COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1916 **Cir. Ct. No. 01-CV-252**

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

WISCONSIN SEAFOOD COMPANY, INC.,

PLAINTIFF-APPELLANT,

BJK LTD.,

PLAINTIFF,

V.

DAVID P. FISHER,

DEFENDANT,

MEAT PROCESSORS OF GREEN BAY AND DOUGLAS M. FARAH,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Wisconsin Seafood Company, Inc., and BJK, Ltd., (Seafood) appeal a summary judgment dismissing its claims against Douglas Farah and Meat Processors of Green Bay, Inc., arising out of a breach of a noncompete agreement by MPI's employee, David Fisher. Seafood argues that the trial court erroneously interpreted the parties' cross-motions for summary judgment as a stipulation of facts waiving trial. It also argues that the trial court erroneously concluded that Farah and MPI were entitled to summary judgment of dismissal on Seafood's claims for libel, tortious interference with contract and conspiracy to breach a noncompete agreement. We reverse the summary judgment dismissing Seafood's claims against Farah and MPI and remand for further proceedings.[1]

BACKGROUND

¶2 In August 1998, Seafood purchased Fisher Brothers Fisheries, Inc. As part of the purchase, David Fisher, the former president of Fisher Brothers, entered into a three-year noncompete agreement with Seafood. The agreement provided, in part:

> Neither Fisher nor Fisher Bros. shall directly or indirectly sell, supply, or attempt to solicit business from any retail customer or jobbers to whom Fisher Bros. provided service or products within the two years prior to this agreement, the only exception being business conducted with customers who have a previously established business relationship with Fisher's new employer outside a 50 mile radius of Green Bay. Neither Fisher nor Fisher Bros. shall directly

[1] Seafood does not raise any issue challenging the dismissal of its claims against David Fisher.

> or indirectly sell, supply or attempt to solicit business from any retail customer within a 50 mile radius of Green Bay.

¶3 On February 1, 1999, Meat Processors, Inc., owned by James Farah and Douglas Farah, employed Fisher for the professed purpose of working only as its seafood buyer. At the time Fisher was hired, Farah was provided a copy of the noncompete agreement. According to Farah's affidavit, between February 1, 1999, and August 31, 2001, MPI paid Fisher a salary and a commission of approximately one and one-half cents per pound of seafood sold by MPI. Fisher attended weekly sales meetings with sales personnel and provided information concerning seafood product available for sale.

¶4 In December 1999, Fisher wrote letters to the City of Monona Health Department and the Minnesota Department of Agriculture—Food Inspection Division alleging violations by Seafood. Farah and MPI disavow any knowledge of the letters. Fisher and MPI assert that the letters were unauthorized by MPI and outside the scope of Fisher's employment.

¶5 MPI acknowledges, however, "that Fisher agreed that he was involved in some sales that violated the Agreement as found in the arbitration proceeding." Following arbitration between Fisher and Seafood over Fisher's violations of the noncompete agreement, the arbitrator awarded Seafood $22,286 in damages in full and final settlement of all claims submitted.[2]

[2] The record is meager as to the arbitration proceedings, but does contain a copy of the arbitrator's March 16, 2001, award. The award states that arbitration was ordered in Brown County Circuit Court Case No. 99-CV-356, ***Wisconsin Seafood Company, Inc., et, al. v. David Fisher***, pursuant to the parties' asset purchase agreement. The agreement specifies remedies for breach. The arbitrator determined that Fisher breached the agreement and that Seafood was entitled to $22,286 in damages.

¶6 In February 2001, Seafood brought this action against MPI, Douglas Farah and Fisher, alleging four claims: (1) libel; (2) tortious interference with contract; (3) conspiracy to breach the noncompete agreement; and (4) intentional interference with employment relations. On cross-motions for summary judgment, the circuit court dismissed all of Seafood's claims. Seafood appeals and challenges the dismissal of its claims against Farah and MPI.

STANDARD OF REVIEW

¶7 Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.[3] 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., Inc.***, 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).

¶8 If the pleadings state a disputed claim for relief, we examine the affidavits and proofs to see whether a genuine issue of material fact exists, or whether conflicting inferences may reasonably be drawn from undisputed facts. If such factual issues exist, summary judgment is improper and the case should be tried. ***Magnum Radio, Inc. v. Brieske***, 217 Wis. 2d 130, 135, 577 N.W.2d 377 (Ct. App. 1998). 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 & Casualty Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

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

DISCUSSION

1. Trial Waiver

¶9 At the outset, we conclude that the circuit court erroneously held that Seafood waived its right to trial because its motion for summary judgment amounted to a stipulation of fact. The trial court relied on two cases that, at first blush, appear to support its holding. ***Wiegand v. Gissal***, 28 Wis. 2d 488, 495a-495b, 137 N.W.2d 412 (1965), *reh'g denied*, 138 N.W.2d 740 (per curiam), states that the practical effect of bilateral summary judgment motions is a stipulation as to facts. Also, ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis. 2d 513, 518, 192 N.W.2d 852 (1972), holds "A motion for summary judgment carries with it the explicit assertion that the movant is satisfied that the facts are undisputed and that on those facts the movant is entitled to judgment as a matter of law." We conclude that ***Wiegand*** and ***Powalka*** must be distinguished from the case before us.

¶10 The distinguishing feature is that, here, the parties do not agree to the same set of facts. We explained in ***Stone v. Seeber***, 155 Wis. 2d 275, 278, 455 N.W.2d 627 (Ct. App. 1990):

> Cross motions for summary judgment sometimes imply a stipulation as to the facts of the case, as in ***Powalka v. State Mut. Life Assurance Co.***, 53 Wis. 2d 513, 518, 192 N.W.2d 852, 854 (1972), but not always. A "movant may be correct in stating that the facts relevant to his theory of the case are not in dispute, yet contest the relevant issues of fact under his opponent's theory." ***Hiram Walker & Sons, Inc. v. Kirk Line***, 877 F.2d 1508, 1513 n.4 (11th Cir. 1989). Additionally, both parties might erroneously conclude from the existence of cross motions that no factual dispute exists, when in fact, one does. We therefore follow the standard summary judgment methodology.

¶11 It is the court's function to determine whether the facts are truly undisputed as the parties claim and, if they are, whether competing inferences may nonetheless be drawn. *Cf.* ***Grotelueschen v. American Fam. Mut. Ins. Co.***, 171 Wis. 2d 437, 446-47, 492 N.W.2d 131 (1992) ("Therefore, when only one reasonable inference can be drawn from those undisputed facts as a matter of law, reciprocal motions for summary judgment waive the right to a jury trial."). We recognize that a motion for summary judgment carries the explicit assertion that the moving party is satisfied the facts are undisputed. Nonetheless, parties may "erroneously conclude that no factual dispute exists when in reality one does" and, therefore, a court must determine on its own whether a genuine issue of material fact exists, which presents "a question of law for the court, not for the parties." ***Id.*** at 462 (Abrahamson, J., dissenting). A motion for summary judgment does not permit "a trial upon affidavits and depositions." ***Lecus v. American Mut. Ins. Co.***, 81 Wis. 2d 183, 189-90, 260 N.W.2d 241 (1977). As we discuss later, the record discloses disputes of material fact and competing inferences from undisputed facts. Consequently, the parties' cross-motions for summary judgment do not amount to a fact stipulation that waives Seafood's right to trial.

2. Intentional interference with contract

¶12 Next, we agree with Seafood that the record discloses factual disputes that preclude summary judgment dismissing Seafood's intentional interference with contract claims against Farah and MPI.

> Wisconsin has long adhered to the basic interference-with-contract rule of RESTATEMENT (SECOND) OF TORTS § 766 (1979), which states: "One who intentionally and improperly interferes with the performance of a contract ... by inducing or otherwise causing the third person not to perform the contract, is subject to liability."

Magnum Radio, 217 Wis. 2d at 136 (citations omitted)

¶13 Interference may be found where the defendant knows the interference is substantially certain to occur as a result of his or her action. ***Foseid v. State Bank***, 197 Wis. 2d 772, 790 n.11, 541 N.W.2d 203 (Ct. App. 1995). A plaintiff does not have to show malicious intent to sustain the claim. *See* ***id.*** It is the plaintiff's burden to establish a prima facie case by showing an intentional interference by the defendant with his or her contract, and the defendant then must prove justification for his or her acts as a matter of defense. *See* ***Federal Pants, Inc. v. Stocking***, 762 F.2d 561, 568-69 (7th Cir. 1985).

¶14 Here, Seafood offered proofs demonstrating a prima facie claim for interference with contract. Farah and MPI were notified and aware of Seafood's noncompete agreement with Fisher. Nonetheless, MPI assigned Fisher responsibilities that included delivery of seafood products to retailers and educating the sales staff in order to increase MPI's seafood sales. According to Farah's affidavit, between February 1, 1999, and August 31, 2001, MPI paid Fisher a salary and a commission of approximately one and one-half cents per pound of seafood MPI sold. Also, the record discloses that after hiring Fisher on February 1, 1999, MPI developed numerous new seafood accounts for which Fisher served as salesman.

¶15 For example, in answers to interrogatories, MPI responded that in March 1999, it first sold products to Burnstad's Pick 'N Save at five locations.[4] Invoices dated in March 1999, state that Burnstad's Pick 'N Save in Tomah purchased hundreds of pounds of seafood from MPI and list "Dave Fisher" as

[4] The locations listed are Black River, Europe, Richland, Sauk City, and Tomah.

"salesman." Mary Jacobs of Seafood asserted that the Burnstad's Pick 'N Save in Tomah had been Seafood's customer in the two-year period preceding the noncompete agreement. Additionally, Seafood produced proof that its revenue and customer base decreased after MPI hired Fisher and MPI's seafood revenue increased.[5]

¶16 These facts reasonably support the inference that Farah and MPI were complicit in Fisher's direct or indirect sales and supply of seafood to retail customers to whom Fisher Brothers provided service or products within two years prior to the noncompete agreement, and that the customer did not have a previously established business relationship with MPI. Seafood also produced evidence permitting an inference of damages. Consequently, the record supports a prima facie case that Farah and MPI intentionally and improperly interfered with the performance of the noncompete agreement by inducing Fisher not to perform the contract, thus causing damages. Farah and MPI's assertions to the contrary establish factual disputes inappropriate for summary judgment methodology.

¶17 Despite concessions in their appellate brief that Fisher violated the noncompete agreement as found by the arbitrator, Farah and MPI argue there is no proof Fisher was involved in sales. We disagree. The fact that he was listed as a salesman on invoices, compensated in part by commission, performed clerical duties ringing up sales for customers on the premises, assisted in delivering seafood to retail stores and attended sales meetings to educate the sales personnel permits inferences refuting this argument. Farah and MPI also claim Seafood

[5] The parties' briefs discuss numerous retail stores that Fisher allegedly supplied and argue whether the stores fell within the scope of the noncompete agreement. We do not restate their fact assertions here, but rather use just one example to illustrate their dispute.

presented no direct evidence that they knew Fisher was in violation of the noncompete agreement. This argument is unavailing due to the reasonable inference that may be drawn to show Farah was aware of the extensive activities of his employee.[6] Farah and MPI further argue that at various times, Fisher's involvement with sales involved merely clerical duties ringing up sales. This argument admits that Fisher was involved in sales and, in any event, raises factual issues as to the extent of Farah's and MPI's interference with the noncompete contract.

¶18 Farah and MPI further argue that Seafood offered no depositions of retail customers to support its claims. They claim Seafood relies solely on hearsay. This argument is meritless given Seafood's reliance on MPI's answers to interrogatories and Fisher's own deposition testimony. Farah and MPI also contend that its proofs are undisputed. This argument ignores their own answers to interrogatories and the contradictions and inconsistencies in the proofs of record, as well as conflicting inferences that may be drawn from the undisputed proofs. Additionally, Farah and MPI claim that Seafood's damages could have been caused by poor management, instead of Fisher's breach of the covenant not to compete. This argument merely illuminates a factual dispute inappropriate for summary judgment.

¶19 Farah and MPI further argue that Seafood received compensation for all its damages, citing the arbitrator's decision entered in the arbitration

[6] Farah and MPI filed a joint response brief. The brief does not develop an issue involving corporate versus personal liability and therefore we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc***., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

proceeding with Fisher. We are unpersuaded. The arbitrator's decision does not indicate that Seafood's claims against Fisher track Seafood's claims against Farah and MPI. Because the record cited is insufficient to support Farah's and MPI's arguments, they are rejected. Consequently, we conclude that the record discloses genuine issues of material fact that preclude summary judgment.[7]

3. Defamation claim

¶20 Seafood argues that the trial court erroneously entered summary judgment dismissing its defamation claim. The trial court stated that no defamation occurred as a matter of law. Because the record reasonably permits inferences to the contrary, we reverse the court's determination.

¶21 The record contains two letters to the City of Monona Health Department and the Minnesota Department of Agriculture—Food Inspection Division alleging violations by Seafood. The letters were printed on MPI's letterhead and stated: "Wisconsin Seafood Co. employs methods of sale that are in violation of State statutes, as well as Food & Drug Adm. Regulations." The letters urged a thorough inspection "to prevent this fraud from being perpetrated" upon the citizens of Wisconsin and Minnesota. The letters were signed by "David P. Fisher/Seafood Director[,] Meat Processors Inc."

[7] Seafood requests that based on Farah's and MPI's concessions, we order entry of summary judgment imposing liability for Seafood's interference with contract claim. Due to the breadth and complexity of the factual issues in dispute and their relationship to the damage issues, we decline its request.

¶22 MPI does not contest that the letters were defamatory.[8] Instead, it argues that neither MPI nor Farah had any involvement in sending the letters, and that Fisher stated he sent them on his own. This argument ignores summary judgment methodology. The court is not to assess the weight and credibility of affidavits and deposition testimony on summary judgment. ***Lecus***, 81 Wis. 2d at 189-90. The fact that the letters were written on company stationery by company personnel permits an inference that the company was involved. MPI and Farah's explanations set up factual disputes precluding summary judgment. *See* ***id.***

4. Conspiracy claim

¶23 Finally, we conclude that the trial court erroneously dismissed Seafood's claim that Farah and MPI conspired with Fisher to breach his noncompete agreement. The trial court dismissed Seafood's conspiracy claim on summary judgment, holding that "there is not enough credible evidence that [MPI and Farah] acted in a malicious manner to create a reasonable inference that there has been a violation of [WIS. STAT. §134.01] governing civil conspiracy to harm another's business." The court also stated: "[C]ompetitive activities that incidentally harm another when the purpose is to improve one's competitive advantage do not violate conspiracy laws if there is no malicious motive."

¶24 Seafood argues that the court misinterpreted the law when it held that a required element of a conspiracy claim was "malice" defined as "harm for

[8] A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. ***Ranous v. Hughes***, 30 Wis. 2d 452, 460, 141 N.W.2d 251 (1966).

harm's sake." We conclude that the court correctly interpreted the law, but erroneously applied it to facts in dispute.[9]

¶25 Before approaching the fact issues, we briefly turn to the parties' legal positions regarding Seafood's civil conspiracy claim. Seafood relies on ***Mendelson v. Blatz Brewing Co.***, 9 Wis. 2d 487, 490, 101 N.W.2d 805 (1960), which holds: "A conspiracy to cause a breach of contract is actionable." ***Id.***; *see also* 16 AM.JUR.2D *Conspiracy* § 61 at 285 (1998). ***Mendelson*** defines conspiracy as "a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." ***Id.*** at 490. The term "unlawful" is not confined to crimes, but "includes all wilful, actionable violations of civil rights." ***Id.***

¶26 ***Mendelson*** examines the element of malice in the context of an action for interference with contract. It concludes that it is unnecessary to allege malice as a separate element because "the act of a person, who procures another to breach a contract, is malicious if the actor acts intentionally and knowingly, for 'unworthy … purposes.'" ***Id.*** at 493. It further explained that the courts that uphold liability for interference with contract "do not use the word malice in the sense of malevolence, spite, or ill will" but "probably use it to mean merely intentionally inducing a breach of contract without justification." ***Id.*** at 494 (citation omitted).

[9] The parties' briefs focus on the correct meaning of the term "malice" as applied to a civil conspiracy claim. Therefore, we limit our discussion to this issue. We do not, for example, address the interplay between a civil conspiracy claim and a claim for damages arising out of the same facts, *see* ***Martin v. Ebert***, 245 Wis. 341, 13 N.W.2d 907 (1944), nor do we discuss issues relating to corporate versus personal liability. *See* 16 AM.JUR.2D *Conspiracy* § 56 at 281 (1998).

¶27 The ***Mendelson*** case compared this scenario to one in which the defense claimed it was acting within a privilege to induce a breach of contract. *See* ***Vassardakis v. Parish***, 36 F. Supp. 1002 (S.D.N.Y. 1941) (involving the issue of privilege where an officer of a corporation induced the sole stockholder to discharge the plaintiff). In the case of privilege, "it is not enough to show that defendant knew, or intended, that plaintiff would be harmed thereby, or even that he was gratified by such a prospect." ***Mendelson***, 9 Wis. 2d at 492 (citation omitted). Instead "'malice' will not suffice to destroy a privilege unless it is shown to have been the sole motive." ***Id.*** Thus, ***Mendleson*** stands for the idea that in an action for interference with contract relations, malice is supplied when the breach is done without privilege and with an improper motive. ***Id.***

¶28 Farah and MPI, on the other hand, rely on ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 469 N.W.2d 629 (1991), and argue that under WIS. STAT. § 134.01, proof of a conspiracy claim requires proof of malice defined as harm, for harm's sake.[10] They contend that the record lacks direct

[10] WISCONSIN STAT. § 134.01 is entitled: "**Injury to business; restraint of will**" and reads:

> 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.

The trial court applied WIS. STAT. § 134.05 to Seafood's conspiracy claim. Because Seafood's pleadings alleged a common law conspiracy claim, and Farah and MPI offer no legal authority that WIS. STAT. § 134.01 overrides common law claims for conspiracy to interfere with contractual relations, we conclude that the trial court erroneously applied § 134.01.

(continued)

evidence of malice or proof that the alleged conspirators' sole purpose was to harm Seafood financially. They point out that "maliciously injuring" has been interpreted as meaning "to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired [such as hurting someone else's business by competition]." ***Id.*** at 87-88 (citation omitted).

¶29 While Farah and MPI concede that circumstantial evidence can support a claim of conspiracy but contend that evidence supporting equal inferences of lawful and unlawful actions fail to prove conspiracy. They reason that because the proofs are capable of being interpreted as presenting a profit motive, Seafood's conspiracy claim must fail.

¶30 Farah's and MPI's statements of law have limited applicability to the case before us and are not dispositive. We acknowledge that under WIS. STAT. § 134.01, "'there can be no conspiracy' unless all conspirators act with 'malice,' meaning they must 'intend[ ] to cause harm for harm's sake.'" ***Joseph P. Caulfield & Assocs. v. Litho Prods.***, 155 F.3d 883, 889 (7th Cir. 1998) (quoting ***Maleki***, 162 Wis. 2d at 86). However, Seafood's pleadings allege a common law conspiracy to interfere with a contract, not a § 134.01 claim.

¶31 Additionally, even if Seafood's claim could be interpreted as a claim under WIS. STAT. § 134.01, Farah and MPI read the term "malice" too narrowly. There is no question that competition that incidentally harms another when the purpose is to improve one's business is not conspiracy when there is no malicious

motive.[11] However, "if there is a combination of persons and they act, even in part as the result of malicious motives and cause the harm, the injury to another is actionable." ***Maleki***, 162 Wis. 2d at 88. ***Maleki*** further explains:

> "Malice," as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition.

Id. at 87 (citation and footnote omitted).

¶32 Here, Seafood did not rely merely on evidence of a profit-seeking motive. It produced facts suggesting that Farah and MPI wrongfully induced Fisher to breach his noncompete agreement. Seafood submitted proofs to the effect that Fisher intentionally violated the noncompete agreement while working at MPI, wrote defamatory letters on MPI's stationery, engaged in acts of property damage at Seafood's place of business, and threatened Seafood's employees. These proofs are sufficient to show malice on Fisher's part. Although Seafood produced no direct evidence that Farah and MPI participated in Fisher's malicious activities, there is evidence nonetheless of a business relationship between Farah, Fisher and MPI, pursuant to which Fisher was assigned duties in violation of the noncompete agreement. Also, Seafood's proofs imply that following its hiring of Fisher, MPI derived economic benefit while Seafood experienced harm. Thus, at this stage of the proceedings at least, the record presents circumstantial evidence

[11] "The conspiracy cases are replete with statements pointing out that competition that incidentally harms another when the purpose is to improve one's competitive advantage does not run afoul of conspiracy laws if there is not a malicious motive." ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 87 n.9, 469 N.W.2d 629 (1991).

raising issues of fact with respect to the nature of Farah and MPI's motives and activities in furtherance of a common design, intention or purpose.

¶33 We conclude that conspiring with another for the purpose of inducing an employee to breach a noncompete agreement is not a legitimate means by which to gain competitive advantage. Seafood has a right to Fisher's adherence to the noncompete contract. To conspire with another to breach that right is malicious within the meaning of the civil conspiracy law. Consequently, Seafood's proofs fulfill the elements of a claim for conspiracy to interfere with a contract.[12]

CONCLUSION

¶34 The record before us consists of numerous affidavits, supplemental affidavits and attachments containing deposition testimony. For instance, one affidavit, that of Farah and MPI's attorney, is one-half inch thick and contains twenty-two multiple-page exhibits. Illustrative of the fact-intensive nature of this case, Farah's and MPI's appendix to their response brief is 276 pages long. Without restating the factual excerpts from the depositions and affidavits, we conclude there are competing reasonable inferences as to Seafood's claims for relief, and it is entitled to have these resolved after a trial by the trier of fact whether it be by a judge or jury. *See* ***Lecus***, 81 Wis. 2d at 190.

[12] Farah and MPI argue that these proofs do not meet Seafood's burden of proof by clear, satisfactory and convincing evidence. We conclude that Seafood's proofs are sufficient to demonstrate a genuine dispute of material fact, and that is the applicable burden at the summary joint stage of proceedings.

By the Court.—Order reversed and cause remanded.

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