COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2965 **Cir. Ct. No. 02-CV-189**

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

GREG LAFOND,

PLAINTIFF-APPELLANT,

V.

DAVID ELVIG AND HUBERT "SNICK" QUICKER,

DEFENDANTS-RESPONDENTS,

JOHN DRAWBERT AND HELEN DRAWBERT,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

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

¶1 CANE, C.J. Greg LaFond appeals a judgment dismissing his fifty-two page amended complaint. LaFond's amended complaint makes claims for conspiracy, defamation, intentional infliction of emotional distress, and tortious

interference with a contract. The trial court determined that the latter two claims were restatements of the defamation claim and therefore dismissed them. The court also dismissed the conspiracy claim and ordered LaFond to file another complaint clearly specifying what words he was alleging were defamatory. LaFond, however, refused to file another complaint, and the court entered judgment dismissing the amended complaint with prejudice.

¶2 We conclude that the trial court correctly dismissed LaFond's defamation claim because the amended complaint did not identify the allegedly defamatory statements. The court, however, erred when it determined that the interference with contract and infliction of emotional distress claims were restatements of the defamation claim. Nonetheless, our own review of LaFond's amended complaint leads us to conclude that it does not support the interference with contract claim because it does not allege the defendants interfered with his employment contract. In addition, because the amended complaint never alleges LaFond's emotional distress was disabling, it fails to state a claim for intentional infliction of emotional distress. Finally, because a civil conspiracy claim depends on another claim for its existence, we affirm the trial court's dismissal of that claim as well.

BACKGROUND

¶3 This case arises from a series of events involving Altoona city politics.[1] At all relevant times, LaFond was Altoona's city administrator. Hubert

[1] The facts are taken from LaFond's amended complaint. The procedural posture of this case requires us to accept these facts as true. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(continued)

"Snick" Quicker and David Elvig were at various times members of the Altoona City Council. LaFond took office in August 1999 and immediately became involved with two controversial issues. One was the proposed development of a heavily wooded area of Altoona known as "Moonlight Meadows" and the other was a corruption investigation of fire chief Arnold Johnson.

¶4 LaFond's investigation of Johnson eventually led to Johnson's entry into the 2000 Altoona mayoral race, with Quicker as one of his supporters. During the campaign, Quicker prepared a flyer accusing LaFond and the current mayor of numerous misconduct charges. In response, LaFond formed the "Citizens Committee for Honesty & Integrity in Government" and created two flyers intended to refute Quicker's. The day before the election, LaFond and the deputy city clerk conducted absentee ballot voting at a nursing home. Johnson lost the election and continued to serve as fire chief. LaFond continued his corruption investigation, which eventually resulted in Johnson's discipline.

¶5 Elvig lived across from Moonlight Meadows and opposed its proposed development. Two development proposals had been submitted to the city council, one with eighty lots and another with forty. Although Elvig opposed development, he considered the forty-lot proposal to be less onerous. The council eventually approved the eighty-lot proposal in June 2000. Shortly thereafter,

Elvig, his neighbors John and Helen Drawbert, Quicker and others allegedly formed "the Elvig conspiracy" in an attempt to remove LaFond from his job.[2]

¶6 The amended complaint alleges that over the course of the summer of 2000, the conspiracy began suggesting that LaFond had financially benefited from the Moonlight Meadows development and that he had engaged in election law violations at the nursing home. According to the amended complaint:

> 1. Elvig wrote a letter to LaFond expressing concern that "there may be other interests involved in the haste to sign a deal with Benrud and Associates,[3] and that these interests are not known to the community at large."
>
> 2. In front of two city council members, Elvig falsely accused LaFond of receiving "kick-backs" from Benrud.
>
> 3. John Drawbert wrote a letter to LaFond criticizing the development process, falsely accusing LaFond of misconduct, and implying that he benefited financially from the plan.

[2] LaFond's amended complaint alleges that the conspiracy's purpose was to "discredit and defame Mr. LaFond; to libel and slander him; to injure him in his profession and reputation; to inflict emotional distress on him; and to interfere with his contract of employment with the City."

[3] Benrud and Associates submitted the eighty-lot proposal for Moonlight Meadows.

4. At a televised city council meeting, Drawbert again falsely accused LaFond of misconduct and suggested, by innuendo, that he financially benefited from the proposed development.[4]

5. At a different televised city council meeting, Elvig and Drawbert both accused LaFond of "strongly lobbying" for the Benrud proposal and suggested, by innuendo, that he stood to financially benefit from the plan.

6. Quicker prepared several documents alleging that LaFond had violated election laws at the nursing home.

7. Quicker prepared a document entitled "False Statements by Greg LaFond Which Affected the Mayoral Election," that accused LaFond of "having made public statements about Johnson that were false and defamatory, suggesting he had criminal exposure."

8. The conspiracy hired a private investigator to look into the election law violations and gave him copies of the election law documents that Quicker prepared.

9. Several members of the conspiracy distributed flyers in an aldermanic district to solicit "sensible" candidates for a special election to replace a recently resigned city council member. In conversations with the district's residents, they falsely accused

[4] LaFond includes Drawbert's entire statement from the meeting in his complaint. We do not reprint it here, but, for purposes of this appeal, accept LaFond's characterization that it falsely accuses him of misconduct and, by innuendo, suggests he financially benefited from the project.

LaFond, "directly and by innuendo" of "unspecified misconduct in office."

10. Several conspiracy members helped Johnson pay his legal expenses in a defamation suit against the Citizen's Committee's treasurer based on one of the committee's election flyers.

11. Elvig e-mailed the head of the State Elections Board falsely claiming that there were "some potential irregularities in the April local elections."

12. Quicker prepared several more documents specifically accusing LaFond of ignoring election laws and misconduct in public office for causing a false campaign registration statement to be filed and altering a campaign registration form.

13. The defendants distributed a binder to members of the city council, the mayor, the city attorney and the executive director of the State Elections Board accusing LaFond of the above misconduct, illegal actions, elections fraud, and unethical behavior.

¶7 LaFond filed the fifty-two-page, 180-paragraph amended complaint containing the listed allegations and others against Elvig, Quicker and the Drawberts. Specifically, he made claims for civil conspiracy, defamation, intentional infliction of emotional distress and tortious interference with contract. The defendants moved to dismiss the complaint for failing to state a claim upon which relief could be granted.

¶8 The court determined that the focus of the lawsuit was the defamation claim, and that the interference with contract and infliction of

emotional distress claims were "nothing other than the defamation claim recast, recolored and reclassified," and should be dismissed. Next, the court dismissed that conspiracy claim, saying it was not legally viable. Finally, the court determined that the amended complaint failed to state a claim for defamation because it did not specify the defamatory phrases as required by WIS. STAT. § 802.03(6). The court ordered LaFond to file another complaint for defamation against Elvig and Quicker, clearly specifying the allegedly defamatory words.[5] LaFond refused, and the court dismissed all of his claims with prejudice. LaFond appeals.

DISCUSSION

¶9 A motion to dismiss for failure to state a claim tests whether the complaint is legally sufficient to state a claim for which relief may be granted. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). The legal sufficiency of the complaint is a question of law that this court reviews de novo. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). In examining the legal sufficiency of the complaint, we assume that the facts alleged are true, ***id.***, and we are concerned only with the legal sufficiency of the complaint. ***Lane v. Sharp Pkg. Sys., Inc.***, 2001 WI App 250, ¶15, 248 Wis. 2d 380, 635 N.W.2d 896. Thus, we will affirm an order dismissing a complaint for failure to state a claim if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff could prove in support of the

[5] The court determined as a matter of law that nothing the Drawberts were alleged to have said was defamatory. This decision, along with the court's rulings that the conspiracy claim had no legal basis and that the infliction of emotional distress and interference with contract claims were identical to the defamation claim, essentially dismissed the Drawberts from the case. Before appealing, LaFond voluntarily dismissed his claims against the Drawberts.

allegations. ***Quesenberry v. Milwaukee County***, 106 Wis. 2d 685, 690, 317 N.W.2d 468 (1982).

¶10 We briefly address the amended complaint itself before determining whether it states a claim upon which relief may be granted. The first 163 paragraphs extensively detail the background facts, which we have summarized in our fact section. We will refer to this as the "fact" section of the complaint. The remainder of the amended complaint states the specific claims by listing their elements and alleging the various types of relief demanded. We will refer to this as the "claim" section.

¶11 LaFond first claims the trial court erred when it determined that his claims for tortious interference with contract and intentional infliction of emotional distress were "nothing other than the defamation claim recast, recolored and reclassified." We agree. The court's reasoning for dismissing the infliction of emotional distress and interference with contract claims was because all of LaFond's claims were essentially based on harms from allegedly defamatory statements. While this appears to be the case from the amended complaint, the court's ruling ignores a basic principle of our notice pleading requirements; that is, a plaintiff may plead as many claims as the alleged facts support. *See* WIS. STAT. § 802.02(5)(b). If the underlying facts support claims for intentional infliction of emotional distress, tortious interference with contract, and conspiracy, LaFond may pursue these claims and the court should not dismiss them on a motion to dismiss for failure to state a claim merely because they arise from the same set of facts.

¶12 Instead, the trial court should have examined LaFond's amended complaint to determine whether it stated any claim upon which relief could be

granted. The thrust of the amended complaint's allegations is that the defendants defamed LaFond, tortiously interfered with his employment contract with the City, intentionally inflicted emotional distress and engaged in a conspiracy to achieve those ends. In our review of LaFond's amended complaint, then, we must determine whether its allegations are legally sufficient.

¶13 We first consider LaFond's defamation claim. The elements of a defamatory communication are: (1) a false statement; (2) communicated by speech, conduct, or in writing to a person other than the person defamed; and (3) the communication is unprivileged and is defamatory, that is, tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997).[6] In addition, a complaint alleging defamation must set forth "the particular words complained of." WIS. STAT. § 802.03(6). This is because a defendant in a defamation action is entitled to notice of the specific statements or implications that are alleged to be defamatory. ***Mach v. Allison***, 2003 WI App 11, ¶28, 259 Wis. 2d 686, 656 N.W.2d 766.

¶14 The trial court determined that the amended complaint failed to comply with WIS. STAT. § 802.03(6). We agree. The amended complaint fails to clearly distinguish what it considers defamatory and what is not, especially given the large number of statements. The fact section is replete with numerous

[6] In addition, when the subject of the defamation is a public figure, the defamation must be made with actual malice. ***Torgerson v. Journal/Sentinel Inc.***, 210 Wis. 2d 524, 535, 563 N.W.2d 472 (1997). LaFond admits he is a public figure and he alleges actual malice in his complaint.

statements the defendants made. Some are alleged to be false, some defamatory, and many are statements of fact. However, LaFond's amended complaint is fifty-two pages and 180 paragraphs long. Many of the statements in it are not obviously defamatory. A defendant cannot be expected to file a responsive pleading to a defamation charge where its claim section only identifies the statements by stating, "The communications complained of by Mr. LaFond, the particular words of which are set forth in the documents identified herein …." Instead, LaFond needed to specifically identify which of the particular words of which particular communications he considered defamatory. The trial court did not err when it dismissed LaFond's defamation claim after LaFond refused to file another complaint identifying the specific defamatory words.

¶15 We next examine the amended complaint to determine if it states a claim that Elvig and Quicker tortiously interfered with LaFond's employment contract. Our courts have adopted the Restatement (Second) of Torts definition of tortious interference with contract. ***Sampson Invests. v. Jondex Corp.***, 176 Wis. 2d 55, 71, 499 N.W.2d 177 (1993), states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

The contract need not be breached for this claim to exist as long as the value of the bargain is diminished or the defendants cause the third party to interfere with a contractual right. ***Id.*** at 72.

¶16 LaFond argues that the conspiracy's aim was to force him from his job and also to interfere with the performance of his duties. In the claim section,

he states that the conspiracy's actions "caused performance of his duties under his contract of employment to be more burdensome." Other than this rather conclusory statement, nothing in the amended complaint demonstrates how the defendants' actions interfered with the contract by causing the City to breach, reducing the value of the bargain, or otherwise interfering with a right under the contract. In fact, the amended complaint belies any claim of contractual interference. Nowhere does LaFond claim he was removed from office. Further, LaFond alleges that in December 2001, the city council extended LaFond's employment contract for three years, reimbursed him $78,000 for legal fees he sustained defending a lawsuit filed by Johnson, paid him a $6,500 bonus for "exemplary performance in 2001," and amended his contract to provide for nine months' severance pay in the event he was terminated other than for cause. LaFond has failed to allege that his contract with the City was in any way compromised by the defendants' actions.[7]

¶17 We next address LaFond's claim for intentional infliction of emotional distress. To state a claim of intentional infliction of emotional distress, a plaintiff must plead that the defendants' conduct (1) was intended to cause emotional distress; (2) was extreme and outrageous; (3) was a cause of the person's emotional distress; and (4) the emotional distress was severe and disabling. ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 695, 271 N.W.2d

[7] We also note that LaFond has not alleged he suffered any pecuniary damages from the defendants' interference. Instead, he maintains he "sustained damages for infliction of emotional distress, and for damage to his reputation," as a result of their actions. Pleading pecuniary damages in a tortious interference contract claim is not required. *See* ***Badger Cab Co. v. Soule***, 171 Wis. 2d 754, 765-66, 492 N.W.2d 375 (Ct. App. 1992). However, a plaintiff must *prove* pecuniary damages as a result of the interference in order to recover for emotional distress. *See* ***Bauer v. Murphy***, 191 Wis. 2d 517, 534-35, 530 N.W.2d 1 (Ct. App. 1995).

368 (1978). The defendants urge us to examine their behavior as alleged and conclude that it does not constitute "extreme and outrageous" conduct. Although they point to several cases where courts have found conduct to be not extreme and outrageous as a matter of law, we decline to make such a determination here given that the case is before us on a motion to dismiss. Given the fact-centered nature of this case, a jury or the trial court acting as a fact-finder would undoubtedly be in a superior position to determine whether the defendants' conduct was extreme and outrageous.

¶18 Instead, after reviewing LaFond's amended complaint, we conclude it fails to state a claim for intentional infliction of emotional distress because it does not allege that the emotional distress was disabling. The claim section states:

> The intentional, wilful and malicious conduct of the defendants, individually and as co-conspirators, was extreme and outrageous; was intended to cause emotional distress to Mr. LaFond; was the cause of emotional distress to Mr. LaFond; and that emotional distress was extreme and of the type reasonably expected to result from defendants' conduct."

Nothing in this statement alleges the distress was disabling.

¶19 More to the point, nothing in the fact section alleges that LaFond's emotional distress was disabling. In order for distress to meet the "severe and disabling" standard, it must be such that the person was unable to function in other relationships. ***Alsteen v. Gehl***, 21 Wis. 2d 349, 360-61, 124 N.W.2d 312 (1963). We discern nothing in the amended complaint that suggests LaFond suffered any harm of this type. LaFond's failure to allege his emotional distress was disabling leads us to conclude he had failed to state a claim for intentional infliction of emotional distress. *See* ***Hillman v. Columbia Cty.***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991).

¶20 Finally, because we have determined that LaFond's amended complaint fails to state any of the discussed claims, we must also conclude that his conspiracy claim fails as well. In Wisconsin, civil conspiracy has been defined 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. ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977) (citing ***Mendelson v. Blatz Brewing Co.***, 9 Wis. 2d 487, 490, 101 N.W.2d 805 (1960)). It is established law that there is no such thing as a civil action for conspiracy. ***Singer v. Singer***, 245 Wis. 191, 195, 14 N.W.2d 43 (1944). An action exists for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone. ***Id.*** "In a civil action for damages for an executed conspiracy, the gist of the action is the damages." ***Id.***

¶21 A civil conspiracy, as LaFond admits in his brief, "is not an independent cause of action, rather it depends on the performance of some underlying tortious act." Because LaFond has not stated a claim upon which relief can be granted, he cannot make a claim for civil conspiracy.

By the Court.—Judgment affirmed.

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