STATE OF
WISCONSIN COURT
OF APPEALS
DISTRICT II

Lori Kuehn,

Plaintiff-Appellant,

Appeal No. 2024AP002185
v. Circuit Court Case No. 2024CV000765

Nicholas Phillip Gordon and

Now Outdoors, LLC,

Defendants-Respondents.

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HON. HEATHER. IVERSON, PRESIDING.

Brief and Appendix of Lori Kuehn, Plaintiff-Appellant

Submitted by:
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STATEMENT OF ISSUES

Did the trial court err in dismissing Lori Kuehn's Amended Complaint with prejudice because all three of the claims contained therein failed to state a claim for relief upon which judgment could be granted?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

An oral argument is not necessary or requested. It would not help this court analyze whether the Amended Complaint states claims for relief. Publication may be warranted to assist circuit courts and litigants to better understand that the key issue on a Motion to Dismiss is whether a claims in a complaint state claims for relief. Other matters, including other matters not in the record, are irrelevant to an analysis of whether the facts plead and reasonable inferences drawn from those facts establish a claim for relief recognized by law.

STATEMENT OF THE FACTS AND CASE

Between December of 2023 and March of 2024, defendants-respondents Nicholas Phillip Gordon and Now Outdoors, LLC (collectively "Gordon"), solicited plaintiff-appellant Lori Kuehn ("Kuehn") to attend a group tour guided by Gordon, the owner of Now Outdoors, LLC, in Peru for a fee. Kuehn paid for a place on the tour, trained, and on March 1, 2024 purchased an airline ticket to Peru. On June 25, 2024, Kuehn and Gordon flew from O'Hare Airport to Cusco, Peru.

After a short time in Peru, Gordon unilaterally changed Kuehn's initial accommodations, removed her from the expedi-

tion group, berated her, had her taken to the airport to return to Wisconsin, and refused to refund any money she paid for the guided expedition. Gordon further defamed Kuehn on social media, causing great distress and requiring professional treatment. (R.19:1-6, Ap. App. 1-6, Amd. Comp., ¶¶ 1-32).

On July 22, 2024, Kuehn commenced this action seeking monetary damages against Gordon and his company, Now Outdoors, LLC. (R. 3:1-11). An Affidavit of service as to both defendants was filed on July 25, 2024. Instead of filing an Answer, on August 26, 2024, the Gordon defendants filed a Notice of Motion and Motion to Dismiss and a Brief supporting the motion. (R. 13 & 14). On September 11, 2024, Kuehn filed an amended Complaint. (R. 19:1-8, Ap. App. 1-8). On September 23, 2024, Gordon filed a Notice of Motion and Motion to Dismiss the Amended Complaint and a Supplemental Brief in support of the motion (R. 20 &21)

Kuehn's Amended Complaint set forth three claims for relief:

(1) Breach of Contract,
(2) Negligent Infliction of Emotional Distress, and
(3) Defamation.

(R. 19:1-8, Ap.App. 1-8).

On September 24, 2024, the circuit court heard arguments on the Motion to Dismiss the Amended Complaint. It issued an oral decision from the bench dismissing the Amended Complaint for failing to state a claim upon which relief could be granted. (R. 14-17:Ap. App. 8-11). On September 25, 2024, the circuit court signed a written order dismissing the case. (R.24:1-3; Ap. App. 12-14) On October 28, 2024, Kuehn filed a Notice of Appeal. (R. 31:1).

STANDARD OF REVIEW

This court's review of the circuit court's decision on a motion to dismiss is *de novo*. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. On a motion to dismiss, the complaint's allegations are taken as true as are the reasonable inferences therefrom, *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205. While pleaded facts and reasonable inferences flowing from them must be taken as true, any legal conclusions plead are not accepted as true and they are insufficient to defeat a motion to dismiss. *Data Key Partners*, 2014 WI 86, ¶19. Whether the facts plead set forth a claim for relief depends on the substantive law underlying each claim. *Id.*, ¶31.

The statutory basics of a claim for relief are required from the complaint: “A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.... A demand for judgment for the relief the pleader seeks.” Wis. Stat. § 802.02(1)(a)-(b).

"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). Wis. Stat. § 802.02 requires no “’magic words’ except in limited circumstances.” *Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde*, 185 Wis. 2d 377, 388, 518 N.W.2d 265 (Ct. App. 1994).

ARGUMENT

I. Breach of Contract

A. The Breach of contract claim is plausible. The Amended Complaint sets forth facts establishing (1) an offer, (2) an acceptance, (3) considertion and (4) damages flowing from the Gordon defendants’ breach of the contract. Those are the essential elements of a breach of contract claim.

Breach of Contract

The Wisconsin Civil Jury Instructions provide that:

"A party to a contract breaches it when performance of a duty under the contract is due and the party fails to perform. Failing to perform a duty under the contract includes defectively performing as well as not performing at all."

WI Civ. JI No. 3053 (2006) (citing Restatement of Contracts (Second) sec. 235; *Steele v. Pacesetter Motor Cars*, Inc., 2003 WI App 242, 267 Wis.2d 873.)

In *Steele,* the court ruled that: "In evaluating a breach of contract claim, a court must determine whether a valid contract exists, whether a party has violated its terms, and whether any such violation is material such that it has resulted in damages." *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶10, 267 Wis. 2d 873. In *Steele*, he contracted with Pacesetter Motor Cars to restore a 26-year-old car. They did a mostly poor job and charged Steele a lot of mOney. Steele took his car to Uptown Motors and with the help of Allis Machines the car was fixed. An Uptown mechanic told Steele that Pacesetter's poor work caused the problems that Uptown and Allis fixed and he sued Pacesetter under the Wis. Administrative Code and for breach of contract. The circuit court found some of Pacesetter's work defective and a cause of Steel's damages. *Steele*, 2003 WI App 242 at ¶¶2-9.

The *Steele* court cited the Restatement (Second) of Contracts 1 (1981):

> "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the

> performance of which the law in some way recognizes as a duty. RESTATEMENT (SECOND) OF CONTRACTS 1 (1981). Moreover, and of particular relevance to this case:
>
> Non-performance is not a breach unless performance is due . . . . When performance is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his [or her] performance was not substantial . . . . Non-performance includes defective performance as well as an absence of performance.
> *Id*. at § 235 cmt. b."

Steele v. Pacesetter Motor Cars, Inc., 2003 WI App 242, ¶11, 267 Wis. 2d 873, 880.

OFFER

Wis. Civil JI 3012 defines the maker of an offer:

> The person making an offer is called the offeror; the person to whom the offer is made is called the offeree.
>
> An offer is a communication by an offeror of what he or she will give or do in return for some act or promise of the offeree. An offer may be addressed to a particular individual or to the public, but must look to the future and be promissory in nature.
>
> A mere expression of intention, opinion, or prophecy is not an offer. A communication intended merely as a preliminary negotiation or willingness to negotiate is not an offer.
>
> While no particular form of words or mode of communication is necessary to create an offer, it

> must reasonably appear that the alleged offeror has agreed to do the thing in question for something in return. An offer must be so definite in its terms, or require such definite terms in acceptance, that the promises and performances to be rendered by each party are reasonably certain.
>
> When an offer is made, it is presumed to continue for the period of time expressed or, if no time limit is expressed, for a reasonable time."

"Offers" also have a "definiteness" requirement. Case law describes it as: "A contract must be definite and certain as to its basic terms and requirements to be enforceable." *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶22, 291 Wis. 2d 393, 717 N.W.2d 58.

The definiteness requirement is relevant to contract formation and may be decided by the fact finder. *Management Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). "[M]utual assent is judged by an objective standard. . . ." *Id.* at 178.

In the Amended Complaint, the solicitation "offers" to enter into a contract for a group expedition to Peru to be led by Gordon and Now Outdoors, LLC are found in ¶¶ 8, 11 and 13:

8. "Defendants solicited Plaintiff for six separate trips."

11. "After the trip to Pictured Rock, Defendant Gordon solicited Plaintiff on multiple occasions to come on other trips Defendants were organizing including a trip to Peru and a 'Winter Workshop.'"

13. "After the 'Winter Workshop' trip, Defendant Gordon solicited Plaintiff to attend the trip to Peru several times."

(R. 19: ¶¶ 8, 11 and 13; Ap. App. 2: ¶¶ 8, 11 and 13)

ACCEPTENCE

WIS JI CIVIL 3014 explains the acceptance of an Offer. In relevant part it provides that:

> To create a contract, an offer must be accepted by one having the right to accept, while the offer is still open. Acceptance of an offer is an assent by the offeree to its terms without qualification; acceptance may be made by a communication to the offeror, either in writing or orally; acceptance may also be implied from the conduct of the parties.
>
> If the offer requires the acceptance to be communicated to the offeror in a specified manner, there is an effective acceptance if the acceptance is made in that manner. If the manner of communicating the acceptance has not been specified, any reasonable manner or means of

> communication may be used. In either case, if actual notice of the acceptance reaches the offeror while the offer is still open, it makes no difference how it reached the offeror.

The Amended Complaint plead Kuehn's acceptance of the offer to go on a guided group expedition to Peru in paragraphs, 14, 15 and 18:

"14. Defendant Gordon sent Plaintiff a photograph of his flight information to Peru on March 1, 2024, and told Plaintiff to book the same flight so they could get to Peru a few days early. Plaintiff expressed concern about going to a foreign country, and she specifically told Defendant Gordon that she was afraid that their relationship ended, she would be stuck in Peru alone for days before the other clients arrived.

"15. Later that same day, March 1, 2024, Defendant Gordon sent Plaintiff a text message to reassure her and offered to share a room with her. Based on this representation, Plaintiff booked the same flight and sent the flight information to Defendant Gordon.

"18. On June 25, 2024, Plaintiff and Defendant Gordon traveled to Cusco, Peru. During this trip, including the bus ride from Kenosha to O'Hare International Airport, Defendant Gordon did not inform Plaintiff that any plans had changed, including lodging arrangements."

(R. 19: ¶¶ 14, 15 and 18: Ap. App. 3-4.¶¶ 14, 15 and 18)

Kuehn by her words, actions and conduct in flying to a foreign country four-thousand miles from Milwaukee clearly accepted the offer to join the group expedition whether she was going to be close to Gordon or not. ("she was afraid that their relationship ended, she would be stuck in Peru alone for days before the other clients arrived." (R. 19 at ¶ 14 above).

A reasonable inference is whether she and Mr. Gordon were close buddies or not, her main goal as an avid outdoorswoman was being part of a group expidition to Peru.

CONSIDERATION

WIS CV JI 3020 defines consideration in part as:

> Consideration is an essential element of a contract; it is necessary to the validity and enforceability of a contract. Consideration is the price bargained and paid for a promise – that is, something

> intended by the parties to be given in exchange for the promise. Consideration is an act or a promise which is either a detriment incurred by the offeree, or a benefit received by the offeror, at the request of the offeror, either of which does not occur gratuitously, but which is accepted and regarded as consideration by both the offeror and the offeree. Detriment as used here means any act which occasioned the offeree the slightest trouble or inconvenience, and which the offeree was not otherwise obliged to perform or refrain from performing. Benefit as used here means anything of slight or trifling value to the offeror.

In *First Wis. Nat'l Bank v. Oby*, 52 Wis. 2d 1, 6, 188 N.W.2d 454 (1971), the Court defined consideration as applied to the type of issues and pleadings in this case as:

> "[A]ny benefit, profit or advantage flowing to the promisor which he would not have received but for the contract constitutes a sufficient consideration therefor. It is not necessary, however, that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, . . . and that the promise is the inducement to the transaction."

Oby, 52 Wis. 2d at 6 n.1, 188 N.W.2d 454 (quoting 17 C.J.S. Contracts § 74 at 757-61).

Continuing with the definition of consideration, the court ruled:

> "[I]t would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obligated to perform."

Oby, 52 Wis.2d at 5-6, 188 N.W.2d 454.

The consideration supporting the contract, whereby Kuehn paid for a guided group trip in Peru, which benefitted Gordon to her significant detriment, is set forth in paragraphs 34 and 35 of the Amended Complaint:

> "34. Defendants and Plaintiff entered into a valid contract where Plaintiff paid money in exchange for a guided backpacking trip to Peru. Defendants failed to perform by removing Plaintiff from the trip the same day as she arrived in Peru, refusing to provide the services promised.

"35. As a result of the Defendants' breach, Plaintiff's monetary damages were: $1,681.45 paid for airfare, $3,400 paid to Defendant NOW Outdoor for a guide fee, $318.51 for required vaccinations, $1,339.30 for required gear for trip, and $7,730.00 for wage loss for time taken off work to take trip."

(R. 19: ¶¶ 34-35:Ap. App. 6)

The Circuit Court's Decision:

Often the circuit court's decision will assist the Court of Appeals in analyzing and deciding issues, even when the review is de novo. Not in this case. Whether it was a Motion to Dismiss the Amended Complaint and Brief filed the day before the hearing (R. 20 & 21) or the two defendants claiming there was nothing to the Breach of Contract claim but hurt feelings, the circuit court seems to have missed the point of applying the applicable law cited herein to the motion. A circuit court is a busy place and mistakes are sometimes made. That is what the Court of Appeals is for. To correct mistakes. This is the circuit court's decision on the Breach of Contract claim set forth in the Amended Complaint:

> "The court will only address the three causes of action that remain in the amended complaint, that is; breach of contract, negligent infliction of emotional distress, and defamation. Regarding the breach of contract claim, the first complaint filed failed to adequately plead the basic elements and the amended complaint, although attempts to allege to the existence of some contractual relationship related to a trip to Peru, the vague allegations and conclusive statements do not suffice to state an actionable contract claim."

(R. 29:15: Ap. App. 10)

As shown above, applying the pleadings to the case law of Breach of Contract, and further to the case law applicable to pleadings, this is a plausible claim. An offer was made, it was accepted, significant consideration was paid to the Gordon defendants for which Kuehn received nothing in return beyond two plane flights she paid for. She paid for a group adventure in Peru, she knew of the kind of outdooors adventures Gordon's company sold from her previous adventures. Regardless of her status with him, she had trained and wanted to participate in the group adventure in Peru. Mr. Gordon in the circuit court made the argument that he was free to take Keuhn's money and offer her nothing in return. The circuit court agreed.

What kind of relationship Gordon had with Kuehn is irrelevant her legal claims alleging (1) he solicited her multiple times to join a group outdoor adventure in Peru his company was leading; (2) paying him and his company thousands of dollars to join the group; (3) travelling 4,000 miles to Peru for the adventure she paid for, (4) forcing her to leave the group on her first day in Peru and (5) keeping her money. This is not a heart-balm claim, it is a breach of contract claim for damages where Kuehn payed for something she did not receive because of the Gordon defendants breaching actions to her detriment.

In Wisconsin, a breach of contract claim has three elements: "(1) a contract between the plaintiff and the defendant that creates obligations flowing from the defendant to the plaintiff; (2) failure of the defendant to do what it undertook to do; and (3) damages." *Brew City Redevelopment Grp., LLC v. The Ferchill Grp.*, 2006 WI App 39, ¶ 11, 289 Wis. 2d 795, 714 N.W.2d 582. The Amended Complaint sets forth facts establising a breach of contract claim.

Duty of Good Faith and Fair Dealing

Wisconsin law provides that each party to a contract owes a duty of good faith and fair dealing to the other. *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶ 27, 348 Wis. 2d 360, 842 N.W.2d 240**.** Gordon breached that duty of good faith and fair dealing by denying Kuehn what she paid for. Gordon's actions had the effect of "injuring or destroying" Kuehn's ability to receive the benefits of the contract. Wis. JI-Civil 3044.

This duty is essentially one of "cooperation on the part of both parties," and arises whenever the cooperation of one party is required for the performance of the other. *Ekstrom v. State*, 45 Wis. 2d 218, 222, 172 N.W.2d 660 (1969). This duty carries an implied promise on the part of each party not to take action intentionally and purposefully that will prevent the other party from carrying out his side of the agreement or from obtaining the benefits of the contract. *Id*. There was no cooperation here. There was, as stated in the Amended Complaint, intentional and purposeful action by Gordon to deny Kuehn the benefits of her bargain.

B. Second Cause of Action – Negligent Infliction of Emotional Distress

The Negligent Infliction of emotional Distress claim is plausible. The Amended Complaint sets forth facts establishing that (1) Gordon was negligent with respect to his treatment of Kuehn; (2) that the incident he created was a cause of Kuehn's emotional distress; and (3) that her emotional distress was severe.

The elements of the claim are that: "(1) that the defendant's conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." *Bowen v. Lumbermens Mut. Casualty Co.*, 183 Wis.2d 627, 532, 517 N.W.2d 432 (1994). *Bowen* involved a young boy hit by a car while riding a bicycle. He died shortly thereafter, His mother brought a claim for severe emotional distress for herself, having witnessed the accident and for her son's estate, for the moments of distress he experienced just before he was struck by the car. *Id.* at 634-45.

A claim for the negligent infliction of emotional distress focuses only on mental suffering or anguish, which must be severe in order to be compensable. WIS JI — CIVIL 1511.

The Amended Complaint alleges that:

> 37. Plaintiff has sustained severe emotional distress as a result of the following incidents: being abandoned in a foreign country, having been verbally abused by Defendant Gordon and others in his party, and by Defendant Gordon writing false and defamatory statements about her on Facebook.

(R.19:7, ¶ 37; Ap. App. 7)

It further alleges that:

> 38. Defendant Gordon was negligent with respect to these incidents.
>
> 39. These incidents were the cause of Plaintiff's emotional distress.
>
> 40. Plaintiff's emotional distress was severe and has resulted in continued therapy to cope with the ongoing emotional distress.

(R.19:7, ¶¶ 38-40: Ap. App. 7)

On a motion to dismiss, all facts plead and reasonable inferences flowing from them are accepted as true. In this case, Kuehn had prepared for, trained and anticipated participating in this group expedition for six months. She flew over 4,000 miles to Cusco, Peru.

The day of her arrival in Peru, she was booted out of the group expedition, denied the outdoors adventure in a foreign country she has been anticipating, berated and forced to return to Wisconsin. This caused her psychological harm, severe emotional distress and required treatment to cope with it as it continued past the day of the incident. No physical manifestation of harm is required. The psychological harm Kuehn sustained is sufficient to support a claim emotional distress. *Wosinski v. Advance Cast Stone Co.*, 2017 WI App 51, ¶ 151, 377 Wis. 2d 596, 901 N.W.2d 797.

The Circuit Court's Decision.

The circuit court dismissed this claim ruling:

> The claim for negligent infliction of emotional distress fails as a matter of law. Wisconsin courts have placed strict limitations on such claims, requiring a showing of exceptional circumstances far beyond what has been alleged here. The disappointment and hurt feelings that may accompany the end of consensual adult relationships simply do not rise to the level required to sustain this cause of action. Our courts have consistently held that the tort of negligent infliction of emotional distress is not designed to compensate for all emotional traumas of everyday life. The plaintiff's allegations do not come close to meeting the high bar set like *Bowen V. Lumberman's Mutual Casualty Company*.

(R. 29:15: Ap. App. 10)

The circuit court erred here by ignoring the pleadings that Kuehn's distress flowed from preparing for the trip for six months, paying a great deal of money, flying to another continent in the Southern Hemisphere and being railroaded out of her Peruvian group adventure by the Gordon defendants the day she arrived in Peru. The circuit court does not mention any of these facts which are far beyond the realm of normal, daily activities. They are far more akin to once-in-a-lifetime activities.

The facts plead and reasonable inferences flowing from them establish that this case does not deal with the "emotional traumas of everybody life." *Bowen v. Lumbermens Mut. Casualty Co.,* 183 Wis.2d 627, 639, 532, 517 N.W.2d 432 (1994). Indeed, the *Bowen* court struggled with allowing claims of emotional distress for "everyday minor disturbances." *Bowen*, at 639. The court expressed concern over "opening the doors to trivial or fraudulent claims and to unlimited liability for a negligent tortfeasor…." *Id*. at 651. Nevertheless, it found the law should "allow plaintiffs to recover for negligently inflicted severe emotional distress while protecting tortfeasors from spurious claims, from claims concerning minor psychic and emotional shocks, and from liability disproportionate to

culpability." *Id*. at 652. The court further opined that: "Detection of false claims is best left to the adversary process." *Id*. at 653-54.

The *Bowen* court ruled that while "it is generally better procedure to submit negligence and cause-in-fact issues to the jury before addressing legal cause, that is, public policy issues," that public policy could be applied on summary judgment, after a trial or in some cases on the pleadings. *Id*. at 654. As the court explained:

> When the pleadings present a question of public policy, the court may make its determination on public policy grounds before trial. [Fn. 26] In contrast, when the issues are complex or the factual connections attenuated, it may be desirable for a full trial to precede the court's determination.
>
> In this case this court is determining public policy considerations before trial because the facts presented are simple, and because the question of public policy is fully presented by the complaint and the motion to dismiss.

Id. at 654-55.

Addressing public policy issues, the court focused on two concerns: "(1) establishing authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent." *Bowen*, 183 Wis. 2d at 655. Summarizing public policy,

the *Bowen* court found that when "it would shock the conscience of society to impose liability, the courts may hold as a matter of law that there is no liability." *Id.* at 656.

The error the circuit court made was in failing to address all the material facts plead taking what happened far out of the realm of normal, daily activities, and describing the facts plead as involving only an emotional trauma associated with "everyday life." To the contrary, the claims are based on an extraordinary event, a once-in-a-lifetime event for most people involving months of preparation, anticipation and an outdoors adventure in a foreign country thousands of miles from Wisconsin.

Kuehn should be allowed to develop her claims and if at some point, the circuit court were to apply public policy to dismiss those claims on summary judgment or after a trial, that would be the proper procedure. To dismiss them on the pleadings based on the opinion of the circuit court that failed to mention significant facts and described what occurred as an everyday event was wrong and unfair. The policy behind

accepting facts plead as true, on a motion to dismiss, goes to the fundamental concept that the "[d]etection of false claims is best left to the adversary process." *Bowen*, 183 Wis. 2d at 653-54.

C. Third Cause of Action - Defamation.

The defamation claim is plausible. The elements of a common law action for defamation are:

> (1) 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 v. Uecker, 2010 WI App 28, ¶8, 323 Wis. 2D 798, 780 N.W.2d 216. WI CIVIL JI 2501.

The Amended Complaint alleges:

> 42. Defendant Gordon made a false statement in writing on a Facebook group with several members that stated: 'Attention Facebook Friends: A disgruntled participant who has been promptly removed from a NOW Outdoors International Trip today and is actively harassing me, my family and friends, other participants, and NOW Outdoors with threats, defamatory

> comments, and false statements.'
>
> 43. Defendant Gordon knew this statement was false at the time he published it.
>
> 44. Defendant Gordon's motivation for making this statement was actual malice toward Plaintiff.
>
> 45. This statement has harmed the Plaintiff's reputation as to lower her in the estimation of the community and has deterred others from associating or dealing with Plaintiff.

(R. 19:7-8, ¶¶ 42-45; Ap. App. 7-8)

The complaint alleges Gordon made false statements about Kuehn, communicated those statements to others by publishing them on Facebook, and they harmed her reputation in the community. In this case, that could be the outdoors enthusiasts community, the legal community, where she lives or all three.

The Circuit Court's Decision:

> A plaintiff and a defamation claim under Wisconsin law. must generally prove three elements; a false statement that is communicated by speech, by conduct, or in writing to a person other than the person defamed, in which is unprivileged and tends to cause harm to one reputation -- one's reputation. The writing alleged by the plaintiff on Facebook, allegedly on Facebook, the statement does not even mention the plaintiff's name. The actual malice standard requires that the alleged defamatory statement

> be made with knowledge that they were false or with reckless disregard, or whether it was false or not. Again being said, the plaintiff's name was not even mentioned in the statement.
>
> The plaintiff's defamation claim is wholly unsupported by any factual allegations in the complaint, and the plaintiff does not identify any false statements published by the defendant to third parties that would support a defamation claim. More broadly, to the entirety of the plaintiff's action itself, it appears the plaintiff is attempting to shoehorn what is essentially a claim for heart fall, an emotional injury from the termination of a romantic relationship into various legal theories. Such claims are expressly barred by Wisconsin statute and public policy.

(R. 29:15-16; Ap. App. 10-11).

The circuit court was right in describing the elements of a defamation claim. It was wrong in (1) requiring the defamatory statements to specifically name Kuehn; (2) in finding the statements in ¶ 42 of the Amended Complaint not defamatory; and (3) in miscontruing the pleadings and applying a statute that is irrelevant to the defamation claims.

(1) Acertainment.

There is no requirement that a plaintiff be specifically named in the defamatory statements, only that their identity can be ascertained. In *Wagner v. Allen Media Broad,* this court explained

the concept of ascertainment:

> Our case law provides that, for a statement to be defamatory, it must 'refer to some ascertained or ascertainable person, and that person must be the plaintiff.' (citation omitted) 'If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory.' (cite ommitted) This concept is sometimes referred to as 'ascertainment.' (cite ommitted).

Wagner, 2024 WI App 9, ¶33, 410 Wis. 2d 666, 3 N.W.3d 758.

There is only one person the defamatory statements are made about, plaintiff Kuehn. The statements refer to a "disgruntled participant" on a "NOW Outdoors International Trip today." The participants in this expidition to Peru were limited in number and only one was removed – Kuehn.

(2) Defamatory Statements.

"In determining whether a statement is capable of a defamatory meaning, a court should construe the words 'in the plain and popular sense in which they would naturally be understood,' and should consider the 'context and circumstances' in which the statement was made."

Wagner, 2024 WI App 9, ¶25.

Paragraph ¶ 42 of the Amended Complaint alleges in part that Gordon published statements to his Facebook Friends that Kuehn, a lawyer, was "actively harassing me, my family and friends, other participants, and NOW Outdoors with threats, defamatory comments, and false statements." It is hard to see how falsely describing anyone as doing these things, much less a lawyer, is not defamatory. If the statements are defamatory, the court's analysis is over as pleadings are entitled to be construed towards finding they state a claim for relief. "On a motion to dismiss ..., the court plays a limited role in assessing the allegedly defamatory statement identified in the complaint. (cite omitted). The court's role is limited to determining whether, as a matter of law, the defendant's statement is 'capable of a defamatory meaning.'" *Wagner*, 2024 WI App 9, ¶24.

(3) Chapter 768 Does Not Apply to the Defamation Claim

The circuit court's dismissal of this claim based on Chapter 768 was misplaced. Wis. Stat. § 768.01 "Actions for breach of promise, alienation of affection and criminal conversation abolished," modified the common law. This chapter bars actions based on broken relationships. It cannot be construed to cover every action between two people who have had some kind of relationship. *Brown v.*

Thomas, 127 Wis. 2d 318, 325-26 (Ct. App. 1985), *disapproved of on other grounds* by *Koestler v. Pollard*, 162 Wis. 2d 797, n.4 (1991).

The chapter does not apply here. Any individual who makes defamatory statements about anyone else may be subject to a common law defamation claim for relief. The status of the individuals does not matter. A husband could defame a wife. There is nothing in the pleadings linking the defamatory statements to any kind of relationship that may have existed. The claim is based on Gordon defaming and harming Kuehn by making false statements about her.

CONCLUSION

Based on the above arguments and the record, I request this court reverse the circuit court and send the case back to the circuit court for further proceedings.

Respectfully submitted,

Electronically signed by Lori Kuehn

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“This document was prepared with the assistance of a lawyer.”

RULE 809.19 (8g)(a) & (b) Certifications.

FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5790 words.

Lori A. Kuehn

Electronically Signed by Lori A. Kuehn

APPENDIX CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Lori Kuehn,

Plaintiff-Appellant,

Appeal No. 2024AP002185
v. Circuit Court Case No. 2024CV000765

Nicholas Phillip Gordon and
Now Outdoors, LLC,

Defendants-Respondents.

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LORI KUEHN'S APPENDIX
