FILED
10-09-2023
CLERK OF WISCONSIN
COURT OF APPEALS

COURT OF APPEALS OF WISCONSIN
DISTRICT III
Appeal No. 2023-AP-998
Circuit Court Case No. 2021-CV-625

CORY TOMCZYK, and
GENESIS VENTURES, INC. (d/b/a IROW),

Plaintiffs-Appellants,

v.

WAUSAU PILOT AND REVIEW CORPORATION,
DAMAKANT JAYSHI, and
SHEREEN SIEWERT,

Defendants-Respondents.

ON APPEAL FROM THE
CIRCUIT COURT OF MARATHON COUNTY
HONORABLE SCOTT M. CORBETT, PRESIDING

APPELLANTS' BRIEF

CRAMER MULTHAUF LLP
Attorneys for Plaintiffs-Appellants
By: MATTHEW M. FERNHOLZ
State Bar No. 1065765
1601 East Racine Avenue • Suite 200
P.O. Box 558
Waukesha, WI 53187
(262)-542-4278
mmf@cmlawgroup.com

TABLE OF CONTENTS

Page

STATEMENT OF ISSUES 1

STATEMENT ON ORAL ARGUMENT 1

STATEMENT ON PUBLICATION 1

INTRODUCTION 1

STATEMENT OF THE CASE 4

ARGUMENT 29

I. TOMCZYK WAS NOT A PUBLIC FIGURE IN AUGUST 2021 29

A. The "Public Figure" Standard for Defamation Claims…. 29

B. Tomczyk Was Not a General-Purpose Public Figure…… 30

C. Tomczyk Was Not a Limited-Purpose Public Figure…… 34

II. UNDER THE NEGLIGENCE STANDARD, WAUSAU PILOT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED 35

III. EVEN IF TOMCZYK IS DEEMED TO BE A PUBLIC FIGURE IN AUGUST 2021, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED 37

CONCLUSION 38

CERTIFICATION BY ATTORNEY 40

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Hebert, 2011 WI App 56, 332 Wis. 2d 432, 798 N.W.2d 275 38-39

Biskupic v. Cicero, 2008 WI App 117, 313 Wis. 2d 225, 756 N.W.2d 649 ..... 29, 30, 32, 34

Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982) 36

Foretich v. Cap. Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994) 30,33

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 29, 31-32

Harris v. Quadracci, 48 F.3d 247 (7th Cir. 1995) 38

Maguire v. J. Sentinel, Inc., 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999) 34

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 29, 38

Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987) 35

Van Straten v. Milwaukee Journal Newspaper-Publisher, 151 Wis. 2d 905, 447 N.W.2d 105 (Ct. App. 1989) 38

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980) 30-32

Wiegel v. Cap. Times Co., 145 Wis. 2d 71, 426 N.W.2d 43 (Ct. App. 1988) 31, 35

Other Authorities

Wis. JI – Civil 2509.....37

STATEMENT OF THE ISSUES

Is Cory Tomczyk a public figure for purposes of defamation law?

Circuit Court: The circuit court held that Tomczyk was a limited-purpose public figure.

Standard of Review: Whether an individual is a public figure is a question of law for the court to decide. *Biskupic v. Cicero*, 2008 WI App 117, ¶14, 313 Wis. 2d 225, 756 N.W.2d 649. An appellate court applies a de novo standard of review to a legal question with an undisputed set of facts. *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶20, 338 Wis. 2d 46, 809 N.W.2d 58.

STATEMENT ON ORAL ARGUMENT

The Plaintiffs-Appellants respectfully request oral argument.

STATEMENT ON PUBLICATION

The Plaintiffs-Appellants believe this case presents an important issue of statewide significance that warrants publication.

INTRODUCTION

This appeal presents an opportunity for this Court to clarify the protections afforded to private citizens who are defamed by the media. On August 28, 2021, the *Wausau Pilot & Review* made a decision that would forever change Cory Tomczyk's life. In reporting on Marathon

County Board meetings relating to the "Community for All" resolution, *Wausau Pilot* wrote the following: "Mosinee resident Cory Tomczyk, during an Executive Committee meeting on Aug. 12, called commission members 'fools' who are paid by taxpayers. Tomczyk, earlier this month, was widely overheard calling a 13-year-old boy who spoke in favor of the resolution a 'fag,' prompting another resident, Christopher Wood, to say later that the boy should 'get over it.'"

"Fag" is one of the most explosive words in the English language, with a long history of being used as a vile epithet. Being associated with using that word in a public forum and against a 13-year-old child can cause a lasting stain on one's reputation. One would expect that before attributing such a quote to Tomczyk, the *Wausau Pilot* would have confirmed the quote with multiple witnesses and afforded Tomczyk the opportunity to respond. But that is not what happened. Instead, the *Wausau Pilot* relied on a journalist (Damakant Jayshi) who never attended the meeting and who never spoke to a single witness. Jayshi felt comfortable putting his name on the byline because his editor, Shereen Siewert, told him she was sure Tomczyk said it. But the source Siewert relied on was a retired

journalist named Pat Peckham, who assured her that Tomczyk said it because "it was the talk of the town." Siewert and Peckham are alike in two respects: both have a long-running disdain for Tomczyk and neither one of them attended the August 12 meeting.

Despite this journalistic malpractice by *Wausau Pilot*, the circuit court below nevertheless granted summary judgment and dismissed Tomczyk's defamation claims on the grounds that Tomczyk was a "limited-purpose public figure" in August 2021 because he had (like many citizens) spoken out against the Community for All resolution. According to the circuit court, Tomczyk could not meet the "actual malice" standard applicable to defamation claims brought by public figures.

This holding was in error. Although now a State Senator, at the time the defamatory article was published, Tomczyk was a private citizen whose only connection to the Community for All Resolution was that he attended public hearings to express opposition to the resolution. This act of basic citizenship should not be used to transform unsuspecting private citizens into public figures. This Court should reverse the circuit court and remand with instructions to apply the correct standard to Tomczyk's defamation claims.

STATEMENT OF THE CASE

Background on Cory Tomczyk

Cory Tomczyk is the founder and owner of IROW (Industrial Recyclers of Wisconsin), which provides recycling and document destruction services to businesses in central and northern Wisconsin. (R. 59 at p. 17-19.) Like many small business owners, he has been actively involved in his community, previously serving on the Mosinee School Board, the Greater Wausau Chamber of Commerce, and the Mosinee Community Athletic Association. (R. 42 at p. 268-270, Ex. N.) He has also volunteered with a number of local charities, such as the Mosinee Community Athletic Association and the Hope Food Pantry. (Id.) Similarly, he has served on the board of various business group and trade organizations. (Id.) He is currently a State Senator serving the 29th Senate District, having won election in November 2022 after declaring his candidacy in May 2022. (R. 59 at p. 39:3-5.)

The Community For All Resolution

Sometime in 2020 or 2021, Tomczyk learned about Marathon County's proposed "Community for All" resolution through an e-mail he received from the Republican Party. (R. 59 at p. 34:11-16.) Tomczyk opposed the resolution on the grounds that "it left the door

open for too many things to go in directions that I personally wouldn't support" and that "it set up the opportunity for some liberal people to enforce their viewpoints and their values on other people within the community." (Id. at p. 35:1-8.) Tomczyk spoke twice as a private citizen at Marathon County Board meetings in opposition to the Community for All resolution, on May 13 and August 12, 2021. (Id. at p. 35:9-18; 47:16-24.) He also attended a protest against the resolution in the summer of 2021. (Id. at p. 36:11-25, 37:1-7.)

August 12 Marathon County Board Executive Committee Meeting

Tomczyk learned that the Community for All resolution would be discussed at the August 12, 2021 Marathon Committee Executive Meeting after reviewing the publicly posted meeting agenda. (R. 59 at p. 51:19-25.) Tomczyk went to the meeting by himself, and when Meg Ellefson saw him, she motioned over for him to sit next to her. (Id. at p. 53:20-21, 54:14-15.) Tomczyk was one of 40 members of the public who spoke at the August 12 meeting. (R. 60.)

The meeting was crowded, with a full gallery by the time the meeting was called into session. (R. 59 at p. 64:10-12.) Tomczyk and Ellefson sat in the second row, roughly 15 feet away from those in the back row. (Id. at p. 66:4-14, p. 70:16-25, 71:1-3.) The people in

attendance that evening spoke constantly, resulting in an ongoing "dull murmur" throughout the evening. (Id. at p. 71:9-19.) A young child was in the back row, and people were getting up and leaving throughout the meeting. (Id. at p. 80:8-22.)

The meeting began at around 4:00 p.m., and Ellefson left at around 5:45 p.m., after the public comment period ended. (R. 56, ¶4.) Tomczyk left at around 6:12 p.m. that evening. (R. 58, ¶16, R. 73.) The entire time Ellefson was at the meeting she was seated next to Tomczyk. (R. 56, ¶4.) At no point did Ellefson ever hear Tomczyk use the words "fag," "faggot," or any derivative of those words. (Id., ¶5.)

THE *WAUSAU PILOT & REVIEW* REPORTS ON THE COMMUNITY FOR ALL RESOLUTION

August 21, 2021 Article

On August 21, 2021, the *Wausau Pilot* published an article entitled, "As diversity decision nears conclusion, an adult dismisses a slur against 13-year-old, saying 'Get over it!'." (R. 30.) The focus of the article was the August 19, 2021 Marathon County Board Educational meeting.[1] (Id.) The article was written by Damakant

[1] A link to a publicly available recording of the meeting can be found here: https://www.youtube.com/watch?v=5wZEQIEvFz0.

Jayshi, a reporter for *Wausau Pilot*, and edited by Shereen Siewert, *Wausau Pilot*'s editor. (R. 61 at p. 45:1-6.) Much of the article was a look back to the August 12 Executive Committee meeting the prior week. According to the August 21 article, Norah Brown "said her son, 13, and another speaker faced a slur at the Executive Committee meeting [of August 12]." (R. 30, p. 3.) The article went on to state that "Lisa Ort Sondergard "witnessed the episode and said she heard a local businessman use the slur 'fag.'" (Id.)

Jayshi, however, never spoke with Brown or Sondergard as sources in writing the article. Instead, he relied entirely on watching the proceedings on YouTube. (R. 61 at p. 45:11-25, 46:1-12.) In fact, Jayshi lives in Georgia and does all of his reporting for *Wausau Pilot* remotely. (Id. at p. 18:14-16.) Indeed, Jayshi did not know the identity of the "local businessman" identified in his article and made no effort to determine who the businessman was, because "I was here in Atlanta, so it wasn't possible for me. I wasn't plugged into that local scene as much as I am now." (Id. at p. 64:17-25, 65:1-7.) As Jayshi testified, he has no idea when the word "fag" was used at the August 12 meeting. (Id. at p. 65:20-25, 66:1-8.)

Subsequently, Ort Sondergard wrote to the *Wausau Pilot* to say that Jayshi falsely quoted her and to demand a retraction:

From: Lisa Ort- Sondergard
Date: Fri, Oct 1, 2021 at 2:16 PM
Subject: August 21, 2021 Article
To: editor@wausaupilotandreview.com

Dear Editor:

The purpose of this email in regards to a false attribution to me regarding a story published by the Wausau Pilot and Review on August 21, 2021, by Mr. Jayshi titled "As diversity decision nears conclusion, an adult dismisses a slur against 13-year-old, saying 'get over it!'"

The statement in questions reads:

Lisa Ort Sondergard who is a member of the county's Diversity Affairs Commission, witnessed the episode and said she heard a local businessman using the slur "fag."

This attribution as reported by Mr. Jayshi is false because I never said that I "witnessed" the episode. I am attaching my complete public statement, which was read by me word-for-word on August 19th, 2021 during the meeting's public comment period. It should be noted that this is the only statement I have ever given and I have never spoke to Mr. Jayshi separately before or after I made my statement.

Thank you for your attention in this needed correction.

Respectfully,
Lisa Ort Sondergard

(R. 33.) *Wausau Pilot* has yet to issue a retraction or correction to its August 21 article. (R. 61 at p. 55:21-25, p. 56:1.)

August 28, 2021 Article

On August 28, 2021, Jayshi wrote an article published by the *Wausau Pilot* entitled "Threats against elected officials marked heated debate on 'Community for All' resolution." (R. 31.) Although the August 21 article did not attribute the "fag" quote to Tomczyk, the August 28 article stated, "Mosinee resident Cory Tomczyk, during an

Executive Committee meeting on Aug. 12, called commission members 'fools' who are paid by taxpayers. Tomczyk, earlier this month, was widely overheard calling a 13-year-old boy who spoke in favor of the resolution a 'fag,' prompting another resident, Christopher Wood, to say later that the boy should 'get over it.'" (Id. at p. 5.) The August 28 article provided a hyperlink to the August 21 article, suggesting the first article provided evidence that Tomczyk was "widely overheard" using the word "fag." (Id.) But as noted above, the August 21 article never mentioned Tomczyk.

Moreover, both the August 21 and August 28 articles misleadingly suggest that Christopher Wood acknowledged that Norah Brown's son was called a "fag." As even Siewert acknowledged, Wood was not speaking about Brown's son specifically, but was speaking more generally about someone being called a "fag." (R. 62 at p. 59:9-18.)

So how did Jayshi and the *Wausau Pilot* decide between August 21 and August 28 that Tomczyk used the word "fag?" Jayshi relied entirely on the word of his editor, Siewert. (R. 61 at p. 71:4 – 72:1.) Indeed, before publishing the article that identified Tomczyk, Jayshi never asked him for a comment "[b]ecause I have complete

trust in my editor [Siewert]." (Id. at p. 80:20-21.) According Jayshi, Siewert "asked around and a few people told her that it was Mr. Tomczyk." (Id. at p. 72:16-17.) The only source Jayshi could recall Siewert identifying Pat Peckham, who at the time was City of Wausau Councilman. (Id. at p. 72:1-3.)

Pat Peckham Testimony

In addition to being a member of the Wausau City Council, Pat Peckham had a 44-year career in journalism, as both a writer and an editor, working most recently for the *Wausau Daily Herald* and *City Pages* before retiring in 2016. (R. 63 at p. 5-20.) He is well familiar with rules of journalistic ethics, and testified that if a journalist did not overhear a quote firsthand, before he could publish a story attributing the quote "the old rule [was] that you always have two sources for something like that." (Id. at p. 23:15-23.) Or as he bluntly put it, "You don't go out on a limb like that on the basis of one person saying something. Standard journalistic practice, anybody responsible is going to have two or three people." (R. 63 at p. 137:21-25.)

Significantly, Peckham did not attend the August 12 meeting where the word "fag" was allegedly uttered. (R. 63 at p. 31:6-8.) He thus had no firsthand knowledge that Tomczyk even attended the

August 12 meeting. (Id. at p. 31:19-25.) However, Peckham testified that he nevertheless knew Tomczyk used a slur at the August 12 meeting because "it was the talk of the town." (Id. at p. 30:2-4.) When asked who the people were who were doing the talking, Peckham answered, "I don't recall. Many people." (Id. at p. 30:5-6.) According to Peckham, he relied on "Facebook comments," comments that he could not identify at his deposition. (Id. at p. 32:8-9.)

Asked to confirm what sources he spoke with to confirm what Tomczyk said, Peckham named Norah Brown and a second person unnamed person who he could not recall, and for which he does not "know how to go back and find out." (R. 63 at p. 37:4-21.) The existence of a second source was critical to Peckham, as "I wasn't going to believe it until I heard it myself from two reliable sources." (Id. at p. 37:10-13.)

Peckham has strong negative feelings towards Tomczyk, stating "I don't care for his demeanor or attitude" and that he is "headstrong, a bully, and politically off target" in that his political views are "rather extreme and ill-considered." (Id. at p. 50:22-25, p. 51:1-5.) He expressed these views in writing before this lawsuit was

filed, writing to a friend on October 1, 2021, that Tomczyk "is indeed a cantankerous bully" and that he "screwed a local nonprofit out of money." (Id. at p. 116:14-24.)

Peckham testified that he believed Tomczyk used the slur when two speakers, Norah Brown's son and Patrick Bacher were walking up to speak at the August 12 meeting:

> My impression is that I believe it was Mr. Bacher and young Mr. Brown, when they walked up to the – when they rose to walk to the microphone and passed within proximity of Mr. Tomczyk, that he turned and said to his friend at the meeting something about, "He's a faggot," or "There's a faggot," or something like that.

(Id. at p. 80:10-16.) Peckham understood the person seated next to Tomczyk was Meg Ellefson. (Id. at p. 92:18.) Peckham's description of what Tomczyk said and when he said it differed from the version he told a friend on August 14, 2021, two days after the meeting: "I watched the whole event last night. Tomczyk said some stupid things up at the mike, but I'm hearing that **as he left the room**, he called Patrick Bacher and a middle school boy 'fags.' Patrick says he did not clearly hear what was said, so he could not confirm it for me." (R. 62 at p. 16.) (Emphasis added).

Peckham was eager for someone to write a story identifying Tomczyk as the source of the remark, even writing to a friend on

August 24, 2021, "If I had been there to hear it, I'd be ratting him out, but it almost has to be somebody who heard what was said." (R. 63 at p. 114:1-4.) When Peckham was sent a link to the August 28 article by Christine Salm identifying Tomczyk, he reacted with glee:



(R. 64 at p. 33.) Peckham testified he was "pleased" that *Wausau Pilot* ran the article. (R. 63 at p. 116:5-7.) Indeed, Peckham said he was "tempted" to write that Tomczyk used a slur at the August 12 meeting, but was afraid that he would be sued. (Id. at p. 40:6-22.)

In short, Peckham had no firsthand knowledge of what Tomczyk said at the August 12 meeting, and he could only identify one person who allegedly overheard Tomczyk use a slur. He is thus not a reliable source in any way.

Shereen Siewert Testimony

Shereen Siewert is the founder, editor, and publisher of the *Wausau Pilot*. (R. 62 at p. 18:12-18, 19:5-6, 21:19-23.) She is also a

journalist for the publication. (Id. at p. 22:2-4.) When she is reporting on a story where she did not hear a quote firsthand, her policy is to verify the quote either through a transcript or recording of the proceeding, or from "trusted sources, which I have developed over the course of my career here." (Id. at p. 22:5-19.) One of her "trusted sources" is Pat Peckham. (Id. at p. 23:17-25, 24:1-9.) If, however, one of her "trusted sources" did not hear a quote firsthand, she would need two sources to confirm a quote. (Id. at p. 27:1-16.) In her view, it would be "inappropriate" for a journalist to attribute a quote to someone that was not properly corroborated. (Id. at p. 28:1-6.)

Siewert admitted that when the August 21 article was published, "we did not know the identity of the man who used the slur." (Id. at p. 50:13-19.) Nevertheless, in the August 21 article, *Wausau Pilot* referred to the unknown person as a "local businessman" based on social media posts. (Id. at p. 51:2-7.) Siewert does not know if any fact-checking was done for the August 21 article. (Id. at p. 51:8-12.) In fact, at the time the August 21 article was published, Siewert was under the mistaken impression that Jayshi had spoken with Norah Brown. (Id. at p. 67:1-9.)

The decision to add Tomczyk's name to the August 28 article was made by Siewert. (Id. at p. 62:19-25, 63:1.) As such, it is important to review how she arrived at that decision. According to Siewert, she called Norah Brown sometime between the August 21 and 28 articles to ask "whether or not she heard the slur." (Id. at p. 35:1-24.) But that is not consistent with Brown's testimony, who testified "She [Siewert] did not call me asking about what I heard. She called to tell me that there was an issue." (R. 65 at p. 42:11-13.) Moreover, Siewert acknowledged that Jayshi never spoke with Brown and that Brown was not a source for the August 28 article. (R. 62 at p. 38:7-8.) And in discovery responses, Defendants did not include Norah Brown on the list of "individuals [who] were communicated with as part of the reporting that led to the August 28, 2021 story." (R. 66 at Interrogatory 3.)

In other words, *Wausau Pilot* did not have a single source who heard Tomczyk use the slur when it named him in the August 28 article. What Siewert relied on instead was unsubstantiated hearsay and social media gossip. One of those rumor mongers was Peckham, who wrote to her that Tomczyk said the word "fag" at the August 12 meeting, despite not attending:

> Q: Did Mr. Peckham attend the August 12, 2021 board meeting?
>
> A: No.
>
> Q: But he told you over email that Cory Tomczyk used the word "fag"?
>
> A: Yes.
>
> Q: And how did Mr. Peckham know that Mr. Tomczyk used that word without attending the meeting?
>
> A: I can't answer for Mr. Peckham.

(R. 62 at p. 45:6-16.) According to Siewert, Peckham "pressured me a bit on publishing Cory's name." (Id. at p. 83:18-19.)

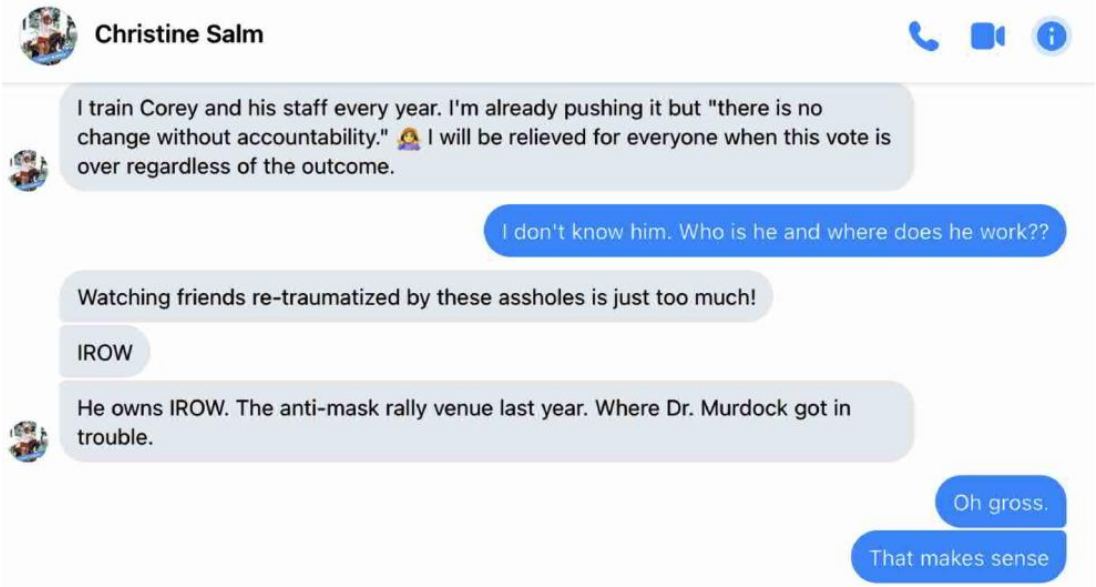
Besides Peckham, Siewert's "fact checking" consisted of relying on a Tweet by Mayor Katie Rosenberg, a Facebook post by Margaret Grout Pagoria, and a comment to the post by Lisa Ort Sondergard. (Id. at p. 46:20 to 48:8.) None of these individuals have personal knowledge of Tomczyk using the word "fag," as none of them overheard the comment. Mayor Rosenberg did not attend the August 12 meeting and testified she does not know if Tomczyk used the word "fag" at that meeting. (R. 67 at p. 32:12-25, p. 33:1.) When Pagoria was asked by Peckham if she would be willing to be named as a source in a story about Tomczyk using the word fag, she declined, saying she "didn't directly hear him say the words" and that she "would not be comfortable speaking on this at this time and cannot be

named." (R. 64 at p. 40.) And as for Ort Sondergard, as mentioned earlier, she demanded that *Wausau Pilot* retract its statement naming her as a source who witnessed Tomczyk use the word "fag," because she never said she witnessed Tomczyk use the word.

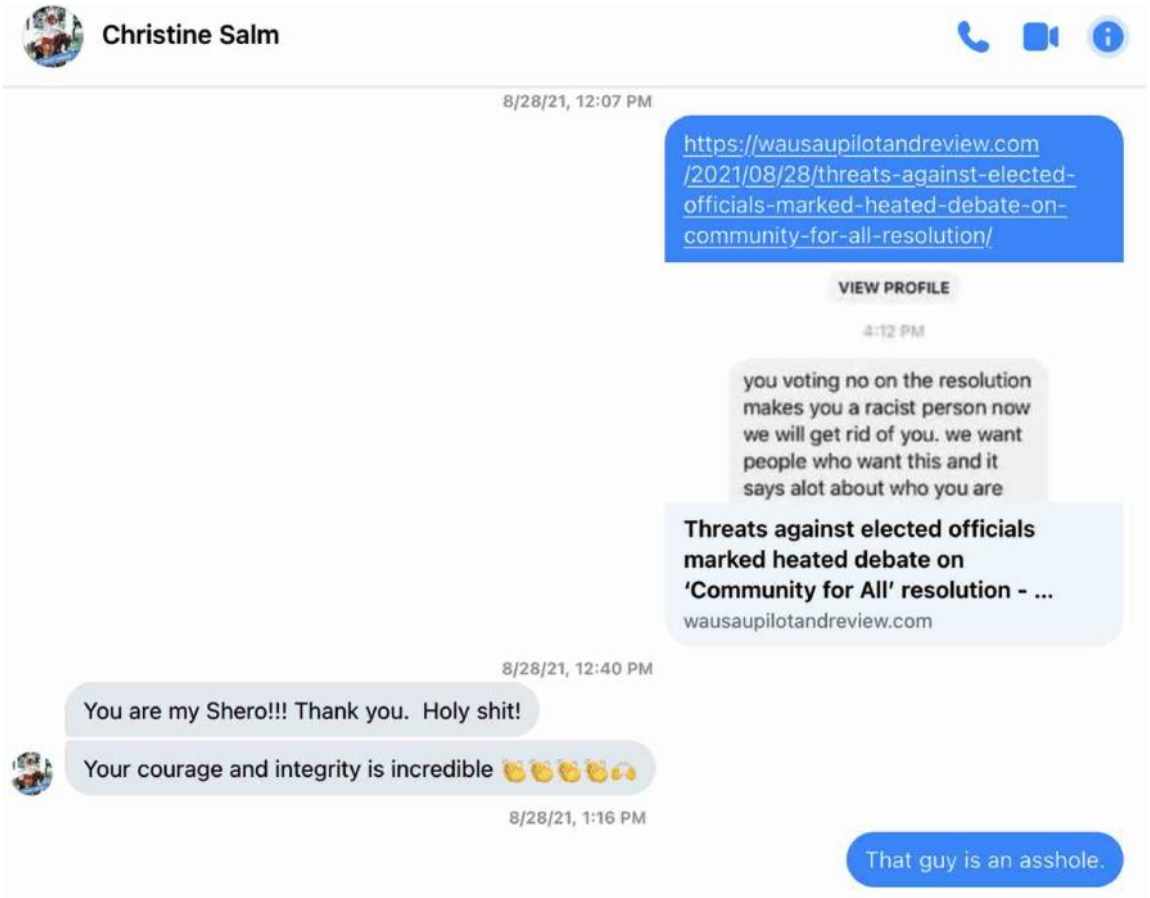
So to conclude, *Wausau Pilot* ran a story accusing Tomczyk of calling a 13 year-old boy a "fag" *without a single corroborating source who had personal knowledge or heard Tomczyk use the word*.

Siewert Has a Palpable Disdain for Tomczyk

Siewert's rush to publish the story may have borne in part by her hostility towards Tomczyk. In private texts with her friend Christine Salm on August 24, 2021, shortly before she published Tomczyk's name, Siewert described an anti-mask rally organized by Tomczyk as "gross."



(R. 68 at p. 51.) Then, the day the August 28 article was published, she received a celebratory text from Salm. Siewert responded by labelling Tomczyk an "asshole."



(R. 68 at p. 52.) And in a later text exchange, Salm wrote (in reference to Tomczyk) "Jesus I hate this fucking bully." To which Siewert responded, "Me too." (Id. at p. 62.) And in a final crass turn of phrase, Siewert referred to Tomczyk as a "dick head." (Id. at p. 65.)

Wausau Pilot Tries to Clean up the Mess

On September 24, 2021, Tomczyk, through counsel, sent a notice of defamation and demand for retraction letter to Siewert and *Wausau Pilot*. (R. 32.) The retraction letter demanded that *Wausau Pilot* either provide supporting documentation or witness statements substantiating the quote attributed to Tomczyk, or retract the quote. (Id.) Soon after receiving the letter, Jayshi and Siewert exchanged e-mails on October 4-5, 2021 in an attempt to "look[] for additional sources to help our attorney." (R. 62 at p. 65:2-3, R. 69.) Remarkably, although Siewert apparently relied on Peckham as a "trusted source" to confirm that Tomczyk said "fag" at the August 12 meeting, she was still unsure on October 5, 2021, whether Peckham actually attended the meeting. In an e-mail to Jayshi, she wrote:

> Ort-Sondergard referred to the incident but did not call him by name. In her statement she e-mailed to me, she made that clear. I also don't know if Pat [Peckham] was really there or just heard it second hand. . . . I may reach out to Pat privately on his gmail address rather than his city email and ask. I have a feeling he wasn't there – but I don't know.

(R. 69.) Shortly after the lawsuit was filed, a panicked Siewert wrote to a colleague to confess that, "When Damakant and I spoke, I was convinced he actually spoke with the witnesses – that's why I went with publishing the name. I can't undo it now, though." (R. 62 at p.

98:23-25, 99:1-17.) She also e-mailed Patrick Bacher on November 9, 2021, hoping that he could verify *Wausau Pilot's* decision to attribute the quote to Tomczyk. (Id. at p. 97:18-25, 98:1-12.) Bacher never responded. (Id.)

Wausau Pilot Sources the Article After it is Sued for Defamation

On January 12, 2022 – more than four months after the August 28, 2021 article identified Tomczyk as the source of the "fag" remark and two months after this lawsuit was filed – *Wausau Pilot* secured the affidavits of a number of witnesses who allegedly will testify that Tomczyk used the phrase. These witnesses will now be discussed.

Alex Heaton

Alex Heaton submitted an affidavit with the following observation:

> At one point during the meeting, I heard Mr. Tomczyk refer to one of the community members speaking in favor of the resolution as a "fag" or "faggot." I also observed the woman sitting immediately in front of Mr. Tomczyk turn and say something to Mr. Tomczyk. *Soon after the exchange, Mr. Tomczyk stormed out of the meeting before it had ended.*

(R. 38, ¶3.) (Emphasis added.) This last statement is demonstrably false. At summary judgment, *Wausau Pilot* argued that, based on Norah Brown's text to Christine Salm and the publicly available video of the August 12 meeting on YouTube, Tomczyk used the word "fag"

at around 4:14 p.m., which was the 12-minute mark of the YouTube video. (R. 44:18.) And yet that same YouTube video never shows Tomczyk "storming out of the meeting." In fact, a shot of the crowd at the 1:47:38 mark of the video—*over 95 minutes later!*—shows Tomczyk calmly seated at his same location:



And the gentlemen seated just to the left and two rows behind Tomczyk is Heaton. In fact, the security camera footage of the proceeding shows Mr. Tomczyk leaving at 6:12 p.m., long after the public comments ended:



(R. 73.)

Megan Marohl

Megan Marohl attended the August 12 meeting with her mom, Carrie Marohl, and Alex Heaton, whom she described as a "friend." (R. 41, ¶2.) At the time of the meeting, she was about to begin her senior year of high school. (Id., ¶1.) Megan Marohl stated in her affidavit that Tomczyk said either "fag" or "faggot" "while a young

individual was speaking." (Id., ¶4.) She claimed that she then immediately turned to her mom. (Id.)

At her deposition, Megan Marohl testified emphatically that Tomczyk said the comment as Norah Brown's son was walking up to the podium to speak. (R. 70 at p. 24:7-25, p. 25:1-16.) In fact, she pinpointed the comment at the 1:02:57 mark of the YouTube video and noted that Tomczyk was covering his mouth when he allegedly uttered the epithet. (Id.) Below is a screen shot of when Megan Marohl testified Tomczyk said the word "fag" or "faggot"



Significantly, this occurs a whopping *50 minutes* after Norah Brown testified the comment was made. Moreover, Brown's son is walking to the podium to speak while this happened.

Like Siewert, Megan Marohl has strong negative feelings towards Tomczyk. Although she has never spoken with Tomczyk, Marohl testified that "I knew of him as a not particularly nice person" because of "his party affiliation." (R. 70 at p. 27:4-22.)

Carrie Marohl

In her affidavit, Carrie Marohl stated "About half-way through the meeting, while a younger person was speaking, I heard Mr. Tomczyk say the word 'fag.' I recall being quite startled given that it was an adult referring to a child as a "fag." (R. 71 at ¶4.) As shown in the YouTube screen shot above, Brown's son was speaking about halfway through the meeting. Although Carrie Marohl could not recall precisely when Tomczyk allegedly used the slur, she agreed with her daughter that it was when Brown's son was speaking. (R. 72 at p. 19:17-23.)

Norah Brown

Defendants' summary judgment motion relied primarily on Norah Brown's text message to Christine Salm at around 4:16 p.m.:

"The man behind me just referred to the speaker and then to my son as a f**. I am in tears and livid." (R. 44:19.) According to the Defendants, this was definitive proof of what Tomczyk said and when he said it. Yet, there are plenty of holes and inconsistencies with Brown's story.

To begin with, as set forth above, the Marohls—who were seated two rows behind Tomczyk—provided a different account of what Tomczyk said and when he said it. Here is Brown's version:

> Q: Tell me exactly what you believe Mr. Tomczyk said.
>
> A: The words I heard were -- You mean in reference to my son?
>
> Q: Well, why don't you just tell me what derogatory language Mr. Tomczyk used, and then we can talk about the specifics of who you believe it was directed to. So what is it that you heard him say at this meeting that you would consider derogatory?
>
> A: I heard him say, "There's fag number 1." I'm so sorry. I don't even like repeating that word.
>
> Q: You heard him say, "There's fag number 1." And then what else did Mr. Tomczyk say?
>
> A: I heard him say another sentence, and the words I heard clearly were "the second fag."

(R. 65 at p. 23:13-25, 24:1.) The Marohls, however, testified that Tomczyk made the comment while Brown's son was speaking, which

occurred *50 minutes* later. The Marohls also never mention a second "fag" comment or reference.

Brown testified that her son read his speech from his own cell phone. (R. 65 at p. 22:18-24.) When shown the video from that evening of her handing her phone to her son, she backtracked and said it was possible her son used her phone. (Id. at p. 37:8-15.) This seemingly small detail matters, as Brown messaged Salm to express her relief that "[My son] thankfully did not hear it (I think)." (R. 39, p. 3.) She later wrote "I do not want [my son] to be uncomfortable first and foremost" and "I just don't want [my son] to hear it if he did not hear him." (Id. at p. 3-4.) Despite expressing concern to Salm that her son would find out about the alleged slur, Brown *immediately* handed her phone over to her son after messaging Salm about the use of the word "fag":



(14:30 mark of YouTube video). It makes very little sense that Brown would share her phone with her son after sending a message about a topic she did not want him to know about.

Finally, Brown testified that Siewert never called her to verify what was said at the August 12 meeting, nor did she ever speak with Jayshi. (R. 65 at p. 7 and 42.)

PROCEDURAL HISTORY

When *Wausau Pilot* refused to issue a retraction, Tomczyk and IROW filed suit on November 5, 2021, alleging personal and business defamation claims against the *Wausau Pilot* and Jayshi. (R. 3.) An Amended Complaint added Siewert as a Defendant. (R. 29.) The *Wausau Pilot* Defendants[2] filed a motion for summary judgment on December 2, 2022. (R. 43.) In their motion, *Wausau Pilot* argued that: (1) Because Tomczyk was a "public figure" in August 2021, the "actual malice" standard applied to his defamation claims; (2) *Wausau Pilot's* reporting was substantially true; and (3) *Wausau Pilot's* August 28 article was privileged as a "true and fair report of a government proceeding." (R. 44.)

[2] Because all three Defendants filed a joint summary judgment motion, the use of *Wausau Pilot* in the remainder of this Brief shall refer collectively to the Defendants.

On the first issue, *Wausau Pilot* initially argued that Tomczyk was a general-purpose public figure. (R. 44:11-14.) For the first time in their summary judgment reply brief, *Wausau Pilot* switched gears and argued that Tomczyk was a limited-purpose public figure. (R. 78:5-7.)

In a written decision, the circuit court granted *Wausau Pilot's* motion for summary judgment. (R. 86.) The court reached only the first issue raised, holding that:

> The Court agrees that Tomczyk was a public figure at least for the limited purpose of the "Community for All" debate. He was a local business owner who spoke out against the resolution at two public meetings on the issue, including the August 12 meeting at which he allegedly uttered the slur. Both his public comments and the alleged use of a slur toward another person making public comment were newsworthy, making his role in the controversy more than trivial or tangential. And, given that the stated purpose of the "Community for All" resolution was to promote inclusivity, his alleged use of the slur would be germane to the resolution and to his participation in the controversy.

(R. 86:4.) The circuit court went no further, holding that, "Because the Court agrees that Tomczyk was a public figure and that he cannot establish actual malice, the plaintiffs' defamation claims must be dismissed. Consequently, the Court need not reach the defendants' other arguments." (R. 86:5.)

ARGUMENT

I. TOMCZYK WAS NOT A PUBLIC FIGURE IN AUGUST 2021

A. The "Public Figure" Standard for Defamation Claims

In *New York Times Co. v. Sullivan,* the United States Supreme Court held that a public official cannot successfully sue for defamation unless the official proves the defamatory statement was made with actual malice. 376 U.S. 254 (1964). To prove actual malice, a plaintiff must demonstrate that the defendant had knowledge that the statement was false or acted with reckless disregard of whether it was false or not. *New York Times Co.*, 376 U.S. at 279-80. The Supreme Court later extended this rule to "public figures." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). A "public figure" is someone "who become[s] involved in a public controversy or who assume[s] a public role that warrants treating them in the same way as public officials." *Biskupic v. Cicero*, 2008 WI App 117, ¶15, 313 Wis. 2d 225, 756 N.W.2d 649. Wisconsin recognizes two types of public figures for defamation cases: "public figures for all purposes and public figures for a limited purpose." *Id.*, ¶16. In its summary judgment decision, the circuit court held that Tomczyk was a limited-

purpose public figure, but did not reach the issue of whether Tomczyk was a general-purpose public figure.

Whether a person is a public figure is a question of law for the court to decide. *Biskupic*, 313 Wis. 2d 225, ¶14. However, courts must start with the presumption that the plaintiff is a private individual and it is the defendants who bear the burden of proving that the plaintiff is a public figure. *Foretich v. Cap. Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994). Moreover, the whether a plaintiff is a public figure is determined "at the time of the alleged defamation." *Id.*

B. Tomczyk Was Not a General-Purpose Public Figure

As courts have noted, the test for a private citizen to be considered a "public figure" is a "strict one," and that such a person would be a "rare creature." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). A public figure is someone who has achieved "general fame or notoriety." *Biskupic*, 313 Wis. 2d 225, ¶16. There is no set test for this standard. *Id.* However, courts recognize that "[f]ew people, of course, attain the general notoriety that would make them public figures for all purposes." *Waldbaum*, 627 F.2d at 1296.

For someone to be deemed a general-purpose public figure, "[a]n individual may have attained a position of such persuasive power and influence and of such pervasive fame or notoriety that he has become a public figure in all situations." *Waldbaum*, 627 F.2d at 1292 (citing *Gertz*, 418 U.S. at 351) (quotations and citations removed). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz*, 418 U.S. at 352. Put bluntly, someone is a public figure only "if he is a 'celebrity' [and] his name a 'household word' whose ideas and actions the public in fact follows with great interest." *Waldbaum*, 627 F.2d at 1296; *see also Wiegel v. Cap. Times Co.*, 145 Wis. 2d 71, 82, 426 N.W.2d 43 (Ct. App. 1988) (citing to *Waldbaum* for the proposition that to be a "public figure" a "person must be a well-known celebrity, his [or her] name a household word") (cleaned up).

As courts have noted, the test for a private citizen to be considered a "public figure" is a "strict one," and that such a person would be a "rare creature." *Waldbaum*, 627 F.2d at 1292. A public figure is someone who has achieved "general fame or notoriety."

Biskupic, 313 Wis. 2d 225, ¶16. There is no set test for this standard. *Id.* However, courts recognize that "[f]ew people, of course, attain the general notoriety that would make them public figures for all purposes." *Waldbaum*, 627 F.2d at 1296.

To support their contention that Tomczyk was a public figure in August 2021, Defendants cited to the fact that Tomczyk served on the Mosinee School Board from 2006 to 2019, that he was an officer in the Marathon County Republican Party from 2008-2015, and that he was sworn in as a State Senator on January 3, 2023. (R. 44:12.) It is dubious that service on a school board or volunteering in a low-profile position with a local political party is enough to grant someone the "general fame or notoriety" or "celebrity" status required to become a public figure. But leaving that aside, whether a plaintiff is a public figure is determined "at the time of the alleged defamation," which is this case is August 2021. *Foretich*, 37 F.3d at 1553. Thus, neither Tomczyk's past community service, nor his current position as a State Senator, has any bearing on the "public figure" analysis in this case.

One we remove Tomczyk civic involvement prior to August 2021, all that *Wausau Pilot* offered to establish that Tomczyk was a

public figure was his position as a board member of the Greater Wausau Chamber of Commerce, that he "organized and spoke at local protests," and that he spoke in opposition to the Community for All resolution at two County Board meetings. (R. 44:12-13.) If *Wausau Pilot* were correct that serving on the board of a local non-profit, attending protests, and speaking at local government meetings is enough to make one a "public figure," then any mildly responsible citizen will unknowingly be transformed into a famous (or notorious) celebrity. This is not the law.

Wausau Pilot also cited to the fact that Tomczyk appeared on two local radio stations in 2020 to discuss his opposition to the Safer at Home order. (R. 44:12-13.) But limited appearances on local radio does not a public figure make. "Although access to the media is often an accouterment of public figure status and part of the rationale for distinguishing a public figure from the more vulnerable private individual who generally lacks access, it is certainly not determinative of public figure status." *Maguire v. J. Sentinel, Inc.*, 232 Wis. 2d 236, 246, 605 N.W.2d 881 (Ct. App. 1999).

For these reasons, Tomczyk was not a general-purpose public figure.

C. Tomczyk Was Not a Limited-Purpose Public Figure

"Limited purpose public figures are required to prove actual malice only when their role in the controversy is 'more than trivial or tangential' and the defamation is 'germane to [their] participation in the controversy.'" *Biskupic*, 313 Wis. 2d 225, ¶17 (citations omitted). As one court has noted, "[a]n individual does not forfeit the full protection of the libel laws merely by stating a position on a controversial issue if he or she is not a principal participant in the debate or is unlikely to have much effect on its resolution." *Wiegel v. Cap. Times Co.*, 145 Wis. 2d 71, 83, 426 N.W.2d 43 (Ct. App. 1988) (quoting *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987).

Here, all the circuit court relied to support its holding that Tomczyk played a "significant role" in the debate over the Community for All resolution is that "[h]e was a local business owner who spoke out against the resolution at two public meetings on the issue, including the August 12 meeting at which he allegedly uttered to slur." (R. 86:4.) According to the court, because "the stated purpose of the 'Community for All' resolution was to promote inclusivity, [Tomczyk's] alleged use of the slur would be germane to his participation in the controversy." (Id.)

This holding was in error. Tomczyk was never an elected official in the summer of 2021 and he never took a vote on the Community for All resolution. His role was limited to that of a concerned citizen.

Moreover, even if Tomczyk's role in the Community for All resolution was significant, the defamation claim is not related to his participation in the debate. The *Wausau Pilot* did not quote Tomczyk's public remarks or report on his views on the resolution. Instead, the paper published comments Tomczyk allegedly whispered to someone seated next to him and which had nothing to do with the public debate.

Because Tomczyk was not a public figure, the actual malice standard does not govern his defamation claims.

II. UNDER THE NEGLIGENCE STANDARD, WAUSAU PILOT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED

Because the circuit court incorrectly determined that Tomczyk was a public figure in August 2021, it improperly applied the actual malice standard to his defamation claims. The correct standard to apply to Tomczyk's defamation claims is the ordinary negligence standard. *Denny v. Mertz*, 106 Wis. 2d 636, 654, 318 N.W.2d 141 (1982) ("[A] private individual need only prove that a media

defendant was negligent in broadcasting or publishing a defamatory statement.") The ordinary negligence standard for private individuals is rooted in the notion "that freedom of the press is not an absolute, but may be limited to protect the valid reputation interests of members of society." *Id.* at 655.

To establish a defamation claim by the "negligence" standard, a plaintiff must prove by the ordinary burden of proof that the defendant "did not have a reasonable basis for making (publishing) the statement or did not use ordinary care in checking on the truth or falsity of the statement before making (publishing) it." Wis JI—CIVIL 2509. Ordinary care is defined as follows:

> Ordinary care is the degree of care which the great mass of mankind ordinary exercises under the same or similar circumstances. A person fails to use ordinary care when, without intending to do any wrong, he or she acts or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or the person's property, or the person or property of another, to an unreasonable risk of injury or damage.

Id.

The circuit did not apply this standard because it incorrectly held that Tomczyk was a limited-purpose public figure. The Court of Appeals should reverse the circuit court's summary judgment decision and hold that the negligence standard is the proper standard

that governs defamation claims brought by a private citizen such as Tomczyk.

III. EVEN IF TOMCZYK IS DEEMED TO BE A PUBLIC FIGURE IN AUGUST 2021, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED

Even assuming that the circuit court was correct in holding that Tomczyk was a public figure in August 2021 and that the "actual malice" standard applies, Defendants' motion for summary judgment must be denied. To prove actual malice, a plaintiff must demonstrate that the defendant had knowledge that the statement was false or acted with reckless disregard of whether it was false or not. *New York Times Co.*, 376 U.S. at 279-80. "Knowledge of falsity means that the defendant was actually aware that the contested publication was false" while "[r]eckless disregard of the truth or falsity of a publication occurs when the defendant in fact entertained serious doubts as to its truth, or a high degree of awareness of its probable falsity." *Harris v. Quadracci*, 48 F.3d 247, 252 (7th Cir. 1995) (internal citations, quotations, and alterations omitted). "The focus is upon the defendant's attitude pertaining to the truth or falsity of the published statements rather than upon any hatefulness or ill-will." *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 917, 447 N.W.2d 105, 110 (Ct. App. 1989).

For the reasons set forth above, *Wausau Pilot's* conduct in publishing Tomczyk's name without any corroborating witnesses constitutes "reckless disregard of the truth" as to whether Tomczyk was the person who used the slur.

At the very least, this issue presents a factual question that could not be resolved on summary judgment. Indeed, whether the failure to investigate allegations rises to the level of reckless disregard for the truth presents a factual question for the jury. *Anderson v. Hebert*, 2011 WI App 56, ¶25, 332 Wis. 2d 432, 798 N.W.2d 275.

CONCLUSION

For the reasons set forth herein, this Court should reverse the circuit court's summary judgment decision that Tomczyk was a limited-purpose public figure in August 2021. Accordingly, the actual malice standard does not apply to Tomczyk's defamation claims. The Court of Appeals should remand the matter to the circuit court with instructions to apply the negligence standard to Tomczyk's claims for defamation.

Dated this 6th day of October, 2023.

CRAMER MULTHAUF LLP,
Attorneys for Plaintiffs-Appellants,

BY: *Electronically signed by Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No. 1065765)

CRAMER MULTHAUF LLP
1601 East Racine Avenue • Suite 200
P.O. Box 558
Waukesha, WI 53187
(262)-542-4278
mmf@cmlawgroup.com

CERTIFICATION BY ATTORNEY

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 7,155 words.

I further hereby 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 6th day of October, 2023.

BY: *Electronically signed by Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No. 1065765)