

GRANT E. STORMS,

Plaintiff,

v.

Case No. 04 CV 002205

Case Code: 30106

ACTION WISCONSIN, INC.

and

CHRISTOPHER OTT,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On October 10, 2003, Grant Storms was an invited speaker at a conference held in Milwaukee, Wisconsin, hosted by an organization called Wisconsin Christians United and titled the "International Conference on Homo-Fascism." This is no dispute about the words Storms delivered at that conference; a compact disc of his entire speech accompanies this brief. Among Storms' words were:

- We are going to liken the Philistines unto the homosexual movement today;
- They want to kill you;
- It's us or them. There is no in between. There is no having this peaceful co-existence. They have to eliminate us and the word of God if they want to succeed;

- There is a Philistine army out there. It's called the homosexual movement. Whether you can see it or not, understand it or not, they want to eliminate us;

- For 20 years we have been begging bad legislators and bad judges to try to do the good thing. Enough is enough my good friends: let's start taking it to the streets;

and, finally these words, chillingly delivered:

- God has delivered them into our hands. Hallelujah, boom, boom, boom, boom, boom - - There's twenty! Ca-ching, glory, glory to God, let's go drive through the McDonalds and come back and get the rest.

Storms even admits that he meant the "boom, boom, boom, boom, boom" to sound like explosions.

There is also no dispute that on December 8, 2003, Action Wisconsin published a press release which said that in his speech, Storms appeared to advocate the murder of gay people. Specifically, there is no dispute that Action Wisconsin said that Storms "made sounds like gunfire as if he were shooting gay people" and that Storms was "apparently advocating the murder" of a Wisconsin Senator's constituents.

The only dispute is whether Storms appeared to advocate the murder of gay people. Storms says he did not intend to do so. Action Wisconsin says that this is a fair interpretation of his words.

This Court must consider several specific legal questions in the course of deciding this motion for summary judgment, including whether the dispute at hand arose in the context of a public controversy, whether Storms is a limited purpose or general purpose public figure, whether Action Wisconsin's words were true, or, if not true, whether they were expressed knowing that they were false or in reckless disregard

as to their falsity. After laying out the facts, this brief will show that the dispute did arise in the midst of a public controversy over the civil rights of gay and lesbian couples and, more specifically, within a controversy over the attendance of a Wisconsin Senator at the “International Conference on Homo-Fascism” at a time that a law limiting the rights of gay and lesbian people were under legislative consideration. This brief will show that Storms has willingly, purposefully, and passionately thrust himself into the middle of these controversies, and thus has earned public figure status. It will show that Action Wisconsin’s published interpretation of Storms’ words was a fair interpretation. That is, this brief will explain how Action Wisconsin’s words were substantially true or, if not demonstrably true, they were not stated with the knowledge that they were false, or in reckless disregard of whether they were true or false. The undisputed facts of this case and the law of defamation will show this Court that Defendants are entitled to summary judgment in their favor.

STATEMENT OF FACTS

Action Wisconsin, Wisconsin Christians United, and Public Debate.

The material facts of this case are uncontested. Defendant Action Wisconsin, Inc. is the statewide organization dedicated to advancing and protecting the civil rights of lesbian, gay, bisexual and transgender (“LGBT”) people. It carries out this mission through education, advocacy, grassroots organizing, coalition-building and electoral involvement. These efforts are designed to educate the general voting public, sensitize the media, promote a politically active and effective organizational membership, and

better inform policy makers on issues of concern to its members. *Affidavit of Christopher Ott*, ¶2. Defendant Christopher Ott, at all relevant times, has been the Executive Director of Action Wisconsin, Inc. and as to the allegations against him in the Complaint and all facts testified to by him his Affidavit has acted in that capacity. *Affidavit of Christopher Ott*, ¶ 1; *Affidavit of Timothy O'Brien*, ¶3. Therefore, throughout this brief we will refer to both Defendants as “Action Wisconsin.”

In the fall and winter of 2003, Action Wisconsin led the grassroots opposition to a proposed law that would have explicitly reserved marriage for opposite-gender couples, and explicitly prohibited recognition of marriage formed validly in another state or country that was not comprised of an opposite-gender couple.¹ *Affidavit of Christopher Ott*, ¶ 3. That opposition included letter-writing campaigns and constituent lobbying of Wisconsin Assembly and Senate representatives.² Specifically, Action Wisconsin organized a statewide lobby day on September 30, 2003 that drew over 200 people from across the state to meet with their state legislators. Action Wisconsin also publicized legislative committee hearings to Action Wisconsin's statewide supporters; organized people to testify at the hearings, call their representatives, and send e-mails; held press conferences; issued regular press releases and gave numerous media

¹2003 AB 475 and companion bill 2003 SB 233.

²2003 AB 475 passed both houses of the Wisconsin legislature but was vetoed by the Governor, and an effort on November 12, 2003 to override the veto in the Assembly failed. Since that time, those opposed to equal marriage rights for gay and lesbian couples have pursued an effort to amend the Wisconsin Constitution to ban marriage for gay and lesbian couples and outlaw any legal status “substantially similar to that of marriage” for all unmarried individuals. 2004 AJR 66. Action Wisconsin has led the opposition to this effort. *Affidavit of Christopher Ott*, ¶ 6.

interviews to present the case against the legislation to the wider public. *Affidavit of Christopher Ott*, ¶ 4. Nearly all of those individuals who testified at legislative committee hearings or commented in the press in support of the proposed legislation cited religious opposition to homosexuality as their basis for supporting it. *Affidavit of Christopher Ott*, ¶ 5. Later that fall, an effort to address this same issue by way of amending the Wisconsin Constitution was begun in the Wisconsin Legislature. Action Wisconsin also led (and continues to lead) the opposition to that. *Affidavit of Christopher Ott*, ¶ 6. Again, public support for the proposed amendment has come largely from the conservative religious community. *Affidavit of Christopher Ott*, ¶ 6.

Long before the fall of 2003, Wisconsin Christians United (“WCU”) was well-known to Action Wisconsin and its staff. WCU is led by Ralph Ovadal. *Affidavit of Joshua Freker*, ¶ 3. WCU regularly leaves its literature on doorsteps in neighborhoods around Wisconsin. LGBT constituents from throughout the state call and e-mail Action Wisconsin to alert Action Wisconsin that it appeared their neighborhoods were targeted because it was known that an openly lesbian or gay person lived there. They often report that these pamphlets make them feel unsafe or afraid. *Affidavit of Joshua Freker*, ¶ 4. WCU has distributed literature over the years with titles such as: “Do Homosexuals Spend Eternity in Heaven or Hell?”, “Is Someone You Know a Bugger?”, “Rape, Murder, and Homosexuality,” “The Truth About Homosexuality,” and “What the Bible Really Says About Homosexuality,” all of which can be found on the WCU website (www.wcuweb.com). *Affidavit of Joshua Freker*, ¶ 5.

Before October 2003, Action Wisconsin was also aware of WCU's tendency to picket locations and events that are friendly to gay people. On several occasions over the years, Action Wisconsin was informed that WCU had demonstrated at high schools, events designed to raise money for AIDS service organizations, and gay pride events in Madison. WCU uses provocative signs at these events and verbally confronts passersby. Some signs and confrontations quote from biblical passages; other signs have read: "Homosexuality is an Abomination." *Affidavit of Joshua Freker*, ¶ 6.

As an organization, before and since October 2003, WCU advocates the eradication of civil rights laws and the criminalization of intimate conduct between same-sex couples. One of WCU's brochures, the text of which can be found on WCU's website (noted above), is titled "A Little Discrimination Can Be a Good Thing." In this brochure, among other things, WCU advocates for workplace and housing discrimination against gay and lesbian people. *Affidavit of Joshua Freker*, ¶ 7. From reviewing the website of WCU and materials published by WCU, staff at Action Wisconsin also knew that WCU describes itself as a group dedicated to stopping "the advance of sodomite tyranny and brutality," and states that its "primary mission is to comprehensively educate the citizens of Wisconsin and the nation regarding the sin of homosexuality and the agenda of the homosexual movement." *Affidavit of Joshua Freker*, ¶ 8. Due to this mission, which is contrary to Action Wisconsin's mission of advancing

and protecting the civil rights of lesbian, gay, bisexual and transgender people, as of the fall of 2003 and continuing today, Action Wisconsin monitors the activities and website of WCU. *Affidavit of Joshua Freker*, ¶ 8.

WCU's International Conference on Homo-Fascism and Action Wisconsin's Reaction.

In October 2003, WCU held a conference in Milwaukee titled the "International Conference on Homo-Fascism." *Deposition of Grant E. Storms, June 30, 2004* (hereinafter "*Storms Dep.*") at 85:16-20. Action Wisconsin became aware of this conference when Communications Director Joshua Freker read about it on WCU's website. Prior to the conference date, Action Wisconsin knew, from reviewing materials posted on WCU's website promoting the "International Conference on Homo-Fascism," that WCU promised to set forth at the conference a "clear, effective plan for action to turn back the homo-fascist tide." *Affidavit of Joshua Freker*, ¶ 9.

Initially, Action Wisconsin was not particularly interested in the conference, as WCU and its activities had in the past appealed only to a small "fringe" group of people. *Affidavit of Timothy O'Brien*, ¶ 5; *Affidavit of Joshua Freker*, ¶ 10. However, within a week or two after the conference, Mr. Freker read in a publication called *InStep* that a Wisconsin state Senator had attended the International Conference on Homo-Fascism. Surprised by this news, he shared it with other Action Wisconsin staff and officers. *Affidavit of Joshua Freker*, ¶ 11. Mr. Freker began to monitor WCU's website more regularly, and discovered on the website WCU's October 14, 2003 press release announcing that a Senator had attended the conference. The Senator was not named in

the press release or the *InStep* column. *Affidavit of Joshua Freker*, ¶ 12. Concerned about the attendance of a Wisconsin Senator at what appeared to be an anti-LGBT conference, particularly at a time when Wisconsin State representatives, as well as members of the public in general, were hotly debating the issue of equal marriage rights for gay and lesbian couples, Action Wisconsin obtained a copy of the compact disc recordings (“CD’s”) containing the speeches made at this conference. *Affidavit of Timothy O’Brien*, ¶¶ 7-8.

There were four CD’s in all, including a CD of invited speaker Grant Storms. Timothy O’Brien, then-President of the Board of Directors of Action Wisconsin, listened to all of the CD’s. In particular, he listened to Plaintiff Grant Storms’ entire speech and was shocked by the vitriolic nature of Storms speech, the use of violent imagery, and the derogatory and false statements about gay and lesbian people and the gay and lesbian community. He was deeply disturbed by Storms’ claims that gay and lesbian people wanted to kill members of Storms’ audience, and what he understood to be a corresponding suggestion that members of Storms’ audience kill gay and lesbian people. *Affidavit of Timothy O’Brien*, ¶ 9.

When Christopher Ott, Executive Director of Action Wisconsin, listened to sections of the Storms speech, he too was shocked and shared Mr. O’Brien’s impressions of Storms’ speech. He immediately decided that it was important to try to find out which state Senator had attended the conference. *Affidavit of Christopher Ott*, ¶¶ 7-8, 10. Mr. Freker also listened to portions of Storms’ speech, which chilled and frightened

him. He heard the same message as Mr. Ott and Mr. O'Brien heard. *Affidavit of Joshua Freker*, ¶¶ 13-14. Before listening to Storms' speech, neither Mr. O'Brien, Mr. Ott, nor Mr. Freker had heard of Storms. *Affidavit of Timothy O'Brien*, ¶ 22; *Affidavit of Christopher Ott*, ¶13; *Affidavit of Joshua Freker*, ¶ 17. Mr. O'Brien and Mr. Freker conducted some Internet research on Storms and other conference speakers. They found, for example, that Storms was well-known as an anti-gay activist in Louisiana. *Affidavit of Joshua Freker*, ¶ 18; *Affidavit of Timothy O'Brien*, ¶ 24.

In light of 1) the derogatory, false, and violent language used about and against gay and lesbian people by speakers at this conference including the encouragement to commit violence against gay and lesbian people, 2) reports that a Wisconsin Senator attended the conference, 3) the ongoing debate over the rights of same-gender couples to marry in Wisconsin, and 4) the participation of Action Wisconsin, religious individuals and organizations, elected officials, and the electorate in that debate, Action Wisconsin decided to issue a press release to bring to the public's attention what had been said at WCU's conference and to call for discipline of the Senator who had attended. *Affidavit of Timothy O'Brien*, ¶25; *Affidavit of Christopher Ott*, ¶¶ 14-15 and Exhibit A; *Affidavit of Joshua Freker*, ¶ 19. The press release was also published on Action Wisconsin's website. *Affidavit of Christopher Ott*, ¶ 15.

The Storms Speech, Listeners' Impressions, and Action Wisconsin's Press Release.

The press release contained two statements that the Plaintiff claims in this lawsuit defame him. The first statement is: "Another speaker made sounds like

gunfire as if he were shooting gay people, saying, 'God has delivered them into our hands . . . Boom boom boom . . . there's twenty! Ca-ching! Glory, glory to God.' Excerpts of the speeches are attached." *Complaint*, ¶ 6.A. The second statement from the Action Wisconsin press release that Storms claims in this lawsuit to be defamatory is "We trust that Senator Panzer will be as appalled as we were to find one of her colleagues in the audience for a speech apparently advocating the murder of his own constituents." *Complaint* ¶6.B.

As to the first statement Storms complains of, the portion that Storms claims is false and defamatory is only this phrase: "like gunfire as if he were shooting gay people . . ." *Storms Dep.* at 124:18-125:3 and *Storms Dep.* Exhibit 5. Excerpts of several different speeches were included with the press release, and accurately indicated that the "God has delivered them . . ." statement was made by the Plaintiff. *Affidavit of Christopher Ott*, ¶15, Exhibit A; *Storms Dep.* at 96:13-18, 100:24-101:15. The full statement delivered by Storms and quoted later in the press release is as follows: "God had delivered them into our hands. Hallelujah- Boom , boom, boom, boom, boom [like gun fire]-There's twenty! Ca-ching. Glory, glory to God. Let's go drive through the McDonalds and come back and get the rest." *Affidavit of Christopher Ott*, ¶15, Exhibit A. Following the speech excerpts included in Action Wisconsin's press release, Action Wisconsin included the following: "Action Wisconsin transcribed the above excerpts from a recording of the conference provided by Wisconsin Christians United. The numbers represent the time on the CD's that the comments were made." *Affidavit of*

Christopher Ott, ¶15, Exhibit A, page 4. Also in the press release, Mr. O'Brien said "While conference participants are a clear threat to the security and freedom of the lesbian and gay communities, so too is a state constitutional amendment that would codify us as second-class citizens. They are both branches from the same tree of intolerance." *Affidavit of Christopher Ott*, ¶15, Exhibit A, page 1.

The delivery of the words "boom boom boom . . ." on the CD sounded to the Action Wisconsin listeners like imitated gunshots. *Affidavit of Timothy O'Brien*, ¶19; *Affidavit of Christopher Ott*, ¶9; *Affidavit of Joshua Freker*, ¶15. Storms admits that he intended those words to sound like some type of explosion. *Storms Dep.* at 102:18-24. Mr. Freker understood from the entire context of Storms' speech, and particularly other specific statements made by Storms in his speech, that Storms was drawing a parallel between the Philistines who were slain, literally, by the Israelites, and gay and lesbian people, who, completing the analogy, should be literally killed by those who he believed Storms considers to be the current army of God, fundamentalist Christians such as those attending the conference. *Affidavit of Joshua Freker*, ¶14. Mr. O'Brien and Mr. Ott agreed with this impression. *Affidavit of Timothy O'Brien*, ¶10; *Affidavit of Christopher Ott*, ¶8.

About 5 minutes into the recording of his speech Storms explained that he would be telling the Bible story of Jonathan and his armorbearer (I Samuel 14) defeating the army of the Philistines, and that for the purposes of the conference, he intended to "liken the Philistines unto the homosexual movement today." Storms said this at least

one other time during his presentation. *Affidavit of Timothy O'Brien*, ¶11; *Storms Dep.* at 92:19-93:19; *Storms Dep.* Ex. 8 at 5:53.³ (Although Storms initially denied saying this, when confronted with a recording of his own voice, he admitted making the statement. *Storms Dep.* at 91:20-24, 92:19-93:19.) About 20 minutes further into the recording, Storms said “They want to kill you,” and “They have contempt for things of God . . . they are a scornful people.” *Storms Dep.* at 114:23-115:5; *Storms Dep.* Exhibit 8 at 24:40, 25:00. Mr. O'Brien understood Storms to mean gay and lesbian people when he said “they.” *Affidavit of Timothy O'Brien*, ¶12. About two minutes later in the speech, Storms said:

It's us or them. There is no in between. There is no having this peaceful co-existence. They have to eliminate us and the word of God if they want to succeed. It's almost like capitalism and communism – it is going to be one or the other. You can't have both Either they're right, or we're right. Either we're going to succeed, or they're going to succeed. Either it's going to be a homosexual, anti-God nation, or it's going to be a nation that stands for God and says that thing is sin. Can't be both, won't be both. Something is going to happen. Either they'll crush us and . . . silence us and kill the ones that won't be silent or imprison the ones that won't be silent. Or the church of the Lord Jesus Christ will rise up and say this is a Christian nation: this is the way it will remain. Go back in the closet.

Affidavit of Timothy O'Brien, ¶13; *Storms Dep.* Exhibit 8 at 26:35.

³Exhibit 8 from the Storms Deposition is a true and correct CD recording of Storms' speech at the International Conference on Homo-Fascism given on October 10, 2003. *Storms Dep.* at 141:19-23. The numbers in the reference indicate the time on the CD at which the quoted statement may be found. For instance, “*Storms Dep.* Exhibit 8 at 26:35” means that this particular statement begins 26 minutes and 35 seconds from the start of the recording that has been marked as Exhibit 8 to the Storms Deposition. Please note that different CD players will show slightly different times on the display.

Mr. O'Brien was horrified that Storms told his audience that gay and lesbian people wanted to kill people like those in his audience. He knew of no reason for Storms to have made such statements. Mr. O'Brien understood Storms to say that if those in his audience did not want gay and lesbian people to kill them, they, with the assistance of God, had to kill the gay and lesbian people. *Affidavit of Timothy O'Brien*, ¶ 14.

As Storms continued with his speech, he began to draw parallels between Jonathan and his armor bearer defeating the army of the Philistines, and the members of his audience and the people he called "Christians" defeating the gay and lesbian rights movement. *Affidavit of Timothy O'Brien*, ¶15. About 31 minutes into the recording, Storms reinforced his parallel again: "There is a Philistine army out there. It's called the homosexual movement. Whether you can see it or not, understand it or not, they want to eliminate us." *Affidavit of Timothy O'Brien*, ¶16; *Storms Dep.* Exhibit 8 at 31:20. Shortly before Storms got to the point in his story when Jonathan began killing members of the Philistine army, Storms said: "For 20 years we have been begging bad legislators and bad judges to try to do the good thing. Enough is enough my good friends: let's start taking it to the streets." *Affidavit of Timothy O'Brien*, ¶17; *Storms Dep.* Exhibit 8 at 43:40.

Mr. O'Brien listened carefully to Storms as he described the story of Jonathan and his armor bearer. As Storms described the story, Jonathan was with the Israelite army, which was encamped across from the Philistine army. Without permission from

Saul, the leader of the Israelites, Jonathan along with his armor bearer, left the Israelite encampment, confronted the Philistines and killed twenty of them. After a brief delay, the Israelite army then rose against the Philistines, routed them and killed them. Thus, O'Brien was particularly frightened when he heard Storms say: "God has delivered them into our hands. Hallelujah, boom, boom, boom, boom, boom - - There's twenty! Ca-ching, glory, glory to God, let's go drive through the McDonalds and come back and get the rest." *Affidavit of Timothy O'Brien*, ¶18; *Storms Dep.* Exhibit 8 at 59:00.

In the minutes leading up to this chilling exclamation, Storms explained how working through the political process, lobbying or reasoning with governmental officials, was not the way to bring about change. Instead, he told his listeners to do what is in their hearts. He encouraged confrontation. He said avoiding confrontation wasn't working. *Affidavit of Timothy O'Brien*, ¶20. Because Storms likened the "homosexual movement" to the Philistines and had said that it was time to take action in the "streets" because politicians had failed, O'Brien understood Storms to be encouraging a person or people to act like Jonathan had: on his own or on their own, to kill twenty homosexuals, take a break and then come back and kill the rest. *Affidavit of Timothy O'Brien*, ¶19.

At no time in his speech did Storms say that he did not mean for listeners to take him literally, that they should not actually "take it to the streets" as Jonathan and his armor bearer did. At no time in his speech did Storms say that what he meant was that his listeners should only speak out and preach against homosexuality, or work through

political and judicial processes to disenfranchise gay and lesbian people. At no time in his speech did Storms say that he did not mean to encourage people to get into physical confrontations with gay and lesbian people in the way that Jonathan and his armor bearer did with the original Philistines. At no time in his speech did Storms explain that while he and other fundamentalists take the Bible literally, his listeners should not take his speech literally. *Affidavit of Timothy O'Brien*, ¶21.

Thus, after hearing Storms say that he was going to “liken the Philistines unto the homosexual movement of today,” that “It’s them or us, there’s no in between,” that “there is a Philistine army out there. It's called the homosexual movement,” that “for 20 years we have been begging bad legislators and bad judges to try to do the good thing. Enough is enough, my good friends: let's start taking it to the streets,” Action Wisconsin listeners then heard Storms tell the story about how Jonathan and his armor bearer snuck away from their army camp and acted on their own to attack the Philistines. They heard him say: “God has delivered them into our hands. Hallelujah, boom, boom, boom, boom, boom - - There's twenty! Ca-ching, glory, glory to God, let’s go drive through the McDonalds and come back and get the rest.” *Storms Dep. Ex. 8* at 59:00. Storms admits that the battle between the Philistine army and the Israelites was a battle to the death; this was not a situation where the Philistines were asked to join the Israelites and be their friends. The point of the battle was to kill the Philistine so they would no longer be in the land of Canaan, and God was on the side of the Israelites. *Storms Dep. at 100:9-23*.

Action Wisconsin understood Storms in this speech to be praising Jonathan and his armor bearer for attacking and killing members of the Philistine army on their own, without the support of their organized army, and suggesting it would be good, in God's eyes, for modern Jonathans to "take it to the streets" and kill those who Storms had identified as members of the Philistine army of today, those who Storms claims want to kill the members of Storms' audience, that is, members of the "homosexual movement." *Affidavit of Christopher Ott*, ¶8; *Affidavit of Timothy O'Brien*, ¶10; *Affidavit of Joshua Freker*, ¶14.

As for the second statement that Storms claims is defamatory, "We trust that Senator Panzer will be as appalled as we were to find one of her colleagues in the audience for a speech apparently advocating the murder of his own constituents," Action Wisconsin representatives did believe this. They believed that Senator Panzer would appalled as they were to find a fellow Senator in Storms' audience, listening to what Action Wisconsin representatives perceived to be a suggestion that members of his audience should emulate Jonathan and his armor bearer and do to members of the gay and lesbian community what Jonathan and his armor bearer had done to members of the Philistine army: kill them. *Affidavit of Timothy O'Brien*, ¶26; *Affidavit of Christopher Ott*, ¶11; *Affidavit of Joshua Freker*, ¶16. There are gay and lesbian people residing in every county of Wisconsin, and thus no matter which Senator attended WCU's conference, there are gay and lesbian people in every Senatorial District. *Affidavit of Christopher Ott*, ¶12.

The statements in Action Wisconsin's press release that in his speech Storms was "apparently advocating . . . murder" and that he made sounds like gunfire "as if he were shooting gay people" are true: from his speech, it appeared to Mr. O'Brien, Mr. Ott and Mr. Freker that Storms was advocating murder, and that he illustrated his message through drawing a parallel between the killing of the original Philistine army and today's Philistine army—the "homosexual movement." Nothing that Action Wisconsin listeners heard in Storms' speech led them to believe that their interpretation was wrong. Furthermore, although they each were disturbed and frightened by the awful things Storms said about the LGBT community and how he believed people should battle them, they did not approve or participate in the writing of the press release with an aim to harm Storms or out of any ill will. Action Wisconsin believes in every person's right to speak, and felt that the best way to counteract Storms' messages was for Action Wisconsin to speak honestly and publicly about who attended this International Conference on Homo-Fascism and what they were told by the speakers, including Storms. *Affidavit of Timothy O'Brien*, ¶¶ 27-28; *Affidavit of Christopher Ott*, ¶¶ 16-17; *Affidavit of Joshua Freker*, ¶¶ 20-21.

Grant Storms.

Storms has lived in the New Orleans, Louisiana area since about 1984. *Storms Dep.* at 35:12-36:22. He became ordained as a minister in 1991 or 1992 when the elders of the church where he was pastoring at the time "laid their hands on me, prayed over me, recognized the call of God on my life." He then had a certificate notarized and filed

it with Vital Statistics in order to be ordained. *Storms Dep.* at 4:17-5:15. The only educational certificate, degree or diploma held by Storms is his high school diploma which he got in 1977 at age 20. Although he attended post-secondary school at several institutions, he never completed a certificate, degree or diploma at any of them. *Storms Dep.* at 7:22-8:2, 8:22-10:21. He is the pastor of a non-denominational fundamentalist church, and believes in a literal interpretation of the Bible. *Storms Dep.* at 32:21-33:9. He has headed the same congregation since December 1996; at the time it was called Good News Revival Center, and later the name was changed to Reformer. *Storms Dep.* at 49:11-22.

In 1996 Storms considered himself a Christian activist and also became a radio talk show host on a New Orleans A.M. radio station, which he considered to be ministry work. *Storms Dep.* at 48:23-49:9. He has continued as a radio talk show host since then; the show is currently called "The Reformer." *Storms Dep.* at 52:13-19. Since about 1997, it has aired weekdays for one hour, and reaches a 60 mile radius from the transmission point. *Storms Dep.* at 52:21-53:11. Judging by the number of callers, Storms believes he has "a good size audience for a Christian radio station." *Storms Dep.* at 53:23-54:6. In the three years prior to his deposition, Storms had also appeared on others' radio shows, including at least 5 shows in the New Orleans area, numerous other Louisiana radio shows, a nationally broadcast Christian radio show, and two internet or radio/internet shows. *Storms Dep.* at 55:14-57:15. Storms has also been a guest on television shows, including The Political Ringside and ABC Primetime. *Storms*

Dep. at 57:25-59:4. He has also engaged in anti-homosexuality protest activities, including burning gay magazines, and those activities have garnered television coverage, in which he was identified by name. *Storms Dep.* at 76:16-77:24. He has also received newspaper and news-magazine coverage both nationally (including *Newsweek*) and local to the New Orleans area, largely with regard to his opposition to a festival called “Southern Decadence,” which he describes as a “gay festival” in New Orleans. *Storms Dep.* at 59:1-4, 68:18-69:15, 79:15-80:11.

In 2002, Storms founded an organization called “Christian Conservatives for Reform,” by opening up a bank account and raising money. One of the principles of this group is “raising its voice loudly against the homosexual militant movement.” He is President of the organization. *Storms Dep.* at 62:14-63:1. Christian Conservatives for Reform has two websites. *Storms Dep.* at 60:10-25. Storms has never used either of these websites to post a response or reaction to the Action Wisconsin press release or to explain how Action Wisconsin’s interpretation of his words was wrong. In fact, he just prefers not to talk about it. *Storms Dep.* at 127:2-15. The only time he has addressed Action Wisconsin’s press release publicly was on Ralph Ovadal’s radio program. Ralph Ovadal is the person who invited Storms to speak at WCU’s International Conference on Homo-Fascism in Milwaukee. *Storms Dep.* at 74:9-17. Ovadal is the head of WCU and his radio show is based out of the Monroe, Wisconsin area. *Affidavit of Joshua Freker*, ¶3. Storms has also addressed specific individuals who have raised the issue with him. *Storms Dep.* at 128:4-25.

Storms has received a lot of publicity in the New Orleans area because of his opposition to Southern Decadence, and has become well-known in that area due to his protests with regard to homosexuality. *Storms Dep.* at 68:12-17, 77:25-78:4. He has said publicly that gay and lesbian people should “go back in the closet,” meaning they should keep their homosexuality to themselves. He has publicly opposed laws which would outlaw discrimination against people based on their sexual orientation. *Storms Dep.* at 80:20-81:24. He opposes marriage for gay and lesbian couples. *Storms Dep.* at 82:11-13. He has publicly stated this position since at least March 2000. Affidavit of Counsel, ¶3.E., Exhibits A, B and C. In fact, as of May 2004, he planned on joining a rally in Washington D.C. scheduled for October 9, 2004 “to stand against the ‘gay’ agenda in general and ‘gay’ marriages specifically. . . .” *Storms Dep.* Exhibit 3, page 3, *Storms Dep.* at 60:15-25.

Storms believes he has become “perhaps one of the top targets for the homosexual movement in the nation, as a result of the success that we’ve had in exposing the Southern Decadence festival for what it is and embarrassing the homosexual movement and their festivals. I have become an obvious target across the nation as a result of that.” He added that he believes the homosexual movement has targeted him due to his unspecified “other successes in regard to rolling back the homosexual agenda.” *Storms Dep.* at 116:24-117:19.

One primary topic of discussion in Storms' radio appearances is his belief that Christians should be opposed to "the homosexual agenda." *Storms Dep.* at 59:16-20. He discusses his opposition to homosexual behavior on his radio program, on the Christian Conservatives for Reform website, and it has also been covered in the newspaper articles about him. *Storms Dep.* at 70:4-12. In the last five years, Storms has also given 20 to 30 additional speeches per year, not including sermons, in which he has addressed the topic of homosexuality. *Storms Dep.* at 70:21-71:20. Storms acknowledges that he would be a good person to contact in the New Orleans area in order to get "plugged into the opposition to the homosexual militant movement or the homosexual agenda;" he is well-known as an opponent to the homosexual militant movement and the homosexual agenda. *Storms Dep.* at 85:4-15. It is his understanding that this is the reason he was invited to speak at the International Conference on Homo-Fascism in Milwaukee in October 2003. *Storms Dep.* at 85:16-20.

ARGUMENT

I. SUMMARY JUDGMENT LAW AND PROCEDURE

A. General Summary Judgment Principles.

Summary judgment under Wis. Stat. §802.08(2) is appropriate where, based on evidence admissible at trial and provided to the Court, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law.” *Id.*; *Voss v. City of Middleton*, 162 Wis. 2d 737, 748 (1991). Facts presented through admissible evidence are taken as true if they are not contradicted by opposing affidavits or other proof. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684 (1997).

“The purpose of the summary judgment procedure is . . . to avoid trials when there is nothing to try.” *L.L.N.*, 209 Wis. 2d at 684 n. 7. In a defamation action such as this one:

Summary judgment may be particularly appropriate . . . in order to mitigate the potential “chilling effect” on free speech and the press that might result from lengthy and expensive litigation.

Bay View Packing Co. v. Taff, 198 Wis. 2d 653, 672, 543 N.W.2d 522 (Ct. App. 1995), *citing* *Time, Inc. v. Hill*, 385 U.S. 374, 401-02 (1967) (Douglas J., concurring).

B. Summary Judgment Principles in Defamation Cases and Specifically Public Figure Cases.

Indeed, summary judgment is particularly important in defamation actions as compared to other civil actions “due to the possible chilling effect on constitutionally protected speech which would result from the defense of defamation claims.” *Bay View Packing Co.*, 198 Wis. 2d at 672 n. 4, *quoting* *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1505 (D. S.C. 1989).

The threshold issue that a court must determine in a defamation action is whether the plaintiff is a “public figure.” In this case, as shown below, Storms is at least a “limited purpose public figure” for defamation purposes. Whether a plaintiff is a limited purpose public figure “is an issue left solely to the court to decide *as a matter of*

law. . . .” Bay View Packing Co., 198 Wis. 2d at 676 (emphasis in original); see also Lewis v. Coursolle Broadcasting, 127 Wis. 2d 105, 110, 377 N.W.2d 166 (1985). This issue must be decided first, for “the status of the plaintiff controls whether he or she must prove ‘actual malice’ in order to recover damages” Id. As both the Wisconsin Supreme Court and the U.S. Supreme Court recognize, determination of the plaintiff’s status by the Court as a matter of law will “. . . both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions.” Rosenblatt v. Baer, 383 U.S. 75, 88, n. 15 (1966), as quoted in Lewis v. Coursolle Broadcasting, 127 Wis. 2d at 110. Courts have a special duty to review the record independently in public figure cases. This duty “entails a ‘constitutional responsibility that cannot be delegated to the trier of fact.’” Torgerson v. Journal/Sentinel, Inc., 210 Wis 2d 524, 539-40, 563 N.W.2d 472 (1997) quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984). Therefore, summary judgment is not only an important method for adjudicating public figure defamation claims, it is the favored method. Id.

Once it is established that the plaintiff is a limited purpose public figure, the dispositive issue on summary judgment becomes:

whether the plaintiff’s summary judgment materials show “actual malice” on the part of the defendant. Hence, the trial court must determine “whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). If the plaintiff does not meet this burden, the defamation claim should be

dismissed as legally insufficient because it is quite clear that under no circumstances can the plaintiff recover.

Bay View Packing Co., 198 Wis. 2d at 677.

“Whether the undisputed facts at summary judgment ‘fulfill the legal standard of actual malice is a question of law.’” *Id.* at 685, quoting *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 917, 447 N.W.2d 105 (Ct. App. 1989). In the unlikely event this court finds facts in dispute which could support a jury finding of actual malice by clear and convincing evidence on the part of Action Wisconsin, Storms must also have sufficient evidence on the other elements of the cause to allow the jury to find in his favor. That is, he must show by affidavit or other proof that there are disputed material facts or undisputed material facts “from which reasonable alternative inferences may be drawn that are sufficient to entitle the opposing party to a trial.”

L.L.N. v. Clauder, 209 Wis. 2d 674, 683 (1997).

The elements of a defamation claim when the plaintiff is a limited purpose public figure are:

- (a) a false and defamatory statement concerning the public figure;
- (b) an unprivileged publication to a third party;
- (c) fault amounting to actual malice on the part of the publisher;
- (d) actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.

Bay View Packing Co. v. Taff, 198 Wis. 2d 653, 673-674, 543 N.W.2d 522 (Ct. App. 1995).

I. STORMS IS A PUBLIC FIGURE.

A. Storms is Generally Famous and Notorious.

Through general fame or notoriety, a person may become a public figure. More often, however, “one assumes that status by involvement in a particular public issue or controversy and thereby becomes a public figure for a limited range of issues.” *Bay View Packing Co.*, 198 Wis. 2d at 675.

Storms is a general purpose public figure. He has appeared on nationally broadcast network and cable television shows (*ABC Primetime* and *The Political Ringside*), stories about him have been distributed throughout the nation by the Associated Press and *Newsweek*, and he has appeared on numerous radio shows throughout the country, including a nationally broadcast Christian radio show. He even has his own daily radio show and gives 20 to 30 speeches, not including sermons, per year.

Storms also believes himself to be generally famous or notorious in the gay and lesbian community, claiming that he has become:

perhaps one of the top targets for the homosexual movement in the nation, as a result of the success that we’ve had in exposing the Southern Decadence festival for what it is and embarrassing the homosexual movement and their festivals. I have become an obvious target across the nation as a result of that. . . . [and] other successes in regard to rolling back the homosexual agenda.

Storms Dep. at 116:24-117:19.

B. Storms Interjected Himself Into the Midst of a Public Controversy.

Yet even if that level of publicity and notoriety did not earn Storms general public figure status, Storms' involvement in the battle over civil rights and equality for lesbian, gay, bisexual and transgender people and his invited presentation at the International Conference on Homo-Fascism in Milwaukee certainly made him a limited purpose public figure. The test for limited purpose public figure status is as follows: (1) there is a public controversy; and (2) the plaintiff has interjected himself into the controversy so as to influence the resolution of the issues involved. *Denny v. Mertz*, 106 Wis. 2d 636, 649-50, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982).

In considering this second prong, a court is to apply a three-step analysis by: (1) isolating the controversy at issue; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential; (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy. *Bay View Packing*, 198 Wis. 2d at 678.

Applying those tests, Wisconsin courts have found that a food processing company was a limited purpose public figure in light of *cryptosporidium* contamination of the City of Milwaukee's water supply, *Bay View Packing Co.*, 198 Wis. 2d at 679; a man who was wrongfully accused of shooting a child was an involuntary limited purpose public figure in light of the public awareness and reaction to the shooting, *Erdmann v. SF Broadcasting of Green Bay, Inc.*, 229 Wis. 2d 156, 599 N.W.2d 1 (Ct. App. 1999); a farmer who failed to practice erosion control was a limited purpose public figure in

light of the pollution of a Wisconsin lake, *Wiegel v. Capital Times Co.*, 145 Wis. 2d. 71, 426 N.W.2d 43 (Ct. App. 1988); and a prisoner was a limited purpose public figure in light of events surrounding his suicide attempt, *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 447 N.W.2d 105 (Ct. App. 1989).

1. Equal rights and civil rights for lesbians, gays, bisexuals and transgendered people is a public controversy.

Dispositive of the “public controversy” prong is “whether the dispute or controversy has ‘an impact outside of those immediately interested’ in the dispute.”

Bay View Packing, 198 Wis. 2d at 679 quoting *Denny v. Mertz*, 106 Wis. 2d 636, 650, 318 N.W.2d 141, cert. denied, 459 U.S. 323 (1974). That is,

[I]t must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. Hence, if the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.

Bay View Packing Co., 198 Wis. 2d at 679 (internal citations and quotation marks omitted).

It can hardly be debated that as of the day Action Wisconsin’s press release was issued, December 8, 2003, equal rights and civil rights for LGBT people, particularly access to civil marriage, was a public controversy, the outcome of which will deeply affect gay and lesbian couples and the general public in very significant ways. As of December 8, 2003, several legal rulings from provincial high courts in Canada, including Ontario, had in the past 6 months ruled that same-gender couples had a Constitutional right to marry. *Halpern v. Toronto*, 172 O.A.C. 276, 65 O.R.3d 161 (2003).

On November 18, 2003, so did the Supreme Judicial Court of the State of Massachusetts. *Goodridge v. Department of Health*, 798 N.E.2d 941 (Mass. 2003). In June 2003, the United States Supreme Court found it unconstitutional to criminalize consensual intimate conduct between people of the same sex. *Laurence v. Texas*, 539 U.S. 558 (2003). In his dissent, which garnered much popular attention, Justice Scalia noted that this decision paved the way to establishing civil legal rights of lesbian and gay couples, notably the right to the benefits and responsibilities of civil marriage. *Laurence*, 539 U.S. at 590 (Scalia, J., dissenting). The court may take judicial notice that these legal rulings generated a great amount of public discussion and debate around the rights of LGBT people in this country and in this State.

Furthermore, the resolution of this issue will affect the general public, and particularly the LGBT community, in very significant ways. Access to civil marriage will provide to same-gender couples hundreds of rights under State law including automatic rights of inheritance, adoption, spousal privilege, spousal employment benefits, and others. Denial of such access makes those rights either unavailable or costly to obtain. If there was a single issue that divided the nation in 2003 (and, for that matter, 2004), it was the issue of civil marriage equality for gay and lesbian couples.

The Wisconsin citizenry and legislature has participated in this discussion and debate, and has been equally passionate and divided. In the fall of 2003, the Wisconsin legislature was attempting to pass a law that would limit marriage to opposite-gender couples, and would prohibit recognition of any marriage performed in another state or

country between same-gender couples. 2003 AB 475. That bill passed both houses, but then the Governor vetoed it. A veto override attempt failed on November 12, 2003.

Wisconsin's LGBT community was heavily engaged in this issue. Action Wisconsin, the Defendant in this case, turned out over 200 individual constituents for a lobby day on September 30, 2003, as well as other constituent contacts. Legislative committees held public hearings, and Action Wisconsin presented testimony from Wisconsin citizens against the bill. Action Wisconsin also issued regular press releases and gave numerous media interviews on the bill. Since the idea of amending our constitution to prohibit comprehensive legal recognition of same-gender relationships was first raised, Action Wisconsin has led the opposition to that too.

But the LGBT community is not the only community fighting mightily in this debate. In the fall of 2003, there was a contingent of the religious right that spoke out loudly and often against civil marriage equality for gay and lesbian couples, and in favor of the Wisconsin bill. One of the leaders of the religious right in Wisconsin, a group called Wisconsin Christians United, organized and held a conference titled "The International Conference on Homo-Fascism" on October 10, 2003, in the midst of this debate. The promise of the organizer was to set forth a "clear, effective plan for action to turn back the homo-fascist tide." The Plaintiff in this case, Grant Storms, was an invited speaker.

2. Storms has interjected himself into the midst of the controversy.

The first step in the three-step analysis of this second prong is to isolate the public controversy relative to the alleged defamatory statements at issue. *See Bay View Packing Co.*, 198 Wis. 2d at 680-81. When Action Wisconsin issued its press release, the broad controversy was, as described above, over the civil rights of same-gender couples. One subcontroversy within that issue was attendance of a Wisconsin Senator at the WCU International Conference on Homo-Fascism. Around the same time that the Governor vetoed 2003 AB 475 and its supporters began speaking of amending the Wisconsin Constitution to make marriage unavailable to same-gender couples, word reached Action Wisconsin that a Wisconsin Senator had attended the WCU conference. The attendance of the Senator at the conference was being debated publicly, inspired by WCU's own report on its website and the *InStep* article, before Action Wisconsin issued its press release discussing Storms' and others' presentations at the conference. It was these reports of the Senator's attendance that drew Action Wisconsin's attention to Storms' speech. It was the combination of the controversy over marriage for same-gender couples, the attendance of a Senator at the WCU conference, and the messages delivered at the conference that resulted in the Action Wisconsin press release about which Storms complains.

The next inquiry is Storms' role in the controversy to be sure that it is more than trivial or tangential. Storms has placed himself front and center in the public controversy over the civil rights for LGBT people, including marriage rights. For years,

he has advocated strenuously against rights for LGBT people. He founded Christian Conservatives for Reform in part to raise a voice “loudly against the homosexual militant movement.” He distributes newsletters publicly advocating against these rights, and uses the various public media of television, radio, newspaper, and internet to spread his position to the general public.

As to his role in the subcontroversy, the attendance of a Wisconsin Senator at the International Conference on Homo-Fascism, he was an invited speaker at that conference, and he chose his own words to share with those attending. He “voluntarily engaged in a course that was bound to invite attention and comment.” *Bay View Packing*, 198 Wis. 2d at 683. The words he chose, stating that gays “want to kill you,” “its either us or them,” “There is a philistine army out there. It’s called the homosexual movement. Whether you can see it or not, understand it or not, they want to eliminate us,” “let’s start taking it to the streets,” and the chilling exclamation, “God has delivered them into our hands. Hallelujah, boom, boom, boom, boom, boom - -There's twenty! Ca-ching, glory, glory to God, let’s go drive through the McDonalds and come back and get the rest,” certainly and inevitably put him “into the vortex of a public controversy.” *Bay View Packing*, 198 Wis. 2d at 684. Storms’ involvement, both in the wider controversy over LGBT civil rights, including marriage rights, and the subcontroversy specific to this case, is certainly more than trivial or tangential.

Similarly, relevant in this second prong of the limited purpose public figure inquiry is whether “the plaintiff’s status gives him access to the media so as to rebut the

defamation.” *Denny v. Mertz*, 106 Wis. 2d 636,650, 318 N.W.2d 141 (1982). Storms had equal, if not greater, access to the media than Action Wisconsin. Action Wisconsin published its press release on its own website. Storms, through Christian Conservatives for Reform, the organization he founded and heads, has two websites available to him. Although he chose not to post his side of the story on those websites, he could have. WCU took the initiative to argue Storms’ side for him on its website. *Affidavit of Counsel*, ¶3.F, Exhibits D, E and F. It also published a rebuttal on WisPolitics.com. *Affidavit of Counsel*, ¶3.G., Exhibit G. Storms could have attempted to address or rebut Action Wisconsin’s press release on his radio show. He did, in fact, discuss it on Wisconsin Christians United leader Ralph Ovadal’s radio show, which is based out of the Monroe, Wisconsin area. And, of course, Action Wisconsin’s own publication made it clear that the quotes in the publication were excerpts, and stated that the full recording was available from WCU. Anyone wishing to interpret Storms’ speech themselves could have obtained it from WCU.

Thirdly, the Court must consider whether Action Wisconsin’s press release was germane to Storms’ participation in the controversy. That, too, can hardly be debated. Both of the allegedly defamatory statements made by Action Wisconsin were made in connection with and to emphasize the impropriety of a Wisconsin Senator lending his stature to the International Conference on Homo-Fascism by attending it, and the horrific messages that the Senator listened to in the midst of the legislative and public debate over marriage for gay and lesbian couples. As Mr. O’Brien succinctly stated in

the press release itself, “While conference participants are a clear threat to the security and freedom of the lesbian and gay communities, so too is a state constitutional amendment that would codify us as second-class citizens. They are both branches from the same tree of intolerance.” The connection between Storms’ speech, the Wisconsin Senator, the proposed State Constitutional amendment, and Action Wisconsin’s press release could not have been clearer.

The undisputed evidence shows that when Action Wisconsin published its press release, there was a very serious public controversy at hand, and Storms was at the center of it. Therefore, as a matter of law, Storms is at least a limited purpose public figure, if not a general purpose public figure.

II. ACTION WISCONSIN’S STATEMENTS WERE NOT FALSE.

One element of a defamation claim is that the statement at issue must be false. Thus, substantial truth is the ultimate defense. *Schaefer v. State Bar of Wisconsin*, 77 Wis. 2d 120, 252 N.W.2d 343 (1977); *Bay View Packing Co.*, 198 Wis. 2d at 687. “If the challenged statements as a whole are not capable of a false and defamatory meaning, or are substantially true, a libel action will fail.” *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534-35, 563 N.W.2d 472 (1997). It is unsettled whose burden it is to prove truth or falsity in a case like this one, involving a public figure, public controversy, and a nonmedia defendant: As of 1982 in Wisconsin, it was generally the defendant’s burden to prove substantial truth. *Denny v. Mertz*, 106 Wis. 2d 636, 660-61 n. 35. However, in 1986, in a case involving a constitutional privilege, the United States Supreme Court

held that the burden was on the plaintiff to show that the statement at issue was false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The Court reserved the question as to whether this ruling applied to defamation actions involving nonmedia defendants. *Id.* at 779, n. 4. Under the reasoning stated in *Philadelphia Newspapers* and adopted by Wisconsin courts, the burden as to falsity in this case should lie with the Plaintiff “in order to avoid the chilling effect that would be ‘antithetical to the First Amendment’s protection of true speech on matters of public concern.’” *Mach v. Allison*, 2003 WI App. 11, ¶13, 259 Wis. 2d 686, 656 N.W.2d 766, quoting *Philadelphia Newspapers, supra*.

Yet even if it is Action Wisconsin’s burden to show that its statements were substantially true, Action Wisconsin carries that burden as a matter of law in this case. Storms **did** appear to advocate the murder of gay people, and illustrated his message using the sound of gunfire.

There can be no dispute that Storms said that gays and lesbians “want to kill you,” will “silence us and kill the ones that won’t be silent,” that the modern Philistine army is the “homosexual movement” and “they want to eliminate us.” There can be no dispute that Storms said “There is no having this peaceful co-existence,” that talking with judges and legislatures was not working and therefore his audience must “start taking it to the streets.” There can be no dispute that Storms equated the Philistine army to the gay and lesbian rights movement, equated his audience to the Israelites, and then told the story of how two Israelites, Jonathan and his armor bearer, snuck

away from the Israelite encampment and killed twenty members of the Philistine army, then returned with the rest of the Israelite army to kill off the rest of the Philistines. Although Storms did not explicitly say “and that is what you, God’s modern army, must do to the modern Philistines, the gay and lesbian people,” he did not have to: that was the clear import of his message. There is no other reason why he would tell his audience that gay and lesbian people want to “kill” them, “eliminate” them, “crush” them. There is no other reason why he would tell his audience that there could be no “peaceful co-existence.” There is no other reason why he would illustrate his message with the sound of gunfire and a trip to the drive-through at McDonald’s. He chose modern weapons and the modern place for those who “deserve a break today” to go along with the advocated destruction of the modern Philistines: gay and lesbian people.

III. STORMS CANNOT SHOW ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE.

As shown above, Action Wisconsin’s interpretation of Storms’ speech was fair. It was substantially true. However, even if we assume that Action Wisconsin’s interpretation of Storms’ speech was erroneous, Storms still cannot prove by clear and convincing evidence that Action Wisconsin published its interpretation with actual malice: knowing that the statement was not true or having reckless disregard as to its truth or falsity. *Bay View Packing Co.*, 198 Wis. 2d at 685, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). As a public figure suing a defendant for statements made in the context of a public controversy, at the summary judgment stage, Storms must present facts from which a reasonable jury could find, by clear and convincing

evidence, that Action Wisconsin published a defamatory statement with “actual malice.” *Torgerson*, 210 Wis. 2d at 542. This is because in this context, a conditional privilege under the First Amendment of the United States Constitution exists:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484. “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the

security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369.

* * *

Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-376, gave the principle its classic formulation:

“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago*, 337 U.S. 1, 4; *De Jonge v. Oregon*, 299 U.S. 353, 365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

New York Times Co. v. Sullivan, 376 U.S. 254, 269-71 (1964); See also *Denny v. Mertz*, 106 Wis. 2d 637 (1982); *Dalton v. Meister*, 52 Wis. 2d 173, 183 (1971) (The *Times-Sullivan* rule applies to private individuals and free speech in some cases).

Because of this commitment to robust debate, the First Amendment protects Storms' right to advocate violence, so long as his advocacy does not initiate imminent lawless conduct, See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which in this case it did not. It would be ludicrous to protect Storms' advocacy while at the same time silencing Action Wisconsin. The parties are leaders in the debate over civil rights for LGBT people, and speech from both sides should be unfettered.

Whether the undisputed facts constitute actual malice is a question of law properly decided at the summary judgment stage. *Bay View Packing Co.*, 198 Wis. 2d at 685, quoting *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 917, 447 N.W.2d 105 (Ct. App. 1989). The focus is on the defendant's attitude regarding the truth or falsity of the statements at issue, rather than upon any hatefulness or ill-will. *Id.* At 685-86. This is a subjective test. *Torgerson*, 210 Wis. 2d at 542.

Indeed, to survive summary judgment “[t]he plaintiff must show ‘that the defendant in fact entertained serious doubts as to the truth of [the] publication.’”

Bay View Packing Co., 198 Wis. 2d at 686, quoting *Van Straten*, 151 Wis. 2d at 917.

The Plaintiff here simply cannot make such a showing. To the contrary, the indisputable facts show that Action Wisconsin honestly believed that in his speech Storms praised Jonathan and his armor bearer for attacking and killing members of the Philistine army on their own, without the support of their organized army, and suggested it would be good, in God’s eyes, for modern Jonathans to “take it to the streets” and kill those who Storms identifies as members of the Philistine army of today, those who Storms claims want to kill, crush and eliminate the members of Storms’ audience, that is, members of the “homosexual movement.” It is also indisputable that Action Wisconsin representatives believed that Senator Panzer would be as appalled as they were to find a fellow Senator in Storms’ audience, listening to what appeared to be a suggestion that members of the audience should emulate Jonathan and his armor bearer and do to members of the gay and lesbian community what Jonathan and his armor bearer had done to members of the Philistine army: kill them. Storms has absolutely no evidence, nor is there any, that Action Wisconsin knew its statements were false. Furthermore, Storms has no proof, because none exists, that Action Wisconsin entertained serious doubts as to the truth of its statements.

At best, Storms was ambiguous in his message – his suggestion to kill gay people was implied, but not expressed. Storms may argue that Action Wisconsin should have

asked him what he meant in his speech, and its failure to do so was reckless. Yet “mere proof of failure to investigate the accuracy of a statement, without more, cannot establish reckless disregard for the truth.” *Bay View Packing Co.*, 198 Wis. 2d at 686, quoting *Van Straten*, 151 Wis. 2d at 918. Action Wisconsin’s interpretation of Storms’ speech was rational, and “a court cannot infer actual malice sufficient to raise a jury issue from the deliberate choice of a rational interpretation of ambiguous materials.” *Torgerson*, 210 Wis. 2d at 546, citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971). When a speech is ambiguous, it is hard to imagine a test of “truth” that would not put speakers at the mercy of the unguided discretion of a jury. See *Time, Inc.*, 401 U.S. at 291. In such circumstances, summary judgment for the defendant is proper. See *Torgerson*, *id.*

Storms may also argue that Action Wisconsin had feelings of ill-will toward Storms, or had a desire to harm him. According to the speech he gave at the International Conference of Homo-Fascism, Storms apparently believes that the “militant homosexual movement” has ill-will toward him and wants to harm him; indeed, according to him that movement wants to kill him and other fundamentalist Christians. He would likely assert that Action Wisconsin is a part of that movement. Of course, he has no evidence to support a belief of ill-will or desire to harm on the part of Action Wisconsin. Yet if he did offer such evidence, even that is not enough to show that Action Wisconsin meets the standard of actual malice. It is not enough to show that a defendant made the complained-of statements out of feelings of ill-will or a desire to injure the plaintiff. *Restatement, Second, of Torts* §580A, Comment d (1977). The only

way Storms can prove the necessary element of actual malice is by 1) offering evidence that Action Wisconsin knew, for a fact, that its statements were false, or 2) by offering evidence that Action Wisconsin in fact entertained serious doubts as to the truth of its statements, and then made those statements public in light of those doubts. *Van Straten v. Milwaukee Journal Newspaper Publisher*, 151 Wis. 2d 905, 917, 447 N.W.2d 105 (Ct. App. 1989) citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Storms simply has no such evidence, and thus summary judgment for Action Wisconsin should be granted.

IV. CONCLUSION.

The Court should grant the Defendants' summary judgment on Plaintiff's Complaint and dismiss this case.

Dated this 13th day of December, 2004.

Respectfully submitted,

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