

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

September 16, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1989

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NANCY JOHNSON CARRICK,

PLAINTIFF-APPELLANT,

v.

**LAWRENCE L. FOSTER, ROBERT O. BUSS,
JOHN R. PHILLIPS, RICHARD G. BOCK,
BLUEMOUND ORTHOPAEDIC GROUP, LTD. AND
PROFESSIONAL MANAGEMENT OF MILWAUKEE, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County:
MICHAEL J. BARRON, Judge. *Affirmed.*

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

CURLEY, J. Nancy Johnson Carrick appeals from two judgments granting summary judgment and dismissing the action she brought against Lawrence L. Foster, Robert R. Buss, John R. Phillips, and Bluemound

Orthopaedic Group, Ltd. (collectively, the “Bluemound defendants”), and Richard G. Bock and Professional Management of Milwaukee, Inc. (collectively, the “Professional Management defendants”). Carrick argues that summary judgment should not have been granted because, among other things, genuine issues of material fact existed making summary judgment inappropriate. The Bluemound defendants were Carrick’s employers, while the Professional Management defendants were financial advisors to the Bluemound defendants. Among Carrick’s causes of action was a claim that her former employers unlawfully terminated her employment, contrary to an oral employment contract, or, alternatively, that if no employment contract existed, she contends the doctors should have been estopped from firing her because of a promise that two of the doctors made to her. She also sued her former employers pursuant to § 134.01, STATS., claiming that they conspired with Bock to cause her injury. She also claimed that Bock both unlawfully interfered with her employment contract and intentionally inflicted emotional distress upon her. Because we conclude that there are no material factual disputes, summary judgment was proper; accordingly, we affirm.

I. BACKGROUND.

Carrick was hired in 1971 as an x-ray technician by Dr. Foster, an orthopedic surgeon, the founder of the Bluemound Orthopaedic Group. Several years later, Doctors Buss and Phillips joined Dr. Foster’s practice. In 1976, Carrick was promoted to the position of office manager. In addition to her duties with Bluemound Orthopaedic Group, she also worked as the resident manager for Bishop’s Woods East Partnership. This partnership, which included Doctors Foster, Buss and Phillips, owned and leased the office building housing the doctors’ offices. Bock, the president of Professional Management of Milwaukee,

was hired by Dr. Foster early in his practice, and he has continued to provide accounting and financial advising services for the group.

According to Carrick's summary judgment submissions, after many years of employment at Bluemound Orthopaedic Group, she was approached in 1993 by Dr. Buss who asked her to conduct a confidential investigation of the financial transactions of Bluemound Orthopaedic Group because he and Dr. Phillips suspected Dr. Foster of engaging in financial irregularities. After receiving assurances from Dr. Buss and then later from Dr. Phillips that the investigation would remain confidential and that her employment would not be adversely affected, she, along with her then-fiancé Terry Carrick, agreed to review the financial transactions of the group.

The several months-long investigation took place away from the office and without Dr. Foster's knowledge. On December 31, 1993, the Carricks met with the two doctors and related that their investigation revealed that Dr. Foster had engaged in certain questionable financial practices. Several months later, Doctors Buss and Phillips, armed with the information supplied by the Carricks, confronted Dr. Foster with their concerns. This led to significant changes in the financial operations of the group. It also led, according to Carrick, to increased criticism of her work performance, particularly by Bock, the financial and accounting advisor. Carrick claimed that as a result of the stress she felt from this criticism, she took four days of sick leave followed by an unplanned two-week vacation. During this time frame she also resigned her position with Bishop's Woods East Partnership in order to relieve some of the stress. Her working conditions, in her opinion, however, continued to deteriorate. Finally, on November 30, 1994, Carrick's employment was terminated. She was told the

reason for her termination was the fact her job as office manager was being eliminated.

Carrick sued Doctors Foster, Buss and Phillips, and the Bluemound Orthopaedic Group, claiming that she was wrongfully terminated in breach of the employment agreement she had with them; or, in the alternative, she claimed that if no employment contract existed, that they violated a promise they were estopped from denying. Also named as defendants were Bock and his company, Professional Management of Milwaukee. Carrick alleged that Bock engaged in tortious behavior, including the intentional infliction of emotional distress upon her, as well as a claim that he unlawfully interfered with her employment agreement with Bluemound. With regard to all of the defendants, Carrick alleged that they acted in concert to injure her, contrary to § 134.01, STATS. Both the Bluemound defendants and the Professional Management defendants brought summary judgment motions. The trial court granted summary judgment to the respondents on all claims except one that is not a part of this appeal.

II. STANDARD OF REVIEW.

Summary judgment is governed by § 802.08, STATS. Although we review the trial court's decision *de novo*, we apply the same standard and methodology employed by the trial court. *Preloznik v. City of Madison*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983).

[We] first examine[] the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint ... states a claim and the pleadings show the existence of factual issues, [we] examine[] the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a

defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, [we] examine[] the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

Id. at 116, 334 N.W.2d at 582-83.

Further, “[s]ummary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment.” *Id.* at 116, 334 N.W.2d at 583. We apply this test here.

III. ANALYSIS.

A. Wrongful termination claim or alternatively the promissory estoppel claim.

Carrick contends that the trial court’s grant of summary judgment to the Bluemound defendants with respect to the wrongful termination claim was inappropriate because the trial court took on the role of the fact finder in deciding the summary judgment motion. Carrick asserts that the trial court erred when it stated that, under the employment-at-will doctrine, “someone in the position of Bluemound Orthopedic Clinic can discharge an employee for no reason at all. There doesn’t have to be any reason,” and that Carrick’s argument that conversations with Doctors Buss and Phillips concerning her employment “would not result in her termination is a smoke screen because there is no separate contract here. There’s only one contract and it’s between Nancy and the orthopedic clinic.”

Carrick argues that the trial court was wrong in finding that her employment-at-will contract had not been altered. She asserts that her agreement with Dr. Buss, later ratified by Dr. Phillips, to investigate Dr. Foster's finances was undertaken only after she was promised that her employment would not be adversely affected. This assurance, she argues, transformed her terminable-at-will employment contract into an employment contract where she could be fired for any reason except one related to her sensitive investigation of Dr. Foster's finances. Carrick argues a grant of summary judgment was improper to the respondents because her belief, standing alone, that her terminable-at-will contract was modified by Dr. Buss's statement transforms this issue into a material factual dispute. As a result, her contention that the promise made to her changed the conditions of her employment became a jury issue.

We need not address this issue. Were we to agree with Carrick that her employment contract was modified, the Bluemound defendants would, nonetheless, still be entitled to summary judgment. Here, all three employers' affidavits state that Carrick was fired because her position as office manager was eliminated—a reason totally unrelated to the financial investigation she conducted months earlier. This assertion has not been countered by any affidavit or documentation by Carrick—except by Bock's testimony that he thought Carrick was fired for her poor work performance. Other than Carrick's suspicions, there is not a scintilla of evidence to support her position. She has produced no documents generated by her former employers which give a different reason for her discharge. She can point to no conversation between her employers and others (all of her co-employees were deposed) which suggests that she was fired for a reason other than the elimination of her post.

Recognizing that she has produced nothing in opposition to the doctors' affidavits, Carrick argues that the doctors' given reason was merely a "pretext." The real reason for her termination, according to Carrick, was the role she played in the investigation. She relies on what she characterizes as circumstantial evidence to support her conclusion that she was terminated because of her involvement with the investigation. First, she argues that the elimination of her position was a bad business decision on behalf of the doctors. Thus, she reasons, the doctors must have had the investigation in mind when they fired her because their decision to eliminate her job was an economically unsound one. She also buttresses her argument with the fact that Bock—contrary to the testimony given by her actual employers—testified that he thought her dismissal was a result of her poor job performance. Given that the two reasons conflict, she concludes again that the real reason surely must have been her involvement in the earlier investigation.

The fact that Carrick believes elimination of her job was a poor business judgment does not lead to the inevitable conclusion that the doctors must have fired her for her part in the investigation. Carrick concedes that her position as office manager was never restored. All of her fellow workers have been deposed, and there has been no hint of a subterfuge or ruse on the part of the doctors. To the contrary, evidence in support of the doctors' explanation can be found in the depositions. The doctors all testified in their depositions that the growth of the practice and the acquiring of personal secretaries for each doctor militated against keeping the position of office manager. Additionally, further deposition testimony of one of the doctors observed that when Carrick submitted her resignation from her position with Bishop's Woods, she significantly reduced her work duties while maintaining her high salary level. Another doctor also

reflected that Carrick's decision to take an impromptu extended vacation may have given impetus to the thought of eliminating her job because the office ran smoothly during her unexpected absence.

Carrick also looks to Bock's contention that she was fired because of her alleged poor work performance as a source bolstering her theory that she was fired for an investigation-related reason. The fact, however, that Bock thought she was fired for a different reason does not lead to the conclusion that Carrick wishes to draw. What Bock thought about regarding her firing does not create a material factual dispute. His deposition testimony reveals that he was not present when the decision to fire her occurred, nor was his opinion on the matter sought by the doctors. Bock also testified that he did not volunteer an opinion. Bock played no role in the firing. He was not her employer, nor was he present when the decision to fire her was made. Further, none of the doctors ever told him a contrary reason.

In short, contrary to Carrick's claim of a bad business judgment, the testimony of her employers gives a well-reasoned explanation of why Carrick's job was eliminated. Bock's differing view of the reason for her firing is of little help to Carrick. He was not a party to the decision. Carrick's bald assertion to the contrary does not meet the definition of a "material fact" found in Wisconsin law. *See Clay v. Horton Mfg. Co.*, 172 Wis.2d 349, 354, 493 N.W.2d 379, 381 (Ct. App. 1992) (stating that "[t]he alleged factual dispute, ... must concern a fact that affects the resolution of the controversy"). Thus, even assuming that Carrick's employment contract was modified, she has failed to counter the affidavits which state that she was not fired because of her involvement in the financial investigation. While Carrick has woven a web of suspicion and innuendo, she has failed to "set forth specific facts showing that there is a genuine issue for trial."

RULE 802.08(3), STATS. As a consequence, the Bluemound defendants were entitled to summary judgment on this claim.

Carrick has pleaded an alternative claim against the Bluemound defendants. She alleged that if there was not an employment contract prohibiting them from firing her for her financial investigation, then her promissory estoppel theory would apply, thereby preventing the doctors from terminating her for reasons related to this confidential investigation. Stripped to its essence, her claim is that even if she was serving as an employee-at-will, the promise that her job would not be adversely affected estops the doctors from firing her from her job for an investigation-related reason. Carrick's promissory estoppel claim fails for the same reasons the wrongful discharge claim does—she has not shown any evidence that her firing was related to her work with the investigation. The trial court could properly reject the promissory estoppel claim.

B. Unlawful interference with employment contract claim.

Carrick coupled her claim of wrongful employment termination with a claim against Bock alleging that he unlawfully interfered with her employment by inducing the doctors to terminate her employment. Having no direct evidence of this contention, Carrick attacked Bock's denial of these allegations by claiming that he had a motive to terminate her. She then bootstrapped this claim into a belief that, because he had a motive to harm her, he therefore must have assisted the doctors in their decision to fire her.

Carrick has again engaged in unfounded speculation and conjecture. There is no evidence, direct or circumstantial, to support this claim. Conversely, a review of the submitted summary judgment material reveals that all three doctors testified that it was solely their decision to terminate her and that Bock was not

present when this determination was made. Bock's affidavit states that he was neither asked about Carrick's firing nor did he offer an opinion on her firing. According to Bock's affidavit, his only participation in the matter was limited to a meeting with the doctors after their decision to eliminate her job had been reached. At that time, he cautioned the doctors to obtain the advice of an attorney before actually firing Carrick. Having no evidence to counter the three doctors' testimony that Bock was not a participant in the original decision to fire her, Carrick challenges this testimony by attacking the credibility of the doctors. Simply stated, she does not believe they are telling the truth. Her beliefs, however, without more, do not defeat the respondent's summary judgment motion. To survive a summary judgment motion, the opposing party must present "evidence ... such that a reasonable jury could return a verdict for the non-moving party." See *Horton Mfg. Co.*, 172 Wis.2d at 354, 493 N.W.2d at 381. Carrick has no evidence. A reasonable jury could not conclude that Carrick was fired for the reasons that she alleged, since such a verdict would be based on mere possibilities and speculation. See *Merco Distributing Corp. v. Commercial Police Alarm Co.*, 84 Wis.2d 455, 461, 267 N.W.2d 652, 655 (1978) ("It is impermissible to base a judgment on 'conjecture, unproved assumptions, or mere possibilities.']"). The Professional Management defendants were entitled to summary judgment on this claim.

C. Section 134.01, STATS., claim.

Carrick contends that the doctors conspired with Bock and decided to terminate her. She asserts that this conduct violates § 134.01, STATS., which provides:

Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his or her reputation, trade, business, or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding \$500.

Much, if not all, of the proof presented in Carrick's opposition to both sets of defendants' summary judgment motions relies on circumstantial evidence. In the context of a claim of a § 134.01 violation, the case law provides that, "if circumstantial evidence supports equal inferences of lawful action and unlawful action, then the claim of ... conspiracy is not proven." *Malecki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis.2d 73, 85, 469 N.W.2d 629, 634 (1991) (quoting *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 516 (7th Cir. 1990)). Here, Carrick relies almost exclusively on circumstantial evidence. Much of the circumstantial evidence can also support the doctors' contention that they acted lawfully. Carrick needs more to prove her conspiracy theory. Additionally, despite her suspicions, Carrick cannot establish that Bock ever conferred with the doctors about her firing. Without evidence of his involvement, Carrick has not met her burden. Section 134.01, STATS., requires that Carrick prove two or more people conspired against her. "[T]he actions of agents within the scope of their corporate authority are the acts of a single corporation entity rather than separate persons." See *Elbe v. Wausau Hosp. Ctr.*, 606 F. Supp. 1491, 1502 (1985). Thus, the doctors and their practice legally constitute only one person. Carrick needs to prove that Bock participated in the firing decision in order to meet the "two person" requirement found in § 134.01, STATS. For the reasons already noted, we have concluded that Carrick failed to connect Bock with the decision to fire her.

Therefore, her claim falls because she has presented no proof of two persons acting in concert together.

D. Intentional infliction of emotional distress claim.

Finally, Carrick alleged that Bock intentionally inflicted emotional distress upon her. Carrick asserts that the trial court erred in determining that none of her claims “singularly or together would even come close to establishing intentional infliction of emotional distress There [are] certainly no facts sufficient to permit a reasonable jury to find for the plaintiff.” We agree with the trial court.

In order to survive summary judgment on an intentional infliction of emotional distress claim, Carrick must show that: (1) Bock’s conduct was intentional; (2) Bock’s conduct was extreme and outrageous; (3) Bock’s conduct was a cause-in-fact of Carrick’s injury; and (4) Carrick suffered an extreme and disabling emotional response to Bock’s conduct which must be proven. *See, e.g., Alsteen v. Gehl*, 21 Wis.2d 349, 359-60, 124 N.W.2d 312, 318 (1963).

Although Bock confesses to absolutely no knowledge of many of Carrick’s complaints about his conduct, he argues that, even if Carrick’s numerous complaints about his conduct are presumed true, the conduct falls short of behavior needed for an intentional infliction of emotional distress claim. He is correct. Carrick’s allegations against Bock are limited to the following: he told Carrick that she was overpaid; he used a “nasty” tone of voice to her; and he once asked her when he was attempting to reach her by telephone “who the hell” were you talking to? All other allegations of his alleged improper conduct dealt with instructions delivered by Bock on behalf of her employers, such as inquiring about how long she was taking for lunch. The allegations being leveled against Bock

can hardly be characterized as “extreme and outrageous conduct,” nor is there any evidence that she suffered “extreme and disabling” emotional distress. Carrick has not made a *prima facie* case for an intentional infliction of emotional distress claim. The Professional Management defendants are entitled to summary judgment on this claim.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

