

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 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. 2009AP15
STATE OF WISCONSIN**

Cir. Ct. No. 2008SC803

**IN COURT OF APPEALS
DISTRICT II**

**MEDICAL COLLEGE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARYN T. MISSIMER,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ In this small claims action Karyn Missimer appeals the circuit court's judgment that she owes Medical College of Wisconsin

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

\$4,515.22, plus costs, for medical services provided to her husband, now deceased. Missimer contends the circuit court erred in granting summary judgment to Medical College because there were disputed issues of fact that entitle her to a trial. We conclude the circuit court correctly granted summary judgment and therefore affirm. We also deny Medical College's motion for attorney fees under WIS. STAT. RULE 809.25(3).

BACKGROUND

¶2 Medical College filed this complaint alleging that on or about January 19, 2005, it had provided medical services either to Missimer, her spouse, or her children, that the remaining balance due was \$4,515.22, and that despite demand she had refused to pay the balance due. It is undisputed that the medical services for which Medical College sought payment from Missimer were provided to Edward Ross and that Missimer was still legally married to Ross when the services were provided, although on or about October 23, 2004, she physically separated from him and filed for divorce on October 29, 2004. It is also undisputed that the divorce action was dismissed on February 23, 2005, because Ross had died.

¶3 One of Missimer's defenses to the complaint was that she did not have an obligation to pay Ross's medical bills because they were separated at the time he incurred them, they were in the process of divorce, and they would have been divorced had the action not been dismissed because he died.

¶4 In support of its motion for summary judgment, the Medical College submitted an affidavit from the lead collection representative of Medical College, itemizing the charges for the medical services provided to Ross from January 9, 2005 through January 19, 2005, and averring that no patient or insurance payments

or adjustments were received for any of the items except one and the total due was \$4,515.22. Attached to the affidavit were copies of the billing statements for each of the medical services referred to in the affidavit. The lead collection representative averred that the amounts charged for the medical services were reasonable and customary within the local medical community.

¶5 Medical College also submitted the affidavit of the associate director of clinical operations at the Medical College. She averred that Medical College provided medical services to Ross from January 9, 2005 through January 19, 2005, and these services were medically necessary and properly performed.

¶6 In opposition to the motion, Missimer submitted her own affidavit and numerous exhibits, which were, she averred in her affidavit, “[t]o my knowledge ... true and correct copies.”

¶7 The circuit court concluded there were no genuine issues of material fact and Medical College was entitled to judgment as a matter of law that Missimer was liable for the cost of the medical services provided Ross under the doctrine of necessities. The court denied Medical College’s request for attorney’s fees on the ground of frivolousness, concluding that the request did not comply with the procedural requirements and, in any event, appeared to have insufficient merit to warrant sanctions.

DISCUSSION

I. Summary Judgment

¶8 On appeal Missimer contends that there are a number of genuine issues of material fact that entitle her to a trial. In addition, she contends the court should have accepted her demand for a jury trial, which the court held was

untimely. Because we conclude summary judgment was properly granted, we do not address the jury demand.

¶9 We review the grant of a summary judgment de novo, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). If the moving party's submissions establish a prima facie case, then in order to avoid summary judgment the opposing party must present submissions that create a genuine issue of material fact for trial. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds as recognized by Meyers v. Bayer AG*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448. In deciding if there are genuine issues of material fact, we draw all reasonable inferences in favor of the nonmoving party. *Id.* at 339. Whether an inference is reasonable presents a question of law for our de novo review. *Groom v. Professionals Ins. Co.*, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

¶10 The doctrine of necessities originated at common law, *see Sharpe Furniture, Inc. v. Buckstaff*, 99 Wis. 2d 114, 117, 299 N.W. 2d 219 (1980), and is now codified at WIS. STAT. § 765.001(2):

Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and 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 well established that necessary medical services come within this statute and are considered “necessaries.” See *St. Mary’s Hosp. Med. Ctr. v. Brody*, 186 Wis. 2d 100, 108-09, 519 N.W.2d 706 (Ct. App. 1994).

¶11 Missimer contends she should not be liable for Ross’s medical expenses because they were living separately when the expenses were incurred and were in the process of getting a divorce. She relies in part on her affidavit in which she avers that her divorce attorney advised her that the petition for divorce and order to show cause for temporary order prohibited her and Ross “from incurring any further debt in the family’s name. Thus, our debts were, in essence, separated.”

¶12 Missimer does not direct us to any temporary order issued in the divorce that addressed the parties’ debts. However, even if there were an order directing each party to be responsible for his or her expenses during the pendency of the divorce, it does not follow that such an order would override the doctrine of necessaries. In *St. Mary’s Hospital*, we held that a divorced wife was liable for the balance of a hospital bill for services provided to her former husband even though, pursuant to the divorce judgment, it was her husband’s obligation; her liability, we held, was not limited to the value of the marital property on the date of the divorce. *Id.* at 102-03, 113. We recognize that it is not clear from the brief recitation of facts in *St. Mary’s Hospital* whether, when the services were rendered, the parties, like Missimer and Ross, were living separately and a divorce action had been initiated. That was not an issue in the case. However, under WIS. STAT. § 767.35(3), a divorce judgment is effective on the day it is granted and the parties are considered legally married until that date. See *Brandt v. Brandt*, 145 Wis. 2d 394, 421, 427 N.W.2d 126 (Ct. App. 1988) (Wisconsin law requires that assets subject to property division be valued as of the date of divorce, unless

special circumstances warrant deviation from this rule). Consistent with this principle, we conclude that, because Missimer was legally married to Ross when the medical expenses were provided him, WIS. STAT. § 765.001(2) is applicable even though they were separated and a divorce action was pending.

¶13 Missimer contends that there are disputed issues of fact concerning whether she should be absolved of liability for the debt because Ross negligently or recklessly refused treatment and continued to drink in spite of his diabetes. This negligent or reckless conduct, she asserts, caused the need for the medical services. Missimer provides no legal authority and no rational argument for the proposition that her obligation for her husband's medical care under the doctrine of necessities is dependent upon whether Ross was at fault for his poor health.

¶14 Missimer contends there are facts or reasonable inferences from the facts that would entitle a jury to conclude that there was no meeting of the minds between her and Medical College and no privity of contract because the contract was with Ross. However, there is no requirement of privity of contract or meeting of the minds in order for a spouse who did not receive the necessary services to be liable under the doctrine of necessities.

¶15 Missimer contends that the doctrine of necessities does not apply because, when the medical services were provided, she was a law student and a part-time legal secretary and she lived on her student loans, which Ross stole after Missimer informed him she was filing for divorce. She cites as factual support the preliminary financial disclosure statement dated November 8, 2004, which she filed in the divorce action. However, it is undisputed that Missimer is now a licensed practicing attorney. We see no logical reason why her ability to pay must be judged only at the time the expenses were incurred, and there is no evidence

from which a reasonable jury could conclude that she does not now have the ability to pay.

¶16 Missimer contends there are disputed issues of fact concerning whether the medical services provided Ross were necessary. First, she asserts, her averment that Ross had refused to consent to treatment indicates he did not believe Medical College's services were necessary and this is sufficient to create a genuine issue of material fact whether the services provided were medically necessary. This argument is so lacking in merit that we decline to address it.

¶17 Second, Missimer asserts that her submissions show that Medicare viewed at least \$692 of the billed services as unnecessary.² As a factual basis for this assertion, Missimer relies on a copy of an "Explanation of Medicare Benefits" that shows that two charges totaling \$692 were not allowed for the reason that:

The information furnished does not substantiate the need for this level of service. If you believe the service should have been fully covered as billed, or if you did not know and could not reasonably have been expected to know that we would not pay for this level of service, or if you notified the patient in writing in advance that we would not pay for this level of service and he/she agreed in writing to pay, ask us to review your claim within 120 days of the date of this notice. If you do not request a[n] appeal, we will, upon application from the patient, reimburse him/her for the amount you have collected from him/her in excess of any deductible and coinsurance amounts. We will recover the reimbursement from you as an overpayment.

² Missimer makes the assertion in several places that Medical College has not provided certified copies of the medical and billing records for the services provided to Ross. However, she does not explain how this relates to the propriety of granting summary judgment. We therefore do not further address this assertion.

¶18 This “Explanation of Medicare Benefits” is inadequate to create a genuine factual dispute on the necessity of the services for which \$692 was charged, let alone all the charges. The statement in the “Explanation of Medicare Benefits” does not say the identified charges were for services that were unnecessary but only that “the information furnished does not substantiate the need for this level of service.” More importantly, the “Explanation of Medicare Benefits” is not accompanied by an affidavit made “on personal knowledge and [setting] forth such evidentiary facts as would be admissible in evidence” as required by WIS. STAT. § 802.08(3). Missimer apparently believes that it is sufficient to aver in her affidavit that “[t]o [her] knowledge” the exhibits attached to her brief “are true and correct copies.” However, this sworn statement does not make the “Explanation of Medicare Benefits” admissible at trial to prove the truth of its contents, i.e., that “the information furnished does not substantiate the need for this level of service ...” because Missimer has no personal knowledge of the factual basis for this statement. *See Mach v. Allison*, 2003 WI App 11, ¶17, 259 Wis. 2d 686, 656 N.W.2d 766 (counsel’s sworn statement that unsworn statements are true copies of letters from the signatories does not make them admissible at trial to prove the truth of their contents because the facts and opinions of the letters are not based on counsel’s personal knowledge; thus they do not meet the requirements of § 802.08(3)).³

³ Missimer evidently misunderstands the summary judgment procedure because in her brief in the circuit court, after contending that at least \$692 of the billed services were improper or unnecessary, she asserts:

(continued)

¶19 Missimer contends there are disputed issues of fact concerning whether the charges for the services were reasonable and customary. She asserts that the lead collection representative of Medical College does not have the expertise to determine whether the charges are reasonable and customary, and this, in her view, creates a genuine issue of material fact. Missimer does not point to any submission of hers that shows that the amount of the charges are not reasonable and customary.

¶20 Missimer misunderstands the correct analysis on this point. If the submissions of Medical College are sufficient to establish a prima facie case that she owed the money, then it is incumbent upon her to present submissions that

other services may be determined improper or unnecessary upon further investigation, but Defendant lacks the expertise to determine what services are improper or unnecessary. Defendant must hire an expert to make such determinations; and it seems unadvisable for Defendant to hire such an expert until after the court's ruling on the summary judgment issues.

Missimer needed to “hire an expert” *before*, not after, the court's decision on summary judgment. Once Medical College submitted the affidavit of the associate director of clinical operations, who averred that the services were medically necessary and properly performed and whose affidavit contained sufficient averments to establish a foundation for her opinion on these issues, in order to create a genuine issue of material fact on this point, Missimer had to submit the affidavit of a person with the requisite expertise opining that certain of the medical services provided Ross, or all of the medical services provided Ross, were not medically necessary. *See Dean Med. Ctr. v. Frye*, 149 Wis. 2d 727, 730, 733-35, 439 N.W.2d 633 (Ct. App. 1989) (the affidavit of a physician employed by the clinic in a collection action for medical services averring that the physician reviewed the collection statement showing the medical services provided and that the charges and all services listed in the statement were necessary to treat the patient's problem or comply with the treatment he requested makes a prima facie case on this point; in order to put this opinion in dispute, the opposing party must show either that the evidence is inadmissible or show facts that put the first party's expert opinion at issue).

We note that on appeal Missimer appears to suggest that an opinion on the necessity of the medical services must be provided by someone who is directly involved in providing the services and that the affidavit of the associate director of clinical operations is deficient. However, she provides no legal authority and no developed argument to support this assertion.

create a genuine issue of material fact. *Grams*, 97 Wis. 2d at 338. The proper question, then, is whether the affidavit of the lead collection representative is sufficient to make a prima facie showing that the charges for the medical services provided Ross were reasonable and customary. This affidavit avers:

3. That your affiant has extensive experience and expertise in examining medical records, patient charts, itemized billings, and other documents related to medical care and billing in order to determine if the services provided were necessary and proper.
4. That your affiant has extensive experience and expertise in examining medical records, patient charts, itemized billings, and other documents related to medical care and billing in order to determine if the services listed on an itemized bill were charged at a reasonable and customary facility rate.
5. The matters to be discussed herein are based upon personal knowledge derived from books and records regularly kept in the ordinary course of plaintiff's business, which books and records are kept in my possession or control and have been personally reviewed by me.

¶21 In essence Missimer is challenging the foundation of the lead collection representative's opinion that the charges were reasonable and customary. When a party objects to an affidavit on the ground that it does not meet the requirements of WIS. STAT. § 802.08(3), it must make this objection in the circuit court. The circuit court then determines whether the submission contains evidentiary facts that would be admissible in evidence. We review the circuit court's determination on such a point under a deferential standard. See *Gross v. Woodman's Food Mkt., Inc.*, 2002 WI App 295, ¶¶31, 32, 259 Wis. 2d 181, 655 N.W.2d 718. We do not see any indication in Missimer's briefs, or the circuit court's decision, that she raised the issue of the adequacy of the foundation for the lead collection representative's opinions in the circuit court. Medical College asserts in its responsive brief that this issue was not raised in the circuit

court. Missimer replies that, because in her brief in the circuit court she stated that she disputed all the facts Medical College was relying on, she did raise this issue. Such a blanket assertion in a brief is not sufficient to bring to the circuit court's attention an objection to the inadequacy of the foundation in an affidavit. It thus appears that Missimer has waived the right to raise this issue on appeal.⁴

¶22 However, even if we overlook the waiver and address Missimer's objection to the foundation for the opinion on the reasonableness and customariness of the charges, she does not prevail on this point. The affidavit sets forth in detail the experience of the lead collection representative and this is sufficient to qualify her to give her opinion on whether the charges are reasonable and customary. Accordingly, her affidavit presents a prima facie case on this point and, in the absence of any factual submission disputing it, we conclude it is undisputed that the charges were reasonable and customary.

¶23 Finally, Missimer contends that Medical College had a duty to use reasonable means to mitigate its damages and it failed to do so in four ways: it did not provide United Healthcare with Medicare summaries, it billed United Healthcare before it billed Medicare, it submitted duplicate claims to Medicare, and it failed to provide Medicare with enough information to determine whether the \$692 worth of services was medically necessary. Medical College's itemized statements show that the bills were submitted to United Healthcare. Missimer

⁴ In contrast, the Medical College did argue in its brief in the circuit court that the "Explanation of Medicare Benefits" by itself was insufficient to create a genuine issue of material fact on the necessity of the \$692 worth of medical services because it was not prepared by a person with the requisite expertise. The court did not explicitly address this contention in its opinion, but implicitly concluded that this document was insufficient to create a genuine issue of material fact.

provides no legal authority and no developed argument to support the proposition that Medical College, rather than Ross, Ross's estate, or Missimer had the obligation to follow up with any responses from United Healthcare or Medicare indicating further information was needed. Moreover, Missimer has submitted no affidavit meeting the requirements of WIS. STAT. § 802.08(3) showing that, but for some omission on the part of Medical College, either United Healthcare or Medicare would have paid for some or all of the medical services for which Medical College is seeking payment from Missimer. The copies of the "Explanation of Medicare Benefits" from United Healthcare and Medicare, submitted by Missimer, in addition to being unaccompanied by an affidavit of someone with personal knowledge of their contents, do not create any reasonable inference that, with the additional information identified, either United Healthcare or Medicare would have paid for particular services.

II. Motion for Attorney Fees

¶24 Medical College moves for attorney's fees for this appeal on the ground that Missimer has filed this appeal "in bad faith, solely for purposes of harassing or maliciously injuring" Medical College, WIS. STAT. RULE 809.25(3)(c)1., and on the alternative ground that "[t]he party or the party's attorney knew, or should have known, that that the appeal or cross-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." RULE 809.25(3)(c)2. We deny the motion.

¶25 With respect to the ground of bad faith, this involves factual findings on Missimer's state of mind. See *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 235-36, 517 N.W.2d 658 (Ct. App. 1994). This court may not find facts. See

Rohl v. State, 96 Wis. 2d 621, 629, 292 N.W.2d 636 (1980). If we were persuaded there was some indication in the record of bad faith in filing the appeal, we would consider remanding to the circuit court for fact finding. However, we see no basis for doing so. Most of the evidence Medical College points to concerns proceedings in the circuit court, and the circuit court specifically stated that “there simply is nothing in the record, including the scheduling of this case, which would lead the [c]ourt to believe that these were brought out of bad faith....” We will not second guess that determination.

¶26 Medical College also refers, without elaboration, to the fact that Missimer has satisfied the judgment. If Medical College means this is evidence of Missimer’s bad faith in appealing, we do not agree. Missimer lost in the circuit court and the judgment provides that Medical College “shall recover” from Missimer \$4,935.22, including costs. Failure to pay the judgment would have entitled Medical College to pursue various remedies against Missimer. There is no legal authority we are aware of and no logic we can think of that permits an inference of bad faith on appeal from the fact that the appellant has paid the judgment.

¶27 With respect to the second ground, we conclude that Missimer, an attorney representing herself, should have known that many of the arguments she makes are “without any reasonable basis in law or equity and [cannot] be supported by a good faith argument for an extension, modification or reversal of existing law.” WIS. STAT. RULE 809.25(3)(c)2. One example is her argument that Ross’s rejection of medical treatment creates a genuine factual dispute on the necessity of the treatment Medical College provided him. Other examples are her arguments that are based on a disregard of very basic and obvious aspects of summary judgment procedure.

¶28 However, fees are not allowed under WIS. STAT. RULE 809.25(3) unless the entire appeal is frivolous. See *Lenhardt v. Lenhardt*, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 618 N.W.2d 218. We are not satisfied that all of Missimer’s arguments meet the “without any reasonable basis” standard. In particular, the issue of whether she is liable under the doctrine of necessities when the medical services were provided to Ross after they were living separately and after the divorce action was filed has not, based on the cases provided us, been squarely addressed by existing case law. As we noted above in paragraph 12, *supra*, *St. Mary’s Hospital* did not address this issue.

¶29 We are to resolve all doubts of frivolousness in favor of a finding of nonfrivolousness. *Stern*, 185 Wis. 2d at 235. Bearing this in mind, we are not persuaded that it is unreasonable to argue that the doctrine of necessities should not apply here because Missimer and Ross were no longer living together and a divorce action was pending. It is arguably not unreasonable to contend that in this situation each party reasonably expects that each will be responsible for his or her own expenses. We emphasize that this is a weak argument and we have rejected it; but we are not convinced it is frivolous.

CONCLUSION

¶30 We affirm the judgment against Missimer because we conclude the circuit court properly granted summary judgment in favor of Medical College. We deny Medical College’s motion for attorney fees under WIS. STAT. RULE 809.25(3).

By the Court.—Judgment affirmed.

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

