

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2009

David R. Schanker
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. 2008AP1321

Cir. Ct. No. 2005CV82

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN ZWIACHER, MD,

PLAINTIFF-APPELLANT,

V.

**COMMUNITY HEALTH NETWORK, INC., DBA BERLIN MEMORIAL
HOSPITAL, DARREN NELSON, MD, BARRY ROGERS, MD AND JEFFREY
CARROLL, MD,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Green Lake County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. John Zwiacher, M.D., appeals from an order granting summary judgment to Community Health Network, Inc. (CHN), d/b/a/ Berlin Memorial Hospital, Darren Nelson, M.D., Barry Rogers, M.D., and Jeffrey Carroll, M.D. The order dismissed Zwiacher’s breach of contract, tortious interference with contract and conspiracy claims on grounds of immunity from civil liability for those who participate in good faith in a health care peer review under WIS. STAT. § 146.37 (2007-08).¹ Despite the decidedly different spin the parties place on the facts, there is no genuine issue of material fact. We affirm.

¶2 At the time relevant to this action, Zwiacher, Nelson and Rogers were general surgeons at CHN; Carroll was chief of staff. Zwiacher and CHN entered into a one-year employment contract in 1996 and renewed the contract annually through 2003, with the final term to expire on March 31, 2004.

¶3 At some point, interpersonal and professional differences arose between Zwiacher and Nelson and Rogers. ICU nursing staff attributed low morale and threats of attrition to Zwiacher. In November 2003, Zwiacher left town for several days without notifying hospital staff how to reach him or arranging for other coverage. Nelson and the other co-chair of the surgery department advised Zwiacher that “[s]ince this has been discussed in the past we have no alternative but to let this letter serve as a written warning ... [that] the next episode will result in suspension of privileges.” Hospital and medical staff leaders met with Zwiacher to discuss the various concerns. In January 2004,

¹ Zwiacher also alleged defamation. The circuit court dismissed the claim against Nelson and Rogers as beyond the statute of limitations and against Carroll under WIS. STAT. § 146.37. Zwiacher does not challenge the disposition of the defamation claim on appeal.

All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

Zwiacher notified CHN he would not renew his employment contract. He remained a member of the medical staff as an independent physician.

¶4 The Medical Patient Care Council (MPCC) and the Surgical Patient Care Council (SPCC) are CHN standing committees responsible for reviewing the quality of patient care provided to medical and surgical patients, respectively. On April 16, 2004, twelve physicians of the Medical Executive Committee (MEC), including Zwiacher and Nelson, convened to peer review two of Zwiacher’s cases. The MPCC had flagged them as Level III cases, meaning that “most experienced, competent practitioners would have handled the case differently” in at least one respect.² Neither Nelson nor Rogers were MPCC members. Zwiacher agreed that for an indefinite period he would obtain medical consults on his postoperative patients admitted to the ICU. A week later, Zwiacher wrote directly to chief of staff Carroll criticizing Nelson’s care of two patients. By majority vote, the MEC suspended Zwiacher’s MEC participation for six months for circumventing peer review procedures, which require first taking concerns to the SPCC at large.

¶5 Shortly thereafter, the SPCC held peer review discussions on four more of Zwiacher’s cases, three Level IIIs and one Level II. Surgeons Nelson and

² The MPCC/SPCC assigns one of three levels after evaluating cases for appropriateness and timeliness of diagnosis, treatment initiation, and response to clinical deterioration:

Level I—Most experienced, competent practitioners would have handled the case similarly in all of the [enumerated areas].

Level II—Some experienced, competent practitioners might have handled the case differently in one or more of the [enumerated areas].

Level III—Most experienced, competent practitioners would have handled the case differently in one or more of the [enumerated areas].

Rogers participated in those reviews, as they had on two of Zwiacher's Level II cases in 2002 and 2003. Zwiacher protested that peer reviews by "economic competitors" posed a conflict of interest and requested outside peer review. CHN at times outsourced peer reviews, but it had no policy for doing so on demand.

¶6 Meanwhile, when Zwiacher changed his status from CHN employee to independent healthcare provider, he had to reapply to participate in Network Health Plan (NHP), a local health insurance group. As part of the application process, NHP required chief of staff Carroll to complete a credentials verification questionnaire. Carroll noted the medical consultation agreement and the MEC suspension, but still recommended that NHP accept Zwiacher's application. NHP did not. It advised Zwiacher of his appeal rights and that it would file a report with the National Practitioner Data Bank (NPDB) "if reporting is required by law."³ Zwiacher did not timely appeal, and NHP filed an Adverse Action Report.

¶7 In July 2004, Zwiacher applied to renew his clinical privileges and medical staff membership. CHN president and CEO Craig Schmidt encouraged Zwiacher to voluntarily withdraw his application and advised him that if he did not, CHN's medical staff leadership and executive management would recommend against reappointment due to the documented problems and discord. The letter also advised that a cooperative withdrawal "will most likely not generate a need to submit a report to the [National Practitioner] Data Bank which

³ The National Practitioner Data Bank (NPDB), created under the Health Care Quality Improvement Act of 1986, is a repository of health care practitioners' professional credentials, including reports of adverse peer review actions. *See* 45 C.F.R. 60.1 (2009). Professional review actions that adversely affect a physician's clinical privileges for longer than thirty days must be reported to the NPDB. *See* 42 U.S.C. § 11133 (2007); *see also* 45 C.F.R. 60.9(a), (b) (2009).

may well be the case in the future.” Zwiacher withdrew his application, and his CHN medical staff membership ended on September 30, 2004.

¶8 Zwiacher then commenced this action. The circuit court granted the defendants’ summary judgment motion on grounds that WIS. STAT. § 146.37 immunizes them from suit. Zwiacher argues on appeal that summary judgment was wrongly granted because reasonable competing inferences exist about the respondents’ good faith. He contends that they saw his thriving practice as an economic threat to the “good old boys’ network” and used the peer review process to cloak their ulterior motive of ousting him.

¶9 We review an award of summary judgment de novo, applying the same methodology as does the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 Zwiacher’s primary argument is that the respondents breached the contractual duties the CHN medical staff bylaws impose. That argument failed below because the trial court found that Zwiacher “fail[ed] utterly” to relate his complaints about the defendants’ conduct to any provision in the bylaws or policies. Zwiacher takes a new approach on appeal and asserts that the breach was of the duty of good faith and fair dealing inherent in every contract. *See Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988). We reject this new tack. As he failed to plead or argue it in the circuit court, it now is waived. *See Schroeder v. Blue Cross & Blue Shield*, 153 Wis. 2d 165, 183, 450 N.W.2d 470 (Ct. App. 1989).

¶11 Turning to the claim as pled and argued before the trial court, Zwiacher asserted that the respondents breached the bylaws in regard to the peer review of his cases. CHN and the respondent doctors contend that they are shielded by WIS. STAT. § 146.37, the peer review statute, and that they did not violate the bylaws in any event. Section 146.37 provides in relevant part:

(1g) ... [N]o person acting in good faith who participates in the review or evaluation of the services of health care providers . . . is liable for any civil damages as a result of any act or omission by such person in the course of such review or evaluation. Acts and omissions . . . include, but are not limited to, acts or omissions by peer review committees or hospital governing bodies in censuring, reprimanding, limiting or revoking hospital staff privileges . . . or taking any other disciplinary action against a health care provider.

¶12 We must presume an actor's good faith. WIS. STAT. § 146.37(1m). One seeking to overcome the presumption of good faith must do so by clear and convincing evidence. *Id.* ; see also *Rechsteiner v. Hazelden*, 2008 WI 97, ¶33, ___ Wis. 2d ___, 753 N.W.2d 496. Thus, at the summary judgment stage, Zwiacher had to present facts or competing inferences sufficient to convince the trial court that there was a triable dispute regarding the defendants' good faith. See *Limjoco v. Schenck*, 169 Wis. 2d 703, 713, 486 N.W.2d 567 (Ct. App. 1992). Conclusory assertions are insufficient. *Rechsteiner*, 2008 WI 97, ¶85.

¶13 In *Limjoco*, the plaintiff doctor claimed that bad faith underlay the defendant doctors' peer review because they bore a grudge against him and were financially motivated to oust him. See *Limjoco*, 169 Wis. 2d at 712-13. We concluded that Limjoco failed to establish a nexus between the defendants' conduct and his allegations of a vendetta, or between his departure and any economic gain to them. *Id.* at 713-14. Limjoco thus failed to make good faith a

disputed issue because he offered only conclusory statements, rather than established facts from which we could draw inferences of bad faith. *Id.* at 714-15.

¶14 Zwiacher, too, only speculates that respondents were improperly motivated by economic gain. Some might call Nelson and Rogers “colleagues,” but Zwiacher labels them “competitors” because all three are general surgeons practicing in the same town and asserts they “stood to gain” if he left. He asserts bad faith because CHN allowed them to critique his cases under the guise of peer review despite his requests for outsourcing, but he cites no bylaw authorizing outside peer review upon request. In fact, he complains that there is no policy. If the contract he signed contained no such provision, respondents hardly can be said to have breached it. Zwiacher also offers no established facts from which we can infer a link between his departure and any economic gain to Carroll or CHN.

¶15 Zwiacher likewise fails to connect the events leading to his departure and his claim of a bad faith crusade against him. He may disagree with the results of his peer reviews, but he offers no evidence, nor even asserts, that the care councils miscategorized his case levels. Indeed, he admitted misjudging one patient’s postoperative course and that, due to their ongoing communication problems, the ICU nurses were “afraid to call” him with concerns about another of his postoperative patients. Further, even assuming that Nelson and Rogers were biased against him, Zwiacher does not suggest how they may have held sway over the twelve physicians on the MEC, the six other SPCC peer reviewers, or the physicians on the MPCC of which Nelson and Rogers were not a part.

¶16 Accepting for argument’s sake that respondents wished Zwiacher gone, we still cannot say it leads to an inference that they acted in bad faith. On the one hand we have Zwiacher arguing from his rendition of bylaw and policy

violations, from a skewed presentation of the facts, or from assertions for which we find no support at all.⁴ On the other hand, we have uncontroverted evidence of disharmony between him and the nursing and medical staffs, a written reprimand for more than once leaving his patients without arranging surgical coverage or contact information, MEC participation suspension for skirting the peer review process, and care concerns leading to a requirement that he get medical consults on his ICU patients. Zwiacher has not clearly and convincingly overcome the presumption of good faith. His speculative assertions are incapable of creating a genuine issue of material fact concerning the peer review committee's bad faith.

¶17 Zwiacher next contends that respondents tortiously interfered with his CHN and NHP contracts and prospective contracts with other facilities. He argues, for example, that they sabotaged his practice through the peer review process, threatened NPBD reports to coerce his compliance and, by their wrongful acts thwarted his continued relationship with NHP and ability to pursue opportunities at two area hospitals. The trial court found that Zwiacher did not specifically allege that Rogers or Nelson interfered with the NHP contract and that Carroll's communication with NHP was privileged under WIS. STAT. § 146.37.

⁴ Zwiacher's brief offers numerous policy and bylaw excerpts, but trying to find them in their entirety and in context was vexing, at best. His record citations for the excerpts match neither the record documents nor the mysteriously paginated appendix and so provide little use for reference. It is the appellant's responsibility to ensure that the record is sufficient to facilitate appellate review. See *Seltrecht v. Bremer*, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). Moreover, we have no duty to scour the record to review arguments unaccompanied by adequate record citation. *Roy v. St. Luke's Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256, review denied, 2008 WI 19, 307 Wis. 2d 293, 746 N.W.2d 810, 2006AP480 (Jan. 22, 2008); see also WIS. STAT. RULE 809.19(1)(e). We agree with respondents that Zwiacher simply "mixes and matches various select excerpts of the Bylaws," combines them with "disparate portions of the ... Peer Review and Appointment/Reappointment Policies," to arrive at "conclusory assertions about the end of his privileges to suit his purposes."

¶18 To show tortious interference with a contract, Zwiacher needed to show: (1) he had an actual or prospective contract; (2) the respondents interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the respondents were not justified or privileged to interfere. *See Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 456, 597 N.W.2d 462 (Ct. App. 1999). We already have determined that WIS. STAT. § 146.37 afforded respondents immunity for their peer review actions. Zwiacher's other contentions as alleged in his complaint, described in his deposition testimony and argued on appeal all are vague and speculative. Zwiacher testified, for instance, that he "learned" that NHP's decision partly was based on Carroll's responses to the questionnaire and that he "think[s]" he did not get an interview in Fond du Lac "because of this CHN circumstance" based on an unidentified recruiter's comments, which he conceded contained "no specifics."

¶19 Zwiacher's assertions that respondents fed NHP false information and "threaten[ed]" him about reporting him or not to the NPDB also crack under scrutiny. NHP required Carroll to complete a recredentialing form when Zwiacher left CHN's employment. The answers Carroll supplied are demonstrably true. 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 contract or a prospective contract. *Liebe v. City Fin. Co.*, 98 Wis. 2d 10, 13, 295 N.W.2d 16 (Ct. App. 1980). Indeed, Carroll recommended that NHP approve Zwiacher's application. Furthermore, the NPDB reporting CHN referenced was not discretionary. Accordingly, Zwiacher's claims of unjustified intentional interference simply are conclusory and fall short of creating disputes of material fact.

¶20 Finally, Zwiacher asserts that sufficient evidence supports his claim of a civil conspiracy under WIS. STAT. § 134.01. Because a conspiracy must be specifically alleged and finding that Zwiacher relied only on innuendo to show a combination among the defendants, the trial granted summary judgment.

¶21 A claim for a civil conspiracy under WIS. STAT. § 134.01 requires a showing that the respondents acted together; with a common purpose to injure his business; with malice; and the acts financially injured him. *See* WIS JI-CIVIL 2820 (2008). The essence of the action is the damages that arise out of the conspiracy, not the conspiracy itself. *Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis. 2d 73, 87, 469 N.W.2d 629 (1991). Malice is an integral element and requires an intent to do “wrongful” harm as an end in itself. *See Maleki*, 162 Wis. 2d at 86-88. It does not include incidental harms that derive from seeking a competitive advantage. *See Brew City Redev. Group, LLC v. The Ferchil Group*, 2006 WI 128, ¶23 n.7, 297 Wis. 2d 606, 724 N.W.2d 879. The elements must be established by more than a mere suspicion or conjecture and must be proved as to each alleged conspirator. *Maleki*, 162 Wis. 2d at 84, 86.

¶22 Zwiacher barely argues malice and completely fails to demonstrate that all of the respondents were motivated by an intent to do him wrongful harm as an end in itself. Insufficient evidence of malice is dispositive. *Id.* at 86. We therefore need not address Zwiacher’s arguments regarding the other elements of a WIS. STAT. § 134.01 conspiracy. Summary judgment on this claim also was proper.

By the Court.—Order affirmed.

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

