**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

March 12, 1996



No. 95-2582

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

**WILLIAM EVERS,**

**Plaintiff-Appellant,**

**v.**

**JOHN A. HAGER and**
**SHERRY J. HAGER,**

**Defendants-Respondents.**

APPEAL from an order of the circuit court for Outagamie County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William Evers appeals the judgment dismissing his claims against John Hager and Sherry Hager. Evers argues that the trial court erroneously (1) applied the doctrine of *in pari delicto*; (2) dismissed for failure to state a claim upon which relief could be granted; and (3) concluded public policy required dismissal. Because the trial court properly applied the doctrine of *in pari delicto* and § 946.87(6), STATS., precludes recovery, we conclude the trial court properly dismissed the matter on summary judgment. We affirm.

Evers' amended complaint seeks money damages under § 946.87(4), STATS., the civil remedy section of the Wisconsin Organized Crime Control Act. It alleges that the Hagers owned and managed a massage parlor, a social club and a sex counseling clinic and caused employees to commit acts of prostitution. It further alleges that John went to prison, but Sherry bought a home with proceeds from prostitution. Evers alleged that John conspired with others to falsely accuse Evers of crimes to work a deal with authorities so that John would be released from prison.

Evers contends that Hager conspired with others, some of whom were acting under the color of state law, to provide false information to the district attorney, judges, and false trial testimony, causing Evers to be subjected to malicious and bad faith prosecution, abuse of process, and denial of his rights to a fair trial, among other things.

After the foregoing "Statement of Facts," Evers lists five legal claims. The first alleges a conspiracy to deprive Evers of constitutional rights, resulting in an "unlawful conviction, loss of property and other intangible injuries." The next four allege racketeering activity, that "caused Evers to be charged with a number of unwarranted criminal charges." He lists twenty-two "predicate acts" to support the claims. He claims loss of freedom, property, family, due process, equal protection under the law, damage to reputation, pain and suffering, humiliation, embarrassment, emotional distress, post traumatic stress disorder, headaches, depression, nightmares and fear of authority.

The Hagers filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, res judicata, public policy and *in pari delicto*. Along with their motion and brief, the Hagers filed a copy of Evers' court records, ***State v. Evers,*** Outagamie Circuit Court file No. 87-CF-120, convicting Evers of numerous counts of racketeering charges. *See* ***State v. Evers,*** 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991); *see also* ***State v. Evers,*** No. 91-2435-CR, unpublished slip op. (Wis. Ct. App. Apr. 14, 1992).[1]

In the instant matter, the trial court applied the doctrine of *in pari delicto* and dismissed Evers' complaint. It further concluded public policy

[1] They also provided the court with a copy of a civil complaint Evers previously filed against the Hagers, Brown County file No. 93-CV-127, dismissed in 1994.

prevents Evers from pursuing his claims and that Evers failed to state a claim upon which relief may be granted. Evers appeals the judgment of dismissal.

We conclude that Evers failed to state a claim of relief and, in any event, the application of the doctrine of *in pari delicto* precludes recovery. To demonstrate a claim for relief under WOCCA, a plaintiff must allege (1) conduct of an enterprise (2) through a pattern (3) of racketeering activity and (4) injuries to the plaintiff proximately caused by WOCCA violations. ***Milwaukee v. Universal Mortg.,*** 692 F.Supp. 992, 998 (E.D. Wis. 1988).[2]

Whether a complaint states a claim upon which relief may be granted is a question of law. ***Dziewa v. Vossler,*** 149 Wis.2d 74, 77, 438 N.W.2d 565, 566 (1989). The motion to dismiss for failure to state a claim tests the complaint's legal sufficiency; the complaint is to be liberally construed and the allegations are to be taken as true. ***Watts v. Watts***, 137 Wis.2d 506, 512, 405 N.W.2d 303, 306 (1987).

If matters outside the pleadings are considered, the trial court may treat the motion as one for summary judgment. Section 802.06, STATS. When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and the moving party is entitled to judgment as a matter of law. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).[3]

We first review whether Evers' amended complaint states a claim upon which relief may be granted. The complaint makes numerous allegations concerning the Hagers' participation in prostitution activities. Under § 946.83, STATS., racketeering activities include prostitution offenses. However, Evers must not only demonstrate racketeering activity, but must also allege that he

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[2] The analysis under WOCCA is analogous to that under RICO. *See* ***Brunswick v. E.A. Doyle,*** 770 F.Supp. 1351 (1991).

[3] An appellate court may sustain a circuit court's holding on a theory not relied upon by the circuit court. ***Liberty Trucking Co. v. DILHR***, 57 Wis.2d 331, 342, 204 N.W.2d 457, 464 (1973); ***State v. Holt,*** 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985).

was injured by the racketeering activity. ***Universal Mortgage***, 692 F.Supp. at 998; § 946.87(4), STATS. Because Evers fails to allege that he was injured by the prostitution racketeering activities themselves, the prostitution activities alone would fail to support a civil WOCCA claim.

Next, the complaint alleges that Hager entered into a conspiracy with others "to falsely accuse [Evers] of various crimes in order to make a deal with the authorities so that [Hager and others] would be released from prison."[4] It further alleges that between September 1, 1984, and July 31, 1988, Hager (1) conspired with others to give false information to the district attorney and judges for the purpose of convicting Evers of crimes that he did not commit, (2) conspired and in fact did make false statements while testifying under oath, and (3) conspired with others acting under the color of state law to subject Evers to malicious prosecution, and perjured testimony, among other things, to deprive Evers of his constitutional rights of a fair trial and due process. The complaint further alleges that the Hagers' pattern of racketeering activities injured Evers: "Such injury consisted of [Evers] being charged with a number of unwarranted crimes and being charged as a party to [the Hagers'] crimes." Evers claims that as a result he suffered loss of freedom, business, property and other injuries.

We conclude that even if these allegations, liberally construed, would state a WOCCA claim for relief,[5] the trial court properly considered matters outside the pleadings that entitled the Hagers to a summary judgment of dismissal. The trial court considered the undisputed fact of Evers' 1988 criminal conviction for racketeering activity.[6]

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[4] Lacking is any suggestion that Hager's imprisonment was related to the prostitution racketeering activities.

[5] To allege an "enterprise," the complaint must allege an enterprise separate from the person. ***State v. Judd,*** 147 Wis.2d 398, 402, 433 N.W.2d 260, 262 (Ct. App. 1988). Other than the complaints relating to prostitution activity, the complaint fails to allege sufficient facts to support the inference of an "enterprise."

[6] On appeal, Evers complains that he was given no opportunity to respond to the factual matter presented. *See* § 802.06(2), STATS. However, he does not suggest what factual matter he would have presented had he been given the opportunity do to so. He does not deny his 1988 criminal conviction, nor could he reasonably do so. Consequently, he fails to make the showing of prejudice necessary to demonstrate reversible error. *See* § 805.18, STATS.

Section 946.87, STATS., governs civil WOCCA claims, and provides in part:

> (6) A final judgment or decree rendered in favor of the state in any criminal proceeding under ss. 946.80 to 946.88 shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil action or proceeding.

This section prevents Evers, as a criminal defendant convicted of WOCCA violations, from denying the essential allegations of his criminal conviction. Therefore, "in any subsequent civil action," the trial court must accept as a matter of law that Evers committed the crimes of which he now stands convicted. As a result, Evers is estopped from proving that the fairness of his trial was affected by allegedly false evidence and testimony. Even if Evers were to claim that the Hagers' allegedly perjured testimony and falsely and wrongly obtained evidence were not "essential" to his criminal conviction, Evers would have no WOCCA claim. False statements not essential to Evers' conviction have no causal relationship to his conviction. Absent a causal relationship, Evers fails to demonstrate an essential element to support a WOCCA claim. *See* ***Universal Mortg.***, 692 F.Supp. at 998.

Evers' remedy for an allegedly unfair criminal prosecution and conviction based upon allegedly perjured testimony lies in the criminal courts, not the civil courts. Remedies include, for example, direct appeal and other post-conviction motions. *See* ***State v. Evers,*** 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991). Evers makes a one sentence unsupported argument that the application of § 946.87(6), STATS., to bar his WOCCA action would "violate the Plaintiff civil and constitutional rights guaranteed by the Wisconsin and Federal Constitution[s]." We need not address issues raised but not briefed. ***In re Balkus,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985).

Evers also argues that § 946.87(6), STATS., does not apply because "the pattern of racketeering, and enterprise elements are not the same, the property in question is not the same and the timeframes are not the same. In fact, predicate acts 3, 4, 5, and 6 are not even relevant to claim #5." We are unpersuaded. Even if § 946.87(6) would not apply, the doctrine of *in pari delicto* precludes recovery.

The doctrine of *in pari delicto* stands for the principle that "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act." ***Evans v. Cameron,*** 121 Wis.2d 421, 427, 360 N.W.2d 25, 28 (1985). It is clear that Evers' conduct underlying his criminal conviction of the racketeering charges is illegal. A comparison of Evers' civil complaint with the criminal information, verdicts and judgment of conviction shows considerable overlap. For example, Count 2 of the information, of which Evers was found guilty, charges that as a party, between January 15, 1980, and January 15, 1987, Evers obtained

> gross income of more that $25,000 and occupied supervisory position in concert with 5 or more persons who acted with intent to commit a crime through a pattern of racketeering activity of at least 3 incidents and maintained directly or indirectly an interest in real property in Green Bay, 201 N. Broadway, 211 and 315 S. Broadway, and in Appleton, 406 and 402 W. Wisconsin Avenue.

In his civil complaint, Evers' allegations include that between January 1, 1982, and June 31, 1984, the Hagers owned and operated a massage parlor at 406 West Wisconsin Avenue, Appleton, and managed a social club at 315 South Broadway, Green Bay.

The court records show that Evers was found guilty of allowing Caesar's Retreat/Lolita's Art Studio, 406 West Wisconsin Avenue, Appleton, to be used as a place of prostitution between June 1981 and May 30, 1987. In his civil complaint against the Hagers, Evers alleges that the Hagers were managers of Caesar's Retreat, a massage parlor, located at 406 West Wisconsin Avenue, Appleton, between January 1982 and August 1984.

Court records also show, for example, that Evers, as a party, on or about April 15, 1982, "intentionally established a person, Julie Wyshinsky, in a place of prostitution, The Cheyenne Social Club, 315 S. Broadway ...." Similarly, Evers' civil complaint against the Hagers alleges that "on or about April 15, 1982 the Defendants [Hagers] did, as a party ... intentionally establish a person, Julie Wyshinsky-VanderPlas, in a place of prostitution, The Cheyenne Social Club,

315 S. Broadway ...." Evers alleges that this illegal conduct exposed his property to criminal forfeiture and "resulted in Plaintiff [Evers] being charged as a party to the Defendants' crimes which resulted in injury to the Plaintiff, a lose [sic] of freedom and property."

Evers has not suggested any circumstances of undue influence, oppression, or great inequality in condition or age, or other hardship to preclude the imposition of the doctrine of *in pari delicto*. *See* ***Evans,*** 121 Wis.2d at 427, 360 N.W.2d at 28. Our review of the record satisfies us that no circumstances would bar its application in this case. Based upon the irrefutable court records of Evers' criminal trial, the doctrine prevents recovery by Evers against parties to his criminal conduct. Because this issue is dispositive, we do not address Evers' other issues on appeal. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).[7]

*By the Court.* – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

[7] To the extent that Evers' brief may be construed to argue that the trial court improperly dismissed his civil rights claims, we conclude that the argument is inadequately briefed and therefore decline to address it on appeal. ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).