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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

GARY BACH,

Plaintiff-Appellant,

vs.

Appeal No. 2011AP00651

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

Defendants-Respondents,

ACUITY, A Mutual Insurance Company,

Intervenor-Respondent.

On Appeal from the Circuit Court of Waukesha County
The Honorable Michael O. Bohren, Circuit Judge, Presiding
Circuit Court Case No. 08-CV-4558

**BRIEF OF DEFENDANTS-RESPONDENTS, ROBERT KRAEMER,
DEBBIE KRAEMER AND KELLY TREECE**

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STATEMENT OF ISSUES PRESENTED

1. Whether the standard for summary judgment was met?

Answered by the trial court: Yes.

2. Whether Plaintiff presented sufficient evidence of an invasion of privacy under Wis. Stat. § 995.50 to avoid summary judgment?

Answered by the trial court: No.

3. Whether Plaintiff presented sufficient evidence of a violation under Wis. Stat. § 968.31 to avoid summary judgment?

Answered by the trial court: No.

4. Whether Plaintiff presented sufficient evidence of a conspiracy to avoid summary judgment?

Answered by the trial court: No.

5. Whether the exclusivity provisions of Wisconsin Worker's Compensation Act barred Plaintiff's claims?

Answered by the trial court: Yes.

6. Whether a prior settlement agreement and release executed by Plaintiff barred his claims?

Answered by the trial court: Yes.

7. Whether Plaintiff's failure to file a notice of claim under Wis. Stat. § 893.80(1) barred Plaintiff's claims?

Answered by the trial court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted under the criteria of Wis. Stat. §§ 809.22 and 809.23 because this case simply requires the Court to apply existing law to undisputed facts, and the arguments are fully set forth in the briefs.

STATEMENT OF THE CASE

This is an appeal of a decision granting summary judgment and dismissing Plaintiff-Appellant's lawsuit on multiple grounds pursuant to an oral ruling on January 20, 2011 in the Circuit Court for Waukesha County, the Honorable Michael O. Bohren, presiding.

An Order setting forth the Circuit Court's decision was entered on February 10, 2011. Judgments and costs in favor of Defendants-Respondents were entered on March 11, 2011. Plaintiff-Appellant Gary Bach appeals.

STATEMENT OF FACTS¹

Parties

Plaintiff-Appellant Gary Bach (hereinafter “Bach”) was appointed Chief of Police of the City of Pewaukee in December, 2002. (R. 2:4) He was Chief of Police until December 31, 2008, when he voluntarily retired in exchange for a monetary settlement of \$170,879.90. (R. 89, Ex. A:5, 83-84; R. 89, Ex. K) Defendant-Respondent John Kopatich (hereinafter “Kopatich”) was employed as a lieutenant for the City of Pewaukee Police Department. (R. 2:3; R. 89, Ex. A:7) Defendants-Respondents Robert Kraemer (hereinafter “Kraemer”) and Kelly Treece (hereinafter “Treece”) were employed as police officers for the City of Pewaukee. (R. 2:3; R. 22:2) Defendant-Respondent Debbie Kraemer is the wife of Robert Kraemer and was not employed by the City of Pewaukee. (R. 89, Ex. B:72)

¹ Contrary to Wis. Stat. § 809.19(1)(d), Bach’s Statement of Facts fails to cite to any fact contained in the Record; *Haley v. State*, 207 Wis. 193, 198-99, 240 N.W. 829 (1932). Bach merely recites the allegations of the Complaint. (R. 2)

Relevant Policies for the City of Pewaukee Police Department

The City of Pewaukee had a number of relevant policies in place with regard to the City of Pewaukee Police Department. (R. 89, Ex. C:2-3) As Chief of Police, Gary Bach was subject to these policies and he was obligated to act in conformity with these rules and regulations. (Id.)

These policies prohibited members from the police department from engaging in any type of sexual harassment or inappropriate behaviors or using inappropriate language. Specifically, Policy 1.00 A.2, Rules and Regulations, Reasonable Standards, stated that “[m]embers of the Department shall be governed by the ordinary and reasonable standards of good behavior and shall not conduct themselves in such a manner as to bring discredit on the Department or City.” (R. 89, Ex. C:2) This rule further required each member of the Department to be “civil, orderly, calm and courteous” in his or her dealings with both “supervisors and associates.” (Id.) The City of Pewaukee further had an explicit prohibition against any type of sexual harassment and discrimination which stated as follows:

ANY sexual harassment, whether verbal, physical or environmental, is **unacceptable** and **will not be tolerated**, whether it occurs in the workplace or outside work-sponsored activities. . . . Types of behavior that constitute sexual harassment may include, but not be limited to. . . Derogatory, vulgar, or graphic written or oral statements regarding ones sexuality, gender or sexual experience. . . Unwanted sexual compliments, innuendoes, suggestions or jokes . . .The display of sexually suggestive pictures or objects.

(R. 89, Ex. C:3 (emphasis in original)).

The City of Pewaukee also regulated the use of email and stated that any transmission of electronic messages “shall be treated with the same degree of propriety, professionalism, and confidentiality as an official written correspondence.” Policy 1.26A.1. (R. 89, Ex. C:3) The City of Pewaukee also prohibited “accessing, transmitting, downloading or printing any materials (other than that required for police business) that involves the use of obscene language, images, jokes, sexually explicit materials, or messages that disparage any person, group or classification of individuals” and it was prohibited whether a recipient consented to or requested such material. Policy 1.26A.5. (Id.)

Bach's History and Use of Inappropriate Language

In his role as Police Chief, Bach never attended any advanced management training. (R. 71, Ex. A:6) Before becoming a police officer, he worked as a factory worker and for the Waukesha County Park and Planning Department. (R. 89, Ex. D:1) He started working as a patrol officer for the Town and City of Pewaukee part-time in 1980. (Id.) He became a full-time sergeant for the Pewaukee Police Department in 1991. In 2002, he was promoted to Lieutenant and Chief of Police. (Id.) An independent review of the Pewaukee Police Department conducted by Resource Management Associates described Chief Bach as “a good example of a person who has been promoted well beyond his level of competence.” (R. 71, Ex. A:6)

During the course of his employment with the Pewaukee Police Department, Bach was involved in a beer distribution ring with his fellow officers. (R. 89, Ex. A:109-119) Bach stated that he would drink approximately five to six beers a day before dinner over the last twenty years. (R. 89, Ex. A:94-95) Bach also had a history of insomnia, chronic anxiety and depression. (R. 89, Ex. E) Bach experienced depression for a number of years at various times in his life. (R. 89, Ex. A:94) This depression started in 1998 when he was

accused of having beer in his squad car. (*Id.* at 94-95) By 2004, Bach was taking a number of antidepressants. (R. 89, Ex. E)

In 2005, Chief Bach was diagnosed with cancer. (R. 2:3) He had six rounds of chemotherapy in 2005 and then received maintenance chemotherapy every six months through at least 2007. (R. 89, Ex. E:7) When he was examined at a final chemotherapy cycle in 2005, the doctor documented “normal short-term and long-term memory.” (*Id.*) During the time that he had cancer, Chief Bach took periodic leaves of absences to attend his cancer treatments. (R. 2:3) Bach returned to work after completing his chemotherapy treatments. (*Id.*)

While Bach was the Chief of Police, he frequently used inappropriate language. Specifically, at his deposition, Bach said it was his “management style” to use the words “b**ch,” “c***” and “fat a**”² when referring to fellow officers and he did not think it was unacceptable if done “[w]ithin the walls of the department.” (R. 89, Ex. A:179-182) At some point, however, Bach learned that there

² To maintain the dignity of the Court and out of respect for the parties, the Defendants do not repeat the actual words used by Bach. The exact words are repeated in the Confidential Investigation Report created by the City of

were concerns with the language he was using. (R. 89, Ex. A:8) Specifically, in October 2006, individuals from the department went to Bach's house to discuss Bach's inappropriate language. (R. 89, Ex. A:8-10) Bach later learned that an officer from the police department, Kim Unger, filed a complaint against him for his use of inappropriate language. (R. 89, Ex. A:10) Kelly Treece also filed a complaint against Bach in 2007 for using inappropriate language and speaking about her in a derogatory manner. (R. 89, Ex. F)

City of Pewaukee's Investigation and Discipline of Bach

In December of 2006, the City of Pewaukee received a written complaint from Officer Kim Unger alleging that Chief Bach had referred to her as a "b**ch" and a "c***" in the presence of fellow officers. (R. 89, Ex. C:2; R. 89, Ex. G:19) At her deposition, Officer Unger testified that she made the complaint because she was "sickened" that he was referring to her like that and she wanted it to stop. (R. 89, Ex. G:50-51) Officer Unger explained that she filed the complaint on her own and that no other person instructed her as to when to file the complaint. (Id. at 48-50) Similarly, Officer

Pewaukee and they were repeated in the various depositions.

Unger testified that at no time did Robert Kraemer, Debbie Kraemer or Kelly Treece instruct her to file a complaint or to take any action in an effort to have Bach fired. (Id. at 57-58)

After receiving Kim Unger's complaint, the City of Pewaukee conducted an investigation. (R. 89, Ex. C) The City of Pewaukee interviewed Kim Unger, other witnesses and Bach on multiple occasions. (Id.) During the investigation, ten witnesses stated that Bach had referred to females in the department as "bi*ches" and that he had referred to the City Administrator as a "f***ing bi**ch." (Id. at 7) Thirteen witnesses stated that Chief Bach used the word "c***" in referring to women including female officers and the City Administrator. (Id. at 8) Other witnesses also reported that Bach referred to male and female employees as "big a**" or "fat a**", that Bach referred to individuals as a "piece of sh**," that he referred to homosexuals as "f***ing fa**ots" and that he used the word "n*****" and other offensive terms. (Id. at 9-11) Witnesses also reported that Bach had sent them sexually graphic emails and pictures of partially or fully nude females. (Id. at 12-13) There were also allegations that Bach mistreated employees and targeted them

for discipline or unfavorable treatment and that he discriminated against female officers. (Id. at 14-24)

After the investigation, the City of Pewaukee found that Bach's actions did violate department policy and that his conduct was inappropriate. (R. 89, Ex. C:25-33) In April 2007, Bach agreed to serve a ten day suspension as a result of his use of inappropriate language and the parties entered into a Discipline Settlement Agreement. (R. 89, Ex. H)

As evidenced by the Discipline Settlement Agreement dated April 20, 2007, the City of Pewaukee agreed that the ten-day suspension constituted the complete discipline to be given to Bach for his inappropriate behavior and derogatory remarks. (R. 89: Ex. H) In exchange, 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." (R. 89, Ex. H) In the Discipline Settlement Agreement, Bach further agreed that "if such claims are filed, they will be legally binding as not actionable and

shall be dismissed.” (Id.) Bach testified that his attorney, Paul Bucher, reviewed the Discipline Settlement Agreement before he signed it. (R. 89, Ex. A:24-26)

There is no dispute by any party that the tape-recording by Kopatich occurred before April, 2007 and that it corroborated the complaints and investigation against Bach. However, Bach did not know if the tape-recording that was given to the Kraemers or Treece played any role in his receiving the ten-day suspension. (R. 89, Ex. A:27-28)

Tape-Recordings within the Department

During the investigation of Bach in and prior to April 2007, it became apparent that officers on the City of Pewaukee Police Department were tape-recording conversations with other employees. (R. 89, Ex. A:68, 71, 206; R. 89, Ex. B: 91-92, 123) In fact, Bach admitted to tape-recording fellow officers. (R. 89, Ex. A: 68, 71) Other officers also testified that they tape-recorded employees at Bach’s request. (R. 89, Ex. B: 91-92, 123)

For example, at his deposition, Bach admitted to taping fellow officers within the City of Pewaukee Police Department

without their knowledge or consent. (R. 89, Ex. A:68, 206) He tape-recorded employees because he believed the information he was getting was not accurate or correct. (R. 89, Ex A:68) He also allegedly tape-recorded these conversations because he had “memory issues.” (Id. at 206) Bach downloaded the tape-recordings onto his computer. (Id. at 68) His wife, Cheryl Bach, helped him download the information onto the computer. (Id. at 72) Bach stated that the majority of people on the department had a tape recorder. (Id. at 71) Former Captain Dan Meister also testified that he tape-recorded individuals. (R. 89, Ex. B:91) Specifically, he tape-recorded conversations involving Chief Bach, John Kopatich, Robert Kraemer and other members of the Department approximately twenty times. (Id. at 92) This was frequently done at Bach’s direction and with his knowledge as illustrated by the following testimony of Captain Meister:

Q: What, if any, notice was given to Gary Bach or others that you were recording?

A: The majority of time Chief Bach knew I was recording because he was recording as well. And he would, you know, check with me, say, make sure that you’re recording or make sure that you’re on. And he had this term that he would frequently

use to refer to the fact that he was recording. He said, I'm loaded or make sure you're loaded.

(R. 89, Ex. B:92) Officer Cher Schneider also testified that “a lot of people were taping each other and everything” and that she listened to the tapes on Bach’s computer and helped “transfer it over.” (R. 89, Ex. B:123) In the Spring of 2007, the Mayor of Pewaukee issued an order requiring all parties to turn over copies of any recordings in their possession. (Id. at 9)

Tape-Recording Made by Officer John Kopatich

Like other officers, Officer John Kopatich testified that he was aware that people within the police department were taping one another. (R. 89, Ex. I:12) As a result, Kopatich testified that he tape-recorded Bach in either August or September of 2005. (Id. at 18-19) Kopatich tape-recorded Bach in Bach’s driveway, when the tape recorder was in Kopatich’s pants pocket and Kopatich was on duty and in uniform. (Id. at 18-23) Kopatich tape-recorded Bach to protect himself against what people were saying. (Id. at 13-14) Kopatich also testified that he recorded Bach to protect himself because Bach would later deny telling him things. (R. 89, Ex. B:43; R. 89, Ex. I:22-23) Kopatich downloaded the tape-recording onto

his computer and did not turn it over to anyone until 2007. (R. 89, Ex. I:32)

In 2007, Kopatich stated that he shared a copy of the tape-recording with Robert and Debbie Kraemer. (R. 89, Ex. I:32) He provided the Kraemers with a copy of the tape-recording because he felt that Robert Kraemer was being “targeted” by Bach. (Id. at 34) Kopatich testified that he turned the tapes over to the City Administrator after he received a direct order from the Mayor. (Id. at 73) The City Administrator then transcribed the tapes. (Id. at 34)

At no time has Debbie Kraemer ever “transcribed” the tapes as alleged in the Complaint. (R. 22:4, ¶ 31; R. 89, Ex. I:34; R. 89, Ex. B:77) Similarly, at no time have the Kraemers or Treece ever tape-recorded Bach. (R. 89, Ex. B:62, 80) Robert Kraemer testified that he heard the tape-recordings approximately two times. (R. 89, Ex. B:57) In fact, before hearing the tapes made by Kopatich, Robert Kraemer testified that he was unaware that anyone had taped Bach. (Id. at 62)

Kopatich decided to tape-record Bach on his own without any input from the other Defendants. (R. 89, Ex I:74-76) At his

deposition, Kopatich testified that the Kraemers did not encourage him to make the tape-recordings of Bach and Kopatich never talked about his decision to record Bach with any of the Defendants before the tape was created. (Id.) Bach presented no evidence to the contrary in this case.

Similarly, the Kraemers did not have any input into the decision to turn the recordings over to the City Administrator. (R. 89, Ex. I:73) Instead, Kopatich turned the tapes over to the City Administrator after receiving a direct order from the Mayor. (Id. at 74) Further, Kopatich denied any conspiracy or agreement with the Kraemers or Treece to use the tapes or to try in any way to have Bach fired. (Id. at 74-76)

Additional Charges Against Bach and His Retirement

In November 2008, the City of Pewaukee Common Council and Mayor filed additional charges against Bach before the City of Pewaukee Police and Fire Commission. (R. 89, Ex. A:83; R. 89, Ex. J) Specifically, it was requested that Bach be disciplined for failing to act honestly and with integrity, for engaging in gossip and for failing to adhere to reasonable standards expected within the

Department. (R. 89, Ex. J) Bach agreed at his deposition that these charges had nothing to do with the alleged tape-recording made by Kopatich or any of the other Defendants. (R. 89, Ex. A:83-84) Bach subsequently voluntarily retired and he reached an agreement with the City of Pewaukee in January 2009, in which he was paid \$170,879.90 upon retirement. (R. 89, Ex. A:83-84; R. 89, Ex. K)

Bach's Claims and Lawsuit

On December 18, 2008, Bach filed a Summons and Complaint against Kopatich, Kraemer, Debbie Kraemer and Treece. (R. 2) Bach's Complaint alleged two causes of action. (R. 2:11-12) Bach's first cause of action alleged an invasion of privacy. (Id.) The second cause of action alleged a violation under Wis. Stat. § 968.31, Interception and Disclosure of Oral Communications. (Id.)

In the Complaint, Bach claimed that when he returned to the Department after his cancer treatment, the Defendants were "surprised" and "disappointed" that he had returned and made progress with his medical treatment. (R. 2:3, ¶¶ 8-9) Bach also alleged that Kopatich, Kraemer and Treece disliked that Bach returned to work as police chief and they attempted to get Bach

“terminated” from his position. (Id. at 3, ¶ 12). No evidence was produced to support these allegations.

The Complaint alleged that Kopatich taped a conversation between Bach and Kopatich at Bach’s residence on December 18, 2006 (R. 2:7, ¶ 30) and that the Defendants obtained this tape and used it as part of a “conspiracy” to get Bach terminated. (Id. at 9, ¶ 39) Bach alleged only two specific causes of action—invasion of privacy and interception and disclosure of oral communications—arising from the alleged December 18, 2006 tape-recording incident. (Id. at 11-12, ¶¶ 48-57)

Following the completion of lengthy discovery in the lawsuit, all of the Defendants filed motions for summary judgment seeking dismissal of Bach’s claims on multiple grounds. (R. 83, 84 and 87) The motions for summary judgment were heard on January 20, 2011. (R. 105) The trial court granted the motions for summary judgment on multiple grounds dismissing Bach’s lawsuit. (R. 105:52-66)

STANDARD OF REVIEW

The appellate court applies the same methodology used by the trial court in deciding a motion for summary judgment. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

An appellate court may reverse a decision granting summary judgment only if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute. A reviewing court does not decide issues of fact; instead the appellate court's inquiry is limited to determining whether a factual issue exists. *Id.* The appellate court's review is limited to the facts put forth in the record before the trial court at the time the motion for summary judgment was decided. *Id.* at 556.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ROBERT KRAEMER, DEBBIE KRAEMER AND KELLY TREECE.

It is important to point out at the outset that Bach opted not to submit any affidavits in opposition to the Defendants' motions for

summary judgment at the trial court level. And now on appeal, Bach also fails to set forth sufficient evidentiary facts from the record to support his challenge to the motions for summary judgment. Bach presents no additional legal or factual basis in opposition to summary judgment than what was provided at the trial court level. Moreover, Bach's "Statement of the Facts" is nothing more than a recitation of the allegations found in his Complaint.³ (Bach Brief, pp. 2-9; R. 2:2-9, ¶¶ 6-39)

Bach may not rely upon the mere allegations in his Complaint in opposition to a summary judgment motion. *Tews v. NHI, LLC*, 2010 WI 137, ¶ 82, 330 Wis. 2d 389, 424-25, 793 N.W.2d 860, citing 3 Grenig, *Wisconsin Practice Series: Civil Procedure*, § 208.4 at 341-42 (3d ed. 2003). Rather, Bach must prove with specific admissible evidentiary facts that an issue is genuine; conclusory remarks, speculation or hearsay testimony not based on personal knowledge are insufficient to challenge a motion for summary judgment. *Park Ave. Plaza v. City of Mequon*, 2008 WI App 39, ¶

³ Due to Bach's disregard for his obligations on appeal under Wis. Stat. § 809.19(1), this Court should hold Bach to the facts as set forth by the Defendants-Respondents. *Town of Cedarburg v. Dawson*, 2004 WI App 174,

24, 308 Wis. 2d 439, 747 N.W.2d 703. As recognized by the trial court in this matter, summary judgment must be based upon admissible evidence:

The moving parties have presented fact assertions on personal knowledge, that the case isn't as the plaintiff asserts. Thus, the plaintiff has to create the fact issue. I can't create it for him. His attorney can't create it for him. The plaintiff has to have the evidence that supports it. That evidence hasn't been presented.

(R. 105:61; see also R. 105:47, 59) See, *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶ 95, fn. 1, 241 Wis. 2d 804, 623 N.W.2d 751.

The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

Bach has simply not met his burden to set forth a genuine issue of material fact to support his appeal. Wis. Stat. §§ 802.08(3), 809.19(1)(e); See, *State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986); *Grothe v. Valley Coatings*,

¶2, 276 Wis. 2d 206, 212, 687 N.W.2d 841.

Inc., 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463 (reiterating that an appellate court “should not address unsupported arguments nor be required to search the record for evidence to support a party’s argument.”). Accordingly, the judgment of the circuit court should be affirmed.

A. The Trial Court Correctly Held That Bach Did Not Have a Reasonable Expectation of Privacy Nor Was There Any Evidence That Robert Kraemer, Debbie Kraemer or Kelly Treece Invaded Bach’s Privacy.

At the trial court, the Kraemers and Treece asserted that they could not be held responsible for an invasion of privacy claim pursuant to Wis. Stat. § 995.50 because there was no evidence that they physically intruded into a place Bach considered private in a manner which was highly intrusive or that they made a public disclosure of private facts in violation of Wis. Stat. § 995.50 (2)(a). (R. 88:21-25)

In order to defeat the Defendants’ motions for summary judgment on the claim under Wis. Stat. § 995.50 (2)(a), Bach needed to bring forth some evidence that the Kraemers and Treece physically intruded on a geographical place that he considered

private. *See Hillman v. Columbia County*, 164 Wis. 2d 376, 392, 474 N.W.2d 913 (Ct. App. 1991). In addition, Bach also needed to establish that any intrusion was “of a nature highly offensive to a reasonable person.” *See Poston v. Burns*, 2010 WI App 73, ¶ 28, 784 N.W.2d 717. Ordinarily, this requires either a trespass or intrusion into a party’s home and it is not enough to simply record sounds emanating from a home with the use of a “common recording device.” *See Poston* at ¶, 28, citing Wis. Stat. § 995.50 (2)(a) (stating that the defendants’ motion for directed verdict should have been granted since “[t]he recording of sounds emanating from the Postons’ home using a common recording device . . . was not, as a matter of law, an intrusion ‘of a nature highly offensive to a reasonable person.’”)

At the trial court level, Bach produced no such evidence. On appeal, Bach still fails to address how the statutory requirements apply to any act by Kraemer, his wife Debbie, or Treece. Nor does Bach present any law demonstrating how the Kraemers or Treece can be held liable for an invasion of privacy. Instead, Bach’s

argument focuses solely on Kopatich's act of recording his conversation with Bach at Bach's residence. (Bach Br., pp. 15-18)⁴

Bach concedes that a tape-recording in a driveway does not violate his expectation of privacy. (R. 105:31, 34) But similar to his argument before the trial court, Bach argues that the recording by Kopatich allegedly occurred, at least in part, in the basement of Bach's home where Bach believes he had an expectation of privacy. Bach himself was unable to recall the circumstances surrounding his meetings with Kopatich. (R. 89., Ex. A:37-40) Yet, Kopatich testified that the recording took place in the driveway of the Bach residence. (R. 89, Ex. I:31)

Bach takes issue with the trial court's reasoning that Bach did not have a reasonable expectation of privacy either in the basement or driveway at the time Kopatich recorded their conversation. (R. 105:59-60) Bach attempts to create an issue of fact by referencing a statement from Cher Schneider, who testified that she was informed by Kopatich that the recording occurred in the basement and driveway. In addition, Bach refers to testimony from Bach's wife

⁴ Once again, Bach fails to directly cite to any fact contained in the Record.

who simply recalls that a meeting took place between Bach and Kopatich in the basement of their home. (Bach Br., p. 14) Neither Cher Schneider nor Bach's wife were present during the recording and neither had personal knowledge of what was discussed. (R. 89, Ex. L:25-28) The trial court specifically held that Bach's wife's testimony did not create a fact issue. (R. 105:47, 59)

Bach's reliance upon Cher Schneider's testimony also does not raise an issue of fact in support of his appeal.⁵ As the trial court recognized, it is immaterial whether the recording took place in the driveway or basement. Given the environment, background and practice by Bach and other members of the Pewaukee Police Department of regularly recording each other, Bach would not have had a reasonable expectation of not being recorded in his conversation with Kopatich wherever it occurred. (R. 105:60) More importantly, however, Cher Schneider's statement does not support a claim of invasion of privacy by Kraemer, his wife Debbie or Treece.

⁵ The portions of Cher Schneider's deposition testimony upon which Bach relies were not made a part of the Record aside from being cited in his brief and argued before the trial court.

To raise an issue of material fact regarding the invasion of privacy claim, Bach was required to present some evidence demonstrating how the Kraemers and Treece violated Wis. Stat. § 995.50. In the alternative, if Bach wanted to establish a “conspiracy,” he needed to produce evidence that the Kraemers and Treece formed a plan with Kopatich to either intrude into a private place or make a public disclosure of private facts.

Here, there is absolutely no evidence that Robert Kraemer, his wife Debbie, or Treece committed any act, whether by themselves or in conspiracy, in violation of Wis. Stat. § 995.50. There has simply been no evidence produced that the Kraemers or Treece “conspired” with Kopatich to invade Bach’s privacy. To the contrary, Kopatich testified unequivocally at his deposition that he tape-recorded Bach without any input or direction from the other Defendants. (R. 89, Ex. I:74-76) Because Bach could not and cannot point to any evidence in the record contradicting this testimony or establishing a conspiracy, the trial court correctly granted the Defendants’ motion for summary judgment. Accordingly, this Court should affirm the

dismissal of claims against Robert Kraemer, Debbie Kraemer and Treece for invasion of privacy.

B. The Trial Court Correctly Held That Kopatich's Recording of Bach Did Not Violate Wis. Stat. § 968.31.

Bach does not contend that Robert Kraemer, Debbie Kraemer or Kelly Treece themselves actively tape-recorded him for an unlawful purpose in violation of Wis. Stat. § 968.31(2)(c). Instead, Bach alleged in his Complaint that the Kraemers and Treece acted “in a conspiracy” with Kopatich to tape-record his conversations. (R. 2:12, ¶¶ 53-57) Bach, however, admitted that he had absolutely no evidence of such a conspiracy. (R. 89, Ex. A:284-85) Bach's allegation is also undermined by Kopatich's testimony refuting any involvement by the Kraemers or Treece in his decision to record Bach. (R. 89, Ex. I:74-76)

As the trial court correctly found, the only evidence presented as to the purpose of Kopatich's recording of his conversation of Bach was Kopatich's own testimony; Bach could not recall what happened. (R. 105:60-61) Kopatich further testified that the purpose of recording Bach was to “protect” himself. (R. 89, E.

B:43; R. 89, Ex. I:13-14, 22-23) The undisputed testimony before the trial court was that Kopatich went to Bach's residence, at the direction of Bach, while on duty, in uniform and in his squad car to discuss issues relating to the police department. (R. 89, Ex. I:18-22; R. 105:61-62) Bach himself presented no testimony to dispute this evidence. The trial court correctly held that there was no evidence that Kopatich was committing a criminal, tortious or injurious act. (Id.) The trial court further correctly found that distribution of the tape to the Kraemers or Treece was not unlawful or improper. (R. 105:62)

Similar to what was presented to the trial court, Bach fails to present any evidence that the Defendants were out to get him. (R. 105:62-63). Without evidence that Kopatich's recording was committed for a criminal or tortious act, the mere sharing of a recording with the Kraemers and Treece cannot demonstrate a violation under Wis. Stat. § 968.31. Accordingly, the circuit court's decision granting summary judgment in favor of the Defendants Kraemer, Debbie Kraemer and Treece should be affirmed.

C. The Trial Court Correctly Found That Bach Failed to Set Forth Facts to Support a Conspiracy Claim.

Civil conspiracy is an agreement between two or more persons to achieve an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Malecki v. Fine-Lando Clinic*, 162 Wis. 2d 73, 86, 469 N.W. 2d 629 (1991); *Addella v. Catlin*, 79 Wis. 2d 270, 275, 255 N.W. 2d 516 (1977). When making a claim for civil conspiracy, the Plaintiff must state with specificity the acts engaged in to further the conspiracy and he or she must show that the purpose of the conspiracy was to damage the Plaintiff. *Onderank v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977). To survive a motion for summary judgment, the Plaintiff must produce competent evidence creating an issue of material fact on each of three elements: (1) the formation and operation of the conspiracy; (2) acts in furtherance of the conspiracy; and (3) damage to plaintiff caused by the conspiracy. *Onderank*, 79 Wis. 2d at 247; *Edwardson v. American Family Mut. Ins. Co.*, 223 Wis. 2d 754, 760, 589 N.W.2d 436 (Ct. App. 1998). In this case, the Plaintiff failed to submit any

evidentiary facts from which a reasonable jury could find a conspiracy.

The proof of the first element – formation and operation of the conspiracy – requires a showing that each Defendant made an agreement to work towards an illegal objective or with illegal means.

Edwardson, 223 Wis. 2d at 762. “At a minimum, to show a conspiracy 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). Parallel activity is insufficient to prove a tacit agreement. *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 188, 342 N.W.2d 37(1984); *see also Thomas v. Mallett*, 2005 WI 129, ¶ 170, 285 Wis. 2d 236, 701 N.W.2d 523.

Further, a Defendant cannot unknowingly be part of a conspiracy. Instead, there must be evidence that the conspiracy was knowingly formed and that each Defendant knowingly participated in the unlawful plan with the intent to advance an object of the conspiracy. Wis. JI-Civil No. 2802; *Bruner v. Heritage Cos.*, 225

Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999) (stating “to form a conspiracy there must be an agreement to violate or disregard the law and the persons must knowingly be members of the conspiracy” (internal citations omitted)); *Edwardson*, 223 Wis. 2d at 762 (finding that “mere knowledge, acquiescence or approval of a plan, without cooperation or agreement to cooperate, is not enough to make a person a party to a conspiracy.”) A Plaintiff, therefore, must prove more than mere suspicion or conjecture that there was a conspiracy. *Malecki*, 162 Wis. 2d at 85. Where the evidence supports equal inferences of lawful and unlawful action, the claim of conspiracy “should not be submitted to the jury.” *Id.* at 85.

Although Bach’s Complaint alleged that the Kraemers and Treece acted “in a conspiracy” with Kopatich to tape-record his conversation. (R. 2:12, ¶¶ 53-57), Bach subsequently conceded that he did not have any personal knowledge that Kopatich, Kraemers or Treece had an agreement or conspiracy to tape-record him or distribute tapes. (R. 89, Ex. A:284-85) Instead, without evidentiary support, Bach argued at summary judgment and in his brief to this

Court that Kopatich, the Kraemers and Treece conspired to have Bach terminated from his position as chief. (R. 90:6; Bach Br. at 21)

Similar to his arguments to the lower court, Bach mainly relies upon two or three quotes from the deposition testimony of Cher Schneider as his sole support for the existence of a conspiracy. (Bach Br., pp. 15, 20-21) However, aside from citing these excerpts within his brief, Bach failed to make these deposition excerpts part of the record at either the trial court level or before this Court. See, *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (assertions of fact not found in the record should not be considered by the court). Even if the Court was to consider Cher Schneider's testimony, it fails to support Bach's claim of conspiracy by Kraemer, his wife Debbie, and/or Treece. Cher Schneider's testimony merely claims that Robert Kraemer and Kopatich allegedly discussed the filing of complaints against Bach due to his inappropriate comments about certain members of the police department. Cher Schneider's testimony does not describe any unlawful conduct by any defendant and does not provide any evidence of an illegal conspiracy. Moreover, Bach fails to present

any facts involving Debbie Kraemer or Treece in any alleged conspiracy. Bach has once again failed to present evidentiary facts to defeat a motion for summary judgment or to provide facts to raise an issue as to the existence of a conspiracy. Accordingly, the trial court's granting of summary judgment should be affirmed.

II. THE TRIAL COURT CORRECTLY HELD THAT BACH'S CLAIMS WERE BARRED ON MULTIPLE GROUNDS.

A. The Trial Court Correctly Held That Bach's Claims Were Barred by the Exclusivity Provisions of the Wisconsin Worker's Compensation Act.

Wisconsin Statute § 102.03 (2) makes the Wisconsin Worker's Compensation Act ("WCA") the exclusive remedy for any injuries *arising* out of employment. (Emphasis added). The exclusivity provision of the WCA provides in pertinent part:

the right to recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier.

Wis. Stat. § 102.03 (2).

The trial court correctly applied the case of *Jensen v. Employers Mut. Cas. Co.*, 161 Wis. 2d 253, 468 N.W. 2d 1 (Ct. App. 1991) in holding that the WCA barred Bach's lawsuit. In *Jensen*, a

village clerk-treasurer brought an action for the intentional infliction of emotional distress caused by the village president. *Id.* at 257. Among other things, the plaintiff alleged that the defendant threatened her with termination, berated her in public, impugned her integrity, made false statements about her and subjected her to unwarranted public criticism. *Id.* at 259. As a result, plaintiff claimed she sustained physical and emotional problems. *Id.* at 258. The defendant moved for summary judgment, arguing that plaintiff's claims were barred by the WCA. The plaintiff contended that claims for emotional distress were not compensable under the WCA and therefore not subjected to the exclusivity provisions of the WCA. *Id.* at 266.

In rejecting plaintiff's argument and granting summary judgment, the Wisconsin Supreme Court held that injuries that are caused by intentional conduct are, in fact, "accidents" as defined by the WCA and therefore can, if proven, constitute compensable injuries under the WCA. The Court noted that "injury" under the WCA specifically includes "mental harm" or "emotional stress or strain." *Id.* at 267. The Court further concluded that the "attacks

upon” plaintiff resulted from her position as village treasurer and the relationship with her “co-worker” and therefore were directly related to her employment. *Id.* at 270. As a result, the plaintiff was only entitled to compensation under the WCA and summary judgment dismissing the case was appropriate. *Id.* at 276.

Similar to *Jensen*, Bach’s claims involve a dispute between a supervisor and his employees. Like the plaintiff in *Jensen*, Bach claimed that the Defendants created a hostile work environment and attempted to get him terminated. As a result, Bach claims he experienced “significant emotional trauma, embarrassment, humiliation and emotional distress.” (R. 2:11-12, ¶¶ 50, 57.) This is the type of injury and action contemplated by the WCA and Bach could have submitted a request for compensation under the WCA.

Bach unconvincingly attempts to distinguish *Jensen* from the present matter by arguing that neither Bach nor Kopatich were “performing services growing out of and incidental to employment” nor did Bach suffer injury arising out of his employment. (Bach Br., p. 24) Yet again, Bach fails to set forth any facts to support his argument. See *Grothe*, 2000 WI App 240 at ¶ 6 (stating Court of

Appeals should not address unsupported arguments nor be required to search the record for evidence to support a party's argument). Bach's own Complaint is replete with alleged facts arising out of the parties' employment with the City of Pewaukee Police Department. (R. 2:2-12) Further, Bach admits that he suffered mental injuries as a result of the defendants' alleged actions. (Bach Br., pp. 24-25) Bach's own expert specifically opined that the cause of Bach's emotional distress was related to what occurred at the police department. (R. 81, Ex. H:100-101)

Because the alleged harms suffered by Bach arose out of his employment and his role as Chief of Police for the City of Pewaukee, his claims are pre-empted by the WCA's exclusivity provision and therefore barred. Accordingly, summary judgment was appropriately granted by the trial court.

B. The Trial Court Correctly Held That a Prior Settlement Agreement and Release Precluded Bach's Claims.

Bach's claims are also barred by a full release provision contained in the Discipline Settlement Agreement that he executed on April 20, 2007. "The language of a contract must be understood

to mean what it clearly expresses. A court may not depart from the plain meaning of a contract where it is free from ambiguity.” *Cernohorsky v. Northern Liquid Gas Co.*, 268 Wis. 586, 592, 68 N.W.2d 429 (1955).

In early 2007, Kopatich was directed by City officials to turn over the recordings he had of Bach. (R. 89, Ex. I:32) Subsequently, the City of Pewaukee investigated Bach’s use of inappropriate language (as evidenced on the tapes made by Kopatich), and imposed a ten (10) day unpaid disciplinary suspension against Bach.

In signing the Discipline Settlement Agreement, Bach accepted this suspension and 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.

(R. 89, Ex. H) (emphasis added). The Discipline Settlement Agreement, signed by Bach, stated that if any such claim was filed, it should be considered “not actionable and shall be dismissed.” (Id.)

Citing no legal authority for his argument, Bach argues that a subsequent separate retirement agreement entered into by Bach in

2009, in essence, supersedes the prior Discipline Settlement Agreement and release. (Bach Br., pp. 25-26) However, the Retirement Agreement was entered into after Bach had already filed the lawsuit against the Defendants-Respondents. Further, the Retirement Agreement makes no mention of the prior Discipline Settlement Agreement and does not specifically abrogate the release contained therein. Accordingly, the trial court correctly held that the broad language of the Discipline Settlement Agreement controlled and therefore barred this action. (R. 105:64-65)

C. The Trial Court Correctly Held That Bach Failed to Abide By The Notice of Claim Provisions Under Wis. Stat. § 893.80.

Wisconsin Statute § 893.80(1) provides that no action may be brought against any governmental officer or employee unless proper and timely written notice of the claim is served upon the governmental agency and employee. Specifically, the statute provides:

No action may be brought or maintained against any . . . political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of

action unless: (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the...political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11.

Wis. Stat. §893.80(1)(a) (emphasis added)

The purpose of the notice of claim statute is to allow counties and other governmental units the opportunity to investigate and amicably compromise claims without litigation. *See Wagner v. Dissing*, 141 Wis. 2d 931, 939, 416 N.W.2d 655 (Ct. App. 1987). If a party fails to give the notice require under Wis. Stat. § 893.80 (1), dismissal is appropriate. A party's failure to give timely written notice of the claim may only be excused if the party demonstrates that the defendants had actual notice of the claim *and* that the plaintiff's failure to give the requisite written notice was not prejudicial. Wis. Stat. § 893.80(1)(a); *Weiss v. City of Milwaukee*, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977).

The Defendants-Respondents asserted at summary judgment that Bach failed to file a notice of claim under Wis. Stat. § 893.80(1) prior to filing suit against employees of the City of Pewaukee Police

Department. In response, Bach asserted that he “brought this action against Kopatich and the Co-Defendants as individuals, not as employees of the City of Pewaukee who were acting in any official capacity” and therefore, Bach should not be required to file a statutory notice of claim. (Bach Br., pp. 27-28) The trial court disagreed. (R. 105:65-66)

Bach’s assertions contradict the very allegations he raised in his Complaint and his Brief to this Court. For example, Bach alleged that following a complaint filed against him by officer Kim Unger related to inappropriate language, he “believed that Defendant Kopatich had valuable information that would assist Chief Bach in preparing a defense or providing additional information relative to the nature of the charges filed against him” (R. 2:4; Bach. Br. at 4) Bach also alleged that he and Kopatich “engaged in a conversation that dealt with a variety of issues, including Chief Bach’s opinion of certain employees of the City of Pewaukee, both employed in the Department and in administrative positions with the City of Pewaukee.” (R. 2:5; Bach Br. at 5) Further, Bach alleged that he and Kopatich discussed “sensitive matters within the Department, as

well as in administration.” (Id.) The undisputed evidence in the record before the trial court included testimony from Kopatich that Bach asked him to come to his home while Kopatich was on duty and that Kopatich went to the Bach residence in uniform, in a squad car, while armed. (R. 89, Ex. I: 13-23) Bach presented no facts to establish that Kraemer or Treece committed any act as individuals, or outside the course of their employment with the City of Pewaukee Police Department.

The undisputed evidence before the trial court established that Kopatich, Kraemer and Treece’s actions arose out of their employment as officers with the City of Pewaukee Police Department. It is undisputed that Bach failed to file a Notice of Claim under Wis. Stat. § 893.80 prior to filing the Complaint. Accordingly, the trial court was correct in granting summary judgment in favor of the Defendants dismissing Bach’s claims for failing to file the required Notice.

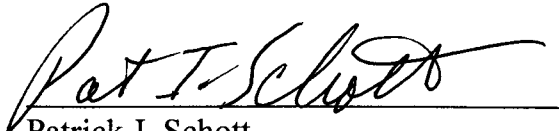
CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s granting of summary judgment in favor of Defendants-

Respondents, Robert Kraemer, Debbie Kraemer and Kelly Treece
which dismissed each of Plaintiff-Appellant Gary Bach's claims.

Dated this 30th day of June, 2011.

SCHOTT, BUBLITZ & ENGEL, S.C.

A handwritten signature in black ink, appearing to read "Pat J. Schott", written over a horizontal line.

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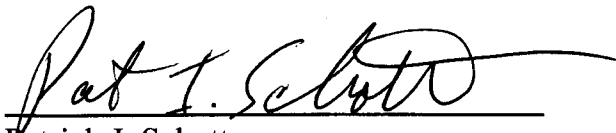
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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in Wis. Stat. § 809.19(8)(b) for a petition produced with a proportional serif font. The length of this Brief is 7,706 words.

Dated this 30th day of June, 2011.

SCHOTT, BUBLITZ & ENGEL, S.C.



Patrick J. Schott

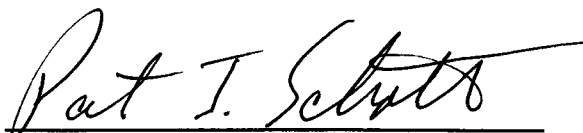
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

Dated this 30th day of June, 2011.

SCHOTT, BUBLITZ & ENGEL, S.C.



Patrick J. Schott

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**CERTIFICATION OF THIRD-PARTY COMMERCIAL
DELIVERY**

I hereby certify that on June 30, 2011, this Brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the Brief was correctly addressed. The undersigned further certifies that she has caused three (3) true and correct copies of the foregoing Brief to be served upon counsel of record via the third-party commercial carrier.

Dated this 30th day of June, 2011.

A handwritten signature in cursive script that reads "Michelle Saunders". The signature is written in black ink and is positioned above a horizontal line.

Michelle Saunders, Legal Assistant