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DISTRICT IV

July 28, 2016

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

2015AP908

Daniel Virnich v. Jeffrey Vorwald, American Trust & Savings Bank, Michael Polsky, and Beck, Chaet, Bamberger & Polsky, S.C. (L.C. #2014CV29)

Before Lundsten, Sherman and Blanchard, JJ.

Daniel Virnich appeals a judgment of the circuit court, which dismissed on summary judgment Virnich's complaint against Michael Polsky and the law firm in which Polsky is a shareholder, Beck, Chaet, Bamberger & Polsky, S.C. (collectively, "the Respondents"), and which awarded costs to the Respondents. Polsky served as the receiver for Communications Products Corporation, which was fully owned, albeit indirectly, by Virnich and another individual. Virnich brought suit against the Respondents, alleging that Polsky conspired with American Trust and Savings Bank and Jeffrey Vorwald, an employee of the Bank, to maliciously

cause him injury in his “reputation, trade, business or profession” in violation of WIS. STAT. § 134.01 (2013-14).¹ The circuit court granted summary judgment in favor of the Respondents on the basis that Polsky has quasi-judicial immunity for his actions as a receiver. 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. We summarily affirm, albeit for reasons different than the circuit court.

This court reviews a grant or denial of summary judgment de novo. *Mach v. Allison*, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A moving party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). This court may affirm a circuit court’s grant or denial of summary judgment for a reason different than the circuit court’s reasoning. *See, e.g., Rolland v. County of Milwaukee*, 2001 WI App 53, ¶6, 241 Wis. 2d 215, 625 N.W.2d 590 (affirming the denial of a motion of summary judgment for different reasons).

A claim for a conspiracy in violation of WIS. STAT. § 134.01 requires that the plaintiff establish the following four elements: (1) the defendants acted together, (2) with a common purpose to injure the plaintiff’s business, (3) with malice, and (4) the acts financially injured the plaintiff. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977); WIS JI—CIVIL 2820. Malice in a § 134.01 claim is an “integral element” and “must be proved in respect to [all] parties to the conspiracy.” *Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis. 2d 73, 86, 469 N.W.2d 629 (1991); *see Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI App 39, ¶17, 289 Wis. 2d 795, 714 N.W.2d 582 (“all parties to the alleged conspiracy

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

must act from § 134.01 ‘malice’”). If malice is not proven on the part of *all* conspirators, there can be no conspiracy under § 134.01. *Maleki*, 162 Wis. 2d at 86.

In a related opinion released today, *Virnich v. Vorwald*, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016), which arises out of the same action as the present suit and involves the same facts as here, we concluded that the Bank and Vorwald are entitled to summary judgment on Virnich’s WIS. STAT. § 134.01 claim against them because the evidence on summary judgment did not establish a genuine issue of fact as to malice on the part of the Bank and Vorwald. Our determination in that appeal is the law of the case in the present appeal. *See State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (It is a “longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the [circuit] court or on later appeal.” (Quoted source omitted.))

As noted above, in a WIS. STAT. § 134.01 claim, malice must be established as to all conspirators. Because we concluded as a matter of law that Virnich failed to make a showing that the Bank and Vorwald acted with malice, Virnich cannot prevail on his § 134.01 claim against the Respondents. Accordingly, we conclude, for reasons different from that of the circuit court, that summary judgment in favor of the Respondents was appropriate.

Because our conclusion is dispositive, we need not and do not address the parties’ arguments as to immunity or malice on the part of Polsky.²

² Virnich filed a motion to submit a supplement brief in this case in the event that we address the issue of whether the summary judgment submissions show there is a factual dispute as to whether Polsky acted with malice. Because we resolve this case without consideration of that issue, we deny Virnich’s motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE
809.21.

Diane M. Fremgen
Clerk of Court of Appeals