

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 98-0800 & 98-2023

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KEITH LOVE,

PLAINTIFF-APPELLANT,

V.

**DR. JOHN EVERSMAN, DR. A. THOMAS INDRESANO,
MARY KAY SCHUKNECHT AND THE MILWAUKEE COUNTY JAIL,**

DEFENDANTS-RESPONDENTS,

THE MEDICAL COLLEGE OF WISCONSIN,

DEFENDANT.

KEITH LOVE,

PLAINTIFF-RESPONDENT,

V.

**DR. JOHN EVERSMAN, DR. A. THOMAS INDRESANO,
MARY KAY SCHUKNECHT AND THE MILWAUKEE COUNTY JAIL,**

DEFENDANTS,

**THE MEDICAL COLLEGE OF WISCONSIN,
DEFENDANT-APPELLANT.**

APPEAL from orders of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. Keith Love appeals the dismissal of Mary Kay Schuknecht, Dr. John Eversman and Dr. A. Thomas Indresano from his suit seeking compensatory and punitive damages for deterioration of his gums that he alleges occurred when he was denied dental care while a Milwaukee County Jail inmate. Additionally, the Medical College of Wisconsin (MCW), which had contracted with Milwaukee County to provide certain dental care to inmates, appeals the denial of its summary judgment motion.¹ We affirm the trial court's dismissal of Mary Kay Schuknecht and the doctors from the suit and we reverse the trial court's denial of summary judgment to the Medical College.²

I. BACKGROUND.

¶2 Keith Love sued MCW, two MCW doctors, and Schuknecht, a Milwaukee County nurse, alleging that while he was an inmate at the Milwaukee

¹ This court granted MCW's petition for leave to appeal and consolidated its appeal with Love's appeal by order dated January 25, 1999.

² Although Milwaukee County Jail is listed in the caption, the jail is not an entity that can be sued in its own right.

County Jail he was denied needed dental care, which resulted in permanent damage to his gums. He sued Schuknecht because she was in charge of providing inmates at the Milwaukee County Jail with medical and dental care. He sued Dr. Eversman, who was a Senior Associate Dean for Clinical Affairs at MCW, and Dr. Indresano, who was a professor and the Chair of the Department of Oral and Maxillofacial Surgery at MCW, because they signed the contract on behalf of MCW which required the medical college to provide dental care to Milwaukee County Jail inmates. He also sued MCW.

¶3 In his complaint, Love claims that he was incarcerated at the Milwaukee County Jail from March 1996 to October 1996, and during his stay in the jail he developed “teeth problems.” He alleges that, as a result of his “teeth problems,” he had difficulty sleeping and eating, and he complained “at least twenty times” to the staff at the jail about his problems. He asserts that the staff refused to provide him with dental care and, instead, either ignored his complaints about his teeth or told him that the dentists employed by the jail only “pull teeth.” Love then wrote to Dr. Indresano and complained about the lack of dental care. Love received a reply from Dr. Indresano, who advised him to contact the jail personnel to set up a dental appointment. Love maintains that he never received the dental care he sought and, as a result, he has suffered permanent damage to his gums.

¶4 In February 1998, the trial court dismissed Schuknecht and the doctors from the action. The trial court found that Love failed to file a notice of claim and injury as required by WIS. STAT. § 803.80(1)(a) & (b), and, as a result,

the trial court did not have jurisdiction over Love's suit against Schuknecht.³ With regard to the doctors, the trial court granted their motion for partial summary judgment, noting that they never treated Love and that their only involvement was limited to being signatories on the contract for MCW. Later, at a separate hearing, the trial court denied MCW's summary judgment motion, stating that "Nothing specified that the Medical College had no duty and also no authority to review the request made by Mr. Love. Therefore, I cannot find that there is absolutely no genuine issue of material fact." MCW's motion asking the court to reconsider its earlier decision was also unsuccessful. Love appealed from the order dismissing Schuknecht and the doctors. MCW sought and obtained leave to appeal the denial of its summary judgment motion.⁴

II. Order Dismissing Schuknecht

¶5 The trial court determined that Love never filed a notice of claim with the county pursuant to WIS. STAT. § 893.80. On appeal, Love takes the extraordinary position that, in fact, he did file a notice of claim. He explains away the lack of documentation of his claim at the hearing by stating that "The proof was not put before the trial court because I did not have copies." Schuknecht has responded that Love is guilty of misrepresentation as Love never claimed in the trial court that he served a notice of claim in this case. Moreover, Schuknecht

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

⁴ After the cases were consolidated, this court discovered that no brief had been filed on behalf of Schuknecht. By order we informed the parties that if Love had not already served Schuknecht's attorney with a copy of his brief, he was to do so. The order also stated that, in the event Schuknecht's attorney had not been served with a copy of the brief, her counsel was being given the opportunity to file a brief. As a result, Schuknecht's attorney filed a motion seeking summary affirmance and Love corresponded with the court including submitting a purported "notice of claim."

argues that the notice of claim which Love recently sent to this court violates appellate procedure and is actually a copy of a notice of claim Love filed in another case. After a review of the record, this court agrees with the trial court that no notice of claim and injury was ever filed. Further, this court reprimands Love for his attempted deception.

¶6 Simply stated, WIS. STAT. § 893.80 requires a party, prior to bringing a suit, to notify the government of the claim and the injury. The statute provides that the “claim containing the address of the claimant and an itemized statement of the relief sought” must be presented to an “appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency.”⁵ Section 893.80(1)(a) mandates

⁵ WISCONSIN STAT. § 893.80(1) reads:

Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.

(1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee....

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the

(continued)

that this action must be taken within 120 days “after the happening of the event giving rise to the claim.” The statute also obligates the claimant to give “written notice of the circumstances of the claim.”

¶7 Love sued Schuknecht in her capacity as the administrator of medical and dental care in the Milwaukee County Jail. He claims that she was negligent in failing to provide him with dental care. Thus, her alleged negligence is directly related to her tasks as an employee of Milwaukee County. Consequently, Love was obligated to comply with the dictates of WIS. STAT. § 893.80 because Schuknecht was sued in her capacity as a Milwaukee County employee.

¶8 At a hearing, the trial court determined that no notice of claim was filed with the county clerk as required by WIS. STAT. § 893.80. This court must accept a trial court’s factual findings unless they are clearly erroneous, and must give due regard to the trial court’s opportunity to judge the credibility of witnesses. *See* WIS. STAT. § 805.17(2); *State v. Yang*, 201 Wis. 2d 725, 735, 549 N.W.2d 769 (Ct. App. 1996).

¶9 The record overwhelmingly supports the trial court’s determination that Love failed to file a notice of claim concerning his allegations of denied dental care. At the hearing, the trial court explained:

Mr. Love has acknowledged that there was no such claim filed on time and really has failed to set up any legal reason why the claim must continue as to either Milwaukee County or Deputy Schuknecht. Now, the deputy was acting clearly in her capacity as an agent for Milwaukee County, and was being sued by Mr. Love, and therefore,

appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

the notice requirement was not filed and therefore, the motion by those two parties for dismissal is granted.⁶

Indeed, Love argued to the trial court that he did not believe he was required to file a notice of claim since he filed a notice for mediation. Love's last-minute attempt to distort the truth by filing a bogus notice of claim will not be tolerated and his new "notice of claim" will not be considered. Thus, we agree with the trial court that no notice of claim was filed and Schuknecht was properly dismissed from the suit.

III. Summary Judgment

A. The grant of partial summary judgment dismissing Dr. Eversman and Dr. Indresano.

¶10 Love contends that the doctors were negligent and therefore should not have been dismissed from the lawsuit. Love argues that the trial court erred in dismissing both Dr. Eversman and Dr. Indresano from his suit because, he asserts, the trial court "was under the premise that Dr. Eversman and Dr. Indresano never entered into any agreement with the [sic] Milwaukee county." Again, Love misrepresents the underlying facts. The trial court actually stated:

[B]ased on the admission of Keith Love that neither Dr. John Eversman nor Dr. A. Thomas Indresano actually treated or examined him, and, the court further finding, that Dr. John Eversman and Dr. A. Thomas Indresano signed the applicable contract between Milwaukee County and [MCW] as agents and on behalf of [MCW], both Dr. Eversman and Dr. Indresano are entitled to dismissal on the merits, with prejudice.

⁶ The trial court apparently mistakenly believed Schuknecht was a deputy rather than a Milwaukee County Jail nurse.

The standard of review for a motion for summary judgment is well known. In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. See **Brownelli v. McCaughtry**, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). After applying the methodology, we are satisfied that the grant of summary judgment to the doctors was proper.

¶11 As noted, the trial court was well aware of the fact that both doctors' involvement was limited to their signing the contract on behalf of MCW that required MCW to provide certain dental services to Milwaukee County Jail inmates. The trial court reasoned that because the doctors never provided any medical or dental services to Love, a negligence suit could not be sustained against them. We agree. Neither doctor provided any medical or dental care to Love; therefore, they cannot be sued for medical malpractice.

¶12 Further, the doctors cannot be sued in their capacity as signatories to the contract. Generally, an agent who contracts on behalf of a disclosed principal bears no personal liability for a subsequent breach. See **Benjamin Plumbing, Inc. v. Barnes**, 162 Wis. 2d 837, 848, 470 N.W.2d 888 (1991). Here, it is undisputed that the two doctors signed the contract as representatives of MCW. The principal was disclosed. Thus, the doctors are free from personal liability.

B. Denial of Summary Judgment to MCW

¶13 The trial court denied MCW's summary judgment motion, finding that the contract between MCW and Milwaukee County created a duty for MCW dentists to "be responsible for the basic general dental care of the inmates for the Milwaukee county jail." Further, the trial court felt Dr. Indresano's failure to

personally investigate Love's circumstances following receipt of Love's letter may have violated a duty of care.

¶14 MCW argues that the trial court erred because there were no disputed issues of fact and MCW had no duty, either under the contract with Milwaukee County or any other duty, to evaluate the inmates and determine who should and should not receive medical and dental care. MCW notes that under the administrative code, the duty to provide necessary medical treatment and emergency dental care is clearly the responsibility of the sheriff. Indeed, MCW points to the affidavit of Schuknecht, who confirmed that jail personnel in the Milwaukee County Jail determined whether an inmate needed emergency dental care. Further, MCW submits that since no one at MCW treated Love, he has no claim in tort. We agree with both contentions.

¶15 On review of a denial of summary judgment, we, like the trial court, initially examine the pleadings to determine whether the complaint states a claim. *See Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). Even if the pleadings state a claim, summary judgment must be granted if the evidentiary material demonstrates “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.” WIS. STAT. RULE 802.08(2).

¶16 The submissions presented both at the time of the summary judgment motion, and those submitted in support of the motion asking the trial court to reconsider its summary judgment ruling, clearly demonstrate that MCW had no duty to evaluate inmates to determine who would receive dental care. WISCONSIN STAT. § 302.38 places the duty to provide for prisoners' medical needs with the “sheriff, superintendent or other keeper of the jail or house of correction.”

WISCONSIN ADMIN. CODE § DOC 350.09(1) obligates the sheriff to also provide emergency dental care. The section states: “[t]he sheriff shall provide or secure necessary medical treatment and emergency dental care for inmates in custody.”⁷ Thus, it was the sheriff who was responsible for securing the services of a dentist to provide the emergency care.

¶17 Documents filed with the trial court reflect that Milwaukee County met the sheriff’s statutory and administrative duties by entering into a contract with MCW for dental services. After reviewing the contract, we observe that the sheriff did not contract away his responsibility to decide which inmates needed emergency dental care. Thus, the obligation to determine who needed emergency dental care remained with the sheriff. Consequently, we conclude that the doctors employed by MCW provided emergency dental care once jail personnel determined it was needed. Support for this conclusion is also found in Schuknecht’s affidavit submitted by MCW. In it, she stated that it was the jail nurses who “performed triage on inmates to determine their medical and dental needs.”⁸

¶18 MCW established that it was Schuknecht and other nurses at the jail who were the gatekeepers for medical and dental care at the jail. MCW had no duty to screen inmates to determine who was in need of emergency dental care

⁷ In fact, Milwaukee County went beyond their duty and contracted with MCW to provide limited routine dental care for prisoners, even though no law requires the sheriff to make routine dental care available to inmates.

⁸ Schuknecht’s affidavit also indicated that the jail nurse who examined Love’s teeth determined that he did not require emergency care and that he was placed on the waiting list for routine dental care. However, he was transferred before he was eligible.

and, thus, Love's suit alleging MCW failed to provide dental care cannot be maintained.

¶19 Nor did the fact that Dr. Indresano sent a reply to Love's letter complaining about the jail's failure to provide dental care create a duty of care for MCW. The trial court indicated that it felt that language in the contract may have required Dr. Indresano to undertake an investigation after Love wrote complaining of his lack of treatment. We disagree. It appears from reading the contract that the trial court confused the duties of the dentist in rendering professional services with the duty of the sheriff to determine who is entitled to that care. Nothing in the contract states MCW selects the inmates entitled to emergency care. Indeed, Dr. Indresano's reply to Love telling him to contact the jail authorities to obtain dental care reinforces the fact that the duty to evaluate inmates remained the sheriff's. Love has not provided, nor can we find, any case law that requires a dentist or his or her employer, who is under contract to provide professional services to jail inmates, to independently investigate an inmate's complaint of a lack of dental care. Consequently, we conclude neither Dr. Indresano nor MCW had any independent duty to investigate Love's complaint about his failure to obtain dental care.

¶20 In sum, MCW has established that it was the sheriff's duty to provide emergency dental care to inmates. Further, at the Milwaukee County Jail, the nurses decided who was in need of the care. The contract with MCW did not relieve the sheriff of his responsibilities to provide emergency dental care, or require MCW to evaluate inmates to determine who should receive dental care. MCW's only involvement was in providing care once the sheriff's personnel decided who needed it. Further, the fact that Dr. Indresano replied to Love's letter complaining about the jail did not create a duty of care for MCW. Accordingly,

we reverse the trial court's decision and remand with directions that MCW's summary judgment motion be granted.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

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

