligence was an issue of fact for a jury.

Plaintiff's second position, that the notice of claim entitles her to summary judgment of liability and damages in the underlying medical malpractice claim is as follows:

The Notice of Claim that the defendant attorney [Bird] filed, exhibit 7, clearly delineates the damage sustained by the plaintiff, and the fact of the failures of the University of Wisconsin Hospital doctors in their care and treatment of the plaintiff. Therefore, plaintiff believes she is also entitled to partial summary judgment not only determining that the defendant was negligent, but that the damages in the underlying case are as set forth in defendant's Notice of Claim.

Plaintiff's brief in support of summary judgment at 8-9. Understandably, plaintiff is unable to cite any legal support for the proposition that the allegations in a notice of claim are conclusive proof that the claim would have succeeded at trial. The proposition is ridiculous. Allegations in a notice of claim or

complaint, even though made with a reasonable factual basis, assuredly do not establish that the plaintiff would have prevailed on those claims. Such an analysis would completely circumvent and eliminate the Lewandowski requirement that plaintiff prove she would have prevailed on the merits of her underlying medical malpractice suit. 88 Wis. 2d at 280. The facts in the present record do not establish as a matter of law that plaintiff would have prevailed in the underlying medical malpractice action against Dr. Thom, and the notice of claim is not a substitute for such proof.

ORDER

IT IS ORDERED that defendants' motion for partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is GRANTED insofar as it seeks a determination that defendant Bird was negligent and that such negligence caused plaintiff to lose her right to pursue a medical malpractice claim against Dr. Thom, and is in all other respects DENIED.

Entered this 17th day of April, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge