

**FILED**  
**11-08-2023**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

WISCONSIN COURT OF APPEALS  
DISTRICT III

---

Appeal No. 2023AP000998

---

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

Plaintiffs-Appellants,

vs.

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

Defendants-Respondents.

---

Appeal from a Final Order of the Marathon County Circuit Court  
The Honorable Scott M. Corbett, Presiding  
Circuit Court Case No. 2021CV000625

---

**BRIEF OF DEFENDANTS-RESPONDENTS**  
**WAUSAU PILOT AND REVIEW CORPORATION,**  
**DAMAKANT JAYSHI, AND SHEREEN SIEWERT**

---

WILLIAMS & CONNOLLY LLP  
Joseph M. Terry, *pro hac vice*  
Stephen J. Fuzesi, *pro hac vice*  
Tyler Infinger, *pro hac vice*  
Peter Jorgensen, *pro hac vice*  
680 Maine Avenue SW  
Washington, DC 20024  
Phone: 202-434-5000  
Fax: 202-434-5029  
Email: jterry@wc.com  
Email: sfuzesi@wc.com  
Email: tinfinger@wc.com  
Email: pjorgensen@wc.com

GODFREY & KAHN, S.C.  
James Friedman, SBN: 020756  
Brian C. Spahn, SBN: 1060080  
Maxted Lenz, SBN: 1104692  
One East Main Street, Suite 500  
Madison, WI 53703  
Phone: 608-257-3911  
Fax: 608-257-0609  
Email: jfriedman@gklaw.com  
Email: mlenz@gklaw.com  
Email: bspahn@gklaw.com

*Attorneys for Defendants-  
Respondents*

## TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW .....	6
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	6
STATEMENT OF THE CASE.....	6
I. Statement of Relevant Facts.....	8
II. Procedural History .....	17
STANDARD OF REVIEW .....	18
ARGUMENT .....	19
I. Summary Judgment Should Be Affirmed Because Tomczyk Failed to Adduce Evidence of Actual Malice.....	19
A. The Actual Malice Standard Applies Because Tomczyk Is a Public Figure. ....	19
1. Tomczyk is a General-Purpose Public Figure Within Marathon County .....	20
2. At Minimum, Tomczyk is a Limited-Purpose Public Figure With Respect to the Community for All Debate.....	23
B. There Is No Evidence that the Wausau Pilot Acted with Actual Malice.....	26
II. Summary Judgment Should Be Affirmed Because the Challenged Statements Are Substantially True. ....	29
III. The Challenged Statements Are Also Protected By the Fair Report Privilege.....	32
IV. The Judgment Must Be Affirmed as to Jayshi Because of a Failure to Comply with Wisconsin’s Retraction Statute. ....	33
CONCLUSION.....	34

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Am. Fam. Mut. Ins. Co. v. Bateman</i> , 2006 WI App 251, 297 Wis. 2d 828, 726 N.W.2d 678.....	18, 34
<i>Anderson v. Hebert</i> , 2011 WI App 56, 332 Wis. 2d 432, 798 N.W.2d 275 .....	28
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	26
<i>Associated Hosp. Serv., Inc. v. City of Milwaukee</i> , 13 Wis. 2d 447, 109 N.W.2d 271 (1961) .....	12
<i>Bay View Packing Co. v. Taff</i> , 198 Wis. 2d 653, 543 N.W. 522 (Ct. App. 1995) .....	26, 28, 29
<i>Bilda v. Cnty. of Milwaukee</i> , 2006 WI App 57, 292 Wis. 2d 212, 713 N.W.2d 661 .....	17
<i>Biskupic v. Cicero</i> , 2008 WI App 117, 313 Wis. 2d 225, 756 N.W.2d 649.....	18, <i>passim</i>
<i>Bustos v. A&amp;E Television Networks</i> , 646 F.3d 762 (10th Cir. 2011) .....	30, 31
<i>CACI Premier Tech., Inc. v. Rhodes</i> , 536 F.3d 280 (4th Cir. 2008) .....	27
<i>Colborn v. Netflix Inc.</i> , 2023 WL 2482620 (E.D. Wis. Mar. 10, 2023).....	31
<i>Curtis Publ'g Co. v. Butts</i> , 388 U.S. 130 (1967) .....	20
<i>DeBraska v. Quad Graphics, Inc.</i> , 2009 WI App 23, 316 Wis. 2d 386, 763 N.W.2d 219 .....	34
<i>Denny v. Mertz</i> , 106 Wis. 2d 636, 318 N.W.2d 141 (1982) .....	23, 24
<i>Desnick v. Am. Broad. Cos.</i> , 44 F.3d 1345 (7th Cir. 1995) .....	31
<i>Driessen v. Vabalaitus</i> , 2023 WL 2954460 (W.D. Wis. Apr. 14, 2023).....	32
<i>Erdmann v. SF Broad. of Green Bay, Inc.</i> , 229 Wis. 2d 156, 599 N.W.2d 1 (Ct. App. 1999) .....	24, 26

## Page

Cases—continued:

<i>Fin. Fiduciaries, LLC v. Gannett Co.</i> , 2020 WL 12582894 (W.D. Wis. June 1, 2020) .....	33
<i>Fin. Fiduciaries, LLC v. Gannett Co.</i> , 46 F.4th 654 (7th Cir. 2022) .....	30, 31
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .....	25
<i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989) .....	26, 28, 29
<i>Haynes v. Alfred A. Knopf, Inc.</i> , 8 F.3d 1222 (7th Cir. 1993) .....	32
<i>Hucko v. Joseph Schlitz Brewing Co.</i> , 100 Wis. 2d 372, 302 N.W.2d 68 (Ct. App. 1981) .....	34
<i>In re Storms v. Action Wis. Inc.</i> , 2008 WI 56, 309 Wis. 2d 704, 750 N.W.2d 739 .....	8, <i>passim</i>
<i>Jankovic v. Int'l Crisis Grp.</i> , 822 F.3d 576 (D.C. Cir. 2016) .....	25, 26
<i>Lathan v. Journal Co.</i> , 30 Wis. 2d 146, 140 N.W.2d 417 (1966) .....	30
<i>Lewis v. Coursolle Broad. of Wis., Inc.</i> , 127 Wis. 2d 105, 377 N.W.2d 166 (1985) .....	20, 21, 22, 25
<i>Maguire v. J. Sentinel, Inc.</i> , 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999) .....	24
<i>Masson v. New Yorker Mag., Inc.</i> , 501 U.S. 496 (1991) .....	29, 30, 31
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	6, <i>passim</i>
<i>Nichols v. Moore</i> , 477 F.3d 396 (6th Cir. 2007) .....	32
<i>Ogren v. Empps. Reinsurance Corp.</i> , 119 Wis. 2d 379, 350 N.W.2d 725 (Ct. App. 1984) .....	18
<i>Pope v. Chronicle Pub. Co.</i> , 95 F.3d 607 (7th Cir. 1996) .....	30
<i>Questions, Inc. v. City of Milwaukee</i> , 2011 WI App 126, 336 Wis. 2d 654, 807 N.W.2d 131 .....	12

## Page

## Cases—continued:

<i>Schultz v. Sykes</i> , 2011 WI App 255, 248 Wis. 2d 746, 638 N.W.2d 604 .....	34
<i>Sidoff v. Merry</i> , 2023 WI App 49, 409 Wis. 2d 186, 996 N.W.2d 88.....	24
<i>Sisson v. Hansen Storage Co.</i> , 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667.....	9
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968) .....	8, 27
<i>State v. Grahn</i> , 21 Wis. 2d 49, 123 N.W.2d 510 (1963) .....	9
<i>State v. Rogers</i> , 196 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995).....	17
<i>Tah v. Glob. Witness Pub., Inc.</i> , 991 F.3d 231 (D.C. Cir. 2021).....	27
<i>Terry v. J. Broad Corp.</i> , 2013 WI App 130, 351 Wis. 2d 479, 840 N.W.2d 255.....	29, 30, 32
<i>Torgerson v. Journal Sentinel, Inc.</i> , 210 Wis. 2d 524, 563 N.W.2d 472 (1997).....	19, 28, 29
<i>Van Straten v. Milwaukee J. Newspaper-Publisher</i> , 151 Wis. 2d 905, 447 N.W.2d 105 (Ct. App. 1989) .....	23, 24, 28, 29
<i>Waldbaum v. Fairchild Publ'ns, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980) .....	21
<i>Wiegel v. Cap. Times Co.</i> , 145 Wis. 2d 71, 426 N.W. 2d 43 (Ct. App. 1988) .....	6, <i>passim</i>

## STATUTES

Wis. Stat. § 895.05 .....	6, 32, 33
Wis. Stat. § 902.01 .....	9

## OTHER AUTHORITIES

Robert D. Sack, <i>Sack on Defamation</i> § 7:3.5 (5th ed. 2019) .....	33
§ 2:9.5 (5th ed. 2023) .....	18

### **ISSUES PRESENTED FOR REVIEW**

1. Were Defendants-Respondents entitled to summary judgment in this libel action on the ground that Plaintiff-Appellant Cory Tomczyk is a public figure and failed to meet his burden of establishing that he could prove actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)?

The Circuit Court answered yes.

2. Should the Circuit Court's judgment be affirmed on either of the additional and alternative grounds that the challenged statements were (i) substantially true and (ii) protected by the fair-report privilege?

The Circuit Court did not address this question.

3. Should the Circuit Court's judgment as to Defendant-Respondent Damakant Jayshi be affirmed on the additional and alternative ground that Plaintiffs-Appellants failed to comply with Wisconsin's retraction statute, Wis. Stat. § 895.05(2), as to Jayshi?

The Circuit Court did not address this question.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

As the judgment below can be affirmed based upon well-settled law, Defendants-Respondents do not request oral argument or publication.

### **STATEMENT OF THE CASE**

"Wisconsin law has always favored free criticism and discussion of public issues." *Wiegel v. Cap. Times Co.*, 145 Wis. 2d 71, 78, 426 N.W. 2d 43 (Ct. App. 1988). This lawsuit arises out of news coverage of one such public issue—a widely reported controversy over whether the Marathon County Board should adopt a resolution championing diversity by labeling the county a "community for all." The proposed resolution was the subject of intense and prolonged debate, garnering local and national media attention.

Plaintiff-Appellant Cory Tomczyk—a longtime resident of Marathon County and active figure in local politics and community affairs, who now represents the area as State Senator—was an outspoken opponent of the resolution. On August 12, 2021, Marathon County’s Executive Committee held a public hearing where members of the community were given the opportunity to voice their views on the proposed resolution. Tomczyk attended that meeting and spoke against the resolution. Multiple people have said that they overheard Tomczyk, during the meeting, refer to two other speakers—including a 13-year-old boy—using the slur “fag.”

The *Wausau Pilot & Review* (“*Wausau Pilot*”), a non-profit online newspaper devoted to covering the local Marathon County area, reported on the “Community for All” debate. In one article, published on August 21, 2021, the newspaper noted public statements made during an August 19 hearing on the resolution, in which a speaker stated that a “local businessman” had been overheard using the slur “f\*\*” at the August 12 Executive Committee meeting. One week later, following further investigation by the newspaper’s editor, the *Wausau Pilot* published a second article in which it identified Tomczyk as the individual who had been overheard using the word.

Tomczyk responded by suing the *Wausau Pilot*, reporter Damakant Jayshi, and editor Shereen Siewert (collectively, “*Wausau Pilot*”) for libel, claiming that the attribution of the slur to him was false. But in the course of the litigation, four witnesses testified that they overheard Tomczyk use the word at the meeting. Likewise, Tomczyk himself admitted under oath that he “absolutely” uses the word, including in jest and out of “spite,” though he continued to contest his specific utterance of the term at the meeting.

The Circuit Court granted summary judgment, holding that Tomczyk is a public figure and that he could not demonstrate that the newspaper acted



with actual malice—the demanding standard under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that applies to libel claims by public figures. R. 86 at 4-6. Indeed, the record was devoid of *any* evidence that the *Wausau Pilot* either knew its reporting was false or “in fact entertained serious doubts as to the publication’s truth,” as required to establish actual malice. *Id.* at 4-5 (quotation marks omitted); *see also In re Storms v. Action Wis. Inc.*, 2008 WI 56, ¶ 5, 309 Wis. 2d 704, 750 N.W.2d 739 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

On appeal, Tomczyk hardly argues otherwise. His cursory discussion of the actual malice standard runs less than two pages. And with good reason: The record established not only that the *Wausau Pilot* did not act with actual malice, but that its reporting was not false—let alone *materially* false, as required under the law of defamation.

The judgment of the Circuit Court should be affirmed.

## **I. Statement of Relevant Facts**

### **A. Tomczyk’s Status in the Marathon County Community**

For nearly two decades, Cory Tomczyk has been a vocal figure in Marathon County. In his words, he “has been actively involved in his community.” Br. 8. Indeed, Tomczyk has featured prominently in public debates through his roles as an elected official on the school board, a leader in the County’s Republican Party, a member of local boards, and, in more recent years, a protest leader championing conservative causes. He has been quoted in newspapers, written opinion pieces, appeared on local radio stations, and appeared on local news television programs. In short, Tomczyk has spent years carving out a name for himself in Marathon County politics and community affairs—an effort that culminated with his election to the



Wisconsin State Senate in 2022, just one year after the events at issue in this litigation and while the suit was pending.

Even before taking an active role in politics, Tomczyk was a well-known figure in Marathon County. Since 1990, he has been the owner, operator, and public face of IROW, an industrial recycling business that operates throughout Northern Wisconsin. R. 59 at 17:1-12, 18:6-11, 19:1-7. At times, Tomczyk has been an outspoken critic of government actions affecting the recycling industry. In 2016, for example, he published an opinion piece in a local newspaper, the *Wausau Daily Herald*, calling on the state of Wisconsin to amend its laws requiring glass recycling.<sup>1</sup>

Tomczyk's involvement in public affairs began with his election to the Mosinee County School Board in 2006. He held that position for thirteen years until 2019, prevailing in numerous election cycles and serving as the Board's President from 2010 to 2015. R. 42, Ex. N. Throughout his tenure, Tomczyk was repeatedly named and quoted in local newspaper articles reporting on the Board.<sup>2</sup> Tomczyk's position on the School Board made him

---

<sup>1</sup> R-App.4-5 (Cory Tomczyk, *It's time to end glass recycling in Wisconsin*, Wausau Daily Herald (Apr. 23, 2016)). That opinion piece was then syndicated by at least three other local newspapers: the Stevens Point Journal (Apr. 23, 2016); the Wisconsin Rapids Daily Tribune (Apr. 23, 2016); and the Marshfield News (Apr. 23, 2016). R-App.6-11. The Court may take judicial notice of this article and the other articles cited herein. *See, e.g., State v. Grahn*, 21 Wis. 2d 49, 53, 123 N.W.2d 510 (1963) (court could properly take judicial notice of newspaper articles); *see also Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (“judicial notice may be taken at any stage of the proceeding,” including on appeal) (quoting Wis. Stat. § 902.01(6)).

<sup>2</sup> R-App.12-37 (*Local School Elections*, Wausau Daily Herald (Mar. 31, 2008); *Gewiss and Tomczyk Win Mosinee School Board Seats*, Wausau Daily Herald (Apr. 2, 2008); *Schools Face Tough Leader Searches*, Wausau Daily Herald (Dec. 11, 2012); *Mosinee School Board Begins Superintendent Search*, Wausau Daily Herald (Feb. 5, 2013); *Schools leader candidates tout experience*, Wausau Daily Herald (Mar. 20, 2013); *Mosinee grad takes helm of her home school district*, Wausau Daily Herald (Apr. 10, 2013); *Mosinee teachers to get pay raises*, The Stevens Point Journal (Apr. 17, 2013); *20 candidates in running for 12 seats on central Wis. school boards*, Wausau Daily Herald (Jan. 9, 2014); *Buildings, budgets on minds of Mosinee School Board hopefuls*, Wausau Daily Herald (Mar. 29, 2014); *Mosinee School District voters keep board intact*, Wausau Daily Herald (Apr. 2, 2014); *Innovative*

highly visible within Mosinee and the surrounding areas. As he put it, “[i]n a small town like Mosinee, the school system is a big part of the community.”<sup>3</sup>

In addition to his elected position on the School Board, Tomczyk has long played an active role in local politics and community affairs through his position on other prominent local boards. For nearly a decade, he served as the Vice Chair of the Republican Party of Marathon County (2008-2015). *Id.* He also has served on the Board of the Wausau Area Chamber of Commerce (2019-2022). *Id.*

Then, in the year leading up to the Community for All debate, Tomczyk was at the forefront of local debate surrounding COVID-19 pandemic restrictions. Starting in Spring 2020, Tomczyk began organizing and publicly promoting numerous large-scale local protests against government actions related to the pandemic. The first such protest, which took place in spring 2020, was held at Tomczyk’s business and attended by thousands of community members. R. 59 at 22:15-25. Tomczyk not only hosted and spoke at this protest—he engaged in active media outreach to promote it, contacting local reporters and appearing on two local radio stations. *Id.* at 23:11-20, 31:12-13. That protest garnered significant media attention, including by local television stations, *id.* at 24:4-9, and the *New York Times*, which published an article about the protest in which Tomczyk was quoted.<sup>4</sup> He has since hosted and/or helped organize at least three similar protests, at least one of which

---

*Training Benefits Soldiers, Community Alike*, Targeted News Serv. (July 15, 2015); *Mosinee mascot change hits roadblock; Board votes against student proposal*, Wausau Daily Herald (Dec. 21, 2017).

<sup>3</sup> R-App.22.

<sup>4</sup> Reid J. Epstein, *In Wisconsin, Virus Creates New Front in Long-Simmering Partisan Wars*, N.Y. Times (Apr. 23, 2020); *see also Hundreds attend ‘Safer at Home’ protest in Mosinee*, WSAW-TV (Apr. 19, 2020).

was covered by a local television news channel, which interviewed and extensively quoted Tomczyk.<sup>5</sup> *Id.* at 24:14-23, 25:24-26:6, 27:7-24.

Six months after filing this lawsuit, and just three months before the contested primary, Tomczyk announced his candidacy for the State Senate. R. 59 at 39:3-7. In August 2022, he won the Republican primary for that Senate seat, defeating two opponents. *Id.* at 39:11-23. He won the general election in November 2022, capturing 62% of the vote, and was sworn in as the State Senator for Wisconsin's 29th Senate District on January 3, 2023.<sup>6</sup>

### **B. Debate Over the “Community for All” Resolution**

The nationwide protests triggered by the death of George Floyd in Minneapolis spurred “the beginning of civic dialogue about the importance of diversity and inclusivity.” R. 86 at 1. “In Marathon County, one manifestation of that civic dialogue was the introduction of a county board resolution that came to be known as a ‘Community for All.’” *Id.*

As the Circuit Court recounted, that resolution faced “significant opposition and sparked extended debate.” *Id.* Tomczyk, in particular, played an active role in opposing the Community for All resolution. In the spring and summer of 2021, he attended multiple protests against the resolution, including one event organized by Get Involved Wisconsin, an organization for which Tomczyk served on the board. R. 59 at 28:25-29:5, 36:11-37:22. He also spoke in opposition to the resolution at multiple Marathon County Board meetings. *Id.* at 35:11-12.

---

<sup>5</sup> *Get Involved Wisconsin hosts ‘Freedom Rally’ protesting mask mandate*, WSAW-TV (Aug. 9, 2020), <https://www.wsaw.com/2020/08/10/get-involved-wisconsin-hosts-freedom-rally-protesting-mask-mandate/>.

<sup>6</sup> *See Cory Tomczyk: State Senator*, <https://legis.wisconsin.gov/senate/29/tomczyk/news-and-updates/> (last visited November 7, 2023); R. 78 at 4.

## 1. May 13, 2021 Marathon County Board Public Hearing

In May 2021, the County Board held a public meeting to discuss the resolution. Tomczyk addressed the Board, voicing his vehement opposition to the resolution and claiming that it was a “shining example [of] a failure of leadership on the County Board.”<sup>7</sup> The *New York Times* published an article reporting on that meeting and describing Marathon County’s ongoing division over the resolution, with a photo of Tomczyk appearing in the online version of the article.<sup>8</sup>

## 2. August 12, 2021 Marathon County Board Public Hearing

By August 2021, Marathon County Board members still had not agreed on the language for the “Community for All” resolution. On August 12, the Executive Committee of the County Board held another public meeting. Tomczyk once again attended, rising to deliver another impassioned speech against the resolution. Among other things, Tomczyk asserted that the County Board was “allow[ing] a charade to persist,” and referred to members of the County Diversity Commission as “fools.” R. 42, Ex. D at 28:08-28:36.

During that meeting, Tomczyk sat in the second row of the gallery in the County Board room. R. 59 at 66:6. Tomczyk was seated next to Meg Ellefson, the host of a local radio show on which Tomczyk has repeatedly appeared. *Id.* at 32:5-33:20, 65:23-25. Norah Brown, a Wausau resident, also

---

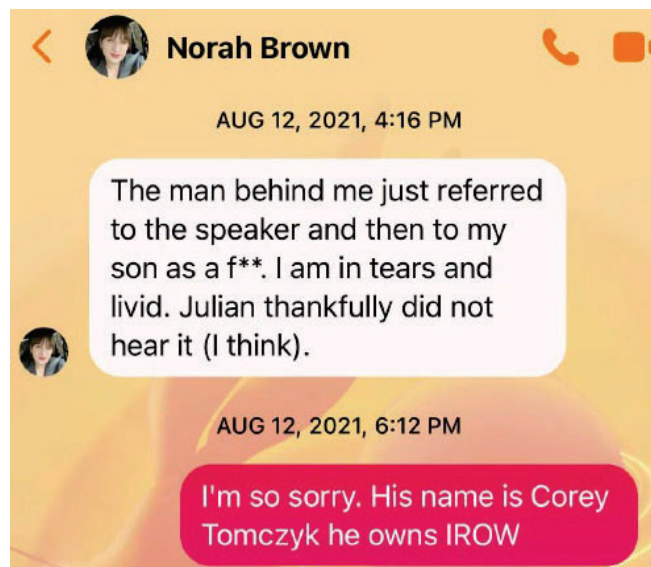
<sup>7</sup> Marathon County Executive Committee Meeting at 46:30, YouTube (May 13, 2021), <https://www.youtube.com/watch?v=F5Sg2UhUgnU>. The Court may take judicial notice of this recording of an official government proceeding. *See supra* n.1; *see also, e.g., Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 453, 109 N.W.2d 271 (1961) (taking judicial notice of transcript of testimony before committee of the State Assembly and report of Wisconsin Insurance Department); *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 30 n.10, 336 Wis. 2d 654, 807 N.W.2d 131 (taking judicial notice of city council meeting minutes “as a matter of public record”).

<sup>8</sup> Epstein, *supra* n.4.

attended the meeting with her 13-year-old son, Julian. Brown and her son sat in the first row of the gallery—directly in front of Tomczyk. Approximately fifteen minutes into the meeting, Tomczyk was heard remarking to Ellefson, “There’s fag number 1.” R. 42, Ex. H at 23:16-22. Brown heard Tomczyk make this comment and suspected that he had used the slur because the individual seated near Brown, who had just stood up to speak, “appeared to be transgender.” *Id.* at 27:6-9.

After hearing Tomczyk use this slur, Brown turned back to look at Tomczyk. R. 40 at ¶ 5; R. 42, Ex. H at 28:5-13; *see also id.*, Ex. D (video of meeting at 11:58-12:04). At that point, Tomczyk looked at Brown’s son, Julian, and called him “the second fag.” R. 40 at ¶ 5; R. 42, Ex. H at 23:23–24:1.

At 4:16 p.m., immediately after hearing Tomczyk comments, Brown sent a Facebook Messenger message to another meeting attendee, Christine Salm, telling her what had happened. Two hours later, Salm—who was seated several rows away from Brown—responded and informed Brown that the man seated behind her was Tomczyk. R. 42, Ex. H at 31:18-24; R. 39, Ex. 1.



While Tomczyk’s comments cannot be heard on the publicly available video of the August 12, 2021 meeting, Norah Brown’s account of what

occurred is corroborated by the video recording of the meeting. *See* R. 42 at Ex. D (video of meeting at 11:54-12:04). At the 12:02 mark of the video, Brown can be seen turning her head back to stare directly at Tomczyk—immediately after she testified that she had heard him use the slur. Two seconds after Brown turned to look at Tomczyk, the video changes cameras to face the front of the room. R. 59 at 94:24-95:1. That shot shows the clock on the wall, which indicates that the time was approximately 4:14 p.m. Approximately two minutes later—that is, at 4:16 p.m.—the camera cuts back to the audience and Brown can be seen on the video looking down at her lap sending a message on her telephone. This was the exact time at which Brown texted Salm.

**C. The *Wausau Pilot*’s Reporting on the “Community for All” Debate**

**1. August 19, 2021 Marathon County Board Public Hearing**

One week later, on August 19, the County Board held another public meeting. The day before that meeting, Brown emailed the *Wausau Pilot* to “encourage” the newspaper to cover it. Brown’s email stressed the importance of coverage, stating that “[a]n individual sitting behind us” at the August 12 meeting “even referred to one of the other speakers and to my son using a slur (f\*\*).” R. 42, Ex. G.

During the August 19 meeting, two members of the Marathon County community rose and addressed Tomczyk’s use of the slur during the prior meeting. Brown noted that she and her son had “heard some despicable comments from a couple people sitting near us, notably referring to another speaker as well as to my son, a 13 year old, with an extremely offensive slur.”<sup>9</sup> Likewise, another meeting attendee, Lisa Ort Sondergard, stated that “at the

---

<sup>9</sup> Marathon County Board Meeting at 19:24, YouTube (Aug. 19, 2021), <https://www.youtube.com/watch?v=5wZEQIEvFz0>. *See supra* n.7.



executive meeting last week, one adult, a local businessman, called a young teen a ‘fag.’” R. 7 at 2-3. Ort Sondergard went on to explain that the speaker “may have thought that only the person he said it to heard his ugly attack. But that is not true. Several people around him heard the slur, including the teen it was directed at and his mother.” *Id.*

## **2. The August 21 *Wausau Pilot* Article**

On August 21, 2021, the *Wausau Pilot* published an article reporting on recent developments in the “Community for All” controversy (the “August 21 Article”). R. 30. The article noted that “[a]fter nearly 18 months of debate and revision,” Marathon County was nearing a vote on its “Community for All” resolution. *Id.* The article further reported on the most recent Marathon County Board meeting held on August 19.

Among other things, the article reported on Brown’s and Ort Sondergard’s public comments during the August 19 meeting. The article reported that Ort Sondergard had noted that a “local businessman” had been heard using the slur “fag” during the August 12 meeting. *Id.*<sup>10</sup> As Tomczyk acknowledges, the August 21 Article did not identify the individual who used the slur, and did not mention Cory Tomczyk by name. *See* Br. 8-9.

## **3. The August 28 *Wausau Pilot* Article**

One week later, on August 28, the *Wausau Pilot* ran another story on the Community for All controversy (the “August 28 Article”), reporting that the debate over the resolution had exposed a “rift[] not only between elected officials but also among members of the community.” R. 31 at 1. That article stated that members of the public had taken “passionate positions both for

---

<sup>10</sup> Ort Sondergard later clarified that she had not stated that she personally “witnessed” Tomczyk using the slur, as reported in the article, but did not retract or revise her unambiguous assertion during the meeting that “a local businessman *called a young teen a fag*” and that “several people around him heard the slur.” R. 7 at 2-3 (emphasis added).



and against” the resolution and reported that certain Marathon County Board supervisors and members of the county’s diversity commission had been subjected to harassment and threats during the months-long debate. *See id.* at 2-6. Towards the end of this lengthy article, the *Wausau Pilot* quoted Tomczyk’s statement at the August 12 meeting calling members of the diversity commission “fools.” It then noted that “Tomczyk, earlier this month, was widely overheard calling a 13-year-old boy who spoke in favor of the resolution a ‘fag.’” *Id.* at 5.

The article was written by reporter Damakant Jayshi. *Id.* at 1. But the sentence attributing the remark to Tomczyk was added by the paper’s editor, Shereen Siewert, a longtime Wausau resident who founded the non-profit *Wausau Pilot* as an independent source of local news coverage, after a decade in journalism—including working for the *Wausau Daily Herald* and *USA Today* in Wisconsin. R. 62 at 15:7-18:18, 19:25-21:1.

Prior to publication, Siewert undertook multiple steps to confirm that Tomczyk had in fact used the slur at the August 12 meeting. *Id.* at 39:9-40:6. In conducting her fact-checking, Siewert reviewed numerous pieces of supporting evidence, including:

- The email from Norah Brown to Siewert on August 18, 2021 (ten days before the August 28 Article was published), stating that “[a]n individual sitting behind” Ms. Brown and her son at the August 12 meeting had referred to her son “using a slur (f\*\*)” (R. 42 at Ex. G; *see also* R. 62 at 93:3-21);
- Information from Salm—who Siewert views as a “trusted source” who has “consistently given [her] factual information time and time again” (R. 62 at 24:5-24)—who told Siewert that Brown had heard Tomczyk use the slur (*id.* at 43:2-17);
- The contemporaneous text messages between Brown and Salm describing the slur that “[t]he man behind [her]” had just used, to

which Salm responded by confirming that the speaker was Tomczyk (*id.* at 69:13-15; R. 39, Ex. 1);

- The video recording of the August 12 meeting, which confirmed that Tomczyk was the man sitting behind Brown—and showed the moments when Brown turned to look at Tomczyk and then proceeded to text Salm (R. 62 at 69:7-12);
- Social media posts describing the incident and identifying Tomczyk as the speaker (R. 62 at 46:20-48:5).

Siewert testified that when the August 28 Article was published, she felt “100 percent certain” that it correctly attributed the remark to Tomczyk. R. 62 at 69:15-17.

Since then, multiple other witnesses have confirmed that the *Wausau Pilot* accurately attributed the use of this slur to Tomczyk. Megan Marohl, Carrie Marohl, and Alex Heaton—all of whom attended the August 12 meeting and sat one row behind Tomczyk and Ellefson—have each testified that they heard Tomczyk use either the word “fag” or “faggot” during the meeting. *See* R. 42, Ex. E at 23:1-7; *id.*, Ex. J at 13:10-18; R. 38 at ¶ 4. Likewise, Brown has confirmed her account under oath. *See* R. 40 at ¶ 5.

## II. Procedural History

Tomczyk filed an initial complaint in this action on November 5, 2021, and an amended complaint on June 10, 2022. The amended complaint asserted claims for defamation and defamation of Tomczyk’s business, Industrial Recyclers of Wisconsin (“IROW”), based on the *Wausau Pilot*’s reporting on Tomczyk’s use of the slur at the August 12 meeting.<sup>11</sup>

---

<sup>11</sup> Plaintiffs do not appeal the dismissal of IROW’s claims. They raise no argument specific to IROW, nor did they in the Circuit Court, and do not contest the application of the actual malice standard to IROW. *See, e.g.*, Br. at 1 (stating issue presented as “Is Cory Tomczyk a public figure for purposes of defamation law?”). Any argument as to IROW is forfeited. *See State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995); *Bilda v. Cnty. of Milwaukee*, 2006 WI App 57 ¶ 20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Indeed, the Amended

Following discovery, the *Wausau Pilot* moved for summary judgment. On April 28, 2023, the Circuit Court granted the motion and entered judgment. In a written opinion, the Circuit Court held that Tomczyk was “a public figure *at least* for the limited purpose of the ‘Community for All’ debate” and was therefore required to prove that *Wausau Pilot* acted with actual malice in publishing the challenged statements. R. 86 at 4 (emphasis added). The Circuit Court concluded that Tomczyk could not meet his burden, explaining that “on this record, it is not possible to find that the defendants had serious doubts about the truth of the publication.” R. 86 at 5. Having decided the case on the basis of actual malice, the Circuit Court did not reach the *Wausau Pilot*’s arguments that the statements at issue were true or that they were privileged under Wisconsin law. *Id.* at 2, 5.

This appeal followed.

### **STANDARD OF REVIEW**

The Circuit Court’s grant of summary judgment is reviewed *de novo*. *Biskupic v. Cicero*, 2008 WI App 117, ¶ 12, 313 Wis. 2d 225, 756 N.W.2d 649. This Court is not limited to considering the grounds on which the Circuit Court ruled; instead, the “respondent may advance for the first time on appeal, and [the Court] may consider, any basis for sustaining the trial court’s order or judgment.” *Am. Fam. Mut. Ins. Co. v. Bateman*, 2006 WI App 251, ¶ 26 n.7, 297 Wis. 2d 828, 726 N.W.2d 678; *accord Biskupic*, 313 Wis. 2d 225, ¶ 19 n.5. And such is the importance of protecting speech that “in doubtful

---

Complaint fails to identify any allegedly defamatory statements that are even about IROW (as opposed to Tomczyk), a fundamental requirement of a libel claim. *See Ogren v. Emps. Reinsurance Corp.*, 119 Wis. 2d 379, 382, 350 N.W.2d 725 (Ct. App. 1984); Robert D. Sack, *Sack on Defamation* § 2:9.5 (5th ed. 2023) (“[A]llegations of defamation [about] an organization and its members are not interchangeable.”) (quotation marks omitted).

cases the doubt should be resolved in favor of free criticism and discussion.” *Wiegel*, 145 Wis. 2d at 79 (quotation marks omitted).

### **ARGUMENT**

The Circuit Court properly granted summary judgment. Because Tomczyk is a public figure, he must prove actual malice by clear and convincing evidence. But there is no evidence here by which a jury reasonably could find that he met his burden. “Indeed, it has been said that in public figure defamation cases, because of the importance of free speech, summary judgment *is* the rule and not the exception.” *Torgerson v. Journal Sentinel, Inc.*, 210 Wis. 2d 524, 538, 563 N.W.2d 472 (1997) (quotation marks omitted); *see also id.* at 540 (“[S]ummary judgment is an important and favored method for adjudicating public figure defamation actions.”).

Moreover, the judgment may be affirmed on additional, alternative grounds—including that the *Wausau Pilot*’s reporting was (at the very least) substantially true and that the reporting was protected by the fair report privilege. For any or all of these reasons, the judgment below should be affirmed.

#### **I. Summary Judgment Should Be Affirmed Because Tomczyk Failed to Adduce Evidence of Actual Malice**

##### **A. The Actual Malice Standard Applies Because Tomczyk Is a Public Figure**

When the plaintiff is a public official or public figure, a heightened standard of fault applies to libel claims brought by that plaintiff. The plaintiff must prove by clear and convincing evidence that the defendant acted with actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)—i.e., that the defendant *knew* her statements were false or acted with *reckless disregard* as to whether the published statements were false. *See, e.g., In re Storms*, 309 Wis. 2d 704, ¶ 38 (quoting *Sullivan*, 376 U.S. at 280). The Circuit

Court correctly concluded that Tomczyk's claims here are subject to the actual malice standard because he is a public figure.

As Tomczyk recognizes, whether an individual is a public figure to whom the actual malice standard applies is a question of law for a court to decide. *Biskupic*, 313 Wis. 2d 225, ¶ 14; Br. 30. Public figures are “those persons who, although not government officials, are nonetheless ‘intimately involved in the resolution of important public questions.’” *Wiegel*, 145 Wis. 2d at 81 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)). Wisconsin law recognizes two kinds of public figures for purposes of defamation lawsuits: “public figures for all purposes [‘general-purpose public figures’] and public figures for a limited purpose [‘limited-purpose public figures’].” *Biskupic*, 313 Wis. 2d 225, ¶ 16. The record evidence establishes that Tomczyk qualifies under either standard. He was not, as Tomczyk would have it, merely an “unsuspecting private citizen[.]” Br. 3.

### **1. Tomczyk Is a General-Purpose Public Figure Within Marathon County**

A general-purpose public figure is a well-known person “whose words and deeds are followed by the public because it regards his [or her] ideas, conduct, or judgment as worthy of its attention.” *Wiegel*, 145 Wis. 2d at 82 (quotation marks omitted). What Tomczyk ignores is that public figure status is based on a “community standard.” *Lewis v. Coursolle Broad. of Wis., Inc.*, 127 Wis. 2d 105, 118, 377 N.W.2d 166 (1985). “[N]ationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety *where he was defamed—i.e., where the defamation was published.*” *Id.* at 117 (emphasis added; quotation marks omitted); *see also Biskupic*, 313 Wis. 2d 225, ¶ 16 (“A person is a public figure for all purposes when he or she has ‘general fame or notoriety’ *in the location*

*the defamation takes place.*”) (emphasis added). Here, the challenged statements were published by the local newspaper covering a debate over local events. R. 62 at 19:23-21:18. To qualify as a general-purpose public figure, Tomczyk thus need only be sufficiently prominent in the local community, the *Wausau Pilot*’s coverage area. *Lewis*, 127 Wis. 2d at 117-18; *Biskupic*, 313 Wis. 2d 225, ¶ 16.

Tomczyk’s extensive involvement in public life readily qualifies him as a general-purpose public figure within Marathon County. While there is “no set test” to determine whether an individual meets that standard, “courts look at a number of factors, including evidence of the person’s name recognition, press coverage of the person, whether the person has shunned or encouraged media attention, and whether the person has access to the media such that he or she would likely be able to respond to false information.” *Biskupic*, 313 Wis. 2d 225, ¶ 16 (citing *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir. 1980)). “No one parameter is dispositive,” and “the decision ... involves an element of judgment.” *Waldbaum*, 627 F.2d at 1295. But here, each of those factors favors a finding that Tomczyk is a “public figure for all purposes.” *Id.* at 1294.

For nearly two decades, Tomczyk has been an active and vocal presence in local politics and community affairs—holding elected office on the School Board for 13 years, serving as Vice Chair of the County’s Republican Party for 8 years, serving on local boards, and organizing large-scale protests regarding high-profile controversies dividing the community. *Supra* at 8-11.<sup>12</sup>

---

<sup>12</sup> Tomczyk wrongly asserts that because a defamation plaintiff’s public-figure status is determined at the time of the alleged defamation, Tomczyk’s “past community service ... has [no] bearing on the ‘public figure’ analysis in this case.” Br. 32. That is incorrect. When an individual has previously held public office or has been an active participant in community affairs over a number of years, that prominence is indisputably relevant to his or her *ongoing* status as a public figure. The question is whether the plaintiff “left [public life] ‘to drift quietly into oblivion’” or instead remained a known figure after his or her public



As a result of that civic involvement, Tomczyk regularly received press coverage from local news media outlets. *See id.* He has been featured in dozens of local newspaper articles (and at least one article by the *New York Times*) reporting on his role in the School Board, the Wausau Area Chamber of Commerce, and as the leader of a burgeoning conservative protest movement in Marathon County. *See id.* Far from “shunn[ing]” such media attention, *Biskupic*, 313 Wis. 2d 225, ¶ 16, Tomczyk has welcomed it—engaging in active media outreach to promote local protests against the government’s COVID-19 restrictions and authoring opinion pieces in the *Wausau Daily Herald* on issues of local concern. *Supra* at 10-11. Indeed, Tomczyk has fostered relationships with members of the local press such as Meg Ellefson, the host of a local radio show that covered the “Community for All” debate. R. 59 at 38:19-22. Tomczyk has made multiple appearances on Ellefson’s show and sat with her at the August 12 “Community for All” meeting. R. 59 at 32:5-33:20, 54:14-15 (“Meg motioned me over and I sat next to her during [the August 12] meeting.”).

Further, while Tomczyk was not a State Senator when the *Wausau Pilot* published the August 21 and August 28 articles, his overwhelming victories in the Republican primary and general election just months later only underscore the name recognition and “notoriety” Tomczyk enjoys in Marathon County. *Supra* at 11.

In short, Tomczyk’s longstanding role in public life and direct “access to [local] media”—which provides him with ample opportunity to “respond to [any allegedly] false information” published about him—make him a general-

---

involvement ended. *Biskupic*, 313 Wis. 2d 225, ¶ 21 (quoting *Lewis*, 127 Wis. 2d at 115). Here, Tomczyk has been continuously involved in Marathon County public affairs since at least 2006. During that time, his local prominence has only *increased*, culminating in his election to the State Senate in 2022.



purpose public figure within Marathon County. *Biskupic*, 313 Wis. 2d 225, ¶ 16.

**2. At Minimum, Tomczyk Is a Limited-Purpose Public Figure With Respect to the Community for All Debate**

In addition to his status as a general-purpose public figure, Tomczyk also qualifies as “a public figure *at least* for the limited purpose of the ‘Community for All’ debate,” as the Circuit Court correctly held. R. 86 at 4 (emphasis added). Under Wisconsin law, a defamation plaintiff qualifies as a limited-purpose public figure if: (1) there is a public controversy; (2) the plaintiff played a role in the controversy that is more than “trivial or tangential;” and (3) the alleged defamation is “germane to the plaintiff’s participation in the controversy.” *Wiegel*, 145 Wis. 2d at 83 (quotation marks omitted). All three criteria are satisfied here.

*First*, Tomczyk does not dispute that the intense and protracted debate over the “Community for All” resolution—which generated local, state, and national news coverage—constituted a “public controversy.” *Id.* (a controversy is public when “persons actually were discussing it” and “persons beyond the immediate participants in the dispute [are likely] to feel the impact of its resolution.”) (quotation marks omitted).

*Second*, Tomczyk’s participation in the “Community for All” debate was far more than “trivial or tangential.” *Id.* There can be little dispute that Tomczyk voluntarily “injected himself” into the “Community for All” debate “so as to influence the resolution of the issues involved.” *Van Straten v. Milwaukee J. Newspaper-Publisher*, 151 Wis. 2d 905, 913, 447 N.W.2d 105 (Ct. App. 1989); *see also id.* (courts should consider whether “the plaintiff voluntarily exposed himself to the controversy, thereby increasing risk of injury from defamation”) (citing *Denny v. Mertz*, 106 Wis. 2d 636, 650, 318 N.W.2d 141 (1982)). Following on the heels of his involvement in organizing

and promoting numerous large-scale protests against COVID-19 measures, *supra* at 10-11, Tomczyk took a strong and vocal stance in opposition to the resolution. He attended multiple events organized to protest the resolution (including one organized by a group on whose board he served) and made public comments at two public meetings, including the August 12 meeting that generated the *Wausau Pilot's* challenged coverage. At both public meetings, Tomczyk gave impassioned speeches, describing the County Board's actions with regard to the resolution as a "failure of leadership" and dubbing members of the County's diversity commission "fools." *Supra* at 12.

Wisconsin courts have held that when considering whether a plaintiff has "injected himself into the [public] controversy so as to influence the resolution of the issues involved," one key factor is whether "the plaintiff's status is such that he has access to the media to rebut the defamation." *Van Straten*, 151 Wis. 2d at 908 (citing *Denny*, 106 Wis. 2d at 649-50); accord *Erdmann v. SF Broad. of Green Bay, Inc.*, 229 Wis. 2d 156, 169, 599 N.W.2d 1 (Ct. App. 1999); *Wiegel*, 145 Wis. 2d at 88-89. As discussed *supra*, Tomczyk's ready access to the media strongly supports his public-figure status. Unlike the plaintiff in *Maguire v. J. Sentinel, Inc.*, 232 Wis. 2d 236, 246, 605 N.W.2d 881 (Ct. App. 1999), whose "access to the media was limited and less than influential," Tomczyk plainly had ample opportunity to turn to the media to rebut the *Wausau Pilot's* alleged defamation—as underscored by the fact that he and local radio host Ellefson sat together at the August 12 meeting, Tomczyk made the comments at issue directly to her, and he has appeared on her show multiple times. *Supra* at 12-13; *see also* Br. 33 (citing *Maguire*).<sup>13</sup>

---

<sup>13</sup> The fact that Tomczyk had "any number of channels through which he could have made public statements" bolsters his public-figure status regardless of whether he chose to take advantage of his media access. "[T]here is no reason to think that if" Tomczyk had approached the media "he would not have been able to give his version of relevant events." *Sidoff v. Merry*, 2023 WI App 49, ¶ 48, 409 Wis. 2d 186, 996 N.W.2d 88.

Tomczyk's only response is to assert that the Circuit Court erred because he was "never an elected official in the summer of 2021" and thus "never took a vote on the Community for All resolution." Br. 35. But this assertion is premised on a fundamental misreading of the law. One need not be a "public official" to be a "public figure." Those are two distinct categories, *either* of which leads to the application of the actual malice standard. *See, e.g., Lewis*, 127 Wis. 2d at 113 ("Although the Court in *New York Times* applied the 'actual malice' standard only to 'public officials,' it subsequently extended the protection to actions brought by 'public figures' who are not 'public officials' but nevertheless are involved in issues in which the public has a justified and important interest."); *see also id.* ("The Court clarified [in *Gertz*] that the *New York Times* standard applies to two broad categories of 'public' individuals: 'public figures' and 'public officials.'") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

*Finally*, the allegedly defamatory statements were clearly "germane" to Tomczyk's participation in the public controversy. Tomczyk claims that because the *Wausau Pilot* "did not quote [his] *public* remarks or report on his views on the resolution," his defamation claims are "not related to his participation in the debate." Br. 35 (emphasis added). But this contention, too, is meritless. The standard for "germaneness" is not that narrow.

"The purpose of the germaneness inquiry is to ensure that the allegedly defamatory statement—whether true or not—is related to the plaintiff's role in the relevant public controversy," and to screen out "misstatements *wholly unrelated* to the controversy." *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016) (quotation marks omitted). The newspaper reported that Tomczyk used a homophobic slur during a public meeting, referring to other attendees of the meeting, in the midst of a heated public debate on *diversity*,

*equity, and inclusion.* As the Circuit Court noted, “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 at 4. The *Wausau Pilot* made the challenged statements “in connection with and to emphasize” the acrimony of the “Community for All” debate and the sharply opposing viewpoints on issues of diversity, which would certainly encompass the use of an anti-gay slur. See *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 684-85, 543 N.W.2d 522 (Ct. App. 1995). The fact that Tomczyk may have said the word to someone seated next to him rather than saying it into a microphone does not render those comments “wholly unrelated” to his participation in the debate. *Jankovic*, 822 F.3d at 589.

In sum, the Circuit Court correctly held that Tomczyk was a public figure. He must satisfy the actual malice standard here.

**B. There Is No Evidence that the Wausau Pilot Acted with Actual Malice**

Tomczyk presents no triable issue of actual malice. His conclusory argument on this point only underscores that he failed to muster *any* evidence by which a jury could find that he met his burden, let alone evidence sufficient to overcome the required threshold of *clear and convincing* evidence. See *Erdmann*, 229 Wis. 2d at 169–70; see also *Bay View Packing*, 198 Wis. 2d at 677 (“[T]he trial court must determine ‘whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.’”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986)).

The actual malice standard focuses on the author’s state of mind. *In re Storms*, 309 Wis. 2d 704, ¶ 39; *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). The plaintiff must establish that the author uttered

a *knowing* falsehood or, at a minimum, “*in fact entertained serious doubts* as to the truth of his publication” and published it anyway. *In re Storms*, 309 Wis. 2d 704, ¶ 39 (emphasis added) (quoting *St. Amant*, 390 U.S. at 731). That is, there must be a showing of “subjective doubt.” *Biskupic*, 313 Wis. 2d 225, ¶ 29. Because it is a subjective standard, actual malice is “*not* measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant*, 390 U.S. at 731; accord *In re Storms*, 309 Wis. 2d 704, ¶ 39.

Courts have long noted that meeting the actual malice standard on summary judgment is “no easy task,” *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293 (4th Cir. 2008) (quotation marks omitted), as the standard “is famously daunting,” *Tah v. Glob. Witness Pub., Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021) (quotation marks omitted). Tomczyk does not come close to meeting it here. He has adduced *no* evidence that *Wausau Pilot* harbored *any* doubts—much less *serious* ones—about the accuracy of the challenged statements.<sup>14</sup> To the contrary, Siewert’s uncontested testimony is that she was “100 percent certain” that Tomczyk uttered the word at issue here. R. 62 at 69:15-17. There is no evidence to the contrary.

Tomczyk relies on an asserted “failure to investigate.” Br. 38. But this allegation of “journalistic malpractice,” *id.* at 3, is precisely what both Wisconsin courts and the U.S. Supreme Court have repeatedly held does *not* constitute actual malice. *See, e.g., In re Storms*, 309 Wis. 2d 704, ¶ 78 (“[M]ere proof of failure to investigate the accuracy of a statement, without more, cannot establish the reckless disregard for the truth necessary for proving

---

<sup>14</sup> Indeed, as to the August 21 Article, Tomczyk does not even attempt to assert that the *Wausau Pilot* acted with actual malice. *See* Br. 38 (addressing only “*Wausau Pilot’s* conduct in *publishing Tomczyk’s name*”) (emphasis added). It is unclear if he is even pursuing a claim with respect to that article anymore.

actual malice.”) (quotation marks omitted); *Torgerson*, 210 Wis. 2d at 542 (a journalist’s “[m]ere failure to investigate adequately does not constitute actual malice”); accord *Biskupic*, 313 Wis. 2d 225, ¶ 29; *Bay View Packing*, 198 Wis. 2d at 686; *Van Straten*, 151 Wis. 2d at 918. Indeed, the Supreme Court has made clear that even an “*extreme departure*” from such standards is constitutionally insufficient. *Harte-Hanks*, 491 U.S. at 665 (emphasis added). And the Wisconsin Supreme Court has similarly emphasized that “[a] court’s role is to interpret and apply the law, not to enforce standards of journalistic accuracy or ethics.” *Torgerson*, 210 Wis. 2d at 552. Tomczyk simply ignores all of this precedent.<sup>15</sup>

In any event, Tomczyk’s claim of a “failure to investigate” is belied by the record, which reflects Siewert’s multi-faceted fact-checking prior to publication.<sup>16</sup> Siewert testified that she investigated and reviewed numerous pieces of supporting evidence—including the video recording of the August 12 meeting, contemporaneous emails and text messages from Brown describing the incident, social media posts identifying Tomczyk as the speaker, and information provided to Siewert by Salm (a source that Siewert had “used ... in the past and found ... to be reliable,” *Biskupic*, 313 Wis. 2d 225, ¶ 31)—to assure herself that the attribution of the slur to Tomczyk was accurate. *Supra* at 16-17.

---

<sup>15</sup> Tomczyk’s citation to *Anderson v. Hebert*, 2011 WI App 56, 332 Wis. 2d 432, 798 N.W.2d 275, does not support his theory of actual malice or establish that a journalist’s alleged failure to investigate “presents a factual question for the jury” on actual malice. Br. 38. In *Anderson*, the court found that there were triable issues of fact as to whether the defendant, who was not even a journalist, personally “had reason to doubt the truth” of what he stated for multiple reasons. *Id.* ¶ 23. It is inapplicable to this case.

<sup>16</sup> Tomczyk badly misconstrues the record in this respect, asserting for example, that the *Wausau Pilot* “did not have a single source who heard Tomczyk use the slur when it named him in the August 28 article.” Br. 15. In fact, the *Wausau Pilot* had multiple statements from Brown confirming that she heard him. *Supra* at 16-17. Tomczyk could not prevail at summary judgment even on a negligence standard.



Nor does Tomczyk's characterization of Siewert's so-called "palpable disdain" for him, Br. 17, come close to meeting the actual malice standard. As Tomczyk quotes in his own brief, "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.*" *Id.* at 37 (emphasis added) (quoting *Van Straten*, 151 Wis. 2d at 917); *accord Bay View Packing*, 198 Wis. 2d at 685-86. Again, both the Supreme Court and the Wisconsin Supreme Court repeatedly have emphasized this distinction: "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991); *see also, e.g., Torgerson*, 210 Wis. 2d at 536 ("Actual malice is a term of art; it is not used in its ordinary meaning of evil intent.") (citing *Harte-Hanks*, 491 U.S. at 666-67 & n.7); *Harte-Hanks*, 491 U.S. at 666 ("[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."). In short, asserting that Siewert expressed "disdain" for Tomczyk has no bearing on whether she believed what she wrote about him.

Because Tomczyk has not adduced evidence by which a jury could reasonably conclude that the *Wausau Pilot* acted with serious doubts about the accuracy of the article—let alone reach that conclusion by the required *clear and convincing* evidence—the Circuit Court's judgment must be affirmed.

## **II. Summary Judgment Should Be Affirmed Because the Challenged Statements Are Substantially True**

In the alternative, summary judgment should be affirmed on the additional ground that Tomczyk cannot meet his burden of establishing falsity under the law of defamation. *See, e.g., Terry v. J. Broad Corp.*, 2013 WI App



130, ¶ 14, 351 Wis. 2d 479, 840 N.W.2d 255; *Fin. Fiduciaries, LLC v. Gannett Co.*, 46 F.4th 654, 665-66 (7th Cir. 2022) (applying Wisconsin law).

To begin, the evidence adduced during discovery demonstrates that Tomczyk in fact *was* “widely overheard” using the slur at the August 12 meeting—precisely as reported by the *Wausau Pilot*. R. 31 at 5. Four separate attendees at the meeting testified that they heard Tomczyk utter the word at the meeting. *Supra* at 17. This is on top of the contemporaneous evidence of Brown’s text exchange with Salm and the corroboration of her account via the video recording of the meeting. *Supra* at 13-14. In light of this record, there can be no genuine dispute that Tomczyk actually was overheard saying the word.<sup>17</sup>

But regardless, the law of libel requires *material* falsity—the test is *substantial* truth, not literal or technical precision. *Masson*, 501 U.S. at 517. The challenged statement need not “be true in every particular.” *Lathan v. Journal Co.*, 30 Wis. 2d 146, 158, 140 N.W.2d 417 (1966). Instead, what matters is “the substance, the gist, the sting” of the allegedly libelous words, and whether they “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” *Masson*, 501 U.S. at 517 (quotation marks omitted). Stated differently, the allegedly defamatory statement must “make the plaintiff significantly worse off than a completely or literally truthful publication would have.” *Pope v. Chronicle Pub. Co.*, 95 F.3d 607, 613 (7th Cir. 1996).<sup>18</sup> Thus, “[a]n author may even

---

<sup>17</sup> In response, Tomczyk relies on a cursory affidavit provided by Ellefson, in which she says only that she did not “hear” Tomczyk use a slur. R. 56 at ¶ 5. Moreover, she also swears that Tomczyk did not make *any* remarks about *any* speaker other than the Chair of the Executive Committee, *id.* ¶ 7, which cannot be reconciled with Tomczyk’s testimony that he and Ellefson discussed a transgender speaker he characterized as a “man dressed as a woman,” R. 59 at 75:13-76:3.

<sup>18</sup> See also, e.g., *Bustos v. A&E Television Networks*, 646 F.3d 762, 765 (10th Cir. 2011) (Gorsuch, J.) (“[T]he alleged misstatement must be likely to cause reasonable people to

attribute words he never uttered to a speaker without running afoul of defamation law, so long as the result conveys the substantial truth.” *Colborn v. Netflix Inc.*, 2023 WL 2482620, at \*10 (E.D. Wis. Mar. 10, 2023).

Here, Tomczyk claims that the defamatory sting of the *Wausau Pilot*’s reporting was in associating him with the use of what he now calls “one of the most explosive words in the English language,” Br. 2, a “vile epithet,” *id.*, and a “horrific slur,” R. 57 at 2. But Tomczyk has testified that he “[a]bsolutely” uses the word. R. 59 at 121:24-122:1. In particular, he uses the slur to “ma[k]e jokes about gay people.” *Id.* at 122:5-16. And he has a habit of calling a gay relative a “faggot”—sometimes as a “jok[e]” and sometimes “out of spite.” *Id.*

This conceded truth is not “significantly less damning” than what was reported by the *Wausau Pilot*. *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1350 (7th Cir. 1995). The “substance, the gist, the sting” of the report, *Masson*, 501 U.S. at 517, is that Tomczyk uses the word. The setting in which he used it is not what makes it allegedly libelous. It is the use of the word itself—the “vile epithet,” per Tomczyk—which, when put under oath, he “absolutely” admits that he uses. R. 59 at 121:24-122:1.

Courts regularly reject defamation claims involving greater discrepancies between the undisputed truth and the alleged defamatory statement. Applying Wisconsin law, the Seventh Circuit recently held that an allegation of “elder abuse” was substantially true because the plaintiff “[m]ishandl[ed] a deceased person’s estate.” *Fin. Fiduciaries*, 46 F.4th at 668. In another case, it found an allegation that the plaintiff had lost his job as a security guard “because of his drinking” substantially true based on the plaintiff’s admitted alcohol abuse and possession of an unopened liquor bottle

---

think ‘significantly less favorably’ about the plaintiff than they would if they knew the truth.” (citation omitted)).

at work. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1225, 1227, 1229 (7th Cir. 1993). And the Sixth Circuit affirmed summary judgment against James Nichols after a documentary claimed that he was “arrested in connection” with the Oklahoma City bombing—which was perpetrated by his brother, Terry. *Nichols v. Moore*, 477 F.3d 396, 401 (6th Cir. 2007). The court found the statement substantially true because, although Nichols “was neither charged nor arrested regarding the Oklahoma City bombing,” he *was* arrested “only days after the bombing” in connection with a different case, and was a “material witness” in the Oklahoma City bombing case. *Id.*; *see also, e.g., Terry*, 351 Wis. 2d 479, ¶ 16 (statement that plaintiff “was facing criminal charges” substantially true because his conduct was potentially a crime, even though he was not actually charged).

There is no reason for a different result in this case. The statement at issue “even if false in detail conveyed an accurate impression.” *Haynes*, 8 F.3d at 1229. The Circuit Court’s grant of summary judgment should be affirmed because the *Wausau Pilot*’s reporting was, at the very least, substantially true based on the undisputed record.

### **III. The Challenged Statements Are Also Protected by the Fair Report Privilege**

Summary judgment should be affirmed for the additional reason that the challenged statements—reporting on events at a government proceeding—are protected by Wisconsin’s fair report privilege. *See* Wis. Stat. § 895.05(1).

Under section 895.05(1), “[n]ewspapers are absolutely privileged when they publish true and fair reports of judicial, police, and other government proceedings.” *Driessen v. Vabalaitus*, 2023 WL 2954460, at \*3 (W.D. Wis. Apr. 14, 2023) (citation and quotation marks omitted). To be protected, “an article or broadcast reporting on an official action or proceeding need not

quote those proceedings verbatim or describe them completely, so long as the report is ‘accurate and complete or a fair abridgement of the proceeding.’” *Fin. Fiduciaries, LLC v. Gannett Co.*, 2020 WL 12582894, at \*15 (W.D. Wis. June 1, 2020) (quoting Robert D. Sack, *Sack on Defamation* § 7:3.5[B][2] (5th ed. 2019)).

This statute precludes liability here. The *Wausau Pilot*’s coverage was a true and fair report of events at the August 12 and 19 County Board meetings, for all of the reasons discussed above. In particular, Tomczyk’s challenge to the August 21 Article—to the extent he still even pursues it, *see supra* at 27 n.14—rests on the *Wausau Pilot* recounting public comments made by a speaker, Ort Sondergard, during a county government proceeding. There is no dispute that, as stated in the article, Ort Sondergard noted in the course of her speech that “a local businessman” used the slur. *Supra* at 15 & n.10. Indeed, she went on to note that “several people around him heard the slur, including the teen it was directed at and his mother.” *Id.*<sup>19</sup> The statute plainly protects this reporting.

#### **IV. The Judgment Must Be Affirmed as to Jayshi Because of a Failure to Comply with Wisconsin’s Retraction Statute**

Finally, the judgment must additionally be affirmed as to Jayshi because of Tomczyk’s failure to comply with Wisconsin’s retraction statute as to him. A defamation plaintiff may not file suit unless he has first provided “those alleged to be responsible . . . a reasonable opportunity to correct the libelous matter.” Wis. Stat. § 895.05(2). In particular, the plaintiff must provide “notice in writing specifying the article and the statements therein

---

<sup>19</sup> Tomczyk quibbles with the newspaper’s interpretation of Ort Sondergard’s remarks as suggesting that she also “witnessed the episode.” Br. 8. But this minor inaccuracy does not affect the application of the privilege. *See Fin. Fiduciaries*, 2020 WL 12582894, at \*15. To the extent Tomczyk even pursues a claim over this statement, it is based on the reference to the use of a slur by a “local businessman,” not who witnessed it.

which are claimed to be false and defamatory and a statement of what are claimed to be the true facts.” *Id.* This “notice requirement ... is a condition precedent to the existence of a cause of action for libel.” *Schultz v. Sykes*, 2011 WI App 255, ¶ 57, 248 Wis. 2d 746, 638 N.W.2d 604. And notice compliant with the statute must be provided to *each* party named in the case. *Hucko v. Joseph Schlitz Brewing Co.*, 100 Wis. 2d 372, 385–86, 302 N.W.2d 68 (Ct. App. 1981) (affirming dismissal of individual defendants when only an entity defendant received a demand letter).<sup>20</sup>

Here, Plaintiffs sent a retraction demand to the newspaper itself, care of Siewert. *See* R. 6. But they did not send the demand to Jayshi. He therefore must be dismissed from the case with prejudice. *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶¶ 23-26, 316 Wis. 2d 386, 763 N.W.2d 219 (failure to comply with retraction statute requires dismissal “with prejudice”).

### **CONCLUSION**

For the foregoing reasons, the Circuit Court’s grant of summary judgment should be affirmed.

---

<sup>20</sup> As previously noted, *supra* at 18, this Court is not limited to considering the grounds on which the Circuit Court ruled. A party may advance for the first time on appeal, and the Court may consider, any basis for sustaining the trial court’s summary judgment dismissal of the claim against him. *Am. Fam. Mut. Ins. Co.*, 297 Wis. 2d 828, ¶ 26 n.7; *see also Schultz*, 248 Wis. 2d 746, ¶ 57 (holding claim must be dismissed under retraction statute when issue raised for first time on appeal).

Dated this 8th day of November, 2023.

GODFREY & KAHN, S.C.

By: *Electronically signed by Brian C. Spahn*

James Friedman, SBN: 020756

Maxted Lenz, SBN: 1104692

Brian C. Spahn, SBN: 1060080

One East Main Street, Suite 500

Madison, WI 53703

Phone: 608-257-3911

Fax: 608-257-0609

Email: jfriedman@gklaw.com

Email: mlenz@gklaw.com

Email: bspahn@gklaw.com

-and-

WILLIAMS & CONNOLLY LLP

Joseph M. Terry, *pro hac vice*

Stephen J. Fuzesi, *pro hac vice*

Tyler Infinger, *pro hac vice*

Peter Jorgensen, *pro hac vice*

680 Maine Avenue SW

Washington, DC 20024

Phone: 202-434-5507

Fax: 202-434-5029

Email: jterry@wc.com

Email: sfuzesi@wc.com

Email: tinfinger@wc.com

Email: pjorgensen@wc.com

*Attorneys for Defendants-Respondents Wausau  
Pilot and Review Corporation, Damakant Jayshi  
and Shereen Siewert*

**RULE 809.19(8g) CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,141 words.

Dated this 8th day of November 2023.

*Electronically Signed by Brian C. Spahn*

Brian C. Spahn

State Bar No. 1060080



**RULE 809.19(8g) APPENDIX CERTIFICATION**

I certify that if the record is required by law to be confidential, the portions of the record included in the supplemental 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.

*Electronically Signed by Brian C. Spahn*

Brian C. Spahn

State Bar No. 1060080