COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1996

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

NOTICE

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

No. 95-1449

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

FROEDTERT MEMORIAL LUTHERAN HOSPITAL, INC.,

Plaintiff-Respondent,

v.

JEROME B. MUELLER
and ESTELLE MUELLER,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Jerome B. Mueller and Estelle Mueller appeal from a judgment of $127,259 in favor of Froedtert Memorial Lutheran Hospital, Inc. The Muellers contend that the trial court's grant of summary judgment in favor of Froedtert and the trial court's conclusion that Mrs. Mueller was liable for Mr. Mueller's debts were in error. Froedtert also moves this court, pursuant to

§ 809.25(3)(c), STATS., for frivolous appellate costs and fees. We affirm and remand the matter to the trial court for a determination of frivolous appellate costs and fees.

In December 1992, Jerome Mueller suffered from a seizure disorder following a work-site injury. Care was administered at Froedtert Hospital during a period from late December to early February 1993. On August 16, 1994, the hospital commenced suit for collection of the account in the amount of $127,259. Mr. Mueller's answer denied liability and contested the necessity of Froedtert's services and alleged that the care was administered negligently. Froedtert served requests for admissions relating to Mr. Mueller's answer and elements of Froedtert's claims, which were not answered by Mr. Mueller. Froedtert also served interrogatories and document requests which were also not answered.

Mrs. Mueller's answer denied any knowledge or information concerning the allegations brought by Froedtert. Based on this assertion, Froedtert requested no additional information from her during discovery.

Froedtert filed a motion for summary judgment following Mr. Mueller's failure to answer the requests for admissions, interrogatories, and document requests. Froedtert also filed a motion for summary judgment against Mrs. Mueller, alleging that she was liable for her husband's care. At this point, Mr. Mueller's counsel withdrew, citing lack of cooperation from his client.

Following Mr. Mueller's retention of new counsel, the Muellers filed separate affidavits in opposition to summary judgment. The Muellers contested the expenses incurred between December 23, 1992, and January 12, 1993, totalling approximately $80,000 of the total bill. Mr. Mueller's affidavit stated that he had not given informed consent to every procedure and that he would not concede: (1) that the charges during this period were reasonable; (2) that the services were necessary; and (3) that the service was provided without negligence. Mrs. Mueller's affidavit included a "deposition" in which Mrs. Mueller provided a handwritten account of the sequence of events.

At the summary judgment hearing, the trial court concluded that Froedtert had established a *prima facie* case, finding that the Muellers had provided no evidence that raised an issue of material fact. The trial court found that the Muellers's affidavits contained conclusory allegations unsupported by anything in evidentiary form. The trial court concluded that Mrs. Mueller's "deposition" was hearsay that fell within no recognizable exception. In addition, the trial court ruled that although Mrs. Mueller was estranged from her husband, she was liable for his debts under the doctrine of necessaries.

II. ANALYSIS.

A. Summary judgment.

Our standard of review for summary judgment questions is *de novo*. ***Green Springs Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We follow the same methodology as the trial court in deciding whether summary judgment is appropriate. ***Id***. at 314, 401 N.W.2d at 820. The first step of that methodology is to examine the pleadings to determine whether a claim for relief has been stated. ***Id***. at 315, 401 N.W.2d at 820. If so, the next step requires the court to examine whether any factual issues exist. ***Id***. Under § 802.08(2), STATS., summary judgment must be entered "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Muellers argue that the trial court incorrectly granted summary judgment based on Mr. Mueller's former counsel's failure to respond to Froedtert's discovery requests. The effect of such failure, the Muellers argue, is to make discovery procedures "some form of super pleading, to which a failure to answer forfeits one's case." We disagree.

Under § 804.11(1)(b), STATS., a matter is admitted when a party from whom an admission is sought does not respond to a request for an admission within thirty days. ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 510, 434 N.W.2d 97, 101 (Ct. App. 1988). Unless a withdrawal is permitted, that matter is conclusively established upon the failure to respond within the

appropriate time constraints. ***Id***. Summary judgment may be founded upon a party's failure to respond to a request for admission. ***Bank of Two Rivers v. Zimmer***, 112 Wis.2d 624, 630, 334 N.W.2d 230, 233 (1983).

From the record, it is clear that the Muellers were uncooperative in response to Froedtert's discovery requests. Mr. Mueller failed on numerous occasions to answer either the interrogatories or the document requests submitted by Froedtert. Mr. Mueller's failure to respond within the allotted period of time had the effect of admitting the matters in which Froedtert sought discovery. Although this is a harsh result, § 802.11(1)(b), STATS., and well-established Wisconsin case law is not forgiving of dilatory responses.

In addition to looking at the facts in the pleadings, depositions, answers to interrogatories, and admissions on file, we must look to the affidavits accompanying the motion. Section 802.08(2), STATS. The Muellers argue that their affidavits in opposition to the motion presented issues of fact that precluded summary judgment. The trial court found that the Muellers's affidavits were conclusory and presented no contravening evidence of a material fact. While we are not bound by this determination, we agree with it.

In his affidavit, Mr. Mueller stated that, "I do not concede that the care ... was necessary ... and I do not concede that [Froedtert Hospital] has charged properly for these services rendered during the period of December 23, 1992 through January 12, 1993." Mr. Mueller offered no expert opinion as to how the care was unnecessary or how the charges were improper. As the trial court noted, without such evidence his allegations are conclusory, since neither of the Muellers is qualified to opine upon the reasonableness of care or accuracy of fees. Opinions do not raise evidence facts—they are simply the conclusions that are insufficient for evidentiary purposes. ***Snider v. Northern States Power Co.***, 81 Wis.2d 224, 231, 260 N.W.2d 260, 263 (1977).

Similarly, the Muellers provide no expert opinion on how Mr. Mueller's care, as provided by Froedtert, was negligent. As to the issue of informed consent, the Muellers failed to point out any procedures which were performed without consent. Without illuminating specific facts which relate to a cause of action or without presenting evidentiary facts, such as expert testimony to support a claim, the affidavit is insufficient for the purpose of

summary judgment. *See* ***Miller Brands-Milwaukee, Inc. v. Case***, 156 Wis.2d 800, 806-08, 457 N.W.2d 896, 899 (Ct. App. 1990), *rev'd on other grounds*, 162 Wis.2d 684, 470 N.W.2d 290 (1991).

As for Mrs. Mueller's "deposition," which was submitted despite her prior denial of knowledge in her answer, the trial court was correct in categorizing it as hearsay for which there is no recognizable exception. The handwritten document contains none of the safeguards inherent in the hearsay exceptions provided in § 908.03, STATS. A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). Thus, the deposition was properly disregarded.

These two determinations, that the Muellers admitted the matters in which Froedtert sought discovery and that their affidavits were insufficient to raise any genuine issue of fact, guides us to our conclusion that summary judgment was appropriate, as there was no issue of material fact.

B. Doctrine of Necessaries.

Mrs. Mueller contends that she is not responsible for Mr. Mueller's liabilities and that the trial court misinterpreted § 766.55(2)(a), STATS., and § 803.045(1), STATS.

The Wisconsin common law of the doctrine of necessaries was modified in § 765.001(2), STATS., which provides:

> Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and a wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

It is this statute that defines upon whom an obligation is placed. The Muellers were recognized as a married couple at the time of the hospitalization and, as such, Mrs. Mueller has an obligation to pay for the liabilities of Mr. Mueller.

Next, we look to § 766.55(2), STATS., to determine what spousal property is subject to a creditor's interest. "Providing for a spouse's necessary medical treatment according to one's ability is a duty of support owed under § 765.001(2), STATS." ***St. Mary's Hosp. Medical Ctr. v. Brody***, 186 Wis.2d 100, 109, 519 N.W.2d 706, 710 (Ct. App. 1994). This duty of support implicates § 766.55(2)(a) rather than an obligation incurred in the interest of marriage or family, which would implicate § 766.55(2)(b-d). ***St. Mary's Hosp.***, 186 Wis.2d at 110-12, 519 N.W.2d at 710-11. Under § 766.55(2)(a), STATS., "A spouse's obligation to satisfy a duty of support owed to the other spouse ... may be satisfied only from all marital property and all other property of the obligated spouse." Mrs. Mueller is correct that § 766.55(2)(a), STATS., does not create a cause of action—it simply clarifies what property may be involved. It is

§ 765.001(2), STATS., that imposes the obligation. ***Sinai Samaritan Medical Ctr., Inc. v. McCabe***, 197 Wis.2d 709, 716, 541 N.W.2d 190, 193 (Ct. App. 1995). The trial court properly concluded that the obligation falls on both spouses and may be satisfied from all marital property and all other property.

The Muellers also point to § 803.045, STATS., to support their argument that Mrs. Mueller is not personally liable. This statute provides:

> **(1)** Except as provided in sub. (2), when a creditor commences an action on an obligation described in s. 766.55(2), the creditor may proceed against the obligated spouse, the incurring spouse, or both spouses.
>
> **(2)** In an action on an obligation described in s. 766.55(2)(a) or (b), a creditor may proceed against the spouse who is not the obligated spouse or the incurring spouse if the creditor cannot obtain jurisdiction in the action over the obligated spouse or incurring spouse.

The Muellers attempt to distinguish Mrs. Mueller from Mr. Mueller by characterizing Mrs. Mueller as an unobligated spouse. However, as we determined earlier, Mrs. Mueller is an obligated spouse under the doctrine of necessaries pursuant to § 765.001(2), STATS. Section 803.045, STATS., is a procedural statute that authorizes a creditor to proceed against a spouse to reach the property described in § 766.55(2)(a). ***St. Mary's Hosp.***, 186 Wis.2d at 113, 519 N.W.2d at 712.

In summary, the doctrine of necessaries, as modified by § 765.001(2), STATS., imposes liability upon Mrs. Mueller; § 766.55(2)(a), STATS., describes what property may be reached; and § 803.045, STATS., clarifies the procedure when a creditor may commence an action to satisfy a judgment.

C. Frivolous Costs and Fees.

Finally, Froedtert moves this court, pursuant to § 809.25(3)(c), STATS., for an order declaring the Muellers's appeal frivolous. We agree with Froedtert that the appeal is frivolous under § 809.25(3)(c)(2), STATS. We conclude that the longstanding rules concerning both the failure to answer a request for admission and the doctrine of necessaries are clearly dispositive of this appeal. Accordingly, the Muellers or their attorney "knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Section 809.25(3)(c)(2). Hence, we must remand the matter to the trial court for a determination of frivolous costs and fees on this appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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