SUPREME COURT OF WISCONSIN

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Appeal 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,

vs.

Milwaukee Circuit Court
Case No. 2004CV002205

ACTION WISCONSIN, INC. and CHRISTOPHER OTT,

Respondents-Petitioners.

ON REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT I, DATED MAY 30, 2007, REVERSING THE MILWAUKEE CIRCUIT COURT DECISION AND ORDER DATED JANUARY 4, 2006, AND THE JUDGMENT ENTERED ON FEBRUARY 2, 2006, THE HONORABLE PATRICIA D. MCMAHON PRESIDING

REPLY BRIEF OF RESPONDENTS-PETITIONERS

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I. INTRODUCTION.

Attorney Donohoo believes that there is an interpretation of Grant Storms' speech that is "The" correct interpretation. He believes that Action Wisconsin's interpretation of Storms' speech was wrong and could not have been sincere. Apparently, those were his beliefs when he filed the lawsuit. His latest brief shows that he still holds them.

However, this case is not about whether Attorney Donohoo believed in his case. It is about whether he met his obligation to analyze the law of public figure defamation to determine if there was a factual and legal basis for it. The record shows that he did not.

The lesson of public figure defamation law is that participants in public discourse, with limited exception, should not have to defend against defamation suits brought by public figures. Unfortunately, Attorney Donohoo did not heed that

lesson. He brought and pursued a defamation case which, given the law of public figure defamation and the facts of this case, was frivolous from start to finish.

II. THE TRUTHFULNESS OF ACTION WISCONSIN'S STATEMENTS.

Attorney Donohoo provides in his Brief, at pages 8 through 16, an alternative interpretation of Grant Storms' speech. In this interpretation, Storms exhorts his listeners (both in the room and those who purchase the recording) to figuratively act as modern-day Jonathans towards the modern-day Philistines, i.e., homosexuals. In contrast, Action Wisconsin interpreted Storms to exhort his listeners to literally take action as modern-day Jonathans by murdering gay and lesbian people.

Other listeners might hear a different message still: the speech, lasting more than one hour, was filled with ambiguity and statements ripe for interpretation. It is not necessary for

the Court to determine "The" meaning of Storms' speech. Instead, the question, properly decided by the Circuit Court on summary judgment,[1] is whether Action Wisconsin's interpretation was a rational one. (R. 57; App. 52-53) The "deliberate choice of one interpretation from a number of possible rational interpretations" is not enough to create a jury issue of actual malice. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 546, 563 N.W.2d 472 (1997).

Contrary to Attorney Donohoo's suggestions, a listener interpreting a speaker's words need not give the speaker the benefit of the doubt, or search for a "balanced" or "journalistic" interpretation. *See Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 573 (N.D. Ill. 1987), *aff'd.*, 841 F.2d 1309 (7th Cir. 1988); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F.

[1]As explained in Action Wisconsin's initial Brief at pages 23 to 25. Attorney Donohoo presented no argument or case suggesting otherwise, and thus concedes this point. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.,* 90 Wis. 2d 97, 108-09, 279 N.W.2d 493, 499 (Ct.App. 1979).

Supp. 377, 386-87 (E.D. Penn. 1985), *aff'd.*, 780 F.2d 340 (3rd Cir. 1986), *cert. denied*, 476 U.S. 1187 (1986). Courts must not become the arbiters of "The" meaning of ambiguous words. Action Wisconsin continues to urge the Court to listen to Storms' speech, contained in the Appendix at 54, to confirm that Action Wisconsin's interpretation was fair, rational, and not unreasonable. (R. 57; App.-52-53)

III. ATTORNEY DONOHOO SHOULD HAVE KNOWN THIS SUIT WAS A COMPLETE FAILURE FROM THE START.

A. The Contours of Public Figure Defamation Law, and the Policy Behind It.

There is no dispute that at all relevant times, Grant Storms was both a "public figure" and a "limited purpose public figure."[2] (R. 57; App.-47) There is also no dispute that

[2]A plaintiff is a limited purpose public figure if (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).

when Action Wisconsin reacted to Grant Storms' speech at the "International Conference on Homofascism" in its press release, it engaged in political speech on matters of public concern: the issue of equal rights for gay and lesbian people in Wisconsin, and the presence of a State Senator at the "Homofascism" conference. (R. 57; App.- 43-45, 49-50, R. 77; App.-29-30, 32) Even now Attorney Donohoo acknowledges that Action Wisconsin's press release was political speech. *Appellant's Brief at 20-21, 43*.

To prove fault in a defamation action, every plaintiff must prove that the defendant (1) made a false statement; (2) to a person other than the person defamed; (3) which was unprivileged and tended to harm the plaintiff's reputation. *Torgerson,* 210 Wis. 2d at 534. When the plaintiff is a public figure or limited purpose public figure as here, he must also prove, by clear and convincing evidence, a fourth element: that

the defendant acted with actual malice. *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 674-675, 543 N.W.2d 522 (Ct. App. 1995), *citing New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); *see also Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d at 535-536.

"Actual malice" can only be proven with affirmative evidence. To even survive a motion for summary judgment, a plaintiff must have affirmative evidence demonstrating either that the defendant (1) knew the statement was false; (2) in fact entertained serious doubts as to the truth of the statement; or (3) had a high degree of awareness of probable falsity. *Torgerson*, 210 Wis. 2d at 542; *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 256 (1986).[3] Attorney Donohoo had no such evidence here.

The additional requirement of actual malice in public figure defamation cases is based in the First Amendment to the United States Constitution, for errors in public debate are inevitable.

> [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

Thus, in a public figure defamation case, the defendant holds a constitutional privilege to say erroneous things which

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[3]Attorney Donohoo cites *Torgerson* for the proposition that a plaintiff may also prove actual malice by showing that "the statement was so inherently improbable that only a reckless person would publish it." *Appellant's Brief at 30.* Neither *Torgerson* nor any other Wisconsin case recognizes such a standard. And while jury instruction Wis-JI Civil 2511 does include this phrase, it is framed as a "factor" available to the jury in determining whether any of the three standards identified in *Torgerson* are met. The Court should disregard Attorney Donohoo's misrepresentation of the law.

is only overcome upon a showing of actual malice: the plaintiff may be able to prove that the defendant spoke in error, i.e., falsely,[4] but unless the plaintiff has evidence that the defendant spoke with actual malice, the plaintiff cannot win.

As the Supreme Court explained in 1964: "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . ." This is because "[e]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co.*, 376 U.S. at 271-72, *quoting*

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[4]This Court has determined that all defamation plaintiffs, both private and public figures, bear the burden of proving falsity. *Torgerson v. Journal/Sentinel, Inc.,* 210 Wis. 2d 524, 543, n. 18, 563 N.W.2d 472 (1997). The Court of Appeals in this case apparently misunderstood a footnote in *Denny v. Merz*, 106 Wis. 2d 636, 660-61, n. 35, 318 N.W.2d 141 (1982), to assign to all defamation defendants a burden to prove the truth of their statements. *App.-8.* Rather, that footnote says that when a defendant relies on truth as a defense, it is the defendant's burden to prove. Any confusion over the meaning of this footnote should have been cleared up with footnote 18 in *Torgerson*.

N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The concept of free debate is key: public figures are less in need of government protection via defamation suits because they usually have access to channels of communication, and are able to mount an effective public response to rebut false statements. Also, they have, in essence, assumed the risk of false statements by voluntarily entering the public forum. *Gertz,* 418 U.S. at 345.

Constitutional concerns are heightened even further when the speech at issue is political in nature, as was both Storms' and Action Wisconsin's speech in this case. The First Amendment guarantees that debate on political issues of the day will remain uninhibited, robust and wide open. *Gertz*, 418 U.S. at 339-340. This constitutional safeguard was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change. *Roth v. United States,* 354 U.S. 476, 484 (1957). Consequently, speech which arises directly from

political debates--that which is at the heart of the First Amendment--is entitled to even greater protection.

The "standard of actual malice is a daunting one." *McFarlane v. Sheridan Square Press,* 91 F.3d 1501, 1515 (D.C. Cir.1996) (quotation and citation omitted). To have acted with actual malice, the publisher must have "come close to wilfully blinding itself to the falsity of its utterance." *McFarlane,* 91 F.3d at 1508. "Few public figures have been able clearly and convincingly to prove that the scurrilous things said about them were published by someone with 'serious doubts as to the truth of [the] publication.' " *McFarlane,* 91 F.3d at 1515 (quoting *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968)).

B. The Impossibility of Meeting the Public Figure Defamation Standard Merits a Finding of Frivolousness.

Attorney Donohoo argues strenuously that the facts of this case could have supported a finding of actual malice. Yet he offers no authority to support that they even provide a colorable claim on that element. None of the facts gathered by Attorney Donohoo demonstrate that Action Wisconsin subjectively (1) knew the statement was false; (2) in fact entertained serious doubts as to the truth of the statement; or (3) had a high degree of awareness of probable falsity. Attorney Donohoo cannot avoid the fact that he needed more than simple, though passionate, disagreement as to whether Action Wisconsin's interpretation was made in good faith: he needed hard evidence. He had none. Had Attorney Donohoo

met his obligation as an attorney and performed even minimally adequate legal research, he would have known that.

Attorney Donohoo cites a Second Circuit case, *Goldwater v. Ginsburg*, 414 F.2d 324 (2nd Cir. 1969), for the proposition that a defendant's failure to read articles in their entirety and quote selections of those articles are facts that a trial court could consider on the issue of actual malice. *Appellant's Brief at 34-35.* He then argues that this case presents similar circumstances to those in *Goldwater*. That is absurd. In *Goldwater*, there was an abundance of material which supported the jury's finding of actual malice, and the trial court listed no fewer than twelve different pieces of evidence including that (1) before the article was published a prominent expert in psychiatry warned the author that his survey was invalid; (2) the allegedly defamatory article included statements for which the defendant could not establish a basis during his deposition; and (3) the author

included in his article "letters" from others that were "rewritten" and "distilled" by the author without so indicating. *Id.* at 336-37. That kind of evidence supports the subjective awareness of probable falsity needed.

There is no similar evidence in this case. Action Wisconsin, by its highest-ranking official, President of the Board Timothy O'Brien, did in fact listen to the entirety of Storms' speech, and directed the creation of the press release. The fact that Action Wisconsin did not ask Storms to confirm its understanding of the speech is irrelevant. It is likewise irrelevant that Action Wisconsin did not explain how it arrived at its interpretation upon receiving a demand for retraction, or ask others what they thought the speech meant. Like one of the defendant representatives in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984), Action Wisconsin "knew what it heard" and did not need to do more. *Id.* Likewise, the fact that

Action Wisconsin staff members Freker and Ott, and for that matter all Action Wisconsin board members, volunteers, and members did not likewise listen to the entire speech, is irrelevant. Attorney Donohoo never identified any affirmative evidence from which anyone could conclude that Action Wisconsin had actual malice, unlike the plaintiff in *Goldwater*.

While losing a motion for summary judgment does not necessarily make a case frivolous, an utter failure of evidence on one or more elements of a claim supports a finding of frivolousness. *See Stoll v. Adriansen*, 122 Wis. 2d 503, 513-14, 362 N.W.2d 182 (Ct. App. 1984). As Judge McMahon correctly found:

> 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.

(R. 77; App.-36)

Judge McMahon reached that conclusion after a thoughtful and reasoned analysis of the submissions made by Attorney Donohoo in defense of his behavior. She was thorough and based her conclusions on a rational consideration of the facts and law placed before her by the parties. That was her obligation. She met it perfectly. Her decision should be upheld.

C. Attorney Donohoo Frivolously Failed to Ascertain at Least One Crucial Aspect of the Well-Settled Law of Public Figure Defamation.

Attorney Donohoo disclosed for the first time in his Brief filed with this Court that his relentless and dogged pursuit of Action Wisconsin in this case was based on a false understanding of the law. Attorney Donohoo now admits that

he persisted in his prosecution of this case based on the erroneous legal belief that "Action Wisconsin bore the burden to prove the substantial truth of their published statements." *Appellant's Brief at 19.*

The magnitude of this legal error is breathtaking. As an attorney, Attorney Donohoo should have known better. Despite his acknowledgment that his client was a public figure and his identification of what elements one must plead in a public figure defamation Complaint, he apparently never took the time necessary to understand the well-settled law of public figure defamation. In particular, Attorney Donohoo apparently never paused to read any of the hundreds of public figure defamation cases founded on the United States Supreme Court decisions discussed in Section III. A. above. If he had, he would have learned that due to the actual malice standard, Action Wisconsin could never be forced to prove that its

interpretation of Grant Storms' speech was a true interpretation.

A competent attorney would have done more than look up the elements of a public figure defamation claim in the jury instructions, decide that a jury could find that Action Wisconsin's interpretation of Storms' speech was wrong and ill-intended, and charge ahead. Clearly, Attorney Donohoo was counting on debating the meaning of Storms' speech to a jury, and believed that as long as the meaning of Storms' speech was debatable, he did not have a frivolous case.

Compounding that fundamental legal error, Attorney Donohoo doggedly clung to his beliefs and refused to change course, despite the mounting legal authority brought to his attention at every stage of the litigation.[5] The courts and

[5]He also went so far as to file a motion for summary judgment merely for the "tactical and strategic advantage" of being able to submit additional briefs, and, while doing so, altered a quote from the *Restatement (Second) of Torts* in an attempt to mislead the Circuit Court

Action Wisconsin have born the brunt of this incompetence. A reasonable attorney would have known at the start of this case and at every step along the way that Action Wisconsin would never have to prove it was right. Attorney Donohoo deserves to be sanctioned for his ostrich-like behavior in initiating and pursuing this case.

IV. CONCLUSION.

Attorney Donohoo's behavior in this case was, and is, frivolous. If not, loud-voiced public figures speaking publicly on controversial subjects will be able to shut down all but their wealthiest and boldest opposition through litigation and the fear of litigation. Citizens and opposing public figures will be afraid to point out the often subtle but possibly intended messages delivered by those engaged in political discourse.

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into believing some legal authority might support his case. Both of these actions were cited by the Circuit Court as providing additional support for the decision to sanction Attorney Donohoo. (R. 77; App.-34-35)

Rather than responding to speech with more speech and open debate, public figures will seek to remove the opposition from the stage by crying "defamation!" Lawyers will feel free to file defamation suits after receiving no response to a retraction demand, comforted by the knowledge, gleaned from the Court of Appeals decision in this case, that they have enough evidence to at least avoid a finding of frivolousness.

For the reasons stated in this Reply Brief and Action Wisconsin's Initial Brief, the decision of the Court of Appeals should be reversed, the judgment of the Circuit Court should be affirmed, and the case should be remanded to the Circuit Court for a determination of the costs, fees and reasonable attorney fees to be awarded against the Appellant for pursuing a frivolous appeal. *Riley v. Isaacson,* 156 Wis. 2d 249, 259, 456 N.W.2d 619 (Ct. App. 1990).

Dated this 19th day of November, 2007.

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Certification of Brief

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2973 words.

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