COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2887 **Cir. Ct. No. 2014CV121**

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

CAROL ANN COLTMAN,

PLAINTIFF-APPELLANT,

V.

STEPHEN A. KASE, BROOKS, KASE & ERIKSON, S.C., ATTORNEYS AT LAW, ZOE ANN WESOLOWSKI, ERIK H. MONSON, COYNE, SCHULTZ, BECKER & BAUER, S.C., ATTORNEYS AT LAW AND ANTOINETTE L. CHRISTENSON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Door County: DAVID G. MIRON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Carol Coltman, pro se, appeals an order dismissing her claims against attorney Stephen Kase; Brooks, Kase & Erikson, S.C.; Zoe

Wesolowski; attorney Erik Monson; Coyne, Schultz, Becker & Bauer, S.C.; and Antoinette Christenson. Coltman argues: (1) the circuit court erred by concluding her complaint failed to state a claim on which relief could be granted; (2) dismissal of her claims violated her right to due process; and (3) the circuit court erred by denying her motion for recusal. We reject Coltman's arguments and affirm.

BACKGROUND

¶2 Zoe Wesolowski, who is Coltman's daughter, sued Coltman in Door County case No. 2012CV316. Wesolowski was represented in that lawsuit by attorney Stephen Kase, of the law firm Brooks, Kase & Erikson, S.C. Coltman filed a number of counterclaims against Wesolowski, and she also filed claims against thirteen third-party defendants, including Antoinette Christenson. Christenson was represented by attorney Erik Monson of the law firm Coyne, Schultz, Becker & Bauer, S.C.

¶3 On July 28, 2014, Coltman filed the instant lawsuit against Kase, Monson, and their respective clients and law firms. The complaint alleged that Kase scheduled a "deposition upon oral testimony" of Coltman for April 23, 2014. However,

> at said deposition Mr. Monson did appear, ready to video tape [Coltman]; that the camera was readied for video taping and that when [Coltman] asked to see the video camera, Mr. Monson, retorted that [she] did not have to see it and then and there signaled to Mr. Kase that the film was running[.]

The complaint alleged that, "when [Coltman] realized that she was in fact … being video tape[d], her only recourse was to leave the premises." As Coltman left, Kase "warned her that she was in a lot of trouble for leaving and then proceeded to

file an Order to Show Cause for Contempt," a procedure the complaint alleged "was dispensed by statute over 40 years ago[.]"

¶4 The complaint further alleged that the "video taping … at Mr. Kase's office … was carried out surreptitiously and clandestinely and by stealth means to avoid detection." Coltman contended Kase provided the "facilities for the video taping to occur[,]" and Monson provided the equipment. She also alleged that no notice of the deposition was given to twelve of the litigants in case No. 2012CV316, and that the "procedures set by statute [for] video taping were not followed[.]" Finally, Coltman alleged she "had a right to expect that the premises would be safe for her to appear and give her oral deposition[,]" and Kase and Monson violated that right by videotaping her.

¶5 Based on these allegations, Coltman asserted four "claims for relief": (1) invasion of privacy; (2) abuse of the elderly; (3) fraud; and (4) abuse of legal process. She also asserted the defendants had committed the "torts" of "mental distress," "extortion," and "bullying."

¶6 Coltman's lawsuit was assigned to Judge D. Todd Ehlers. On August 15, 2014, Kase, his law firm, and Wesolowski (the Kase defendants) answered Coltman's complaint and moved to dismiss for failure to state a claim on which relief could be granted. On August 25, Monson, his law firm, and Christenson (the Monson defendants) answered the complaint. On September 2, the Monson defendants moved for judgment on the pleadings. They also moved the circuit court to consolidate the instant case with case No. 2012CV316, which was assigned to Judge David Miron. Judge Ehlers subsequently wrote to Judge Miron advising that he had no objection to consolidating the cases. Judge Miron responded to Judge Ehlers, suggesting that the issue be addressed on October 16 at

a previously scheduled hearing in case No. 2012CV316. Coltman filed a brief opposing the motion to consolidate.

¶7 On September 17, Coltman requested that Judge Ehlers recuse himself for cause, pursuant to WIS. STAT. § 757.19(2)(g).[1] That request was granted, and on September 19, Judge Peter Diltz was assigned to the case. On September 22, Coltman requested that Judge Diltz recuse himself for cause, again pursuant to § 757.19(2)(g). That request was also granted, and the case was assigned to Judge Miron.

¶8 Thereafter, the Monson defendants withdrew their motion to consolidate, asserting the assignment of both cases to Judge Miron rendered the motion moot.[2] The Monson defendants requested that their motion for judgment on the pleadings be considered at the October 16 hearing scheduled in case No. 2012CV316. Coltman subsequently requested that Judge Miron recuse himself for cause, pursuant to WIS. STAT. § 757.19(2)(g). Judge Miron denied that request on October 7. Coltman then moved to adjourn the October 16 hearing. However, no action was taken on her motion prior to the hearing date.

¶9 At the beginning of the October 16 hearing, Coltman renewed her argument that the hearing should be adjourned. She also objected to any consideration of the instant case, asserting the hearing was scheduled only to

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

[2] In her appellate brief, Coltman contends that Judge Ehlers and Judge Miron "acted together" to consolidate this case and case No. 2012CV316. However, nothing in the record shows the cases were consolidated.

address issues in case No. 2012CV316. Coltman's request for an adjournment was denied, and the hearing proceeded as scheduled.

¶10 After considering several motions in case No. 2012CV316, the circuit court turned to the motions for dismissal and for judgment on the pleadings filed by the defendants in the instant case. The court granted those motions, concluding Coltman's complaint failed to state a claim on which relief could be granted. Coltman moved for reconsideration, which the court denied. A written order dismissing Coltman's claims was entered on October 28, 2014, and this appeal follows.

DISCUSSION

I. Dismissal of Coltman's claims

¶11 Coltman first argues the circuit court erred by granting the Kase defendants' motion to dismiss and the Monson defendants' motion for judgment on the pleadings. We independently review the court's decision to grant these motions. *See* ***Kohlbeck v. Reliance Constr. Co.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277 (addressing motions to dismiss); ***Freedom from Religion Found., Inc. v. Thompson***, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (addressing motions for judgment on the pleadings).

¶12 "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). When considering whether a complaint states a claim, we accept the facts alleged in the complaint as true and draw all reasonable inferences from those facts in the plaintiff's favor. ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610, 535 N.W.2d 81 (Ct. App. 1995). A complaint should not be dismissed

for failure to state a claim unless it is clear the plaintiff cannot recover under any circumstances. ***Id.*** at 610-11.

¶13 Similarly, when reviewing a motion for judgment on the pleadings, our first step is to determine whether the complaint states a claim on which relief can be granted. ***Jares v. Ullrich***, 2003 WI App 156, ¶8, 266 Wis. 2d 322, 667 N.W.2d 843. If so, we look to the responsive pleadings to determine whether a material factual issue exists. ***Id.***

¶14 Here, we conclude the circuit court properly granted the Kase defendants' motion to dismiss and the Monson defendants' motion for judgment on the pleadings because Coltman's complaint failed to state a claim on which relief could be granted. We address Coltman's claims individually below.

A. Invasion of privacy

¶15 Wisconsin recognizes a civil tort claim for invasion of privacy, which is codified in WIS. STAT. § 995.50. Under that statute, a person whose privacy is "unreasonably invaded" is entitled to equitable relief to prevent and restrain the invasion, compensatory damages, and reasonable attorney fees. Sec. 995.50(1). As relevant here, the statute defines the term "invasion of privacy" as "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Sec. 995.50(2)(a). "The test is an objective one: whether a reasonable person would find the intrusion highly offensive." ***Gillund v. Meridian Mut. Ins. Co.***, 2010 WI App 4, ¶29, 323 Wis. 2d 1, 778 N.W.2d 662.

¶16 Coltman's complaint fails to state a claim for invasion of privacy under WIS. STAT. § 995.50. Coltman alleges her privacy was invaded when Kase and Monson attempted to videotape her deposition without her knowledge or consent. However, videotaping depositions is a common practice; in fact, it is specifically allowed by statute. *See* WIS. STAT. § 885.42(1) ("Any deposition may be recorded by audiovisual videotape without a stenographic transcript."). We therefore conclude, as a matter of law, that videotaping a deposition is not the type of activity that would be "highly offensive to a reasonable person[.]" *See* § 995.50(2)(a). In addition, no reasonable person would "consider private" a conference room at opposing counsel's law firm where the person was asked to appear for a deposition. *See* ***id.*** Thus, even accepting the facts alleged in the complaint as true, Coltman failed to state a claim for invasion of privacy.

B. Abuse of the elderly

¶17 Coltman's complaint also purported to assert a claim for abuse of the elderly. However, Wisconsin does not recognize any such civil tort claim. Coltman cites WIS. STAT. § 46.90, but that statute pertains to Wisconsin's elder abuse mandatory reporting and investigation system. Coltman also cites WIS. STAT. § 940.285, but that statute sets forth criminal penalties for abuse of certain at-risk individuals. Neither statute expressly permits a private individual to bring a civil tort action. Consequently, Coltman's abuse of the elderly claim was properly dismissed.

C. Fraud

¶18 Coltman's complaint next asserted a claim for fraud. The elements of a fraud claim are: (1) a knowingly false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and

(3) justifiable reliance upon the false representation, causing injury or damage. ***Korhumel Steel Corp. v. Wandler***, 229 Wis. 2d 395, 403, 600 N.W.2d 592 (Ct. App. 1999). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." WIS. STAT. § 802.03(2). In other words, when pleading a claim for fraud, a plaintiff must state with specificity "the time, place and content of an alleged false representation"—that is, the "who, what, when, where and how." ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271.

¶19 In support of her fraud claim, Coltman's complaint alleged that the defendants "[r]epresented to the plaintiff that the premises were safe and that she would be safe; that it was reasonable for plaintiff to rely on that representation; that she did rely on it to her detriment and was consequently damaged and injured." These allegations are insufficient to meet the heightened pleading standard for a fraud claim. The complaint does not explain when or where it was represented to Coltman that the premises were safe and that she would be safe, or which of the defendants made those representations. In addition, the complaint does not explain why any representation about the safety of the premises was false—that is, it does not clarify how the alleged surreptitious videotaping rendered the premises unsafe. Moreover, the complaint does not explain how Coltman was harmed by the alleged fraud or what damages she sustained. For these reasons, the circuit court properly dismissed Coltman's fraud claim.

D. Abuse of legal process

¶20 Coltman's complaint also asserted a claim for abuse of legal process. Abuse of legal process is "a tort that occurs when someone 'uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for

which it is not designed ....'" ***Wisconsin Pub. Serv. Corp. v. Andrews***, 2009 WI App 30, ¶19, 316 Wis. 2d 734, 766 N.W.2d 232 (quoting ***Schmit v. Klumpyan***, 2003 WI App 107, ¶6, 264 Wis. 2d 414, 663 N.W.2d 331). "The tort has two elements: (1) a purpose other than that which the process was designed to accomplish, and (2) a subsequent misuse of the process." ***Keller v. Patterson***, 2012 WI App 78, ¶13, 343 Wis. 2d 569, 819 N.W.2d 841. The second element requires proof that the process was used to obtain a collateral advantage—in other words, that the defendant attempted to use the process as a means of extortion. ***Wisconsin Pub. Serv. Corp.***, 316 Wis. 2d 734, ¶19.

¶21 Coltman's abuse of legal process claim fails for two reasons. First, Coltman's complaint does not allege any improper purpose on the part of the defendants. In her appellate brief, Coltman asserts the defendants videotaped her in order to "present her image to a psychiatrist[] or judge" to support a determination that she was "suffering from a mental disease or defect that would pr[e]vent her from taking care of her own affairs," thus requiring appointment of a guardian. Coltman asserts this would result in Wesolowski becoming successor trustee of the Carol Coltman Revocable Trust, which Coltman contends is worth over $2 million. None of these allegations, however, are found in Coltman's complaint. When deciding whether a complaint states a claim for relief, we may not look beyond the allegations in the complaint. ***Noonan v. Northwestern Mut. Life Ins. Co.***, 2004 WI App 154, ¶30, 276 Wis. 2d 33, 687 N.W.2d 254.

¶22 Second, Coltman's complaint does not allege that the defendants obtained a collateral advantage over her by secretly videotaping her deposition. It does not allege the defendants used or threatened to use the videotape in some way to obtain Coltman's action or inaction. To the extent Coltman's complaint alleges that Kase attempted to obtain a collateral advantage over her by threatening to file

an order to show cause for contempt, Coltman does not allege that she was ever found in contempt or otherwise harmed by that filing. We therefore agree with the circuit court that Coltman failed to state a claim for abuse of legal process.

E. Mental distress, bullying, and extortion

¶23 Finally, Coltman's complaint asserted the defendants committed three additional "torts"—mental distress, bullying, and extortion. Wisconsin does not recognize civil tort claims for extortion or bullying. Accordingly, any claims based on those alleged "torts" were properly dismissed.

¶24 Likewise, "mental distress" is not a tort recognized under Wisconsin law. Coltman may have intended to assert a claim for intentional infliction of emotional distress. However, assuming that was her intent, her complaint still fails to state a claim. The elements of intentional infliction of emotional distress are: (1) the defendant's purpose was to cause the plaintiff emotional distress; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct was the cause in fact of the plaintiff's injury; and (4) the plaintiff suffered an extreme disabling emotional response. ***Koestler v. Pollard***, 162 Wis. 2d 797, 812, 471 N.W.2d 7 (1991). Coltman's complaint does not allege that the defendants' purpose in videotaping her was to cause her emotional distress. It also fails to allege that Coltman suffered an extreme disabling emotional response as a result of the defendants' conduct. In addition, no reasonable person would consider the videotaping of Coltman's deposition—a practice specifically allowed by statute—to be extreme and outrageous conduct. Thus, even if construed as a claim for intentional infliction of emotional distress, Coltman's mental distress claim was properly dismissed.

II. Due process

¶25 Coltman next argues the dismissal of her claims violated her right to due process.[3] "The fundamental requirements of procedural due process are notice and an opportunity to be heard." ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). Here, Coltman contends the circuit court dismissed her claims "without giving [her] any notice[.]" She also claims "there was no propone[nt] for any motion to dismiss and the judge unilaterally ruled on a motion not advanced by any defendant."

¶26 The record does not support Coltman's assertions. Prior to the October 16, 2014 hearing, the Kase defendants moved to dismiss Coltman's complaint for failure to state a claim, and the Monson defendants moved for judgment on the pleadings. Copies of both motions were sent to Coltman. The Kase defendants subsequently joined the Monson defendants' motion. After the case was assigned to Judge Miron, the Monson defendants wrote to the court asking it to consider their motion for judgment on the pleadings at the October 16 hearing. Although Coltman moved the court to adjourn the October 16 hearing, she did not specifically object to the court considering the motion for judgment on

[3] In her statement of the issues, Coltman asserts the circuit court violated her rights to both procedural and substantive due process. However, in the body of her brief, she fails to develop any argument related to substantive due process. We therefore confine our analysis to procedural due process. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

the pleadings. On these facts, we conclude the dismissal of Coltman's complaint did not violate her right to procedural due process.[4]

III. Coltman's recusal motion

¶27 Finally, Coltman argues Judge Miron erred by denying her motion for recusal, and the circuit court therefore lost jurisdiction over her case.[5] In support of this argument, Coltman asserts that Judge Miron consistently ruled in Kase's favor, and Kase "could do no wrong in the eyes of the judge." She also contends that at least one ex parte communication occurred between Kase and Judge Miron. In addition, she asserts, without any supporting evidence, that Judge Miron's rulings against her were "the return of a favor to Mr. Kase" or were purchased by Wesolowski.

¶28 Coltman's recusal motion was based on WIS. STAT. § 757.19(2)(g). Under that statute, a judge must recuse himself or herself "[w]hen [he or she] determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." ***Id.*** Whether disqualification is required under § 757.19(2)(g) "is based upon the judge's own determination of whether he or she

[4] Moreover, our review of a circuit court's ruling on a motion to dismiss or motion for judgment on the pleadings is de novo. Here, we have independently concluded, as a matter of law, that Coltman's complaint failed to state a claim on which relief could be granted. No argument Coltman could have presented during the October 16 hearing, had she received additional notice, would have changed the fact that her complaint is insufficient as a matter of law. Thus, it ultimately makes no difference whether Coltman received sufficient notice that the court would consider the defendants' motions during the October 16 hearing.

[5] In addition to her recusal motion, Coltman also moved to substitute Judge Miron, pursuant to WIS. STAT. § 801.58. However, she does not develop any argument on appeal that the circuit court erred by denying that request. We therefore deem the issue abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

may remain impartial." ***State v. Harrell***, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). In other words, § 757.19(2)(g)

> mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification … in a situation in which the judge's impartiality "can reasonably be questioned" by someone other than the judge.

State v. American TV & Appliance of Madison, Inc., 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989).

¶29 Our review of a circuit court's decision to deny a recusal motion under WIS. STAT. § 757.19(2)(g) is limited to objectively deciding whether the judge went through the required exercise of making the subjective determination that he or she could act impartially. ***Harrell***, 199 Wis. 2d at 663-64. In ***Harrell***, a criminal case, the trial judge determined the fact that he was married to an assistant district attorney who had never appeared in the case did not affect his ability to be impartial. ***Id.*** at 664. The entirety of the trial judge's analysis was:

> [Judge's spouse] made no appearance on behalf of the State in the present case. Indeed, she has never appeared on behalf of the State before this court. Accordingly, the court finds that there is no reason to believe, nor is there an appearance of a reason to believe, that this court could not act, or did not act, in an impartial manner.

Id. The supreme court held that the trial judge "clearly made a subjective determination regarding his ability to proceed in the case." ***Id.*** The court observed that the judge "[o]bviously … felt that he could be impartial in light of his wife's nonparticipation in the case[,]" and "[t]his is all that is required by WIS. STAT. § 757.19(2)(g)." ***Harrell***, 299 Wis. 2d at 664.

¶30 Similarly, the transcript of the October 16, 2014 hearing shows that Judge Miron made the requisite determination that he could act impartially:

> MS. COLTMAN: … I don't think you've been—you've been fair to me.
>
> Mr. Kase seems to be your fair haired boy and I'm the b[ê]te noire.
>
> THE COURT: Well—
>
> MS. COLTMAN: He gets what he wants and you demand that I get—do this and that where Mr. Kase has been holding this whole trial—not trial, but proceedings with won't let [Wesolowski] do the—all the questions, interrogatories. Everything's stonewalled by them.
>
> It's not—I don't like spending my last years here. I want to get it done too. But he will not cooperate. And when I ask for your help, you don't give it to me.
>
> THE COURT: Well, it's not my job to give help to anybody, to be honest.
>
> MS. COLTMAN: Well, you are supposed to help pro se litigants, be kind to them.
>
> THE COURT: Well, and I think I've been kind to you throughout so I take issue with your suggestion that I haven't been.
>
> …
>
> THE COURT: All right. With respect to your request to have me recuse myself, I'm denying that. There's absolutely no reason that I cannot continue in this file. It looks like what you do when things don't seem to be going your way is then you file either a request for substitution or a request for recusal.
>
> I know that I ordered you to attend a deposition [in case No. 2012CV316]. I was well within my rights to do that. So I'm denying your request to have me recuse myself from both of those files. There's no reason for that in either file.

¶31 Judge Miron clearly determined he had acted, and could act, impartially in this case. He observed that Coltman had a pattern of filing recusal motions when judges ruled against her. He also noted that one specific unfavorable ruling was justified and was not evidence of bias. Further, he rejected Coltman's claim that he had been unkind to her. These remarks show that Judge Miron made the subjective determination required by WIS. STAT. § 757.19(2)(g). Accordingly, Coltman's recusal motion was properly denied.

By the Court.—Order affirmed.

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