COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0828

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

EVELYN HOMMRICH,

PLAINTIFF-APPELLANT,

V.

JOSEPH VAN BEEK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

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

PER CURIAM. Evelyn Hommrich, pro se, appeals a summary judgment dismissing her claims against Joseph Van Beek, pro se. Hommrich argues that the trial court erroneously (1) dismissed the action on its own motion; (2) determined the statements were not defamatory and not part of a conspiracy; (3) erroneously determined issues of fact; (4) failed to rule on her motion to strike

affidavits made in bad faith; (5) dismissed her tortious interference with contract claim; (6) found that Van Beek had not intimidated witnesses and disseminated derogatory confidential information; and (6) erred by granting summary judgment on public policy grounds. Because the pleadings, affidavits and supporting papers fail to set forth such evidentiary facts as would be admissible in evidence showing that there is a genuine issue for trial, we affirm the summary judgment of dismissal.

This action arises out of Hommrich's claims of tortious interference with contract, infliction of emotional distress, conversion, publication of private facts, negligence and counseling negligence against Van Beek. When we review a summary judgment, we apply the standards set forth in § 802.08, STATS., in the same manner as the trial court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We do not defer to the trial court's decision. ***Id.*** Our first step is to review the pleadings to determine whether they state a disputed claim. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). We construe the pleadings liberally, in favor of stating a claim, with a view toward substantial justice to the parties. ***Hillcrest Golf & Country Club v. Altoona,*** 135 Wis.2d 431, 434, 400 N.W.2d 493, 495 (Ct. App. 1986).

The affidavits and other materials in support of summary judgment must be made upon personal knowledge and contain such facts as would be admissible in evidence. Section 802.08, STATS. A party demonstrates a prima facie case for summary judgment when evidentiary facts are stated which, if they remain uncontradicted by opposing affidavits, resolve all factual issues in the party's favor. ***Walter Kassuba, Inc. v. Bauch,*** 38 Wis.2d 648, 655, 158 N.W.2d 387, 391 (1968). The court's function is not to make factual findings on summary

judgment, but to determine whether there are factual issues to justify a trial. ***State Bank v. Elsen,*** 128 Wis.2d 508, 515-16, 383 N.W.2d 916, 919 (Ct. App. 1986).

With these principles in mind, we turn to Hommrich's arguments. Hommrich argues that the trial court erred when it brought summary judgment proceedings on its own motion. We disagree. "The general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.'" ***Neylan v. Vorwald,*** 124 Wis.2d 85, 94, 368 N.W.2d 648, 653 (1985) (citations omitted). "That a court should raise issues *sua sponte* is the natural outgrowth of the court's function to do justice between the parties." ***State v. Holmes,*** 106 Wis.2d 31, 39, 315 N.W.2d 703, 707 (1982). Here, the trial court gave the parties notice and opportunity to brief the summary judgment issue, so "[a]ny objection to the circuit court's raising of the issue *sua sponte* on the grounds of … the theoretical unfairness to the litigants is diminished or eliminated by the circuit court's giving the litigants notice of its consideration of the issue and an opportunity to argue the issue." ***Id.*** at 40-41, 315 N.W.2d at 708. We conclude that the circuit court did not err when it raised the issue of summary judgment disposition on its own motion.

Hommrich argues that the trial court erroneously dismissed her defamation claim by failing to construe her pleadings liberally. Because our review is de novo, and we apply the standards of § 802.08, STATS., to the record independently of the trial court's reasoning, we may affirm on a theory not relied upon by the trial court. *See* ***Liberty Trucking Co. v. DILHR,*** 57 Wis.2d 331, 342-43, 204 N.W.2d 457, 464 (1973). Our independent review of the complaint discloses that Hommrich claimed tortious interference with contract, infliction of

emotional distress, conversion, publication of private facts, negligence and counseling negligence against Van Beek. Although the complaint does not specifically set out separate claims of defamation and conspiracy, it could be reasonably interpreted to do so. However, the complaint is legally insufficient because it fails to comply with § 802.03(6), STATS., requiring the particular defamatory words to be pled. As a result, the defamation claim was properly dismissed.

Next, Hommrich argues that the trial court erroneously dismissed her conspiracy claim for failure to factually support it. She contends that her pleadings are sufficient to state a claim. However, in summary judgment proceedings a "party may not rest upon the mere allegations" set out in the pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Section 802.08(3), STATS.

Hommrich argues that she proved the allegations with her affidavits and supporting documents. We disagree. Hommrich relies on the affidavit of Randy Romitti, that states in part as follows:

> Carol Schneider, Pam Pierquet, Christine Baeb, Paul Baeb, Kimberly Kelly, Dick Pierquet, and Joe Van Beek came in and told myself and others about the intervention they had just done on Evelyn Hommrich.… I was told Evelyn had stole Carol's pain medication in Milwaukee … that Evelyn was using drugs, that she was mentally ill, that she was obsessing about a will.

A "conspiracy" is a combination of two or more persons acting together to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. *See* WIS J I--CIVIL 2800. The Wisconsin Supreme Court has repeatedly held there is no such thing as a civil action for conspiracy.

Instead, there is an action for damages incurred by acts performed pursuant to the conspiracy. *See* WIS J I--CIVIL 2800 cmt.

"The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful." ***Onderdonk v. Lamb,*** 79 Wis.2d 241, 246-47, 255 N.W.2d 507, 509 (1977). "At a minimum, to show a conspiracy there must be facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end." ***Augustine v. Anti-Defamation League of B'nai B'Rith,*** 75 Wis.2d 207, 216, 249 N.W.2d 547, 552 (1977).

Rometti's affidavit is insufficient to support the claim that Van Beek entered into a conspiracy to defame or otherwise injure Hommrich. We recognize that express agreements need not be proved, and may be inferred from business behavior. ***Norfolk Monument Co. v. Woodlawn Mem'l Gardens,*** 394 U.S. 700, 704 (1969). Nonetheless, Van Beek's mere presence, as testified to by Romitti, fails to suggest any overt act or indicate a mutual understanding to accomplish a common plan or purpose.

We also scrutinized the affidavits of Robert Tappy, Jacque Ackerman-Tappy, Barbara West, Jay Parrish, Karen Delaney, and Carolyn Schneider. These affidavits fail to allege any overt acts by Van Beek either individually or in connection with other individuals. The affidavit of Kimberly Kelly-Cichocki, Hommrich's daughter, states that Van Beek went to a motel with Schneider and others "to conduct an intervention on my mother," and that Schneider got her involved in "an evil plot which destroyed my mother's life." The affidavit does not attribute any unlawful or injurious conduct to Van Beek,

nor does it state that he participated in the evil plot. We conclude that Kelly-Cichocki's affidavit falls short of permitting a reasonable inference that Van Beek participated in a conspiracy.

One of Hommrich's affidavits also attests to Schneider's activities and not those of Van Beek. It fails to mention Van Beek. Sue Lavassor's affidavit is based on personal knowledge related essentially to the issues of damages. She spoke to Hommrich's emotional health, grief and emotional pain. Statements relating to Van Beek's liability were based upon hearsay. For example, the affidavit stated in part that a friend, Jay Parish, said that Van Beek "did an intervention on Evelyn and told her they shut her businesses down, they wanted her to go to treatment for 3 to 6 months, none of them wanted anything to do with her." Because hearsay fails to comply with the requirement that the affidavit "shall set forth such evidentiary facts as would be admissible in evidence," § 802.08(3), STATS., it fails to support Hommrich's claims.

The balance of the affidavits have similar deficiencies. The affidavit of Duane Flesch referred only to Hommrich's mental health, an issue concerning damages. Harry Krause's affidavit spoke to personal knowledge concerning Hommrich's damages. With respect to liability issues, however, he repeated assertions told to him by Jay Parrish and Randy Romitti. Geraldine Helberg's affidavit attested to damage issues, but her assertions with respect to liability were conclusory: "The plot to destroy Evelyn's agencies was deliberate, and successful, from the crooked lawyers to the anonymous letters; I have never seen a more corrupt bunch of people in my life." Conclusions of ultimate fact fail to comply with § 802.08(3), STATS. ***Maynard v. Port Publications, Inc.,*** 98 Wis.2d 555, 562, 569, 297 N.W.2d 500, 504, 507 (1980). Joyce Pringle, Hommrich's mother, signed an affidavit attesting to damage issues; for example, "It was all done to ruin

Evelyn's career, steal the businesses and clients, and Christine's motive was to hide her theft." However, the affidavit contains no "evidentiary facts as would be admissible in evidence" on the issue of liability. Section 802.08(3), STATS.

We conclude that the record falls short of permitting a reasonable inference of any overt act taken in furtherance of a conspiracy on the part of Van Beek. For the same reasons, we conclude that the record fails to reveal evidentiary facts to support any claim upon which relief may be granted. Because the record fails to disclose a prima facie case entitling Hommrich to relief, the trial court properly entered a summary judgment of dismissal.[1]

Next, Hommrich argues that the trial court erroneously dismissed her claim of tortious interference with contractual relations. She argues that her pleadings are sufficient to state a claim and prima facie evidence of her allegation. We disagree. On summary judgment, a party may not rest on pleadings. Section 802.08(3), STATS. We have determined that the record fails to disclose evidentiary facts to support any claim upon which relief may be granted. The trial court correctly entered summary judgment dismissing her claim of tortious interference with contract.

Next, Hommrich contends that the trial court erroneously made findings of fact upon a motion for summary judgment. Our review of the record indicates that the trial court's determinations were not factual findings, but rather conclusions of law. Nonetheless, whether the court made factual findings is not

[1] Our review of the record is largely unaided by any record citations. *See* RULE 809.19(1), STATS. Although Hommrich makes reference to affidavits and other items of record, she does not refer to record numbers indexed by the circuit court clerk. For example, the table of contents to Hommrich's appendix lists page numbers up to 166a, but the index to the record lists just 41 documents.

grounds for reversal of a summary judgment where we have independently reviewed the record and it fails to disclose a genuine issue of material fact for any conceivable claim that could be construed from the pleadings.

Next, Hommrich argues that the trial court failed to strike Van Beek's affidavits as made in bad faith. Because the record fails to disclose facts to support a prima facie claim for relief, this court does not reach defensive matters filed by Van Beek. *See* ***Grams,*** 97 Wis.2d at 356, 294 N.W.2d at 485. Consequently, we conclude that any failure of the trial court to consider the motion to strike is not reversible error. *See* § 805.18, STATS.

Next, Hommrich contends that the trial court erred in determining that Van Beek was not involved in dissemination of derogatory and confidential information and intimidation of witnesses. For evidentiary support, she relies on her affidavit that states that "defendant conspired with people to intimidate witnesses and … by sending anonymous letters to destroy her life, and her businesses and reputation." She cites to Helberg's affidavit that "[p]eople have blackmailed Evelyn." She further refers to Pringle's affidavit that states that Hommrich has been tormented with anonymous papers and half her family has been blackmailed. These allegations fail to connect Van Beek with any overt act and as a result fail to support Hommrich's claims against him. She further contends that he sat in court and laughed. While the alleged conduct is egregious, it falls short of providing support for her claims.

Finally, Hommrich contends that the trial court erroneously dismissed her claims on the basis of public policy and by ruling that Van Beek's status as a counselor does not permit a medical malpractice claim to be brought against him. We decide cases on the narrowest grounds presented. ***State v.***

Blalock, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989). Because we have affirmed the summary judgment on the ground that the record fails to disclose a genuine issue of material fact, we do not address these issues unnecessary to the case's disposition.

By the Court.—Judgment affirmed.

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