

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 18

MILWAUKEE COUNTY

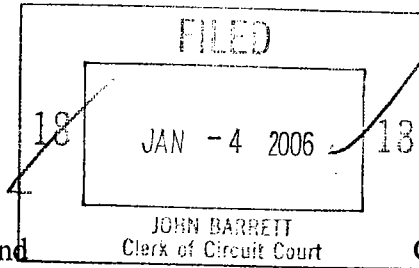
GRANT E. STORMS,

Plaintiff,

vs.

ACTION WISCONSIN, INC. and
CHRISTOPHER OTT,

Defendants.



DECISION and ORDER

Case No. 04-CV-002205

Plaintiff, Grant Storms, commenced this defamation action against defendants Action Wisconsin, Inc, and Christopher Ott (Defendants). This Court in a previous ruling granted defendants' motion for summary judgment. The case is before the Court on plaintiff's motion for reconsideration and defendants' motion for costs and attorney fees pursuant to §§814.024(1) & (3)(b) and 802.05(1)(a). The court has had the opportunity to review the submissions of the parties and the record in the case. There has been no request for an evidentiary hearing with respect to any of the issues raised in these motions. For the reasons set forth herein, plaintiff's motion for reconsideration is denied. Defendants' motion for costs and attorney fees is granted.

Plaintiff's Motion for Reconsideration

Plaintiff filed a motion for reconsideration requesting that the Court issue an amended decision. The standard for a motion for reconsideration was set forth in *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI. APP. 129, ¶ 44:

To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). A 'manifest error' is not demonstrated by the disappointment of the losing party. *Id.* It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.' *Id.* (citation omitted).

Plaintiff's stated reason for filing a motion for reconsideration is that this Court's decision is contrary to plaintiff's arguments stated in his three briefs; plaintiff disagrees with the ruling of this Court and rehashes old arguments. Plaintiff's motion essentially reargues the motions for summary judgment and contends the Court reached the wrong conclusion.

Moreover, plaintiff's motion misstates the decision of this Court and addresses conclusions that this Court did not reach. For example, plaintiff objects to this Court's conclusion that defendants' statement was the *only* reasonable interpretation of comments made by plaintiff. This Court did not reach that conclusion. What this Court found was "Defendants' interpretation that Storms did appear to advocate the murder of gay people is not unreasonable." Decision at p. 11. Plaintiff contends that this Court found that any other interpretation than that offered by defendants was unreasonable. This Court did not

reach that conclusion. What this Court found was that the interpretation offered by plaintiff is “strained and inconsistent with the speech as a whole.” Decision at pp. 11-12.

Plaintiff focuses on the fact that this Court quotes only a portion of the speech in its Decision to support an argument that this Court failed to consider the speech as a whole. But this Court did listen to the audio recording in its entirety. Indeed, as stated in the Decision, the “volume, inflection and cadence” of the plaintiff in giving the speech were relevant and significant factors in assessing the reasonableness of defendants’ interpretation. Decision at p. 7. The issue decided was whether defendants’ interpretation was a reasonable interpretation of the speech given by plaintiff and the audio recording of that speech, the same recording that defendants listened to, was relevant to that determination.

Plaintiff has not established any basis for granting a reconsideration of this Court’s decision.

Defendants’ Motion for Costs and Fees

In the fall and winter of 2003, state legislation and later an amendment to the Wisconsin Constitution were proposed which would have explicitly reserved marriage for opposite-gender couples and prohibited the recognition of any marriage, whether in Wisconsin or elsewhere, not composed of an opposite-gender couple. These legislative proposals were the subject of much public discussion and debate. Many of those who publicly supported this legislation cited religious opposition to homosexuality as their basis for supporting it. Defendant Action Wisconsin publicly opposed this legislation

and worked to increase public awareness of the issues of civil rights for lesbian, gay, bisexual and transgender (“LGBT”) people. Wisconsin Christians United (WCU) is an organization whose stated mission is to educate the citizens of Wisconsin and the nation regarding the sin of homosexuality and the agenda of the homosexual movement.

In October 2003, plaintiff gave a speech in a WCU conference in Milwaukee. Defendants learned that a member of the Wisconsin State Senate had been present at the conference and was at plaintiff’s speech. Defendants obtained a compact disc recording of the speech and issued a press release which it published on its website to inform the public about the speech and call for discipline of the senator who had been in attendance.

Plaintiff’s attorney filed this action in February 2004. The facts were neither complex nor difficult to discern prior to filing. An audio recording of plaintiff’s speech was available as was a copy of defendants’ press release characterizing that speech. Defendants contend that before commencing this action, plaintiff’s counsel failed to analyze the law and satisfy himself that there were facts to support each element of the claim.

In an action commenced before July 1, 2005, when an attorney signed a Complaint, he or she certified that he or she had made a reasonable inquiry into the facts and applicable law and determined that the paper is well-grounded in both fact and law, or a good faith argument for the extension, modification or reversal of existing law. In accordance with then Wis. Stat. ¶802.05, if an attorney fails to do so, a court may award reasonable attorney fees and costs to the defendant.

In an action commenced or continued before July 1, 2005, in accordance with Wis. Stat. ¶814.025 (1), if an attorney knew or should have known the action was without

reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law, the Court must award the defendant costs and reasonable attorney fees.

Counsel has a duty to the legal system to not waste judicial time and not to force other litigants to expend resources on frivolous claims. Courts must enforce these requirements to maintain the integrity of the judicial system and the legal profession.

The facts of this case are not complex and consisted primarily of the audio recording of plaintiff's speech as well as a copy of defendants' press release characterizing that speech. Plaintiff had the opportunity investigate further. Plaintiff also had the time to investigate any other information; time constraints were not a factor as plaintiff chose to file within three months of the alleged defamation, well before any statute of limitations pressures. Plaintiff's counsel appears to have relied primarily on his client's interpretation. That is not sufficient if such allegations do not comport with "common sense and human experience." *Belich v. Szymaszek*, 224 Wis.2d 419, 432 (Ct.App. 1999).

Nor did plaintiff's counsel conduct a reasonable inquiry with respect to plaintiff's claim that his reputation had been damaged. Plaintiff is the one who could best describe the impact of the defendants' press release on him. Yet no evidence was submitted on this issue. Plaintiff contends he was not required to present any evidence, but this contention finds no support in Wisconsin law, particularly on a motion for summary judgment where a party fails to respond to an argument at his peril.

Plaintiff's counsel also failed to conduct a reasonable inquiry into the law. The law of defamation in Wisconsin is not complicated. Substantial truth of the statement is an absolute defense. The defendant holds a Constitutional privilege when the claim is brought

by a public figure. The defendant holds a Constitutional privilege when a nonmedia defendant speaks on matters of public interest or concern. In the instant case, plaintiff conceded he was a public figure and there was no dispute that the issue of the proposed anti-gay constitutional amendment is an issue of public controversy. Thus plaintiff would have to establish actual malice by clear and convincing evidence. Counsel knew or should have known that the law did not support plaintiff's claim. There is no evidence that counsel conducted a reasonable and thoughtful inquiry into the claim before filing this action. Counsel had more than sufficient time to research the relevant law; the legal issue presented was not complex; plaintiff's filings did not present a plausible view of the law nor did plaintiff seek to extend or modify the law. *See, Jandrt v. Jerome Foods, Inc.*, 227 Wis.2d 531, 550-1 (1999)

The Supreme Court has recognized that it is not always possible to be certain of the law and facts when drafting a pleading. But counsel must then make reasonable inquiry within a reasonable time after the pleading is filed. Counsel did not do this. Indeed, counsel ignored the warnings given by defendants shortly after this suit was commenced.

In accordance with Wis. Stat. ¶814.025 (1), if an attorney knew or should have known the action was without reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law, the Court must award the defendant costs and reasonable attorney fees. As this Court found in ruling on the dispositive motions, plaintiff failed to provide necessary evidence on the contested elements of his claim. Counsel knew or should have known that plaintiff's claim was brought "without any reasonable basis in law or equity." In the instant case, plaintiff's

claim had to be proven by clear and convincing evidence yet plaintiff failed to even meet the ordinary “greater weight of the evidence” burden.

Moreover, plaintiff’s counsel continued his claim throughout this litigation despite notice from defendants that there was no legal or factual basis for his claim. Defendants’ counsel placed plaintiff on notice early on in the litigation that plaintiff’s claim was frivolous and that defendants intended to seek attorney fees and costs. Yet plaintiff continued to pursue this litigation.

Defendants filed a motion for summary judgment. In addition to responding to defendants’ motion, plaintiff filed a separate motion. Yet there were no disputes of fact. The facts were essentially as set forth in the audio tape of plaintiff’s speech and in the defendants’ press release. Nor were the controlling legal precedents disputed. And there was no argument for an extension, modification or reversal of that law.

Counsel gives no indication of his investigation into the law before filing this action. He should have known that Storms was a public figure. After defendants filed their motion for summary judgment with an extensive analysis of the relevant law, plaintiff conceded the point. Counsel should have known that the issue of the civil rights of homosexuals was an issue of public concern and controversy. Plaintiff did not contest this issue. Nowhere does counsel describe how he concluded there was evidence of actual malice.

Defendants warned plaintiff of the failure of proof on this precise issue but counsel went forward ignoring defendants warning. Nor has counsel informed this Court what analysis was done to establish whether he could prove actual malice after receiving this explicit warning from defendants. This Court can only conclude that plaintiff deliberately ignored defendants’ letters. The Courts should not and do not tolerate such ostrich-like

reaction to opposing arguments. The courts should not allow the blind defense of “I believe I am right and don’t need to consider any other arguments.”

The courts should not and do not permit a litigant to continue a lawsuit despite the fact the litigant produces no facts and no law to support its claim. Reasonable inquiry is required. Not just at the onset of litigation but throughout. It is not responsible to file a case and resolutely ignore any law or facts that conflict with the litigant’s preconceived ideas. As officers of the court, counsel must be more objective. To act otherwise costs limited judicial resources and requires litigants to expend funds for their defense.

This is precisely what happened here. Plaintiff commenced this action without adequate investigation into the law or facts. Defendants, in an effort to avoid litigation costs, sent plaintiff’s counsel a letter detailing their position and requesting plaintiff to consider the law that applied. Plaintiff and counsel did not do so and continued this litigation forcing defendants to expend considerable resources in defense. To maintain the integrity of the judicial system and the legal profession plaintiff and his counsel must compensate defendants for this expense.

In reaching the conclusion that plaintiff and counsel were frivolous in commencing and continuing this action, this Court considered that a dispute of law that was raised by plaintiff was supported with an inaccurate quote from the *Restatement (Second) of Torts*. When defendants raised this discrepancy in their brief, plaintiff’s counsel failed to provide any explanation for this misrepresentation in his reply brief. A fair inference is that counsel intended to mislead the Court on this argument. Plaintiff’s counsel belatedly and only in response to this motion for attorney fees and costs, provided an explanation. But counsel has an obligation to respond immediately when an error or misstatement of this significance

is brought to his attention. Plaintiff now contends that the removal of a portion of the language did not change the meaning. This Court does not agree with counsel's contention. Nor does this position remove the obligation to provide an immediate response.

In reaching the conclusion that plaintiff and counsel were frivolous in commencing and continuing this action, this Court considered plaintiff's filing of a separate motion for summary judgment. Plaintiff commenced this lawsuit and then took no action to further it. Only when faced with defendants' motion for summary judgment did plaintiff begin to conduct discovery. Plaintiff then sought more time to respond and to file a cross-motion for summary judgment. As noted, nothing was raised in plaintiff's motion that could not have been addressed in the context of defendants' motion for summary judgment. Plaintiff's stated rationale for filing a separate motion was for the "tactical and strategic advantage" to be able to submit more than one brief. But this is not a sufficient rationale. Tactical advantage is not the appropriate standard in evaluating whether to file a motion for summary judgment.

That tactical advantage was the only reason for plaintiff's decision to file the motion is evident upon examination of plaintiff's motion. This Court is satisfied that it merely repeats the arguments made in response to defendants' motion and adds little to plaintiff's arguments. But it did require defendants to expend additional resources to respond to the motion regardless how superfluous. The courts should not tolerate such a waste of time and effort for the "tactical" advantage of a litigant.

Plaintiff's counsel had ample opportunity to conduct whatever discovery necessary to establish his claim. This Court takes into account the fact that plaintiff delayed in

conducting any discovery until defendants had filed their motion for summary judgment. Such “sitting and waiting” is not to be condoned.

This Court issued a detailed decision with respect to the issues raised in the motions for summary judgment. Plaintiff objected to the conclusions reached by this Court and in doing so misstated those conclusions. Counsel’s misstatements continued in plaintiff’s response to defendants’ motion for sanctions. In defending his decision to file and continue this action, counsel asserts that he either played the audio tape or showed a transcript to two of his law clerks and two other persons. He claims that “they did not believe that anyone listening to the speech could honestly come to the conclusion that the plaintiff was re-enacting the shooting of gay people.” Counsel claims he believed the same thing. Again, plaintiff misstates the facts in this case. At no time did defendants say that Storms was “re-enacting” anything. This was a meaningless investigation.

Considering the record as a whole, the conclusion is inescapable that counsel failed to conduct a reasonable and thoughtful inquiry into his client’s claims before commencing this action. He failed to conduct a reasonable and thoughtful inquiry into the law before commencing this action. He merely dropped his papers “into the hopper” of the legal system and required this Court and defendants to undertake the necessary factual and legal investigation. *See, Belich v. Symaszek*, 224 Wis. 2d 419, 435 (Ct.App. 1999)

Determination of Costs and Fees

Defendants submitted a request for attorney fees and costs with supporting affidavits. Defendants submitted detailed affidavits describing precisely what work was

done by their attorneys, the hourly rates associated with that work and the costs incurred. Defendants also submitted affidavits from attorneys who practice in Milwaukee and elsewhere in Wisconsin verifying that the services performed and the hourly rates for those services were reasonable. Plaintiff has submitted no objection. He has submitted no evidence that the services performed by counsel for defendants and their hourly rates or costs expended were unnecessary or unreasonable. Nor did plaintiff contend that the claimed fees and costs were in any way unreasonable. There has been no request for an evidentiary hearing.

This Court has had the opportunity to consider the written submissions of the parties and review the record of these proceedings. For the reasons set forth herein, the Court determines that defendants shall be awarded attorney fees in the amount of \$78,542.50 and costs in the amount of \$2,095.33 plus additional fees and costs in the amount of \$6,814.26.

The basic formula for calculating attorney fees is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Wisconsin courts, in analyzing whether the attorney fees charged for services rendered are reasonable, not only consider this "lodestar formula" but consider the factors set forth in Supreme Court Rule 20:1.5(a):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, ¶ 25.

If the amount of the attorney fees is challenged, the burden of proof is upon the attorney submitting the fees to prove that the fees are reasonable. *Standard Theaters, Inc. v. Department of Transportation*, 118 Wis. 2d 730, 748, (1984); *In the Matter of Marine*, 82 Wis. 2d 602, (1978). The party who opposes the requested fee has the responsibility to state any objections with particularity and clarity. *Pfeifer v. Sentry Insurance*, 745 F.Supp. 1434, 1443 (E.D. Wis. 1990). Plaintiff has not contested the amount of costs and fees sought by defendants.

Defendants submitted a fee application which documented the attorney fees and costs incurred in defending against plaintiffs' claims. This submission includes a detailed description of the services performed, the person who provided the services, and the amount of time required. Defendants submitted evidence of the level of experience of each person who worked on the case. Defendants' submission included affidavits from counsel with expertise in civil rights litigation as well as in the determination of the appropriate award of attorney fees. These submissions support the finding that the rates charged by defendants' counsel and his staff are commensurate with the market rate for the work performed in the representation of defendants. These submissions also support the finding that the amount of

time spent in litigating defendants' defense was appropriate and reflected an efficient use of legal resources.

Plaintiff does not challenge the hourly rates claimed by defendants. Plaintiff does not challenge the amount of time expended by defendants' counsel. Nor does plaintiff object to defendants' statement of costs. Plaintiff does not dispute that the amount claimed by defendants was required to be expended in defense of this action.

The issue before this Court, therefore, is whether the defendants' request is reasonable under the circumstances. This Court considered the time and labor required given the nature of the issues involved.

This court observed the high quality of representation provided by defendants' counsel. Written materials were consistently well prepared, timely filed, and appropriately addressed the issues. The motions and supporting memoranda reflected a depth of knowledge of the case both factually and legally. The opinions offered in the supporting affidavits with respect to the skill and abilities of counsel are substantiated by the quality of the materials presented to this Court.

From the onset of this litigation, defendants informed plaintiff of their position that this action was without merit. Yet plaintiff continued the litigation. Defendants sought to terminate the litigation by a motion for summary judgment. In response, plaintiff sought additional time for response and insisted on filing what was in essence a cross-motion for summary judgment. But plaintiff's motion was repetitious of arguments already raised by defendants' motion yet it required additional effort by defendants. In addition to this unnecessary motion, plaintiff submitted materials which were improper and necessitated defendants' filing motions to object to their submission.

Certainly plaintiff may elect an aggressive litigation posture--that is his decision--but the cases are explicit that when a party adopts such a strategy and loses, that party must compensate the prevailing party fully for their attorney's time. If the actions of the opposing party cause the expenditure of time by the prevailing party's counsel then compensation is both reasonable and necessary. *Standard Theaters*, 118 Wis.2d at 751. Defendants' response to this action was appropriate given the threat to Action Wisconsin's mission and purpose. The amount claimed by defendants was directly and unavoidably caused by conduct of plaintiff and his counsel. Defendants were successful in this action. Defendants should recover the cost to attain that result; to find otherwise would reward plaintiff for his tactics.

Plaintiff and counsel knew or should have know that the action filed and maintained against Action Wisconsin, Inc. and Christopher Ott 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 and counsel failed to make a reasonable inquiry into the facts before signing and filing the Complaint.

This Court is satisfied that this action as commenced and continued is frivolous as defined by §§814.025 and 802.05, Wis. Stats., and full compensation to defendants is appropriate. Defendants were forced to expend resources to defend against this frivolous suit and thus are entitled to be fully compensated.

Conclusion

For the reasons set forth herein,

(1) Defendants' motion for Costs and Attorneys fees is granted;

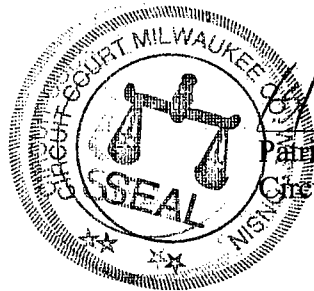
(2) Defendants are awarded attorney fees in the amount of \$85,232.50 and costs in the amount of \$2,220.09.

(3) Plaintiff's motion for reconsideration is denied.

(4) Defendants' counsel is to draft an order for judgment under the five-day rule.

Dated: January 4, 2006

BY THE COURT:



Patricia D. McMahon
PATRICIA D. McMAHON

Patricia D. McMahon
Circuit Judge, Branch 18