STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

RODNEY RIGSBY,

Plaintiff,

v. Case No. 14 CV 108

TRAVIS WEST, *et al.*,

Defendants.

DECISION AND ORDER GRANTING MOTION TO DISMISS

STATEMENT OF THE CASE

Plaintiff Rodney Rigsby has filed this action against a number of parties, including attorneys Travis West, Jim Statz, and their firm Solheim, Billings & Grimmer/SPG Law S.C. ("defendant attorneys"). He alleges various claims for relief against the defendant attorneys arising out of their representation of Andrea Russell, ARA Design Collections, and Ell Russ, LLC in a separate, recently concluded action before Judge Juan Colas in Dane County case number 13-CV-941.[1],[2] Plaintiff's claims here include (1) violation of § 893.53, Stats., (2) violation of plaintiff's right of privacy under § 995.50, Stats., (3) invasion of privacy through violation of § 885.365, Stats., (4) breach of fiduciary duty, and (5) unjust enrichment. As remedies, plaintiff seeks damages "for unjust enrichment", "all available remedies for Breach of Fiduciary Duty", and costs, disbursements, expert fees and attorneys fees under various statutes.

Before the court is the defendant attorneys' § 802.06 (6), Stats., motion to dismiss the complaint for failure to state a claim for which relief may be granted[3]. The motion has been fully briefed and is accordingly ripe for resolution. It is GRANTED for the following reasons.

[1] Andrea Russell, ARA Design Collections, and Ell Russ, LLC were also sued in this action, but were previously dismissed for failure by plaintiff to serve the summons and complaint on them.
[2] When this action was commenced and the motions briefed, the action before Judge Colas was still pending. Judgment was entered concluding that case on May 5, 2014.
[3] The defendant attorneys also move for dismissal of Claim Five, the unjust enrichment claim, on claim preclusion grounds, but that motion need not be addressed here.

PRELIMINARY MATTERS

Before considering the merits of the motion to dismiss, two issues bear discussion.

First, both sides submit evidentiary materials in support of their respective positions on the motion to dismiss. Indeed, claim preclusion as a basis for dismissal by its very nature invokes the results of a separate action and therefore *requires* submission of evidentiary materials in support, either through judicial notice of the court record in the separate action or otherwise by affidavit. Regardless, under § 802.06 (b), "if matters outside the pleadings are presented to *and not excluded by the court*, the motion shall be treated as one for summary judgment..." under § 802.08, Stats. (Italics added). Here, there is no need to consider the extraneous material on the motion to dismiss, because on its face, plaintiff's complaint fails to state a claim for which relief may be granted. A litigant may not rely on matters outside the pleadings to revive a complaint that is, as here, dead on arrival:

> It is true that, pursuant to Wis. Stat. § 802.06(2)(b), on a motion to dismiss for failure to state a claim for relief, if matters outside the pleadings are presented and are considered by the court, the court is to treat the motion as one for summary judgment. Apparently Broome viewed this statute as a means of correcting a failure of a complaint to state a claim **509 for relief. However, as we have already stated, the first step in summary judgment methodology is to determine if the complaint states a claim for relief. *Hoida*, 291 Wis.2d 283, ¶ 16, 717 N.W.2d 17. This is the same analysis as that employed on a motion to dismiss for failure to state a claim. *Prah v. Maretti*, 108 Wis.2d 223, 228, 321 N.W.2d 182 (1982). Whether the motion is initially one for dismissal under Wis. Stat. § 802.06(2) and is then converted to one for summary judgment under § 802.06(2)(b), or whether it is filed in the first instance as a motion for summary judgment under § 802.08, the court does not consider matters outside the pleading until it has determined that the complaint states a claim for relief. *See C.L.*, 143 Wis.2d at 706, 422 N.W.2d 614 ("*Only* if a claim for relief has been stated does the court then proceed to determine whether the [affidavits and other submissions] demonstrate a genuine issue as to any material fact.") (Emphasis added.). In other words, the *801 submissions by a plaintiff showing facts not alleged in the complaint do not "cure" a pleading deficiency.

Broome v. State Dep't of Corr., 330 Wis. 2d 792, 800-801 (Ct. App. 2010).

Accordingly, if for no other reason than the utter futility of it all, the court exercises its discretion under § 802.06 (b) to exclude the materials submitted by the parties in its consideration of the motion to dismiss, although they will certainly be addressed in the motion for sanctions.

Second, plaintiff's *pro se* status accords him neither leeway to pursue frivolous claims, privilege to ignore the procedural rules applicable to lawyers under Wisconsin law, license to advance legal gobbledygook, nor justification for harassment.

> Although Hooker is self-represented, that status does not confer a license to ignore the legal principles that govern a dispute nor does it permit a litigant to burden this court and the opposing party with meritless arguments. *See Waushara Cnty. v. Graf,* 166 Wis.2d 442, 452, 480 N.W.2d 16 (1992).

Hooker v. Hooker, 345 Wis. 2d 845 (Ct. App. 2012).

> *Pro se* appellants must satisfy all procedural requirements, unless those requirements are waived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." *Farretta v. California,* 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2541 n. 46, 45 L.Ed.2d 562 (1975). While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law. As one commentary states:
>
> Depending on what the court knows about a particular litigant's circumstances, almost any of the briefing requirements may be waived, except the basic requirements that the brief state the issues, provide the facts necessary to understand them, and present an argument on the issues.
>
> ....
>
> Although the court may make special concessions in certain pro se appeals, it cannot be said that pro se appellants have any advantage over appellants who are represented by counsel. Whatever minor procedural deviations are allowed, a pro se appellant cannot compensate for the lack of legal training and therefore has a greatly reduced likelihood of success on appeal.
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> D. Walther, P. Grove, M. Heffernan, *Appellate Practice and Procedure in Wisconsin,* Ch. 11, sec. 11.9 (1986).

Waushara County. v. Graf, 166 Wis. 2d 442, 452 (1992). This is all the more true for Mr. Rigsby, who (1) is a serial litigator in state and federal court with more courtroom experience than virtually all recent law school graduates, and (2) has not demonstrated indigency.[4]

Mr. Rigsby will be held to the same standards as attorneys in his filings and appearances in this court.

[4] Mr. Rigsby has paid the filing fee to initiate this action.

ANALYSIS AND DECISION

1. Claim One-Violation of Wis. Stat. 893.53

Plaintiff's first claim, based upon § 893.53, not only fails to state a claim, but is legal nonsense. Section 893.53 is a statute of limitations. It provides a limitation period for commencing certain actions to recover damages; it does not create a substantive cause of action nor claim for relief. Nor does it provide an avenue for recovery of costs, disbursements, expert fees or attorneys fees as plaintiff contends in his prayer for relief. Section 893.53 provides no basis for a claim by plaintiff, or anyone else in the state of Wisconsin. Pleading the claim here as an affirmative basis for relief, as plaintiff should have known, is without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

2. Claim Two– Under Wisconsin Statutes 995.50 Violation of Right of Privacy

Plaintiff alleges that defendants obtained "personal and private information in a supplemental exam that had no grounds in the first place", and submitted his and his business's "bank statements, personal information, and the exam deposition transcript on the record as an exhibit for [defendant attorneys'] third false contempt motion". He contends the transcript had "trade secret and proprietary information on (sic) it". Complaint, ¶ 8. He claims the defendant attorneys accordingly violated § 895.50, Stats., which provides:

> The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:
> (a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;
> (b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and
> (c) A reasonable amount for attorney fees.
> (2) In this section, "invasion of privacy" means any of the following:
> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not

an invasion of privacy to communicate any information available to the public as a matter of public record.
(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.
(3) The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.
(4) Compensatory damages are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.
(6)(a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.
(b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:
1. The action was commenced in bad faith or for harassment purposes.
2. The action was devoid of arguable basis in law or equity.
(7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 196.63 or 968.27 to 968.37.

Plaintiff is wrong. No reasonable person could view either the conducting of a supplemental exam under Chapter 816 of the Wisconsin Statutes, or the filing of the results thereof with the court in a contempt proceeding under Chapter 785, Stats., to be an "invasion of privacy" as defined by § 895.50 (2) (a) through (d). The civil courts of this state are not "private" places but are open to the public. Litigants do not "trespass" therein by participating in statutorily authorized proceedings. Moreover, there is no allegation that the defendant attorneys used the contempt or supplementary proceedings "for advertising or for purposes of trade", nor is § 942.09, pertaining to "representations depicting nudity" even remotely implicated. So we are left with definition (c), which is where plaintiff apparently hangs his hat, although as with much of what he files, plaintiff's position on this point is none too clear:

> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

Plaintiff makes only conclusory allegations that the defendant attorneys' conduct falls within this definition. See Complaint, ¶ 9. Such bare conclusions are insufficient to withstand a motion to dismiss. *See e.g. Wilson v. Continental*

Insurance Companies, 87 Wis. 2d 310, 319 (1979). Only facts alleged, and reasonable inferences from those facts, are accepted as true, and this court is not a liberty to add facts to those alleged. *Id.* Here, the only facts alleged do not support plaintiff's "bare conclusion" that the defendant attorneys violated § 895.50. Pursuing supplementary proceedings and contempt of court remedies, which proceed by statute under the auspices of the circuit court, does not and probably cannot constitute "acting unreasonably or recklessly as to whether there is a legitimate public interest in the matter involved..." Indeed, as a matter of law, contempt and supplementary proceedings, along with virtually <u>all</u> court proceedings, are imbued with the public interest, which is why they are open to the public.

Even if there had been some misconduct by the attorneys during the supplementary or contempt of court proceedings in 13 CV 941, or if some supervision of the process had been required to protect plaintiff's rights, the circuit court superintending the proceedings retained the jurisdiction and competence to fashion the remedy. This court, in an entirely collateral lawsuit, is without authority to meddle with the proceedings in another circuit court. *Salter v. Cook*, 131 Wis. 20 (1907).

Claim Two accordingly fails to state a claim for which relief may be granted.

3. <u>Claim Three – Invasion of Privacy</u>

Plaintiff's third claim is that Attorney West recorded a phone call with plaintiff without plaintiff's consent, in violation of his right of privacy under § 885.365, Stats. The claim is frivolous. Section 885.365 provides:

> (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state in civil actions, except as provided in ss. 968.28 to 968.37.
> (2) Subsection (1) shall not apply where:
> (a) Such recording is made in a manner other than by interception and the person whose conversation is being recorded is informed at that time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law; or such recording is made through a recorder connector provided by the telecommunications utility as defined in s. 196.01(10) or a telecommunications carrier as defined in s. 196.01(8m) in accordance with its tariffs and which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds;
> (b) The recording is made by a telecommunications utility as defined in s. 196.01(10), a telecommunications carrier as defined in s. 196.01(8m) or its officers or employees for the purpose of or incident to the construction, maintenance, conduct or operation of the services and facilities of such

public utilities, or to the normal use by such public utilities of the services and facilities furnished to the public by such public utility; or
(c) The recording is made by a fire department or law enforcement agency to determine violations of, and in the enforcement of, s. 941.13.

As can be readily seen, § 885.365 is purely and simply a rule of evidence, not a basis for a cause of action. In fact, plaintiff is wrong in asserting that there is anything illegal about defendant West's recording his conversation with an unsuspecting Mr. Rigsby. See § 968.31(2)(c):

(2) It is not unlawful under ss. 968.28 to 968.37:

...

(c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

4. Claim Four – Breach of Fiduciary Duty

Plaintiff alleges that the defendant attorneys

had an existing fiduciary duty to their clients to serve their needs and protect them and breached this duty by launching a frivolous defense adding Mr. Rigsby and RigRad Studios & syndication, LLC as third-party Defendants' acting in bad faith conduct and malpracticing (sic) to induce unduly burdensome delay and costs on the Plaintiff to get his sanction and fees and continually harassment for future work for himself.

Complaint, ¶ 15. He furthers this line of thought by alleging, in ¶ 17 of the Complaint, that the defendant attorneys should have addressed their clients concerns and resolved the clients' issues, rather than undertake whatever legal machinations they employed against plaintiff. Further plaintiff avers that the defendant attorneys "cannot even prove that they have ever been in 'good faith' for their clients." Complaint, ¶ 19.

The "clients" referenced in the above allegation are Andrea Russell, Ell Russ, LLC, and ARA Design Collections, LLC, not plaintiff Rigsby. This is fatal to plaintiff's claim here. Whether or not the defendant attorneys breached a fiduciary duty to their clients is of no legal concern to plaintiff Rigsby, and certainly does not provide him with the basis for a claim for relief against them. Plaintiff was neither a party to the contract between the defendant attorneys and their clients nor, by any stretch of the imagination, a third-party beneficiary of that contract, since the defendant attorneys were hired by their clients to oppose plaintiff's claims in a lawsuit. Wisconsin recognizes no third-party claim for bad faith

against another party's attorney.[5] Nor does Wisconsin impose any fiduciary duties upon attorneys in favor of those who oppose the attorneys' clients in litigation. Such would be antithetical to the lawyer's fiduciary duty to his own clients.

Claim Four accordingly fails to state a claim for which relief may be granted.

5. Claim Five – Unjust Enrichment

Plaintiff's unjust enrichment claim appears primarily targeted at the dismissed defendants Russell, Ell Russ and ARA. Complaint, ¶ 21. However, at the tail end of the claim, plaintiff adds this: "Travis West, Jim Statz and Solheim, Billings benefitted because the monies that were due to Rigsby and for their[6] creative ideas went to the instead." Id. Apparently the claim is that the defendant attorneys were unjustly enriched because they were paid for their legal work (Russell, Ell Russ and ARA) with money that had unjustly enriched their clients at the expense of Mr. Rigsby, Ms. Conrad and their company. In his 27 page brief, plaintiff offers no more insight into this claim other than merely repeating the above one sentence.

The elements of an unjust enrichment claim are:

> The plaintiff maintains that the complaint states a cause of action in equity for unjust enrichment. The elements ***689** of such a cause of action are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. S & M Rotogravure Service, Inc. v. Baer, 77 Wis.2d 454, 460, 252 N.W.2d 913 (1977); Seegers v. Sprague, 70 Wis.2d 997, 1004, 236 N.W.2d 227 (1975); Gebhardt Bros. Inc. v. Brimmel, 31 Wis.2d 581, 584, 143 N.W.2d 479 (1966); Don Ganser & Assos., Inc. v. MHI, Inc., 31 Wis.2d 212, 217, 142 N.W.2d 781 (1966); Kelley Lumber Co. v. Woelfel, 1 Wis.2d 390, 83 N.W.2d 872 (1957); Nelson v. Preston, 262 Wis. 547, 55 N.W.2d 918 (1952).

Puttkammer v. Minth, 83 Wis. 2d 686, 688-89 (1978).

Plaintiff does not allege he conferred a benefit upon the defendant attorneys. Instead, his unjust enrichment claim is purely vicarious. That is, he allegedly conferred a benefit upon the defendant attorneys' clients and it has been inequitable for the clients to retain the benefit without payment for its value.

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[5] Nor, for that matter, is there any basis for plaintiff to claim, as he does in ¶ 3 of his Complaint, that *Seltrecht v.Bremer*, 214 Wis. 2d 110 (Ct. App. 1995), *rev. denied* , offers any hope for his lawsuit here. *Seltrecht*, on its face, is completely beside the point.

[6] Presumably Mr. Rigsby, Catherine Conrad and their company RigRad, although again it is none to clear.

However, instead of paying plaintiff, his colleague and his company for the benefit received, the clients paid the attorneys for legal services, or so the story goes.

Plaintiff presents no legal authority for a vicarious unjust enrichment claim, and this court can find none. Indeed, it would be hugely surprising if Wisconsin law would allow any plaintiff asserting an unjust enrichment claim to join the defendant's attorneys in the action on the mere grounds that the lawyer has been paid for his services. There would be no stopping point. Why not also sue the defendant's landlord, grocer, etc.? Or the lawyers the lawyers hire, if any, to defend the unjust enrichment claim?

If a legally valid claim for unjust enrichment exists in Claim Five, the court of appeals will have to find it.

MISCELLANY

Hints of various other potential claims for relief not specified in the complaint pepper plaintiff's briefing on the motion to dismiss. Beyond the fact that the Complaint must stand on its own two feet and cannot be augmented by legal briefs and other supplementary materials, see *Broome v. State Dep't of Corr.*, 330 Wis. 2d 792, 800-801 (Ct. App. 2010) discussed above, these claim fragments fail.

For example, on page 14 of his brief, plaintiff invokes 42 U.S.C § 1983, which is inapplicable here because there is no allegation in the Complaint that defendants acted under color of law within the meaning of § 1983 (nor could there be), nor identification of a constitutional deprivation.

On page 16 of his brief, plaintiff cites 5 U.S.C. § 552 a (2), which governs disclosure of records by a federal agency. Enough said.

On page 26 of his brief, plaintiff argues that defendant attorneys violated the federal Unfair Debt Practices Act, but the Complaint does not come within hailing distance of setting forth any facts that would support such.

On page 4 of his brief, plaintiff alludes to the Supreme Court Rules of Professional Conduct for Attorneys, S.C.R. Chapter 20, accusing the defendant lawyers of conflict of interest in the representation of their clients in 13-CV-941. Even if true -- and the factual allegations in the Complaint do not support this bare conclusion -- the Supreme Court Rules of Professional Conduct for Attorneys do not provide a basis for a civil action by third parties against attorneys. See Preamble, ¶ (20):

> [20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily

> warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

Finally, there are vague and conclusory fragments of an abuse of process claim scattered hither and yon in the Complaint, but plaintiff neither specifically identifies abuse of process as a separate claim for relief nor does he argue it in response to the motion to dismiss. It is not for this court to string together stray conclusory accusations sprinkled sparingly across an 11 page complaint (not counting exhibits) into some coherent argument that satisfies *Brownsell v. Klawitter*, 102 Wis. 2d 108, 115-17 (1981). If plaintiff intended to pursue abuse of process as a claim for relief, his pleading is insufficient to raise the issue and his argument is not only undeveloped, it is non-existent. It is therefore considered no further. See *In re Guardianship of Giovanna P.*, 345 Wis. 2d 847 (Ct. App. 2012) *review dismissed as improvidently granted,* 351 Wis. 2d 28 (2013) and *review granted,* 839 N.W.2d 615 (Wis. 2013).

CONCLUSION

A notice of scheduling conference accompanies this decision. At the conference the parties should be prepared to discuss further handling of the defendant attorneys' motion for sanctions.

Dated this 27 day of May, 2014

BY THE COURT:

Richard G. Niess
Circuit Judge

cc: Mr. Rodney Rigsby
Attorney Travis West