WISCONSIN SUMMARY JUDGMENT MEMORANDUM

INDEX

I. THE WISCONSIN SUMMARY JUDGMENT STATUTE

II. STANDARDS FOR APPROVING A MOTION FOR SUMMARY JUDGMENT

II. ALL DOUBT MUST BE CONSTRUED IN FAVOR OF NON-MOVING PARTY

IV. QUALIFIED PRIVILEGE IF REASONABLE GROUNDS EXIST FOR BELIEF IN TRUTH OF ALLEGEDLY DEFAMATORY STATEMENT

V. THERE CAN BE NO FINDINGS OF FACT IN A SUMMARY JUDGMENT DECISION

VI. PREMATURE ELEMENT OF SUMMARY JUDGMENT MOTION

VII. THE STANDARDS FOR APPROVAL OF A MOTION TO RECONSIDER

Draft 6/20/2019

WISCONSIN SUMMARY JUDGMENT MEMORANDUM

I. THE WISCONSIN SUMMARY JUDGMENT STATUTE

802.08. Summary judgment.

(1) Availability. A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim, counterclaim, cross claim, or 3rd-party claim which is asserted by or against the party. Amendment of pleadings is allowed as in cases where objection or defense is made by motion to dismiss.

(2) Motion. Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing. Prior to a hearing on the motion, any party who was prohibited under s. 802.02(1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. **The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(3) Supporting papers. **Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.** Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. **The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.**

(4) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(5) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees.

(6) Judgment for opponent. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor. Section 802.08(2) provides the standard for granting summary judgment. There must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. *Id.* The court does not decide factual issues. It decides whether any such issues exist precluding the grant of summary judgment. Grams v. Boss, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Schmidt v. Safeco Ins. Co. of Am., 107 Wis. 2d 742, 321 N.W.2d 366 (Ct. App. 1982).

II. STANDARDS FOR APPROVING A MOTION FOR SUMMARY JUDGMENT

Grant of summary judgment against the company in its action for damages resulting from unlawful access to its computer system was improper where there were material issues of fact as to whether the injury was caused by a failure to exercise due care; if believed, the company's owner's testimony, along with the testimony of others, gave rise to issues of material fact as to whether the internet service provider and owner were liable on the company's negligent supervision claim. Fun-World 2, L.L.C. v. Konopka, 670 N.W.2d 557, 267 Wis. 2d 278 (Wis. Ct. App. 2003).

The court must initially examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's . . . affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08(2). To make a *prima facie* case for summary judgment, a moving defendant must show a defense, which would defeat the plaintiff. If the moving party has made a *prima facie* case for summary judgment, the court must examine the affidavits and other proof of the opposing party (plaintiffs in this case) to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn,

sufficient to entitle the opposing party to a trial. Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473, 476-77 (1980) (internal citations omitted).

Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. It is also inappropriate when difficult legal questions are presented which are better resolved after a determination of the underlying facts, or when the totality of the facts and the circumstances surrounding those facts must be developed before the ultimate issue in the case may be resolved. Forgues v. Heart of Tex. Dodge, Inc., 2003 WI App 188, ¶17, 266 Wis. 2d 1060, 668 N.W.2d 562 (internal citations omitted).

Summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Fun-World 2, L.L.C. v. Konopka, 2003 WI App 201, ¶32, 267 Wis. 2d 278, 670 N.W.2d 557.

III. ALL DOUBT MUST BE CONSTRUED IN FAVOR OF NON-MOVING PARTY

The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment. Grams v. Boss, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 461-62, 449 N.W.2d 35 (1989).

IV. QUALIFIED PRIVILEGE IF REASONABLE GROUNDS EXIST FOR BELIEF IN TRUTH OF ALLEGEDLY DEFAMATORY STATEMENT

The plaintiff's own testimony given in Washington, which he testified at the trial was true, was equivocal, if not contradictory, as to whether or not he had been guilty of forgery. If the plaintiff had signed the names of other policyholders to ballots, as a part of his testimony seems to indicate, he was a forger at common law If on the other hand, being himself a policyholder, he signed his own name to a number of ballots, not enough appears to make out forgery. This is not a case where the plaintiff finally adhered to one of two conflicting statements and repudiated the other. It was for the jury to say whether or not the accusation of forgery, if made, was true. The defendant must prove the substantial truth of the charge as made. Bander v. Metro. Life Ins. Co., 313 Mass. 337, 342, 47 N.E.2d 595, 599 (1943).

In a case where a doctor claimed an administrator defamed him for prescribing unlawful narcotics, the court found the administrator not liable on summary judgment, because "Given the results of the administrator's investigation and the additional suspicious circumstances, the administrator had reasonable grounds to believe that prescription pads may have been stolen from the Duluth clinic, and that appellant--who submitted the prescription to the pharmacy--may have been attempting to forge a prescription from the stolen pads." Desmonde v. Nystrom & Assocs., No. A09-0221, 2009 Minn. App. Unpub. LEXIS 967, at *12-13 (Aug. 25, 2009).

Truth provides a complete defense to defamation claims. Dillon v. City of N.Y., 261 A.D.2d 34, 39, 704 N.Y.S.2d 1, 6 (App. Div. 1999).

V. THERE CAN BE NO FINDINGS OF FACT IN A SUMMARY JUDGMENT DECISION

There are no "findings" on a **summary judgment**. Storms v. Action Wis., Inc., 2007 WI App 162 n.7, 303 Wis. 2d 744, 735 N.W.2d 192.

On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. Fun-World 2, L.L.C. v. Konopka, 2003 WI App 201, ¶32, 267 Wis. 2d 278, 670 N.W.2d 557

VI. PREMATURE ELEMENT OF SUMMARY JUDGMENT MOTION

A party defending against a motion for summary judgment may claim the motion is is premature due to a lack of sufficient time to gain information from the moving party in discovery. A party making such a claim must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." In other words, the party must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete. Furthermore, if the party defending the summary judgment motion on the grounds it is premature, cross-moves for his or her own summary judgment, the incomplete-discovery argument is deemed waived. Roberts v. Mintz, No. A-1563-14T4, 2016 N.J. Super. Unpublished LEXIS 1756, at *9 (Super. Ct. App. Div. July 26, 2016).

VII. THE STANDARDS FOR APPROVAL OF A MOTION TO RECONSIDER

The purpose of a motion to reconsider is narrow and limited to bringing the court's attention to manifest errors of law or fact or newly discovered evidence. Sheikh v. Grant Regional Health Center, No. 11-cv-1-wmc, 2012 U.S. Dist. LEXIS 85374, at *2 (W.D. Wis. June 20, 2012).