STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

Case No. 2006AP000396

In the matter of attorneys fees in:
Grant E. Storms, plaintiff v. Action Wisconsin Inc.
and Christopher Ott, defendants.

JAMES R. DONOHOO,

Appellant,

Milwaukee Circuit Court
Case No. 2004CV002205

vs.

ACTION WISCONSIN, INC. and
CHRISTOPHER OTT,

Respondents.

ON APPEAL FROM THE DECISION AND ORDER DATED JANUARY 4, 2006, AND THE JUDGMENT ENTERED ON FEBRUARY 2, 2006, THE HONORABLE PATRICIA D. MCMAHON PRESIDING, MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 2004CV002205.

BRIEF & APPENDIX OF RESPONDENTS

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Dated: September 11, 2006

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ISSUES PRESENTED

The issues presented are as follows:

Did Attorney James R. Donohoo violate his obligations under Wis. Stat. §802.05 when he filed the Complaint in the underlying case: *Grant E. Storms v. Action Wisconsin, Inc., et al.*, Milwaukee County Circuit Court Case No. 04-CV-002205?

Circuit Court Answered: Yes

Did Attorney James R. Donohoo violate Wis. Stat. §814.025 when he filed the Complaint and maintained the action in the underlying case: *Grant E. Storms v. Action Wisconsin, Inc., et al.*, Milwaukee County Circuit Court Case No. 04-CV-002205?

Circuit Court Answered: Yes

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

Respondents do not request oral argument.

Respondents submit that the Court's opinion should not be published because this case presents only the application of facts to settled law.

STATEMENT OF THE CASE

Attorney James R. Donohoo (hereinafter "Donohoo") on behalf of his client, Grant E. Storms (hereinafter "Storms"), filed a Summons and Complaint on February 24, 2004 alleging that Action Wisconsin, Inc. and Christopher Ott (hereinafter "Action Wisconsin") had defamed Storms. (R. 1, A-App. 130) Action Wisconsin answered on April 22, 2004 and at the same time filed a motion for costs and reasonable attorneys' fees pursuant to §814.025(1) and (3)(b) and §802.05(1)(a). (R. 4, R-App. 1-2) Also on April 22, 2004, Attorney Tamara Packard wrote a letter to Donohoo explaining why Action Wisconsin asserted that the case that he had filed was frivolous. (R. 62, Ex. 2; R-App. 3-5) On June 30, 2004 Action Wisconsin took Storms' deposition. On July 19, 2004, Attorney Lester Pines wrote to Donohoo and once again explained to him Action

Wisconsin's interpretation of the facts and the law and again told him that the case was frivolous. (R. 62, Ex. 3, R-App. 6-11)

On December 13, 2004, Action Wisconsin moved for summary judgment. (R. 20) Thereafter, Donohoo took the depositions of Christopher Ott and Joshua Freker on January 3, 2005. On February 2, 2005 Donohoo filed a motion for summary judgment, on Storms' behalf, entitling it "Plaintiff's Motion for Court Ruling on Matters of Law." (R. 44)

On June 28, 2005 the circuit court in a Memorandum Decision and Order, granted summary judgment to Action Wisconsin, denied summary judgment to Storms and dismissed his case. (R. 57, A-App. 101) That decision has not been appealed. On August 15, 2005 Action Wisconsin submitted to the court a brief in support of their motion for costs and fees along with supporting affidavits. (R. 61 through

R. 66) On August 25, 2005, Donohoo, on behalf of Storms, filed a motion for reconsideration and brief in support. (R. 67-69)

Donohoo also filed a response to the motion for costs and fees, along with supporting affidavits. (R. 55-56) He did not ask for an evidentiary hearing. The court issued its Decision and Order on January 4, 2006 denying Storms' motion for reconsideration and granting Action Wisconsin's motion for costs and reasonable attorneys' fees for violation of Wis. Stat. §§802.05 and 814.025. (R. 77, A-App. 113) An order for judgment was issued by the court on January 23, 2006 (R. 84) and judgment was entered on February 2, 2006. (R. 85)

This appeal of the circuit court's January 2006 Decision and February 2006 Judgment followed. A motion for costs, fees and attorneys fees accompanies this Brief.

SUMMARY OF ARGUMENT

The circuit court reviewed Donohoo's factual investigation and legal analysis of the defamation claim filed on behalf of his client, Storms, against Action Wisconsin, Inc. Using a rational process and applying the standards set out in *Janrdt v. Jerome Foods, Inc.*, 227 Wis. 2d 531 (1999), the circuit court determined that Donohoo failed to adequately investigate the facts and analyze the law before filing the Complaint, thereby violating his obligations under Wis. Stat. §802.05. The circuit court's factual findings are not clearly erroneous and must be upheld. Applying the deferential standard set out in *Janrdt, supra*, as to decisions by the circuit courts under Wis. Stat. §802.05, the Court of Appeals must affirm the court's judgment.

The circuit court also determined that Donohoo filed and maintained the lawsuit in violation of Wis. Stat. §814.025. The court determined that Donohoo knew, or should have

known, that the case was frivolous when he filed it and when he maintained it. That finding is not clearly erroneous. The Court of Appeals, in reviewing the circuit court's finding, should itself determine that Donohoo violated Wis. Stat. §814.025 and that the circuit court's judgment should be affirmed. The Court of Appeals should also find that this appeal is frivolous and award Action Wisconsin's fees, costs and attorneys' fees pursuant to Wis. Stat. §809.25(3) and *Riley v. Isaacson*, 156 Wis. 2d 249, 456 N.W.2d 619 (Ct. App. 1990).

ARGUMENT

I. INTRODUCTION.

Attorney James Donohoo ("Donohoo") brought a lawsuit against Action Wisconsin, Inc. and Christopher Ott, its Executive Director ("Action Wisconsin"), alleging that they had defamed Donohoo's client, Grant E. Storms ("Storms"). Donohoo filed the lawsuit because Action Wisconsin issued a press release following Storms' appearance at a gathering called the " International Conference Against Homo-Fascism" in October 2003 in Milwaukee that was sponsored by Wisconsin Christians United ("WCU"). The press release said, in part:

> 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 to God." Excerpts of the speeches are attached.
>
> * * *
>
> 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.[1]

(R. 1, A-App. 135-138) Before issuing the press release, Action Wisconsin obtained and reviewed a recording of Storms' speech from WCU. (R. 22, 23) In his speech, Storms recounted the story of Jonathan and his armor-bearer from The Bible, 1 Samuel 14. In that biblical story the Israelite and Philistines armies are facing one another. The Israelite army is not taking action against the Philistines. Jonathan, without permission from Saul, the leader of the Israelites, leaves the Israelite encampment and alone, except for his armor-bearer, goes to the Philistine camp and kills twenty Philistines. Seeing what Jonathan has done, the Israelite army after a brief delay attacks the Philistines and kills them.

In reference to what he called the "homosexual movement" Storms said this:

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[1] Storms' name appears in an addendum to the press release that specifically quotes speakers at the gathering.

> 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.

(R. 1, A-App. 136) In his speech, Storms specifically equated "homosexuals" with the Philistine army:

> There's 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.

(R. 1, A-App. 136) He continued with his speech, claiming that legislators and judges had not done their job and, appealing to his audience for direct action, stated:

> For 20 years we've 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.

(R. 1, A-App. 136) Later in the speech he told the story of Jonathan attacking the army of the Philistines by saying:

> *God has delivered them into our hands. Hallelujah, boom, boom, boom, boom – There's twenty . . . ."*

(R. 1, A-App. 136-137) Action Wisconsin interpreted that statement in light of the story of Jonathan and his armor bearer and Storms' equating homosexuals to the Philistine army as meaning that there should be twenty dead gays and lesbians, just like the twenty Philistines killed by Jonathan.

> *Ca-ching, glory, glory to God, let's go drive through the McDonald's and come back and get the rest.*

(R. 1, A-App. 137) Likewise, Action Wisconsin interpreted that phrase to mean that after the twenty gay and lesbian people are killed by a modern-day Jonathan, there will be a brief delay, just as the Israelite army delayed, and then the rest of them will be killed, as were the Philistines. Thus, it appeared to Action Wisconsin as it would appear to any objective person that a fair interpretation of Storms'

statements was that he made sounds "as if he were shooting gay people" and that he was "apparently advocating" the murder of gay and lesbian people.

This is not an appeal about whether the circuit court correctly granted summary judgment to Action Wisconsin. Donohoo (and Storms) conceded that issue by not appealing the circuit court's decision dismissing Storms' claim. Consequently, the findings, both legal and factual, in the circuit court's memorandum opinion granting summary judgment to Action Wisconsin and denying it to Storms cannot be contested in this appeal.

The circuit court made the following finding in its summary judgment decision:

> Defendants' press release presented a fair interpretation of plaintiff's speech. **There is no evidence** that the statements made were false or in reckless disregard to whether they were true or false.

(Emphasis added.) (R. 57, A. App. 112) The circuit court also concluded:

> Although plaintiff concedes the words spoken by Storms were accurately reported, plaintiff contends that the defendants' interpretation was wrong. **There is no evidence** that defendants believed their interpretation was wrong and published it anyway. **The only evidence** is that the defendants honestly believed the words spoken by Storms advocated violence against gay people. Defendants' initial reaction to the speech [of] shock and fear is consistent with their interpretation as expressed in the press release.

(Emphasis added.) (R. 57, A-App. 110) The circuit court continued, stating:

> Defendants' interpretation must also be considered in the context of the entire speech. For example, plaintiff also stated:
>
> > 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.

Storms discussed his frustration with judges, legislators, and other public officials and spoke of the futility of letter writing, petitions, and other protests. He urged his listeners to make a difference, that "you alone can make a difference." He stated, "we need some people that will get up with radical ideas and go forward in the name of Jesus." Storms urged his audience to "take it to the streets." It is in this context that Storms discussed the story of Jonathan and his armor bearer who killed the Philistines. Storms denies he advocated murder because murder is a sin. But Storms concedes that when Jonathan killed the Philistines this was not considered wrong by God. Moreover, it is significant to note what Storms did not say. At no time did Storms say he did not mean to encourage people to get into physical confrontations with gay and lesbian people. At no time did he tell his listeners that his words should not be taken literally. **Defendants' statements were a rational interpretation of Storms speech.**

In their moving papers, defendants have extensively and accurately set forth the words and sounds used by plaintiff. Defendants have extensively and accurately explored the entire speech. **Defendants'**

> **interpretation that Storms did appear to advocate the murder of gay people is not unreasonable.** The language used was "God had delivered them into our hands. Hallelujah-Boom, 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." with loud sounds made to sound like explosions. In addition Storms drew a parallel between the Philistines who were slain by the Israelites and gay and lesbian people. It is also significant that earlier in the speech Storms stated he intended to "liken the Philistines unto the homosexual movement today." Defendants' statements expressed their understanding of the meaning of this analogy.

(Emphasis added.) (R. 1, A-App. 110-111)

When the circuit court later considered Action Wisconsin's motion for costs and fees, it did so in the context of having previously found that Storms and Donohoo, who had conceded that Storms was a public figure, produced absolutely no evidence to show that Action Wisconsin's statements were false and, likewise, produced absolutely no evidence that Action Wisconsin acted with actual malice. In other words, after filing a lawsuit claiming defamation by a

non-media defendant of a public figure regarding a public controversy and making a motion for summary judgment, Donohoo produced absolutely nothing - - no facts and no law - - on at least two essential elements of the claim. The circuit court was correct when it found that he had failed to adequately investigate the legal and factual basis of the lawsuit before bringing it and that he continued it without any factual or legal basis for doing so.

Donohoo's brief on this appeal has an extensive section that purports to explain the meaning of his client's statements in the speech at the "International Conference Against Homo-Fascism." (Appellant's Brief and Appendix, hereinafter "Donohoo Brief" at pp. 23-31) None of those explanations may be considered in this appeal if they differ from the unappealed June 28, 2005 findings by the circuit court. The court made that substantive decision based on cross motions

for summary judgment and recited in its memorandum the material facts that were undisputed.

Had Donohoo or his client believed that there were other facts that were relevant to the circuit court's June 28, 2005 substantive decision that the court overlooked or ignored, they should have appealed the summary judgment decision. They did not. This appeal is not an opportunity to argue that issue *sub rosa*: it is about Donohoo's conduct in commencing and maintaining a lawsuit that the circuit court found he "knew or should have known . . . was brought, 'without any reasonable basis in law or equity,'" that was "commenced . . . without adequate investigation into the law

or facts," and that Donohoo frivolously maintained.[2] (R. 77, A-App. 118, 120)

As to the facts regarding Donohoo's conduct, the circuit court considered all of the information that Donohoo chose to provide. He did not ask for an evidentiary hearing. Consequently, he did not testify. He merely submitted his affidavit in opposition to Action Wisconsin's motion. (R. 68, Ex. 3; R-App. 12-15) That affidavit contained Donohoo's entire explanation of the steps that he took to investigate the facts and the law that applied to those facts before he filed the lawsuit and the steps that he took, if any, to re-analyze the case as it proceeded. In addition, the circuit court had before it the Affidavits of Lester Pines and Tamara Packard

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[2] Donohoo apparently appealed from the denial of the motion for reconsideration of the summary judgment decision that was decided by the circuit court on January 4, 2006. However, Donohoo did not make Storms a party to this appeal. Nor did he address that issue in his brief. Issues raised but not briefed are deemed abandoned. *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 140 Wis. 2d 80, 89, 410 N.W.2d 585 (Ct. App. 1987).

submitted in support of Action Wisconsin's motion for costs and reasonable attorneys' fees (R. 62, R. 63) and the court's file. This appeal is a review of the record made in the circuit court. Donohoo may not supplement the record by adding new facts and attempting to construct new explanations here.

The circuit court concluded that Donohoo had violated his obligations under both §§802.05 and 814.025. The record in the circuit court shows that Donohoo did neither an appropriate factual nor legal analysis of Storms' defamation claim before filing it. Donohoo compounded that error by persisting with the lawsuit despite having no factual or legal basis to do so. The circuit court's findings as to both §§802.05 and 814.025 were correct factually and legally. They must be affirmed.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT DONOHOO VIOLATED HIS OBLIGATIONS UNDER §802.05.

A. The Court Of Appeals Applies A Deferential Standard To The Review Of The Circuit Court's §802.05 Findings.

The standards for the review of a finding made pursuant to Wis. Stat. §802.05 were set out in *Janrdt v. Jerome Foods, Inc*. 227 Wis. 2d 531, 597 N.W.2d 744 (1999) which explained that:

> [A] person who signs a pleading makes three warranties:
>
> First, the person who signs a pleading, motion or other paper certifies that the paper was not interposed for any improper purpose. Second, the signer warrants that to his or her best 'knowledge, information and belief formed after reasonable inquiry' the paper is 'well grounded in fact.' Third, the signer also certifies that he or she has conducted a reasonable inquiry and that the paper is warranted by existing law or a good faith argument for a change in it. *Riley v. Isaacson*, 156 Wis.2d 249, 256, 456 N.W.2d 619 (Ct.App.1990)(citing *Beeman v. Fiester*, 852 F.2d 206, 208-09 (7th Cir.1988)). **If the circuit court finds that any one of the three requirements set forth under the statute has been disregarded,** it may impose an appropriate sanction on the person signing

> the pleading or on a represented party or both. Wis. Stat. § 802.05(1)(a); but see *Riley*, 156 Wis.2d at 256, 456 N.W.2d 619 ("If any one of these three prongs has been violated, sanctions must be imposed."). 227 Wis. 2d at 548.

(Emphasis added.)

> When made pursuant to Wis. Stat. § 802.05,[the appeal court's] review of a circuit court's decision that an action was commenced frivolously is deferential. *Riley*, 156 Wis.2d at 256, 456 N.W.2d 619 (citing *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 933 (7th Cir.1989)). Determining what and how much pre-filing investigation was done are questions of fact that will be upheld unless clearly erroneous. *Id.* . . . 227 Wis. 2d at 548.
>
> * * *
>
> A circuit court's discretionary decision will be sustained if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson,* 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982).
>
> First, in determining whether an action has been commenced frivolously, the circuit court is to apply an objective standard of conduct for litigants and attorneys. . . . 227 Wis. 2d at 549.
>
> * * *

Section 802.05 requires that the claim be well grounded in both facts and law. Applying the objective standard when determining whether an attorney made a reasonable inquiry into the facts of a case, the circuit court should consider: whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion, or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts. *Brown v. Federation of State Medical Boards of U.S.*, 830 F.2d 1429, 1435 (7th Cir.1987) (citations omitted), abrogated on other grounds, *Mars Steel Corp.*, 880 F.2d 928; *Belich v. Szymaszek*, 224 Wis.2d 419, 430-31, 592 N.W.2d 254 (Ct. App. 1999). 227 Wis. 2d at 550.

And in determining whether the attorney made a reasonable inquiry into the law, consideration should include the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law. *Brown,* 830 F.2d at 1435. 227 Wis. 2d at 550-551.

Second, the circuit court's proper analysis must be made from the perspective of the attorney and with a view of the circumstances that existed at the time counsel filed the challenged paper. . . . 227 Wis. 2d at 551.

B. The Circuit Court Correctly Determined That Donohoo Failed To Make The Appropriate Factual and Legal Investigation Before Filing The Lawsuit.

1. The circuit court found that Donohoo had not done a sufficient factual investigation.

The circuit court, based all of the information Donohoo thought relevant to submit about his conduct, concluded that he had not conducted a sufficient factual investigation of the claim before filing the complaint, stating:

> 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 to 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."

(R. 77, A-App. 117).

The circuit court specifically discussed Donohoo's description of his "investigation" of the facts:

> 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 reenacting 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 "reenacting" 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.

(R. 77, A-App. 122).

In other words, Donohoo had all the information he needed to review the facts of the defamation claim: he had a recording of what his client said in his speech and he had a written document memorializing what Action Wisconsin said about his client's speech. He knew that his client was a public figure and that he was speaking on issues of public concern.

Yet the only factual investigation that Donohoo did before filing suit was to have some people tell him that they did not think that Storms was "reenacting" the killing of gay people. (R. 77, A-App. 122) Of course, the issue was not "reenacting:" the issue was whether Storms was "**apparently** advocating the murder of gay and lesbian people" and whether Storms "made sounds like gunfire **as if** he were shooting gay people." And even more importantly, Donohoo did no investigation at all to determine in what way Action Wisconsin's statements could have been made with actual malice.

The fact is that Donohoo merely adopted his own and his client's unwavering belief that no one could possibly have interpreted Storms' statements as Action Wisconsin did. He failed in his obligation to ensure the case was "well grounded in fact." One can understand why Storms would be so resolute in his belief: no one would want to admit that he had apparently exhorted people to commit murder. Storms told

the story of Jonathan allegorically. His message was: The "homosexual movement" is the modern-day Philistine army. Jonathan acted alone to kill twenty Philistines. That woke the Israelite army up and they killed the rest. The listeners were obviously asking themselves: if the "homosexual movement" is like the Philistine army and they want to kill us, shouldn't I be like Jonathan? And, if I am, won't others then follow me to finish the job just like the Israelite army followed Jonathan?

Obviously, Storms was upset that other people caught on to the allegory and publicized it for what it was: an exhortation to violence. But Donohoo's obligation as an attorney was to objectively investigate whether the listeners at Action Wisconsin could reasonably have interpreted Storms' speech as they did, the factual standard by which a defamation claim is measured. As to whether Donohoo met that obligation, the circuit court made this crucial finding: "Nowhere does counsel describe how he concluded that there

was evidence of actual malice" (R. 77, A-App. 119) and correctly concluded that Donohoo:

> . . . merely dropped his papers "into the hopper" of the legal system and required this court and defendants to undertake the necessary factual and legal investigations.

(R. 77, A-App.122)

In this appeal, Donohoo has described no information regarding his factual investigation that was submitted to the circuit court that it failed to analyze. Nor did Donohoo show that the circuit court failed to examine the relevant facts as to sufficient time to investigate, the source of the factual allegations, the complexity of the facts, Donohoo's ability to conduct a pre-filing investigation and whether discovery would have been useful in developing those facts. In fact, the circuit court did analyze all of those factors. Thus, its finding that Donohoo failed to do a sufficient pre-filing factual investigation pursuant to §802.05 is not clearly erroneous.

2. The circuit court found that Donohoo had not done a sufficient legal analysis before he brought the lawsuit.

The circuit court made the following finding regarding Donohoo's analysis of the law before he filed the lawsuit:

> 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.

(R. 77, A-App. 117-118).

Donohoo knew that his client was a public figure. He knew that as a public figure Storms had to prove that the statements that he gave a speech "apparently advocating the murder" of gay and lesbian people and that he made sounds like gunfire "as if he were shooting gay people" were made by Action Wisconsin with actual malice.

Actual malice in defamation cases is a legal concept with over a fifty year history. It has been thoroughly discussed in numerous cases and other sources since the United States Supreme Court applied it to public figure defamation cases in *New York Times v. Sullivan,* 376 U.S. 254 (1964). Yet the only evidence of any pre-filing legal analysis, if

it can even be fairly called that, is Donohoo's statement that he knew the elements of a defamation claim:

> Therefore, the complaint documented that the appellant at the time the complaint was filed was aware of all of the elements to prove to prevail on the defamation cause of action.

(Donohoo Brief, p. 21) Good for him! However, he provided no information to the circuit court to show that there was a legal basis for claiming, as he did in his affidavit in opposition to defendants' motion for cost and reasonable attorneys fees, (R. 68, R-App. 12-15) that actual malice could be proven by showing that a defendant: failed to respond to demands for retraction; made the statements because of animus against the plaintiff's cause; or made the statements to advance their own political agenda. He repeats those same assertions in his brief here and again fails to provide any legal support for them. (Donohoo Brief, pp. 49-50)

The bottom line is this: before filing a complaint, a lawyer is required to do more than merely identify the elements of a claim; a lawyer must apply the particular facts about the potential claim to those elements and then determine if those facts legally support it. To do that, a lawyer must avail himself or herself of sources like case law, treatises, law review articles, professional publications, continuing education material or the like, to try to find even a modicum of direction about how the potential case could be proven based on the experiences of other plaintiffs, or on newly developed legal theories. Donohoo did not do that.

But, says Donohoo:

> This [his identification of the elements of a defamation claim in the complaint] was followed by a comprehensive discussion of the law in plaintiff's trial court brief.

(Donohoo Brief, p. 21) Well, that was just a dite late. He should have done a comprehensive analysis before the

complaint was filed. The circuit court did not find Donohoo's discussion of the law to be comprehensive at all stating: "[P]laintiff's filings did not present a plausible view of the law . . . " (R. 77, A-App. 118)

The record is irrefutable. Donohoo did no legal analysis before filing the lawsuit. And, that is precisely what the circuit court found: "Counsel gives no indication of his investigation into the law before filing this action." (R. 77, A-App. 119)

Having made that finding, the circuit court was obligated to hold that Donohoo had violated his duties under §802.05 and properly sanctioned him. This Court must give deference to the circuit court's finding because the court reviewed "the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Jandrt, supra* at 549.

The circuit court properly found that two of the requirements of Wis. Stat. §802.05 were violated by Donohoo - - he failed to do an adequate factual investigation and failed to do an adequate legal analysis before commencing the lawsuit. A failure to do only one of those activities was enough to trigger sanctions. *Riley v. Isaacson*, 156 Wis. 2d at 256. This Court must defer to the circuit court's findings and affirm its judgment.[3]

[3] Donohoo did not challenge in the circuit court the amount of costs and attorneys' fees sought by Action Wisconsin and he has not challenged on appeal the amount awarded by the circuit court.

III. THE CIRCUIT COURT PROPERLY CONCLUDED THAT DONOHOO COMMENCED AND CONTINUED A LAWSUIT THAT WAS FRIVOLOUS IN VIOLATION OF §814.025.

A. In Reviewing A Finding Under §814.025, The Court Of Appeals Sustains The Circuit Court's Factual Findings, Unless They Are Clearly Erroneous And Independently Determines Whether The Lawsuit Was Frivolous.

The standards for the review of a finding made pursuant to Wis. Stat. §814.025 were also set out in *Janrdt v. Jerome Foods, Inc.*, *supra,* which stated:

> We recently explained the standard we use in reviewing a circuit court's finding under § 814.025 that an action is frivolously continued:
>
> > Inquiries about frivolousness involve a mixed question of law and fact. *Stern*, 185 Wis.2d at 241, 517 N.W.2d 658 (citing *State v. State Farm Fire & Cas. Co.*, 100 Wis.2d 582, 601-02, 302 N.W.2d 827 (1981)). The determination of what a party or attorney "knew or should have been known" [under Wis. Stat. § 814.025] is a factual question, and the circuit court's findings of fact will not be reversed by an appellate court unless the findings of fact are clearly erroneous. See Wis. Stat. § 805.17(2). The

> ultimate conclusion of whether the circuit court's factual determinations support the legal determination of frivolousness is, however, a question of law, which this court determines independent of the circuit court or court of appeals, benefitting from the analysis of both courts. Id. (citing *State Farm*, 100 Wis.2d at 602, 302 N.W.2d 827).*Juneau County*, 221 Wis.2d at 638-39, 585 N.W.2d 587. 227 Wis. 2d 562-563.
>
> * * *

We are mindful of the delicate balance involved in the application of Wis. Stat. § 814.025. A significant purpose of the statute is to help maintain the integrity of the judicial system and the legal profession. *Juneau County*, 221 Wis.2d at 639, 585 N.W.2d 587 (citing *Sommer v. Carr*, 99 Wis.2d 789, 799, 299 N.W.2d 856 (1981)). As we have explained, courts and litigants should not be subjected to actions without substance. *Id.* At the same time, we must also recognize that courts must be cautious in declaring an action frivolous, for to do so may stifle "the ingenuity, foresightedness and competency of the bar." *Id.* (citing *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis.2d 605, 613, 345 N.W.2d 874 (1984)). In making the appropriate balance between these competing interests, we will declare the continuation of an action frivolous only when there is no reasonable basis for a claim. *Id.* Any doubts about the reasonableness of claim will be resolved in favor of the litigant or attorney subject to the sanctions motion. *Id.* 227 Wis. 2d at 572-573.

B. The Circuit Court Correctly Determined That Donohoo Failed To Make The Appropriate Factual And Legal Investigation Before Filing the Lawsuit.

The circuit court applied its factual analysis of Donohoo's failure to comply with §802.05 to its analysis of Donohoo's behavior in relation to §814.025. Those facts, which are set out in the circuit court's decision and discussed above in Sections II(B)(1)&(2), are most certainly not clearly erroneous. They must be upheld by this Court.

C. The Circuit Court Correctly Determined That Donohoo Frivolously Continued The Lawsuit After It Had Been Filed.

The circuit court explains its analysis of Donohoo's violation of §814.025 on pages 6 through 10 of its memorandum decision and order. (R. 77, A-App. 118-122) Its presentation is thoughtful and thorough. Ultimately, the circuit court held:

> 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.

(R. 77, A-App. 120)

Before reaching that conclusion, the circuit court noted that Donohoo had "failed to provide necessary evidence on the contested elements of his claim" and that while he knew the claim had to be "proven by clear and convincing evidence" he "failed to even meet the ordinary 'greater weight of the evidence ' burden." The court held that Donohoo continued the litigation "despite notice from defendants that

there was no factual or legal basis for [the] claim."[4] (R. 77, A-App. 119)

The court also found that in addition to filing and persisting in maintaining a lawsuit without a factual or legal basis, Donohoo deliberately misrepresented the law in an attempt to support his claim, concluding that "a fair inference is that [plaintiff's] counsel intended to mislead the Court . . ." (R. 77, A-App. 120) Furthermore, he did so in a summary judgment motion that he admitted was filed for an improper purpose, as the Court found:

> 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.

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[4] In fact, the April 22, 2004 letter from Attorney Tamara Packard to Donohoo (R. 62, Ex. 2; R-App. 3-5) is a virtual roadmap of the legal issues that Donohoo needed to review. He provided no evidence that he ever did so. Likewise, the July 19, 2005 letter from Attorney Lester Pines to Donohoo (R. 62, Ex. 3, R-App. 6-11) explains again the legal issue and details how the facts stated by Storms do not support the claim.

(R. 77, A-App. 121) All of those findings by the circuit court support its determination that Donohoo "merely dropped his papers 'into the hopper' of the legal system and required the Court and defendants to undertake the necessary factual and legal investigation" and that the lawsuit was filed and maintained in violation of §814.025.

IV. THE COURT OF APPEALS SHOULD AFFIRM THE CIRCUIT COURT'S DECISION.

Donohoo filed a defamation case against Action Wisconsin without having made a reasonable and objective investigation of the facts and without analyzing the law regarding public figure defamation. Donohoo was notified by Action Wisconsin's counsel immediately after he filed the suit that Action Wisconsin considered it to be frivolous. (R. 4, R-App. 1-2; R. 62, Ex. 2; R-App. 3-5) Yet, he persisted.

Action Wisconsin deposed his client and then explained in detail to Donohoo why he had no facts and no law to

support the claim. (R. 62, Ex. 3, R-App. 6-11) Still, he continued the case. Action Wisconsin moved for summary judgment. Donohoo ignored the arguments in their motion. Then Donohoo took depositions. Even in the face of the witnesses' detailed and reasonable explanations of why they interpreted Storms' speech as they did, Donohoo pressed on with the lawsuit.

Donohoo then made his own motion for summary judgment in which he deliberately misrepresented the law to the court. Ultimately, the court determined that Donohoo had presented no facts and no law to support his client's claim and that he had made his summary judgment motion for an improper purpose. The circuit court correctly observed that Donohoo believed that he was right and that he ignored any other point of view. (R. 77, A-App. 120) What that attitude led him to do was to file a lawsuit that was utterly devoid of merit from its very inception and then blithely continue it despite

mounting and obvious signs that he had no case and never did. For that he was appropriately sanctioned by the circuit court.

This is not a case where an attorney had an arguable case based on the facts and law but ultimately had a court decide against him. He never had a case.

Donohoo's conduct is an egregious example of how an attorney can cause harm by filing and continuing a completely meritless lawsuit: this case required Action Wisconsin to incur in excess of $88,000 in attorneys' fees and costs to defend in the circuit court, plus the costs of defending against this meritless appeal. Whether Donohoo was acting blindly, foolishly, maliciously or for some unknown reason does not matter: he acted frivolously. And, because of that, this Court should affirm the circuit court's judgment that Donohoo violated the provisions of §814.025.

V. CONCLUSION.

The judgment of the circuit court should be affirmed as to the court's findings under §§802.05 and 814.025. Because the circuit court determined that the underlying case was frivolous, on affirming the circuit court, this Court should award costs and reasonable attorneys fees to the Action Wisconsin for this appeal. *Riley v. Isaacson*, 156 Wis. 2d 249 (Ct. App. 1990).

Dated this 11th day of September, 2006.

CULLEN WESTON PINES & BACH LLP

By:_____

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Certification of Brief

I hereby certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 6,701 words.

_____

Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

Case No. 2006AP000396

In the matter of attorneys fees in:
Grant E. Storms, plaintiff v. Action Wisconsin Inc.
and Christopher Ott, defendants.

JAMES R. DONOHOO,

Appellant,

Milwaukee Circuit Court
Case No. 2004CV002205

vs.

ACTION WISCONSIN, INC. and
CHRISTOPHER OTT,

Respondents.

ON APPEAL FROM THE DECISION AND ORDER DATED JANUARY 4, 2006, AND THE JUDGMENT ENTERED ON FEBRUARY 2, 2006, THE HONORABLE PATRICIA D. MCMAHON PRESIDING, MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 2004CV002205.

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Dated: September 11, 2006

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