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

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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.

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

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# APPELLANTS' REPLY BRIEF

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## I. TOMCZYK IS NOT A PUBLIC FIGURE

### A. Tomczyk is Not a General-Purpose Public Figure

*Wausau Pilot* argues that the "actual malice" standard applies to Tomczyk's claims[1] because Tomczyk was a "general-purpose public figure."[2] (Resp. Br. at p. 20.) This is an extremely high bar and one that does not apply to Tomczyk circa August 2021. Because Tomczyk was a private individual when *Wausau Pilot* defamed him, the ordinary negligence standard applies. *See Denny v. Mertz*, 106 Wis. 2d 636, 656-57, 318 N.W. 2d 141 (1982).

To establish that Tomczyk was a "celebrity" within Marathon County in the summer of 2021, *Wausau Pilot* points to Tomczyk's past membership on the Mosinee School Board and as the former vice

[1] For ease of reference, the Plaintiffs are collectively referred to as "Tomczyk" and the Defendants as "*Wausau Pilot*." Contrary to Defendants' assertion, IROW remains an appellant to this appeal.

[2] To support their position that Tomczyk was a public figure, *Wausau Pilot* submits an appendix consisting entirely of newspaper articles or editorials that were not part of the circuit court record. (Resp. App.) This is not permissible. It is well established that reviewing courts are limited to the record and will not consider materials that were not made part of the record in the trial court. *See Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256.

Indeed, the case cited by *Wausau Pilot* to support its position held that while a court could take judicial notice of a newspaper article to establish the date of an event of national importance, the general rule was the newspaper articles were hearsay. *State v. Grahn*, 21 Wis. 2d 49, 53, 123 N.W.2d 510 (1963).

chair of the Republican Party of Marathon County, positions he did not hold in August 2021. (Resp. Br. at p. 9-10.) *Wausau Pilot* even uses Tomczyk's board membership on the Greater Wausau Chamber of Commerce as evidence that he was a general-purpose public figure. (Id. at p. 10.) Other than that, *Wausau Pilot* attributes Tomczyk's participation in protests against the government's COVID-19 policies and sporadic appearances on a radio program as "extensive involvement in public life" sufficient to make Tomczyk a "general-purpose public figure within Marathon County." (Resp. Br. at p. 21-22.)

In order for someone to be "a public figure for all purposes" that "person must be a 'well-known "celebrity," his [or her] name a "household word"'—a 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 v. Cap. Times Co.*, 145 Wis. 2d 71, 82, 426 N.W.2d 43, 48 (Ct. App. 1988) (quoting *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980)). *Wausau Pilot* simply failed to put forward evidence sufficient to demonstrate that Tomczyk's name was a "household word" in Marathon County in the summer of 2021. There was no

evidence offered in the summary judgment record in the form of surveys or other evidentiary support to establish what percentage of the local population even knew who Tomczyk was prior to *Wausau Pilot* defaming him. *See Waldbaum*, 627 F.2d at 1295 (noting that a court can "examine statistical surveys" to determine a "plaintiff's name recognition").

For the "actual malice" standard to attach to someone as a general-purpose public figure, the defendant must show that the plaintiff was "known to a large percentage of the well-informed citizenry." *Id.* at 1295 n.20. *Wausau Pilot* never did any of the heavy lifting required to meet this standard, and instead blithely assumed that one's past involvement in local civic organizations or the school board was enough to vault someone into the public's consciousness as a "celebrity." Because 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), this court must conclude that *Wausau Pilot* has failed to establish that Tomczyk was a general-purpose public figure in August 2021.

### B. Tomczyk is Not a Limited-Purpose Public Figure

Alternatively, *Wausau Pilot* asserts that Tomczyk was a limited purpose-public figure with respect to the debate surrounding the Community for All Resolution. As *Wausau Pilot* notes, there is a three-part test that it must meet to establish that Tomczyk was a limited-purpose public figure. *Wiegel*, 145 Wis. 2d at 83. To be sure, the Community for All Resolution was a public controversy in Marathon County in the summer of 2021. However, *Wausau Pilot* did not—and cannot—establish that the other two elements were met.

On the second element, *Wausau Pilot* avers that Tomczyk exposed himself to the limited-public purpose standard because he "made public comments at two public meetings," by which *Wausau Pilot* means the Marathon County Board meetings held on August 12 & 19, 2021. (Resp. Br. at 24.) True enough. But 40 and 55 citizens spoke out and those two board meetings, respectively. (R. 60; R. 4:3.) Does *Wausau Pilot* seriously contend all of them are now limited-purpose public figures?

The law in Wisconsin is that "[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,*

145 Wis. 2d at 83 (citation omitted). Tomczyk was one of a large group of people who spoke publicly on the Community for All Resolution. Speaking out at a public board meeting, or attending a public rally, are cannot transform a private citizen into a public figure.

*Wausau Pilot* also states that Tomczyk had "ready access to the media" to rebut its defamatory reporting by virtue of his friendship with Meg Ellefson, a local radio show host. (Resp. Br. at 24.) And yet, there is nothing in the record showing that Tomczyk was given media access to rebut the allegations made by *Wausau Pilot*.

In short, there is nothing in the record to show that Tomczyk's influence over the Community for All Resolution was in any way different than the dozens of individuals who publicly expressed opinions at the two Marathon County Board meetings. The second factor has not been met.

On the third factor, *Wausau Pilot* cannot establish that its false attribution that Tomczyk allegedly whispered the word "fag" to someone seated next to him was related to whether the Marathon County Board should pass a resolution declaring the County a "community for all." It is paradoxical to assert that one's alleged *private* comments are related to a *public* controversy. If Tomczyk had

wanted the public's views to be swayed by the word "fag," he would have said it during either of his public comments.

*Wausau Pilot* takes the capacious view that because the Community for All Resolution dealt with "inclusion," any private comment by a human being in attendance at the either County Board meeting that could be deemed "exclusive" is "germane" to the Community for All Resolution. (Resp. Br. at p. 25-26.) Even if Tomczyk injected his views on the Community for All Resolution into the public forum, a private comment he allegedly made about a 13-year-old boy was utterly unrelated to whether the Marathon County Board should pass the Community for All Resolution.

### C. Applying the Proper Negligence Standard, Summary Judgment Should Have Been Denied

As Tomczyk argued in his initial brief, the proper standard that the circuit court should have applied to his defamation claims was the ordinary negligence standard, which governs claims made by private individuals against media defendants. *Denny*, 106 Wis. 2d at 654. (App. Br. at p. 35-37.)

*Wausau Pilot* did not develop a response to this argument, other than to comment in a footnote that "Tomczyk could not prevail at summary judgment even on a negligence standard" because it

allegedly had "multiple statements from [Norah] Brown confirming" that Tomczyk used some derivative of "fag." (Resp. Br. at p. 28, n.16.) No case law is cited and no argument is developed. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). *Fryer v. Conant*, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990) ("We will not consider an argument that is inadequately briefed."). As such, *Wausau Pil*ot has conceded that summary judgment was not appropriate under the negligence standard. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not responded to are conceded).

## II. BECAUSE WAUSAU PILOT HAS SUBMITTED DIFFERENT ACCOUNTS OF WHAT TOMCZYK SAID AND WHEN HE SAID IT, IT CANNOT CLAIM SUBSTANTIAL TRUTH AS A DEFENSE

Paradoxically, *Wausau Pilot* argues that it is "substantially true" that Tomczyk called Brown's son a "fag" at the August 12 Board meeting, although it has submitted different versions of what Tomczyk said and when he said it. In one version of truth, at 4:14 p.m. Tomczyk said "there's fag number 1" and then "the second fag" while Norah Brown's son was seated immediately in front of him. This is the version that Norah Brown gave in her deposition. (R. 65

at p. 23:13-25, 24:1.) In a second version of the truth, Tomczyk said "fag" or "faggot" while Norah Brown's son was speaking, which occurred 50 minutes later. This was the version supplied by Megan and Carrie Marohl. (R. 70 at p. 24:7-25, p. 25:1-16; R. 72 at p. 19:17-23.) And in the third version of the truth, Tomczyk "stormed out of the meeting" after Norah Brown turned around and said something to him. This was the truth according to Alex Heaton. (R. 38, ¶3.) Yet, Brown never testified that she said anything to Tomczyk and the video from the evening showed Tomczyk calmly leaving at 6:12 p.m., long after the public comments period ended. (R. 73.)

These different versions of the truth obviously cannot all be correct. As such, contrary to *Wausau Pilot's* contention, there is a genuine factual dispute. (Resp. Br. at 30.)

Next, *Wausau Pilot* contends that because Tomczyk testified at his deposition that he has used the word "fag" in jest with friends or family members, that it was "substantially true" for *Wausau Pilot* to report that on August 12, 2021 at a public hearing, Tomczyk called a 13 year-old boy a "fag" (or some derivative of the word). This is absurd. Here is Tomczyk's deposition testimony:

> A: Oh, I made jokes about gay people. I am -- I am a[n] aficionado of Monty Python and -- and

> English comedy. So that term "fag" is used fairly often in some of their routines.
>
> I have a brother who is a gay guy, and I've certainly out of joking and out of spite called him a "faggot" more than once. I have a couple of friends who are also gay, and in that community, that term -- I don't -- I don't feel in that community that term has the same negative connotation that -- in a straight community. The guys that I know laugh it off.

(R. 59 at p. 122:5-16.)

Contrary to *Wausau Pilot's* assertion, the August 28 article was not "that Tomczyk uses the word [fag]." (Resp. Br. at 31.) Rather, *Wausau Pilot* was reporting that Tomczyk directed the slur towards a *specific* child, at a *specific* event, in public. It was not reporting that Tomczyk has in the past used the word with friends or family. One cannot compare the published statement that Tomczyk "was widely overhead calling a 13-year-old boy who spoke in favor of the resolution a 'fag,'" (R. 5:5), with a statement such as "Cory Tomczyk has used the word 'fag' or 'faggot' in jest with gay friends and family members." This "substantial truth" argument is meritless.

## III. EVEN APPLYING THE "ACTUAL MALICE" STANDARD, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED

*Wausau Pilot* never grapples with the legion of inconsistencies in the statements of the four witnesses it is relying on to support its publications on August 21 and 28 which attributed use of the word

"fag" to Tomczyk.[3] (See App. Br. at p. 5-27.) In summary, here was the path *Wausau Pilot* took to "confirm" that Cory Tomczyk directed the word "fag" at a Norah Brown's 13-year-old son:

- *Wausau Pilot's* reporter, Damakant Jayshi, did not attend any of the Marathon County Board meetings he reported on, and instead relied entirely on the YouTube recordings. (R. 61 at p. 45:11-25, 46:1-2.)
- Jayshi did not interview any sources or witnesses before writing that the word "fag" was uttered at the August 12 meeting. (Id.)
- Jayshi did not know the identity of the person who used the word "fag" when he published the August 21 article. (Id. at p. 65:20-25, 66:1-8.)
- Lisa Ort Sondergard was falsely quoted as saying she "witnessed" a local businessman use the word "fag." Sondergard demanded a retraction from the *Wausau Pilot*, which the paper ignored. (Dkt. 33.)
- Both articles misleadingly suggest that another speaker, Christopher Wood, acknowledged that Norah Brown's son was called a "fag." In fact, even Siewert acknowledged that Wood was not speaking about anyone in particular. (R. 62 at p. 59:9-18.)
- Shereen Siewert relied on Pat Peckham as a "trusted source" to confirm that Tomczyk said "fag" at the August 12 meeting, despite not knowing if Peckham attended the hearing (he did not). (R. 63 at p. 31:6-8.) Peckham's "sources" were nothing more than hearsay and unidentified gossip. (Id. at p. 32:8-9.)

[3] Wausau Pilot claims it is "unclear" if Tomczyk is still pursuing a claim for the August 21 article. (Resp. Br. at 27 n.14.) The answer to that question is "yes."

- Siewert violated her own journalist rule, which is to confirm a quote with two sources who have first-hand knowledge. (R. 62 at p. 27:1-16.) In this case, she admitted to relying on only one: Norah Brown. (Id. at p. 35:1-24.) But Brown contradicted Siewert's testimony, saying she was never asked by Siewert to confirm the quote. (R. 65 at p. 42:11-13.)

Siewert's desire to publish an unsourced story was likely colored by her long-running disdain for Tomczyk, a man she has labelled "gross," an "asshole," and a "dick head." (R. 68.)

In short, there is more than enough in the evidentiary record for a reasonable jury to conclude that Wausau Pilot acted with "reckless disregard" of the truth when it rushed to attribute the use of the word "fag" to Tomczyk. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 521 (1991) (denying summary judgment when factual questions exist over whether statements were made with reckless disregard for the truth); *Renner v. Donsbach*, 749 F. Supp. 987, 993 (W.D. Mo. 1990) (same); *Beverly v. Abbott Lab'ys*, No. 17 C 5590, 2019 WL 3003352, at *13 (N.D. Ill. July 10, 2019) (same).

## IV. THE FAIR REPORT PRIVILEGE STATUTE IS INAPPLICABLE

*Wausau Pilot* next asserts that summary judgment should be affirmed because its decision to publish that Tomczyk "was widely overhead calling a 13-year-old boy who spoke in favor of the

resolution a 'fag,'" is protected by Wis. Stat. § 895.05(1). (Resp. Br. at 32.) This statute is inapplicable because the quote attributed to Tomczyk was not part of any "public statement, speech, argument or debate" he was making at either County Board meeting. *See* § 895.05(1). Indeed, Siewert testified that she relies on "transcripts" or "recordings" of government meetings to verify quotes. (R. 62 at p. 22:14-17.) That is not what happened here, as no transcript or recording of the Marathon County Board has anyone stating that Tomczyk used the word "fag." As such, the statutory immunity under § 895.05(1) does not apply.

In fact, when *Wausau Pilot* attempted to quote someone's public comments, it failed. The August 21 article stated that "Lisa Ort Sondergard witnessed the episode and said she heard a local businessman use the slur 'fag.'" (Dkt. 30, p. 3.) But as noted above, Sondergard issued a demand for a retraction, as she never said she "witnessed" anyone say the word "fag." (Dkt. 33.)

Section 895.05(1) provides no shelter for *Wausau Pilot*.

## V. DEMAND FOR RETRACTION WAS MADE UPON *WAUSAU PILOT*, SIEWERT, AND JAYSHI

For the first time on appeal, *Wausau Pilot* contends that the September 24, 2021 notice of defamation and demand for retraction

served on *Wausau Pilot* c/o Shereen Siewert was not properly served on Jayshi, the reporter who wrote both stories. (Resp. Br. at p. 33.)

It is false to assert that the demand for retraction letter did not put Jayshi on notice that Tomczyk was seeking a retraction for the August 21 and 28 articles. Jayshi is mentioned throughout the letter and was put on notice to preserve any documents relating to the August 21 and 28 stories. (R. 6.) Moreover, Jayshi resides in Decatur, Georgia, a fact not known at the time the demand letter was sent. (R. 61 at p. 18:10-16.)

Jayshi was added as a defendant in the amended complaint. The amended complaint referenced the demand letter, to which Defendants answered, "that document speaks for itself." (R. 37, ¶22.) Defendants thus never denied the validity of the retraction demand, which distinguishes this case from the *Schultz v. Sykes* case cited by *Wausau Pilot*. 2001 WI App 255, ¶ 57, 248 Wis. 2d 746, 638 N.W.2d 604 ("The Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do.").

## CONCLUSION

For the reasons set forth herein, this Court should reverse the circuit court's summary judgment decision.

Dated this 22nd day of November, 2023.

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## CERTIFICATION

I 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 13 pages and 2,951 words.

Dated this 22nd day of November, 2023.

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