

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2009

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. 2008AP836

Cir. Ct. No. 2007SC30937

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MEDICAL COLLEGE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KARYN T. MISSIMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Karyn T. Missimer appeals the order dismissing without prejudice the small claims action filed against her by the Medical College of Wisconsin (Medical College). She submits that the trial court erroneously

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

exercised its discretion when it failed to dismiss the case with prejudice. Because the record contains no information that conclusively shows that the Medical College itself acted in an egregious fashion or contributed to the events which led the court to dismiss the case, this court affirms. *See Industrial Roofing Servs., Inc. v Marquardt*, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898 (Imputing the attorney's conduct to the client where the client is blameless is an erroneous exercise of discretion.).

I. BACKGROUND.

¶2 Missimer, an attorney, first learned of several outstanding medical bills for her estranged husband in April 2006, when she was contacted by a collection agency. Missimer disputed whether she was responsible for the bills because she had filed for divorce prior to the time her husband had incurred the bills, and they were physically separated; she never agreed to pay the bills; and she had no knowledge of them until the collection agency contacted her.² When she was unable to resolve the bill, she hired an attorney.³ After some negotiations, a settlement offer was made to the Medical College's attorney by Missimer's attorney, but it was rejected by the Medical College.

¶3 Unbeknownst to Missimer, one month after the Medical College rejected her settlement offer, the law firm representing the Medical College started a small claims action against her and subsequently obtained a default judgment for

² The divorce was never finalized because her husband died shortly after the medical bills were incurred.

³ Actually, she hired two attorneys. She hired the second one when her first attorney became a fact witness in the case.

approximately \$4515. Missimer discovered the existence of the suit when she entered her name into the state's Consolidated Court Automation Programs (CCAP) system. Missimer brought a motion both to reopen the default judgment, followed by a motion to have the matter dismissed with prejudice. She also supplied the Medical College's lawyer with her new addresses.

¶4 Missimer discovered through documents in the court file that although the small claims summons showed her address to be a post office box in Butler, Wisconsin, the process server chose to serve her at an old address where she had not lived for two years. In addition, the process server claimed in an affidavit that no forwarding address existed for her, and that a check of both directory assistance and CCAP did not reveal any telephone number or current address. Later, an employee of the law firm, in an affidavit submitted to the court, claimed that she had done an internet and CCAP search that revealed the post office box was no longer a valid address for Missimer. As a consequence, the law firm elected to proceed to serve her by publication. The law firm then mailed a copy of the summons and complaint and service by publication to her at the old address, not the post office box the law firm listed in the complaint.

¶5 Further, although the law firm knew that an attorney represented Missimer, the law firm did not contact Missimer's lawyer to find out her correct address. Missimer testified at the hearing on her motion to reopen that the post office box was still in existence at the time the lawsuit was commenced and it was regularly checked. Missimer also explained to the court that she was listed in the yellow pages, and that when she conducted an internet search, it quickly revealed her whereabouts. The trial court granted Missimer's motion to reopen the case.

¶6 While the matter was pending in small claims court, the Medical College's law firm made several additional mistakes. In responding by mail to two motions filed by Missimer, the law firm addressed one of the letters to the wrong post office box, and neither mailing had sufficient postage. Missimer had to pay \$1.25 in postage in order to obtain the documents. At the hearing, the trial court also learned that Missimer had subpoenaed one of the Medical College's attorneys, who failed to honor the subpoena. After hearing what had occurred with regard to service of the summons and complaint, the trial court dismissed the case, but delayed determining if it was to be with or without prejudice. The trial court later signed an order stating that the dismissal was without prejudice. This appeal follows.

II. ANALYSIS.

¶7 Missimer argues that the trial court erroneously exercised its discretion when it dismissed the case without prejudice. She submits that the actions of the Medical College and its law firm were "egregious and suggest[] dishonesty, and threaten[] the orderly administration of justice." She recited as proof the law firm's inability to find her despite having her correct address, its failing to contact her lawyer, and its later sloppy practices in sending her mailings. She also was skeptical of the explanations given by the law firm for its failure to personally serve her. She challenged the affidavits in the record submitted by the law firm stating she could not be located because she had a listing in the telephone book, and an internet search she conducted revealed her telephone number and an address where she could be reached. She pointed out that many of the law firm's documents substantiating its earlier efforts to find her were all dated in January 2008, not August or September 2007, when the search would have taken place.

¶8 As to her argument that the conduct that transpired in her case threatens the orderly administration of justice, Missimer points to the Medical College's lawyer's disregard for a subpoena and its failure to respond to a discovery request. While this court can appreciate Missimer's exasperation at the conduct of the law firm in trying to serve her, and her suspicion that the law firm was attempting to obtain a default judgment so that Missimer would be obligated to pay is understandable, but there is no evidence in this record that proves that the Medical College participated in the actions that transpired. Thus, this court must affirm.

¶9 "The decision to impose sanctions and the decision of which sanctions to impose, including dismissing an action with prejudice, are within a [trial] court's discretion." *Industrial Roofing*, 299 Wis. 2d 81, ¶41. "'A discretionary decision will be sustained if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" *Id.* (citation omitted).

¶10 This case is governed by the holding in *Industrial Roofing*: "[W]e determine that it is an erroneous exercise of discretion for a [trial] court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." *Id.*, ¶61. Missimer attributes the actions of the Medical College's lawyers in their attempt to obtain service of process in the small claims case to the Medical College. However, the only actions specifically attributable to the Medical College are her contentions that it: (1) changed the name on the medical bills from her husband's name to her name; (2) failed to send her verification that the patient listed on the medical bills was actually her husband; (3) never responded to her discovery requests; and (4) is a sophisticated

client who repeatedly uses this particular law firm. This court concludes that these acts were insufficient to rise to the level of egregious conduct that threatens the orderly administration of justice.

¶11 No evidence that the Medical College changed the name on the medical bills can be found in the record. The documents in the record that alerted Missimer to the existence of the debt reflect that the information came from a collection agency, not the Medical College. Additionally, there is nothing in the record showing that Missimer dealt directly with the Medical College. Her earlier attempts at resolving the matter were conducted with the collection agency, and the later attempts were conducted with the Medical College's law firm. So too, her discovery requests of the Medical College were sent to its law firm. Moreover, no motion to compel discovery was ever filed, and the request for discovery was moot after the trial court granted the motion to dismiss. In sum, nothing points to any involvement with the suit by the Medical College.⁴

¶12 Missimer makes much of the failure of the Medical College's attorney to honor a subpoena and claims she could have connected the Medical College with the other acts, had she been able to cross-examine the attorney. However, Missimer failed to pursue her request to have the lawyer present and to take testimony from her concerning the Medical College's level of interest and knowledge of the case. Nor does the Medical College's status as a sophisticated client who has contracted with this particular law firm to do its collection work,

⁴ Missimer stated to the trial court that in conversations with the Medical College's attorney, Missimer was given the impression that the Medical College was "very involved" in decisions in the case. Even if true, this casual remark is not sufficient to implicate the Medical College.

without more, trump the admonition that attorney conduct cannot be imputed to the client if the client is blameless.

¶13 Finally, Missimer asks this court to remand the matter to the trial court to flesh out her argument that the Medical College's conduct was egregious. However, she never requested the trial court for a hearing to take additional testimony on the matter, and, by filing her appeal, she has waived this issue. Pursuant to *State v. Rogers*, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995), failure to raise specific challenges in the trial court waives the right to raise them on appeal. Consequently, this court affirms the order of dismissal without prejudice.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4. (2007-08).

