COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP651 **Cir. Ct. No. 2008CV4558**

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

GARY BACH,

PLAINTIFF-APPELLANT,

V.

JOHN KOPATICH, ROBERT KRAEMER, DEBBIE KRAEMER AND KELLY TREECE,

DEFENDANTS-RESPONDENTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Gary Bach appeals from an order granting summary judgment to John Kopatich, Robert Kraemer, Debbie Kraemer and Kelly Treece ("the Respondents"). The circuit court concluded that Bach failed to present evidence sufficient to give rise to a genuine issue of material fact as to his claims alleging invasion of privacy and a conspiracy to intercept and disclose oral communications. *See* WIS. STAT. §§ 995.50 and 968.31(2)(c) (2009-10).[1] We agree and affirm.[2]

¶2 Bach was the City of Pewaukee chief of police. Kopatich was a lieutenant in the police department; Robert Kraemer ("Kraemer") and Treece were police officers. Kraemer's wife, Debbie, was not an employee of the police department or the City. Bach alleged that the Respondents "maliciously orchestrated" to oust him from his position as police chief. Bach claimed that on the same date that he was served with notice of a complaint filed against him by a female police officer, Kopatich came to his home and, without his knowledge or consent, tape recorded a conversation in which Bach expressed negative opinions

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] We advise Bach that his brief contains numerous violations of the rules of appellate procedure. His statement of the case and statement of facts are devoid of "appropriate references to the record." *See* WIS. STAT. RULE 809.19(1)(d). His argument, too, is without "citations to the … parts of the record relied on." *See* RULE 809.19(1)(e). Except for a couple of references to his trial court brief or to police officer Cher Sneider's deposition, Bach's brief cites exclusively to the appendix. The appendix is not the record, *see* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶2 n.2, 302 Wis. 2d 245, 733 N.W.2d 322, Sneider's deposition is not part of the appeal record, and Bach provides no record cite for the trial brief. It is within this court's authority to refuse to consider arguments unsupported by references to the record. ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988).

about various employees. Bach also alleged that Kopatich shared the recording with Kraemer, who Bach believed coveted his position, that Debbie typed up a transcript of the recording and that Kraemer, Debbie and/or Kopatich provided a copy of the recording to Treece, who later lodged a complaint against Bach.

¶3 The City initiated an investigation in response to the female officer's complaint. Witnesses told the investigator that Bach engaged in and tolerated specific inappropriate conduct and language within the department. The investigator found that Bach's conduct violated the City's sexual harassment policy. Bach negotiated a Discipline Settlement Agreement and release ("the April 2007 Release") with the City so as to avoid the filing of a formal charge with the Police and Fire Commission. He agreed to serve a ten-day suspension. In exchange for the City's agreement that the suspension would constitute his full discipline, Bach agreed:

> not to file, support or participate in any action, claim, grievance, request for charges and/or complaint as it relates to this Discipline Agreement, the investigation concerning this Agreement, or the discipline provided herein, except as necessary to enforce the Agreement [and that] if such claims are filed, they will be legally binding as not actionable and shall be dismissed.

¶4 In November 2008, formal charges against Bach unrelated to the earlier investigation were filed with the Commission. Bach agreed to voluntarily retire in exchange for certain monetary considerations from the City. In January 2009, Bach and the City also entered into a Retirement Agreement and Release by which Bach agreed to forever forgo any claims against the City relating to his employment or retirement. The Agreement excluded "the current case filed in Waukesha Circuit Court 08CV4558," which Bach had filed on December 18,

2008. In that suit, Bach sought, among other things, recovery of wages lost during his disciplinary suspension and his financial outlay in defending that earlier action.

¶5 All of the defendants filed motions for summary judgment.[3] Bach filed one brief in opposition to the several motions. Bach's brief was unsupported by any admissible evidentiary documents. The circuit court granted the defendants' motions and dismissed Bach's lawsuit. Bach appeals that ruling.

¶6 We review summary judgment de novo, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). If, as here, the pleadings create fact disputes, we examine whether the moving party has submitted affidavits or other evidence establishing a prima facie case for summary judgment. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994); *see also* WIS. STAT. § 802.08(2). If so, we review the opposing party's affidavits and submissions to determine whether they place any material facts in dispute that would entitle that party to a trial. ***Id.*** at 372-73; § 802.08(2).

¶7 The simple existence of a factual dispute between the parties will not defeat summary judgment if the factual issue is not genuine. ***Park Ave. Plaza v. City of Mequon***, 2008 WI App 39, ¶24, 308 Wis. 2d 439, 747 N.W.2d 703. "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Id.*** (citation omitted). A party opposing a summary judgment motion "must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial." ***Helland v.***

[3] Bach represents without citation to the record that he, too, filed a motion for summary judgment in June 2009. We are unable to locate the motion, any responses to it or its disposition.

Kurtis A. Froedtert Mem'l Lutheran Hosp., 229 Wis.2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999).

¶8 In this court's estimation, the dispositive issue is the effect of the April 2007 Release. A release is to be treated as a contract. ***Peiffer v. Allstate Ins. Co.***, 51 Wis. 2d 329, 336, 187 N.W.2d 182 (1971). Terms used in a contract are to be given their plain or ordinary meaning. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. Here, Bach plainly agreed that any action he filed in regard to the discipline imposed was "not actionable and would be dismissed." Our analysis ends there. *See* ***id.***

¶9 Bach attempts to wriggle out from under the April 2007 Release, however, by virtue of the January 2009 Retirement Agreement. The Retirement Agreement in no way nullified the prior Release. Rather, the latter agreement simply acknowledged the existence of the already-commenced lawsuit and forbade Bach from bringing any more. Thus, Bach plainly released everyone—except Debbie Kraemer, a non-City employee—from any claims relating to the Discipline Agreement and Release.

¶10 Even on the merits, however, Bach's claims fail for an utter lack of proof. Bach bases his invasion-of-privacy claim on WIS. STAT. § 995.50. To defeat summary judgment on that ground, therefore, Bach had to set forth specific facts showing the Respondents, in a way highly offensive to a reasonable person, physically intruded onto a place that he considered private. *See* WIS. STAT. § 995.50(2)(a).

¶11 The complaint alleged that Kopatich came to Bach's home on December 18, 2006, and that the two went into the basement because Kopatich wanted to speak to Bach privately. Bach contends Kopatich surreptitiously

recorded the ensuing forty-five-minute conversation. Kopatich admits secretly tape recording Bach in Bach's driveway in August or September 2005 and at times in the workplace but testified he never recorded Bach inside his residence.

¶12 Bach concedes that being tape recorded in a driveway does not violate an expectation of privacy. Furthermore, a culture of distrust prevailed at the police department, where it is undisputed that tape recording of employees by one another—including Bach—was, if not commonplace, at least not unusual. Indeed, Bach's wife acknowledged that she downloaded on their home computer hundreds of hours of covert tape recordings Bach made of department employees. We agree with the circuit court that Bach's expectation of privacy did not create a material fact issue at all.

¶13 As for a basement recording, Bach offers no admissible proof. He testified that he does not even recall Kopatich visiting his residence.[4] Instead, he reconstructed the event based wholly on information from his wife and daughter—neither of whom heard the conversation nor had independent knowledge of any recording. Similarly, the deposition testimony of police officer Cher Sneider is not founded on personal knowledge but on her claim that Kopatich told her he taped Bach in the basement. What is more, Bach simply read Sneider's testimony into the record at the motion hearing. This is insufficient. *See* ***Helland***, 229 Wis. 2d at 756 (the summary judgment opponent may not rely on testimony not based on personal knowledge, and must set forth specific, evidentiary, admissible facts that show that a genuine issue exists for trial).

[4] Bach underwent chemotherapy in 2005, with resultant short- and long-term memory loss.

¶14 The conspiracy to intercept oral communications claim likewise fails. The interception of oral communications where one party gives consent is unlawful if it was intercepted for the purpose of committing any criminal or tortious act or for the purpose of committing any other injurious act. *See* WIS. STAT. § 968.31(2)(c). The complaint alleged that the Kraemers and Treece conspired with Kopatich to intercept Bach's oral communication for the purpose of jeopardizing Bach's employment and causing the City to discipline him.

¶15 A civil conspiracy is an agreement between two or more persons to achieve an unlawful purpose or to accomplish a lawful purpose by unlawful means. ***Maleki v. Fine-Lando Clinic***, 162 Wis. 2d 73, 86, 469 N.W. 2d 629 (1991). 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 (1977).

¶16 Bach asserts that the taping was unlawful because it was done for the purpose of attempting to have him disciplined or discharged. As proof, he once more cites a few excerpts from Sneider's deposition in which she asserted that Kopatich and Kraemer urged female officers to file a series of complaints against Bach based on his recorded comments. Again, Bach failed to make these excerpts part of the summary judgment record. Further, he does not deny using the vulgar, derogatory language toward and about females of which he is accused. Filing a harassment complaint or providing evidence of Bach's admitted misconduct to an employer is not unlawful. Any discipline flowing from the complaints was in the City's hands.

¶17 In addition, the evidence does not show an agreement among the alleged conspirators to intercept Bach's communication. The Kraemers and Treece testified that they first learned of the tape-recording only after it had occurred. Kopatich testified that he made the recording on his own initiative and turned it over to the city administrator on a direct order of the mayor. Bach himself conceded that he had no evidence of a conspiracy among the Respondents to record him and no knowledge about who transcribed it. Bach also testified that he was unaware whether the Kopatich tape played any role in triggering the investigation. The resulting report of the investigation did not reference it.

¶18 Having concluded that summary judgment is proper on other grounds, we do not address Bach's further contentions that the circuit court erred in determining that he was required to file a notice of claim and that his claim was preempted by the Worker Compensation Act. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

By the Court.—Order affirmed.

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