COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP396 **Cir. Ct. No. 2004CV2205**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE MATTER OF ATTORNEYS FEES IN:
GRANT E. STORMS, PLAINTIFF V.
ACTION WISCONSIN, INC. AND
CHRISTOPHER OTT, DEFENDANTS,

JAMES R. DONOHOO,

APPELLANT,

V.

ACTION WISCONSIN, INC. AND
CHRISTOPHER OTT,

RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Reversed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Attorney James R. Donohoo appeals *pro se* from a judgment ordering him to pay Action Wisconsin, Inc. and Christopher Ott over $85,000 in costs and attorney's fees following the dismissal of a defamation lawsuit Donohoo filed on behalf of his client, Grant E. Storms. He also appeals from an order denying his motion seeking reconsideration of the trial court's decision. Donohoo contends the trial court erred in holding that the underlying defamation action was frivolous. Donohoo argues there was a sufficient factual and legal basis to support the filing of the plaintiff's complaint. Because the trial court erred in ruling that Donohoo filed and continued this lawsuit without a sufficient factual and legal basis to support it, we reverse.

BACKGROUND

¶2 In October 2003, Grant E. Storms, a pastor of a church in Louisiana, and a well-known activist crusading against the homosexual agenda spoke at a conference held in Milwaukee, Wisconsin. His speech was about fighting the homosexual movement/agenda. In December 2003, Storms became aware of a press release issued by Action Wisconsin and Christopher Ott, which was posted on the Internet. The press release alleged that during the October 2003 speech, Storms made sounds like gunfire "as if he were shooting gay people," and "apparently advocated the murder" of gay people. Storms also found a handbill affixed to telephone poles in his home city of New Orleans which contained his picture and was captioned, "Why does Pastor Grant E. Storms of Christian Conservatives for Reform advocate the murder of gays?" and at the bottom referred the readers to Action Wisconsin's web site.

¶3 On January 8, 2004, Donohoo, on behalf of Storms, sent a letter to Timothy O'Brien, the president of Action Wisconsin, requesting that Action

Wisconsin retract the two statements referenced above and remove the press release from its website. The letter set forth the two portions of the press release believed to be false and defamatory, and explained the true facts/statements occurring in the October 2003 speech.

¶4 When no response was forthcoming, Donohoo sent a second letter to O'Brien on February 4, 2004, noting the previously ignored January 8, 2004 letter and requesting "immediate retraction of the libelous statement contained in the press release regarding" Storms. In this letter, Donohoo included the handbill, explaining that such was posted on telephone poles in New Orleans, as well as an e-mail sent to Storms's radio program, which illustrated the negative impact Action Wisconsin's libelous statements were having in Storms's community and elsewhere. The letter advised that if a retraction was not forthcoming, legal action for defamation would be commenced against Action Wisconsin.

¶5 Donohoo received no response or retraction from Action Wisconsin. On February 23, 2004, Donohoo filed a defamation action against Action Wisconsin and Ott. On April 22, 2004, Action Wisconsin's counsel sent Donohoo its answer to the complaint together with a notice of motion and motion for costs and attorneys fees pursuant to WIS. STAT. §§ 814.025(1), (3)(b) and 802.05(1)(a) (2003-04).[1] Counsel for Action Wisconsin, Tamara B. Packard, advised that she believed the defamation lawsuit was frivolous and explained her reasons for so

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. The supreme court repealed WIS. STAT. § 814.025 and amended WIS. STAT. RULE 802.05 by Supreme Court Order 03-06. 2005 WI 38 (eff. July 1, 2005). The parties do not contend that the new frivolous action statute applies to this case; however, we held in ***Trinity Petroleum, Inc., v. Scott Oil Co., Inc.***, 2006 WI App 219, ___ Wis. 2d ___, 724 N.W.2d 259 that the new statute is procedural and therefore has retroactive effect. ***Id.***, ¶2. Thus, although newly enacted WIS. STAT. RULE 802.05 applies to this case, it is not dispositive.

thinking. She stated: "The sooner you drop this suit, the less you and your client will have to pay."

¶6 On July 19, 2004, Donohoo received a letter from Lester A. Pines, also counsel for Action Wisconsin. Pines's letter asserted that based on Storms's deposition, there was no basis to continue the defamation lawsuit. Pines stated: "I write to offer you the opportunity to dismiss this case with prejudice and payment of costs to us now. If you do so, we will not seek sanctions for this frivolous lawsuit." The basis for the letter was that Storms was a public figure, requiring that actual malice be proven to support the defamation allegation. In addition, Pines stated that Storms would not be able to establish the key element of "damage to his reputation" as a result of the allegedly defamatory statement. Pines advised that the attorney's fees to date "exceed $13,000 and will likely double if they have to proceed with a motion for summary judgment."

¶7 Subsequently, Action Wisconsin filed a motion for summary judgment. Storms filed a response and a separate motion. On June 28, 2005, the trial court issued a decision and order granting Action Wisconsin's motion for summary judgment and dismissing the action. That decision was not appealed.

¶8 Subsequent to the dismissal of the defamation suit, Storms filed a motion for reconsideration and Action Wisconsin filed a motion seeking costs and actual attorney's fees on the basis that the complaint was frivolous, based on WIS. STAT. §§ 802.05 and 814.025. On January 4, 2006, the trial court denied the motion for reconsideration, but granted the motion seeking costs and actual attorney's fees, finding the underlying action was frivolous. The trial court ruled that there was no evidence of actual malice, that Storms had not shown any damage to his reputation and that Action Wisconsin's press release "presented a

fair interpretation" of the October 2003 speech. The court awarded Action Wisconsin costs in the amount of $2220.09 and attorney's fees in the amount of $85,232.50. Attorney James Donohoo, counsel for Storms, appeals from this decision of the trial court.

DISCUSSION

¶9 This case is not about whether the trial court correctly decided the summary judgment issue. This case is not, therefore, governed by the summary judgment standards as the dissent seems to believe. Rather, the only issue in this case is whether the trial court correctly concluded that the lawsuit was frivolous either when it was commenced and/or when it was continued. Thus, the case is controlled by the frivolous action standards, which are different than those governing summary judgment. In order for something to be frivolous, we must conclude that there is no reasonable basis for it. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 573, 597 N.W.2d 744 (1999). In our analysis, we balance between maintaining the integrity of the judicial system/legal profession and stifling "'ingenuity, foresightedness and competency of the bar.'" ***Id.*** at 572 (citation omitted). Doubts about the reasonableness of the claim shall be resolved in favor of a finding of nonfrivolousness "unless the claim was brought solely for purposes such as harassment or malicious injury." ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶28, 277 Wis. 2d 21, 690 N.W.2d 1.

¶10 Thus, contrary to the rationale proffered by the dissent, which exclusively discusses the burdens relative to summary judgment, this appeal concerns only whether the commencement or continuation of this action was frivolous. We conclude for the following reasons, that it clearly was not frivolous.

¶11 As noted, this case is about whether the defamation lawsuit was frivolous, thus justifying an award of actual attorney's fees.[2] A claim is frivolous when a party or attorney "knew or should have known" that the claim lacked "any reasonable basis in law and equity." WIS. STAT. § 814.025(3)(b). A court uses an objective standard to determine whether an action is frivolous. The standard is "whether the attorney knew or should have known that the position was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994) (quoting ***Sommer v. Carr***, 99 Wis. 2d 789, 799, 299 N.W.2d 856 (1981)).

¶12 Inquiries about frivolousness involve a mixed question of law and fact. ***Stern***, 185 Wis. 2d at 236. The determination of what a party or attorney "knew or should have known" is a factual question, and the trial court's finding of facts will not be reversed by an appellate court unless the findings of fact are clearly erroneous. WIS. STAT. § 805.17(2). The ultimate conclusion of whether the trial court's fact determinations support the legal conclusion of frivolousness is, however, "a question of law, which this court reviews independently." ***Stern***, 185 Wis. 2d at 236.

¶13 In determining whether an action is frivolous, a court should keep in mind that a significant purpose of the frivolous action statute is to help maintain the integrity of the judicial system and the legal profession. ***Sommer***, 99 Wis. 2d

[2] We also note that one of the significant changes Supreme Court Order 03-06 made is that sanctions are no longer mandatory, nor are they limited to costs and attorney fees. WIS. STAT. § 802.05(3)(b) (2005-06) (The court upon making a finding of frivolous "may impose an appropriate sanction," and the sanction is "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."). ***Id.***

at 799. [C]ourts and litigants should not be subjected to actions without substance. ***Jandrt***, 227 Wis. 2d at 572. A determination of frivolousness, however, is "an especially delicate area"; a court must be cautious in declaring an action frivolous, lest it stifle the "ingenuity, foresightedness and competency of the bar …." ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 613, 345 N.W.2d 874 (1984). "Because it is only when *no* reasonable basis exists for a claim or defense that frivolousness exists, the statute resolves doubts in favor of the litigant or attorney." ***In re Estate of Bilsie***, 100 Wis. 2d 342, 350, 302 N.W.2d 508 (Ct. App. 1981). In reviewing a WIS. STAT. § 802.05 decision, our review is deferential. ***Riley v. Isaacson***, 156 Wis. 2d 249, 256, 456 N.W.2d 619 (Ct. App. 1990).

¶14 The trial court found the defamation to be frivolous on three grounds: (1) no evidence of actual malice; (2) lack of proof of damage; and (3) no evidence that counsel conducted a reasonable and thoughtful inquiry into the claim before filing this action. We conclude that the trial court erroneously exercised its discretion in so ruling for three reasons: (1) there were disputed issues of material fact as to the actual malice element; (2) the law presumes damage to reputation in a libel suit; and (3) the record clearly reflects that Donohoo engaged in a reasonable and thoughtful inquiry before filing the action. We address each in turn.

A. Law of Defamation/Actual Malice

¶15 The law of defamation as pertinent to the instant action required proof that: (1) the published statements were defamatory; (2) that they were false; (3) special harm resulted or there was presumed special harm; (4) no privilege applies; and (5) actual malice exists if a public figure is the subject of the

statement. ***Bay View Packing Co. v. Taff***, 198 Wis. 2d 653, 673-74, 543 N.W.2d 522 (Ct. App. 1995).

¶16 The first element requires that the published statement be defamatory and the second element requires that the statement be false. If the statement is substantially true, then it cannot be defamatory. ***Schaefer v. State Bar of Wisconsin***, 77 Wis. 2d 120, 125, 252 N.W.2d 343 (1977). The defendant in a defamation action has the burden of proving that the statement is the truth. ***Denny v. Mertz***, 106 Wis. 2d 636, 660-61, n.35, 318 N.W.2d 141 (1982).

¶17 Here, there is no question that the published statements were capable of conveying a defamatory meaning. A statement is defamatory "if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with him …." ***Vultaggio v. Yasko***, 215 Wis. 2d 326, 330, 572 N.W.2d 450 (1998). Action Wisconsin was suggesting that Storms was advocating the elimination by death of all gay people. Clearly such statement is capable of conveying a defamatory meaning.

¶18 Action Wisconsin contends that the statement was not defamatory because it was not false. We conclude that whether the statement was false or substantially true presented an issue of material fact. Storms presented sufficient evidence to suggest that the October 2003 speech could not be reasonably interpreted to accuse Storms of calling for the murder of homosexual people. Storms asserted that the speech speaks about killing the homosexual movement/agenda, but never suggests that individual homosexuals should be killed.

¶19 Storms asserts that the passage referred to with the "boom, boom, boom" cannot be reasonably interpreted to advocate killing gay people. Rather, in context, that portion comes during the part of Storms speech where he is preaching in an allegorical manner. He is discussing a Bible passage and the fighting between two peoples.

¶20 The question of whether the defamatory statement was true also interplays with whether there was evidence of actual malice. It is undisputed here that Storms was a public figure; therefore, to succeed in a defamation suit, it is not enough to show that the defamatory statement was false. He must prove that the defamatory statement was published with actual malice.

¶21 The trial court ruled there was no evidence of actual malice. We disagree. "Actual malice is a term of art; it is not used in its ordinary meaning of evil intent. Proof of actual malice requires a showing that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for its truth." ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997) (footnote omitted). Reckless disregard for the truth of the statement has been defined as having serious doubts as to the truth of the statement, a high degree of awareness of its probable falsity, or whether the statement is so inherently improbable that only a reckless person would have published it. ***Id.*** at 542.

¶22 Here, both sides presented contentions with respect to the merits of the underlying action—both sides presented disputed facts on the element of actual malice. Donohoo argues that actual malice was demonstrated: (1) when Action Wisconsin ignored his two requests for retraction; (2) when Action Wisconsin did not make any attempt to contact Storms before publishing the

statements; (3) by the lack of any explicit reference in the speech to suggest that Storms was advocating the murder of gay people; (4) by the extremely serious nature of the statements; (5) by the politics between a nationally-known figure who opposed Action Wisconsin's agenda thus resulting in the twisting of the speech to harm Storms to the advantage of Action Wisconsin; and (6) by Ott's failure to listen to the entire speech in context before publishing the defamatory statements.[3] Action Wisconsin, in return, sets forth a variety of factors in support

[3] The dissent suggests that Ott's failure to listen to the entire recording does not constitute evidence of actual malice because one of Ott's employee's did listen to the entire recording and reported what he heard to Ott. We disagree. It turns the law on its head that someone can make seriously defamatory charges by merely relying on what someone else says, when verification is not only possible but, as in this case, compelled.

Ott was not prudent in relying on what someone told him in charging Storms with incitement to murder. *See* ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 542, 563 N.W.2d 472, 480 (1997) (libel defendant "cannot prevail simply by proclaiming a belief in the truth of its publication") (specifically referencing "media" defendants in connection with the ***New York Times v. Sullivan*** "actual malice" standard, which, as the dissent concedes, is the applicable standard here). Thus, as ***Torgenson*** recognized, relying on ***Curtis Pub. Co. v. Butts***, 388 U.S. 130, 153 (1967) (Harlan, J. announcing judgment of the Court), that "[i]nvestigatory failures alone [are] insufficient to satisfy this standard." But, as the following from ***Butts*** indicates, Ott's decision to not listen to the tape on which he based his defamatory charges was not an against-a-tight-deadline decision to not investigate further, it was an abdication of an easily met responsibility to be sure that the speech he was describing actually said the vile things he claimed it did:

> The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information. The Post writer assigned to the story was not a

(continued)

of its contention that there was no actual malice.[4]

¶23 Thus, such dispute (as to whether Action Wisconsin's press release constituted actual malice) would have raised a jury issue as to whether seizing upon what Donohoo contends was allegorical commentary, justified accusing Storms of advocating murder. We also note that the United States Supreme Court has recognized because an analysis of actual malice is dependent on interpreting a person's state of mind, it is difficult to rule on this issue as a matter of law. *See* ***Hutchinson v. Proxmire***, 443 U.S. 111, 120 n.9 (1979). Further, the dissent protests that this opinion insufficiently analyzed the issue of actual malice. We

> football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking,' and the pressure to produce a successful expose might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id., 388 U.S. at 157-158. As in ***Butts***, Ott ignored what ***Butts*** characterized as "[e]lementary precautions." ***Id.***, 388 U.S. at 157. This weighs significantly against the circuit court's findings that Donohoo's action was frivolous.

[4] The dissent asserts that this sentence suggests this court did not consider the respondent's brief. The dissent is wrong. The sentence does not state that Action Wisconsin addressed the "merits" of this issue in its brief. Rather, the *record* reflects that Action Wisconsin asserted that it did not act with actual malice. Action Wisconsin asserted: (1) it "honestly believed" Storm's speech was advocating killing gay and lesbian people; and (2) Storms has no proof that "Action Wisconsin entertained serious doubts as to the truth of its statements." Because Action Wisconsin did not repeat these arguments in its appellate brief, this court relied on the record.

disagree. The only analysis necessary was to reach a conclusion as to whether there was *any reasonable basis* for Donohoo's claim that Storms was defamed. Because Donohoo proffered sufficient allegations on the element of actual malice, he demonstrated that his circuit-court action was not frivolous. Thus, our analysis, per force, ended there. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed). The trial court erred in finding the case to be frivolous.[5]

¶24 Based on the foregoing, we conclude that the trial court's decision awarding frivolous costs and fees on the grounds that the case lacked any evidence of actual malice was clearly wrong.

B. Harm

¶25 The second basis for the trial court's ruling was that Storms failed to present any evidence suggesting that the publication harmed him in any way. The trial court erred in so ruling.

¶26 The law in Wisconsin with respect to libel—defamation in writing—is that actual proof of damages is not required. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶40, 265 Wis. 2d 703, 666 N.W.2d 38; ***Martin v. Outboard Marine Corp.***, 15 Wis. 2d 452, 460-61, 113 N.W.2d 135 (1962); RESTATEMENT (Second) OF TORTS, § 569 (1981). The reason for the rule is that

[5] Although the dissent discusses each of the six allegations individually, the allegations, taken together, demonstrate that Donohoo had a reasonable basis to support his claim of defamation. As we have seen, Donohoo sent a letter to Action Wisconsin, explaining in detail why its contention that Storms was advocating the murder of gays was *false*. This letter, together with what Storms's speech actually said, the political battle surrounding this issue, and Ott's unjustified decision not to listen to the speech in its entirety, was a sufficient basis for Donohoo to assert that Action Wisconsin acted in *reckless disregard* of whether its representations were false.

when a person is defamed by a writing, it is presumed that he or she suffered general damages, such as humiliation, injury to feelings, damage to reputation or good name, but that the damage may be so subtle or indirect that it is difficult to prove monetarily. *See* ***Dalton v. Meister***, 52 Wis. 2d 173, 179, 188 N.W.2d 494 (1971). "The law does not require specific proof on these elements of damage." ***Calero v. Del Chem. Corp.***, 68 Wis. 2d 487, 510, 228 N.W.2d 737 (1975). Thus, the trial court erred in basing its decision on the fact that Storms failed to establish that he suffered specific harm.

C. Donohoo's Pre-suit Investigation

¶27 The trial court's final basis for declaring the underlying suit to be frivolous was that Donohoo failed to engage in sufficient investigation before filing suit. The record belies the trial court's conclusion.

¶28 The record contains the sworn affidavit of Donohoo asserting the investigation he conducted before filing the defamation complaint. In the affidavit, Donohoo avers that he listened to the recording himself to analyze whether it could be interpreted as suggested by the press release. He concluded that no person listening to the speech could have reasonably interpreted the speech to mean that Storms was acting as if he were shooting gay people or that Storms was advocating the murder of gay people. Donohoo also analyzed the evidence of whether actual malice existed. Donohoo also wrote not one, but two requests for retractions from Action Wisconsin, with detailed analysis as to why the press release statements were defamatory and not true. He explained what Storms actually stated in his October 2003 speech in much detail. These letters demonstrate that Donohoo spent a significant amount of time analyzing the speech before filing the defamation suit. Thus, based on the foregoing, we conclude that

the record demonstrates the trial court erred in ruling that Donohoo failed to do a reasonable inquiry into the merits of the case before filing suit.

¶29 This case essentially involves two allegations of frivolousness. The first centers on filing of the lawsuit in the first instance, which is governed by WIS. STAT. § 802.05. This statute requires the person who signs the pleading to make three warranties: (1) the complaint was not filed for an improper purpose; (2) the information contained therein is well grounded in fact based on knowledge, information and belief formed after reasonable inquiry; and (3) a reasonable inquiry has been conducted and the complaint is supported "by existing law or a good faith argument for a change in it." ***Jandrt***, 227 Wis. 2d at 548 (1999).

¶30 Whether an attorney engaged in the requisite "reasonable inquiry" involves applying the objective standard of whether the party or his counsel "should have known that his position is groundless." ***Id.*** at 550. WISCONSIN STAT. § 802.05 requires a reasonable inquiry into both the facts and the law and the trial court can consider a variety of factors to assess such. ***Id.*** Based on our review of this case, we conclude that the lawsuit was not frivolous when commenced. Donohoo engaged in a reasonable inquiry and the case was grounded in both facts and law. Donohoo analyzed the correct law when he formed his belief that Action Wisconsin had published the defamatory statements with actual malice. Donohoo wrote Action Wisconsin two retraction letters explaining the inquiry he had conducted and advising of his intent to file a defamation action if Action Wisconsin did not respond. Based on the documentation in the record, we cannot conclude that Donohoo knew or should have known that the position he took was frivolous.

¶31 The second allegation of frivolousness is based on WIS. STAT. § 814.025[6] as to whether the continuation of the action was frivolous after receiving Action Wisconsin's letters asserting its belief that the complaint was frivolous. Under this statute, the standard applied is whether a reasonable attorney knew or should have known under the same or similar circumstances that the position taken was frivolous. ***Id.*** We again conclude that continuation of this action was not frivolous. The record in this case demonstrates that there are disputed issues of material fact with respect to the element of actual malice. We resolve any doubts in favor of the attorney and against a finding of frivolousness. Donohoo set forth a variety of factors suggesting a reasonable basis as to how a jury could conclude that Action Wisconsin acted with actual malice. He also averred in his affidavit that he had four other individuals listen to the October 2003 recording and none of the four thought Storms was advocating shooting or killing gay people. Action Wisconsin, in turn, presented its position asserting that it did not act with actual malice. Action Wisconsin believed that its position of the lack of actual malice rendered continuation of the lawsuit frivolous. The trial court erroneously decided the disputed issue of fact at the summary judgment stage instead of allowing the case to proceed to determination by a factfinder. Because there are disputed issues of fact in the underlying merits of this case, we conclude as a matter of law that its continuation cannot constitute frivolousness. A reasonable attorney in Donohoo's position could have reasonably determined that there was a good faith basis in fact and law to continue the case. The fact that Action Wisconsin's two attorneys believed there was no evidence of actual malice

[6] As noted, WIS. STAT. § 814.025 was repealed and § 802.05 was amended effective July 1, 2005. The statutory changes, however, do not affect our analysis here.

does not make it so. Likewise, a "claim is not frivolous merely because there is a failure of proof. Nor is a claim frivolous merely because it was later shown to be incorrect … or because it lost on the merits." ***Stern***, 185 Wis. 2d at 243-44 (citations omitted). A claim should be found to be frivolous only if there is no reasonable basis for it.

¶32 Here, the record contains a set of facts which could satisfy the elements of the claim. A statement capable of defamatory effect was published. Damage is presumed. Actual malice is alleged and supported by facts from which a jury could have found that Action Wisconsin published the statement either with reckless disregard or with knowledge that it was false. We do not know which way a jury would have ruled because the judgment dismissing the underlying defamation action was not appealed. That decision is not before us.[7]

¶33 Based on our analysis, we do conclude that Donohoo had a reasonable basis to commence and continue the action. Accordingly, we reverse the trial court's order granting Action Wisconsin's motion seeking attorney's fees

[7] We reject Action Wisconsin's contention that we are bound by the trial court's findings that the underlying action was without merit. This contention is frivolous. First, there are no "findings" on a summary judgment. Second, the issue before us is not whether the determination on summary judgment was correct but whether Donohoo had a reasonable basis to begin and maintain the action.

We also reject Action Wisconsin's contention that there is no way its press release could constitute defamation because its remarks were preceded by the word "apparently"—thereby rendering its statement a non-actionable *opinion* rather than a fact. "Wisconsin law recognizes that, 'communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions or beliefs.'" ***Briggs & Stratton Corp. v. National Catholic Rptr. Pub. Co.***, 978 F. Supp. 1195, 1198 (E.D. Wis. 1997). Liability may result when a party blends an opinion with a statement of fact. ***Id.***

on the grounds that the case was frivolous. The underlying action was not frivolous and therefore the trial court erred in so ruling.[8]

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

[8] Based on the disposition of this case, Action Wisconsin's motion for frivolous appellate costs is hereby denied.

¶34 CURLEY, J. (*Dissenting*). I dissent. To understand my reasoning, I set forth a brief history of the case. Action Wisconsin monitored Rev. Grant E. Storms's (Donohoo's client) speech at a convention held in Milwaukee. After purchasing a CD containing the speech, an employee of Action Wisconsin listened to the entire CD and alerted the executive director, Christopher Ott, to parts of it which he found disturbing. Ott listened to those parts of the speech. Action Wisconsin then issued a press release which stated that Storms's speech appeared to advocate the murder of homosexuals. Donohoo, on behalf of Storms, requested a retraction. When none was forthcoming, Donohoo sued Action Wisconsin and Ott for defamation. After the suit was filed, Action Wisconsin and Ott's attorneys wrote two letters to Donohoo seeking the dismissal of the suit, warning him that it was frivolous as it had "no reasonable basis in law or equity." Donohoo persisted.

¶35 Eventually Action Wisconsin moved for summary judgment. The trial court granted summary judgment to Action Wisconsin and dismissed the defamation suit. Donohoo then brought a motion for reconsideration, and Action Wisconsin brought a motion seeking costs and legal fees for violations of WIS. STAT. §§ 802.05 and 814.025. The trial court denied the motion seeking reconsideration of the summary judgment, but did grant the motion for costs and legal fees after the trial court found that Donohoo maintained the lawsuit in violation of § 814.025(1). The dismissal of the defamation suit was never appealed and remains the law of the case.

¶36 First, the majority faults this dissent for allegedly applying the incorrect standard of review claiming "this appeal concerns only whether the

commencement or continuation of this action was frivolous." Majority, ¶10. In so arguing the majority properly cites to ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 597 N.W.2d 744 (1999), which sets forth the procedures to be followed in determining whether an appeal is frivolous. The majority then, however, sets out a balancing test, that is a much lower standard than the clearly erroneous standard set forth in ***Jandrt***, and declares "[w]e conclude for the following reasons, that it clearly was not frivolous." Majority, ¶10. This is not the proper standard.

¶37 ***Jandrt*** provides:

> When made pursuant to Wis. Stat. § 802.05, our review of a circuit court's decision that an action was commenced frivolously is deferential. Determining what and how much prefiling investigation was done are questions of fact that will be upheld unless clearly erroneous. "Determining how much investigation should have been done, however, is a matter within the trial court's discretion because the amount of research necessary to constitute 'reasonable inquiry' may vary, depending on such things as the particular issue involved and the stakes of the case." 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.

Id., 227 Wis. 2d at 548-49 (internal citations omitted).

¶38 Accordingly, because the trial court's conclusion that the action was frivolous was discretionary, this case is not, as the majority claims, about "whether the defamation lawsuit was frivolous," Majority, ¶11; rather, it is about whether the trial court's conclusion that it was frivolous was clearly erroneous. For the following reasons, Donohoo has not and cannot show that the trial court's discretionary determination that the action was frivolous was clearly erroneous. Therefore, this court should affirm the trial court.

¶39 Without taking up all the issues raised by the majority in reversing the trial court, I address only its discussion of "actual malice," as I conclude it is the lynchpin of this suit. No actual malice was ever alleged by Donohoo.

¶40 As noted in the majority opinion, to show defamation, five elements must be satisfied. Common law defamation sets forth the first four:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Van Straten v. Milwaukee Journal Newspaper-Publisher, 151 Wis. 2d 905, 912, 447 N.W.2d 105 (Ct. App. 1989) (citation omitted), *cert. denied*, 496 U.S. 929 (1990). In ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964), the United States Supreme Court added a fifth element that applies only to "public officials," holding that under the First and Fourteenth Amendments "public officials" to show defamation must "prove that the statement was made with 'actual malice.'" ***Denny v. Mertz***, 106 Wis. 2d 636, 643, 318 N.W.2d 141 (1982) (citing ***Sullivan***, 376 U.S. at 279-80; emphasis added), *cert. denied*, 459 U.S. 883 (1982). The rule was subsequently extended to include not only "public officials" but also "public figures." ***Denny***, 106 Wis. 2d at 643-44 (citing ***Curtis Publ'g Co. v. Butts***, 388 U.S. 130, 155 (1967)); *see* ***Underwager v. Salter***, 22 F.3d 730, 734 (7th Cir. 1994) (applying Wisconsin law) (recognizing that in Wisconsin "a public figure must establish that the defendant acted with actual malice").

¶41 Inasmuch as Rev. Storms was defined in Donohoo's brief as a "well-known activist crusading against the homosexual agenda" and had his own radio show, there can be little doubt or debate about his status as a public figure. Indeed, that issue does not appear to have been contested below.

¶42 A working definition of actual malice can be found in the Wisconsin Jury Instruction:

> 4. **Actual Malice.** Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Polzin v. Helmbrecht, 54 Wis. 2d 578, 587-88, 196 N.W.2d 685 (1972).

WIS JI—CIVIL 2500.

¶43 WISCONSIN JI—CIVIL 2511 sheds some light on when actual malice occurs.

> To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.
>
> Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it. It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff). There must be sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. (footnotes omitted). Thus, "[t]he focus is upon the defendant's attitude pertaining to the truth or falsity of the published statements rather than upon any

hatefulness or ill-will." ***Van Straten***, 151 Wis. 2d at 917 (citing ***Cantrell v. Forest City Publ'g Co.***, 419 U.S. 245, 252 (1974)).

¶44 With that background in mind, I now look to see what evidence the majority viewed that prompted them to write "both sides presented disputed facts on the element of actual malice." Majority, ¶22. The so-called "disputed facts" are a list of Donohoo's arguments and one sentence about Action Wisconsin:

> Donohoo argues that actual malice was demonstrated: (1) when Action Wisconsin ignored his two requests for retraction; (2) when Action Wisconsin did not make any attempt to contact Storms before publishing the statements; (3) by the lack of any explicit reference in the speech to suggest that Storms was advocating the murder of gay people; (4) by the extremely serious nature of the statements; (5) by the politics between a nationally-known figure who opposed Action Wisconsin's agenda thus resulting in the twisting of the speech to harm Storms to the advantage of Action Wisconsin; and (6) by Ott's failure to listen to the entire speech in context before publishing the defamatory statements. Action Wisconsin, in return, sets forth a variety of factors in support of its contention that there was no actual malice.[1]

Majority, ¶22 (footnote added). These "disputed facts" claiming to establish actual malice are not supported by a single case citation that links the particular type of evidence alleged to a finding of actual malice. Moreover, the opinion is devoid of *any* analysis. I will address each "disputed fact" in turn.

[1] This last sentence is incorrect. Action Wisconsin's brief explicitly refuses to address the merits of the case because it asserts that the summary judgment was not properly appealed and the brief thus never reached the issue of actual malice. In acknowledgement of the fact that Action Wisconsin's brief does not address the merits of the case, the majority has explained that it looked to the record to find arguments previously made by Action Wisconsin on the issue of actual malice. Majority, ¶22 n.4. It is odd that the majority would search the record for "disputed facts" presented by the parties, inasmuch as the majority recognizes that "[t]his case is not about whether the trial court correctly decided the summary judgment issue." Majority, ¶¶9, 22.

¶45 The opinion first claims one disputed piece of evidence was Action Wisconsin's ignoring Donohoo's two requests for retraction. Majority, ¶22. My research revealed no case law requiring a person or organization exercising their constitutional right to report a public figure's speech to respond to a retraction letter in order to escape the claim of actual malice. Failure to respond to a retraction request has nothing to do with knowledge of whether the publication was false or distributed with reckless disregard as to its truth. Indeed, the law is clear that continuing to publish a defamatory statement about a public figure does *not* produce actual malice. ***Underwager***, 22 F.3d at 735-36 (rejecting plaintiffs' principal argument that malice is shown by continued publication of defamatory statements, including monographs that remained in circulation and repeated lectures).

¶46 So, too, with the majority opinion's next claim that actual malice is shown when the public figure is not contacted before publication. Majority, ¶22. I could find no case law that mandates that a publisher must contact the party who claims he or she was defamed prior to publication or he/she will be found guilty of publishing with actual malice. Such a requirement would place an impossible burden on the publisher since one would not know that the party believed him or herself to have been defamed until *after* publication. Consequently, such a requirement would require prior notice for all publications that report the statements of others. Because continued publication of defamatory statements about a public figure does not establish actual malice, ***Underwager***, 22 F.3d at 735-36, it stands to reason that failing to give advance notice does not produce "actual malice" either.

¶47 Next, the majority claims that Donohoo presented disputed evidence of actual malice because of the "lack of any explicit reference in the speech to

suggest that Storms was advocating the murder of gay people." Majority, ¶22. Again, I could find no case law, and the majority opinion offers none, that suggests a report of a speech must contain a verbatim report of it in order not to be considered to be motivated by actual malice. Indeed, "mere proof of failure to investigate the accuracy of a statement, without more, cannot establish the reckless disregard for the truth necessary for proving actual malice." ***Erdmann v. SF Broad. of Green Bay, Inc.***, 229 Wis. 2d 156, 170, 599 N.W.2d 1 (Ct. App. 1999) (citing ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 332 (1974)); *see* ***Lewis v. Coursolle Broad. of Wis., Inc.***, 127 Wis. 2d 105, 121, 377 N.W.2d 166 (1985) ("[F]acts proving the failure of … employees to verify the accuracy of their report would not establish that [a person] acted with 'actual malice' or 'reckless disregard for the truth.'"). In addition, "[i]t is well settled that the failure to use the word 'allegedly' is insufficient to create a jury issue of actual malice." ***Erdmann***, 229 Wis. 2d at 170 (citing ***Time, Inc. v. Pape***, 401 U.S. 279, 290 (1971)). Consequently, no actual malice can be presumed from a failure to state the exact wording of a speech of another in a publication.

¶48 The majority conjures up another "disputed fact" showing actual malice by noting "the extremely serious nature of the statements." Majority, ¶22. Clearly, the logic that flows from this argument is that whenever a publication contains "extremely serious … statements" reportedly made by another, they evince evidence of actual malice. This argument is so preposterous it need not be discussed further.

¶49 Next in the list of "disputed facts" supporting actual malice in the majority's opinion is the claim that "the politics between a nationally-known figure who opposed Action Wisconsin's agenda thus resulting in the twisting of the speech to harm Storms to the advantage of Action Wisconsin." Majority, ¶22.

Although the lack of clarity of this statement makes a response difficult, I can only discern that the majority believes that actual malice was shown because the issue upon which Storms spoke and Action Wisconsin reported was controversial with each holding contrary views and, as a consequence, Action Wisconsin wanted to twist the meaning of the words used in the speech in order to harm Storms. Even if this allegation was true, the motives of a person or organization do not dictate whether the report was published with actual malice. *See* RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1977). In fact,

> "[A]ctual malice" has nothing in common with "ill will." A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops.… Persons who hold such opinions cannot be expected to look kindly on their subjects, and the law certainly does not insist that they shut up as soon as they are challenged. [Plaintiffs] cannot, simply by filing suit and crying "character assassination!", silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests.

Underwager, 22 F.3d at 736 (citation omitted).

¶50 Finally, the majority points to "Ott's failure to listen to the entire speech in context before publishing the defamatory statements" as evidence of actual malice. Majority, ¶22. Under the applicable case law, no one can characterize the failure of the executive director to listen to all of Storms's speech as conclusive evidence of actual malice. An employee of Action Wisconsin purchased the CD and listened to *the entire* speech. He was appalled and concerned at what he heard. He then reported to Ott, who listened to key portions of the speech before the organization issued a press release. Ott confirmed that the CD contained the offensive statements. Moreover, as already explained, even if he had not listened to the pertinent parts of the speech, a failure to investigate does not imply actual malice. *See* ***Erdmann***, 229 Wis. 2d at 170; ***Lewis***, 127 Wis. 2d at

121. Nothing in this scenario points to Action Wisconsin's or Ott's publishing statements that they knew were false or whose truthfulness was recklessly disregarded.

¶51 The law defines "actual malice" as requiring knowledge of falsity or reckless disregard as to truthfulness. The arguments of the majority are utterly devoid of any evidence that suggests either. The majority's final suggestion that although this dissent discusses them individually, "the allegations, taken together, demonstrate that Donohoo had a reasonable basis to support his claim of defamation," Majority, ¶23 n.4, is utterly without merit. Claims that are without merit individually do not morph into having merit when they are considered together. ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("[z]ero plus zero equals zero"). Donohoo either knew or should have known that his client was a public figure and that a successful defamation suit required a showing of actual malice. He had an obligation to meet this standard prior to filing his complaint. As I have demonstrated, this is an extremely high standard. He failed to meet it or present evidence that could arguably be considered to show actual malice. He was put on notice by Action Wisconsin and Ott that they intended to seek frivolous costs and he was given the opportunity to dismiss the action. He chose to proceed, and he did so at his own peril. The trial court's finding of frivolousness was well-founded. Consequently, I would affirm and remand this matter for the determination of frivolous appellate fees as requested by the respondents.