SUPREME COURT OF WISCONSIN

TRI-CORP HOUSING, INC.,

Third-Party Plaintiff-Appellant-Petitioner,

vs.

District I
Appeal No. 2022AP000993

ROBERT BAUMAN, Alderman,

Third-Party Defendant-Respondent.

Review of the Court of Appeals District I, Appeal No. 2022AP000993
Milwaukee County Circuit Court Case No. 2007CV013965
The Honorable Pedro A. Colón, Presiding

PETITION FOR REVIEW OF THIRD-PARTY PLAINTIFF-APPELLANT-PETITIONER TRI-CORP. HOUSING, INC.

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INTRODUCTION

The Third-Party Plaintiff-Appellant-Petitioner, Tri-Corp Housing, Inc. ("Tri-Corp") petitions the Supreme Court to review the August 27, 2024 decision of the Court of Appeals, which affirmed the Circuit Court's decision to set aside a $1.4 million jury verdict in Tri-Corp's favor. The Court of Appeals denied Tri-Corp's motion for reconsideration on September 17, 2024.

At its heart, this case calls for an examination of when, and to what extent the First Amendment constrains civil claims of defamation and tortious interference. The Wisconsin Supreme Court last examined the "limited purpose public figure" constraint on defamation claims in *Denny v. Mertz,* 106 Wis. 2d 636, 318 N.W.2d 141 (1982) and *Lewis v. Coursolle Broad. of Wisconsin, Inc.*, 127 Wis. 2d 105, 377 N.W.2d 166 (1985). Since then the decisions of the Court of Appeals have diverged from these cases and cases decided by the United States Supreme Court. To our knowledge, the Wisconsin Supreme Court has not examined the extent to which the First Amendment constrains claims of tortious interference.

Tri-Corp sued the Defendant-Respondent Robert Bauman ("Bauman"), who is and was a City of Milwaukee Alderman, for tortiously interfering with its business relationships and defamation. Tri-Corp sued Bauman personally, and not in his capacity as an alderman. Tri-Corp is a nonprofit organization which provided housing for mentally disabled individuals in a rooming house known as "West Samaria," which was located near Bauman's home. In an eight-day trial, Tri-Corp proved that

Bauman, acting personally and outside of the scope of his employment, maliciously defamed Tri-Corp resulting in the closure of West Samaria.

The Circuit Court, the Honorable Pedro A. Colón, presided over the trial. At the close of evidence, the Circuit Court granted Bauman's motion for a directed verdict on Tri-Corp's tortious interference claim. Its decision was based on its interpretation of *Dumas v. Koebel*, 2013 WI App 152, 352 Wis. 2d 13, 841 N.W.2d 319. Rejecting Tri-Corp's arguments to the contrary, the Circuit Court determined as a matter of law that because there was a "public concern" related to West Samaria, Bauman had absolute immunity from any claim of tortious interference with the operation of West Samaria.

The Circuit Court determined that there was sufficient evidence to send the case to the jury on Tri-Corp's defamation claims. Bauman asked that the jury be required to find that Bauman had acted with actual malice, arguing that Bauman had a conditional privilege as a government officer. Over Tri-Corp's objection, the Circuit Court instructed the jury that they were required to find actual malice. The jury found actual malice as to two of the three claims of defamation on the verdict. The jury returned a verdict of $1.4 million on those claims.

In its decision on post-trial motions, the Circuit Court citing *Wiegel v. Cap. Times Co.*, 145 Wis. 2d 71, 80, 426 N.W.2d 43, 48 (Ct. App. 1988), for the first time in these proceedings declared that Tri-Corp was a "limited purpose public figure" and that this required Tri-Corp to prove actual malice. Bauman had not raised this issue at any time before or during the

trial, and there had not been any hearing on whether Tri-Corp was a "limited purpose public figure."

The Circuit Court then decided that there was no evidence that Bauman acted with actual malice. The Circuit Court changed the corresponding answers to the verdict and entered judgment in favor of Bauman. Its decision reversed the outcome of the case and effectively denied Tri-Corp its right to a jury trial.

Tri-Corp timely appealed the Circuit Court's decision, and the matter was fully briefed on March 17, 2023. While the case was pending before the Court of Appeals, Judge Colón was appointed to the Court of Appeals. On August 27, 2024, the Court of Appeals issued a *per curiam* decision affirming Judge Colón's decision. The decision indicated that the other three judges in District I had reviewed the case.

The Court of Appeals stated that it "agree[d] with the circuit court's conclusion that [Tri-Corp] was a 'limited purpose public figure'" and was therefore required to prove actual malice. [¶28] The Court of Appeals then stated: "We agree with the circuit court's conclusion that there was no credible evidence of actual malice adduced at trial." [¶32]

On September 13, 2024, Tri-Corp filed a motion for reconsideration with the Court of Appeals asking it to reconsider: (1) whether the record showed that Tri-Corp was a "limited purpose public figure", (2) whether Bauman waived the argument that Tri-Corp was a "public figure" by failing to request that the Court conduct a hearing and make such a finding before the matter went to the jury, and (3) the specific evidence cited by Tri-Corp which supported the jury's finding of actual malice. On September 17,

2024, the Court of Appeals denied the motion only stating that "this court concludes that reconsideration is not warranted."

STATEMENT OF THE ISSUES

Tri-Corp asks the Supreme Court to review these issues:

1. Is Tri-Corp a "limited purpose public figure" for purposes of First Amendment limits upon claims of defamation?

The concept of "limited purpose public figure" was developed by the United States Supreme Court in a series of decisions following *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 defamation. The Supreme Court decided that the First Amendment required a federal rule requiring that a public official prove "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" to sustain a defamation claim *Id.* at 279–80, 84 S. Ct. 710, 726.

In decisions following *Sullivan*, the United States Supreme Court extended the concept of "public official" to "public figure." However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) the 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 purpose public figures"). *Id.* at 351, 94 S.Ct. 2997.

In *Denny,* at 106 Wis. 2d 649–50, 318 N.W.2d 147-148, 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." (Emphasis added)

2. Can the issue of whether Tri-Corp was a "limited purpose public figure" be decided without a hearing on the matter?

This Court has stated that the question of whether or not the plaintiff in a defamation action is a "public figure" is a question for the court to decide as a matter of law. *Lewis,* at 127 Wis. 2d 110, 377 N.W.2d 168, citing *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966). Here, the Circuit Court, without Bauman ever raising the issue, decided that Tri-Corp was a "limited purpose public figure" in its decision on post-trial motions. There was no hearing on the matter at any time.

3. Does the First Amendment give absolute immunity from claims of tortious interference whenever the interference involves a "matter of public concern"?

Citing *Dumas, supra*, the Circuit Court dismissed Tri-Corp's claims that Bauman tortiously interfered with Tri-Corp's relationships with Milwaukee County and its lender for the sole reason that it found, upon Bauman's motion for a directed verdict, that Tri-Corp's operation of West Samaria involved a "matter of public concern."

4. Does the Court of Appeals' decision satisfy its duty to search for credible evidence to sustain the jury's verdict?

This Court has stated in *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*, 2010 WI 49, ¶ 118, 325 Wis. 2d 56, 102–03, 784 N.W.2d 542, 565, and *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 306, 347 N.W.2d 595, 598 (1984) (overruled on other grounds by *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 547 N.W.2d 592 (1996)) that 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.

STATEMENT OF CRITERIA FOR REVIEW

This petition meets the criteria for granting review under Wis. Stat. § 809.62(1r)(a),(b),(c) and (d).

This case presents a real and significant question of how and when the First Amendment constrains or prevents civil claims of defamation and tortious interference, an issue which will have statewide impact. These are constitutional law questions which are not factual in nature.

A decision by the Supreme Court will help develop, clarify or harmonize the law regarding whether a defamation claimant is a "limited purpose public figure." After the Supreme Court considered the issue in *Denny, supra*, decisions of the Court of Appeals beginning with *Wiegel, supra,* have expanded this limit on defamation claims far beyond this Court's decision in *Denny*, the United States Supreme Court decisions of *Gertz, supra, Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675, 61 L.

Ed. 2d 411 (1979), and *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), and consequently, are in conflict with those decisions.

This petition demonstrates a need for a rule for if and when a court must conduct a separate hearing on whether a defamation claimant is a "limited purpose public figure." Here the determination was made without any hearing before the Circuit Court ruled that Tri-Corp was a "limited purpose public figure" in its decision to change the jury's verdict.

A decision by the Supreme Court will for the first time consider whether a defendant has absolute immunity from claims of tortious interference where the interference involves a "matter of public concern." The Court of Appeals decision in *Dumas, supra*, which was here cited for this broad and sweeping interpretation of the First Amendment, was never reviewed by this Court.

This case is unique in that it presents for the first time ever that the Supreme Court or Court of Appeals has reviewed a case where a jury considered and found "actual malice" in a defamation case. Earlier decisions by these courts involve motions to dismiss or motions for summary judgment sometimes remanding, but more often dismissing without trial. Here, after a properly instructed jury found "actual malice" (as to two out of three claims), the Circuit Court disagreed with the jury and set aside the jury's findings. Consequently, this case presents an extremely unique opportunity to address the quantum of evidence required to find "actual malice."

Lastly, the reversal of a $1.4 million defamation jury verdict against a prominent Milwaukee alderman, sued personally by a nonprofit organization he intentionally harmed by his conduct, which was then affirmed in a *per curiam* Court of Appeals decision, deserves close scrutiny.

STATEMENT OF THE CASE

The Nature of the Case. The Circuit Court dismissed Tri-Corp's tortious interference claim on a motion for directed verdict, finding that the existence of a "public concern" precluded the claim. The Circuit Court then changed the answers to a jury verdict, finding defamation with actual malice and awarding Tri-Corp $1.4 million in damages, by deciding after the trial that Tri-Corp was a "limited purpose public figure" and that there was no evidence of actual malice.

Procedural History. Although this case was filed by WHEDA on November 19, 2007 as a foreclosure action against Tri-Corp, Tri-Corp answered, counterclaimed, and filed a third-party complaint against Robert Bauman. [R56] At present, the only parties to this case are Tri-Corp and Bauman.

On early motions for summary judgment, the Circuit Court dismissed Tri-Corp's claims against WHEDA and Bauman. Tri-Corp appealed, and the appeals were heard separately. On March 8, 2011, the Court of Appeals affirmed the dismissal of 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 reversed and remanded the dismissal of 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.

Following the remand, Tri-Corp amended its complaint against Bauman to add causes of action for defamation and for violations of 42 U.S.C § 1983, 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. [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, but declined to exercise supplemental jurisdiction over Tri-Corp's state law claims of tortious interference and defamation, and remanded the case to the 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.

Tri-Corp amended its defamation claims. [R197,App:57-63] Bauman filed additional motions to dismiss and for summary judgment, but none of them raised the issue of whether Tri-Corp was a "limited purpose public figure." At a hearing held on July 2, 2019, the Circuit Court (Judge

Witkowiak), decided that absolute privilege precluded Tri-Corp's defamation claims arising from statements Bauman made at hearings before the Board of Zoning Appeals ("BOZA"), but that otherwise, the defamation claims presented questions for the jury, and on July 11, 2019, entered its order [R314,App.55-56;R356,App:49-54].

On August 23, 2019, the parties filed their pretrial reports, proposed jury instructions and proposed verdict questions. Bauman did not raise the issue of whether Tri-Corp should be regarded as a "limited purpose public figure" in this filing [R325] or when he later filed revised jury instructions and verdict questions. [R379-R380]

The jury trial began on February 7, 2022, and the testimony concluded on February 14, 2022. [R628:75,App:392] 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:65-69]

Following a lengthy instruction conference, the jury convened the afternoon of February 16, 2022 and heard instructions and closing arguments. [R623:34-120,App:402-488] The Circuit Court denied Tri-Corp's request to have punitive damages on the verdict. [R623:26-27,App:395-396] At Bauman's request, over Tri-Corp's objection, the Circuit Court instructed the jury that they would have to find "actual malice" on the part of Bauman in order for Tri-Corp to recover. The Circuit Court gave WCJI No. 2511 and instructed the jury that: "Your answers to Questions 3, 4, 8, 9, 13 and 14 of the verdict will determine whether Robert

Bauman acted with actual malice in making or publishing the alleged defamatory statements." [R623:49-51,App:417-419]

On February 17, 2022, the jury returned its verdict in favor of Tri-Corp on its defamation claims, found actual malice on two of the three claims, and awarded damages in the amount of $1.4 million. [R437,App:44-48]

The Circuit Court heard post-trial motions on April 14, 2022, and asked for additional submissions on whether or not Judge Witkowiak had ruled as a matter of law that the defamatory statements in the jury's verdict presented questions for the jury. [R630:35,App:523] Bauman and Tri-Corp filed their submissions on April 18, 2022. [R594-R595]

On May 16, 2022, the Circuit Court filed its Decision and Order Granting Motion to Change Verdict Answers. [R598,App:31-43] Tri-Corp appealed from both this order and the subsequent judgment. [R608,App:29-30] The two appeals have proceeded under the same case number**.**

Statement of Facts. Tri-Corp is a non-profit organization which provided housing for mentally disabled individuals. 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.

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:116]

Most of the 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:112,126-128] Some of the rooms at West Samaria were leased by the Red Cross and Milwaukee County for their own programs. [R616:24,33-34,53-54,App:163,171-172,188-189] Tri-Corp charged residents $530.00 per month for a private room, three meals per day, and room cleaning services. [R617:126-127,App:120-121;R616:24,App:163]

Tri-Corp essentially functioned as a landlord. [R617:134,App:128; R616:185,App:245] Residents had room keys which also operated the front door of the building, and residents could come and go at will. [R617:131-132,App:125-126] 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:161-162]

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:530;R618:7-8,App:248-249] Bauman displayed a not uncommon prejudice against residences for mentally disabled individuals. 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:156] When that effort failed, Bauman sought the closure of West Samaria through other avenues.

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

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:73,75-76]

Later, at trial, the Circuit Court granted Bauman a directed verdict on Tri-Corp's tortious interference claim, citing *Dumas*. [R623:32-34,App:400-402]

Tri-Corp contested these rulings [R387:28-29,App:71-72;R392:1-5;R623:27-30,App:396-399], but presented its case to the jury on the three remaining defamation claims.

The jury was asked to decide whether the following three statements made by Bauman were false, and if so, made with actual malice. [R437,App:44-48][1]

[1]The Circuit Court answered "yes" to the verdict questions (nos. 1 and 6) asking whether Bauman made the first two statements. The jury found (no.11) that Bauman made the third statement.

(1) "Did Robert Bauman say to the City of Milwaukee Department of Neighborhood Services 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?"

(2) "Did Robert Bauman say that 'West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who live there?'"

(3) "Did Robert Bauman say that West Samaria had a bad design, bad location and bad operator?"

The jury found that all three statements were false, and that the second and third statements were made with actual malice.[2]

The trial testimony gave context to these statements and showed that Bauman was out to shut down West Samaria and would lie when it suited his objective.

The first defamatory statement considered by the jury was part of a ruse by Bauman to suggest that Tri-Corp was responsible for the death of a resident, Joseph Droese. 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:565-569][3]

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[2]The Circuit Court instructed the jury that actual malice was shown if Bauman made the statement "with reckless disregard of its truth or falsity" in answering verdict question nos. 3, 8, and 13.

[3]The article may have first appeared one day earlier, on February 28, 2007. [R616:134,App:228]

Droese was found dead in his room on January 20, 2007.[4] 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. 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. His 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. Tri-Corp was not responsible for Droese's death.[5] [R616:29-31,137,App:167-169,229;R677:26-27,Ex525,App:103-104]

Bauman seized on the publication of this newspaper article. Bauman emailed the City of Milwaukee Department of Neighborhood Services

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[4]Joseph Droese 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:102-105] He was using Fentynal pain patches, had injuries due to an earlier suicide attempt, and suffered from schizophenia 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:166-167,229-230]

[5]See *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.

("DNS") directing DNS to issue an order to close West Samaria. The email, dated March 1, 2007, [R516,Ex26,App:551] 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 notice to vacate West Samaria within 30 days. [R616:26-27,App:164-165][6]

Tri-Corp's plan of operation stated that as to residents, Tri-Corp provided room and board and Milwaukee County provided caseworkers to monitor residents.[7] Michael Brever, Tri-Corp's Executive Director, testified that to his knowledge no building inspectors visited West Samaria before the notice was issued. [R616:27,App:165]

At trial, Bauman called Chris Kraco from DNS, who claimed there was an inspection initiated by Bauman. Kraco testified that none of the DNS inspectors made any effort to contact Brever during or after the inspection. [R621:33,35,41,App:369,371,377] Kraco conceded that West

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[6]The Court of Appeals stated at ¶7 of its opinion that "DNS determined that West Samaria was operating in a manner inconsistent with its approved plan of operation." Viewing the evidence with a view toward supporting the verdict, that is not correct. DNS was instructed by Bauman to issue an order.

[7]Exhibit 541 [R439:1-4,App:572-575], October 13, 2004 Plan of Operation; Exhibit 542 [R435:1-31,App:578-608], February 6, 2006 Application.

Samaria's plan of operation required Milwaukee County (and not Tri-Corp) to provide "monitoring by case workers." [R621:45,App:381]

Also at trial, James Hill testified that in late 2007 he became Director of Housing for Milwaukee County, pending approval of the County Board. [R625:34,App:337] 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:338-339,340-342;R575,Ex120:2,App:559]

The jury determined that Bauman's statement that Droese's death showed that Tri-Corp was not in compliance with its plan of operation was false.

The second defamatory statement considered by the jury was Bauman's March 23, 2007, press release [R414,Ex537,App:570-571] stating: "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who live there." Bauman testified that his statement was based on the deaths of two residents, "residents of the community" complaining to him about the conditions at West Samaria, and added the "audit report where they found fraud." [R624:47-48,App:300-301]

The jury found that this statement was not only false, but was made with actual malice. None of the so-called complaining "residents of the community" testified at trial.[8] The audit report (which had been orchestrated by Bauman) did not find fraud. [R616:173-178,App:234-239]

[8]Tri-Corp's executive director testifed that he did not know of complaints that Bauman received about West Samaria. [R616:89,App:211]

Moreover, Bauman knew that the circumstances of the deaths of the two residents he referred to contradicted his defamatory statements.

Three years earlier, in 2004, David Rutledge was assaulted on the corner of 28th Street and Richardson Street. The corner was not even visible from West Samaria. The assault was witnessed by one of West Samaria's residents who helped Rutledge 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:241-242;R628:56-58,App:384-386][9] Tri-Corp's Executive Director testified that Tri-Corp was not at fault for Rutledge's death. [R616:181,App:242]

Bauman blatantly lied about the circumstances of Rutledge's death. He 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 at West Samaria several days later. [R677:2,18-23,App:79,95-100;R618:22-34,App:255-267] At his deposition Bauman emphasized that his information came from the police reports. [R677:21-23,App:98-100] At trial, Bauman hedged, and suggested that his information came "probably from the neighbors." [R618:20-21,App:253-254] He was impeached with his deposition testimony. [R618:34,App:267]

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[9]See *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.

Bauman showed his reckless disregard for the truth by inventing other reasons for his stating that Tri-Corp "dropped the ball." [R624:89,App:302]. On direct examination Bauman 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:303] On cross-examination Bauman conceded that he did not know whether Rutledge was beaten up "with two-by-fours." [R624:92,App:304] Brever 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:557;R628:56-58,App:384-386]

The jury found that Bauman's statement that Tri-Corp was not operating Tri-Corp in line with its plan of operation was false. The jury also found actual malice.

At the time of this press release, Bauman was familiar with the plan of operation and knew that the DNS inspection which he ordered did not support his false statements.[10] Bauman's knowledge that Tri-Corp was not in violation of its plan of operation, coupled with evidence, that Bauman had never been inside of West Samaria, that Bauman refused invitations to tour West Samaria, and that Bauman even threatened Tri-Corp's executive director [R616:11-13,App:152-154], certainly support the jury's finding that Bauman made the statement with actual malice.

[10]Chris Kraco testified that four inspectors from DNS conducted a surprise inspection of West Samaria after Bauman's directive, and yet was unable to describe anything which showed that Tri-Corp violated its plan of operation. [R621:28-45,App:364-381]

The third defamatory statement considered by the jury was Bauman's statement that "West Samaria had bad design, bad location and bad operator." The jury considered the context of this statement. This was a lie calculated to harm Tri-Corp's reputation with its lender and the source of its referrals, Milwaukee County. Bauman made the statement in a meeting that Tri-Corp was not aware of until after it occurred.

The meeting was arranged by WHEDA at Bauman's request. Bauman and Antonio Riley, the head of WHEDA (Tri-Corp's mortgage lender), were friends. [R614:54-55,App:281-282] 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:283] Neither Antonio Riley nor Rae Ellen Packard had ever been inside of West Samaria. [R614:57,App:283;R625:12,App:336] Bauman made it clear to Riley that he wanted West Samaria closed. [R677:10-14,App:87-91][11]

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:198;R567,Ex88,App:554]

[11]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:552;R618:43-46,App:269-272;R677:10-12,App:87-89]

Maria Prioletta reported Bauman's defamatory statement in a contemporaneous email. [R619:44,App:328;R567,Ex88,App:554] She also testified that "Bauman said that this was a badly run project" [R619:54-55,App:332-333] and 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:554;R619:46-47,App:329-330] 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 testified that this was the only meeting Mathy had with Bauman, and that the focus of the meeting was the closure of West Samaria. [R619:24-25,App:322-323] 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:316]

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:277-278]:

> 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:92]:

> 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:274-275]

Immediately after the meeting, Milwaukee County began relocating residents of West Samaria. [R616:35,App:173] 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:170-174]

The Court of Appeals stated in its 2010 decision: "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 Housing & Economic Development Authority v. Tri Corp Housing, Inc.*, 2011 WI App 99, ¶28, 334 Wis. 2d 809, 800 N.W.2d 958. At trial, the circumstantial evidence was supported by direct evidence that immediately after the meeting, Mathy drew up a "relocation plan" for residents of West Samaria [R619:17,App:317], and relocation was underway at least by November 2, 2007. [R570,Ex95,App:555-556] Mathy

testified there was no similar effort to relocate residents of New Samaria. [R619:20,App:320] Mathy himself never recommended shutting down West Samaria. [R619:22,App:321]

Brever 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:175] Brever testified that he did not believe that the mortgage or later foreclosure proceeding explained why West Samaria was being emptied out. [R616:37,App:175] Brever 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:178-180] By October 2007, Brever and Tri-Corp's bookkeeper had initiated meetings with WHEDA to discuss readily available options for bringing the loan current. [R616:62-63,App:197-198]

On November 12, 2007, WHEDA notified Tri-Corp that WHEDA intended to foreclose its mortgage and close West Samaria. [R616:63-64,App:198-199] 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.

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:576-577] 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:534-541;R544,Ex4,App:542-549]

When Milwaukee County relocated residents of West Samaria, Tri-Corp lost its rental income, but its expenses continued. [R541,Ex23,App:550;R616:52-59,App:187-194] Tri-Corp kept West Samaria open (at a substantial loss to itself) until all residents were relocated. [R616:68-69,App:203-204] When Tri-Corp tried to sell the building to mitigate its loss, Bauman discouraged the potential buyer. [R628:70,72-75,App:388,389-392;R547,Ex42,App:553] Ultimately, West Samaria was razed. [R621:25,App:363]

ARGUMENT

1. The Supreme Court should clarify Wisconsin law as to who is a "limited purpose public figure" and determine, based on this record, that Tri-Corp is not a "limited purpose public figure."

In *Denny,* at 106 Wis. 2d 649–50, 318 N.W.2d 147-148, the Wisconsin Supreme Court held that a libel claimant was not a public figure (and consequently not required to prove actual malice), 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." (emphasis added) *Denny* is in accord with the decisions of the United States Supreme Court in *Gertz, supra*, *Time, Inc, supra*, *Hutchinson, supra*, and *Wolston, supra*.

Beginning with *Wiegel,* at 145 Wis. 2d 85, 426 N.W.2d 50, the Court of Appeals has displaced the express ruling of *Denny* and declared that "the focus of the public figure inquiry should be on the plaintiff's role in the public controversy rather than on any desire for publicity or other voluntary act on his or her part."

In *Van Straten v. Milwaukee J. Newspaper-Publisher*, 151 Wis. 2d 905, 914, 447 N.W.2d 105, 109 (Ct. App. 1989), the Court of Appeals stated that it had "adopted the federal analysis in *Wiegel*" instead of following the Wisconsin Supreme Court's direction in *Denny*. See also, *Sidoff v. Merry*, 2023 WI App 49, ¶ 18, 409 Wis. 2d 186, 197, 996 N.W.2d 88, 93

In *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 678, 543 N.W.2d 522, 531 (Ct. App. 1995) the Court of Appeals stated that *Wiegel* "expanded on *Denny*" when it addressed the second prong of the *Denny* test (whether the claimant has *voluntarily injected* himself into the controversy so as to influence the resolution of the issues involved.) *Bay View Packing Co.* states that the test became a three step process: "(1) isolating the controversy at issue; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential; and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy."

In these cases the Court of Appeals, as shown by its own discussion of the law, has not followed *Denny*. In *Denny*, a dissident stockholder of a publicly held corporation actively seeking ouster of the management of the corporation in a dispute that was reported in the financial pages of the

Milwaukee newspapers, *The Wall Street Journal*, and *Business Week* was determined *not* to be a public figure required to prove actual malice. In *Sidoff*, by contrast, the Court of Appeals determined that a defamation claimant who "intentionally avoided the media and actively chose[n] not to make public statements" [at ¶48] was determined to be a public figure required to prove actual malice. The Court of Appeals stated in *Erdmann v. SF Broad. of Green Bay, Inc*., 229 Wis.2d 156,169, 599 N.W.2d 1 (Ct. App. 1999): "While we have sympathy with those individuals who are thrust into the public lime-light without any affirmative conduct of their own, we can find no support for Erdmann's claim that limited figure public status cannot be created without purposeful or voluntary conduct by the individual involved."

Other jurisdictions have recognized that:

> ... to accept a definition of "involuntary public figure" that includes any unfortunate person swept up into a public tragedy is the functional equivalent of returning to the rule that any person involved in a matter of public interest cannot make out a claim for defamation without alleging actual malice. The Supreme Court has indeed squarely rejected that logic. See *Wolston v. Reader's Digest Ass'n, Inc*., 443 U.S. 157, 167, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979) ("A *212 private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.").

Alharbi v. Beck, 62 F. Supp. 3d 202, 211–12 (D. Mass. 2014)

Here, the Court of Appeals stated at ¶28 that "[T]he focus of the inquiry should be on the plaintiff's role in the public controversy rather than on any desire for publicity or other voluntary act on his or her part." citing

Wiegel, at 145 Wis. 2d 85. This is a clear opportunity for the Wisconsin Supreme Court to resolve the conflict in a number of decisions of the Court of Appeals and its own decision in *Denny*.

2. **The Supreme Court should establish a rule requiring (1) a defendant to raise the issue of whether a defamation claimant is a "limited purpose public figure" prior to trial and (2) the court to decide that issue at a pretrial hearing.**

In *Lewis,* at 127 Wis. 2d 110–11, 377 N.W.2d168, citing *Rosenblatt,* at 383 U.S. 88, 86 S.Ct. 677, and *Denny*, at 106 Wis.2d 649–50, 318 N.W.2d 141, the court stated that the question of whether or not the plaintiff in a defamation action is a "public figure" is a question for the court to decide as a matter of law.

In *Wagner v. Allen Media Broad*., at 2024 WI App 9, ¶ 66, 410 Wis. 2d 712–13, 3 N.W.3d 781–82, citing *Sidoff, supra*, the Court of Appeals stated: Whether the plaintiff is a limited purpose public figure "can also be a fact-intensive inquiry that is shaped in large part by extrinsic evidence concerning the existence and scope of a preexisting public controversy," and "[b]ecause this determination may require a court to consider matters extrinsic to the pleadings, it is not always readily amenable to resolution through a motion to dismiss or for judgment on the pleadings." In *Bay View Packing Co.*, at 198 Wis. 2d 676–77, 543 N.W.2d 530, the Court of Appeals stated that if necessary, the court should conduct an evidentiary hearing, and referred to *Harris v. Tomczak*, 94 F.R.D. 687, 693 (E.D.Cal.1982), where the court extensively discussed the need for a hearing on the issue.

At present, the Court has not created a procedural rule on when the trial court should conduct a hearing on the issue. Nor has the Court considered whether a defamation defendant waives the argument that the claimant is a public figure by not raising it before the case is sent to the jury. Here, the Circuit Court conducted its own, unrequested public figure analysis after the trial, picking through the record for exhibits to support its opinion, without even advising counsel that it was engaged in this process. No public figure case has suggested that this is an appropriate method of making that determination.

The Court of Appeals, at ¶¶ 27-28, did not cite what specific exhibits or testimony underlie its conclusion, and in particular, how its examination of the record supports the statement that "Brever again pointed the blame to a case worker from Milwaukee County." Tri-Corp attempted to address this in its motion for reconsideration, but the motion was summarily denied. [Motion for Reconsideration, App:21-27]

3. The Supreme Court should decide whether there is "absolute immunity" from claims of tortious interference whenever the interference involves a "matter of public concern."

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:65-69] The Court reasoned that *Dumas, supra,* 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. The Circuit Court also considered the United States Supreme Court's decision in *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011), which was cited in *Dumas*.

The Court of Appeals indicated that it was not considering Tri-Corp's tortious interference claim, but actually did so in its opining (contrary to the jury's finding that Bauman was acting outside of the scope of his employment)[12] that "Bauman was exercising political advocacy over a matter of public concern" and its citation of *Snyder v. Phelps*, *supra.* [¶¶33-34,36]

This Court should decide whether there is some broad brush rule that the existence of a "public concern" always defeats a claim of tortious interference. Here, the evidence showed that after failing to persuade BOZA to deny permitting for West Samaria, Bauman went behind the scenes to convince Milwaukee County and WHEDA to terminate their business relationships with Tri-Corp. The import of this broad brush rule is that Bauman is free to do so, as long as some vaguely defined "public concern" is involved.

We do not believe that either *Dumas* or *Snyder* were intended to create such a rule. 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. The reporter's information that Dumas was a convicted prostitute was true and a matter of public record.

In *Snyder*, the *father* of a marine killed in action sued members of a church who picketed nearby his son's funeral. The claims before the court

[12]At ¶33, the Court of Appeals stated: "The record reflects that this case went to trial to determine if Bauman's speech was part of his advocacy as an alderman and not with a 'personal motive not connected with the public good.'" However, the jury found that he had personal motive.

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 noting: "There was no pre-existing relationship or conflict between [the defendant] and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter." *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 quoted this excerpt from *Snyder* and stated: "Likewise, [the news reporter] confronted Dumas in public and asked her questions about public information, and Dumas did not allege any facts showing that she had a preexisting relationship with either [the reporter] or Journal Communications that would suggest a veiled attempt at a private attack."

Both *Dumas* and *Snyder* indicate that there is a line to be drawn when there is a pre-existing relationship between the parties and speech is a part of an intentional wrong, such as tortious interference. Here, as distinct from *Dumas* and *Snyder,* there was a pre-existing relationship and Bauman's false words were part of an orchestrated attack upon Tri-Corp.

Recently, in *Kindschy v. Aish*, 2024 WI 27, ¶ 11, 412 Wis. 2d 319, 327, 8 N.W.3d 1, 5, this Court recognized that the First Amendment does not create absolute rights. The "public concern" test, as applied in this case, erroneously creates such an absolute right.

4. **The Supreme Court should decide that the Court of Appeals' decision did not satisfy its duty to search for credible evidence to sustain the jury's verdict.**

Most appellate decisions addressing "limited purpose public figure" and "actual malice" discuss in detail the evidence which led to their conclusions. Here the Court of Appeals, at ¶27, refers to the Circuit Court's comments that "Tri-Corp, through its executive director, Brever, made statements throughout the public controversy that attempted to mitigate West Samaria's responsibility" and "Brever *again* pointed the finger of blame." (emphasis added) The record does not support this finding.[13]

The Court of Appeals did not review the evidence of actual malice introduced by Tri-Corp. There is no discussion of how Bauman intentionally communicated false information regarding the two West Samaria residents who died in 2004 and 2007, or how Bauman prompted the City Comptroller to audit Tri-Corp in the hope of revealing fraud on the part of the organization (or how his effort fell flat). There is no discussion of how Bauman directed DNS to issue an order shutting down West Samaria on the false pretense that West Samaria was in violation of its plan of operation.

Instead, at ¶31, the Court of Appeals treats the horrible portrayal of Tri-Corp instigated by Bauman as an excuse for Bauman's own conduct. The Court wholeheartedly adopted Bauman's version of the facts, which the jury clearly rejected.

[13]Tri-Corp addressed this in its motion for reconsideration. [App:22-23]

This is the opposite of a search for credible evidence to sustain the jury's verdict, and in this case, Tri-Corp has truly been deprived of its right to a jury trial.

CONCLUSION

For these reasons, the Third-Party Plaintiff-Appellant-Petitioner, Tri-Corp Housing, Inc., asks the Court to accept this Petition for Review.

Dated this 11th day of October, 2024.

Respectfully submitted,

MACHULAK, ROBERTSON & SODOS, S.C.

Electronically signed by John E. Machulak

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CERTIFICATIONS

1. Form and Length: I hereby certify that this Petition for Review and accompanying Appendix conform to the rules contained in §§ 809.62(4)(a) and 809.19(8)(b) and (c) for a brief (petition) and appendix produced with a proportional serif font. The length of this petition, exclusive of tables, signatures, and certifications, is 7,989 words.

2. Electronic Filing: I hereby certify that I have submitted an electronic copy of this petition, which complies with the requirements of §§ 809.62(4)(b) and 809.19(12).

3. Contents and Confidentiality of Appendix: I hereby certify that filed with this petition, either as a separate document or as part of this petition, is an Appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b).

Dated this 11th day of October, 2024.

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