STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION, BRANCH 18

GRANT E. STORMS,

Plaintiff,

v.

Case No. 04 CV 002205
Case Code: 30106

ACTION WISCONSIN, INC.

and

CHRISTOPHER OTT,

Defendants.

REPLY BRIEF OF ACTION WISCONSIN AND CHRISTOPHER OTT

I. THERE ARE NO MATERIAL FACTS IN DISPUTE AND THE PARTIES AGREE ABOUT WHAT LAW APPLIES.

Plaintiff's Response Brief[1] narrows the issues considerably:

1. Storms agrees that he is both a general purpose and limited purpose public figure. *Response Brief at 3 and 27.*

2. There is no dispute about what Storms said during his speech on October 10, 2004 because a recording of his speech is in the record and neither party disputes its accuracy.

[1] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and Exhibits of Plaintiff, undated and received by Action Wisconsin's counsel on January 27, 2005, will be referred to as "Response Brief" or "Resp. Br."

3. It is undisputed that in its press release Action Wisconsin[2] accurately quoted what Storms said in his speech.[3]

4. Nor is there a dispute over what Action Wisconsin said in its press release that interpreted Storms' speech.

In his Response Brief, Storms identified no material disputes of fact and offered no alternative statement of facts. Storms also conceded that Action Wisconsin accurately stated the applicable law. *Response Brief at 2*.

Summary judgment must be used "to avoid trials where there is nothing to try." *Rogers v. AAA Wire Products, Inc.*, 182 Wis. 2d 263, 268 (Ct. App. 1994). The remaining issues, which the Court can resolve without a trial by applying the uncontested legal standards to the undisputed facts of this case, are these:

1. Was what Action Wisconsin said false?

2. Was it said with actual malice?

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[2] Defendants Action Wisconsin, Inc. and Christopher Ott will be referred to collectively as "Action Wisconsin."

[3] Storms agreed during his deposition that Action Wisconsin accurately quoted him on the "boom, boom, boom" statement. *Storms Dep. at 96:13-18.* Yet now he argues that Action Wisconsin does not precisely quote him, saying that his "boom, boom, boom" statement included "Whew" after "There's twenty," "Yes," after "ca-ching," "through the" after "let's go," and "at McDonalds" instead of "the McDonalds." *Response Brief at 12.* Storms does not claim any defamation arising from the alleged errors in the quote versus the version he now claims is accurate, nor does he claim the meaning of the two versions is or could have been seen by Action Wisconsin as different. The relevance of this quibble is therefore not apparent. Similarly, Storms found a typographical error on page 10 of the Brief, where the word "had" was typed instead of "has." *Response Brief at 12.* Action Wisconsin is at a loss as to why this is relevant. Every other time Action Wisconsin quoted the "God has delivered them . . ." statement, there was no typographical error. *Brief at 2, top and middle of 10, 14, 15, 31.*

II. STORMS MUST PROVE ACTUAL MALICE AND FALSITY BY THE PRESENTATION OF EVIDENCE.

On summary judgment, the ultimate burden of demonstrating that there is sufficient evidence to go to trial at all is on the party with the burden of proof. *Rogers,* 182 Wis. 2d at 269. Bluntly stated, summary judgment "is the 'put up or shut up' moment in a lawsuit." *Schacht v. Wisconsin Dept. of Corrections,* 175 F.3d 497, 503-504 (7th Cir. 1999). To survive this summary judgment motion, Storms had to present evidence sufficient for the Court to conclude that a reasonable jury could find actual malice by clear and convincing evidence. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 541-42 (1997); *Bay View Packing Co. v. Taff,* 198 Wis. 2d 653, 677 (Ct. App. 1995). He also had to show that he had sufficient evidence from which a jury could conclude that Action Wisconsin's statements were false. It was his burden to prove falsity. *Torgerson,* 210 Wis. 2d at 543.

Falsity and actual malice are intertwined. *Torgerson*, 210 Wis. 2d at 543. Storms concedes that the actual malice standard is correctly stated in *Bay View Packing Co.*, and that it is his burden to prove. *Response Brief at 27. Bay View Packing Co.* explains that actual malice is proven with clear and convincing evidence that the defendant had "actual knowledge" that the statement at issue was false or that the defendant "entertained serious doubts" as to the truth of the statement. *Bay View Packing Co.*, 198

Wis. 2d at 686.[4] Storms has not even come close to presenting sufficient evidence on either actual malice or falsity.

III. STORMS PRESENTS NO EVIDENCE OF ACTUAL MALICE.

Storms makes no evidentiary showing at all that Action Wisconsin or Ott (or O'Brien or Freker, for that matter) had actual knowledge that the subject statements were false. He does not even attempt such a showing. Storms also offers no evidence that anyone associated with Action Wisconsin subjectively entertained "serious doubts" as to the truth of the statements at issue.

Rather, Storms claims that Action Wisconsin showed reckless disregard for the accuracy of its interpretation of Storms' words because it did not perform an "extensive investigation" before publishing its press release. From Storms' point of view, the internet research performed by Action Wisconsin was not enough, and staff Ott and Freker, like President O'Brien, should have listened to Storms' entire speech before Action Wisconsin issued its press release.[5] *Response Brief at 6-12, 23.* That argument is frivolous. It was rejected 36 years ago by the United States Supreme Court in *St. Amant v. Thompson*, 390 U.S. 727 (1968). It must be rejected by this Court, as well.

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[4] This actual malice test is subjective. The objective standard, whether a reasonably prudent person would have published the statements, is not the test and is immaterial. *Torgerson*, 210 Wis. 2d at 542.

[5] Storms ignores, and does not attempt to rebut, President Timothy O'Brien's testimony that he listened to the speech in its entirety. *Affidavit of Timothy O'Brien ¶ 9.* O'Brien asked Ott and Freker to listen to portions of the speech, and the three of them developed the press release together. *Id. ¶¶23, 25; Affidavit of Christopher Ott, ¶¶7, 14; Affidavit of Joshua Freker ¶¶13, 19.* When Ott later listened to the entire speech, he heard nothing that changed his interpretation. *1/10/04 Deposition of Ott at 109:7-8* (attached to Response Brief as Ex. 25).

In *St. Amant,* the U.S. Supreme Court held that the following considerations "fall short" of proving reckless disregard: the publisher (a) "had no personal knowledge" of the plaintiff's activities; (b) relied solely on an eye-witness's affidavit of what the plaintiff had said although the record was silent as to the witness's reputation for veracity; (c) failed to verify the witness's information with others who might have known the facts; (d) gave no consideration to whether or not the statements defamed the plaintiff and published them heedless of the consequences; and (e) mistakenly believed he had no responsibility for the publication because he was merely quoting the witness's words. *St. Amant,* 390 U.S. at 730.

Here, not only did Ott and Action Wisconsin rely on the President of Action Wisconsin's report and interpretation of Storms' words, Ott and Freker also each listened to significant portions of the speech themselves, verifying that Storms did in fact speak the words that O'Brien heard and found to be significant.[6] Action Wisconsin and Ott did more than the defendant in *St. Amant* did.

Storms is essentially arguing that an ordinary care standard applies to this case. But, "[a]ctual malice is not determined by whether a reasonably prudent person would have published the challenged statements"*Torgerson,* 210 Wis. 2d at 542; because while

> . . . the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or

[6] Storms admits that Ott acted in his capacity as Executive Director of Action Wisconsin in his involvement in this matter. *Response Brief at 6.* Storms offers no authority, and there is none, that requires a spokesperson for an organization to personally verify all statements made in the course of his or her job. Executives must be able to rely on the work of other members of their organizations (here, the President of the organization to whom Ott reported to and who was also an authorized spokesperson for the organization, *Affidavit of Timothy O'Brien* ¶2) in performing their duties.

> the prudent publisher . . . . the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

St. Amant, 390 U.S. at 731-32.

Storms also argues throughout his Response Brief that there is an alternative "common sense" interpretation of his speech that the Defendants failed to consider or disclose. He then asserts, based on that alternative, but without any supporting evidence, that Ott and Freker acted with actual malice because they could not have honestly believed the assertions in the press release. He supports this assertion not with facts, but with conjecture:

> Perhaps most importantly, merely a common sense reading of the Plaintiff's speech belies the Defendants' claim that they had an honest belief in the truthfulness of the published statements.

Response Brief at 28.

Storms is, in essence, claiming that because he has an interpretation of the meaning of his words, anyone who disagrees with him could not possibly be making an honest statement. Storms' submission is insufficient to survive a summary judgment motion. *Belich v. Szymaszek*, 224 Wis. 2d 419, 592 N.W.2d 254, 258 (Ct. App. 1999).

IV. STORMS' PROPOSED STANDARD FOR DETERMINING FALSITY IS LEGALLY UNSUPPORTED.

A. Storms Suggests That the Court Apply Legal Standards That Do Not Exist.

Separate from his efforts at proving actual malice Storms does not attempt to prove falsity. However, Storms' argument on actual malice is in fact, an argument about falsity. He offers an alternative interpretation of his own words, which he claims is the "true" interpretation. *Storms Aff. at* ¶¶*4, 5; Resp. Brief at 12-15,17-21, 24-26.*[7] Storms says that Action Wisconsin's impressions were wrong, and therefore false: he says that he was not making sounds as if he were shooting gay people, that he did not intend to advocate the murder of gay people, and that his words simply could not be interpreted in such a way. *Storms Aff. at* ¶¶*2, 3.*

Storms would have the Court create and impose a test for falsity that wholly relies on the speaker's *ex post facto* subjective interpretation of his own words. Storms has not provided the Court with any statute or case that would support that argument. No court should consider an argument unsupported by reference to legal authority. *See Racine Steel Castings v. Hardy,* 139 Wis. 2d 232, 240, 407 N.W.2d 299, 302 (Ct. App. 1987), *rev'd on other grounds*, 144 Wis. 2d 553, 426 N.W.2d 33 (1988).

[7] While on the one hand Storms prosecutes Action Wisconsin for using excerpts from his speech to illustrate its impression of it, on the other hand Storms is guilty of the same thing. Furthermore, he makes false claims, such as that in the passage ending "go back in the closet," Storms did not "hint or mention any type of violence . . ." *Response Brief at 20.* That can only be true if eliminating, crushing, silencing, killing, and imprisonment are not violence. *Affidavit of Timothy O'Brien,* ¶*13; Storms Dep.* Exhibit 8 at 26:35.

B. Storms Has Not Shown That Action Wisconsin's Statements Were False.

In a public figure case where concepts of falsity and actual malice are intertwined, *see Torgerson*, 210 Wis. 2d at 542-43, if a defendant accurately quotes a public figure plaintiff and the claim of defamation is based on the defendant's *interpretation* of words that the plaintiff agrees he spoke, the question of truth or falsity becomes one of whether the statement is provable as false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Simply put: the statements in this case are not provable as false.

Storms tries to prove that Action Wisconsin's interpretation of his words are false by pointing out that during his speech he told his audience that in battling the homosexual movement, they should "get confirmation along the way" and not be "spiritually reckless . . . " and to do what is in their hearts so long as it is not sin. Storms argues that because murder is sin, he could not have been advocating murder. *Response Brief at 19, 24.*

Yet in his speech, Storms told the story of Jonathan and his armor bearer (I Samuel 14) as an allegory. In that Bible story, when Jonathan killed Philistines, those killings were not sin. Storms agrees that Jonathan got in trouble with God not for killing the Philistines, but rather for eating after the slaughter. *Storms Dep. at 108:21-109:9*; *Second Affidavit of Counsel*, attaching Exhibit 1 from Storms Dep.

All too often, murderers believe that they were told by God to kill.[8] When given a deific decree to kill, it is believed that killers do not understand the killing to be wrong, i.e., sinful. Grant H. Morris and Ansar Haroun, M.D., "*God Told Me to Kill:" Religion or Delusion?*, 38 San Diego L. Rev. 973 (2001). All it would have taken is for one person in Storms' audience to have believed that if it was not a sin to kill the Philistines of old, then it would not be a sin to kill the new Philistines, gay people, and we would have had yet another deific decree case of murder.

Storms has not shown that Action Wisconsin's interpretation of his words was false. Indeed, as explained in its Brief, Action Wisconsin's interpretation of Storms' words was true: Storms did appear to advocate the murder of gay people and used the sound of gunfire in his message, illustrating the murder of "modern Philistines:" gay people. The press release said that Storms "made sounds of gunfire as if he were shooting gay people" and was "apparently advocating the murder of [a senator's] constituents," meaning gay people. The press release included excerpts from the speech. And it noted that the entire speech could be obtained from Wisconsin Christians United. *Affidavit of Christopher Ott, Exhibit A.*

> When an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.

[8] Earlier this month, a Wisconsin man shot and killed his wife and two children and then himself. In a note, he wrote "Today God asked me to bring my family to heaven." *Wisconsin State Journal*, 2/4/05, A1. Many examples of similar occurrences are discussed in Grant H. Morris and Ansar Haroun, M.D., "*God Told Me to Kill:" Religion or Delusion?*, 38 San Diego L. Rev. 973 (2001).

Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002). Action Wisconsin's words have that protection.

Moreover, as a public figure, if he believed that his words were misinterpreted, Storms could have used his website, his radio show or his extensive media contacts to set the record straight. Instead, he chose to try to punish Action Wisconsin by filing a frivolous lawsuit, wholly devoid of factual or legal merit.

V. CONCLUSION.

The Court should grant summary judgment to the Defendants and dismiss this case.

Dated this 10th day of February, 2005.

Respectfully Submitted,

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