COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2100 **Cir. Ct. No. 2003CV3792**

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

COLLEEN WALTERS AND BILL WALTERS,

PLAINTIFFS-APPELLANTS,

V.

MARC SORIANO, M.D., A/K/A MORRIS SORIANO, M.D.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Colleen and Bill Walters appeal an order of the circuit court dismissing their complaint for failure to state a claim. The complaint alleged "assault and battery" by Dr. Marc Soriano against Colleen, committed in the course of a worker's compensation medical evaluation. The complaint also

alleged a loss of consortium claim on behalf of Colleen's husband, Bill.[1] The circuit court concluded that the claims were prohibited by the exclusivity provision in WIS. STAT. § 102.03(2) (2003-04).[2] We affirm dismissal, but employ different reasoning than the circuit court.

Background

¶2 Because the issue on appeal is whether the complaint states a claim, the pertinent facts are those alleged in the complaint. The complaint names Dr. Soriano as the only defendant and identifies the claim or claims as "assault and battery." The complaint makes the following allegations.

¶3 Colleen Walters sustained an injury while working for the School District of Tomah and presented a claim for worker's compensation benefits against the district. The school district's worker's compensation insurance carrier sent Walters to Dr. Soriano for a medical evaluation. Dr. Soriano is employed by Medical Evaluations, Inc., and, in the course of that employment, does medical evaluations in worker's compensation matters. During the medical evaluation here, Dr. Soriano asked Walters to stand up and bend backwards as far as she could. Walters bent as far back as she could bend. Dr. Soriano accused Walters of not giving her best effort, and placed one arm across the small of her back and the other in front of her chest. He "pulled" her backward, and Walters felt her spine "pop." Dr. Soriano then asked Walters to bend to her right and to her left,

[1] Although both Colleen and Bill Walters are plaintiffs, for the most part we speak in this decision as if Colleen were the only plaintiff.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and she did so as far as she could. Dr. Soriano placed his hands on Walters and "pulled" her to the left and to the right, causing her to bend her body "beyond tolerance," at which time Walters sustained severe additional pain. Dr. Soriano "accused [Walters] of not giving her best effort and felt that it was incumbent upon him to manipulate her forward, backward, and to her left and right to the point where she sustained further pain." At no time did Walters consent to being "physically manipulated by [Dr. Soriano] in the manner that he did and which placed her in great pain." All of Dr. Soriano's actions "constituted an assault and battery by [Dr. Soriano] on Colleen Walters and caused [Walters] to suffer great pain, suffering and disability, caused her to aggravate the condition of her back that had been injured in the course of her employment." Dr. Soriano's actions caused Walters "permanent injury," necessitating further medical care and treatment.

¶4 The complaint also alleges, on behalf of Walters' husband, a claim of loss of consortium resulting from Dr. Soriano's actions.

¶5 Dr. Soriano moved to dismiss the complaint, arguing that it failed to state a claim. Dr. Soriano argued that Walters failed to state a claim for either battery or assault because the complaint failed to allege that Dr. Soriano intended to cause Walters harm or to put Walters in apprehension of harm. Dr. Soriano also argued that he was immune from suit as a matter of law because he was acting as an agent of the insurance carrier and, as such, the claims were prohibited by the exclusive remedy provision in WIS. STAT. § 102.03(2).

¶6 The circuit court dismissed the complaint based on Dr. Soriano's exclusive remedy theory. The court concluded that the claims were prohibited by the exclusivity provision in WIS. STAT. § 102.03(2), as interpreted in ***Walstrom v.***

Gallagher Bassett Services, Inc., 2000 WI App 247, 239 Wis. 2d 473, 620 N.W.2d 223. In the circuit court's view, Dr. Soriano was acting as a representative of the employer's worker's compensation insurance carrier.

¶7 Because of the circuit court's conclusion that suit against Dr. Soriano was prohibited by the exclusivity provision in WIS. STAT. § 102.03(2), the court found it unnecessary to address the "legal sufficiency of [the] assault and battery claims." Still, the circuit court indirectly addressed the topic. In the context of addressing Walters' alternative "coemployee" theory of liability, the court explained why the coemployee provision of § 102.03(2) did not permit Walters' claims. Section 102.03(2) reads, in part: "This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm …." The court concluded that, even if Dr. Soriano could be considered a coemployee, "[t]he allegations in this complaint are devoid of any allegation that [Dr. Soriano] intended to cause bodily harm in taking whatever steps he did during the medical evaluation."

¶8 The circuit court concluded that the loss of consortium claim was derivative of Walters' tort claims and, therefore, also dismissed that claim.

Discussion

¶9 The standards applicable to our review of whether a complaint states a claim are well established. They were recently summarized in ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, __ Wis. 2d __, 700 N.W.2d 180:

> We review de novo the circuit court's dismissal of a complaint for failure to state a claim. A motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." A reviewing court "accept[s] the facts pled as true for purposes of [its] review, [but is] not required to assume as true legal conclusions pled by the plaintiffs."

> Although the court must accept the facts pleaded as true, it cannot add facts in the process of liberally construing the complaint. Rather, "[i]t is the sufficiency of the facts *alleged* that control[s] the determination of whether a claim for relief" is properly pled.
>
> The court should not draw unreasonable inferences from the pleadings. After liberally construing the complaint, a court should dismiss a plaintiff's claims if it is "quite clear" that there are no conditions under which that plaintiff could recover. In other words, "A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations."

Id., ¶¶19-20 (citations omitted).

¶10 We affirm the circuit court, but we do not employ the reasoning used by that court. We affirm because it is apparent that, regardless of any possible protection afforded Dr. Soriano by the worker's compensation statutes, the complaint fails to allege facts supporting a claim against the doctor. Thus, we need not address whether the circuit court correctly concluded that Dr. Soriano was a representative of the worker's compensation insurance carrier within the meaning of our ***Walstrom*** decision or the primary case ***Walstrom*** relies on, ***Miller v. Bristol-Myers Co.***, 168 Wis. 2d 863, 485 N.W.2d 31 (1992).

¶11 Under Wisconsin law, there is an "assault" tort, a "battery" tort, and an "assault and battery" tort. Although her complaint alleges "assault and battery," it is not apparent that Walters means to allege this tort, rather than the torts of "assault" and "battery." In the arguments before the circuit court, Dr. Soriano argued that the complaint failed to state a claim for assault and, separately, argued that it failed to state a claim for battery. Walters' responsive pleading did not explain or even suggest that Dr. Soriano's arguments missed the

mark because his arguments did not address the tort of "assault and battery." In any event, we will address all three torts.

¶12 First, our supreme court has explained that the torts of battery, assault, and assault and battery are not available claims where, as here, the allegation is against a medical doctor and there is no allegation that the doctor had contact with the alleged victim for a purpose other than the purpose of medical treatment or diagnosis. *Cf.* ***Deborah S.S. v. Yogesh N.G.***, 175 Wis. 2d 436, 441-43, 499 N.W.2d 272 (Ct. App. 1993) (during medical examination, alleged sexual touching that involved no medical purpose). Repeatedly, our supreme court has explained the lack of fit between "battery" and "assault and battery" torts and conduct that solely involves a medical treatment or diagnostic purpose. In ***Schreiber v. Physicians Insurance Co. of Wisconsin***, 223 Wis. 2d 417, 588 N.W.2d 26 (1999), the supreme court said:

> Originally founded on the common law tort of assault and battery, the limitations of that theoretical framework became apparent with the passage of time. Namely, a doctor's performance of an unauthorized treatment did not intuitively coincide with the "intentional, antisocial nature of battery" nor did it adequately reflect the fact that patients "consent" on some level whenever they see a doctor. As a result, negligence—the doctor's failure to exercise reasonable care to a patient—replaced intentional battery as the theoretical underpinning for the doctrine.

Id. at 427 (citations omitted). More recently, the court stated:

> In ***Trogun***, this court determined that it was no longer appropriate to treat the failure to obtain informed consent as an assault and battery and instead "recognize[d] a legal duty, bottomed upon a negligence theory of liability, in cases wherein it is alleged the patient-plaintiff was not informed adequately of the ramifications of a course of treatment."

Hannemann v. Boyson, 2005 WI 94, ¶35, __ Wis. 2d __, 698 N.W.2d 714 (quoting ***Trogun v. Fruchtman***, 58 Wis. 2d 569, 600, 207 N.W.2d 297 (1973)); s*ee also* ***Martin v. Richards***, 192 Wis. 2d 156, 171, 531 N.W.2d 70 (1995) ("An inherent difficulty existed, however, in applying the tort of battery to informed consent. A doctor's failure to disclose fit uncomfortably, or not at all, within the intentional, antisocial nature of battery; it was assumed that doctors acted in good faith when treating patients.").

¶13 Furthermore, even if we assumed that touching for a medical purpose could be the basis for a battery, assault, or assault and battery claim, we conclude that the facts alleged here are insufficient to support such claims.

¶14 The torts of battery and assault require proof of intent. A battery claim requires proof that the defendant "had the mental purpose to cause bodily harm … or was aware that his or her conduct was practically certain to cause bodily harm." WIS JI—CIVIL 2005. An assault claim requires proof that the defendant "either had an intent to cause physical harm to [the plaintiff] or an intent to put [the plaintiff] in fear that physical harm was to be committed upon [him or her]." WIS JI—CIVIL 2004.

¶15 Nothing in the complaint here supports a reasonable inference that Dr. Soriano had the mental purpose to cause bodily harm to Walters, was aware that his conduct was practically certain to cause bodily harm to Walters, or that Dr. Soriano intended to physically harm Walters or put Walters in fear of physical harm. Instead, the only reasonable inference from the complaint is that Dr. Soriano acted in the belief that Walters was pretending to be more injured than she was. There is no indication that Dr. Soriano had any personal animosity toward Walters. The complaint asserts only that Dr. Soriano accused Walters of

"not giving her best effort" when he asked her to bend her torso. This suggests the opposite: that Dr. Soriano thought Walters was faking, at least to some degree, and that he would not injure Walters or cause more pain than is inherent in such an examination.

¶16 The factual allegations in the complaint also fail to support an "assault and battery" claim. "To constitute an assault and battery, there must be an infliction of force upon another … and such infliction of force must be made in anger, for revenge, or in a rude or insolent manner." WIS JI—CIVIL 2010. Nothing in Walters' complaint creates the reasonable inference that Dr. Soriano acted in anger, for revenge, or in a rude and insolent manner. In addition, an "assault and battery" claim requires proof that the contact would be offensive to personal dignity; the pertinent jury instruction states: "Every person is … entitled to be free of … contacts which are offensive to a reasonable sense of personal dignity, contacts which are unwarranted by the social usages prevalent at the time and place at which they are inflicted." ***Id.*** Again, nothing in the complaint suggests this sort of contact by Dr. Soriano. Viewed in a light most favorable to Walters, at most Dr. Soriano exerted force on Walters that was beyond her "tolerance" because he believed Walters was not being candid about her injury.

¶17 In her circuit court brief, Walters argued that she did not need to allege any intent on the part of Dr. Soriano because the complaint's allegations show that Dr. Soriano's contact with her was "unlawful." We disagree that Walters has alleged "unlawful" contact within the meaning of "assault and battery" law. Walters pointed to ***McCluskey v. Steinhorst***, 45 Wis. 2d 350, 357, 173 N.W.2d 148 (1970), and ***Vosburg v. Putney***, 80 Wis. 523, 527, 50 N.W. 403 (1891). Both cases state that if contact is "unlawful," then, for purposes of the tort of "assault and battery," the defendant's intent is also unlawful. We have no

quarrel with this proposition, but it sheds no light on whether the contact alleged in Walters' complaint was "unlawful." Apart from her allegation that Dr. Soriano committed a battery when he touched her, the complaint presents no allegations suggesting that Dr. Soriano's contact was "unlawful."

¶18 If we disregard the complaint's label of "assault and battery" and test the complaint against the elements of a claim for failure to obtain informed consent, the complaint still does not state a claim for relief. To prove this tort, Walters needs to prove (1) that Dr. Soriano failed to disclose information about his diagnostic procedure that was necessary for Walters to make an informed decision, (2) that had necessary information about the procedure been provided, a reasonable person in Walters' position would have refused the procedure, and (3) that Dr. Soriano's failure to disclose necessary information about the procedure was a cause of injury to Walters. *See* WIS JI—CIVIL 1023.1. Walters has not alleged what Dr. Soriano should have told her that would have caused a reasonable person to refuse the procedure. Rather, the gist of Walters' factual allegations is that Dr. Soriano manipulated her torso because he believed Walters was faking the seriousness of her injury. That does not permit a reasonable inference that Dr. Soriano failed to provide information that was necessary to an informed decision.

¶19 Finally, we analyze whether Walters' complaint states a claim for medical negligence. We conclude it does not. The complaint does not allege that Dr. Soriano failed to use the degree of care, skill, and judgment that a reasonable medical doctor would exercise in the same situation. *See* WIS JI—CIVIL 1023. The complaint neither identifies a pertinent medical standard of care nor alleges facts indicating that any applicable standard was not met.

¶20 In sum, the portion of Walters' complaint captioned "Assault and Battery" fails to state a claim. Because Walters does not dispute the proposition that the loss of consortium claim in the complaint is dependent on the "assault and battery" claim or claims, we conclude that the entire complaint fails to state a claim. We affirm the circuit court's order dismissing Walters' complaint.

By the Court.—Order affirmed.

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