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.

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR COSTS AND FEES

I. INTRODUCTION.

A defamation suit is like any other: the lawyer considering it must analyze the law and satisfy himself or herself that there are facts to support each element of the claim. Simply put, Attorney Donohoo, counsel for the Plaintiff, did not do that.

Before July 1, 2005, pursuant to Wis. Stat. §802.05(1)(a), when an attorney signed a Complaint, he or she certified that he or she had (1) made reasonable inquiry into the facts and applicable law, and (2) 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. If an attorney failed to do so, a circuit court may award reasonable attorney fees and costs to the defendant. *Riley,* 156 Wis. 2d at 256; Wis. Stat. §802.05.

Similarly, if an attorney commenced or continued an action prior to July 1, 2005 that the attorney knew or should have known 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. Wis. Stat. §814.025(1) and (3)(b).

The statutes against frivolousness, Wis. Stat. §§802.05 and 814.025, create "obligations to one's adversaries and to the legal system to avoid needless cost, delay and waste of judicial resources." *Riley v. Isaacson*, 156 Wis. 2d 249, 259, 456 N.W.2d 619 (Ct. App. 1990); *see also Belich v. Szymaszek*, 224 Wis. 2d 419, 434-35, 592 N.W.2d 254 (Ct. App. 1999). Because he violated those statutes, Attorney Donohoo must be sanctioned for his abuse of the legal system, and for the waste of judicial resources that he has caused.

II. ATTORNEY DONOHOO FILED A FRIVOLOUS LAWSUIT.

A. This Suit Was Frivolous Under Wis. Stat. §802.05.

1. Attorney Donohoo made an insufficient inquiry into the facts.

In determining under Wis. Stat. §802.05 whether an action has been commenced frivolously, a circuit court applies an objective standard of conduct for attorneys. *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 549, 597 N.W.2d 744 (1999), *reconsideration denied*. The evaluation is to be made considering "what was reasonable to believe at the time the pleading, motion or other paper was submitted." *Id.* at 551. A court is to avoid using the wisdom of hindsight, and rather should take a view of the circumstances that existed at the time the attorney filed the challenged paper. *Id*.

When determining whether an attorney made a reasonable inquiry into the facts of a case as required by Wis. Stat. §802.05, a circuit court considers:

> 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.

Id. at 550.

Attorney Donohoo filed the Complaint in this suit on February 23, 2005, less than three months after the day of the alleged defamation. The statute of limitations on a defamation claim is two years. Wis. Stat. §893.57. He had ample time to investigate the claim, yet chose to use only a small portion of that time before filing the Complaint.

The facts were neither complex nor difficult to discern prior to filing. Attorney Donohoo had available an audio recording of his client's speech, as well as a copy of Action Wisconsin's press release characterizing that speech. He had a duty to check closely the plausibility of his client's account about the meaning of the speech, to consider whether his client's allegations "comported with common sense and human experience," *Belich,* 224 Wis. 2d at 432, and not accept his client's version on faith alone. *Jandrt*, 227 Wis. 2d at 556. Attorney Donohoo was either blind to the gaping holes in the factual basis of his case or ignored them. Even a paper filed "in the best of faith," however, "is sanctionable if counsel neglected to make reasonable inquiry beforehand." *Riley*, 156 Wis. 2d at 259.

Attorney Donohoo had available to him tools, such as the internet, to find out whether his client was a public figure. He did not need to research whether the parties' speech was on an issue of public controversy, an important inquiry within the public figure evaluation, for Action Wisconsin's press release refers to the proposed anti-gay constitutional amendment and makes the connection between Storms' speech, a state Senator's presence at the conference, and the press release. Indeed, in his Complaint, Attorney Donohoo appeared to concede that Storms was a public figure by pleading the elements of actual malice. (Complaint ¶¶18 & 19)

Finally, Attorney Donohoo needed only ask his client for the facts showing that his reputation had been damaged, for instance, the identities of those who stopped associating with him or dropped out of his organization because of what Action Wisconsin had said. Yet by the

time he filed the Complaint, he could only say that Action Wisconsin's statements "tended and do tend" to harm his client's reputation (Complaint ¶13). He was unable to say that Action Wisconsin's words had harmed Storms' reputation. No such evidence existed.

2. Attorney Donohoo made an insufficient inquiry into the law.

In determining whether an attorney commencing a lawsuit made a reasonable inquiry into the law, factors considered under Wis. Stat. §802.05 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.

Jandrt, 227 Wis. 2d at 550-51.

As with his factual inquiry, Attorney Donohoo had plenty of time to research the law before he prepared the Complaint. Had he performed even a cursory review of the law prior to filing suit, such as reading the law note on defamation claims in the Wisconsin Jury Instructions-Civil, he would have known that substantial truth of the statement is an absolute defense, that opinions cannot be defamatory, and that when a nonmedia defendant speaks on matters of public interest or concern, or when a claim is brought by a public figure (both present here), the defendant holds a Constitutional privilege. He also would have known that with a public figure plaintiff, he had to show actual malice by clear and convincing evidence. Wis JI-Civil 2500. At the commencement of his case, Attorney Donohoo knew or should have known that the law did not support the claim. Action Wisconsin warned Donohoo of that on April 22, 2004 in a detailed letter. (Pines Affidavit ¶ 17, Ex. 2)

Wisconsin courts have cautioned that "an empty head but pure heart is no defense" to claims of frivolousness, and that attorneys must conduct reasonable and thoughtful inquiries into

their clients' claims before filing any document in court. *Belich*, 224 Wis. 2d at 433. Attorney Donohoo failed to do so here. Instead, he dropped his papers "into the hopper" of the legal system, and left the Court and Action Wisconsin to undertake the investigation that he should have done. *See Belich*, 224 Wis. 2d at 434-35.

B. The Filing of This Case Was Frivolous Under Wis. Stat. §814.025.

The guidelines used to determine frivolousness under Wis. Stat. §802.05 are generally the guidelines used in determining frivolousness under Wis. Stat. §814.025. *Jandrt.* 227 Wis. 2d at 550. An attorney must be sanctioned under Wis. Stat. §814.025 if he knew or should have known that either key elements pled or the entire claim was brought "without any reasonable basis in law or equity." *Jandrt,* 227 Wis. 2d at 563. The proof necessary to meet this "any reasonable basis" standard is greater where, as here, the claim must be proven by clear and convincing evidence. Wis. JI-Civil 205. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 245, 517 N.W.2d 658 (1994). In *Stoll v. Adriansen*, 122 Wis. 2d 503, 513-14, 362 N.W.2d 182 (Ct. App. 1984), a total lack of proof on failure to use ordinary care and on causation resulted in a finding of frivolousness. In this case, as the Court found, there was also a total lack of evidence on any contested element of the claim, making Attorney Donohoo's behavior particularly egregious. He could not have met the "any reasonable basis" standard even under the ordinary civil burden of proof.

Even after a thorough review of the briefs on the cross motions for summary judgment, the Court found that Attorney Donohoo "failed to provide evidence of any publicly available materials that could have or should have changed defendants' interpretation of the speech," (Decision & Order, p. 9) offered "**no evidence**" that his client was defamed, and "**no facts** to support a finding of harm" to his client's reputation. (Decision & Order, p. 12, emphasis added)

This is the evidence that, had it existed, Attorney Donohoo could have and should have obtained before filing. He failed in that duty.

> A claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed . . . ."

Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994).

Indeed, even presenting some evidence, if that evidence is wholly insufficient to support a claim, does not cause the claim to become nonfrivolous. *Howell v. Denomie*, 2005 WI 81 ¶13, ___ Wis. 2d ___, 698 N.W.2d 621.

> The obvious purpose of sec. 814.025, Stats., is to deter litigants and attorneys from commencing or continuing frivolous actions and to punish those who do so. The trial court must enforce sec. 814.025 for the purpose of maintaining the integrity of the judicial system and the legal profession.

Stoll, 122 Wis. 2d at 511.

Attorney Donohoo violated his duty to the legal system by bringing a case without reasonable basis in law or equity. For that, he should be sanctioned, both under Wis. Stat. §802.05 and Wis. Stat. §814.025.

III. ATTORNEY DONOHOO PURSUED A FRIVOLOUS LAWSUIT.

An attorney is not relieved of his obligation to ensure that an action is well-grounded in law and fact once it is commenced. That responsibility is ongoing. Once an attorney realizes or should have realized that a claim is not properly supported, he "must dismiss or risk sanctions." *Jandrt,* 227 Wis. 2d at 563. At several key points in this litigation, detailed in the Pines Affidavit ¶¶ 17-19 and Exhibits, it was or should have been clear to Attorney Donohoo that his claim was not supported. At each of those points, he failed to dismiss. For that he must be sanctioned.

Forced to continue its defense against this suit, Action Wisconsin moved for summary

judgment on December 12, 2004. Despite warnings that he had evidence problems, Attorney Donohoo made no effort at discovery between the day he filed suit and the day Action Wisconsin filed its Motion: nearly ten months. (Pines Affidavit ¶19).

> The filing of a complaint can set in gear, as it did here, a great deal of activity--costly activity--with respect to the defendant. With the power to institute a lawsuit must come responsibility. With the problems this case presented to the plaintiffs, the plaintiffs had a responsibility to do more than sit and wait.

Jandrt, 227 Wis. 2d at 574-75.

Action Wisconsin's briefs supporting its Summary Judgment Motion laid out the facts of the case. Attorney Donohoo agreed with those facts. Action Wisconsin's briefs also identified the relevant case law. Attorney Donohoo neither disputed the law controlling the case, nor argued for an extension, modification, or reversal of that law.

Nevertheless, Attorney Donohoo frivolously pursued a separate motion for summary judgment. That motion and briefing added nothing to what had already been done--nothing, that is, except additional work for Action Wisconsin, its counsel, and the Court. (Pines Affidavit ¶20) Moreover, unable to find real law to put in his brief, Attorney Donohoo apparently manufactured law by altering a quote from the *Restatement (Second) of Torts* §580A cmt. d. (Pines Affidavit ¶21) Misquoting authorities causing an altered meaning is an appropriate ground for sanctions. *Precision Speciality Metals, Inc. v. United States,* 315 F.3d 1346 (Fed. Cir. 2003).

Action Wisconsin brought the misrepresentation to Attorney Donohoo's and the Court's attention in its March 18, 2005 brief. In his reply brief, Attorney Donohoo said nothing about his misrepresentation: he did not withdraw it, deny it, apologize for it, or explain how it came to be. It is a fair inference that his silence is an admission that he deliberately tried to deceive and mislead the Court. (Pines Affidavit ¶21)

In *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W.2d 182 (Ct. App. 1984), the Court of Appeals affirmed a finding of frivolousness under Wis. Stat. §814.025, explaining that "the total lack of evidence necessary to prove negligence would lead a reasonable party to conclude under the facts of this case that assertion of such a claim would be frivolous." This Court should likewise find frivolousness here, for even after seeking additional information by belatedly conducting discovery, Attorney Donohoo still:

- "Failed to provide any evidence of any publicly available materials that could have or should have changed defendants' interpretation of the speech;" (Decision & Order, p. 9)
- Established that "the only evidence is that defendants honestly believed the words spoken by Storms advocated violence against gay people;" (Decision & Order, p. 10)
- Offered only an interpretation of his client's words that was "strained and inconsistent with the speech as a whole," while Action Wisconsin's interpretation was "a rational interpretation" and "not unreasonable;" (Decision & Order, pp. 11-12)
- Offered only a "bare allegation" of actual malice (Decision & Order, p. 12);
- Offered "no evidence that [Storms] was defamed;" (Decision & Order, p. 12);
- Had to concede, by his client's own admission, "that no person has stopped associating with [Storms] because of defendants' press release nor has he suffered a loss of membership in his organization or his church;" (Decision & Order, p. 12); and
- Offered "no facts to support a finding of harm to [Storms'] reputation." (Decision & Order, p. 12).

There are very few cases in which an attorney deserves sanctions for bringing and maintaining a lawsuit. This is one of those cases. Few lawyers behave so irresponsibly and abuse the legal system so thoroughly, knowing that the likely effect is to chill protected speech.

IV. THE COURT SHOULD AWARD REASONABLE FEES AND COSTS.

Upon a finding of frivolousness under Wis. Stat. §814.025, the award of reasonable attorney fees and statutory costs is mandatory. Under Wis. Stat. §802.05, such an award is permissive. Full compensation of those forced to defend frivolous litigation is appropriate, to

make the party whole, and to deter and punish the attorney who files and maintains that action. *See Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 576-77, 597 N.W.2d 744 (1999).

Action Wisconsin's vigorous defense against this frivolous suit was reasonable. It viewed the suit as an effort to stifle its ability to pursue its core mission. To Action Wisconsin, this was a "Strategic Lawsuit Against Public Participation ("SLAPP") suit. Action Wisconsin's defense was no different from Jerome Foods, Inc.'s defense in *Jandrt*, *supra.* Just as that suit was a significant threat to that corporation, *Jandrt*, 227 Wis. 2d at 578, so too was this suit a significant threat to the mission and purpose of Action Wisconsin.

Once an award of reasonable attorney fees and costs is found to be appropriate, Wisconsin Courts apply the lodestar method (i.e., reasonable hours multiplied by reasonable rates), using the factors of Supreme Court Rule 20:1.5, to evaluate those hours and rates for reasonableness. *Kolupar v. Wilde Pontiac Cadillac*, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58. The factors of Rule 20:1.5 are as follows:

> (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 lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Kolupar, 2004 WI 112 ¶25.

Applying particularly factors (1), (3), (4), and (7), we ask the Court to find both the hourly rates and the work performed by Action Wisconsin's attorneys to be reasonable, and to award $78,542.50 in attorney fees and $2095.33 in statutory costs. In support, Action Wisconsin submits the Affidavits of Attorneys Pines and Packard, which outline their backgrounds and experience. The Pines Affidavit also provides an itemization of the work performed and costs, based on contemporaneous records. Also submitted are the Affidavits of Attorneys Jeff Scott Olson, Steven Porter, and Stephen Glynn. These respected attorneys provide expert opinions as to the reasonableness of the amount of work performed and of Defense counsel's rates. Ultimately, the Court is in the best position to evaluate the quality of the work provided by Attorneys Pines and Packard, as their briefs, motions, and affidavits, have been reviewed by this Court in the pendency of this case.

IV. CONCLUSION

Defendants' Motion for Reasonable Attorneys Fees and Costs for the defense in this case, including reasonable fees for pursuing this motion, should be granted.

Respectfully Submitted this 12th day of August, 2005,

CULLEN WESTON PINES & BACH LLP

By: _____

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