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

August 1, 1995

**NOTICE**

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.

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**No. 94-2922**

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

**T.C. #88-CV-018071**
**CENTURY SHOPPING CENTER FUND I, a Wisconsin Limited Partnership, by its general partner, Century Capital Group, and CENTURY MANAGEMENT GROUP, LTD., a Wisconsin corporation,**

**Plaintiffs-Joint-Appellants,**

**v.**

**MALONE & HYDE, INC., a Delaware Corporation, as successor in interest to Godfrey Company, Inc., JOSEPH A. CRIVELLO and CRIVELLO PROPERTIES, a General Partnership,**

**Defendants-Respondents.**

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**T.C. #93-CV-008413**
**MARQUETTE PHARMACY, INC., a Wisconsin Corporation, SUSAN L. KULINSKI, d/b/a Oak Creek Book Exchange, a Sole Proprietorship, RONALD J. and MARGARET S. ENTRINGER, d/b/a Oak Creek Homestyle**

**Laundry and Cleaners, a Wisconsin General Partnership,**

**Plaintiffs-Joint-Appellants,**

**v.**

**MALONE & HYDE, INC., a Delaware Corporation, JOSEPH A. CRIVELLO and CRIVELLO PROPERTIES, a General Partnership,**

**Defendants-Respondents.**

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**T.C. #93-CV-013728**
**RONALD P. HUNTLEY, as and only as Trustee in Bankruptcy of HOWELL PLAZA, INC.,**

**Plaintiff-Joint-Appellant,**

**v.**

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

**Defendant-Respondent.**

APPEAL from orders of the circuit court for Milwaukee County: JOHN E. MCCORMICK, Judge. *Reversed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

FINE, J. This is an appeal from the trial court's dismissal of consolidated actions brought against what this opinion refers to as the Sentry defendant—the successor to the entities that owned the anchor tenant in the Howell Plaza Shopping Center in Oak Creek, Wisconsin, a Sentry food store. One action was brought by the former owner and manager of Howell Plaza and by former tenants in the Howell Plaza shopping center. We refer to these

parties as the "Century plaintiffs," and to their complaint as the "Century complaint." The Century plaintiffs also sued the Crivello defendants, developers of Oak Creek Centre, a shopping center across the street from Howell Plaza.[1] The other action, against the Sentry defendant only, was brought by the trustee-in-bankruptcy of Howell Plaza's developer and current owner. The trial court dismissed the complaints and precluded Century from pursuing certain discovery. We reverse.

## I. The complaints.

### A. *Standard of review*.

Facts alleged in a complaint must be taken as true, and "a claim should be dismissed as legally insufficient only if `it is quite clear that under no conditions can the plaintiff recover.'" ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979) (citation omitted). Unfortunately, the trial court ignored this paradigm. In any event, whether a complaint states a claim is a question of law that we decide independently of the trial court's determination. *See* ***Williams v. Security Sav. & Loan Ass'n***, 120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984).

### B. *The claims*.

The complaints filed by the various plaintiffs allege claims that are either identical or similar to each other, or are overlapping. For simplicity of discussion, we analyze the separate claims *seriatim*.

1. The Century plaintiffs allege that the Sentry food store owner breached its anchor-tenant lease. This claim had been dismissed previously, but the dismissal was reversed by this court in ***Century Shopping Center Fund I v. Crivello***, 156 Wis.2d 227, 233–237, 456 N.W.2d 858, 861–863 (Ct. App. 1990). The

[1] The action against Frank P. Crivello and Crivello Investments has been stayed pursuant to § 362 of the United States Bankruptcy Code, as the result of their filing under Chapter 11 of the Code.

supreme court denied review. 461 N.W.2d 444 (1990) (Table). The Sentry defendant argues, and the trial court agreed, that the breach-of-lease issue could be revisited because the supreme court partially overruled ***Century Shopping Center Fund*** in ***Sampson Investments v. Jondex Corp.***, 176 Wis.2d 55, 69–70, 499 N.W.2d 177, 183 (1993). We disagree.

***Sampson Investments*** explained that the lease clause in ***Century Shopping Center Fund*** was different than the lease clause in ***Sampson Investments***:

> Although the court of appeals, in *Century*, required a commercial lessee to continuously operate a retail food market, the lease at issue in *Century* is distinguishable from the lease at issue in the present case. The lease in *Century* provided that the premises "shall be used as a retail food market and allied operation." The provision at issue in *Century*, however, differs from the provision at issue in the present case which contains the word "only." Furthermore, while the commercial lessee in *Century* was not permitted to sublet the premises without the lessor's written consent, Jondex possesses an unfettered right to sublet[,] which is inconsistent with a continuous operation clause. Additionally, the lease in *Century* contained a percentage-of-gross-receipts as part of the rent component while the lease at issue in the present case provided for a flat-rate monthly rent. These distinctions render the *Century* case inapposite to the present case.

***Sampson Investments***, 176 Wis.2d at 69–70, 499 N.W.2d at 183 (footnote omitted). Nevertheless, ***Sampson Investments*** opined that the legal analysis in ***Century Shopping Center Fund*** was flawed, and overruled the decision "to the extent it contradicts the law as expressed herein." ***Id.***, 176 Wis.2d at 70, 499 N.W.2d at 183.

Absent extraordinary circumstances, a final appellate decision in a lawsuit is the law of the case for all subsequent proceedings in that action. ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38–39, 435 N.W.2d 234, 237–238 (1989) (doctrine may be disregarded "when `cogent, substantial, and proper reasons exist'") (citation omitted); *cf.* ***Schauer v. DeNeveu Homeowners Assoc.***, No. 93-2459, slip op. at 11-14 (Wis. June 20, 1995) (RULE 806.07(1)(f), STATS., does not permit trial court to reopen judgment because caselaw relied upon in rendering judgment has been overruled in an unrelated proceeding). Although ***Sampson Investments*** criticized the analysis in ***Century Shopping Center Fund*** in connection with whether a lease clause requires a tenant to continually operate its business, it did not opine that the *result* in ***Century Shopping Center Fund*** was wrong. Accordingly, we see no reason to depart from the general rule—***Century Shopping Center Fund***'s decision on the breach-of-lease issue is the law of the case here.

The breach-of-contract count also asserts claims other than the clause required Sentry to continuously operate a food store at Howell Plaza. The trial court's written decision did not address these claims. We do. First, the count alleges that the Sentry defendant intentionally destroyed property in its Howell Plaza space, thereby violating the lease provision that required Sentry to surrender the premises at the end of the lease term "in the same condition in which they were at the commencement of said term, reasonable use and wear thereof, and damage by accidental fire or the elements excepted." Second, the count asserts that Sentry secretly assigned to the Crivello defendants effective control to whom Sentry could sublease its space, in violation of a clause in the lease that provided that the lease "shall not be assigned in any way" by Sentry "nor shall the leased premises be subleased in whole or in part without the written consent" of Howell Plaza. These averments state claims. The trial court's dismissal of the breach-of-lease count is reversed.

2. The Century plaintiffs allege that Joseph A. Crivello, a partner in Crivello Properties, tortiously interfered with Century's contract rights in connection with Howell Plaza's lease with Sentry. The classic summary of what constitutes tortious interference with contract rights is in RESTATEMENT (SECOND) OF TORTS § 766 (1979):

> One who intentionally and improperly interferes with the performance of a contract (except a contract to

> marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

This formulation is the law in this state. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis.2d 97, 105–106, 279 N.W.2d 493, 497 (Ct. App. 1979). A partner is liable for the wrongful acts of his or her partners. Sections 178.10 and 178.12, STATS. The Century complaint alleges sufficiently that the Crivello partnership acting through partner Frank P. Crivello induced Sentry to violate its contract with Howell Plaza. The trial court's dismissal of the tortious-interference-with-contract claim against Joseph A. Crivello is reversed.

3. The Century plaintiffs allege that the Sentry defendant conspired to injure Century's "reputation, trade and business," and the Howell Plaza trustee alleges that Frank P. Crivello and the Sentry defendant entered into a similar conspiracy to injure Howell Plaza, Inc., in its business, all in violation of § 134.01, STATS. Section 134.01 provides that: "Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever ... shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500." This statute gives rise to a civil claim for damages by those injured by the conspiracy. ***Radue v. Dill***, 74 Wis.2d 239, 244–245, 246 N.W.2d 507, 510–511 (1976).

The complaints allege that the Sentry defendant agreed with Crivello to cripple Howell Plaza and destroy Howell Plaza's business, and that, pursuant to that agreement, the Sentry defendant, among other things, destroyed Howell Plaza property, violated its lease agreement to operate a food store in Howell Plaza, gave Crivello effective control over to whom the Sentry defendant could sublet its Howell Plaza space, and that the Sentry defendant refused to relinquish its space at Howell Plaza once it moved to the Oak Creek Centre, thereby preventing Howell Plaza from getting another anchor tenant. These allegations sufficiently assert that the conspiracy was to harm Howell Plaza; they thus state a claim under § 134.01, STATS. *See* ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis.2d 73, 86–88, 469 N.W.2d 629, 634–635 (1991)

("malice" requirement in § 134.01 means that all parties to conspiracy intended to do harm). The trial court's dismissal of the claims predicated on § 134.01 is reversed.[2]

4. The Century plaintiffs allege that Crivello defamed them by telling a Howell Plaza tenant that "Century is a real estate group and is a risky venture," that the "Century management group is bankrupt," and that the tenant "should really go with someone more stable" as a shopping center landlord. These statements are capable of a defamatory meaning and are actionable *per se*. *See* ***Ridgeway State Bank v. Bird***, 185 Wis. 418, 426, 202 N.W. 170, 173 (1925). Further, the complaint sufficiently avers that the statements were part of the alleged conspiracy between Crivello and the Sentry defendant to destroy Howell Plaza so as to make the Sentry defendant liable for the defamation even though it did commit the tort directly. *See* ***Segall v. Hurwitz***, 114 Wis.2d 471, 481, 339 N.W.2d 333, 338 (Ct. App. 1983). Moreover, although the defamation claim was asserted in an amended Century pleading beyond the applicable two-year statute of limitations, § 893.57, STATS., Century's original complaint was filed within the two-year period, and the defendants have not explained why the relation-back provisions of § 802.09(3), STATS., do not apply.[3] The trial court's dismissal of the defamation claim is reversed.

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[2] The trial court dismissed the claim under § 134.01, STATS., because it believed that the violation of an underlying legal right was required (relying on our statement in ***Century Shopping Center Fund I v. Crivello***, 156 Wis.2d 227, 239, 456 N.W.2d 858, 864 (Ct. App. 1990), that there is no violation of § 134.01 "unless a legal right has been invaded") and that Howell Plaza had no legal right to compel the Sentry defendant to operate a food store at the shopping center. Our statement in ***Century Shopping Center Fund***, however, was predicated on our holding to that effect in ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 154 Wis.2d 471, 481–486, 453 N.W.2d 208, 212–214 (Ct. App. 1990). The supreme court overruled our decision in ***Maleki*** on this point. ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis.2d 73, 91–95, 469 N.W.2d 629, 636–638 (1991). The supreme court's decision in ***Maleki*** thus also overruled, *sub silentio*, its own decision on this point in ***Cranston v. Bluhm***, 33 Wis.2d 192, 198–200, 147 N.W.2d 337, 340–341 (1967), which it did not cite and which held that a conspiracy claim based on the closing of a theater for six months was properly dismissed when there was "no affirmative requirement in the lease that the theatre [*sic*] be operated at least six months in any lease year."

[3] RULE 802.09(3), STATS., provides:

RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or

5. The Century plaintiffs allege that the Sentry defendant and Crivello engaged in "unfair competition." We are puzzled by this stand-alone count because we are unaware of any Wisconsin authority, and the parties have cited none, sanctioning in this context a legally cognizable claim for "unfair competition" as such, absent an impingement on some other right or interest. Indeed, "[u]nfair competition is still competition," and restraints on competition, fair or unfair, may run counter to the core free-market-place rationale underlying the anti-trust laws. *See* ***Northwest Power Products, Inc. v. Omark Industries, Inc.***, 576 F.2d 83, 88–90 (5th Cir. 1978) (absent anti-competitive effect, allegations that "unfair" methods were used to eliminate a competitor does not state a cognizable claim under the Sherman Antitrust Act), *cert. denied*, 439 U.S. 1116. Giving Century's complaint the benefit of every reasonable inference, as we must, we read the "unfair competition" count to refer to the other, more specific allegations of injury that have been well-pleaded. *See* ***id.***, 576 F.2d at 89.[4] Accordingly, we reverse the trial court's dismissal of the "unfair competition" count.

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> attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

[4] As ***Northwest Power Products*** explains:

> "An instance where the result of antitrust law and unfair competition law enforcement may not conflict is when a firm with substantial market power, perhaps approaching that of a monopoly, uses unfair competition to augment its position by eliminating a rival concern from the market. *But it is the elimination of the competition, by fair means or foul, that is the concern of the antitrust law, and it is only the unfair method on which the law of unfair competition focuses*."

***Id.***, 576 F.2d at 89 (emphasis added). *See also* ***Grams v. Boss***, 97 Wis.2d 332, 347, 294 N.W.2d

6. The Century plaintiffs allege that the Sentry defendant and Crivello, together with "the other co-conspirators" engaged in a common-law conspiracy. A plaintiff who suffers damages as the result of 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" has a claim sounding in conspiracy. ***Radue v. Dill***, 74 Wis.2d at 241, 246 N.W.2d at 509; *see also* ***Cranston v. Bluhm***, 33 Wis.2d 192, 198, 147 N.W.2d 337, 340 (1967). Century's complaint alleges that among the methods Crivello and the Sentry defendant used to harm Howell Plaza was the unlawful destruction of Howell Plaza's property. This is sufficient to state a claim for conspiracy under the ***Radue*** formulation, and the trial court's dismissal of the conspiracy claim is reversed.

7. The Century plaintiffs and the Howell Plaza trustee allege that the Sentry defendant and Crivello conspired to restrain trade and commerce in violation of § 133.03(1), STATS. This provision, which tracks section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, declares: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal." "[A]ny person injured, directly or indirectly," by a violation of § 133.03(1) "shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees." Section 133.18(1)(a), STATS. We interpret § 133.03(1) in accordance with the federal courts' interpretation of section 1 of the Sherman Act. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis.2d 1, 6, 298 N.W.2d 102, 104 (Ct. App. 1980).

"[A]llegations that the defendants conspired or combined to engage in acts of unfair competition with intent to injure or to destroy the plaintiff as a competitor" "constitute [allegations of] an antitrust violation" under § 133.03(1), STATS. ***Grams v. Boss***, 97 Wis.2d 332, 347, 294 N.W.2d 473, 481 (1980). The Century complaint's allegations in support of this claim are abundant. The only question is whether there must be an allegation of an anti-competitive effect, or whether a *per se* rule applies. *See* ***id.***, 97 Wis.2d at 348, 294 N.W.2d at 481.[5] As with the situation in ***Grams***, 97 Wis.2d at 351, 294 N.W.2d at

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473, 481 (1980) ("[A]llegations that the defendants conspired or combined to engage in acts of unfair competition with intent to injure or destroy the plaintiff as a competitor" state an antitrust-violation claim under § 133.03(1), STATS.).

[5] The *per se* doctrine is a broad-bladed sword, unable to make distinctions with any precision. It is pressed into service by the dual engine of instinct and necessity. It spares victims of presumed

483, we need not decide whether application of the *per se* rule here is appropriate because the Century complaint amply alleges the anti-competitive effects of the alleged conspiracy.

The Century complaint identifies a relevant market for grocery and related products, which, for the purposes of the appeal, the Sentry defendant does not challenge, and alleges that the Sentry defendant, as the anchor tenant in Howell Plaza was serving that market. The complaint also alleges that Crivello's Oak Creek Centre was seeking a supermarket similar to Sentry but decided that it would be in its interest if there were only one, rather than two, supermarkets serving that market, and that Crivello conspired with the Sentry defendant to have Sentry move to Oak Creek Centre and, significantly, to prevent Howell Plaza from replacing Sentry. Thus, according to the facts alleged in the complaint, the defendants saw to it that a second supermarket could not operate in what is alleged to be the relevant market. Whether or not these allegations can be proved at a trial, or whether or not they can survive a motion for summary judgment, they certainly state a claim under § 133.03(1), STATS. *See* ***Grams***, 97 Wis.2d at 352–353, 294 N.W.2d at 483–484. The trial court's dismissal of the § 133.03(1) claims is reversed.[6]

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inherently pernicious practices the burden of demonstrating the market impact of those practices, which would be required under the so-called "rule of reason," because adverse market impact is assumed. *See* ***Broadcast Music, Inc. v. CBS, Inc.***, 441 U.S. 1, 7–8 (1979); ***Northern Pac. Ry. Co. v. United States***, 356 U.S. 1, 5 (1958). Membership criteria for this club of convenience, however, is strict: the practice must threaten the "central nervous system of the economy." ***United States v. Socony-Vacuum Oil Co.***, 310 U.S. 150, 224 n.59 (1940). As we have already noted, the antitrust laws protect *competition* not *competitors*. *See* ***Northwest Power Products, Inc. v. Omark Industries, Inc.***, 576 F.2d 83, 88–90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116; ***Mid-West Underground Storage, Inc. v. Porter***, 717 F.2d 493, 497 (10th Cir. 1983). The *per se* rule's rationale has weakened as markets have expanded and the tools with which to compete in those market have become more efficient. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 19 (1984). Accordingly, there has been a retrenchment from the rigidity of the *per se* rule, *see, e.g.,* ***National Collegiate Athletic Ass'n v. Board of Regents***, 468 U.S. 85 (1984); ***Copperweld Corp. v. Independence Tube Corp.***, 467 U.S. 752 (1984); ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis.2d 1, 10–11, 298 N.W.2d 102, 106 (Ct. App. 1980), and calls for permitting the forces of free-market dynamics to assume the greater regulatory burden, Easterbrook, 63 Tex. L. Rev. at 29.

[6] In its brief and on oral argument, the Sentry defendant focussed on ***Juster Associates v. City of Rutland***, 901 F.2d 266 (2nd Cir. 1990), as, in the Sentry defendant's view, requiring affirmance of

8. The Century plaintiffs allege that Frank P. Crivello monopolized and attempted to monopolize the relevant market for "retail strip mall supermarket space," that Frank P. Crivello and the Sentry defendant monopolized and attempted to monopolize the relevant market for groceries and related products, and that Frank P. Crivello and the Sentry defendant conspired to monopolize the relevant market for "retail strip mall supermarket space" and the relevant market for groceries and related products, all in violation of § 133.03(2), STATS. The Howell Plaza trustee alleges that the Sentry defendant attempted to monopolize the relevant market, and that Frank P. Crivello and the Sentry defendant conspired to monopolize that market, also all in violation of § 133.03(2). This provision, which tracks section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, declares: "Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than 5 years, or both." "[A]ny person injured, directly or indirectly," by a violation of § 133.03(2) "shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees." Section 133.18(1)(a), STATS. As with § 133.03(1), STATS., we interpret § 133.03(2) in accordance with the federal court's interpretation of its Sherman Act counterpart. *See* ***Grams***, 97 Wis.2d at 346, 294 N.W.2d at 480.

The focus of § 133.03(2), STATS., is monopolization by "predatory or anticompetitive conduct" combined with specific intent to achieve monopoly power. *See* ***Spectrum Sports, Inc. v. McQuillan***, 506 U.S. ___, 113 S. Ct. 884, 890, 122 L.Ed.2d 247, 257 (1993) (interpreting § 2 of the Sherman Act). Attempted monopolization in violation of § 133.03(2) requires, in addition, that there be a "dangerous probability of achieving monopoly power." ***Ibid.***

Century's allegations are sufficient to state a claim under § 133.03(2), STATS. Century asserts that Frank P. Crivello and the Sentry

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the trial court's dismissal of the antitrust claims. In ***Juster***, a shopping center owner complained because the City of Rutland "subsidized or otherwise aided" the developers of a competing shopping center—thus *increasing* competition in the relevant market, ***id.***, 901 F.2d at 269; here, on the other hand, Century complains that the defendants have conspired to destroy, not help, a competitor—thus *decreasing* competition. ***Juster*** recognized that "increased competition and reduced profits resulting from an agreement between other parties does not constitute an antitrust injury." ***Ibid.*** ***Juster*** is wholly inapplicable.

defendant conspired to and did acts that would cripple Howell Plaza as a competing shopping center and that would prevent the location in Howell Plaza of a competing supermarket. Indeed, incorporated into the complaint is a letter by Frank P. Crivello to a potential source of financing for Oak Creek Centre. In that letter, Frank P. Crivello boasts of his pursuit of monopoly power as assisted by the Sentry defendant. He tells the financing source that the Sentry defendant has agreed to close its store in Howell Plaza, and "keep it dark." This, he predicts, "will cripple [Howell Plaza] and make it difficult for them to compete with me in the future." Further, he notes that the Sentry defendant can tie up its space ("keep it dark") in Howell Plaza for six years, and that this "will make the lease of our [non anchor-tenant] space extremely easy because we will be the dominant center without question." Additionally, Frank P. Crivello describes the result of his deal with the Sentry defendant as a "very neat play for us" because "we are not going to see competition pop up down the road in the way of another food store" inasmuch as "the other corners are already developed." Century alleges that Howell Plaza was forced into bankruptcy as a result of the defendants' predatory practices. This is a sufficient allegation of injury to pass muster under § 133.18(1)(a), STATS. The trial court's dismissal of the monopolization and attempted monopolization claims is reversed.

9. The Century plaintiffs allege that the Sentry defendant's predecessors and the Crivello defendants violated the Wisconsin Organized Crime Control Act, §§ 946.80 to 946.88, STATS. The Act was patterned after the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968, and we are guided by pertinent federal authority interpreting that statute. ***State v. Evers***, 163 Wis.2d 725, 732, 472 N.W.2d 828, 831 (Ct. App. 1991). For the purposes of a private plaintiff seeking damages resulting from the violation of the Wisconsin Organized Crime Control Act, the Act has three main components: the section describing the activities prohibited by the Act, § 946.83, STATS.;[7] the section defining the terms of art used in the Act, § 946.82, STATS.;[8] and the provision permitting recovery of damages, § 946.87(4), STATS.[9]

[7] Section 946.83, STATS., provides:

> **Prohibited activities**. **(1)** No person who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity may use or invest, whether directly

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or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

**(2)** No person, through a pattern of racketeering activity, may acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

**(3)** No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.

[8] Section 946.82, STATS., provides:

**Definitions**. In ss. 946.80 to 946.88:

**(1)** "Commission of a crime" means being concerned in the commission of a crime under s. 939.05.

**(2)** "Enterprise" means any sole proprietorship, partnership, limited liability company, corporation, business trust, union organized under the laws of this state or other legal entity or any union not organized under the laws of this state, association or group of individuals associated in fact although not a legal entity. "Enterprise" includes illicit and licit enterprises and governmental and other entities.

**(3)** "Pattern of racketeering activity" means engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

**(4)** "Racketeering activity" means any activity specified in 18 USC 1961 (1) in effect as of April 27, 1982 or the attempt, conspiracy to commit, or commission of any of the felonies specified in: chs. 161 and 945 and ss. 49.49, 134.05, 139.44 (1), 180.0129, 181.69, 184.09 (2), 185.825, 215.12, 221.17, 221.31, 221.39, 221.40, 551.41, 551.42, 551.43, 551.44, 553.41 (3) and (4), 553.52 (2),

Defendants violate the Wisconsin Organized Crime Control Act if they knowingly use, directly or indirectly, proceeds derived directly or indirectly "from a pattern of racketeering activity" to acquire "any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise," § 946.83(1), STATS.; "acquire or maintain, directly of indirectly, any interest in or control of any enterprise or real property" "through a pattern of racketeering activity," § 946.83(2), STATS.; or as employees or associates of "any enterprise" "conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity," § 946.83(3), STATS. "`Pattern of racketeering activity' means engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity." Section 946.82(3), STATS. The crimes that constitute "racketeering activity" are listed in § 946.82(4), STATS.

(..continued)

> 940.01, 940.19 (3) to (6), 940.20, 940.203, 940.21, 940.30, 940.305, 940.31, 941.20 (2) and (3), 941.26, 941.28, 941.298, 941.31, 941.32, 943.01 (2), 943.012, 943.013, 943.02, 943.03, 943.04, 943.05, 943.06, 943.10, 943.20 (3) (b) to (d), 943.23 (1g), (1m), (1r), (2) and (3), 943.24 (2), 943.25, 943.27, 943.28, 943.30, 943.32, 943.34 (1) (b) and (c), 943.38, 943.39, 943.40, 943.41 (8) (b) and (c), 943.50 (4) (b) and (c), 943.60, 943.70, 944.21 (5) (c) and (e), 944.32, 944.33 (2), 944.34, 945.03, 945.04, 945.05, 945.08, 946.10, 946.11, 946.12, 946.13, 946.31, 946.32 (1), 946.48, 946.49, 946.61, 946.64, 946.65, 946.72, 946.76, 947.015, 948.05, 948.08, 948.12 and 948.30.

[9] Section 946.87(4), STATS., provides, as material here:

> **Civil Remedies**.
>
> ....
>
> **(4)** Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought under this section.

The Century plaintiffs sufficiently allege all the necessary elements to support its claim under the Wisconsin Organized Crime Control Act. First, as predicate crimes under § 946.82(4), STATS., the complaint alleges that the Sentry defendant's predecessors falsely reported to the Wisconsin Secretary of State that they did not conspire to restrain trade and monopolize the relevant market. Such false reports, if made, violate § 180.0129, STATS., and § 943.39(1), STATS., which are predicate offenses under the Act.[10] *See* § 946.82(4), STATS. The complaint also alleges that the Sentry defendant's predecessors illegally destroyed Howell Plaza property, in violation of § 943.01, STATS., which is also a predicate offense under the Act. *See* § 946.82(4).[11] Second, the Century plaintiffs

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[10] Section 133.12, STATS., requires every Wisconsin corporation, "in its annual report filed with the secretary of state, [to] show whether it has entered into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce." Section 180.0129, STATS., provides:

> **Penalty for false document. (1)** A person may not sign a document with intent that it be delivered to the secretary of state for filing or deliver, or cause to be delivered, a document to the secretary of state for filing, if the person knows that the document is false in any material respect at the time of its delivery.
>
> **(2)** Whoever violates this section may be fined not more than $10,000 or imprisoned for not more than 2 years or both.

Section 943.39(1), STATS., provides:

> **Fraudulent writings.** Whoever, with intent to injure or defraud, does any of the following is guilty of a Class D felony:
>
> **(1)** Being a director, officer, manager, agent or employe of any corporation or limited liability company falsifies any record, account or other document belonging to that corporation or limited liability company by alteration, false entry or omission, or makes, circulates or publishes any written statement regarding the corporation or limited liability company which he or she knows is false[.]

[11] Section 943.01, STATS., provides:

> **Damage to property. (1)** Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

(..continued)

**(2)** Any person violating sub. (1) under the following circumstances is guilty of a Class D felony:

(a) 1. In this paragraph, "highway" means any public way or thoroughfare, including bridges thereon, any roadways commonly used for vehicular traffic, whether public or private, any railroad, including street and interurban railways, and any navigable waterway or airport.

2. The property damaged is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage; or

(b) The property damaged belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier; or

(c) The property damaged belongs to a person who is or was a witness as defined in s. 940.41 (3) or a grand or petit juror and the damage was caused by reason of the owner's having attended or testified as a witness or by reason of any verdict or indictment assented to by the owner.

(d) If the total property damaged in violation of sub. (1) is reduced in value by more than $1,000. For the purposes of this paragraph, property is reduced in value by the amount which it would cost either to repair or replace it, whichever is less.

(e) The property damaged is on state-owned land and is listed on the registry under sub. (5).

**(2m)** Whoever causes damage to any physical property of another under all of the following circumstances is subject to a Class B forfeiture:

(a) The person does not consent to the damage of his or her property.

(b) The property damaged is on state-owned land and is listed on the registry under sub. (5).

....

**(3)** If more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a

have sufficiently alleged that the Sentry defendant's predecessors, Crivello Properties, Joseph A. Crivello, and Frank P. Crivello violated § 946.83 in connection with their interest in Oak Creek Centre and the anchor-tenant space, *see* §§ 946.83(1) & (2), and that they participated in each other's affairs "through a pattern of racketeering activity," *see* § 946.83(3). The Century plaintiffs also sufficiently allege damage under the Wisconsin Organized Crime Control Act—as long as the Act has been violated it is sufficient for a plaintiff to allege injury flowing from the predicate offenses (here, alleged violations of §§ 180.0129, 943.01, and 943.39(1)) rather than a "racketeering injury." *See* ***Sedima, S.P.R.L. v. Imrex Co., Inc.***, 473 U.S. 479, 497 (1985) (interpreting the Racketeer Influenced and Corrupt Organizations Act). Further, "`general factual allegations of injury'" suffice at this stage because "`on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" ***NOW, Inc. v. Scheidler***, 510 U.S. ___, 114 S. Ct. 798, 803, 127 L.Ed.2d 99, 107 (1994) (interpreting the Racketeer Influenced and Corrupt Organizations Act) (citation omitted). The trial court's dismissal of the Wisconsin Organized Crime Control Act claim is reversed.[12]

(..continued)

> single forfeiture offense or crime.
>
> **(4)** In any case of unlawful damage involving more than one act of unlawful damage but prosecuted as a single forfeiture offense or crime, it is sufficient to allege generally that unlawful damage to property was committed between certain dates. At the trial, evidence may be given of any such unlawful damage that was committed on or between the dates alleged.
>
> **(5)** The department of natural resources shall maintain a registry of prominent features in the landscape of state-owned land. To be included on the registry, a feature must have significant value to the people of this state.

[12] Inasmuch as we have reversed the trial court's dismissal of the complaints, we do not reach the issue of whether the trial court erred in denying leave to the plaintiffs to replead. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

## II. Discovery.

On July 2, 1992, the Milwaukee law firm of O'Neil, Cannon & Hollman, S.C., attorneys for the Sentry defendant in this case, and the firm that represented one of the Sentry defendant's predecessors in ***Century Shopping Center Fund I v. Crivello***, 156 Wis.2d 227, 456 N.W.2d 858 (Ct. App. 1990), filed motions with the supreme court for permission to submit *amicus* briefs in the then pending ***Sampson Investments*** case on behalf of the Wisconsin Merchants Federation and the Wisconsin Grocers Association, trade associations representing retailers in this state. The supreme court granted the motions on July 16, 1992, and a consolidated brief on behalf of the Federation and the Association was filed on August 4, 1992. The motions and the consolidated *amicus* brief filed with the supreme court argued that the court of appeals decision in ***Sampson Investments***, which relied on ***Century Shopping Center Fund***, *see* ***Sampson Investments v. Jondex***, Nos. 91-0297, 91-0957, slip op. at 5 (Wis. Ct. App. Jan. 10, 1992) (unpublished), would "have calamitous results" for the members of the Federation and the Association. In their consolidated brief, the trade associations asked, *inter alia*, that the supreme court overturn this court's holding in ***Century Shopping Center Fund***.

As part of their discovery in this action, Century sought to depose two attorneys from O'Neil, Cannon & Hollman, S.C., and officers and employees of the Wisconsin Merchants Federation and the Wisconsin Grocers Association, all in connection with the filing of the *amicus* brief in ***Sampson Investments***. The notices of deposition also sought documents described as pertinent to that inquiry. The trade associations, again represented by O'Neil, Cannon & Hollman, S.C., moved to quash, and asserted three grounds in support of the motion. First, they alleged that the information sought was "not reasonably calculated to lead to the discovery of admissible evidence," a prerequisite to discovery under RULE 804.01(2), STATS. Second, they argued that discovery would "chill the constitutional rights of non-parties to petition the government for redress of grievances contrary to the First Amendment to the Constitution of the United States and Article I, sec. 4 of the Wisconsin Constitution." Third, they asserted that the discovery "seeks information protected by the attorney-client privilege." In support of the motion, the trade associations submitted a conclusory affidavit by a lawyer from O'Neil, Cannon & Hollman, S.C., that essentially reiterated these arguments.

In opposition to the motion to quash, and in support of its own motion to compel discovery, Century argued that the *amicus* filing in ***Sampson Investments*** was part of the scheme by one of the predecessors of the Sentry defendant to affect the merits of this action in the guise of the *amicus* submission in another case: "The Plaintiffs seek the discovery at issue in order to determine whether and the extent to which [a predecessor of the Sentry defendant] subverted the integrity of the judicial process by effectively appearing before the Wisconsin Supreme Court ex parte, and without the full disclosure required by the applicable ethical rules." (Footnote omitted.) The trial court granted the motion to quash and denied Century's motion to compel discovery, holding that the information sought was not relevant to the issues in this case, would subject those named in the notices of deposition to "an unwarranted fishing expedition" and would invade the attorney client privilege. The trial court neither held an evidentiary hearing on the motions nor examined *in camera* any of the requested documents. We reverse.

As with its federal counterpart, Rule 26(b) of the Federal Rules of Civil Procedure, RULE 804.01(2)(a), STATS., is an expansive grant of pre-trial discovery. Anything that is "relevant to the subject matter involved in the pending action" is fair game even though what is sought to be discovered would not itself be admissible at trial if discovery "appears reasonably calculated to lead to the discovery of admissible evidence." RULE 804.01(2)(a). As long as these requisites are met, the hoary cry of "fishing expedition" is not a valid objection. *See* ***Hickman v. Taylor***, 329 U.S. 495, 507 (1947); ***State ex rel. Dudek v. Circuit Court***, 34 Wis.2d 559, 585, 150 N.W.2d 387, 402 (1967); *see also* ***State ex rel. Amek bin Rilla v. Circuit Court***, 76 Wis.2d 429, 435, 251 N.W.2d 476, 480 (1977) (requirement that material sought be relevant).

On this record, sparse and untested by examination and cross-examination as it is, Century has made a threshold showing that the material it seeks is within the scope of permissible discovery. First, the spine of this case is the alleged conspiracies by the defendants in connection with termination of Sentry's anchor-tenant status in the Howell Plaza shopping center. An important vertebra in that spine is Sentry's Howell Plaza lease. Our decision in ***Century Shopping Center Fund*** interpreted that lease, and, as noted, the supreme court denied review. The *amicus* submission to the supreme court in ***Sampson Investments*** by the law firm that represents the Sentry defendant in this case sought to have ***Century Shopping Center Fund*** overruled. Century claims that the law firm did not adequately disclose to the supreme court that,

as alleged by Century, the law firm's interest in seeking to have ***Century Shopping Center Fund*** overruled extended beyond the face of its submissions and that those submissions were attempts by the firm on behalf of the Sentry defendant here to influence the outcome of this case in a proceeding at which the plaintiffs in this case would not be represented. Although there is, of course, a broad right under the First Amendment and its Wisconsin equivalent to petition government and participate in judicial proceedings, that right does not immunize illegal activity when the petitioning of government or the participation in judicial proceedings is a mere "sham" designed to cloak and advance illegal activity. ***California Motor Transport Co. v. Trucking Unlimited***, 404 U.S. 508, 511–516 (1972) (applying the "sham" exception to the *Noerr-Pennington* doctrine enunciated in ***Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.***, 365 U.S. 127 (1961), and ***United Mine Workers v. Pennington***, 381 U.S. 657 (1965)); ***Badger Cab Co., Inc. v. Soule***, 171 Wis.2d 754, 762–765, 492 N.W.2d 375, 379–380 (Ct. App. 1992) (applying ***California Motor Transport***). This is what Century contends is the situation here; it has the right under RULE 804.01(2)(a), STATS., to pursue discovery in that area. Accordingly, we reverse the trial court's order precluding discovery.

Our conclusion that Century may pursue discovery does not mean that it may rummage unchecked through the files of either the trade associations or of O'Neil, Cannon & Hollman, S.C. RULE 804.01(2)(a), STATS., permits discovery of "any matter, *not privileged*." (Emphasis added.) "Statutory privileges are to be strictly and narrowly construed." ***Steinberg v. Jensen***, No. 92-2475, slip op. at 20 (Wis. June 30, 1995). Upon remand, those subject to the notices of deposition are to produce all documents requested and to answer all questions asked, with the exception of those matters or documents claimed to be protected by privilege. Documents that are not produced pursuant to a claim of privilege are to be listed by date, author, recipient, and privilege or privileges asserted, and are to be transmitted to the trial court for its *in camera* inspection. A copy of the list shall also be furnished to all counsel. The trial court is to decide in a written memorandum keyed to each document for which privilege is claimed whether the claimed privilege or privileges apply. *See* ***United States v. Zolin***, 491 U.S. 554, 568–569 (1989) (*in camera* review is appropriate method to determine applicability of attorney-client privilege) (crime-fraud exception to privilege). All questions that are not answered pursuant to a claim of privilege shall be certified to the trial court. The trial court is to decide in a written memorandum keyed to each question so certified whether the claimed privilege or privileges apply. The trial court may, in the appropriate exercise of its discretion, hold an evidentiary hearing in connection

with the applicability of the "sham" exception to the *Noerr-Pennington* doctrine and in connection with any claim of privilege.

*By the Court.*—Orders reversed.

Publication in the official reports is recommended.