SUPREME COURT OF WISCONSIN

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-Respondent,

vs.

Milwaukee Circuit Court
Case No. 2004CV002205

ACTION WISCONSIN, INC. and
CHRISTOPHER OTT,

Defendants-Appellees-Petitioners.

PETITION FOR REVIEW AND APPENDIX OF ACTION WISCONSIN, INC. AND CHRISTOPHER OTT

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Dated: June 29, 2007

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INTRODUCTION

Action Wisconsin, Inc. and Christopher Ott (collectively "Action Wisconsin"), hereby petition the Supreme Court of the State of Wisconsin, pursuant to Wis. Stats. §§808.10 and 809.62 to review the decision of the Court of Appeals, District I, in *James R. Donohoo v. Action Wisconsin, Inc. and Christopher Ott,* Appeal No. 2006AP396, filed on May 30, 2007. The Supreme Court should accept this Petition for Review because the Court of Appeals decided that when considering a circuit court's findings of frivolousness against plaintiff's counsel under Wis. Stats. §§802.05 and 814.025 (2003-2004)[1] following cross motions for summary judgment and an unappealed summary judgment decision in favor of the defendants, that the Court of Appeals may *sua sponte* review the unappealed summary judgment decision. There is no explicit law which either allows or forbids the Court of Appeals from doing so, however, such

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[1] The Motion for Sanctions was filed and served in April 2004, and was briefed to the trial court and Appeals Court as though the pre-July 1, 2005 law applied. While the Court of Appeals later determined that the amendment to Wis. Stat. §802.05 was procedural and therefore had retroactive effect, *Trinity Petroleum, Inc v. Scott Oil Co., Inc.*, 2006 WI App 219, 296 Wis. 2d 666, 724 N.W.2d 259, the Court of Appeals also determined that in this case, the change in the rule was not dispositive (App. 3, n.1) and did not affect its analysis (App. 15, n. 6). We proceed based on that same understanding.

review interferes with the finality of unappealed decisions. It should not be allowed.

Furthermore, in its opinion, the Court of Appeals decided that certain facts cited by the plaintiff could be used to support a finding of actual malice, but there is no law which supports that conclusion. In fact, persuasive authority suggests that those facts cited by the plaintiff cannot form the evidentiary basis for a finding of actual malice. The Supreme Court is needed to clarify the law on actual malice in public figure defamation cases, and how such law is to be applied when considering a motion for sanctions under Wis. Stats. §§802.05 and 814.025.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

First Issue: When (1) a trial court is presented with cross motions for summary judgment in a public figure defamation case, finds that there are no material facts in dispute, grants summary judgment for the defendant on the grounds that the public figure presented no facts to support the element of actual malice and that defendants' interpretation of the public figure's statements was rational and not unreasonable, (2) that decision is not appealed, and (3) the trial court

subsequently grants a motion for sanctions for bringing a frivolous lawsuit in violation of Wis. Stats. §§802.05 and 814.025, may the Court of Appeals *sua sponte* review the circuit court's summary judgment decision to find that there were material facts in dispute, summary judgment should not have been granted, and therefore that the circuit court erroneously exercised its discretion in awarding sanctions against the public figure's attorney?

The Court of Appeals, in a two-to-one decision, answered "yes."

Second Issue: Did the circuit court apply a proper standard of law and use a demonstrated rational process in concluding that the filing and maintenance of this action was frivolous under Wis. Stats. §§802.05 and 814.025 with regard to the facts offered and law governing the legal element of actual malice?

The Court of Appeals, in a two-to-one decision, answered "no."

STATEMENT OF REVIEW CRITERIA

The standards set forth in §809.62(1)(c) 2 and 3 are met by the both issues for review in this Petition. As to the first issue, the decision from the Court of Appeals reveals that the law on reviewing circuit court findings of frivolousness is still confused or uncertain, and there is a need for this Court to clarify and harmonize the law, particularly when a judgment on the merits has not been appealed. While the Wisconsin Supreme Court has issued several very useful and frequently cited decisions which provide guidance on the process to be followed when an appellate court reviews a circuit court's findings of frivolousness, there is no case law that supports the Court of Appeals' *sua sponte* action, nor is there any case law that explicitly forbids such action.

Likewise, as to the second issue, the Court of Appeals found that certain facts cited by the plaintiff could have supported a legal finding of actual malice. There appears to be no case law to support the Court of Appeals' conclusion, which suggests a decision from this Court is needed to develop or clarify the law. Consequently, both questions presented by this case are, indeed, novel.

As trial courts decide the merits of cases more and more often on cross-motions for summary judgment, such decisions are not appealed, and then the prevailing party seeks sanctions for filing and maintaining a frivolous lawsuit, as occurred here, the decision on the first issue in this case will have statewide impact. This scenario is likely to recur unless the Supreme Court resolves the standards that the Court of Appeals must follow.

Similarly, polarized political and social debates will continue to occur and involve public figures, and inevitably some of those public figures will try to squelch debate with defamation lawsuits. In order to protect free speech through the application of the conditional constitutional privilege (the condition being the absence of actual malice), the question of what constitutes actual malice will continue to arise throughout the state. Finally, both of the issues in this case are legal, rather than factual.

STATEMENT OF THE CASE

The Court of Appeals reviewed and reversed a circuit court's determination that James Donohoo ("Donohoo"), counsel for the plaintiff in the circuit court, had filed and maintained a frivolous lawsuit in violation of his obligations under Wis. Stats. §§802.05 and 814.025.

Donohoo brought a lawsuit against Action Wisconsin, Inc. and Christopher Ott, its Executive Director ("Action Wisconsin") in February 2004, 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.[2]

(R. 1) 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:

> 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

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

> 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) 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) 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) 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, boom – There's twenty . . . ."*

(R. 1) 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) 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.

Action Wisconsin filed its Answer to the lawsuit in April 2004 and at the same time filed and served a Motion for Sanctions pursuant to Wis. Stats. §§802.05 and 814.025. The parties filed cross-motions for summary judgment in December 2004 and February 2005. On June 28, 2005, the circuit court, in a Memorandum Decision and Order, granted summary judgment to Action Wisconsin, denied summary judgment to the plaintiff, and dismissed the case. That decision was not appealed.

Relevant to later proceedings, however, were the following findings by the circuit court 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; App. 53) 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; App. 51) 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; App. 51-52)

When the circuit court later considered Action Wisconsin's motion for costs and fees, it did so in the context of having previously found, when considering the parties' cross motions for

summary judgment, 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.

Briefing on Action Wisconsin's Motion for Sanctions began in August 2005. The circuit court's decision and order granting that motion and issuing sanctions against the plaintiff's attorney, Donohoo, was issued on January 4, 2006. As to the facts regarding Donohoo's pre- and post-filing 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; App. 58-60) 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 submitted in support of Action

Wisconsin's motion for costs and reasonable attorneys' fees. (R. 62, R. 63)

The circuit court concluded that Donohoo had violated his obligations under both §§802.05 and 814.025. The circuit court considered all of the information Donohoo thought relevant to submit about his conduct, applied the process called for in *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 550-51, 597 N.W.2d 744 (1999), and 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; App. 31).

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; App. 36).

As to whether Donohoo met that obligation with regard to facts supporting the element of actual malice, the circuit court made this crucial finding: "Nowhere does counsel describe how he concluded that there was evidence of actual malice" (R. 77; App. 33) 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; App. 36)

The circuit court also 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; App. 31-32).

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; App. 32) And, the circuit court found: "Counsel gives no indication of his investigation into the law before filing this action." (R. 77; App. 33)

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; App. 34)

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."[3] (R. 77; App. 33)

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; App. 34) 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

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[3] In fact, the April 22, 2004 letter from Attorney Tamara Packard to Donohoo (R. 62, Ex. 2; App. 62-64) 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; App. 65-70) explains again the legal issue and details how the facts stated by Storms do not support the claim.

> 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.

(R. 77; App. 35)

The Order for Judgment based on the circuit court's decision on frivolousness was issued on January 23, 2006 and the Judgement was entered on February 2, 2006. Donohoo timely appealed to the Court of Appeals that Judgment and associated Decision and Order on frivolousness. The Court of Appeals reviewed the circuit court's decision and, in a two-to-one decision dated May 30, 2006, reversed the circuit court's determination that Donohoo had filed and maintained a frivolous action in violation of his obligations pursuant to Wis. Stat. §§802.05 and 814.025.

ARGUMENT

I. THE CIRCUIT COURT'S CONCLUSIONS OF LAW ON THE DEFAMATION CLAIM ARE UNAPPEALED AND FINAL.

A. Finding: No Material Facts in Dispute.

The circuit court made its findings of frivolousness after it had heard and considered cross motions for summary judgment and then dismissed the plaintiff's public figure defamation complaint in its June 28, 2005 Decision and Order. That Decision was not

appealed. In order to decide the cross motions for summary judgment and the legal questions presented by the parties on the merits of the public figure defamation claim, the circuit court first had to determine if there were material facts in dispute. The court specifically found at the outset of the June 28, 2005 Decision that:

> The material facts are not in dispute. Defendants contend there are no disputes of material fact. Plaintiff has failed to identify any genuine disputes of material fact.

(R. 57; App. 42)

In its decision the circuit court quoted *Friendship Village v. City of Milwaukee,* 181 Wis. 2d 207, 219, 511 N.W.2d 345 (Ct. App. 1993): "When both parties move by cross-motions for summary judgment, it is 'the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues.'" (R. 57; App. 46) The circuit court also recognized that the Wisconsin Supreme Court has advised that summary judgment is the favored method for adjudicating public figure defamation claims, citing *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 539-40, 563 N.W.2d 472(1997). (R. 57; App. 46)

B. Finding: No Evidence of Actual Malice.

The circuit court then considered the legal issues on summary judgment, specifically finding that the plaintiff had produced no

evidence in the summary judgment process that the statements made by the defendants about the plaintiff were published with knowledge of falsity or in reckless disregard of whether they were true or false. That is the showing required to establish the legal element of actual malice.

The circuit court specifically determined in its summary judgment decision that the defendants' interpretation of the plaintiff's statements was rational. It also specifically determined that there was no evidence that the defendants believed that their interpretation was wrong and published it anyway and that the only evidence in the record was that the defendants honestly believed that the words spoken by the plaintiff advocated violence against gay people.

The circuit court's precise findings were:

> Defendants' press release presented a fair interpretation of plaintiff's speech. (R. 57; App. 53)
>
> 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. (R. 57; App. 51)

> Defendants' statements were a rational interpretation of Storms speech. (R. 57; App. 52)
>
> Defendants' interpretation that Storms did appear to advocate the murder of gay people is not unreasonable.(R. 57; App. 52)

Because the plaintiff did not appeal the circuit court's summary judgment in favor of Action Wisconsin, those findings were not before the Court of Appeals for review. They were and are the law of the case.

II. THE COURT OF APPEALS' *SUA SPONTE* REVIEW OF THE CIRCUIT COURT'S DECISION ON THE MERITS.

At the outset of the Discussion portion of the Court of Appeals decision, that court stated, "This case is not about whether the trial court correctly decided the summary judgment issue." (App. 5) In the next paragraph, it said, "this appeal concerns only whether commencement or continuation of this action was frivolous." (App. 5) The Court of Appeals reiterated that sentiment in the third paragraph of the Discussion: "this case is about whether the defamation lawsuit was frivolous, thus justifying an award of actual attorney's fees." (App. 6) It then recited various legal standards related to how courts determine frivolousness.

Yet, despite having recited the standards applicable to the review of a circuit court's finding of frivolousness, the Court of Appeals then analyzed the record on the merits and determined that there were "disputed issues of material fact" in dispute. As a result it found that the circuit court should not have granted summary judgment to the Defendants. Specifically, the Court of Appeals held: **"The trial court ruled there was no evidence of actual malice. We disagree."** (App. 9) and that **"[T]he trial court erroneously decided the disputed issue of fact at the summary judgment stage instead of allowing the case to proceed to a 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."** (App. 15)

The dissent in the Court of Appeals pointed out that "[t]he dismissal of the defamation suit was never appealed and remains the law of the case." (App. 18) It continued: "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.' . . . The majority then, however, sets out a balancing test, that is a much lower standard

than the clearly erroneous test set forth in *Jandrt* and declares '[w]e conclude for the following reasons, that it clearly was not frivolous.'" (App. 18-19) Additionally, the dissent stated:

> 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.

(App. 19)

The dissent then explained why Donohoo could not show that the trial court's discretionary determination that the action was frivolous was clearly erroneous.

The dissent was absolutely right. The Court of Appeals had no authority or jurisdiction to revisit the circuit court's summary judgment findings: those findings had not been appealed and, consequently, they were final and binding on the Court of Appeals. Had the plaintiff wanted an appellate court to reach the issues of whether there were material facts in dispute, or whether the facts could have supported the defeat of the conditional constitutional privilege by showing actual malice, he should have, and could have, appealed the circuit court's decision on the merits of his case. *See*

Lassa v. Rongstad, 2006 WI 105 ¶¶96, 97, 104, 294 Wis. 2d 187, 718 N.W.2d 673 (Butler, concurring).

III. THE COURT OF APPEALS SHOULD HAVE ONLY REVIEWED THE DISCRETIONARY FINDING OF FRIVOLOUSNESS.

The only findings that the Court of Appeals had any authority to review were the circuit court's findings as to Donohoo's conduct before filing the case and during it. In its decision on the Motion for Sanctions, the circuit court made the following findings of fact regarding Donohoo's pre-filing factual investigation:

> 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. (R. 77; App. 36)
>
> 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; App. 36)

These conclusions were based in part on the circuit court's finding of fact about Donohoo's pre-filing legal investigation:

> Nowhere does counsel describe how he concluded that there was evidence of actual malice . . .

> [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 investigations. (R. 77; App. 33, 36)

The Court of Appeals was obligated to review those findings with deference to the circuit court and reverse them only if clearly erroneous. As the Supreme Court explained in *Jandrt v Jerome Foods*, 227 Wis. 2d 531, 548-49, 597 N.W.2d 744 (1999):

> 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.

Despite paying lipservice to that standard, the Court of Appeals ignored it. Instead it reviewed the circuit court's underlying unappealed summary judgment decision to determine "whether the lawsuit was frivolous." As the dissent correctly observed, that was not the proper standard. (App. 19)

Indeed, what the Court of Appeals did was unprecedented. It ignored the appropriate deferential standard, *sub rosa* reviewed the summary judgment decision and reviewed *de novo* the circuit court's findings on frivolousness, including the factual findings about what the attorney did and should have done to investigate the facts and law of the claims.

If this decision is not reviewed and reversed by the Supreme Court, no future litigant can be assured that the findings and determinations on unappealed summary judgment decisions will be respected by the Court of Appeals. This is most certainly a question of law that the Supreme Court should address so that litigants on a statewide basis will understand the parameters of what the Court of Appeals must do when reviewing a circuit court's actions under Wis. Stat. §802.05. The Supreme Court should use this opportunity to resolve the novel legal question raised by the Court of Appeals' approach to reviewing a finding of frivolousness by the circuit court.

IV. THE FACTS OFFERED COULD NOT CONSTITUTE ACTUAL MALICE.

Every defamation claim brought by a public figure involves a conditional constitutional privilege. *See Wis. J.I.–Civil* 2500 at 9. The privilege can be defeated through proof of actual malice, which a plaintiff must able to prove by clear and convincing evidence. Wis JI-Civil 2500. Proof of actual malice requires showing that the statement at issue was published "with knowledge of its falsity or with reckless disregard for its truth." *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 535-36, 563 N.W.2d 472 (1997).

The Court of Appeals determined that several "disputed facts" offered by the plaintiff in the underlying defamation claim could have provided the necessary basis for the legal finding of actual malice, therefore summary judgment should not have been granted, and therefore the action could not have been frivolously brought and maintained. That determination is inconsistent with the guidance provided by the Wisconsin Jury Instructions, particularly Civil Instruction 2511, as well as prior Wisconsin Supreme Court decisions and other persuasive authorities.

The dissent provides an excellent and clearly-written explanation as to how these facts could not have supported a finding of actual malice. It also shows why the absence of any other facts or law supporting the claim of actual malice properly should lead an appellate court to affirm the circuit court's January 4, 2006 Decision and Order finding that Donohoo brought and maintained the public figure defamation lawsuit frivolously.

It is particularly important for the Supreme Court to clarify the law of actual malice in this case, as this dispute began with a presentation by a public figure expressing as a general matter very

strong, passionate, and provocative pronouncements about, as WCU conference organizers would describe it, "homofascism," and what most people in Wisconsin would call the movement for legal rights for gay and lesbian people. Those pronouncements included, in addition to general disdain for the movement, words that Action Wisconsin listeners perceived to endorse violence - - murder - - against gay and lesbian people. Action Wisconsin spoke out, alerting the public about the extreme passions that were being expressed, right in the midst of a public political and social debate about amending the Wisconsin Constitution to ban gay and lesbian couples from the right to legally-recognized marriage or to form a substantially similar civil union.

No sooner had they spoken out that this lawsuit was filed and pursued. As this Court has recognized in the past, "the threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Torgerson*, 210 Wis. 2d at 538-39 n. 14. The primary protection participants in public political and social debate have is the conditional

constitutional privilege. If the Court of Appeals' decision is allowed to stand as the final word in this dispute, not only will Action Wisconsin be wronged by a faulty decision, but participants in any movement about social or political issues may be afraid to speak out the next time a public figure speaks publicly in a potentially violent manner against members of that movement:

> Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992) (cited in *Lassa v. Rongstad,* 2006 WI 105, ¶162, 294 Wis. 2d 187, 718 N.W.2d 673 (Prosser, dissenting)

The Court of Appeals' decision presents a clear and present danger to free and full speech about the actions, behavior and statements of public officials and public figures. If the decision is not reversed, any attorney who represents a public official or public figure may bring a defamation case without fear of sanctions if the individual who criticized the public figure did not contact the public figure in advance or did not respond to the public figure's demand for retraction. The attorney will be able to rely on the Court of

Appeals' decision to claim that he or she had a reasonable basis in law for bringing the suit. The Court of Appeals' decision will act as a shield against claims of frivolousness for attorneys who bring lawsuits designed to stifle criticism of public officials and public figures.

The Supreme Court should take this opportunity to repudiate the Court of Appeals' analysis, to reiterate the sanctity of free and open debate and to warn attorneys who are inclined to bring frivolous defamation claims on behalf of public figures that the courts in this state will not hesitate to sanction that improper behavior.

CONCLUSION

Action Wisconsin's Petition for Review should be granted and the Court of Appeals reversed, including its ruling on Action Wisconsin's Motion for frivolous appellate costs.

Dated this 29th day of June, 2007.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. §§809.19(b) and 809.62(4) for a Petition for Review and Appendix produced with a proportional serif font. The length of this Petition for Review is 6,306 words.

Dated this 29th day of June, 2007.

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