

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2001

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.

No. 00-2268

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MERCY MEDICAL CENTER OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

ALBERT FISHER, MD,

DEFENDANT-APPELLANT,

ELIZABETH A. FISHER,

DEFENDANT,

MERCY MEDICAL CENTER, INC.

GARNISHEE-DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago
County: BRUCE SCHMIDT, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Albert and Elizabeth A. Fisher (Fisher) appeal from the summary judgment granted Mercy Medical Center, Inc., for the cost of medical services provided to Elizabeth. We affirm because Fisher failed to file an affidavit with sufficient evidentiary facts to establish that there was a material dispute of a genuine issue for trial.

¶2 Mercy started a small claims collection to recover \$4,753.57 in medical services provided to Elizabeth. After the court commissioner rendered a decision in favor of Mercy, Fisher demanded a trial de novo in the circuit court. WIS. STAT. § 799.207(5). After a failed attempt at mediation, Mercy filed a motion for summary judgment. The motion was supported by two evidentiary affidavits. The first affidavit was from the coordinator of credit and collections at Mercy and included an agreement signed by Elizabeth agreeing to pay the normal and customary costs for all medical services, copies of four accounts itemizing goods and services provided to Elizabeth, and a history of the Fisher account. The affidavit also stated that the charges were in accord with the hospital's regular rates and terms. The second affidavit was from the director of budget and reimbursement for the health system of which Mercy was a member and contained a statement that the hospital's standard charges are contained in a "Procedure Revenue Report" that is available to the public and the charges billed to Fisher were in accordance with this report.

¶3 In response to Mercy's motion, Fisher filed an opposing affidavit. In the affidavit there is an admission that Elizabeth did receive medical services from

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Mercy. The affidavit also establishes that Albert is a physician with staff privileges at Mercy. The balance of the affidavit contains assertions prefaced by either “[y]our affiant believes” or “[y]our affiant, based on past experience, believes” The assertions are that the costs for specified procedures were excessive, specified procedures were improper, or procedures were double billed.

¶4 The circuit court granted summary judgment to Mercy. The court concluded that Mercy’s submissions established a prima facie case and that Fisher’s affidavit in opposition failed to meet the statutory requirement to set forth specific facts showing that there is a genuine issue for trial.

¶5 On this appeal, Fisher asserts that there are issues of fact worthy of a jury trial. Fisher contends that included in these issues is whether Mercy’s rates are excessive, whether there was a meeting of the minds when the patient agreement was signed, whether services were duplicative, whether unnecessary tests were performed, and whether Mercy bills patients uniformly.

¶6 We review a motion for summary judgment using the same methodology as the trial court. *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2). A summary judgment motion shall be granted “if the pleadings, 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.” Sec. 802.08(2). The party with the burden of proof in the case must establish that there is at least a genuine issue of fact by submitting evidentiary material “set[ting] forth specific facts,” *see* § 802.08(3), material to the elements of the case. *Transp. Ins. Co. v.*

Hunzinger Constr. Co., 179 Wis. 2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993). Mercy's evidentiary submissions fulfill this requirement.

¶7 The party opposing summary judgment is required to submit affidavits or other proof of material facts that are examined to determine whether there exist disputed material facts.

Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, *an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

WIS. STAT. § 802.08(3) (emphasis added).

¶8 The statute requires that the affidavits in opposition to a motion for summary judgment must contain only evidentiary facts. **Maynard v. Port Publ'ns, Inc.**, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980). Affidavits made on the basis of the affiant's information and belief or containing mere assertions of ultimate facts are ineffectual to establish evidentiary facts. **Webb v. Ocularra Holding, Inc.**, 2000 WI App 25, ¶33, 232 Wis. 2d 495, 606 N.W.2d 552, *review denied*, 234 Wis. 2d 178, 612 N.W.2d 734 (Wis. Apr. 26, 2000) (No. 99-0979-FT). Fisher's affidavit fails this simple requirement; the assertions in the affidavit are mere conclusions and not facts. **Kroske v. Anaconda Am. Brass Co.**, 70 Wis. 2d 632, 641, 235 N.W.2d 283 (1975).

¶9 Albert's status as a physician with staff privileges does not elevate his conclusions to evidentiary facts. His belief—no matter how sincere—that the charges were excessive or duplicative or that procedures were unnecessary does not elevate his conclusions to evidentiary facts.

¶10 Because Fisher has failed to factually refute Mercy's evidentiary affidavits establishing that it provided medical services to Elizabeth and that its charges were reasonable and necessary, summary judgment was properly granted to Mercy.

By the Court.—Judgment affirmed.

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

