COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0660 **Cir. Ct. No. 02-CV-5**

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

ANDREW J. PETERSON AND MARILYNN J. PETERSON,

PLAINTIFFS-APPELLANTS,

V.

ANDREW S. PETERSON,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Ashland County: NORMAN L. YACKEL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Andrew J. Peterson (Andrew) and MariLynn Peterson, pro se, appeal from an order granting a motion to dismiss one of their claims and an order granting summary judgment for the balance of their claims. Andrew and MariLynn claim the motion to dismiss was not properly noticed. We conclude that because they failed to object to the lack of notice, this argument was

not preserved for appellate review. Andrew and MariLynn also claim that there are genuine issues of material fact precluding summary judgment. We disagree. Consequently, we affirm the orders.

BACKGROUND

¶2 On June 2, 1995, Andrew, by way of his mother, MariLynn, who held his power of attorney, retained attorney Andrew S. Peterson to represent him in certain matters in Bayfield County. On October 31, 2001, Andrew and MariLynn commenced this action in Outagamie County against attorney Peterson for legal malpractice. The venue was later changed to Ashland County. Andrew and MariLynn listed a number of allegations in their complaint, including failure to seek a writ of habeas corpus in connection with a psychiatric detention and failure to protect Andrew's right to a jury trial in a traffic matter.

¶3 Attorney Peterson filed a motion to dismiss one count in the complaint for failure to state a claim upon which relief can be granted. He argued that the count, denominated "MariLynn's cause of action," showed on its face that he had no attorney-client relationship with MariLynn. A telephone conference took place on March 27, 2002, during which the court granted attorney Peterson's motion to dismiss. Although they had notice of the telephone conference itself, Andrew and MariLynn did not receive notice that the motion to dismiss would be heard during the conference.

¶4 On November 25, 2002, attorney Peterson filed a motion for summary judgment on the remainder of the complaint. The court granted the motion and entered its order on January 22, 2003. Andrew and MariLynn appeal.

DISCUSSION

¶5 Andrew and MariLynn first argue the circuit court erred by granting attorney Peterson's motion to dismiss "MariLynn's cause of action." We review independently a circuit court's decision granting a party's motion to dismiss for failure to state a claim. ***Lane v. Sharp Packaging Sys., Inc.***, 2001 WI App 250, ¶15, 248 Wis. 2d 380, 635 N.W.2d 896.

¶6 Andrew and MariLynn claim the circuit court failed to give them notice that attorney Peterson's motion to dismiss would be discussed during the telephone conference on March 27, 2002. Due process requires notice and opportunity to be heard. ***Riemer v. Riemer***, 85 Wis. 2d 375, 377, 270 N.W.2d 93 (Ct. App. 1978). Because Andrew and MariLynn did not receive notice regarding the motion to dismiss, they argue their due process rights were violated.

¶7 Attorney Peterson responds that Andrew and MariLynn waived the right to challenge notice because they failed to raise the issue during the telephone conference. During the conference, after attorney Peterson made his argument in favor of dismissal, the court asked MariLynn whether she had any response. MariLynn did not object to the lack of notice or suggest in any way that she was surprised or unprepared to discuss the motion. Indeed, she spoke to the merits of the motion.

¶8 We generally do not review issues raised for the first time on appeal. ***Lenz Sales & Serv. v. Wilson Mut. Ins. Co.***, 175 Wis. 2d 249, 256-57, 499 N.W.2d 229 (Ct. App. 1993). Thus, Andrew and MariLynn's argument was not preserved for appellate review.

¶9 The next issue is whether summary judgment was appropriate. The circuit court held that there were no genuine issues of material fact. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We review an order for summary judgment applying the same methodology as the trial court, ***M&I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995), and owing no deference to the trial court's determination. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). We will reverse a summary judgment if the trial court incorrectly decided a legal issue or if material facts were in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶10 Andrew and MariLynn argue that the circuit court failed to permit "Andrew's responsive filings to be considered by the Court on summary judgment …." First, these filings were late. The hearing was scheduled for January 8, 2003. The filings were served on January 2, 2003. Responsive summary judgment filings must be made at least five days before the hearing, not counting Saturdays, Sundays, and holidays. WIS. STAT. §§ 802.08(2), 801.15(1)(b).[1] January 4 and 5 were a Saturday and Sunday, respectively. Thus, Andrew and MariLynn's filings were served only four days before the hearing.

¶11 Further, the circuit court indicated that, even though the filings were late, it did consider them:

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> [T]he court is going to permit [attorney Peterson's attorney] to respond to any of those allegations in that filing if in fact he feels that it's relevant and has some material bearing on it. But I will say I have perused it and it sounds like all the rest, everything else I have read here, that there is no issue of any material fact and this court will so rule.

¶12 Beyond raising the issue of the timing of their filings, Andrew and MariLynn simply allege that summary judgment was inappropriate because "[t]he record at the pleadings and transcripts of the proceedings contains evidence of disputed facts concerning claims of negligence and tort, certainly to an extent sufficient to permit an inference that the defendant is guilty of negligent and/or tortious conduct." However, Andrew and MariLynn point to no disputed facts to support this claim. Pro se litigants are held to the same rules that apply to attorneys on appeal. ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). We will not develop an appellant's unsupported arguments. ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct App. 1995). Nor should we sift and glean the record to find facts to support an alleged error. ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (citation omitted).

By the Court.—Orders affirmed.

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