

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1330

Cir. Ct. No. 2013CV1817

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BRIAN A. HENSON AND KATHLEEN S. M. HENSON,

PLAINTIFFS-APPELLANTS,

V.

MONICA M. STROEDE AND RONALD G. DOBRZYNSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Brian and Kathleen Henson appeal pro se from a circuit court order dismissing their amended complaint against Monica Stroede and Ronald Dobrzynski (hereafter Stroede). The amended complaint alleged three

claims arising from a dispute between these former apartment building neighbors: private nuisance, tortious interference with contract, and defamation. The circuit court dismissed for failure to state a claim. We affirm the dismissal of the Hensons' claims for private nuisance and tortious interference with contract. However, we conclude that the Hensons' defamation claim should not have been dismissed because it was properly pled. Therefore, we affirm in part, reverse in part, and remand for further proceedings in the circuit court on the Hensons' defamation claim.

¶2 In their amended complaint, the Hensons alleged that they were tenants in a multi-family apartment building in which Stroede also lived. Over a period of approximately eighteen months, Stroede directed a variety of nasty behavior toward them and their then two-year-old son. Stroede allegedly yelled on numerous occasions that Brian Henson was a “[expletive] felon.” Stroede yelled this allegation repeatedly on numerous occasions such that the Hensons and guests in their home heard the allegation along with other derogatory and disparaging remarks. Derogatory and disparaging remarks were also directed at the Hensons' two-year-old son. In addition to alleging that this conduct constituted a private nuisance and defamation, the Hensons alleged that by this behavior, Stroede tortiously interfered with the Hensons' contractual relationship with their common landlord. The Hensons ultimately vacated their apartment, although they conceded in the circuit court that they were not evicted.

¶3 Stroede moved to dismiss the Hensons' amended complaint. The circuit court granted the motion to dismiss the private nuisance claim because Stroede's conduct did not amount to a nuisance as a matter of law. The court also concluded that the Hensons did not make sufficient allegations to support their tortious interference claim. Turning to the defamation claim, the court ruled that

although Brian Henson was not a felon, the Hensons did not allege that Stroede communicated this false allegation with intent to be heard by others. The Hensons appeal.

¶4 “A motion to dismiss tests the legal sufficiency of the complaint.” *Ladd v. Uecker*, 2010 WI App 28, ¶7, 323 Wis. 2d 798, 780 N.W.2d 216. On a motion to dismiss, the court accepts as true the facts alleged in the complaint and reasonable inferences from those facts. *Id.* When deciding whether a complaint should be dismissed for failure to state a claim on which relief can be granted, we liberally construe the complaint in favor of stating a claim. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). “The purpose of a complaint in a notice pleading jurisdiction is to provide ‘sufficient detail’ such ‘that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery.’” *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶21, 349 Wis. 2d 587, 836 N.W.2d 807. The complaint need only allege “the basic facts giving rise to the claims.” *Id.* (citation omitted). We independently determine whether the complaint was legally sufficient. *Ladd*, 323 Wis. 2d 798, ¶7.

¶5 We assume without deciding that the amended complaint properly pleads a claim for private nuisance. Nevertheless, we affirm the dismissal of the nuisance claim because under the facts alleged in the amended complaint, a private nuisance claim is barred on public policy grounds.¹ Nuisance claims can be barred on public policy grounds where allowing such a claim would “would

¹ We independently determine whether public policy bars a claim in any given case. *Fandrey ex rel. Connell v. American Family Mut. Ins. Co.*, 2004 WI 62, ¶6, 272 Wis. 2d 46, 680 N.W.2d 345.

enter a field with no just or reasonable stopping point.” *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶34, 294 Wis. 2d 397, 717 N.W.2d 760.² Wisconsin law provides other avenues for addressing the conduct alleged in this case.³ We decline to apply the law of private nuisance to the Hensons’ allegations.

¶6 We affirm the dismissal of the Hensons’ tortious interference with contract claim because it was not properly pled. The elements of tortious interference are: “(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere.” *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 2006 WI 128, ¶37 n.9, 297 Wis. 2d 606, 724 N.W.2d 879 (citation omitted).

¶7 The circuit court concluded that the Hensons’ amended complaint was insufficient because it did not allege facts or facts from which inferences could be drawn that Stroede’s conduct interfered with the Hensons’ contractual relationship with their common landlord. The Hensons conceded at the motion to dismiss hearing that they were not evicted. We agree with the circuit court that the

² In support of their claim that Stroede’s conduct could be redressed via a private nuisance claim, the Hensons rely upon an unpublished one-judge opinion of this court, *Seeger v. Kreuzpainter*, No. 2009AP2794, unpublished slip op. (WI App Apr. 14, 2010). In that case, the circuit court determined, after a trial, that a neighbor’s noise and other disruptive behavior constituted a private nuisance. *Id.*, ¶10. We are not required to consider this unpublished case, and we are not bound by it. WIS. STAT. RULE 809.23(3)(b) (2013-14). We do not address this case.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

³ For example, harassment law.

amended complaint was insufficient to give notice of a claim relating to the second and fourth elements of tortious interference, i.e., that Stroede interfered with the Hensons' contractual relationship and there was a causal connection between the interference and the harm to the Hensons. The amended complaint does not show that the Hensons have a basis for recovery on their tortious interference claim. *United Concrete*, 349 Wis. 2d 587, ¶21.

¶8 We turn to the dismissal of the Hensons' defamation claim. The elements of defamation are:

a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her.

Ladd, 323 Wis. 2d 798, ¶8.

¶9 We conclude that the amended complaint alleges a defamation claim. Paragraph 16 of the amended complaint alleges that the defamatory statements (among them, Brian Henson is a felon) were published to others when Stroede yelled these accusations at the Hensons in their apartment building. Paragraphs 18 and 20 allege that guests in the Hensons' home, including family members and business associates, heard the statements. Paragraph 23 refers to electronic circuit court records stating that the charges against Brian Henson were dismissed, paragraph 41 alleges that the felon allegations were false, and paragraph 42 alleges that the felon allegations were not privileged. Paragraph 49 alleges that Stroede's disparaging statements damaged Brian's reputation and

deterred others from associating with him. Liberally construing the amended complaint, we conclude that the complaint states a defamation claim.⁴

¶10 In dismissing the defamation claim, the circuit court noted that there was no allegation that Stroede acted with intent. First, intent is an element of criminal defamation. WIS. STAT. § 942.01(1). The Hensons brought a civil defamation claim. Second, if the circuit court is correct that intent is an element of a civil defamation claim, which we need not decide, the amended complaint alleges that Stroede allegedly made defamatory statements while yelling at the Hensons. Intent can be inferred from conduct. *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 569, 360 N.W.2d 65 (Ct. App. 1984) (intent is a fact that can “be inferred from the acts and statements of the person, in view of the surrounding circumstances”). The amended complaint permits a reasonable inference that Stroede intended to be heard by others because the allegedly defamatory statements were conveyed by yelling. *Ladd*, 323 Wis. 2d 798, ¶7.

¶11 The circuit court also concluded that yelling in the apartment building did not constitute publication for purposes of the defamation claim. On appeal, Stroede argues that the Hensons did not allege any facts supporting “publication” of the false statements. A defamation claim requires that a false statement be “communicated by speech ... to a person other than the one

⁴ The respondents’ brief persists in referring to Brian Henson as a felon and goes so far as to allege that this alleged status qualifies as a defense to the defamation claim. On the record before it, the circuit court found that Brian Henson had not been convicted of a felony. Other than citing earlier proceedings in the criminal case which did not result in a felony conviction, Stroede does not counter the court’s finding with citation to evidence or other portions of the record. Given the circuit court’s uncontested finding that Brian Henson was not convicted of a felony at the time of the circuit court proceedings in this case, the felon allegation in the respondents’ brief arguably runs afoul of counsel’s duty to exhibit candor toward a tribunal. SCR 20:3.3.

defamed.” *Id.*, ¶8. “Publication, in the law of defamation, is the communication of defamatory matter to a third person, or persons.” *Hucko v. Jos. Schlitz Brewing Co.*, 100 Wis. 2d 372, 377 n.3, 302 N.W.2d 68 (Ct. App. 1981) (citation omitted). In this case, the concepts of communication and publication are neither distinct nor different. The amended complaint alleges that others heard what Stroede yelled. The complaint alleges communication of an allegedly false statement.

¶12 Because the amended complaint states a claim for defamation, the defamation claim should not have been dismissed.⁵

¶13 We affirm the circuit court’s order to the extent it dismisses the Hensons’ private nuisance and tortious interference with contract claims. We reverse the circuit court’s order to the extent it dismissed the Hensons’ defamation claim, and we remand for the defamation claim to be determined in further circuit court proceedings.

¶14 No WIS. STAT. RULE 809.25 costs on appeal are awarded to any party.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

⁵ We leave for the circuit court on remand the task of determining the type of proof required for the Hensons’ defamation claim. Our analysis is strictly limited to the sufficiency of the amended complaint.

