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**WISCONSIN COURT OF APPEALS
DISTRICT I**

TRI-CORP HOUSING, INC.,

Third-Party Plaintiff-Appellant,

vs.

Appeal No. 2022AP000993

ROBERT BAUMAN, Alderman,

Third-Party Defendant-Respondent.

**ON APPEAL FROM THE CIRCUIT COURT FOR
MILWAUKEE COUNTY
THE HONORABLE PEDRO A. COLON PRESIDING
Circuit Court Case No. 2007CV013965**

THIRD-PARTY PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

In this civil case, the jury returned a verdict of \$1.4 million in favor of the Third-Party Plaintiff-Appellant Tri-Corp Housing, Inc. (“Tri-Corp”) and against the Third-Party Defendant-Respondent Robert Bauman, Alderman (“Bauman”), finding that Bauman defamed Tri-Corp and caused substantial damages. Tri-Corp is a nonprofit organization which provided housing for mentally disabled individuals in a building known as “West Samaria,” which was located near Bauman’s home. Bauman’s conduct caused the closure of West Samaria.

The Circuit Court, the Honorable Pedro A. Colón, ruled that Tri-Corp was a “public figure” and consequently has to prove “actual malice” to sustain a defamation claim against Bauman. In its verdict, the jury specifically found “actual malice.” On post-trial motions, the Circuit Court decided that there was no clear and convincing evidence that Bauman acted with actual malice, changed the corresponding answers to the verdict, and entered judgment in favor of Bauman.

During the trial, Bauman moved for a directed verdict. The Circuit Court granted the motion as to Tri-Corp’s separate claim of tortious interference but ruled that there was sufficient evidence for Tri-Corp’s defamation claim to be decided by the jury. However, after the jury returned its verdict, the Circuit Court changed the jury’s answers, which reversed the outcome of the case and effectively denied Tri-Corp its right to a jury trial.

Tri-Corp asks the Court of Appeals to consider:

1. Was there sufficient evidence to sustain the jury's answers to the special verdict, where it found that Bauman acted with "actual malice" when he defamed Tri-Corp?
2. Did the Circuit Court err in its finding that Tri-Corp was a public figure, and that consequently, Tri-Corp had to prove "actual malice" on the part of Bauman to prevail on its claim of defamation?
3. Did the Circuit Court err by dismissing Tri-Corp's tortious interference claim on Bauman's motion for a directed verdict?

The Circuit Court answered "no" to these questions. Tri-Corp contends that all three should be answered "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant Tri-Corp requests oral argument if it would assist the Court. The record in this case leading to jury trial spans fifteen years, this was a nine-day trial, and some of the issues involve application of constitutional law.

Tri-Corp requests publication because the issues involved in this case are of general importance to developing the law relating to defamation, and in particular, proof of "actual malice," the definition of a "public figure," as well as the interplay between claims of tortious interference and the First Amendment.

STATEMENT OF THE CASE

Statement of the Nature of the Case. Tri-Corp appeals the Circuit Court's decision to change answers to the jury's verdict on Tri-Corp's defamation claim and to grant a directed verdict dismissing Tri-Corp's tortious interference claim.

Statement of Facts. Tri-Corp is a non-profit organization which provided housing for mentally disabled individuals capable of living within the community as opposed to an institution. In 2007, Tri-Corp operated two buildings serving over 160 disabled individuals, providing them with room and board. One building, "West Samaria", was located at 2713 West Richardson Place, Milwaukee, Wisconsin, and the other, "New Samaria", was located at 6700 West Beloit Road, West Allis, Wisconsin. [R617:139-140,App:106-107;R616:19-20,App:135-136;R520,Ex24]

At West Samaria and New Samaria people with mental disabilities could live in the community. Residents were not confined and typically frequented stores and restaurants in the neighborhood. Residents were people of limited means. Their primary source of income was social security benefits averaging approximately \$650.00 per month. [R617:122,App:93]

Residents of both West Samaria and New Samaria came to Tri-Corp by referral from Milwaukee County and were participants in programs administered by Milwaukee County. [R617:118,132-134,App:89,103-105] The only exception

to this was that one third of the rooms available at West Samaria were leased by the Red Cross and Milwaukee County Behavioral Health (a division of the Milwaukee County Department of Health & Human Services) for their own programs. [R616:24,33,53-54,App:139,147,164-165] Tri-Corp charged residents \$530.00 per month for a private room, three meals per day, and room cleaning services. [R617:126-127,App:97-98;R616:24,App:139]

Tri-Corp essentially functioned as a landlord. [R617:134,App:105; R616:185,App:221] Residents' room keys also operated the front door of the building, and residents could come and go at will. [R617:131-132,App:102-103] Prior to West Samaria's closure in 2007, many residents had been living in West Samaria for as many as seven to nine years, and the population was extremely stable. [R616:21,23,App:137-138]

In 1997, Robert Bauman bought a house approximately two blocks from West Samaria and in 2004 was elected alderman of the district. [R533,Ex2,App:458;R618:7-8,App:223-224] He immediately engaged in efforts to close West Samaria. From 2005 to 2007, he tried to force the closure of West Samaria by demanding that the City of Milwaukee Board of Zoning Appeals ("BOZA") deny Tri-Corp an occupancy permit. [R616:16,App:132] When that effort failed, Bauman sought the closure of West Samaria through other avenues.

Bauman displayed a not uncommon prejudice against residences for mentally disabled individuals. In an internal email written at the time of the events of this case, James Hill, Director of Mental Health for Milwaukee County, wrote that creating a new location of the same size as West Samaria would require having the site “de-NIMBY’ed .” [R570,Ex95,App:505-506] Hill testified that the acronym NIMBY means “[n]ot in my back yard.” [R625:107,App:322] Bauman did not want West Samaria in his back yard, but in this case, West Samaria was there first by twenty years.¹ Nonetheless, Bauman achieved his goal.

Bauman defamed Tri-Corp with reckless disregard for the truth or falsity of his statements. Although invited numerous times, he never set foot inside of West Samaria. Yet he led others to believe that the conditions he personally observed justified closing it down and razing the building. He led others to believe that Tri-Corp was responsible for the deaths of two residents, while misrepresenting the content of police reports and Tri-Corp’s responsibilities.

In its earlier opinion, the Court of Appeals determined that “issues of material fact exist regarding Tri-Corp’s tortious interference with a contract or prospective contract claim against Alderman Bauman” and that Bauman made statements regarding Tri-Corp “that were factually untruthful.” *Wisconsin Housing*

¹Tri-Corp introduced permits dating back as far as 1977. [Exs5-19;R617:119-130,App:90-101]

& Economic Development Authority v. Tri Corp Housing, Inc., 2011 WI App 99, ¶¶ 1,8, 334 Wis. 2d 809, 800 N.W.2d 958.

However, after the case was remanded, the Circuit Court determined that Tri-Corp could not present evidence of what Bauman said to BOZA and ruled that because those statements were absolutely privileged, they could not be used at trial for any purpose. [R387:30,32-33,App:36,38-39] Later, at trial, the Circuit Court granted a directed verdict on Tri-Corp's tortious interference claim, ruling that the claim was related to a "public concern." [R623:32-34,App:365-367] Tri-Corp did not agree with these rulings [R387:28-29,App:34-35;R392:1-5;R623:27-30,App:361-364], but tried its case within these parameters.

Tri-Corp proved that Bauman maliciously defamed Tri-Corp, by stating that "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there" and that "West Samaria had a bad design, a bad location and a bad operator" with reckless disregard of the truth or falsity of these statements. Bauman's objective was to undermine Tri-Corp's relationships with its lender, the Wisconsin Housing and Economic Development Authority ("WHEDA") and its source of revenue, referrals from Milwaukee County. His strategy ultimately worked.

Tri-Corp lost the support of both WHEDA and Milwaukee County. WHEDA was Tri-Corp's lender for a loan secured by a mortgage on both West

Samaria and New Samaria. [R617:139,141,App:106,108] Before Bauman's defamation, Tri-Corp enjoyed an exceptionally good relationship with WHEDA, evidenced by, among other things, loans for other projects, a low-income housing program jointly designed with WHEDA [R617:140,App:107], awards which Tri-Corp received, [R617:144-145,App:111-112;R522,R521,R523,Exs20-22,App:476-478], the honor of having WHEDA's executive director deliver the keynote address at Tri-Corp's 2003 annual meeting [R616:6-8,App:124-126;R562,Ex90,App:491-504], and the respect shown by WHEDA's asking Tri-Corp to assist West Side Housing Cooperative, an unrelated nonprofit organization. [R617:140-144,App:107-111,R616:9,App:127]

Milwaukee County and Tri-Corp had been allies in providing much needed housing for people with mental disabilities and limited income. However, Milwaukee County responded to Bauman's defamation by discontinuing referrals to West Samaria and relocating the people who lived there.

At trial, Bauman chose to "double-down" on his strategy of defaming Tri-Corp, by attempting to convince the jury that Tri-Corp was a bad organization.

In his opening statement, counsel for Bauman told the jury that in late 2004 the City of Milwaukee determined that Tri-Corp was committing fraud. [R617:103,106,109,111,App:85-88] This claim was not true, and backfired when it demonstrated Bauman's deceitfulness.

The evidence showed that on November 1, 2004, the year he was first elected, Bauman appeared before the City of Milwaukee Community & Economic Development Committee to present a motion to eliminate approximately \$1 million in funding for Tri-Corp's low-income housing programs.² [R417,Ex528:6-7,App:554-555;R616:13-14,100-101,172-173,App:130-131,192-193,209-210;R618:12;App:225;R454,Ex565,App:619-621] After Tri-Corp lost this funding, Bauman asked the city comptroller to conduct an audit of Tri-Corp. [R616:122-123,172,App:197-198,209;R440,Ex538:3,App:564;R618:12-14,App:225-227] The comptroller examined Tri-Corp's work with Westside Housing Cooperative. The comptroller's audit report did not show that Tri-Corp committed fraud. [R440,Ex538,App:562-581;R458,Ex573,App:623-624;R616:125-129,172-178,App:199-203,209-215]

Bauman had no apologies for his false statements. He testified that he stood by his statement: "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who live there." Bauman published this statement in a March 23, 2007, press release. [R414,Ex537,App:560-561] When questioned by his attorney, he testified that his statement was based on the deaths of two residents, "residents of the community"

²These programs were offered through South Community Organization, one of Tri-Corp's three nonprofit subsidiaries, and were not related to West Samaria. [R616:105,App:194]

complaining to him about the conditions at West Samaria, and added the “audit report where they found fraud.” [R624:47-48,App:273-274]

None of the so-called complaining “residents of the community” testified at trial.³ The audit report did not find fraud. The evidence relating to the deaths of the two residents cited by Bauman, David Rutledge and Joseph Droese, did not support Bauman’s defamatory statements.

In 2004, David Rutledge was assaulted on the corner of 28th Street and Richardson Street, which was not visible from West Samaria. The assault was witnessed by one of West Samaria’s residents who helped him return to the West Samaria building. West Samaria staff called the police and paramedics, and Rutledge was transported to the hospital within a half hour of the assault. He died in the hospital. [R616:180-181,App:217-218;R628:56-58,App:350-352]⁴ Michael Brever, Tri-Corp’s Executive Director, testified that Tri-Corp was not at fault for Rutledge’s death. [R616:181,App:218]

³Tri-Corp’s executive director testified that he did not know of complaints that Bauman received about West Samaria. [R616:89,App:187]

⁴See *Wisconsin Housing & Economic Development Authority, supra*, footnote 2. On July 2, 2007, the Estate of David Rutledge and his mother filed suit against Tri-Corp in Milwaukee County Case No. 07-CV-7485. On January 20, 2009, the court ordered summary judgment dismissing all claims that Tri-Corp was negligent or otherwise responsible for what happened to David Rutledge. The Court of Appeals can take judicial notice of public records. *State v. Ramel*, 2007 WI App 271 (footnote 9), 306 Wis.2d 654, 670, 743 N.W.2d 502, 510. At trial, the Circuit Court declined to take judicial notice of the two summary judgment orders entered in the Droese and Rutledge cases. [R616:43-48,App:157-162]

Bauman testified at his video deposition (shown at trial) that Rutledge was assaulted fifty feet outside of West Samaria, made his way into West Samaria without anyone noticing his condition or calling for medical assistance, and that because Tri-Corp “dropped the ball” he died three days later. [R618:22-34,App:230-242;R677:2,18-23,App:57,73-78] At his deposition Bauman emphasized that his information came from the police reports. [R677:21-23,App:76-78] At trial, Bauman hedged, and suggested that his information came “probably from the neighbors” [R618:20-21,App:228-229] He was impeached with his deposition testimony. [R618:34,App:242] Undaunted, Bauman tried to invent other reasons for stating that Tri-Corp “dropped the ball.” [R624:89,App:275].

The jury had a first-hand demonstration of Bauman’s propensity to recklessly invent “facts.” On direct examination he testified that Rutledge “was beaten up with two-by-fours” and that the assault could have been stopped had there been “security cameras that would normally project out to the sidewalk area.” [R624:90,App:276] On cross-examination Bauman conceded that he did not know whether Rutledge was beaten up “with two-by-fours.” [R624:92,App:277] Brevier demonstrated with an aerial photograph that it would have been physically impossible to have a security camera in front of West Samaria which could view

the street corner where Rutledge was assaulted. [R574,Ex111,App:516;R628:56-58,App:350-352]⁵

In January, 2007, Joseph Droese, a resident of West Samaria, died in his room. He had been placed at West Samaria by a Milwaukee County caseworker approximately two weeks prior to his death. According to the Medical Examiner's Demographic Report, he was "morbidly obese," had a high tolerance for narcotics, and had been asked to leave a prior group home he was living in because of his aggressive behavior. [R677:25-28,Ex525,App:80-83] He was using Fentanyl pain patches, had injuries due to an earlier suicide attempt, and suffered from schizophrenia and depression. *Id.* Droese was prescribed sixteen medications (according to the Medical Examiner's report) and he needed the Milwaukee County caseworker's assistance in receiving those medications on a daily basis. *Id.* The caseworker was supposed to visit him six days a week. *Id.* As was his right, Droese regularly went to McDonald's for his meals, rather than dine at West Samaria. Consequently, he was not missed at meal times. [R616:28-29,137-138,App:142-143,205-206]

⁵The Court refused to allow Brever to show a contemporaneous photograph showing a view from the street outside of West Samaria [R579,Ex109,App:515] or allow the admission of the police report [R577,Ex108,App:507-514], which would have also impeached Bauman's statements [R617:147-155,App:114-122;R628:59,App:392]

On March 1, 2007, the Milwaukee *Journal/Sentinel* published an article stating that Droese had been dead in his room “for as long as four days before his body was discovered.” [R416,Ex517,App:524-528]⁶ Droese was found dead in his room on January 20, 2007. It was never established when he died. A staff member and a resident of West Samaria stated that they had seen him the day before. [R616:137,App:205;R677:26-27,Ex525,App:81-82] The “four days” stated in the newspaper article were measured from the day that his mother had last visited him, which she said was January 16, 2007. [R677:27,Ex525,App:82] The Milwaukee County caseworker reported that she had last seen him on January 10, 2007, and had spoken with him on the phone on January 15, 2007. [R677:26,Ex525,App:81; R616:29-30,App:143-144] Tri-Corp was not responsible for Droese’s death.⁷ [R616:31,App:145]

Bauman seized on the publication of this newspaper article. Bauman emailed the City of Milwaukee Department of Neighborhood Services (“DNS”)

⁶The article may have first appeared one day earlier, on February 28, 2007. [R616:134,App:204]

⁷See *Wisconsin Housing & Economic Development Authority, supra*, footnote 3. On January 17, 2008, Droese’s parents sued Milwaukee County and Tri-Corp in Milwaukee County Circuit Court Case No. 08-CV-942. On March 5, 2009, the court granted summary judgment after determining that neither Milwaukee County nor Tri-Corp were in any way negligent or responsible for Droese’s death.

directing DNS to issue an order to close West Samaria. The email, dated March 1, 2007, [R516,Ex26,App:480] stated:

Please take immediate action regarding West Samaria.... The fact that a resident died and was not discovered for 4 days suggests that the facility is not operating in compliance with their plan of operation or operating in a manner consistent with the health, safety and welfare of the public.

Please issue the appropriate orders revoking their special use permit so this matter can be brought back before BOZA at the earliest possible time.

Based on Bauman's request, on March 2, 2007, DNS gave Tri-Corp a Notice to Vacate West Samaria within 30 days. [R616:26-27,App:140-141] On March 2, 2007, Bauman broadcasted an email [R515,Ex28,App:482] stating:

"The Department of Neighborhood Services has determined that the recent events at West Samaria violate its plan of operation. DNS is going to issue an order revoking the Special Use permit and order the property vacated."

Breuer testified that to his knowledge no building inspectors visited West Samaria before the notice was issued. [R616:27,App:141]

At trial, Bauman called Chris Kraco, who was a DNS construction trade supervisor. [R621:5-6,App:326-237] Kraco testified that after Bauman sent his email to DNS, he was instructed by his manager to look at West Samaria. [R621:29,App:334] Kraco testified that he went to the site with a building inspector, a special enforcement inspector, and a commercial code enforcement inspector. [R621:31,App:335] He believed that the building inspector then went

back to his office to write an order which he then returned to West Samaria to personally serve, but was unable to locate a copy. [R621:10,32,App:328,336] Kraco assumed that the order would have been issued for the same reasons shown on an internal DNS document. [R621:13,App:330;R478,Ex620,App:637-638] He testified that none of the DNS inspectors made any effort to contact Brever during or after the inspection. [R621:33,35,41,App:337,339,341] Kraco testified that Bauman was advised of the results of the inspection. [R621:16-17,App:331-332]

The internal DNS document [R478,Ex620,App:637-638] stated that Tri-Corp violated its plan of operation with respect to “1. Daily meal Plan 2. Monitoring by case workers 3. Oversight of facilities.” When asked to explain this, Kraco conceded that the plan of operation required Milwaukee County (and not Tri-Corp) to provide “monitoring by case workers.” [R621:45,App:343] Kraco testified that the “Daily meal Plan” notation resulted from the inspector’s asking an unknown member of Tri-Corp’s staff for a menu, and not receiving one. [R621:34-35,App:338-339] Kraco testified that the notation of “Oversight of facilities” meant that the four inspectors “saw people coming and going pretty freely.”⁸ [R621:40,App:340] Kraco testified that there were no building

⁸Residents of West Samaria were not restricted from doing so. [R617:131,App:102]

maintenance issues worth reporting (and none were reported).

[R621:12,43,App:329,342]

On March 23, 2007, Bauman issued his press release [R414,Ex537,App:560-561] stating in its relevant part: “West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there.” The jury found that Bauman defamed Tri-Corp when he made this statement. (Verdict, Questions 6-9) The jury also found that Bauman defamed Tri-Corp by stating that “West Samaria had bad design, bad location and bad operator.” (Verdict, Questions 11-14).

Bauman’s public attack on West Samaria in March caused uncertainty as to whether West Samaria would close, and this had an immediate affect on occupancy. [R539,Ex1,App:454-457;R616:33,App:147] Later, BOZA upheld Tri-Corp’s right to continue to operate West Samaria in hearings culminating on September 9, 2007, and occupancy began to grow again. [R539,Ex1,App:454-457;R616:33-34,38-39,App:147-148,152-153] Bauman then turned to WHEDA and Milwaukee County as a means of closing West Samaria.

Bauman and Antonio Riley, the head of WHEDA (Tri-Corp’s mortgage lender), were friends. [R614:54-55,App:255-256] Bauman met with Antonio Riley and Riley’s assistant, Rae Ellen Packard, in Milwaukee at Bauman’s office to discuss West Samaria. [R614:57,App:257] Neither Antonio Riley nor Rae Ellen

Packard had ever been inside of West Samaria.

[R614:57,App:257;R625:12,App:307] Bauman told Riley that West Samaria was poorly managed by Tri-Corp. [R614:59,App:258] Bauman testified that he consistently stated that West Samaria had bad architecture, design, location, and management. [R618:42,App:243] Bauman made it clear to Riley that he wanted West Samaria closed. [R677:10-14,App:65-69]

Bauman's handwritten notes dated August 8, 2007, underscored that he was urging Antonio Riley to close West Samaria. These notes start: "Antonio Riley – Tri-Corp in default on mortgage – Proposes meeting on strategy" and end: "Goal. Relocate residents and RAZE." [R519,Ex27,App:481;R618:43-46,App:244-247; R677:10-12,App:65-67]

Afterwards, Riley had WHEDA staff arrange a meeting at WHEDA's Milwaukee office, which took place on October 19, 2007. At WHEDA's invitation, representatives of Milwaukee County (Jim Hill and James Mathy), and a representative of the City of Milwaukee Department of City Development (Maria Prioletta), attended the meeting along with Bauman and others from WHEDA. Tri-Corp was not notified of the meeting. [R616:63,App:174;R567,Ex88,App:490] Tri-Corp's executive director first found out about this meeting after the fact. [R616:35,38-39,61-63,App:149,152-153,172-174]

Maria Prioletta sent a contemporaneous email reporting what she observed. [R619:44,App:300;R567,Ex88⁹,App:490] Prioletta herself was not familiar with West Samaria. [R619:50,App:303] She testified that her department had been asked to have someone present. [R619:43,App:299]

Prioletta reported: “[Bauman] said that the property is a combination of three things – bad design, bad location and bad operator.” [R567,Ex88,App:490] Prioletta testified that “Bauman said that this was a badly run project.” [R619:54-55,App:304-305] Bauman also told attendees that “it would be a bad idea” for another organization to acquire and continue West Samaria as a residence for mentally disabled individuals, and that he, as alderman, would not support any redevelopment of the project. [R567,Ex88,App:490;R619:46-47,App:301-302] Prioletta’s email showed that Bauman’s defamation influenced WHEDA. She reported: “It’s not a matter of if WHEDA is going to foreclose, it’s when. They want Tri-Corp out.”

James Mathy’s testimony showed that Bauman continued to misrepresent the responsibility of Tri-Corp with respect to the deaths of David Rutledge and Joseph Droese at this meeting. Mathy served as an administrator coordinator at the Milwaukee County Behavioral Health Division and in that role assisted individuals who had history of mental disorders in finding housing. [R619:4-5,App:279-280]

⁹R567,Ex88,App:490 was also marked R469,Ex592,App:625.

Mathy characterized West Samaria as a “room and board type facility” available to case managers. [R619:5-10,App:280-285] He corroborated that historically, Milwaukee County referred individuals with disabilities to West Samaria. [R619:34-35,App:297-298]

Mathy testified that Jim Hill asked him to attend the October 19, 2007 meeting because there was going to be discussion of relocating the residents of West Samaria. [R619:12-13,24,30,App:286-287,294,296] This was the only meeting Mathy had with Bauman. The focus of the meeting was the closure of West Samaria. [R619:24-25,App:294-295] Mathy testified that Bauman raised as “his two major issues” at this meeting “the David Rutledge incident and the Joseph Droese incident.” [R619:16,App:288]

James Hill testified that in late 2007 he became Director of Housing for Milwaukee County, pending approval of the County Board. [R625:34,App:308] Hill had appeared before BOZA in 2007 to support the continued operation of West Samaria and testified that he was not aware of any instances where Tri-Corp violated its plan of operation. [R625:48-49,52-54,App:309-313; R575,Ex120:2,App:518] Hill testified that the County was not working to find a different operator for West Samaria or to find a different place for the residents of West Samaria. [R625:72,App:316] Hill recalled having a conversation with Bauman where he told Bauman that he could not summarily shut down West

Samaria, although he could not recall when that occurred. [R625:57-58,75,App:314-315,317]

Hill attended the October 19, 2007, meeting at the WHEDA office. [R625:54,App:313] Hill did not recall expressing an opinion about Tri-Corp or West Samaria at the meeting. [R625:88,App:318] At trial Hill volunteered that Bauman “can’t tell County people what to do.” [R625:91,App:319] However, as events unfolded, Milwaukee County did exactly what Bauman wanted it to do.

At trial, Bauman attempted to downplay his role at the October 19, 2007 meeting. Bauman denied discouraging Milwaukee County from referring residents to West Samaria [R618:55-56,App:252-253]:

Q. Would it be fair to say that at the October 19th meeting you were discouraging Milwaukee County from sending residents to West Samaria?

A. That wasn’t my role. I have nothing to do with Milwaukee County.

However, he was impeached with his deposition testimony [R677:15,App:70]:

Q. You don’t think that you discouraged people from – such as Milwaukee County, from using West Samaria?

A. Discourage them? I told them as much. I thought it was contrary to their – I thought they were disserving their clients by sending clients to that facility. You bet.

At trial, Bauman admitted that his statements that West Samaria had bad design, bad location and a bad operator were intended to advance his goal of closing down and razing West Samaria. [R618:49-50,App:249-250]

Immediately after the meeting, Milwaukee County began relocating residents of West Samaria. [R616:35,App:149] While New Samaria was under the same mortgage and same threat of foreclosure, none of its residents were relocated. [R448,Ex539;R616:32-36,App:146-150]

The Court of Appeals stated in its 2010 decision:

...In October 2007, at the meeting attended by Milwaukee County representatives, Alderman Bauman argued against continuing the operation of West Samaria and urged another operator not to take over the facility. Milwaukee County did not remove residents of New Samaria, although that facility was subject to the same WHEDA mortgage and the same foreclosure involving West Samaria. A jury could reasonably infer from these undisputed facts that Alderman Bauman's charges were a substantial factor in Milwaukee County's decisions not to continue to refer residents to West Samaria and to remove existing residents.

Wisconsin Hous. & Econ. Dev. Auth., supra, at ¶ 28. The Court held at ¶ 30:

We conclude that the facts in the record could support the inference that the closing of West Samaria was not a necessary consequence of the WHEDA mortgage foreclosure, and that Alderman Bauman's efforts were a cause of Milwaukee County's decision to remove residents it had referred to West Samaria and not to refer others.

This inference was supported by other evidence.

After the meeting Mathy drew up a “relocation plan” for residents of West Samaria [R619:17,App:289], and relocation was underway at least by November 2, 2007. [R570,Ex95,App:505-506] Milwaukee County employees, who Mathy described as “our whole team,” went to West Samaria to interview residents as part of that process. [R619:18-20,App:290-292] Mathy believed that only West Samaria was going to get foreclosed upon, and there was no similar effort to relocate residents of New Samaria. [R619:20,App:292] Mathy himself never recommended shutting down West Samaria. [R619:22,App:293]

Hill testified that the mass exodus from West Samaria following the meeting was simply the County finding better alternatives. [R625:91-92,App:319-320] He was impeached by a contemporaneous email, which showed otherwise. [R570,Ex95,App:505-506;R625:106-108,App:321-323] Also, Hill’s testimony was inconsistent with his contemporaneous statement to Kate Venne, where he described the residents of West Samaria as “people who have burned every bridge behind them” and that “it would take time to move them out.” [R624:17-18,App:267-268] Hill never asked Riley why WHEDA’s plan to foreclose the mortgage required Milwaukee County to relocate residents from West Samaria. [R625:109,App:324] Hill never asked why residents had to be relocated from West Samaria, but not New Samaria, considering that both buildings were under the same mortgage. [R625:109,App:324]

Breuer testified that West Samaria and New Samaria were subject to the same mortgage and were operated by Tri-Corp no differently. In fact, meals came out of the same kitchen. [R616:37,App:151] Breuer testified that he did not believe that the mortgage or later foreclosure proceeding explained why West Samaria was being emptied out. [R616:36-38,App:150-152] Breuer acknowledged that Tri-Corp was delinquent in its mortgage payments, but in his experience with WHEDA, WHEDA would typically work out arrangements with borrowers. [R616:40-42,App:154-156] By October 2007, Breuer and Tri-Corp's bookkeeper had initiated meetings with WHEDA to discuss readily available options for bringing the loan current. [R616:62-63,App:173-174]

On November 12, 2007, WHEDA notified Tri-Corp that WHEDA intended to foreclose its mortgage and close West Samaria. [R616:63-64,App:174-175] Tri-Corp was surprised. It had not been privy to the discussions of relocating residents and believed that WHEDA was considering Tri-Corp's proposals to bring its loan current.

Tri-Corp did not want to close West Samaria. [R624:5,App:260] On November 12, 2007, Kate Venne, the Director of Communications for WHEDA, circulated a draft of a press release which included language that Tri-Corp agreed with the closure of West Samaria. [R624:5-8,App:260-263;R566,Ex86,App:488] Breuer immediately called Venne and objected to the press release [R624:14,22-

23,App:264,269-270;R566,Ex86,App:488;R616:64,App:175], and within twenty minutes Tri-Corp's counsel sent a revised press release showing that Tri-Corp did not agree that West Samaria should be closed. [R624:14-16,23,App:264-266,270;R565,Ex87,App:489] On the same day, Tri-Corp sent a letter to WHEDA reiterating clearly available avenues of bringing the mortgage current. [R549,Ex46,App:487;R616:64-67,App:175-178]

WHEDA filed its foreclosure action on November 19, 2007. [R42] As was stated by the Court of Appeals in its 2010 decision, this certainly did not require or justify relocating the residents of West Samaria. Tri-Corp remained in charge of both West Samaria and New Samaria during the foreclosure proceedings through April 30, 2009, when a receiver was appointed for New Samaria. [R442,Ex552,App:617-618] No receiver was ever appointed for West Samaria; it continued to be managed by Tri-Corp until it was empty. During the foreclosure proceedings New Samaria remained at full occupancy while West Samaria was depleted of its residents over a year. [R538,Ex3,App:460-467;R544,Ex4,App:468-475]

When Milwaukee County relocated residents of West Samaria, Tri-Corp lost its rental income, but its expenses continued. [R541,Ex23,App:479;R616:52-59,App:163-170] Tri-Corp kept West Samaria open (at a substantial loss to itself) until all residents were relocated. [R616:68-69,App:179-180] When Tri-Corp tried

to sell the building to mitigate its loss, Bauman discouraged the potential buyer. [R628:70,72-75,App:354-358;R547,Ex42,App:486] Ultimately, West Samaria was razed. [R621:25,69,App:333,344]

Additional facts are incorporated into the Argument section of this brief.

Procedural History. This case was filed by WHEDA on November 19, 2007 as a foreclosure action against Tri-Corp. [R42] Tri-Corp answered, counterclaimed [R47], and filed a third-party complaint against Robert Bauman [R56], alleging tortious interference, common law and §134.01 conspiracy, and violations of RICO and WOCCA. [R13] At present, the only parties to this case are Tri-Corp and Bauman.

On August 10, 2009s/b January 11, 2010, the Circuit Court granted WHEDA summary judgment. [R109] The Circuit Court also dismissed all but one claim (tortious interference) against Bauman and ordered additional briefing on that claim. On January 11, 2010, the Circuit Court granted Bauman summary judgment on Tri-Corp's tortious interference claim [R109] and entered its order on May 7, 2010. [R121]

On February 10, 2010, Tri-Corp appealed the dismissal of WHEDA, in Case No. 2010AP000418. On June 8, 2010 and July 15, 2010, Tri-Corp appealed the dismissal of Bauman [R139,R35], in Case No. 2010AP001443.

On March 8, 2011, the Court of Appeals affirmed as to WHEDA in *Wisconsin Housing and Economic Development Authority v. Tri-Corp Housing Inc.*, 2011 WI App 58, 332 Wis. 2d 804, 798 N.W.2d 320. On May 10, 2011, the Court of Appeals affirmed in part, reversed in part, and remanded Tri-Corp's claim of tortious interference against Bauman in *Wisconsin Housing and Economic Development Authority v. Tri-Corp Housing Inc.*, 2011 WI App 99, 334 Wis. 2d 809, 800 N.W.2d 958.

On February 3, 2012, Tri-Corp amended its complaint against Bauman to add causes of action for defamation and for violations of 42 U.S.C § 1983, arising from violations of the Federal Fair Housing Act, the Americans With Disabilities Act, and the Rehabilitation Act. [R17] On March 5, 2012, Bauman removed the action to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. §1446(a). [R14]

Bauman moved the District Court for dismissal of Tri-Corp's claims. On January 22, 2014, the District Court granted Bauman's motion for summary judgment on Tri-Corp's federal claims [R1], but declined to exercise supplemental jurisdiction over Tri-Corp's state law claims of tortious interference and defamation, and remanded the case to the Milwaukee County Circuit Court. *Tri-Corp Hous., Inc. v. Bauman*, No. 12-C-216, 2014 WL 238975 (E.D. Wis. Jan. 22, 2014). Tri-Corp appealed the dismissal of its federal law claims, but on June

13, 2016, the Seventh Circuit affirmed. *Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446 (7th Cir. 2016) Tri-Corp filed a petition for writ of certiorari with the Supreme Court of the United States, but on December 12, 2016, its petition was denied. *Tri-Corp Hous. Inc. v. Bauman*, 196 L. Ed. 2d 474, 137 S. Ct. 592 (2016). The case then returned to the Milwaukee County Circuit Court.

On October 31, 2017, Bauman filed motions to dismiss Tri-Corp's defamation claim and other relief. [R180-R192] On December 8, 2017, Tri-Corp responded and filed a motion for leave to amend its defamation claim. [R193-R199] Bauman replied on December 22, 2017. [R200-R201] The motions were heard on February 8, 2018, and on February 19, 2018, the Circuit Court (Judge Witkowiak) entered an order denying Bauman's motions and granting Tri-Corp's motion to amend its defamation claim. [R209] Tri-Corp had filed an amended claim with its motion. [R197,App:41-47]. Bauman answered the amended claim on March 2, 2018. [R210]

On March 8, 2018, Bauman filed a motion for partial summary judgment seeking a ruling that the damage limitation of Wis. Stats. § 893.80(3) should apply. [R211-R214,R218] Tri-Corp opposed the motion. [R215-R217] The Circuit Court denied the motion at a hearing held on May 15, 2018, determining that there were fact issues. [R242]

On July 27, 2018, the Circuit Court entered an order scheduling a final pretrial conference for May 3, 2019, with deadlines for disclosures of witnesses, discovery, and the filing of proposed jury instructions and verdict questions.

[R219]

On February 28, 2019, Bauman filed another motion for summary judgment on all of Tri-Corp's claims. [R232-R240] On April 10, 2019, Bauman moved for reconsideration of the damage limitation. [R243-R252] On May 9, 2019 and May 10, 2019, Tri-Corp responded to Bauman's motion for summary judgment [R255-R286], and on May 16, 2019, Tri-Corp responded to Bauman's motion for reconsideration. [R287] Bauman replied on May 31, 2019. [R298-R299] Tri-Corp supplemented its response on June 26, 2019. [R305-R306] Also, on May 29, 2019, Tri-Corp filed a motion to compel discovery. [R290-R297]

On July 2, 2019, the Circuit Court (Judge Witkowiak) granted in part and denied in part the pending motions [R356] and entered its order on July 11, 2019. [R314,App:48-49] The Circuit Court, decided that absolute privilege precluded Tri-Corp's defamation claims arising from statements made at hearings before the Board of Zoning Appeals, but that otherwise, the defamation claims presented questions for the jury.

On August 23, 2019, the parties filed their pretrial reports, proposed instructions, proposed verdict questions and motions *in limine* [R315-R326] and

on September 6, 2019, appeared for a pretrial conference. At the conference, counsel for Bauman advised the Circuit Court that the City Attorney's office needed time to consider whether it had a conflict of interest in representing Bauman. The Circuit Court scheduled the matter for trial beginning May 4, 2020, and a telephone conference for November 14, 2019, to determine whether there was going to be a substitution of counsel for Bauman. [R329] On February 24, 2020, new counsel appeared on the case, but there was no withdrawal by the City Attorney's office. [R333]

On February 25, 2020 and February 27, 2020, Judge Witkowiak initiated two telephone conferences with counsel regarding events which could affect his ability to hear the case. [R340] Afterwards, Judge Witkowiak recused himself from the case, and the case was assigned to Branch 1, which was vacant at the time. [R335,R340] On March 6, 2020, the Chief Judge scheduled the matter for a status hearing but by then the Covid-19 outbreak interrupted scheduling. The trial was cancelled. On July 10, 2020, Judge Colón was assigned to the case.

On March 11, 2021, Bauman filed another (partial) motion for summary judgment. [R359-R361] On March 23, 2021, Tri-Corp moved to strike this motion as being untimely [R363-R364], and filed a brief. [R367] Bauman opposed the motion to strike [R366] and filed a motion to retroactively enlarge the time to file his motion. [R370-R371] Tri-Corp opposed the motion to enlarge time. [R373] On

June 16, 2021, the Circuit Court entered an order denying Bauman's motions.

[R375]

The Circuit Court conducted a pretrial conference on December 6, 2021. Just before the conference, on December 2, 2021, Bauman filed revised jury instructions and verdict questions with an affidavit of counsel. [R378-R381] The Circuit Court addressed and re-addressed the motions *in limine* through the commencement of the trial. [R382-R387,R390-R397]

The jury trial began on February 7, 2022, and testimony concluded on February 14, 2022. [R628:75,App:358] Bauman filed a motion for directed verdict. [R403] The next morning, on February 15, 2022, the Circuit Court heard argument and granted Bauman's motion as to Tri-Corp's tortious interference claim and denied the motion with respect to Tri-Corp's defamation claim. [R620:34-38,App:28-32]

Following a lengthy instruction conference, the jury convened the afternoon of February 16, 2022 and heard instructions and closing arguments. [R623:34-120,App.367-453] The Circuit Court denied Tri-Corp's request to have punitive damages on the verdict. [R623:26-27,App:360-361] On February 17, 2022, the jury returned its verdict in favor of Tri-Corp on its defamation claims and awarded damages in the amount of \$1.4 million. [R437,App:22-26]

Bauman filed post-trial motions on March 9, 2022. [R583-R586] On the same day, Tri-Corp filed a motion for judgment on the verdict [R587]. On March 29, 2022, Tri-Corp responded to Bauman's post trial-motions. [R590-R591] The Circuit Court scheduled the matter for hearing on April 14, 2022. On April 7, 2022, Bauman filed a reply brief to which Tri-Corp objected on April 11, 2022. [R592-R593] The Circuit Court heard Bauman's motions, indicated that it would issue a written decision, and asked for additional submissions on whether or not Judge Witkowiak had ruled as a matter of law whether the defamatory statements in the jury's verdict presented questions for the jury.¹⁰ [R630:35] Bauman and Tri-Corp filed their responses to the Circuit Court's question on April 18, 2022. [R594-R595]

On May 16, 2022, counsel for Bauman filed a letter with the Circuit Court indicating that their motions after verdict had to be decided by May 18, 2022, to be within 90 days. [R597] Later that day, the Circuit Court filed its Decision and Order Granting Motion to Change Verdict Answers. [R598,App:9-21] After Tri-Corp appealed from this order, on June 13, 2022 [R602], the Circuit Court entered a Judgment at Bauman's request. [R608,App:7-8] Tri-Corp filed a second Notice

¹⁰Judge Witkowiak had in fact ruled that the defamatory statements in the jury's verdict presented questions for the jury. Later, in his decision, Judge Colón stated in his footnote 3, that he was reversing Judge Witkowiak's ruling.

of Appeal on July 20, 2022 [R626]. The two appeals are proceeding under the same case number.

The Circuit Court's Decision. The Circuit Court's Decision and Order [R598,App:9-21] advocates Bauman's position, instead of examining the record for credible evidence supporting the jury's verdict. The Circuit Court goes on at length to justify its determination that Tri-Corp was a "public figure," but the Circuit Court's instructions to the jury were already based on that premise. The Circuit Court changed the outcome of the case by eliminating Tri-Corp's right to have a jury decide what was proven by the evidence.

ARGUMENT

Credible evidence supported the jury's findings. The Circuit Court erred by substituting its own views in place of the jury's verdict to justify Bauman's conduct and change the outcome of the case. The Circuit Court also erred by deciding that the First Amendment gave Bauman special protection against Tri-Corp's defamation and tortious interference claims.

1. The Circuit Court erred by changing the answers to the jury's verdict.

The Circuit Court erroneously changed the jury's answers to Questions 8 and 13 of the Verdict stating that "no rational fact finder could find actual malice by clear and convincing evidence." [R598:13,App:21]

The decision reads as though this was a case tried to the court. Dismissing the jury's findings, the Circuit Court decided that "Bauman's statements were consistent with and corroborated by numerous statements made by the press, elected officials, city staff, BOZA members, and members of the community." [R598:13,App:21] The record shows that the only elected official who testified at trial was Bauman.¹¹ While no BOZA members testified, BOZA's decision ultimately supported Tri-Corp. The city staff who testified at trial, Maria Prioletta, Chris Kraco, and David Misky, did not corroborate Bauman's statements. No other "members of the community" were called to testify by Bauman. As to "the press", the Circuit Court ruled, on Tri-Corp's hearsay objections, that statements of persons who were not witnesses, made in newspaper articles introduced by Bauman, were not being admitted for their truth. [R616:77-80,App:183-186]

Without being specific, the Circuit Court "conclude[d] that the evidence presented at trial is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." [R598:12,App:20] The Circuit Court did not search the record for credible evidence supporting the verdict.

¹¹Circuit Court stated [R598:13,App:21]: "Mayor Tom Barrett sought to have the DNS conduct an investigation to determine whether West Samaria was meeting the conditions of its plan of operation required by its permit." This was hearsay. [R624:32,App:272;R616:150-151,App:207-208]

a. The verdict of the jury should be affirmed if supported by any credible evidence.

When there is a motion to change an answer in a jury verdict, the evidence must be viewed in the light most favorable to the verdict and the verdict will be affirmed if supported by any credible evidence. Wis. Stat. § 805.14 (1), *Nelson v. Travelers Ins. Co.*, 80 Wis. 2d 272, 282–83, 259 N.W.2d 48, 52–53 (1977). It is the Court of Appeals’ duty to search for credible evidence to sustain the jury’s verdict, and the appellate court will not search the record for evidence to sustain a verdict the jury could have reached but did not. *Radford v. J.J.B. Enterprises, Ltd.*, 163 Wis. 2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991), citing *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 306, 347 N.W.2d 595, 598 (1984). A circuit court’s decision to change the jury’s answer is “clearly wrong” if the jury verdict is supported by “any credible evidence.” *Best Price Plumbing, Inc. v. Erie Ins. Exch.*, 2012 WI 44, ¶ 30, 340 Wis. 2d 307, 318–19, 814 N.W.2d 419, 425, citing *Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 541 N.W.2d 753 (1995).

b. There was credible evidence supporting the jury’s determination that the statements made by Bauman were not true.

In its decision, the Circuit Court stated: “In this case, all of the statements at issue are substantially true, and Bauman’s statement regarding West Samaria’s ‘bad design, bad location, and a bad operator’ is pure opinion. It is unclear why any of these statements were even issued to the jury.” [R598:5,App:13]

This statement is confusing. First, if “all of the statements at issue are substantially true,” the Circuit Court should have changed the answers to Questions 2, 7, and 12 of the Verdict, which asked whether Bauman’s statements were true. Instead, the Circuit Court left Questions 2, 7, and 12 intact and changed the jury’s answers to Questions 8 and 13, which were to be answered only if Bauman’s statements were not true. In his post-trial motions [R583,R584], Bauman did not even ask the Circuit Court to change the jury’s answers to Questions 2, 7, and 12 of the Verdict, which is understandable, because any reasonable jury could conclude that Bauman’s statements were false.

Second, this statement necessarily means that there is no credible evidence contradicting Bauman’s assertions including that “West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there.” Brever’s testimony evidenced the contrary.

Third, to question “why any of these statements were even issued to the jury” is puzzling because the Circuit Court formulated the verdict questions for the jury during a lengthy instruction conference. Also, the Circuit Court denied Bauman’s motion for a directed verdict as to Tri-Corp’s defamation claim at the conclusion of the evidence because these were questions for the jury. [R620:34-38,App:28-32] Long before that, on pretrial motions, the Circuit Court (Judge

Witkowiak) determined that these questions would be decided by the jury.

[R356,App:50-55;R314,App:48-49]

Fourth, the conclusion that “Bauman’s statement regarding West Samaria’s ‘bad design, bad location, and a bad operator’ is pure opinion” is at odds with the decision to submit the question to the jury. Communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions or beliefs. *Laughland v. Beckett*, 2015 WI App 70, ¶ 27, 365 Wis. 2d 148, 167–68, 870 N.W.2d 466, 475; *Converters Equip. Corp. v. Condes Corp.*, 80 Wis.2d 257, 263–64, 258 N.W.2d 712 (1977). “One may be libeled by implication and innuendo quite as easily as by direct affirmation.” *Converters Equip.*, 80 Wis. 2d at 264 (quoting *Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259 (1966)). “A communication is defamatory if it tends to harm the reputation of another so as to lower him [or her] in the estimation of the community or deter third persons from associating or dealing with him [or her].” *Zinda v. Louisiana Pac. Corp.*, 149 Wis. 2d 913, 921, 440 N.W.2d 548 (1989).

Bauman sought to deter WHEDA and Milwaukee County from dealing with Tri-Corp. Bauman uttered these words to decision-makers (Antonio Riley and Rae Ellen Packard) and others (Maria Prioletta) who had never been inside of West Samaria, and who were susceptible to Bauman’s declarations that he had accurate information supporting his false statements.

- c. There was credible evidence supporting the jury's findings that Bauman acted with "actual malice" when he defamed Tri-Corp.**

The jury was instructed that it could find that Bauman acted with "actual malice" if it determined that Bauman made a defamatory statement knowing that the statement was false or with reckless disregard of whether it was false or not.

- i. Bauman falsely stated that "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there" with actual malice.**

Tri-Corp's goal was to provide room and board at West Samaria for people who would otherwise be homeless. There was ample evidence for the jury to find that Tri-Corp performed its function well. Tri-Corp had a long history of serving residents of West Samaria. West Samaria had a high rate of occupancy and residents typically chose to stay at West Samaria for seven to nine years. Tri-Corp had recently engaged in fund-raising and invested \$400,000 into improvements to the building. Tri-Corp received an award from the National Alliance for the Mentally Ill [NAMI] for its work at West Samaria [R521,Ex21,App:477] as well as awards from WHEDA for its commitment to provide affordable housing.

Credible evidence showed that Bauman made this statement with reckless disregard of its truth or falsity. Bauman asserted that he was familiar with West Samaria's plan of operation [R439,Ex541,App:582-585,R435,Ex542,App:586-

616], as shown by his instruction to DNS to revoke Tri-Corp’s special use permit. [R516,Ex26,App:480] Either he never read the plan of operation or read it and chose to misrepresent its contents.¹² The plan of operation showed that Tri-Corp essentially provided room and board. Bauman was advised that the surprise inspection by DNS which he prompted disclosed no building code violations, showing that Tri-Corp performed its role well. When DNS reported to him that they did not see caseworkers during their inspection, Bauman knew that under the plan of operation, Tri-Corp did not provide caseworkers. A juror could easily conclude that Bauman “had serious doubts as to the truth of his statements or had a high degree of awareness that the statement was probably false.”

Also, Bauman testified that the basis for his statement that Tri-Corp was “unwilling or unable to provide quality care” was the events surrounding the deaths of David Rutledge and Joseph Droese. However, the evidence showed that Bauman fabricated facts relating to the death of David Rutledge, going so far as to suggest that Tri-Corp ignored the assault and let him die at West Samaria.

Bauman stated that Tri-Corp “repeatedly demonstrated” its lack of care for residents. Brevier testified that Bauman’s statements were totally unfounded.

¹²In answering Question 2 of the Verdict, the jury found that Bauman’s statement to DNS that “the fact that Joseph Droese died and was not discovered for four days suggested that West Samaria was not operating in compliance with the plan of operation or operating in a manner consistent with the health, safety and welfare of the public” was not true.

[R616:72-73,App:181-182] Outside of the deaths of David Rutledge in 2004 and Joseph Droese in 2007, there was nothing else that Bauman could point to that “demonstrated” this “repeated” lack of care.

A jury could easily find that Bauman’s blaming Tri-Corp for the death of Joseph Droese demonstrated actual malice. Bauman implied that Tri-Corp was responsible for providing the services assigned to professional Milwaukee County caseworkers, knowing that this was not true.

There was no investigation before Bauman instructed DNS to revoke West Samaria’s permit. [R516,Ex26,App:480;R624:27,App:271] Kraco from DNS testified there was an investigation after Bauman’s instruction. Kraco also testified that DNS reported to Bauman before Bauman issued his defamatory press release. [R621:16-17,App:331-332] A jury could easily conclude that DNS’s report should have put Bauman on notice (if Bauman did not know it already) that there was no link between Tri-Corp’s management of West Samaria and Droese’s death.

Credible evidence, considered with a view toward supporting the jury’s verdict, showed that Bauman made this statement knowing that it was false or with reckless disregard of whether it was false.

ii. Bauman falsely stated that West Samaria had a “bad design, bad location and bad operator” with actual malice.

Maria Prioletta’s notes of the October 19, 2007, meeting, [R567,Ex88,App:490;R469,Ex592,App:625] records Bauman’s statement that West Samaria had a “bad design, bad location and bad operator.” This was not the first time this was uttered by Bauman. Bauman testified: “I reiterated what I’ve been stating for three years at this point.” [R618:49-50,App:249-250] He acknowledged that his goal and purpose in saying this was to shut down West Samaria and see the building razed. [R618:46,52,App:247,251]

Credible evidence showed the jury that Bauman’s statement that West Samaria had a “bad design, bad location and bad operator,” was false. Tri-Corp had invested \$400,000 into improvements to West Samaria and remodeled with a view toward the special needs of its residents. [R617:145-146,App:112-113] Tri-Corp received an award from NAMI for its work at West Samaria.

[R521,Ex21,App:477] Other evidence showed that West Samaria was located among other apartment buildings with the same type of architecture.

[R477,Ex617,App:626-636;R621:72-75,App:345-348]

While Bauman tried to portray the neighborhood of West Samaria as having an unduly high crime rate, the jury was free to consider that other Milwaukee neighborhoods are not free from crime. Bauman himself bought a house in this

same neighborhood. Brever testified that the location did not pose a risk to West Samaria residents [R616:92-93,181-183,App:189-190,218-220], that he did not recall a heavy public emphasis on its location [R616:96,App:191], and that there was no need to relocate residents of West Samaria [R616:108,App:195]. At the same time, West Samaria was a great location for its residents (who did not drive) because it was close to bus lines, fast food restaurants, and other nearby destinations. [R617:131-132,App:102-103]

Credible evidence showed that Bauman's statement that West Samaria had a "bad operator" was not true. Any reasonable jury could find that Tri-Corp managed West Samaria extremely well. For decades, West Samaria provided affordable room and board to people that would otherwise be homeless. Residents who lived on Social Security checks amounting to \$630 per month, paid \$530 for decent food and shelter. Although there were private donations, there were no government subsidies. Residents appreciated West Samaria, as evidenced by high occupancy and lengthy stays. Tri-Corp had received awards for its excellence in management practices. Any jury could easily choose not to believe Bauman's claim that the circumstances surrounding the deaths of David Rutledge in 2004 and Joseph Droese in 2007 proved bad management.

Credible evidence showed that Bauman stated that West Samaria had "bad design, bad location and bad operator" with actual malice. Although Bauman gave

the impression that he was intimately familiar with the design and operation of West Samaria, he was never inside of West Samaria. When Bauman testified that “absolutely” he was in the building at a time when “Mr. Brever was not there,”¹³ [R618:48,App:248], he was impeached with his 2008 deposition testimony, where he admitted that he had never been inside. [R677:16-17,App:71-72]

Brever testified that Tri-Corp’s staff invited Bauman to tour West Samaria after Bauman was elected alderman in 2004, but Bauman declined. [R616:11,App:128] Brever made an appointment to meet Bauman in his office in February 2005, and at that time personally asked Bauman to visit West Samaria and become acquainted with it. Bauman not only refused, but became “extremely assertive.” Brever testified that “[i]t was not a friendly meeting,” and that Bauman showed no “willingness for conversation.”¹⁴ [R616:12-13,App:129-130] Bauman ultimately told Brever that he should “get a good attorney.” [R616:12,App:129]

Beginning in 2005, Tri-Corp created a “Community Advisory Committee,” which met monthly at West Samaria, where neighborhood residents could visit

¹³Brever had testified that to his knowledge Bauman was never in the building. [R616:17-18,App:133-134]

¹⁴After this meeting, Tri-Corp told Bauman that it would be willing to relocate West Samaria if it had the funding to do that. [R546,Ex37,App:483-484; R551,Ex38,App:485] Brever testified that although West Samaria was not a nuisance to the neighborhood and was providing a valuable resource, it was clear from their first meeting in 2005 that Bauman was intent on closing West Samaria. [R616:21,App:137]

West Samaria and discuss any concerns. Bauman (who lived approximately two blocks away) was invited to these meetings but never attended any of them.

[R616:17,App:133,R462-R462,Ex571,App:622] A jury could easily determine from Bauman's outright refusal to become familiar with West Samaria that he acted with reckless disregard of the truth or falsity of his statements, which amounts to actual malice.¹⁵ Cf. *Hart v. Bennet*, 2003 WI App 231, ¶ 31, 267 Wis. 2d 919, 947, 672 N.W.2d 306, 320. Also, Bauman never addressed any of his supposed complaints regarding West Samaria with Tri-Corp or Brever. [R616:91,115,179-180,App:188,196,216-217] This would have been a logical first step in resolving them.

Bauman demonstrated to the jury how prepared he was to invent facts disparaging West Samaria when he told the jury that a security camera on the front of West Samaria could have observed the assault on David Rutledge.

[R624:90,App:276] He was contradicted by evidence showing that this was physically impossible. [R574,Ex111,App:516;R628:56-58,App:350-352] A jury could easily find that Bauman made untrue statements with reckless disregard of their truth or falsity.

¹⁵Bauman declined to meet with Tri-Corp even to discuss Bauman's own desire to relocate West Samaria's residents. [R616:59-60,App:170-171;R546,Ex37,App:483-484]

2. The Circuit Court erred in finding that Tri-Corp was a public figure, and that consequently, Tri-Corp had to prove “actual malice” on the part of Bauman to prevail on its claims of defamation.

While there was credible evidence supporting the jury’s verdict that Bauman made statements with actual malice, the Circuit Court should not have required proof of actual malice in the first place. If so, the entire discussion of whether Tri-Corp proved actual malice is immaterial to Tri-Corp’s right to judgment on the verdict.

The requirement of proving actual malice stems from *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In *Sullivan*, an elected public official sued the New York Times for publishing defamatory statements in an appeal for donations for civil rights’ causes. The Supreme Court decided that the First Amendment requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279–80, 84 S. Ct. 710, 726.

In *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991, 18 L. Ed. 2d 1094 (1967), the Court extended the requirement to “public figures,” and in *Rosenbloom v. Metromania, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality of the court extended the actual malice requirement to others.

However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) the Supreme Court clarified that the actual malice requirement did not apply to an individual who is neither a public official nor a public figure. *Gertz* articulated two types of public figures: (1) those who achieve such “pervasive fame or notoriety” that they are public figures for all purposes (“all-purpose public figures”); and (2) those who inject themselves into a particular public controversy and thereby become public figures only with respect to a limited range of issues (“limited public figures”). *Id.* at 351, 94 S.Ct. 2997.

Here, the Circuit Court decided: “By making statements throughout the controversy which mitigated West Samaria’s responsibility in the events that led to Droese’s death, Brever and others made public comments which in turn transformed Tri-Corp from a private organization to a limited purpose public figure.” [R598:10,App:18]

The evidence shows that on March 1, 2007, the *Journal/Sentinel* published its first story regarding Droese. [R416,Ex517,App:524-528] Brever related to a reporter who called him that Droese had recently moved into West Samaria and that his absence was not noted at dinner. On March 2, 2007, the *Journal/Sentinel* published an article focused on “the deaths of patients with mental illness in Milwaukee County’s care,” including a patient at the Milwaukee County Mental

Health Complex. [R422,Ex518,App:529-531] Brever is not interviewed or quoted in this article.

On March 3, 2007, the *Journal/Sentinel* reported on the DNS order to vacate West Samaria (which was prompted by Bauman). [R413,Ex519,App:532-536] Brever is quoted as stating that Tri-Corp would appeal the order. The article quotes correspondence that Tri-Corp submitted to BOZA in connection with its pending permit application. It quotes Bauman as saying: “This management [Tri-Corp] is not doing its job.” It then quotes Brever: “I wish that things had turned out differently...But we had all full belief that he [Droese] was being monitored by his caseworker.”¹⁶ Brever is also quoted as saying that he welcomed the media attention given to people with mental illness and would do everything possible to keep West Samaria open.

On March 6, 2007, the *Journal/Sentinel* published an update. Brever is quoted as saying that Tri-Corp was consulting with its lawyer regarding an appeal of BOZA’s order and would welcome any ideas for improving the lives of its residents. [R424,Ex520,App:537-540] On March 11, 2007, the *Journal/Sentinel* published an editorial which does not quote Brever. [R420,Ex521,App:541-543]

¹⁶This was accurate, but the Circuit Court recharacterized the statement as: “Brever pointed the proverbial finger of blame on the county.” [598:11,App:19] This illustrates the Circuit Court’s willingness to substitute its view of evidence for that of the jury.

On March 23, 2007, the *Journal/Sentinel* published an article regarding Tri-Corp's appeal of the DNS order which does not quote Brever. [R421,Ex522,App:544-545]

On March 23, 2007, Bauman issued his press release stating that "West Samaria has demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who live there." [R414,Ex537,App:560-561]

Tri-Corp did not respond with any press releases. On March 29, 2007, the *Journal/Sentinel* published an article about the "troubled" West Samaria rooming house, but reported no comments from Brever. [R418,Ex523,App:546-548]

This does not make Tri-Corp a "limited purpose public figure." It is settled law that publicity in itself does not make one a public figure.¹⁷ In *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), Readers Digest argued that Wolston (who was accused of being a Soviet spy) was a "public figure" because he became involved in a public controversy. Wolston's failure to appear before a grand jury and ensuing contempt citation were previously reported in fifteen newspaper stories over a period of six weeks. *Id.* at 161-163, 99 S. Ct. 2704-2705.

¹⁷In *Gertz*, the Court recognized that although a lawyer's involvement in a controversial case generated publicity, "[h]e plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Gertz* at 352, 94 S. Ct. 3013.

Citing *Gertz*, the Supreme Court held that Wolston did not fall within the category of those public figures who have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.* at 158, 99 S. Ct. 2702. Wolston’s conduct “was in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue.” *Id.* at 158, 99 S. Ct. 2702–03. Citing *Time, Inc. v. Firestone*, 424 U.S., at 454, 96 S.Ct., at 965 the Court stated: “A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.”

Furthermore, Bauman’s conduct was designed to give Tri-Corp a bad image from the start. In *Hutchinson v. Proxmire*, 443 U.S. 111, 128–29, 99 S. Ct. 2675, 2684–85, 61 L. Ed. 2d 411 (1979), Hutchinson sued Senator Proxmire for defamation after receiving a “Golden Fleece of the Month Award” ridiculing his research grant. The Supreme Court held that Hutchinson was not a “public figure.” Citing *Wolston*, at 443 U.S. 167–168, 99 S.Ct. 2708, the Court stated: “Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”

In *Denny v. Mertz*, 106 Wis. 2d 636, 649–50, 318 N.W.2d 141, 147-148 (1982), the Wisconsin Supreme Court held that a libel claimant was not a public figure, deciding that “there must be a public controversy” and “the court must look

at the nature of the plaintiff's involvement in the public controversy to see whether he has *voluntarily injected* himself into the controversy so as to influence the resolution of the issues involved.” *Id.* at 649–50, 318 N.W.2d 147 [emphasis added]

In *Wiegel v. Cap. Times Co.*, 145 Wis. 2d 71, 80, 426 N.W.2d 43, 48 (Ct. App. 1988), the court held that the libel claimant, Weigel, was a public figure. The court defined the public controversy as “the pollution problems at Yellowstone Lake State Park” from farm run-off. *Id.* at 80, 426 N.W.2d 48 Weigel, the largest farmer, had been publicly at odds with the DNR. Prior to the alleged defamation, Weigel had stated in a newspaper interview that he could not afford to adopt soil conservation practices recommended by DNR. *Id.* at 88–89, 426 N.W.2d 51.

The Circuit Court cited *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 543 N.W.2d 522 (Ct. App. 1995) for its discussion of how a claimant can become an “involuntary public figure.” However, in that case, the court found no defamation to begin with. The newscasters reported that the claimant had completely disregarded a request from the FDA to voluntarily recall products, and the claimant admitted the truth of that statement at deposition. *Id.* at 665,669–670,687,543 N.W.2d 525,527–28,534. The Circuit Court’s applying the term “involuntary public figure” circumvents established law that being connected with a “public

interest” does not by itself make a claimant a “public figure.” *Gertz, supra*,
Wolston, supra, *Time, Inc., supra*.

In *Maguire v. J. Sentinel, Inc.*, 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999) the court held that the libel claimant, Maguire, was not a public figure. The claim arose from an article publishing that Maguire had assaulted her ex-husband. The story came to light after Maguire invited a reporter to report on an injunction hearing where she was a party. *Id.* at 246, 605 N.W.2d 887.

3. The Circuit Court erred by granting a directed verdict dismissing Tri-Corp’s claim of tortious interference.

After both parties rested the Circuit Court dismissed Tri-Corp’s tortious interference claim. [R620:34-38, App:28-32] Tri-Corp does not seek a new trial, but if for any reason this case is remanded for a new trial, this claim should be reinstated.

a. The circuit court should not direct a verdict dismissing a cause of action where there is credible evidence supporting it.

The circuit court may grant a motion for directed verdict if it “is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” § 805.14(1). Where a circuit court grants a motion for a directed verdict, the appellate court will uphold the circuit court’s decision unless the circuit court was clearly wrong. *Gagliano &*

Co., Inc. v. Openfirst, LLC, 2014 WI 65, ¶30, 355 Wis. 2d 258, 850 N.W.2d 845 (citing *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 389, 541 N.W.2d 753 (1995) “A circuit court’s evidentiary determination is clearly wrong when there is any credible evidence to support the position of the non-moving party.” *Gagliano*, 355 Wis. 2d 258, ¶30, 850 N.W.2d 845. *Emer’s Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 15, 391 Wis. 2d 674, 683, 943 N.W.2d 513, 518.

b. There was credible evidence supporting Tri-Corp’s claim of tortious interference.

The Circuit Court did not rule that there was no credible evidence supporting Tri-Corp’s claim, and indeed, the Court of Appeals found credible evidence when it remanded the case in 2010. Here, the Circuit Court dismissed the case based on its erroneous interpretation of the law.

c. The Circuit Court erred by finding that there could be no tortious interference because a “public concern” was involved.

The Circuit Court dismissed Tri-Corp’s tortious interference claim because it found that there was a “public concern” related to West Samaria. [R620:34-38, App:28-32] Bauman argued that *Dumas v. Koebel*, 2013 WI App 152, 352 Wis. 2d 13, 841 N.W.2d 319, required the Circuit Court to determine as a matter of law whether there was an issue of “public concern,” and if so, Bauman had absolute immunity for any claim of tortious interference. [R620:8-9] Tri-Corp disagreed,

and argued that *Dumas* did not require “absolute immunity” whenever a case involved a “public concern.” [R620:17-33]

In *Dumas*, a television reporter surprised a school bus driver with a TV interview where he confronted her with information that she was a convicted prostitute. The broadcast led to her losing her job. When Dumas sued for tortious interference with her employment contract, invasion of privacy, and intentional infliction of emotional distress, her case was dismissed.

However, *Dumas* is easily distinguished. The reporter’s information that Dumas was a convicted prostitute was true and a matter of public record. Had this been a claim of defamation, the truth of the reporter’s statements would have been an absolute defense. By contrast, the statements Bauman made to injure Tri-Corp’s relationships were false. The Circuit Court did not recognize this distinction.

The Circuit Court suggested that *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1210, 179 L. Ed. 2d 172 (2011) also required dismissal of Tri-Corp’s tortious interference claim. However, *Snyder* can likewise be distinguished.

In *Snyder*, the *father* of a marine killed in action sued members of a church who picketed nearby his son’s funeral. The case before the Supreme Court did not involve defamation; the defamation claim had been dismissed because the offensive words used by the defendants did not utter untrue statements about the

father. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572–73 (D. Md. 2008); *Snyder*, at 450, 131 S. Ct. 1214. The claims before the court were that the plaintiff (father) was hurt by the speech appearing on signs held by the defendants, which were offensive, but not defamatory.

The Supreme Court upheld the dismissal of these claims because the defendants were not engaged in a sham to personally attack the plaintiff (father). *Snyder*, at 455, 131 S. Ct. 1217. In *Dumas*, at ¶ 31, 352 Wis. 2d 31, 841 N.W.2d 328, the Wisconsin Court of Appeals found this analysis important, as it stated: “the Snyder Court noted that the picketers stood on public land and that *there was no preexisting relationship or conflict between the picketers and the Marine that might suggest that the “speech on public matters was intended to mask an attack ... over a private matter.”*” [emphasis added]

Neither *Dumas* nor *Snyder* support the Circuit Court’s decision that Bauman had absolute immunity from a claim of tortious interference.

CONCLUSION

For these reasons, Tri-Corp asks the Court of Appeals to reverse the Circuit Court’s Decision and Order Granting Motion to Change Verdict Answers and Judgment, to direct the Circuit Court to enter judgment in favor of Tri-Corp, Housing, Inc. on the jury’s verdict, and for interest and costs, including the costs of this appeal.

Dated this 23rd day of December, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,879 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 23rd day of December, 2022.

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