COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP827 **Cir. Ct. No. 2006CV1487**

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

PEG WESTPHAL,

PLAINTIFF-RESPONDENT,

V.

PEGGY ANN SMELSER, MARGARET ZWEIFEL AND GREENBRIER & RUSSEL, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Reversed.*

Before Higginbotham, P.J, Dykman and Bridge, JJ

¶1 DYKMAN, J. Peggy Ann Smelser, Margaret Zweifel, and Greenbrier & Russel, Inc. (Smelser and Zweifel) appeal from an order denying their motions for summary judgment. They contend that the circuit court erred in

concluding that there are disputed issues of material fact in Peg Westphal's action for civil conspiracy and tortious interference with employment. We conclude that the undisputed facts in the record do not support Westphal's claims, and therefore reverse.

Background

¶2 The following facts are taken from the parties' submissions on summary judgment. Peg Westphal was an at-will employee of WEA Insurance Corporation (WEA Trust), from 1984 until 2006. In late 2004 and early 2005, WEA Trust was in the process of developing a program to transition to a new software system (the program). In the fall of 2004, Fred Evert, who had recently been elected president of WEA Trust, selected Westphal to be WEA Trust's director of special projects. As director of special projects, Westphal was responsible for the change management (CM) piece of the program. Westphal was responsible for managing the change that WEA Trust personnel would experience during the program. As director of special projects, Westphal initially reported to Evert. In January 2006, Evert became CEO of WEA Trust, in addition to president. At around that same time, Peggy Ann Smelser, WEA Trust's chief operating officer, advised Evert to have Westphal report to Smelser for organizational and structural reasons. Evert decided that Westphal should begin reporting directly to Smelser.

¶3 WEA Trust hired two consulting firms to evaluate its program. The first firm, Proxicom, issued a report on March 27, 2006, that identified problems within the program. The other firm, Greenbrier, was hired to assist WEA Trust with its CM efforts and take a closer look at the CM component of the program.

¶4 In mid-March, 2006, Greenbrier sent consultant Margaret Zweifel to WEA Trust for this purpose. WEA Trust expected Zweifel to assess the status of CM and to develop a strategy to improve the CM component of the program. In assessing WEA Trust's CM efforts, Zweifel interviewed fifteen key members of the program team. She then typed a summary of the interviews, reflecting a handful of positive or neutral comments about CM and Westphal, as well as some negative feedback concerning Westphal's leadership of CM.

¶5 Zweifel and Smelser met on Monday, March 27, and discussed the results of the interviews. Smelser then asked Zweifel whether she would be available to work for WEA Trust after her contract was concluded at the end of the week. Smelser set up a meeting with Evert for Friday, March 31, for Smelser and Zweifel to share their findings and concerns with him.

¶6 Smelser and Zweifel met together in the afternoon of Thursday, March 30, and then met with Evert on the morning of Friday, March 31. Smelser relayed to Evert the negative feedback she had received concerning Westphal's performance as director of special projects. Zweifel reported her findings regarding Westphal's performance, including that members of the program team lacked confidence in Westphal. Evert asked Zweifel whether she believed Westphal could remain in CM and be effective. Her response to Evert was "no," and that it was "too late" for that.

¶7 Between his March 31 meeting with Smelser and Zweifel and April 4, Evert met with Smelser and the two vice presidents of WEA Trust, Denise DeLong and Neal Kaderabek, to discuss Westphal's status as director of special projects. At this meeting, everyone agreed that Westphal should be removed from the position of director of special projects. Evert decided to do so.

¶8 On April 4, 2006, Evert and Smelser met with Westphal, and Evert informed Westphal of his decision. WEA Trust offered Westphal an alternative position of staff development specialist, a position crafted specifically for her, for a limited term and at a reduced salary. Alternatively, Westphal was offered a severance package, in exchange for a release. Westphal declined both options and her employment with WEA Trust ended April 30, 2006. Zweifel was given a new one-year contract with WEA Trust.

¶9 Westphal sued Smelser and Zweifel for conspiracy to interfere with her employment relationship, conspiracy to maliciously injure her business reputation, and tortious interference with her employment relationship. Smelser and Zweifel appeal from the circuit court's denial of their motions for summary judgment.

Standard of Review

¶10 We review summary judgments de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316-17, 401 N.W.2d 816 (1987). Under WIS. STAT. § 802.08(2), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

¶11 First, we look to whether the plaintiff's complaint states a claim. ***Green Spring Farms***, 136 Wis. 2d at 317. Then, we examine the moving party's submissions to determine if they make a prima facie case for summary judgment; here, we must determine whether Smelser and Zweifel have established a defense to defeat Westphal's claims. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294

N.W.2d 473 (1980). Next, we examine the submissions of the opposing party to determine if there are any disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, necessitating a trial. ***Id.***

¶12 Thus, if the moving party establishes entitlement to judgment as a matter of law, "the opposing party may avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial." ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted). Summary judgment for the defendant is appropriate if the plaintiff presents no credible evidence to support an element on which the plaintiff bears the burden of proof. ***Id.*** at 290.

Discussion

¶13 Smelser and Zweifel do not argue that Westphal's complaint does not state a claim. Instead, they argue that the parties' submissions establish that there are no disputed issues of material fact and that Smelser and Zweifel are entitled to judgment as a matter of law on each of Westphal's claims. We agree.

Conspiracy to injure business reputation under WIS. STAT. § 134.01

¶14 Westphal claims that Smelser and Zweifel conspired to maliciously injure her business reputation in violation of WIS. STAT. § 134.01 (2005-06).[1]

[1] WISCONSIN STAT. § 134.01 provides:

> Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any

(continued)

Specifically, Westphal contends that Smelser and Zweifel agreed to convey false and misleading information about Westphal's job performance to Evert, and that they did so to cause Evert to lose confidence in Westphal and fire her. They did this, Westphal argues, to detract attention from Smelser's poor managing of the program, as would soon be revealed in the Proxicom report, and to secure additional consulting work for Zweifel. Smelser and Zweifel argue that they are entitled to summary judgment on Westphal's claim for conspiracy under WIS. STAT. § 134.01 because the parties' submissions establish that the elements of the claim have not been met.[2] We agree with Smelser and Zweifel.

¶15 A claim for a conspiracy in violation of WIS. STAT. § 134.01 requires the plaintiff to establish that (1) the defendants acted together, (2) with a common purpose to injure the plaintiff's business, (3) with malice, and (4) the acts financially injured the plaintiff. WIS JI-CIVIL 2820 (2008). Additionally, "a plaintiff must show more than a mere suspicion or conjecture that there was a conspiracy or that there was evidence of the elements of a conspiracy." ***Maleki v. Fine-Lando Clinic Chartered***, 162 Wis. 2d 73, 84, 469 N.W.2d 629 (1991). Thus, "if circumstantial evidence supports equal inferences of lawful and unlawful action, … the claim of conspiracy … is not proven…. [I]n such circumstances,

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> act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Smelser also argues that Westphal's WIS. STAT. § 134.01 claim is precluded by the Worker's Compensation Act. Because we conclude that Smelser and Zweifel are entitled to summary judgment because the parties' submissions establish that the elements of the § 134.01 conspiracy claim have not been met, we need not address this argument.

the matter at issue should not be submitted to the jury." ***Id.*** at 85 (citations omitted). Because the parties' submissions do not support even an equal inference of the required element of malice, we conclude that Smelser and Zweifel are entitled to summary judgment.[3] *See* ***id.*** at 86 ("There can be no conspiracy if malice is not found in respect to both conspirators.").

¶16 Malice in WIS. STAT. § 134.01 "does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious." ***Maleki***, 162 Wis. 2d at 87 (citation omitted). "[M]aliciously injuring [means] doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." ***Id.*** at 87-88 (citation omitted). Westphal's claim of malice is that Smelser and Zweifel intended to harm her by conveying false and misleading information to Evert; that is, that Smelser and Zweifel knew Westphal was performing well and yet disparaged her to Evert in order to cause him to lose confidence in her. The record, however, does not support her claims.

¶17 In response to Westphal's claims, Zweifel submitted an affidavit stating that she accurately conveyed to Smelser and Evert the information she gathered in interviewing the program team members. She averred that Evert asked her whether she believed Westphal could still effectively lead change management, and that she honestly answered that she believed it was too late for

[3] Because the lack of sufficient evidence of malice is dispositive, *see* ***Maleki v. Fine-Lando Clinic Chartered***, 162 Wis. 2d 73, 86, 469 N.W.2d 629 (1991), we need not address the parties' arguments over whether the other elements of a WIS. STAT. § 134.01 conspiracy claim have been established.

Westphal to do so. Smelser submitted an affidavit averring that she honestly advised Evert that she did not believe Westphal could continue as the leader of change management. Both Smelser and Zweifel stated in their affidavits that they advised Evert that Westphal was not effectively leading change management because they were concerned about the success of the program and that they acted in the interest of WEA Trust. The same facts are echoed in Smelser and Zweifel's depositions, Evert's deposition, and Zweifel's notes from the interviews she conducted with program team members. Thus, Smelser and Zweifel submitted evidence to show their defense to Westphal's claim of malicious injury: that even if their acts were intended to harm Westphal, they did not cause a wrongful harm, because they did not convey false information to Evert.

¶18 Westphal argues, however, that the affidavits and Zweifel's interview notes to the contrary are inadmissible under WIS. STAT. § 802.08(3) and therefore cannot be relied upon in summary judgment. She argues that the affidavits are inadmissible because they set forth no evidentiary facts, only conclusory assertions that Smelser and Zweifel acted honestly. She argues that Zweifel's interview notes and her testimony about the interviews are inadmissible because they are hearsay. Thus, Westphal asserts, Smelser and Zweifel have submitted no evidence to support their defense that they honestly conveyed information to Evert. We disagree.

¶19 First, Westphal mischaracterizes Smelser and Zweifel's assertions that they gave their honest opinions to Evert as legal conclusions. Statements by affiants as to why they took certain actions are evidentiary facts which may or may not meet a legal standard. *See* ***Harman v. La Crosse Tribune***, 117 Wis. 2d 448, 455-56, 344 N.W.2d 536 (Ct. App. 1984). Thus, Smelser and Zweifel's statements that they gave their honest opinion to Evert regarding Westphal's work

performance are factual assertions as to why they acted as they did; whether those facts negate an assertion of malice is a legal question. That is, Westphal's argument would be appropriate if Smelser and Zweifel asserted they acted without malice, which is a legal conclusion. But whether they advised Evert honestly rests on their own opinions, and the opinions of affiants are admissible. *See* ***Eichenseer v. Madison-Dane County Tavern League, Inc.***, 2006 WI App 226, ¶27 & n.12, 297 Wis. 2d 495, 725 N.W.2d 274.

¶20 Next, we reject Westphal's argument that Zweifel's interview notes and her testimony about the interviews were inadmissible hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at trial, which is offered to prove the truth of the matter asserted." ***State v. Wilson***, 160 Wis. 2d 774, 776, 467 N.W.2d 130 (Ct. App. 1991). Westphal argues that Zweifel's assertions that she received negative feedback regarding Westphal during her interviews of team members are inadmissible as hearsay because Zweifel offers them for the truth of the interview comments, to show Westphal was actually performing badly. But Westphal is mistaken; Zweifel does not offer the interview comments to prove that they are true and that Westphal was performing badly. Westphal was an at-will employee, and thus whether there was cause to fire her is irrelevant. ***Repetti v. Sysco Corp.***, 2007 WI App 49, ¶8, 300 Wis. 2d 568, 730 N.W.2d 189 ("Generally, at-will employees may be terminated for good cause, for no cause, or even for cause morally wrong, without [establishing] legal wrong." (citation omitted)).

¶21 Instead, the significance of Zweifel's assertion that she interviewed program team members and received negative feedback is to show Smelser and Zweifel's states of mind. Indeed, the crux of Westphal's conspiracy claim is that Smelser and Zweifel conspired to convey false information to Evert; the

conveying of false information is the wrongful act that Westphal alleges establishes malice. Thus, Zweifel's assertion that she obtained negative feedback from the program team members, and her notes from those interviews, are admissible as assertions to show Zweifel's state of mind in advising Evert. *See* ***Wilson***, 160 Wis. 2d at 776-77. Thus, Smelser and Zweifel have submitted evidentiary facts establishing their defense that they conveyed honest information to Evert. At this point in summary judgment methodology, Westphal was required to submit evidence to create a genuine issue of material fact as to whether Smelser and Zweifel intentionally conveyed false and misleading information to Evert.

¶22 Westphal submitted documents showing (1) Westphal's adequate work performance, through positive past job reviews from Evert, emails between Westphal and WEA Trust management praising Westphal's job performance, including her performance leading CM, and emails from Zweifel indicating her initially positive impression of Westphal's work on CM; (2) Smelser and Zweifel's communications, in secret, regarding Westphal and the change management position, as indicated in their emails deciding to keep their meetings together and with Evert off WEA Trust's public calendar system; (3) indications that some of the program members interviewed by Zweifel held personal animosity toward Westphal, Smelser knew of that animosity, and directed Zweifel to include those individuals in her interviews; and (4) negative feedback regarding the program contained in the Proxicom report, which was not limited to the CM portion of the program. These documents arguably support Westphal's claims that WEA Trust management harbored ill-will towards her, and that Smelser and Zweifel secretly decided to convey to Evert that Westphal was poorly leading change management. They also arguably support Westphal's claim that Smelser and Zweifel did so in the hopes that it would detract from any negative findings

regarding Smelser in the Proxicom report and cause Evert to fire Westphal so that Zweifel could take over her position. This does not amount to a claim for malicious injury under WIS. STAT. § 134.01.

¶23 We cannot make the logical leap that Westphal urges: that because Smelser and Zweifel may have had their own motives to disparage Westphal to Evert, and Westphal had been praised for her job performance in the past, the information conveyed to Evert must have been untrue. The missing piece in Westphal's argument is any factual support for her claim that the information and advice Smelser and Zweifel gave to Evert was, in fact, untrue. Ultimately, whether Smelser and Zweifel, or others, had ulterior motives for desiring to remove Westphal from her position in change management, Westphal's claim for malicious injury cannot survive absent some facts to support Westphal's claim that Smelser and Zweifel conveyed false information to Evert. Because Westphal has submitted no evidence to create a material issue of fact regarding whether Smelser and Zweifel conveyed false information to Evert, Smelser and Zweifel are entitled to summary judgment on Westphal's malicious injury claim.

Tortious interference with employment

¶24 Westphal contends that Smelser and Zweifel tortiously interfered with her employment relationship. Smelser and Zweifel argue that they are entitled to summary judgment on this claim because the parties' submissions establish that they did not improperly interfere with Westphal's employment. We agree.

¶25 A claim for intentional interference with employment has five elements: (1) a contractual relationship, (2) that the defendant interfered in the contractual relationship, (3) the interference was intentional, (4) a causal

connection between the interference and the plaintiff's damages, and (5) the interference was not justified or privileged. ***Briesemeister v. Lehner***, 2006 WI App 140, ¶48, 295 Wis. 2d 429, 720 N.W.2d 531. "Employment at will is a contractual relationship, albeit one with no definite duration." ***Preston v. Wisconsin Health Fund***, 397 F.3d 539, 543 (7th Cir. 2005). Thus, Wisconsin recognizes a tort for intentionally interfering with an at-will employment relationship. ***Mackenzie v. Miller Brewing Co.***, 2000 WI App 48, ¶63, 234 Wis. 2d 1, 608 N.W.2d 331. "Interference alone, however, does not establish the tort; the interference must be 'improper.'" ***Id.***

¶26 Because justification or privilege to interfere is a defense to a tortious interference claim, Smelser and Zweifel bear the burden to establish they are not liable on those grounds. *See* ***Briesemeister***, 295 Wis. 2d 429, ¶50. Smelser and Zweifel argue that the parties' submissions establish that their interference was not improper because they provided only honest advice and truthful information to Evert.[4] We agree.

¶27 When we examine whether conduct is justified or privileged, we look to "the nature, type, duration and timing of the conduct, whether the interference is driven by an improper motive or self-interest, and whether the conduct, even though intentional, was fair and reasonable under the circumstances." ***Id.***, ¶51. Additionally, we have held that "the transmission of truthful information is privileged, does not constitute improper interference with a contract, and cannot subject one to liability for tortious interference with a

[4] Because we find no evidence that Smelser and Zweifel's interference was improper, we need not address their other defenses to Westphal's claim of tortious interference with employment.

contract." ***Liebe v. City Fin. Co.***, 98 Wis. 2d 10, 13, 295 N.W.2d 16 (Ct. App. 1980). Again, the crux of Westphal's claim is that Smelser and Zweifel conveyed false and misleading information to Evert, and therefore improperly interfered with her employment. We have already explained that the admissible evidence submitted on summary judgment does not support an inference that Smelser and Zweifel fabricated the information conveyed to Evert, or that they had reason to believe the information Zweifel gathered was untrue. Westphal's belief that the information they shared with Evert was wrong does not support a claim for tortious interference with employment.

¶28 Westphal also argues that even if the information Smelser and Zweifel conveyed to Evert was truthful, it is not necessarily privileged. She claims that truthfulness of information is only one factor to examine when considering whether conduct is improper. We disagree. While we have recognized that we look to various factors when analyzing whether conduct is improper, including the actor's conduct and motive, "truthfulness" is not merely another factor. *See* ***Mackenzie***, 234 Wis. 2d 1, ¶¶63-64. Instead, as we have recently reiterated, truth is a defense to a claim of intentional interference with contract based on an accusation of communicating false information.[5] ***AON Risk Servs., Inc., v. Liebenstein***, 2006 WI App 4, ¶20, 289 Wis. 2d 127, 710 N.W.2d 175. Because the record does not support an inference that the information

[5] Westphal disputes Smelser and Zweifel's claim of a "privilege" to interfere, arguing that Wisconsin does not recognize "privileges" to tortious interference with employment. While we agree that Wisconsin "substitutes the concept of propriety for privilege, and provides that one who intentionally and improperly interferes with the performance of a contract is liable," ***Briesemeister v. Lehner***, 2006 WI App 140, ¶50 n.8, 295 Wis. 2d 429, 720 N.W.2d 531 (citations omitted), we disagree that Smelser and Zweifel therefore may not assert truth as a defense.

Smelser and Zweifel conveyed to Evert was not true, Smelser and Zweifel are entitled to summary judgment on this claim as well.

Common law conspiracy

¶29 Finally, Smelser and Zweifel claim that the parties' submissions establish that they are entitled to summary judgment on Westphal's common law conspiracy claim. We agree.

¶30 A claim for common law conspiracy requires "(1) [t]he formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts." ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977). Again, Westphal relies on her assertion that Smelser and Zweifel conveyed false and misleading information to Evert, which we have explained is unsupported in the record. Without factual support for her claim of a wrongful act by Smelser and Zweifel, Westphal's civil conspiracy claim cannot survive summary judgment.

By the Court.—Order reversed.

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