

2820 INJURY TO BUSINESS: WIS. STAT. § 134.01

Section 134.01 of the Wisconsin statutes makes it unlawful for two or more persons to act together to maliciously injure another person's reputation, trade, business, or profession.

(Plaintiff) claims that the (defendants) (defendant) and (_____) acted together in violation of this Wisconsin law to maliciously injure (his) (her) (reputation) (trade) (business) (profession).

To establish a violation, (plaintiff) must prove four things:

First, that the (defendants) (defendant) and (_____) acted together.

Second, that the (defendants) (defendant) and (_____) acted with a common purpose to injure the (plaintiff's) (reputation) (trade) (business) (profession).

Third, that the (defendants) (defendant) and (_____) acted maliciously in carrying out the common purpose.

Fourth, the acts of the (defendants) (defendant) and (_____) financially injured the plaintiff.

The first thing (plaintiff) must prove is that the (defendants) (defendant) and (_____) acted together. This means that they agreed, combined, associated or mutually undertook a common purpose.

The second thing (plaintiff) must prove is that the agreed upon purpose was to injure (plaintiff's) (reputation) (trade) (business) (profession).

The third thing (plaintiff) must prove is that the persons who acted with the common purpose to injure the (plaintiff's) (reputation) (trade) (business) (profession) acted maliciously; that is, with a malicious motive. For conduct to be malicious, it must be intended

to cause harm for harm's sake. The harm must be an end in itself, and not merely a means toward some legitimate end.

The fourth thing the (plaintiff) must prove is that the harmful acts of the (defendants) (defendant) and (_____) financially injured (plaintiff). This means that (plaintiff) sustained economic damage as a result of the acts of the (defendants) (defendant) and (_____) in carrying out their malicious purpose.

[Burden of Proof, Wis. JI-Civil 205]

COMMENT

This instruction was approved in 2002. The comment was updated in 2008.

Section 134.01, Wis. Stats. prohibits two distinct illegal activities: (1) A conspiracy by two or more persons to wilfully and maliciously injure another in his or her reputation, trade, business or profession; and (2) a conspiracy by two or more persons to maliciously compel another to do an act against his or her will or to prevent or hinder another from doing or performing a lawful act. The leading Wisconsin case is Malecki v. Fine-Lando Clinic, 162 Wis.2d 73 (1991). See also Brew City Redevelopment Group v. The Ferchill Group, 2006 WI 128, 297 Wis.2d 606, 724 N.W.2d 879; Radue v. Dill, 74 Wis.2d 239, 245, 246 N.W.2d 507 (1976). In Brew City Redevelopment Group, the court said that while Wis. Stat. § 134.01 is a criminal statute, it provides the basis for civil tort liability (citing Radue).

The key difference between a conspiracy under this statute and a common law conspiracy is the requirement of malice. Malice is an integral element of a § 134.01 violation and must be proved in respect to all parties to the conspiracy. Allen & O'Hara v. Barrett Wreckers, Inc., 898 F.2d 512 (7th Cir. 1990).

Malecki makes clear that the conspirators must act maliciously; that is, all must act with the same specific malicious purpose. Id. at 85-86. (" . . . whatever other evidence is produced, an essential element of the cause of action is the malicious motive of the conspirators sought to be charged.") Id. at 88.

There is no such thing as a civil action for conspiracy. See Malecki, supra; Brew City Redevelopment Group, supra, fn. 5. Instead, there is an action for damages incurred by acts performed pursuant to a conspiracy. Therefore, a § 134.01 action is not a statutory claim for conspiracy, rather it is a claim for the damages that occurred as a result of a § 134.01 conspiracy. Malecki makes clear that the essence of the legal action under § 134.01 are the damages that arise out of the conspiracy. ("In civil conspiracy, the essence of the action is the damages that arise out of the conspiracy, not the conspiracy itself.") Id. at 87.

Although the statute uses both the terms "wilfully and maliciously" in the first section, Justice Holmes in the U.S. Supreme Court case, Aikens v. Wisconsin, 195 U.S. 194, (1904), pointed out that the words must be read conjunctively and not disjunctively. Wisconsin law has accepted this interpretation. (Malecki at 91, fn. 10)

Malecki makes clear that § 134.01, Stats., requires that there be a conspiracy of two or more persons. The prohibited conduct, if done by one acting alone, is not a violation of § 134.01. Id. at 88 citing Hawarden v. The Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 550 (1901).

Where a key issue in the case is the nature and purpose of the conspiracy, the following language may be considered and added to the jury instruction:

Competition that incidentally harms another when the purpose is to improve one's competitive advantage is not malicious if it is not done with a malicious motive or purpose.