

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 31, 1996**

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.

**NOTICE**

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

**No. 95-2079**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**VILLA CAPRI SHOPPING CENTER,  
a co-partnership,**

**Plaintiff-Appellant,**

**v.**

**MALONE & HYDE, INC.,  
a Delaware corporation,**

**Defendant,**

**JAMES H. DE WEES,  
ALLEN GEHRKE and  
OTHERS UNKNOWN,**

**Defendants-Respondents.**

APPEAL from an order of the circuit court for Kenosha County:  
MICHAEL S. FISHER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

ANDERSON, P.J. Villa Capri Shopping Center  
(Villa Capri) appeals from an order dismissing its amended complaint against James H. DeWees and Allen Gehrke alleging tortious interference of its lease with Godfrey Company and a conspiracy in violation of § 134.01, STATS. We conclude that Villa Capri has failed to state a claim for either tortious interference or a conspiracy in violation of § 134.01. Accordingly, we affirm the trial court.

This action stems from Godfrey's alleged breach of its commercial lease with Villa Capri. Villa Capri is a shopping center located on the north side of Kenosha, Wisconsin. Godfrey<sup>1</sup> operated Sentry supermarkets throughout Wisconsin, including one at Villa Capri. DeWees was the president of Godfrey and an officer and director of Malone & Hyde, Inc. Gehrke was a vice president with Godfrey and an officer of Malone & Hyde. Both DeWees and Gehrke are being sued in their corporate capacities.

The commercial lease in question was entered into in the mid-1960s and was extended to run through August 31, 1992. The lease permitted Godfrey to operate its business as "a retail food market and allied operation." The lease also required Godfrey to provide at least one year advance, written notice of its intention to extend the lease beyond the expiration date. Without

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<sup>1</sup> In 1987, Godfrey was acquired by Fleming Companies, Inc., and became a subsidiary of Fleming. In 1990, Fleming merged Godfrey into Malone & Hyde, Inc., which assumed all assets and liabilities of Godfrey Co. To remain uniform with the parties' briefs, Malone & Hyde shall be referred to as Godfrey throughout this decision.

notice, the lease would terminate at the end of the lease term. Godfrey did not seek a renewal or an extension of the lease.

In November 1991, Godfrey provided written notice that it was ceasing its retail business operations in the shopping center. The letter indicated that Godfrey was not abandoning or vacating the premises because it still had a "substantial investment in both trade fixtures and inventory" in the store. The letter also stated that Godfrey intended to honor the terms of the lease. Godfrey continued to pay the base rent of \$3041.66 per month through the end of the lease term. Godfrey subsequently moved its Sentry supermarket to Glenwood Crossings Shopping Center, also located on the north side of Kenosha.

Thereafter, Villa Capri sought declaratory relief requesting additional rental payments based upon 1% of Godfrey's sales from November 7, 1991 through August 31, 1992, and reasonable attorney's fees and costs. Villa Capri alleged that Godfrey breached the commercial lease by retaining control of the premises in contradiction of the lease terms. Villa Capri moved for summary judgment. The circuit court, the Honorable Robert V. Baker presiding, construed the "use" clause of the lease as a continuous operation covenant based upon *Century Shopping Ctr. Fund I v. Crivello, (Century I)*, 156 Wis.2d 227, 233, 456 N.W.2d 858, 861 (Ct. App. 1990), and awarded Villa Capri "an amount of money in addition to the base rent that [it] would have received had [Godfrey] remained on [Villa Capri's] premises." The question of how much money was owed to Villa Capri was to be determined at trial.

In June 1993, Godfrey moved to vacate the partial summary judgment previously issued and moved for dismissal of the complaint. Godfrey argued that on May 13, 1993, *Century I* was overruled by the Wisconsin Supreme Court in *Sampson Invs. v. Jondex Corp.*, 176 Wis.2d 55, 499 N.W.2d 177 (1993). The court, the Honorable Barbara A. Kluka presiding, agreed and vacated the order granting partial summary judgment. The court however denied the motion to dismiss concluding that based upon the entire lease, Villa Capri may still be entitled to judgment.

Villa Capri hired new counsel and in December 1993 filed an amended complaint to substitute Malone & Hyde, DeWees and Gehrke for Godfrey, and alleged additional causes of action.<sup>2</sup> The motion was granted. Godfrey then filed a motion to dismiss the amended complaint, which the circuit court granted except for the claim for damages to the leased premises.<sup>3</sup> The court also denied Villa Capri's motion for reconsideration. Villa Capri appeals.

Villa Capri argues that its amended complaint states a claim for tortious interference with the commercial lease and also violations of § 134.01, STATS. Whether a complaint properly pleads a cause of action upon which relief may be granted is a question of law which we review without deference to the trial court. *Heinritz v. Lawrence Univ.*, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83

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<sup>2</sup> Villa Capri only seeks interlocutory review of the dismissal of Counts 2 and 3. The remaining counts in the amended complaint will not be considered on appeal.

<sup>3</sup> DeWees requested a substitution of judge and the Honorable Michael S. Fisher was assigned.

(Ct. App. 1995). To determine whether a complaint states a claim upon which relief can be granted, the facts pled are taken as admitted and inferences are drawn in favor of the party against whom the motion is brought. *Id.* However, “legal conclusions and unreasonable inferences need not be accepted.” *Bartley v. Thompson*, 198 Wis.2d 323, 332, 542 N.W.2d 227, 230 (Ct. App. 1995) (quoted source omitted), *cert. denied*, 116 S. Ct. 1829 (1996). A complaint should be dismissed as legally insufficient if, based on the facts and inferences alleged, it is clear that under no conditions can the plaintiff recover. *Id.*

This is such a case. Even assuming the facts of the amended complaint to be true, Villa Capri fails to state a claim upon which relief can be granted. Villa Capri makes separate arguments in its appellate and reply briefs. In the appellate brief, Villa Capri argues that the trial court made the following errors: (1) it “completely ignored its own finding ... that Godfrey had breached [the] lease by damaging the premises;” (2) it incorrectly concluded that Godfrey did not breach the “restrictive use” clause in the lease; (3) it failed to acknowledge that Villa Capri’s claims do not require a breach of the lease; and (4) *Century Shopping Ctr. Fund I v. Malone & Hyde, Inc.*, No. 94-2922, unpublished slip op. (Wis. Ct. App. Aug. 1, 1995) (*Century II*), confirms the facts, as alleged by Villa Capri, that are sufficient to support the claims at issue. These contentions completely disregard the clear import of the trial court’s decision.

First, the trial court correctly determined, based upon *Sampson*, that Villa Capri’s “use” clause was a restrictive use clause—not a covenant for

continuous operations as Villa Capri has argued up to this appeal. The court was also correct in preserving the claim for damages of the property. Simply because the amended complaint stated a claim for damages, it does not follow that the claims for tortious interference or violations of § 134.01, STATS., are thereby valid as well.

Second, the trial court correctly determined that Godfrey did not violate the "use" clause of the lease, as alleged. The amended complaint contends that Godfrey breached the lease by closing the Villa Capri store, by continuing to occupy the premises and by using them for storage and other nonretail business purposes. The lease provided that Godfrey "shall have the right to use the leased premises for the purpose of carrying on it's [sic] business as a retail food market and allied operation." Villa Capri's lease does not require, as dictated by *Sampson*, that the store shall be continuously occupied as a retail food market. The trial court correctly concluded that there was no breach of the lease; rather, Godfrey had the same options available to it as the tenant did in *Sampson*, including the option of refraining from using the property as a retail food market. See *Sampson*, 176 Wis.2d at 71-72, 499 N.W.2d at 184.

Third, the trial court correctly determined that in order to establish Villa Capri's claims of conspiracy and tortious interference, "[I]t must be shown that a legal right has been invaded. No legal right has been invaded when the business ceased operating at ... Villa Capri." The amended complaint contends that after Godfrey moved out, it kept the premises dark to prevent a competing

grocery store from occupying the premises, it continued to occupy the premises and it hindered Villa Capri's attempts to re-lease the space. This alleged interference continued "up to the expiration of the Villa Capri Lease in August, 1992." However, Godfrey was entitled to remain on the premises and utilize the space through the end of the lease term. Also, under the terms of the lease, Villa Capri was prohibited from leasing any property within 2000 feet of Godfrey's rental space to any business which might compete with Godfrey's business. Because the lease was a restricted use lease, Villa Capri's claims of conspiracy and tortious interference must fail.

Fourth, the trial court "considered the written and oral presentations of the parties" in its decision to dismiss the allegations against DeWees and Gehrke, and apparently was not convinced that *Century II* was similar to this case. We also fail to see the similarity between the two cases "mandating" reversal of the trial court's decision. *Century II* involved allegations of a conspiracy and tortious interference between Godfrey and its new landlord, Crivello. *Century II*, unpublished slip op. at 2-3. Here, the allegations involved a conspiracy and tortious interference between two corporate executives and the corporation. As Villa Capri notes in its reply brief, the two situations are dissimilar. Simply because the plaintiff in *Century II* stated a claim, it does not necessarily follow that Villa Capri did as well. The relationship between the parties and the language in the leases are both different. Villa Capri has failed to overcome these fundamental differences.

In Villa Capri's reply brief, it contends that the complaint stated claims for conspiracy in violation of § 134.01, STATS.<sup>4</sup>, and for tortious interference against the individual defendants. Villa Capri's complaint alleges that "Godfrey, DeWees and Gehrke combined, agreed, and concerted with others for the purpose of willfully and maliciously injuring [Villa Capri's] reputation, trade and business in violation of § 134.01, Wis. Stats." Section 134.01 requires two or more persons to act in concert. Villa Capri has failed to set forth facts in support of this alleged conspiracy. Rather, Villa Capri seeks an opportunity "to explore this avenue of relief through discovery instead of having it forever precluded by the affirmance of the trial court's decision. If [DeWees and Gehrke] did nothing wrong, they would not be unfairly prejudiced by waiting and addressing these issues after a full factual record has been amassed."

Essentially, Villa Capri concedes that it has not stated a claim of conspiracy, yet it would like this court to preserve its ability to do so in the future. This we may not do. For a conspiracy to exist, there must be, at a minimum, "facts that show some agreement, explicit or otherwise, between the

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<sup>4</sup> Section 134.01, STATS., provides:

**134.01 Injury to business; restrain of will.** Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully 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.

alleged conspirators on the common end sought and some cooperation toward the attainment of that end.” *Bartley*, 198 Wis.2d at 342, 542 N.W.2d at 234 (quoted source omitted). It is not enough that the defendants may have acted in concert or with a common goal. *Id.* at 342, 542 N.W.2d at 235. Even though the rules of civil procedure require a plaintiff to plead only “[a] short and plain statement of the claim ... showing that the pleader is entitled to relief,” § 802.02(1)(a), STATS., “a general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action.” *Bartley*, 198 Wis.2d at 342, 542 N.W.2d at 235 (quoted source omitted). It is apparent, based upon Villa Capri’s concession that further discovery is necessary to develop its case against DeWees and Gehrke, that Villa Capri has failed to state a claim of conspiracy in violation of § 134.01, STATS.<sup>5</sup>

Furthermore, a conspiracy is 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.” *Maleki v. Fine-Lando Clinic*, 162 Wis.2d 73, 86, 469 N.W.2d 629, 634 (1991) (emphasis added). Villa Capri alleges that DeWees and Gehrke conspired with Godfrey to injure Villa Capri’s reputation, trade and business. This allegation ignores the fact that a corporation is an individual existing only in contemplation of the law, and its acts are those of its officers and agents. *See State v. Lunz*, 86 Wis.2d 695,

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<sup>5</sup> If this court were to speculate, it would theorize that DeWees, Gehrke and Godfrey allegedly conspired to breach Godfrey’s lease with Villa Capri. However, this is not clear from the allegations in the complaint.

707, 273 N.W.2d 767, 773 (1979); *see also Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (if the conduct is a single act by a single business entity, then the fact that two or more agents participated in the decision or in the act itself will normally not constitute a conspiracy). A corporation cannot conspire with itself.

In addition, DeWees and Gehrke, as corporate officers, are protected by a conditional privilege, although this privilege may be destroyed by a wrongful motive. *W.H. Major & Sons, Inc. v. Krueger*, 124 Wis.2d 284, 294-95, 369 N.W.2d 400, 405 (Ct. App. 1985). However, if officers “are acting in good faith for the protection of the interests of their corporation and in the course of their official duty, they should be protected.” *Id.* at 295, 369 N.W.2d at 405 (quoting *Lorenz v. Dreske*, 62 Wis.2d 273, 287, 214 N.W.2d 753, 760 (1974)). Villa Capri has not alleged that DeWees and Gehrke were acting within the scope of their corporate duties during this alleged conspiracy; rather, “given the serious allegations of egregious conduct,” we are asked to infer that the opposite is true. To prove a conspiracy, Villa Capri must show more than a mere suspicion or conjecture that there was a conspiracy or that there was evidence of the elements of a conspiracy. *See Maleki*, 162 Wis.2d at 84, 469 N.W.2d at 633. Based upon the allegations in the complaint, we conclude that Villa Capri has failed to state a claim of conspiracy in violation of § 134.01, STATS.

Villa Capri’s complaint also alleges that Godfrey, DeWees and Gehrke “directly or indirectly, intentionally and tortuously interfered with the

actual and prospective contractual rights of [Villa Capri].” The complaint specifically alleges that Godfrey, DeWees and Gehrke owed: a duty to respect the contractual rights of [Villa Capri] and to refrain from inducing those with whom [Villa Capri] ha[d] entered into valuable contractual agreements or had the prospective right to enter into such relations, including but not limited to Godfrey and Malone & Hyde, from breaching those agreements or interfering with those prospective relationships.

This alleged interference continued through the end of the Villa Capri lease in August 1992.

A claim for tortious interference with a contract must allege that: (1) the plaintiff had a contract or prospective contractual relationship with a third party, (2) the defendant interfered with the relationship, (3) the interference was intentional, (4) a causal connection exists between the interference and the damages, and (5) the defendant was not justified or privileged to interfere. See *Cudd v. Crownhart*, 122 Wis.2d 656, 659-60, 364 N.W.2d 158, 160 (Ct. App. 1985). The defendant must act intentionally, *id.* at 660, 364 N.W.2d at 160, and the plaintiff must show that a specific right has been interfered with. See *Sampson*, 176 Wis.2d at 73, 499 N.W.2d at 184.

Villa Capri has failed to establish that a specific right in the Godfrey lease has been interfered with. Under *Sampson*, it is clear that a commercial lessee cannot be forced to continuously operate a business in the absence of a clear, express provision in the lease requiring continuous operation. *Id.* at 70, 499 N.W.2d at 183. Villa Capri’s lease had no such provision. Similarly, Villa Capri had no right to require Godfrey to

continuously operate a retail food market and Godfrey's "keep[ing] the anchor space dark" did not interfere with Villa Capri's rights. Villa Capri's inability to show any right which was interfered with is fatal to its tortious interference claim. See *Sampson*, 176 Wis.2d at 73, 499 N.W.2d at 184.

As to the ongoing economic relationship with the smaller tenants, Villa Capri has also failed to state a claim for tortious interference. The amended complaint states that "without the presence of an anchor tenant ... [the] smaller tenants are demanding lower rental rates for their spaces." Again, Villa Capri has failed to show a specific right which has been interfered with. The lease provided Godfrey with a five-year renewal option by providing Villa Capri with notice by August 31, 1991. Godfrey did not provide the requisite renewal notice; rather, it provided notice of termination and continued to pay its base rent for the duration of the lease term. Since the lease agreement allowed Godfrey – the anchor tenant – to decline renewing the lease, Godfrey's nonrenewal cannot be considered interference with the rental rates for the smaller tenants. To hold otherwise would allow Villa Capri to circumvent the limitations of the lease agreement and would grant it rights which were not bargained for. See *id.* at 72-73, 499 N.W.2d at 184. The inability to show that Godfrey interfered with Villa Capri's rights as to the smaller tenants is the final blow to Villa Capri's tortious interference claim.

*By the Court.* – Order affirmed.

Not recommended for publication in the official reports.