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DISTRICT III

July 30, 2024

To:

Hon. Thomas J. Walsh
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Shari L. Locante
Electronic Notice

Daniel D. Hawk
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1497 Daniel D. Hawk v. Judy Marie Cornelius Hawk
(L. C. No. 2022CV249)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daniel D. Hawk, pro se, appeals a circuit court order dismissing his complaint against Judy Marie Cornelius Hawk for failing to state a claim upon which relief can be granted. On appeal, Daniel argues that he stated claims for fraud and malicious prosecution. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We reject Daniel's arguments and affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On March 1, 2022, Daniel filed a complaint against Judy alleging that she "conspired with Amber Haessly to maliciously accuse the Plaintiff of molesting [a] two-year-old" in order to gain an advantage in pending divorce proceedings. Child Protective Services ("CPS") initiated an investigation, but the investigation was closed as unsubstantiated. While the investigation was pending, Daniel threatened suicide and was hospitalized. Daniel also alleges that he experienced reputational harm in his community.

On April 28, 2022, Judy moved to dismiss Daniel's complaint. Among other arguments, Judy contended that Daniel failed to state a claim upon which relief could be granted because the complaint did not address all of the required elements of malicious prosecution. On May 3, 2022, the circuit court set a briefing schedule on Judy's motion to dismiss. The court ordered Daniel to submit his brief in opposition to dismissal by May 31, 2022, and further ordered that the brief be limited to fifteen pages. On May 31, Daniel submitted seventy-eight pages of materials in which he addressed numerous issues that had no apparent bearing on the malicious prosecution claim, including issues that had arisen during the divorce proceeding as well as allegations about Judy's family.

On August 31, 2022, the circuit court issued its decision and order granting Judy's motion to dismiss Daniel's complaint for failure to state a claim. On September 6, 2022, Daniel filed a notice of appeal.

Complaints are governed by WIS. STAT. § 802.02, which requires that a complaint contain "[a] short and plain statement of the claim, identifying the transaction or occurrence … out of which the claim arises and showing that the pleader is entitled to relief." Sec. 802.02(1)(a). Our supreme court has explained that in order to satisfy this statutory standard, "a complaint must

plead facts, which if true, would entitle the plaintiff to relief." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693. In contrast, "[b]are legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss." ***Id.*** "Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review; however, we benefit from discussions of the … circuit court." ***Id.***, ¶17.

A claim for malicious prosecution has six essential elements. *See* ***Maniaci v. Marquette Univ.***, 50 Wis. 2d 287, 297-98, 184 N.W.2d 168 (1971). These elements are:

> 1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
>
> 2. Such former proceedings must have been by, or at the instance of the defendant in this action for malicious prosecution.
>
> 3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
>
> 4. There must have been malice in instituting the former proceedings.
>
> 5. There must have been want of probable cause for the institution of the former proceedings.
>
> 6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Id. (quoting ***Elmer v. Chicago & N.W. Ry. Co.***, 257 Wis. 228, 231, 43 N.W.2d 244 (1950)).

Our supreme court has further explained that the tort of malicious prosecution is disfavored. *See* ***Krieg v. Dayton-Hudson Corp.***, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981) ("The common law tort of malicious prosecution has not been favored by the courts."). As a result, "in Wisconsin we have taken a restrictive position on this tort." ***Id.*** While Wisconsin courts "want to afford a remedy to those who have been truly wronged, we must also deter

frivolous or groundless litigation." ***Id.*** Thus, "the tort of malicious prosecution is designed to place a stringent burden upon a plaintiff to meet" each of the six elements. ***Id.*** at 460-61; *see also* ***Yelk v. Seefeldt***, 35 Wis. 2d 271, 277, 151 N.W.2d 4 (1967) ("There is a strong reason of public policy for thus making it rather onerous for a person to successfully maintain an action for malicious prosecution." (citation omitted)).

Here, the circuit court focused on the first element and determined that Daniel "has not alleged, and it does not appear he will be able to allege, that '[a] judicial proceeding was brought against [him].'" The court pointed out that Daniel's own brief referred to the CPS investigation as "a pre-judicial proceeding[] to determine if prosecution of [Daniel was] warranted." Daniel's allegation that CPS closed its investigation as unsubstantiated, without seeking any kind of court order, meant that "Daniel's factual allegations fail[ed] to satisfy the first" element of a malicious prosecution claim.

The circuit court further explained that Daniel had failed to allege any facts regarding what Judy actually did. The court explained that the complaint "simply alleges Judy conspired with Haessly to initiate the CPS complaint." As such, "Daniel's complaint is void of even minimal facts as to how and when the alleged conspiracy came about and who actually signed and filed the paperwork with the county." The court explained that Daniel's conclusory allegation was insufficient, given "the admonishments that public policy interests demand courts to make it 'rather onerous for a person to successfully maintain an action for malicious prosecution.'" *See* ***Yelk***, 35 Wis. 2d at 277.

Daniel devotes the bulk of his appellate brief to the argument that he has a viable claim for fraud against Judy. Daniel does not cite any Wisconsin authority for this proposition, nor

does he provide any citations to the record. Instead, Daniel appears to be arguing a new claim that was not included in his complaint. "A fundamental appellate precept is that we 'will not … blindside [circuit] courts with reversals based on theories which did not originate in their forum.'" ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted). We therefore reject Daniel's arguments regarding claims other than the malicious prosecution claim that he attempted to assert in his complaint.

The only argument we can discern from Daniel's brief regarding his claim for malicious prosecution is his conclusory assertion that he "has provided all six elements of malicious prosecution." However, Daniel does not provide any citations to the record to show where he alleged each of these elements. We could reject his argument on that ground alone. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("[W]e may choose not to consider … arguments that lack proper citations to the record.").

Moreover, Daniel does not present any authority to challenge the circuit court's determination that, because Daniel conceded that the CPS investigation was a "pre-judicial proceeding," Daniel would be unable to satisfy the first element of a malicious prosecution claim. "[M]alicious prosecution lies only when a plaintiff's interests are invaded by an ostensibly legal process." ***Maniaci***, 50 Wis. 2d at 297. Although "any prior regular but unjustifiable judicial proceedings, civil or criminal, will suffice," ***id***. at 298, Daniel has not identified any authority to suggest that a malicious prosecution case can arise from a CPS investigation that terminates prior to a judicial proceeding. Moreover, extending the tort of malicious prosecution in this manner would be inconsistent with our supreme court's admonition that Wisconsin has "taken a restrictive position on this tort." ***Krieg***, 104 Wis. 2d at 460.

We therefore agree with the circuit court that a CPS investigation that terminated prior to the institution of a civil or criminal action is not sufficient to satisfy Daniel's "stringent burden" of establishing the first element of a malicious prosecution claim. *See* ***id.*** Accordingly, we affirm the court's order dismissing Daniel's complaint for failing to state a claim on which relief can be granted.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals