COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2439

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

AUGUST F. KLITZKA,

PETITIONER-APPELLANT,

V.

MICHAEL W. SULLIVAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. August Klitzka appeals from an order dismissing his action against Michael Sullivan, the Secretary of the Department of Corrections. Klitzka's complaint sought monetary, injunctive and declaratory relief under 42 U.S.C., § 1983, for alleged violations of his constitutional rights stemming from the department's recommendation in 1990 or 1991 that he enter a

treatment program for sexual offenders after being convicted of first- and third-degree sexual assault of persons under the age of thirteen. In essence, he claimed that he had been placed in the program against his will and that the fact that he had been so placed has wrongfully classified him as a "sex deviate."

The charges against Klitzka grew out of the 1989 sexual assaults of his daughters, which he admitted. He was on parole from an earlier sentence for a similar offense at the time. After his conviction for the 1989 assaults he was sentenced to prison in January 1990 to a term of thirty-five years, and incarcerated at the Green Bay Correctional Institution. He was evaluated by Dr. Christopher Snyder, a psychologist, to determine whether he was a proper subject for sexual offender treatment. Snyder concluded that treatment was advisable, but did not immediately recommend it, even though, according to Snyder, Klitzka was interested. When Klitzka later expressed continued interest in treatment, Snyder recommended that he be admitted to the program. He was eventually removed from the program for lack of satisfactory progress.

Klitzka commenced this action in 1996, and both he and Sullivan moved for summary judgment. Sullivan's motion, seeking dismissal, was supported by an affidavit of Snyder which, together with supporting documents, indicated that Klitzka was assessed as eligible for the program, that he expressed an interest in voluntarily entering the program, and that he received treatment and was eventually removed from the program because he was making unsatisfactory progress.

Klitzka moved to strike Sullivan's motion, claiming that the trial court should not have considered Snyder's affidavit because it contained information communicated in violation of the physician-patient privilege. The

trial court denied the motion to strike, granted Sullivan's motion and dismissed the action.

Klitzka argues on appeal that the trial court erred in failing to strike the State's motion for summary judgment based upon the alleged breach of the doctor-patient privilege. This presents an issue of law which we review *de novo*. *See* ***State ex rel. Sielen v. Milwaukee Cir. Ct.***, 176 Wis.2d 101, 106, 499 N.W.2d 657, 659 (1993); ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989).

Under § 905.04(2), STATS., a patient may prevent disclosure of "confidential communications" made "for purposes of diagnosis or treatment," and Klitzka claims he never waived that privilege. However, § 905.04(4)(c) contains an exception to the general rule:

> **(c) Condition an element of claim or defense.** There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense ....

The statutory exception has been applied in several cases and we think it is equally applicable here.[1] We agree with Sullivan that Snyder's affidavit is relevant because it tends to show that Klitzka himself requested the treatment he is now challenging and voluntarily entered the program. It is also relevant because the crux of Klitzka's claim—that he was placed in treatment against his will and thus has been wrongfully identified as a sex deviate—centers, obviously, on the

[1] *See, e.g.,* ***Ranft v. Lyons,*** 163 Wis.2d 282, 290-92, 471 N.W.2d 254, 257-58 (Ct. App. 1991); ***State v. Taylor,*** 142 Wis.2d 36, 40-41, 417 N.W.2d 192, 194 (Ct. App. 1987).

facts surrounding his entry into treatment at Green Bay. And we are satisfied that when Klitzka made and advanced these allegations in his lawsuit, he placed his treatment, and the facts surrounding it, at the heart of his action and thus lost any right to claim that the information in Snyder's affidavit was privileged.

As to the propriety of the trial court's dismissal of Klitzka's action, he does not claim that any material facts are in dispute. With respect to his claim of "forced" treatment, his supporting affidavit contains only a very general, conclusory statement that "[d]efendant has now forcing [sic] plaintiff to take part in treatment program when plaintiff was not alleged guilty as being sex deviate." Affidavits must contain evidentiary, not conclusory, facts in order to serve as a basis for decision on motions for summary judgment. ***Fritz v. McGrath***, 146 Wis.2d 681, 689, 431 N.W.2d 751, 755 (Ct. App. 1988). Snyder's affidavit meets that rule, establishing that Klitzka had acknowledged his need for, and actually requested, treatment at Green Bay. On the basis of those facts, which Klitzka did not dispute with any evidentiary facts of his own, the trial court properly entered summary judgment dismissing his action.

By the Court—Order affirmed.

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