

No. A10863

STATE OF MINNESOTA  
IN SUPREME COURT

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Chris Gregerson, Appellant/Petitioner,

vs.

[OP], et al.\*, defendants,  
Morgan Smith et al., respondents, Boris  
Parker, et al., respondents, and Vladimir  
Kazaryan, respondent

PETITION FOR REVIEW OF DECISION  
OF COURT OF APPEALS AND APPENDIX

APPELLATE COURT CASE NUMBER: A10863

DATE OF FILING OF COURT OF  
APPEALS DECISION: November 9<sup>th</sup>, 2010

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TO: The Supreme Court of the State of Minnesota:

The petitioner, Chris Gregerson, requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Statement of legal issues and their resolution by the Court of Appeals.

**I. Does attorney immunity in a malicious prosecution claim based on believing facts stated by his client include facts the client had no personal knowledge of?**

The trial court and court of appeal held in the affirmative.

**II. Is the dismissal of a claim as “purely speculative” sufficient to create a triable issue that the claim lacked probable in a malicious prosecution action?**

The trial court and court of appeals held in the negative.

**III. Can the malice element of malicious prosecution be established by knowing furtherance of a client's malice or the knowing commission of wrongful act?**

The trial court and court of appeals held in the negative.

**IV. Are legal claims brought to compel a defendant to stop truthful public statements and expressions of opinion a legitimate use of the legal process?**

The trial court and court of appeals held in the affirmative.

2. Statement of the criteria of the rule relied upon to support the petition.

Appellant respectfully requests review because the lower courts have so far departed from the accepted an usual course of justice, and narrowed the definition of abuse of process and malicious prosecution, so as to require an exercise of the Supreme Court's supervisory powers.

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\* Following a settlement with the Original Plaintiff[OP], he is not named specifically in documents on this site.

### 3. Statement of the case (facts and procedural history).

#### I. STATEMENT OF THE FACTS

In 2005, photographer Chris Gregerson discovered a photograph from his website being used in [OP]'s phone book ad without his permission. [OP] dismissed Gregerson's demand for a licensing fee and Gregerson wrote a web page complaining the owner, [OP], would not “discuss a settlement based upon fair market value” (A-104). Respondent Smith, acting as attorney for [OP], demanded Gregerson remove the web page or face a lawsuit for defamation. Gregerson did not comply, [OP] sued, and the court found:

[OP]'s lawyer [respondent Morgan Smith] surely knew he could only ask Gregerson to remove those statements in the essay that were allegedly false. Yet, except for a reference to the headline, [Smith] made no effort to describe to Gregerson what statements in the essay were allegedly false. The lawyer's letter appears to be a bullying tactic designed to cause Gregerson to refrain from making statements which [OP] knew Gregerson was entitled to make.

...the Complaint fails to state a claim for relief under the substantive law of defamation.

Order and opinion, Judge Mark Wernick, April 10<sup>th</sup>, 2006. [OP], represented by respondent Boris Parker, brought six additional claims against Gregerson over his web page in 2006, all alleging [OP] “lawfully purchased” the rights to Gregerson's photos from a man named “Micheal Zubitskiy”, who created the photos himself. This contention was based upon “Mr. Zubitskiy's oral representations” (Answer to interrogatory no. 4, A-106). No record of anyone named “Michael Zubitskiy” living in the USA could be found by either party.

Gregerson produced certificates of copyright registration for two photos [OP] used in their ads, and showed he published the photos prior to the alleged March, 2004, creation date by

“Michael Zubitskiy”. [OP] did not claim to have any personal knowledge whether Zubitskiy created the photos, he was relying on his subjective, personal opinion:

Q. Did he [Zubitskiy] make any statement that he had taken the pictures?

A. I don't recall the conversation.

Q. What is your basis for believing that he did take this photo?

A. He brought them over to me.

Deposition of [OP], Feb. 13<sup>th</sup>, 2006, 27:8 – 27:13. On summary judgment in 2007, a federal court found there was “no genuine dispute” as to Gregerson's ownership of the photos, and 3 claims against Gregerson were dismissed, one for being “purely speculative”. On October 27<sup>th</sup>, 2007, Bassford Remele's CEO, Rebecca Moos, wrote:

[OP] – client [OP] is lying about buying picture from a person who can't be located.

A-102. Following trial, all remaining claims against Gregerson were dismissed.

...there is no credible evidence to support the belief that “Zubitskiy” exists or was the source of the controverted photos....[OP] failed to provide any information regarding the whereabouts or existence of Zubitskiy.

...[OP] did not identify any specific comments by [Gregerson] that were false.

*Findings of Fact and Conclusions of Law*, Judge Ann D. Montgomery, pp.5, 17

## II. PROCEDURAL HISTORY

Appellant Gregerson filed the instant action for malicious prosecution and abuse of process on May 28<sup>th</sup>, 2009. On July 20<sup>th</sup>, 2009, he settled with [OP]. On Oct. 6<sup>th</sup>, 2009, the trial court dismissed appellant's claim for abuse of process based on failure to state a claim.

The court granted a motion by the Parker respondents for summary judgment, dismissing all remaining claims against all defendants (Order for Judgment issued March 5<sup>th</sup>, 2010).

#### **4. A brief argument in support of petition**

##### **I. THE RESPONDENT ATTORNEYS RELIED UPON DUBIOUS FACTS OUTSIDE THEIR CLIENT'S PERSONAL KNOWLEDGE**

The court of appeals wrote “[Gregerson] claimed ownership of the photographs...” (p.7), and the opposing claim was made by “‘Micheal Zubitskiy' who claimed to have taken the photos” (p.3). Respondent's client, [OP], only “...assured [respondents] that he had paid Zubitskiy...” (p.6), but on the crucial issue of whether Zubitskiy actually owned the images, the respondents relied upon “...Mr. Zubitskiy's oral representations...” (A-106). The respondents' client, [OP], did not have any personal knowledge whether this dubious claim was true, he merely manifested the belief that Zubitskiy, rather than Gregerson, took the photos. This improperly extends attorney immunity to include relying upon his client's unsupported beliefs.

##### **II. THE RESPONDENTS NEVER CLAIMED THEY BELIEVED THEIR CLIENT**

The lower courts find no dispute “...Respondents did believe their client...” (p. 6). Nowhere in the record do the respondents claim to have believed [OP]'s story (which is arguably an obvious falsehood). To the contrary, Bassford Remele's CEO, Rebecca Moos, wrote “...[OP] is lying about buying picture from person who can't be located.” (A-102).

##### **III. RESONDENTS LACKED PROBABLE CAUSE**

A claim against Gregerson for unjust enrichment was dismissed as “purely speculative”. The lower courts did not specify how they determined the claim actually had probable cause.

Under 17 USC, 410(c), Gregerson's certificates of copyright registration are “*prima facie* proof of ownership...”. The respondents lacked a reasonable belief they could overcome that presumption with only their client's naked “belief” the unavailable Zubitskiy took the photos.

#### IV. A GENUINE DISPUTE ON THE ELEMENT OF MALICE EXISTS

The lower courts held there was no evidence of malice. If there was a lack of probable cause, “malice may be, but need not be, inferred from lack of probable cause. “ *Allen v. Osco Drug, Inc.*, 265 NW 2d 639, 645 (Minn. Supreme Court 1978). Appellant also provided evidence the malice element was satisfied because respondents did “...knowingly sell himself to work out the malicious purposes of another...”. *Hoppe v. Klapperich*, 28 N.W.2d 780, (Minn. 1947).

#### V. DEMANDING GREGERSON'S COMPLETE SILENCE WAS NOT PROPER

Appellant's claim for abuse of process alleged the litigation was brought against him to pressure him to “...remove the web page entirely, post no other pages, and drop his copyright claims.” (Complaint at ¶73, A-94). In dismissing this cause of action for failure to state a claim, the court of appeals affirmed all seven claims were properly used to pressure Gregerson into “shutting down his website” and ceasing all expression of “...negative information and opinion”. (p.11, A-11). This is in conflict with appellant's first amendment right to communicate truthful information and express opinion. On behalf of their client, respondents were “...using the process to accomplish a result not within the scope of the proceedings...”. Complaint at ¶ 108 (A-99), citing *Kellar v. VonHoltum*, 568 N.W. 2D 186, 192. (Minn. App. 1997).

For these reasons, the petitioner seeks an order granting review of the decision of the Court of Appeals.

DATED: December 8<sup>th</sup>, 2010

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Chris Gregerson, Appellant/Petitioner (pro-se)  
150 N. Green Ave.  
New Richmond, WI 54017  
612-245-4306