

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP710

Cir. Ct. No. 2011SC1755

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SCOTT HAMBLY,

PLAINTIFF-APPELLANT,

V.

KRISTOFER M. LEWIS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Reversed and cause remanded.*

¶1 NEUBAUER, P.J.¹ Scott Hambly appeals from a judgment dismissing his small claims action against Kristofer M. Lewis and ordering him to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

reimburse Lewis his costs in defending against the action. Because Hambly's complaint alleged malicious prosecution, we reverse.

¶2 On September 12, 2011, Hambly filed a small claims complaint against Lewis requesting a judgment in the amount of \$10,000. Hambly alleged that in May 2008, Lewis provided a false statement to the police that resulted in Hambly's arrest and subsequent two-year "battle" in court until he was ultimately acquitted on December 6, 2010, following a jury trial.² Hambly asked the court to order Lewis to reimburse him \$8,600 in legal fees and \$1,400 for the time and travel expenses spent on his defense. In his response, Lewis denied falsifying any statements.

¶3 Lewis filed a motion to dismiss Hambly's complaint for failing to state a claim upon which relief could be granted. Lewis, who acknowledged providing information to the Washington County Sheriff's Department after being arrested for possession of narcotics, argued that there was no legal basis for requesting attorney fees from a complaining witness in a criminal action. After hearing the matter, the circuit court agreed, finding that Hambly failed to state a claim upon which relief could be granted. The court dismissed Hambly's complaint on the merits and ordered Hambly to reimburse Lewis \$300 for costs. Hambly appeals.

¶4 This court reviews de novo whether a pleading states a claim for which relief may be granted. *Heinritz v. Lawrence Univ.*, 194 Wis. 2d 606, 610,

² Hambly submitted a 2009 search warrant and supporting affidavit in which Lewis is identified as implicating Hambly in the sale of marijuana. The evidence uncovered in the search warrant resulted in a five-count criminal complaint against Hambly.

535 N.W.2d 81 (Ct. App. 1995). For purposes of our analysis, we accept the facts alleged in the complaint as true. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995). We construe the pleadings liberally and will not affirm the dismissal of a complaint unless “it is quite clear that under no circumstances can the plaintiff recover.” *Id.* at 311.

¶5 Liberally construed, Hambly’s complaint alleges malicious prosecution. The elements of malicious prosecution are:

1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
2. Such former proceedings must have been by, or at the instance of, the defendant in this action for malicious prosecution.
3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
4. There must have been malice in instituting the former proceedings.
5. There must have been want of probable cause for the institution of the former proceedings.
6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Pollock v. Vilter Mfg. Corp., 23 Wis. 2d 29, 37, 126 N.W.2d 602 (1964).

¶6 Viewing Hambly’s complaint and the facts we can infer from it in the light most favorable to his case, *see Town of Eagle*, 191 Wis. 2d at 311, Hambly alleges the elements of malicious prosecution. First, there was a criminal case pursued against Hambly. Second, Hambly alleges that Lewis’s false statements to the police caused the instigation of the criminal case against Hambly. Third, Hambly was acquitted in the former proceedings. Fourth, we can

infer an allegation of malice from Hambly's allegation that Lewis made "slandorous statements." Fifth, although Hambly does not allege that there was a lack of probable cause, he does allege that Lewis falsely accused him and that he was acquitted, from which we can infer an allegation of lack of probable cause for Lewis's alleged false allegations. Sixth, Hambly alleges that he was injured by incurring expenses in defending himself in the criminal case. Hambly's complaint states a claim for malicious prosecution and should not have been dismissed.

¶7 Lewis's sole argument on appeal is that a criminal defendant has no right to recover attorney fees as an element of damages in an action for malicious prosecution. The attorney fees Hambly seeks are those incurred in the original proceeding and not in prosecuting the malicious prosecution claim itself. Attorney fees are potentially recoverable in an action for malicious prosecution. *Waufle v. McLellan*, 51 Wis. 484, 8 N.W. 300, 301 (1881) (plaintiff entitled to attorney fees incurred in defending self against criminal prosecution instituted by defendant) (cited in A.L. Azores, Annotation, *Attorney's Fees as Element of Damages in Action for False Imprisonment or Arrest, or for Malicious Prosecution*, 21 A.L.R.3d 1068 (1968) (summarizing: "It has generally been held or recognized that in an action for ... malicious prosecution, the plaintiff may recover as an element of damages attorneys' fees incurred by him [or her] as a result of the ... malicious prosecution in question.")); *Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002 (1922) (exception to the American Rule permits recovery of attorney fees in third-party litigation caused by the party from whom fees are sought); see also *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶73, ___Wis. 2d ___, ___N.W.2d ___, (discussing *Weinhagen* rule).

¶8 We reverse and remand for further proceedings not inconsistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.