COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2014

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. 2013AP177 **Cir. Ct. No. 2011CV4650**

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

RODNEY RIGSBY,

PLAINTIFF,

CATHERINE CONRAD,

PLAINTIFF-APPELLANT,

V.

AM COMMUNITY CREDIT UNION, TODD STREETER, LORI M. SAUCIER, MIDCOAST FEDERAL CREDIT UNION, CREDIT UNION NATIONAL ASSOCIATION/CUNA MANAGEMENT SCHOOL, CUNA MUTUAL GROUP AND DAVID POLET,

DEFENDANTS-RESPONDENTS,

BOARD OF REGENTS UNIVERSITY OF WISCONSIN,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Catherine Conrad appeals an order dismissing Conrad's action for defamation, invasion of privacy, and trademark and trade dress infringement based on events following Conrad's performance of a singing telegram as the character "Banana Lady."[1] Conrad contends that her complaint should not have been dismissed because it stated valid claims.[2] We conclude that Conrad's complaint fails to state any cognizable claim. Accordingly, we affirm.

Background

¶2 This action stems from Conrad's performance of a singing birthday telegram as her character "Banana Lady" at the Credit Union National Association's annual conference, the 2011 CUNA Management School.[3] Conrad

[1] Conrad's complaint also asserts a claim for copyright infringement. The circuit court dismissed that claim, explaining that copyright claims are federal rather than state claims. *See* 28 U.S.C.A. § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to … copyrights."). Conrad does not raise any argument on appeal that a copyright claim is properly brought in state court. In any event, such an argument would fail. *See* ***id.***

[2] While Conrad asserts many wrongs against her, the only coherent argument we decipher in her brief is an assertion as to the merits of the claims in her complaint. Accordingly, we limit our discussion in this opinion to that issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[3] When we review an order dismissing a complaint for failure to state a claim, we assume the truth of the facts asserted in the complaint. ***Putnam v. Time Warner Cable of Se. Wis.***, 2002 WI 108, ¶11, 255 Wis. 2d 447, 649 N.W.2d 626. Accordingly, for purposes of this opinion, we rely on the facts set forth in Conrad's complaint.

was contacted by Lori Saucier regarding the telegram, and Conrad informed Saucier at that time that the "Banana Lady" character was a federal copyright and trademark, and that no photographs or videos of "Banana Lady" could be posted on the internet without a licensing fee. Saucier agreed to those terms and stated that she would advise the conference attendees in advance of the performance.

¶3 Conrad subsequently discovered that photographs and videos of the "Banana Lady" singing telegram event at the CUNA Management School had been posted on the internet. Conrad emailed Saucier and reminded her that no images of "Banana Lady" could be posted on the internet, and requested that Saucier forward the message to all conference attendees to inform them that they needed to remove all such photographs and videos immediately. Saucier agreed to forward Conrad's message to the conference attendees.

¶4 Conrad then received an email from Todd Streeter, Chief Information Officer at AM Community Credit Union, in response to Conrad's request that no conference attendees post any photographs or videos of "Banana Lady" on the internet. Streeter's email stated:

> Catherine, my name is Todd and I recently attended the CUNA Management School in Madison for two weeks. During week one, we had the pleasure of having either yourself or someone playing the part of a Bananagram serenade a member of our class who turned 50. Pictures were taken, videos as well, all in celebration of a memorable moment. Imagine my surprise upon reading the email below from a fellow classmate. I neither took a picture nor a video but I'll flat out tell you that your overzealous legal approach is both confusing as well as self-defeating. I quite frankly could care less about who trademarked what or who copyrighted that, at least in terms of people posting a couple pictures and videos to a Facebook account to celebrate a fun event. You were compensated for you[r] time weren't you? People posting videos and photos of the Bananagram experience ENHANCE your exposure and business potential,

> something that should be celebrated not forbidden. Our class did not make a profit on posting the pictures and videos of the event, but rather posted them to celebrate a fellow classmate's birthday. Lest you think I don't have familiarity with intellectual property, I'd like to also mention that I do website design, free lance photography, and graphic design on a regular basis. I understand that you want to protect your brand, which is why no official CUNA Management School Class of 2012 website or Facebook page posted anything about the Bananagram, but to issue a terse email like the one you did below to folks who simply wanted to show others what fun they had on their personal Facebook pages seems rude and overreaching. It appears that Amy Jesse's nephew works for your company and perhaps had a hand in connecting our class with a company that could offer a service such as yours. I can tell you this: I will warn future classes that your company has asinine rules about being able to post pictures and photos and will encourage them to seek other companies who are friendlier to the buyer. Furthermore, I will pass your litigious email to other friends and family I have in the Madison area and warn them that if they do business with you, expect to get heavy handed emails and threats. It really is a shame that such a unique and positive experience now will likely leave a bad taste in the mouths of potentially 83 credit union employees.

¶5 Conrad filed this lawsuit against Streeter and his employer, seeking damages for defamation.[4] Conrad later added additional defendants, including Saucier and CUNA Management School, and added claims for copyright and trademark infringement and invasion of privacy.

¶6 The circuit court dismissed Conrad's complaint for failing to state a claim. Conrad appeals.

[4] Rodney Rigsby was also a plaintiff in the circuit court, but has not appealed the circuit court decision.

Discussion

¶7 "'Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of the complaint is improper.'" ***Putnam v. Time Warner Cable of Se. Wis.***, 2002 WI 108, ¶11, 255 Wis. 2d 447, 649 N.W.2d 626 (quoted source omitted). Because the facts asserted in Conrad's complaint do not set forth any cognizable claim, the complaint was properly dismissed.

¶8 Conrad argues first that she has stated a claim for defamation. Conrad argues that Streeter's email placed Conrad in a negative light by implying that Conrad did not have a right to enforce her copyright or trademark. Conrad also argues that the statements, as a whole, would tend to deter others from doing business with Conrad. *See* ***Bauer v. Murphy***, 191 Wis. 2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995) ("A communication is defamatory 'if it tends so to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her].'" (quoted source omitted)).

¶9 In general, a defamatory statement must be a statement of fact rather than opinion. *See* WIS JI–CIVIL 2500. A statement of opinion may be defamatory if it departs from expressing pure opinion and communicates a "mixed opinion," that is, a statement that blends an opinion with underlying facts. However, to be actionable as defamation, the statement of opinion must imply undisclosed facts as the basis of the opinion. *See* Restatement (Second) of Torts § 566 (1977)).

¶10 Here, Streeter's email expressed Streeter's opinion that Conrad's policy about posting her image on the internet was an "overzealous legal approach" that was "both confusing as well as self-defeating." Streeter also

expressed that he believed Conrad's email to the conference attendees on that topic was "rude and overreaching." Streeter stated that he would "warn future classes that [Conrad's] company has asinine rules about being able to post pictures and photos"; "encourage them to seek other companies who are friendlier to the buyer"; and would "pass [Conrad's] litigious email to other friends and family [Streeter has] in the Madison area and warn them that if they do business with [Conrad], expect to get heavy handed emails and threats." These statements were plainly Streeter's opinion regarding the fully disclosed facts of Conrad's policy as to posting her image on the internet, as expressed in Conrad's email to the conference attendees. Accordingly, none of those statements are actionable. Additionally, nothing else in Streeter's email, set forth in full above, rises to the level of defamation. We conclude that Conrad's complaint fails to state a claim for defamation.[5]

¶11 Next, Conrad contends that she has stated a claim for invasion of privacy. Conrad asserts that the respondents used photographs and videos of Conrad as "Banana Lady" on their websites for advertising purposes without Conrad's consent. *See* WIS. STAT. § 995.50(2)(b) (statutory right of privacy is violated by "[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person ...."). However, Conrad's complaint states only that photographs and videos of her performance of a singing telegram at the CUNA Management School were "posted on the internet" and, more specifically, "on the

[5] To the extent Conrad's brief attempts to set forth other arguments as to why the statements in Streeter's email are actionable as defamation, we deem those arguments insufficiently developed to warrant a response. *See* ***Pettit***, 171 Wis. 2d at 646.

commercial CUNA Management School website." Nothing in Conrad's complaint asserts in what way any of the respondents used the photographs or videos of "Banana Lady" for advertising purposes. Moreover, Conrad's complaint does not support a reasonable inference that any of the credit union respondents used those photographs or videos for advertising purposes. Rather, the only reasonable inference is that the CUNA Management School website displayed photographs and videos of the "Banana Lady" singing telegram as an event that occurred at the conference. Because Conrad's complaint does not set forth any facts to support Conrad's claim that her name or picture was used in advertising or for purposes of trade, this claim fails.

¶12 Conrad also argues that she has stated claims for trademark and trade dress infringement. Conrad asserts that the respondents infringed on the trademark and trade dress of "Banana Lady" by posting photographs and videos of the distinctive character "Banana Lady" on their websites. *See* ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶28, 261 Wis. 2d 4, 660 N.W.2d 666 ("The purpose of both trade dress and trademark is to enable a business to identify itself as the source of a given product through the adoption of some distinctive mark."). Conrad asserts that the respondents' use of the photographs and videos of "Banana Lady" on their websites would likely create confusion among consumers as to the affiliation between "Banana Lady" and the credit unions and CUNA Management School. *See* ***id.***, ¶30; ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis. 2d 226, 233-34, 552 N.W.2d 440 (Ct. App. 1996).

¶13 The facts set forth in Conrad's complaint—that photographs and videos of Conrad performing a singing telegram as her trademarked character "Banana Lady" at the CUNA Management School were posted on the internet,

including the CUNA Management School website—simply do not give rise to trademark or trade dress infringement claims. There is nothing in the complaint alleging that any respondent displayed the photographs and videos in a way that would possibly confuse consumers as to the connection between "Banana Lady" and any of the credit unions or CUNA Management School. *See* ***Fireman's Fund Ins. Co. of Wis.***, 261 Wis. 2d 4, ¶30 ("The key to finding a violation [of trade dress] 'is a determination that the materials used by the defendant created a likelihood of confusion, deception or mistake on the part of the consuming public.'" (quoted source omitted)); ***Madison Reprographics, Inc.***, 203 Wis. 2d at 234 ("In order to prevail on [a trademark] claim, the plaintiff must show that a designation meets the definition of trademark or trade name and that the defendant's use of a similar designation is likely to cause confusion."). Rather, the only reasonable inference from the facts alleged in Conrad's complaint is that the CUNA Management School website displayed photographs and videos of an event that occurred at the conference, that is, the performance of the "Banana Lady" singing telegram. Because the facts in Conrad's complaint do not support a reasonable inference that the consuming public would have been confused by those photographs and videos, the complaint does not state a claim for trademark or trade dress infringement.

¶14 Finally, Conrad asserts that she has stated claims for breach of a duty of care and joint and several liability. These arguments are premised on the idea that Conrad's damages from the alleged copyright and trademark infringement would not have occurred if Saucier had made the announcement as to Conrad's photograph and video policy before Conrad's performance. Conrad asserts that, instead, the announcement was made after Conrad's performance, which Conrad asserts was too late. She then asserts that all respondents contributed to Conrad's

harm from the copyright and trademark infringement, invasion of privacy and defamation. Because we have concluded that Conrad's complaint does not support any of those claims, this argument fails as well.

By the Court.—Order affirmed.

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