COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2643

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STEPHEN V. HANNIGAN,

PLAINTIFF-APPELLANT,

V.

LIBERTY MUTUAL INSURANCE COMPANY, RELIANCE NATIONAL INSURANCE COMPANY, BORGELT, POWELL, PETERSON & FRAUEN, S.C., A WISCONSIN SERVICE CORPORATION, ERIC B. JENSEN AND VIRGINIA NEWCOMB,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Eich and Vergeront, JJ.

VERGERONT, J. Stephen Hannigan appeals a summary judgment dismissing his claims under §§ 146.81-84 and 51.30, STATS., regarding the

confidentiality of his health care and treatment records, respectively,[1] and his claims of invasion of privacy under § 895.50, STATS. The court also concluded the claims were frivolous. Hannigan alleged these claims against the law firm of Borgelt, Powell, Peterson & Frauen, S.C., two of its attorneys,[2] and Liberty Mutual Insurance Company, which the law firm represented in Hannigan's prior personal injury suit. Hannigan contends on appeal that the trial court erroneously interpreted the statutes and decided disputed issues of fact, and he challenges the trial court's determination that the claims were without a reasonable basis in law or equity and filed solely for the purpose of harassment.

We affirm dismissal of all claims, but on grounds other than those relied on by the trial court. We conclude the complaint does not state a claim for a violation of §§ 146.82-83 or 51.30(4), STATS., for requesting or obtaining Hannigan's records without his informed consent because these sections do not govern such conduct and there is therefore no civil liability for such conduct under

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[1] Section 146.81(4), STATS., defines patient health care records as:

> (4) "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, … but not those records subject to s. 51.30….

Section 51.30(1)(b), STATS., defines treatment records as:

> (b) "Treatment records" include the registration and all other records concerning individuals who are receiving or who at any time have received services for mental illness, developmental disabilities, alcoholism, or drug dependence which are maintained by the department, by county departments under s. 51.42 or 51.437 and their staffs, and by treatment facilities.

The parties dispute whether any of Hannigan's records are treatment records. For purposes of our decision, we assume without deciding that some are.

[2] We use "Borgelt" to refer to the law firm and the individual attorneys, collectively, and "the Borgelt attorneys" to refer to the two attorneys.

§§ 146.84 or 51.30(9), STATS. We conclude that §§ 146.83(4)(b) and 51.30(4)(dm)(2), which prohibit withholding or concealing of records, do not prohibit inducing others to withhold or conceal, and therefore the complaint does not state a claim for relief under these provisions. We conclude the complaint does not state claims for relief under either § 895.50(2)(a), STATS., (intrusion in a private place), or § 895.50(2)(b), (misappropriation), but does state a claim against Borgelt (though not Liberty Mutual) for giving publicity to a private matter under § 895.50(2)(c). However, based on the parties' submissions, we conclude Borgelt is entitled to judgment as a matter of law on this claim. Finally, we reverse the trial court's determinations on frivolousness and remand for proceedings consistent with this opinion.

BACKGROUND

Since the first step in summary judgment analysis is a determination whether the complaint states a claim for relief, we begin with the allegations of the second amended complaint.[3] They are as follows. In the prior personal injury litigation, Hannigan provided, through his attorney Lee Atterbury, a number of releases for his medical records to Borgelt attorneys Virginia Newcomb and Eric Jensen. Each release contained, among other information: the name of one medical provider, a statement that the purpose of the release was for investigation of a personal injury claim, the specific type of information to be disclosed, a

[3] We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The first inquiry is whether Hannigan's complaint states a claim or claims for relief, and at this stage, we take all facts and all reasonable inferences from those facts as true. ***Id.*** Only if the complaint does state a claim for relief do we consider the submissions of the parties in support of and in opposition to the motion to determine if these are genuine issues of material fact, and, if there are not, which party is entitled to judgment as a matter of law. ***Id.***

statement that only the original of the release was valid, and Hannigan's original signature.

Without Hannigan's consent, the Borgelt attorneys, or others under their supervision and control, altered the scope of the requested information in two of the releases, both notarized, to include "psychological or psychiatric records," inserted Hannigan's initials next to this alteration, and copied the altered forms, substituting the names of other record holders. They then sent the copied and altered releases to various providers, who, in response, released Hannigan's medical records, including his treatment records. Borgelt altered a third release to Dean Medical Center (the original of which was witnessed but not notarized) to authorize the release of Hannigan's treatment records, also without Hannigan's consent, and received Hannigan's treatment records in response. Borgelt released the records it obtained in this way to Liberty Mutual and others, and Borgelt interfered with Hannigan's right to obtain his patient health care and treatment records by inducing providers who had received requests from Hannigan to either withhold his records from Hannigan or send them to Borgelt.

The complaint asserts that Borgelt violated Hannigan's right to the confidentiality of his patient health care records under § 146.81-84, STATS., and to the confidentiality of his treatment records under § 51.30, STATS., by accessing or attempting to access Hannigan's records without his consent, releasing those records to others, putting them into public records, and tortiously interfering with his right to control the disposition of information in the records; and that Liberty Mutual violated his rights under those statutes by securing and possessing those records. The complaint also asserts claims for invasion of privacy under § 895.50, STATS. Hannigan seeks compensatory damages, exemplary damages under

§§ 146.84(1)(b) and 51.30(9)(b) for each knowing and willful violation of those statutes, punitive damages and declaratory and injunctive relief.

In its answer, Borgelt denied that any alterations to certain releases occurred without the permission of Attorney Atterbury. As for other releases, including the Dean release, the answer alleged that Borgelt requested permission to alter them from Attorney Atterbury, believed it had permission and forwarded the records received to Attorney Atterbury. The records it received in response to the altered Dean release were duplicates of those originally received by Attorney Atterbury. Borgelt admitted that, through a clerical error, it requested updated medical records from U.W. Hospital using a release to which Attorney Atterbury had objected; however, it denied that any unauthorized records or psychological records were received as a result of this error, and alleged that all records it did receive were forwarded to Attorney Atterbury. The answer denied the other allegations in the complaint, asserted various affirmative defenses and alleged the action was frivolous and should be dismissed under § 814.025, STATS., with attorney fees awarded. Liberty Mutual's answer denied knowledge or information sufficient to form a belief as to the allegations of the complaint, and also asserted a number of defenses.

Both Borgelt and Liberty Mutual moved for summary judgment and the court granted judgment in their favor, dismissing the complaint. The court concluded that the plain language of §§ 146.81-84 and 51.30, STATS., applies only to health care providers or treatment facilities. The court concluded that Hannigan had no privacy right in his health care and treatment records because he initiated the prior lawsuit, the judge in that lawsuit had ruled that records of both Hannigan's mental and physical health were relevant and admissible, and, without a protective order, those records were public. The court decided that Borgelt had

the right to share the records it obtained in discovery in that suit with its client, Liberty Mutual. The court also apparently decided there were no factual disputes concerning the altered releases, Attorney Atterbury had agreed to the alterations, and Borgelt was entitled to rely on Hannigan's attorney's agreement. The court ruled that all claims were frivolous under either §§ 814.025 or 895.50(6), STATS., because they had no basis in law and equity and were brought solely to harass Borgelt and Liberty Mutual. It therefore awarded attorney fees to the respondents with the amount and the apportionment between Hannigan and his counsel to be determined at a later hearing. The amount and apportionment of attorney fees are not before us on this appeal.

DISCUSSION

Section 146.81-84, STATS., (patient health care records) and § 51.30, STATS., (treatment records)

We begin with the claims asserted for violations of Hannigan's rights under §§ 146.81-84 and 51.30, STATS. The first question is whether obtaining patient health care or treatment records by altering the patient's consent form without his or her permission violates either statute. To resolve this question we must construe the statutes, and we do so independently of the trial court. *See* ***Lincoln Sav. Bank, S.A. v. DOR***, 215 Wis.2d 430, 441, 573 N.W.2d 522, 527 (1998). We conclude that neither statute creates liability in a civil action for this conduct.

The purpose of statutory interpretation is to discern the legislative intent. We first consider the language of the statute and, if the language of the statute clearly and unambiguously sets forth the legislative intent, we will not look outside the statutory language to ascertain the intent of the legislature. ***Id***. We also consider related sections. *See* ***City of Milwaukee v. Milwaukee County***, 27

Wis.2d 53, 56, 133 N.W.2d 393, 395 (1965). A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons. ***State v. Sample***, 215 Wis.2d 487, 495, 573 N.W.2d 187, 191 (1998). If a statute is ambiguous, we look to the scope, subject matter, history, context and object of the statute in order to ascertain legislative intent. *See* ***id.*** Whether a statute is ambiguous is a question of law. ***Awve v. Physicians Ins. Co.***, 181 Wis.2d 815, 822, 512 N.W.2d 216, 218 (Ct. App. 1994).

We consider §§ 146.81-84 and 51.30, STATS., together because the language is similar as it relates to the issue we must resolve. Section 146.82(1) provides that "[a]ll patient health care records shall remain confidential [and] … may be released only to the persons designated in this section or to other persons with the informed consent of a patient or of a person authorized by the patient…."[4]

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[4] Informed consent is defined in § 146.81(2), STATS.:

> (2) "Informed consent" means written consent to the disclosure of information from patient health care records to an individual, agency or organization that includes all of the following:
>
> (a) The name of the patient whose record is being disclosed.
>
> (b) The type of information to be disclosed.
>
> (c) The types of health care providers making the disclosure.
>
> (d) The purpose of the disclosure such as whether the disclosure is for further medical care, for an application for insurance, to obtain payment of an insurance claim, for a disability determination, for a vocational rehabilitation evaluation, for a legal investigation or for other specified purposes.
>
> (e) The individual, agency or organization to which disclosure may be made.
>
> (f) The signature of the patient or the person authorized by the patient and, if signed by a person authorized by the patient, the

(continued)

Subsections (2) and (3) then describe those situations in which patient health care records may be released without informed consent, none of which are applicable here. Section 146.83(1) governs the conditions under which the patient, or other person upon submitting an informed consent, may inspect and copy the patient's records; subsec. (2) requires health care providers to inform patients of this statute; subsec. (3) requires health care providers to keep records concerning requests to inspect; and subsec. (4) prohibits any person from falsifying, concealing or destroying records. Section 146.84 provides for civil remedies and criminal penalties:

> **Violations related to patient health care records.** (1) ACTIONS FOR VIOLATIONS; DAMAGES; INJUNCTION. (a) A custodian of records incurs no liability under this paragraph for the release of records in accordance with s. 146.82 or 146.83 while acting in good faith.
>
> (b) Any person, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 in a manner that is knowing and wilful shall be liable to any person injured as a result of the violation for actual damages to that person; exemplary damages of $1,000 in an action under this paragraph.
>
> (c) An individual may bring an action to enjoin any violation of s. 146.82 or 146.83 or to compel compliance with s. 146.82 or 146.83 and may, in the same action, seek damages as provided in this subsection.
>
> (2) PENALTIES. Whoever does any of the following may be fined not more than $1,000 or imprisoned for not more than 6 months or both:
>
> (a) Requests or obtains confidential information under s. 146.82 or 146.83 (1) under false pretenses.

> relationship of that person to the patient or the authority of the person.
>
> (g) The date on which the consent is signed.
>
> (h) The time period during which the consent is effective.

> (b) Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.
>
> (c) Violates s. 146.83 (4).

Section 51.30, STATS., establishes similar, and additional, restrictions with respect to treatment records. These records are confidential and privileged and may be released only to persons specifically designated in the statute or to other designated persons with informed consent, *see* § 51.30(4)(a)-(b), and the definition of informed consent is substantially the same. *See* § 51.30(2). The remedy and penalty subsections of § 51.30 provide:

> (9) (a) Any person, including the state or any political subdivision of the state, violating this section shall be liable to any person damaged as a result of the violation for such damages as may be proved, together with exemplary damages of not less than $200 for each violation and such costs and reasonable actual attorney fees as may be incurred by the person damaged. A custodian of records incurs no liability under this paragraph for the release of records in accordance with this section while acting in good faith.
>
> (b) In any action brought under par. (a) in which the court determines that the violator acted in a manner that was knowing and wilful, the violator shall be liable for such damages as may be proved together with exemplary damages of not less than $1,000 for each violation, together with costs and reasonable actual attorney fees as may be incurred. It is not a prerequisite to an action under this subsection that the plaintiff suffer or be threatened with actual damages.
>
> (c) An individual may bring an action to enjoin any violation of this section or to compel compliance with this section, and may in the same action seek damages as provided in this subsection. The individual may recover costs and reasonable actual attorney fees as may be incurred in the action, if he or she prevails.
>
> (10) PENALTIES. Whoever does any of the following may be fined not more than $1,000 or imprisoned for not more than 6 months or both:

> (a) Requests or obtains confidential information under this section under false pretenses.
>
> (b) Discloses confidential information under this section with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.
>
> (c) Violates sub. (4) (dm)1., 2. or 3. [same language as § 146.83(4) prohibiting falsification, concealment, destruction or damage of records].

Hannigan and the amicus, Aids Network Legal Services, argue that because §§ 146.82 and 51.30(4), STATS., require that a person other than the patient must provide the patient's informed consent in order to obtain the records of another (absent exemptions that do not apply here), it is a violation of those provisions to request or obtain records with a consent form that has been altered without the patient's permission. They point out that because §§ 146.84(1)(b) and 51.30(9)(b), STATS., make "any person" liable for a knowing and willful violation of the preceding sections, rather than any "health care provider," a term which is defined in § 146.81, STATS., the statutes plainly mean that persons who are not health care providers may be liable in a civil action. Borgelt and Liberty Mutual, on the other hand, contend that both statutes are plainly directed only to health care providers and their record custodians, specifying when they must and must not release records and other obligations they have with respect to the records. Therefore, they contend, "any person" violating those sections in §§ 146.84(1)(b) and 51.30(9)(b) can refer only to health care providers and their record custodians.

We do not agree with the trial court or the respondents that the statutes plainly govern the conduct only of health care providers and their record custodians. There are express provisions in §§ 146.82-83 and 51.30, STATS., that govern the conduct of persons who are not necessarily either. For example, § 146.82(2)(b) prohibits "the recipient of any information" received without

informed consent because of the statutory exemptions in para. (2)(a) from disclosing that information without a court order;[5] and § 146.83(4) and the corresponding § 51.30(4)(dm) prohibiting "any person" from falsifying, concealing or destroying records. The use of the "any person" language in the civil remedies sections of both statutes, rather than the more restrictive "health care provider" or "custodian" may reasonably be interpreted as an indication that other persons may violate the provisions of the statute and therefore may be civilly liable under §§ 146.84(1) and 51.30(9), STATS.

However, it does not automatically follow that persons who request or obtain records by altering a consent form without the patient's permission are civilly liable under §§ 146.84(1) and 51.30(9)(b), STATS. They are liable only if that conduct violates §§ 146.82-83 or 51.30 STATS. There are no provisions in any of these sections that directly address the conduct of a person in obtaining informed consent. Nevertheless, the general statement that "all … records shall remain confidential," § 146.82(1); *accord* § 51.30(4)(a), and the provision that a person (other than a patient and statutorily designated individuals) may inspect and receive copies of records "upon submitting a statement of informed consent," § 146.83(1); *accord* § 51.30(4)(a), could reasonably be interpreted to reach conduct in requesting or obtaining records of others, as well as conduct in disclosing those records.

[5] Rather than a separate provision in § 51.30, STATS., paralleling § 146.82(2)(b), STATS., certain of the provisions in § 51.30(4)(b) for release without informed consent provide that the information will remain confidential after release, *see, e.g.*, subdivisions (4)(b)1, 2, 3, 5; and the regulations the department is authorized to promulgate further regulate the use of the information by an authorized recipient. *See, e.g.*, WIS. ADM. CODE § HSS 92.03(1).

We also observe that the penalty section of each statute provides for a fine and imprisonment for anyone who "[r]equests or obtains confidential information … under false pretenses," §§ 146.84(2)(a) and 51.30(10)(a), STATS., thus expressly addressing conduct in requesting records. Because this reference appears in the penalty sections only, one reasonable construction is that the civil remedies apply only to record holders who improperly release records or deny access. However, this reference could also be reasonably interpreted to support Hannigan's view that persons who request or obtain records without informed consent as defined in the statute (when no statutory exemptions apply) are subject to civil remedies as well as to the penalties specified in §§ 146.84(2)(a) and 51.30(10)(a), if applicable. We therefore conclude that the statutes are ambiguous on this point, and we examine first the scope and subject matter of the statutes as an aid in resolving the ambiguity.

As we have noted earlier, both §§ 146.82-83 and 51.30, STATS., directly address in detail the obligations and prohibitions of health care or treatment providers, custodians of their records, and persons who have received records from these persons ("record holders"); but none directly address conduct in requesting records. This in itself is an indication that the legislature intended to address only the conduct of record holders in these sections, not the conduct of persons requesting records, and that it intended to address the conduct of persons requesting records only in the penalties sections, §§ 146.84(2)(a) and 51.30(10)(a), STATS., and only as there provided.

We next examine the legislative history, beginning with § 51.30, STATS., which was enacted in its present form by Laws of 1977, ch. 428, § 67.

Section 51.30(9) as originally enacted was substantially the same as it is today.[6] Subsection (10) contained a penalty only for requesting or obtaining confidential information under false pretenses, what is now § 51.30(10)(a). As originally drafted, subsec. (10) contained another subsection, providing that "any person who violates the provisions of this section shall forfeit not more than $5000."[7] This subsection was eliminated during the drafting process, but we have been unable to discover any materials explaining the reason. Arguably the initial inclusion of this second and separate subsection is an indication that "requesting or obtaining confidential information under false pretenses" was not considered a violation of other provisions of § 51.30, but that is somewhat speculative since we do not know why the second subsection was removed. We are persuaded, though, that establishing a criminal penalty only for requesting or obtaining confidential records under false pretenses is an indication that the legislature did not consider that such conduct was subject to the civil remedies in subsec. (9) as a violation of other subsections of § 51.30. We come to this view because we cannot see a basis for singling out this conduct for criminal penalties, when the release of records by treatment providers and record custodians in violation of § 51.30, coupled with the requisite criminal intent, could be equally egregious. The more reasonable interpretation of § 51.30(9) and (10) as enacted in 1977 is that the legislature intended that persons who violated the provisions of § 51.30 willfully and knowingly were subject to exemplary damages (as well as actual damages if any, and costs and attorney fees); but persons who requested or obtained confidential

[6] The amount of exemplary damages has increased; originally it was not less than $500 nor more than $1,000 for each violation. Laws of 1977, ch. 428, § 67.

[7] Legislative Reference Bureau (LRB) Draft of 1977 AB 898 (LRB-1257/2).

records under false pretenses were not included in that group, and it was therefore necessary to establish a penalty specific to them.

Turning now to patient health care records, §§ 146.81-83, STATS., were originally enacted by Laws of 1979, ch. 221, § 649t, with no provision for remedies or penalties. Section 146.84, STATS., was enacted by 1991 Wis. Act 39, § 2667n, and the final wording was the result of a gubernatorial veto.[8] As passed

[8] Following are the relevant parts of the version of § 146.84, STATS., originally passed by the legislature, with the line-through portions showing the governor's veto.

> **146.84 Violations related to confidentiality of and patient access to health care records.** (1) ACTIONS FOR VIOLATIONS; DAMAGES; INJUNCTION. (a) ~~Except as provided under par. (b), any person, including the state or any political subdivision of the state, violating s. 146.82 or 146.83 shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not less than $200 for each release of information in violation of s. 146.82, each denial of the rights to inspect or receive copies under s. 146.83(1) and each failure to provide a statement under s. 146.83(2), and costs and reasonable actual attorney fees incurred in an action for damages under this paragraph.~~ A custodian of records incurs no liability under this paragraph for the release of records in accordance with s. 146.82 or 146.83 while acting in good faith.
>
> (b) Any person, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 in a manner that is knowing and wilful shall be liable to any person injured as a result of the violation for actual damages to that person; exemplary damages of ~~not less than~~ $1,000 ~~for each release of information in violation of s. 146.82, each denial of the rights to inspect or receive copies under s. 146.83(1) and each failure to provide a statement under s. 146.83(2); and costs and reasonable actual attorney fees incurred by the person~~ in an action under this paragraph. ~~It is not a prerequisite to an action under this paragraph by the person whose records are released in violation of s. 146.82, who was denied the right to inspect or receive a copy of records under s. 146.83(1) or who was not provided a statement required under s. 146.83(2) that he or she suffer or be threatened with actual damages.~~
>
> (c) An individual may bring an action to enjoin any violation of s. 146.82 or 146.83 or to compel compliance with s. 146.82 or 146.83 and may, in the same action, seek damages as provided in this subsection. ~~The individual may recover costs and~~

(continued)

by the legislature, § 146.84(1)(a)-(b) were patterned after § 51.30(9)(a)-(b), STATS.,[9] in that § 146.84(1)(a) addressed violations generally and para. (b) addressed "knowing and willful" violations, and both paragraphs provided for exemplary damages, actual damages, costs and reasonable attorney fees. 1991 Wis. Act 39, § 2667n. However, there was a significant difference from § 51.30(9) in that the exemplary damage amounts in § 146.84(1)(a) and (b) were each specifically tied to "each release of information in violation of s. 146.82, each denial of the right to inspect or receive copies under s. 146.83(1) and each failure to provide a statement under s. 146.83(2)." Section 146.84(2) provided in one paragraph for a forfeiture for "any person who violates s. 146.82 or 146.83," and in a second paragraph for a fine and imprisonment for "any person who violates s. 146.82 … in a manner that is knowing and wilful or any person who requests or obtains confidential information under s. 146.82 or 146.83(1) under false pretenses…." ***Id.***

~~reasonable actual attorney fees incurred in an action under this paragraph if he or she prevails.~~

(2) PENALTIES. ~~(a) Any person who violates s. 146.82 or 146.83 may be required to forfeit not more than $200 for each violation.~~

(b) Any person who violates s. 146.82, except s. 146.82(2)(a)3, in a manner that is knowing and wilful or any person who requests or obtains confidential information under s. 146.82 or 146.83(1) under false pretenses may be fined not more than $500 or imprisoned not more than one year in the county jail, or both.

1991 Wis. Act 39, § 2667n.

[9] *See* ***Hannigan v. Sundby Pharmacy, Inc.***, 224 Wis.2d 910, 922-23 n.6, 593 N.W.2d 52, 57 (Ct. App. 1999), discussing the legislative history of § 146.84, STATS., and its relation to § 51.30, STATS.

Thus the version of § 146.84, STATS., as originally passed by the legislature, shows that the legislature made distinctions between acts of requesting or obtaining confidential information under false pretenses, on the one hand, and violations of §§ 146.82-83, STATS., on the other hand. Furthermore, an act of requesting or obtaining confidential information under false pretenses was not among the specified conduct in either of the paragraphs in the subsection governing civil remedies, and it was distinguished, in the penalty subsection, both from violations of §§ 146.82-83 and from knowing and willful violations of § 146.82. We consider this a persuasive indication that the legislature did not consider that requesting or obtaining confidential information under false pretenses was a violation of §§ 146.82-83.

This indication of legislative intent is not vitiated by the governor's partial veto of § 146.84, STATS. The governor deleted most of para. (1)(a)[10] and all of para. (2)(a) because he did not believe "penalties should apply in cases of accidental violations of confidentiality"; he deleted the specific violations of §§ 146.82-83, STATS., enumerated in para. (b), because he did not want damages awarded for each violation, due to his concern for "possible misinterpretation or abuse as a result of repeated similar requests"; and he deleted the provision for exemplary damages without actual damages because he did not want "the record

[10] The deletion in § 146.84(1)(a), STATS., left only the present sentence—"A custodian of records incurs no liability for the release of records in accordance with §§ 146.82-83, STATS., while acting in good faith." This has the potentially confusing result of providing a good faith exception when damages may only be awarded for knowing and willful violations.

holder [to be exposed] to the possibility of frivolous or nuisance litigation."[11] These explanations do not suggest that the governor viewed violations of § 146.82 as encompassing more than "release of information," or viewed violations of 146.83(1) and (2) as encompassing more than "denial of the right to inspect and or receive copies." Moreover, his explanation for deleting the provision that no actual damages are required suggests that he viewed the "record holder" as the only potential violator. And he did not remove the distinction in para. (2)(b) between violations of § 146.82, STATS., and requesting or obtaining information under false pretenses.[12]

Finally, we consider the object of the statutes. We agree with Hannigan and amicus that the object is to protect the confidentiality of health care and treatment records, and we agree this is an important public policy. It may also be, as they contend, that imposing civil liability for altering consent forms without the patient's approval is necessary for a complete implementation of this policy. However, we do not agree that we should therefore interpret the statutes to do so. The manner and extent of implementation of public policy objectives identified by the legislature are for the legislature to decide, not this court. Our job is to determine the legislature's intent. The legislature could reasonably decide to

[11] Governor Tommy Thompson, Veto Message on 1991 A.B. 91 (1991 Wis. Act 39), provisions relating to "Privacy Council and Access to Information," including § 2667n, at pages 32-33. The governor explained the other deletions in para. (b) by stating that he wanted to limit punitive damages to $1,000 so as not to encourage nuisance litigation, and he did not believe that attorney fees, costs and minimum damages were necessary because actual damages provided sufficient compensation. ***Id.***

[12] Sections 146.84(2) and 51.30(10), STATS., were subsequently both amended by 1993 Wis. Act 445, §§ 15 and 60, respectively, to their present forms, at the same time that the prohibitions in §§ 146.84(4) and 51.30(4)(dm) against falsifying, concealing and damaging records were added. *See* ***id.*** at §§ 14 and 58. We have been able to uncover nothing regarding this legislative change that is pertinent to our inquiry.

regulate the conduct of, and impose civil liability on, only record holders, and to address only the most egregious conduct of persons in requesting records by imposing criminal penalties on that conduct. Based on the scope, subject matter and legislative history, we are persuaded that this is what the legislature, and the governor acting in his legislative capacity, intended.[13]

Tortious Interference with Hannigan's Access to His Records

Hannigan argues that he has a statutory right to access to his own records, and that Borgelt tortiously interfered with this right by inducing health care providers to withhold access from him.[14] The only specific provisions of the statutes that appear arguably applicable are §§ 146.83(4)(b) and 51.30(4)(dm)2, STATS., which state that "no person" may "conceal or withhold a … record," either

[13] We do not agree with Hannigan and the amicus that ***Steinberg v. Jensen***, 186 Wis.2d 237, 262, 519 N.W.2d 753 (Ct. App. 1994), *rev'd on other grounds*, 194 Wis.2d 439, 534 N.W.2d 361 (1995), supports their construction. In ***Steinberg***, the issue was whether the trial court in a malpractice action had properly permitted the plaintiff's treating physicians to testify as defense experts after they reviewed records, which the defendant gave them, of health care the defendant had provided the plaintiff. (We held the defendant and his attorney had impermissible ex parte contracts with the treating physicians. ***Id.*** at 244, 519 N.W.2d at 755. The supreme court reversed. *See* ***Steinberg***, 194 Wis.2d at 446, 534 N.W.2d at 363.) For purposes of the appeal, we assumed the records were related to the injuries that were the subject of the lawsuit and had been properly obtained by the defendants pursuant to the discovery procedures of § 804.10(2), STATS., with the result that the patient lost her physician privilege and, therefore, "the cloak of confidentiality derived from § 146.82(1), STATS." ***Steinberg***, 186 Wis.2d at 262, 519 N.W.2d at 762-63. In a footnote we observed that the plaintiff contended that a portion of her health care records was not voluntarily disclosed to the defendants, that the defendant's physician had, after suit was filed, removed certain records from the hospital where he had treated her without her informed consent and delivered them to his attorney. ***Id.*** at 262 n.13, 519 N.W.2d at 763. We stated, consequently, "Dr. Jensen was *potentially* liable in an action under § 146.84(1)(b), STATS., adding that it was unclear "whether [those records] were subject to the physician-patient privilege or whether they were discoverable under § 804.10(2), STATS.," were issues which the trial court had to resolve. ***Id.*** Our statement on Dr. Jensen's potential liability under § 146.84(1)(b) does not support Hannigan's position: as a health care provider, Dr. Jensen's release of his patient's records to his (Dr. Jensen's) attorney without informed consent is a violation of the express provisions of § 146.82.

[14] The allegations of this claim apply only to Borgelt, not to Liberty Mutual.

"with intent to prevent or obstruct an investigation" or "with intent to prevent its release to [the patient]." As we have discussed above, we do not construe this subsection as applying only to health care or treatment providers or to custodians of their records. The plain language could also apply to any recipient of the records. The issue is whether "concealing or withholding" for the prescribed statutory purposes encompasses inducing others to conceal or withhold. We conclude that the plain language of the statute does not include inducing others to conceal or withhold. Examples abound where the legislature has expressly addressed the inducing of conduct, in addition to engaging in the conduct itself. *See, e.g.,* §§ 49.49(3), 66.293(11)(b)2 and 103.53(j), STATS. The legislature could have chosen such language here, but did not. *See* ***Village of De Forest v. County of Dane***, 211 Wis.2d 804, 810, 565 N.W.2d 296, 299 (Ct. App. 1997).

Section 895.50, STATS., (Right of Privacy)

We next consider whether the complaint states a claim for relief against Borgelt or Liberty Mutual under § 895.50, STATS., for any of the three types of invasion of privacy:

> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
>
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
>
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to

> communicate any information available to the public as a matter of public record.

Section 895.50(2).

The trial court concluded that Hannigan has no claim under these sections because he initiated the personal injury lawsuit, putting his health in issue, and the judge in that lawsuit determined that his medical records, including treatment records, were relevant to that issue. It is true that initiating such a lawsuit does waive the physician/patient privilege as to communications relevant to or within the scope of discovery. *See* § 905.04(4)(c), STATS. However, it does not automatically follow that a plaintiff has thereby waived all claims for invasion of privacy.[15] Each of the three privacy claims addresses different conduct, which may or may not be affected by the waiver of the physician/patient privilege, and it is necessary to analyze the allegations of the complaint in light of the elements of each claim.

Intrusion in a Private Place

We conclude the complaint does not state a claim for relief under § 895.50(2)(a), STATS., against either Borgelt or Liberty Mutual. The intrusion alleged—obtaining patient health care and treatment records without permission—was not conducted in a manner actionable for trespass; nor was the intrusion in a "place," which we defined in ***Hillman v. Columbia County***, 164 Wis.2d 376, 392, 474 N.W.2d 913, 919 (Ct. App. 1991), to be geographical, and not to include medical records.

[15] Similarly this waiver of the privilege does not necessarily waive all claims for violations of §§ 146.81-84 and 51.30, STATS., as we indicated in ***Steinberg v. Jensen***, 186 Wis.2d 237, 262 n.13, 519 N.W.2d 753, 763 (Ct. App. 1994), *rev'd on other grounds*, 194 Wis.2d 439, 534 N.W.2d 361 (1995), in a different factual context. *See* footnote 13.

The amicus argues that ***Hillman*** is distinguishable because the patient there was an inmate in a correctional institution, and, as a matter of constitutional law, prisoners are entitled to less protection of their privacy than persons who are not incarcerated. However, Hillman's prisoner status was not relevant to our conclusion that "place" plainly means a geographical place and does not include medical records. In addition to making this same factual (prisoner/non-prisoner) distinction, Hannigan makes two points which, he contends, should alter our legal analysis in construing § 895.50(2)(a), STATS. First, in ***Hillman***, we did not consider other statutory protections against invasions of privacy that are not confined to geographical places, such as § 134.43, STATS., relating to information on television subscribers' viewing habits. Second, after we decided ***Hillman***, the supreme court decided ***Woznicki v. Erickson***, 202 Wis.2d 178, 549 N.W.2d 699 (1996), in which it held that, because our statutory and case law has consistently recognized the legitimate interests of citizens to privacy and the protection of their reputational interests, before a district attorney may, under the open records law, release records pertaining to an individual that implicates those interests, the individual must be given notice and the opportunity to litigate the release. ***Id.*** at 187, 193, 549 N.W.2d at 703, 705.[16] We do not consider the merits of Hannigan's arguments on these two points because we do not have the power to overrule, modify or withdraw language from our decision in ***Hillman***. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 255 (1997). ***Hillman*** controls and compels dismissal of the claims against Borglet and Liberty Mutual under § 895.50(2)(a).

Misappropriation

[16] More recently in ***Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, ___ Wis.2d ___, ___, 596 N.W.2d 403, 404 (1999), the court extended ***Woznicki*** to custodians other than district attorneys.

We also conclude the complaint states no claim under § 895.50(2)(b), STATS. Hannigan argues that the dictionary definition of "trade" includes profession, which includes the profession of law, and, he contends, by submitting altered notarized documents that were purportedly signed by Hannigan and by forging his initials, the Borgelt attorneys did use Hannigan's name for purposes of their trade without his consent. We reject this argument because it stretches the boundaries of this misappropriation claim beyond those recognized by our supreme court in ***Hirsch v. S.C. Johnson & Son, Inc.***, 90 Wis.2d 379, 387, 280 N.W.2d 129, 132 (1979). While the court in ***Hirsch*** did not apply § 895.50(2)(a) because that statute was enacted after the events giving rise to the claim occurred, it did state that Hirsch would have a cause of action under that paragraph for the use of his nickname "Crazylegs" on a shaving gel product without his permission. In explaining why Hirsch had a cause of action under common law, even though there was no common law right in Wisconsin for certain other privacy torts, the court explained:

> [T]he right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts which protect primarily the mental interest in being let alone. The appropriation tort is different because it protects primarily the property interest in the publicity value of one's name.

Hirsch, 90 Wis.2d at 387, 280 N.W.2d at 132. The court then cited a number of other sources to emphasize this distinctive characteristic of the misappropriation claim, which it also called "the right of control of the commercial aspects of one's identity." ***Id.*** Because the court, in discussing the common law misappropriation, or right of publicity, claim described its elements with the same language used in § 895.50(2)(b), we conclude that the essence of the statutory claim and the common law claim discussed in ***Hirsch*** is the same: to protect the property

interest in the publicity value of one's name (or portrait or picture) from commercial exploitation by others.

This formulation of the statutory claim is also consistent with the comments to RESTATEMENT (SECOND) OF TORTS § 652A, B, C and D (1977), after which § 895.50(2)(a), (b) and (c), STATS., are patterned (with some modifications). RESTATEMENT (SECOND) OF TORTS § 652C provides:

> One who appropriates to his own use or benefit the name of likeness of another is subject to liability to the other for invasion of his privacy.

As comment c to this section explains, "[i]n order that there may be liability under the rule stated in this Section, the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." Comment b to this section notes that, unless a statute limits the use of the plaintiff's name or likeness to advertising or some similar commercial purpose, the rule as stated in the Restatement of Torts is not so limited. However, Wisconsin *has* limited the tort by statute to commercial purposes, adding "for advertising purpose or for purposes of trade" to the rule as expressed in the RESTATEMENT (SECOND) OF TORTS § 652C. Section 895.50(2)(b). Because Hannigan has alleged no publicity value of his name—that is, no reputation, prestige, social or commercial standing, public interest or other value of his name—and no purpose of commercial exploitation on the part of any defendant, the allegations of the complaint are insufficient to state a claim under § 895.50(2)(b).

Public Disclosure of Private Facts

The complaint does, however, state a claim for relief against Borgelt under § 895.50(2)(c), STATS. There are four elements to this claim: (1) publicity, (2) of private facts, (3) on a matter that would be highly offensive to a reasonable person, and (4) if the defendant has acted unreasonably or recklessly concerning whether there was a legitimate public interest in the matter, or with actual knowledge that one existed. ***Zinda v. Louisiana Pac. Corp.***, 149 Wis.2d 913, 929-30, 440 N.W.2d 548, 555 (1989). "Publicity" in this context means that "the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." ***Id.***, citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. a. However, there is also authority for finding publicity "where a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed." ***Hillman***, 164 Wis.2d at 395 n.10, 474 N.W.2d at 920.

The allegations in the complaint, construed liberally, are sufficient to meet these four elements as to Borgelt. A person's health care and treatment records are generally considered private and confidential, *see* §§ 146.82 and 51.30(4), STATS., and thus may constitute "private" facts. The Borgelt attorneys allegedly obtained Hannigan's records without his consent and gave them to Liberty Mutual, to others, and put them into the public record. This is sufficient to meet the "publicity" requirement at the complaint stage. *See* ***id.*** at 395, 474 N.W.2d at 920 (oral communication among numerous employees and inmates of a jail of a person's AIDS infection sufficient to constitute "publicity" at the pleading stage). The highly offensive nature of this disclosure, and unreasonableness or recklessness concerning whether there was a legitimate public interest in his records, may be inferred from the complaint, liberally construing the allegations in Hannigan's favor. However, there is no allegation that Liberty Mutual gave

publicity to Hannigan's records. Therefore the complaint states a claim only against Borgelt.

We next examine the materials submitted by the parties to determine if there are issues of fact material to the resolution of this claim against Borgelt.[17] It is undisputed that the judge in the personal injury action ruled that the medical records collected and filed by the defendants in that action were relevant and admissible and allowed their admission into evidence; and there was no appeal in that action.[18] It is also undisputed that Borgelt provided Hannigan's medical records to their experts and consultants, including Hannigan's psychological records from Dean Clinic. As for whether Borgelt provided copies of Hannigan's records to Liberty Mutual, Newcomb avers that Borgelt did not provide Hannigan's records to Liberty Mutual. The Liberty Mutual representative who

[17] There may be genuine issues of fact concerning how Borgelt obtained the Dean Clinic psychological records, whether that was done with Hannigan's or his attorney's consent, and whether he or his attorney consented to the modification of other consent forms Hannigan had already signed. We do not decide these questions because the manner in which Borgelt obtained Hannigan's records, or attempted to do so, is not material to the claim under § 895.50(2)(c), STATS. For the same reason, we do not decide the legal propriety of the manner in which, the submissions show, Borgelt attempted to obtain agreements to modify the original consent forms: a letter to Attorney Atterbury proposing particular changes to an original and stating that if no objection is received by a certain date, Borgelt will assume the changes are acceptable and will make the changes. However, we do observe that this method appears to have either created or contributed to some of the disputes that gave rise to this lawsuit.

[18] Newcomb makes these averments in her affidavit and none of the materials submitted by Hannigan—his affidavits and Atterbury's affidavit—dispute these statements. Newcomb also avers that neither Hannigan nor Atterbury objected to the admission of these records at trial or moved that the record be sealed. Atterbury's affidavit does not dispute these assertions. Hannigan's does in that he avers in his first affidavit that Judge Curtin sealed the "first file of treatment records" in Newcomb's presence at an in-camera hearing, and, during the following months when he (Hannigan) examined the case files and discovered additional confidential materials, he requested they be sealed, writing on April 20, 1997, to Judge Curtin requesting that all records in the case file be sealed. Hannigan also avers that during the trial, when Newcomb was cross-examining him, he objected to her possession and use of his Dean Medical Center psychiatric report.

handled the claim avers that his file does not contain any psychiatric records of Hannigan but does contain a medical records chronology that references some mental health care at Dean in 1994; however neither the medical chronology nor any confidential information in the file was provided to any outside individual or insurance company.[19] Hannigan avers that when he was reviewing the court file in April 1997 he saw a letter on Borgelt stationary with Newcomb's signature, with a copy of his 1967 University of Wisconsin Hospital and Clinic psychiatric report, "with verification that copy was sent to Liberty." He returned to obtain a copy at the request of his attorney in this action, but was unable to locate this document.[20] Liberty Mutual contends that Hannigan's affidavit does not create a genuine factual dispute because he can provide no document to show that he saw what he avers, while Borgelt argues that the cover letter that indicated Liberty was sent a copy did not reflect that any enclosures were included. We assume without deciding that there is a material dispute as to whether Borgelt provided Hannigan's medical records, including his psychological records, to Liberty Mutual.

Hannigan asserts that Borgelt's placement of his records in the public court files constitutes publicity, and that it is a jury question whether that is highly offensive. However, he cites no authority for this proposition, and he overlooks the privilege that applies to attorneys in judicial proceedings. Section 895.50(3), STATS., states that the right of privacy is to be interpreted in

[19] This affidavit avers that in compliance with insurance industry standards, certain limited information on Hannigan's claim was reported to the "Index System" in April 1994 which consisted of his name, address, date of loss and description of the injury as "cervical neck strain blurred vision."

[20] The next sentence of Hannigan's affidavit is not complete, stating: "It also appeared that some of the sealed…." Page two ends at that point and page three begins a next numbered paragraph.

accordance with the "developing common law of privacy, including defenses of absolute and conditional privilege." In ***Zinda***, we followed RESTATEMENT (SECOND) OF TORTS § 652G which provides that the Restatement's rules on conditional privilege to publish defamatory matter apply to the publication of any matter that is an invasion of privacy. *See* ***Zinda***, 149 Wis.2d at 931, 440 N.W.2d at 556. In this case, we follow RESTATEMENT (SECOND) OF TORTS § 652F (1977), which provides that the absolute privileges to publish defamatory matter stated in §§ 583-592A of the Restatement of Torts also apply to the publication of any matter that is an invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 586 (1977) provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

We conclude that this privilege applies to Hannigan's claim against Borgelt under § 895.50(2)(c). It is undisputed that all the health care records and treatment records concerning Hannigan that were placed in the court files or presented to the court or the jury in the personal injury proceeding were determined to be relevant and admissible by the presiding judge. We therefore conclude that, as a matter of law, Borgelt has an absolute privilege in defense of Hannigan's claim that Borgelt attorneys gave publicity to his records in violation of § 895.50(2)(c) by presenting them to the court or the jury or placing them in the court file.

With respect to the disclosure to Liberty Mutual (which we are assuming occurred for purposes of appeal because we are assuming there is a genuine issue of fact on this point) and to Borgelt's experts, we conclude that

these disclosures do not constitute "publicity" within the meaning of § 895.50(2)(c), STATS. Disclosure to these persons for the purposes established by the undisputed facts do not constitute communication "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." ***Hillman***, 164 Wis.2d at 394, 474 N.W.2d at 920. It is true that some courts have found publicity when there was a disclosure to a small group of people who had a special relationship with the plaintiff (when the plaintiff is not a public figure) such as the plaintiff's fellow employees, church members, family members or neighbors. *See, e.g.,* ***Miller v. Motorola***, ***Inc.***, 560 N.E.2d 900, 903 (Ill. App. 1990). However, Liberty Mutual's and Borgelt's experts do not have such relationships with Hannigan.

Attorney Fees—Frivolous Claims

Hannigan challenges the trial court's determination that all his claims were without a basis in law and equity and were brought for purposes of harassment. The court addressed these issues as to the privacy claims under § 895.50(6), STATS., and as to the other claims under § 814.025, STATS. The provisions of each of these statutes permitting the award of attorney fees for frivolous actions or claims are substantially the same.[21] The determination

[21] Section 895.50(6), STATS., provides:

> (6) (a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.
>
> (b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

(continued)

whether a party or attorney knew, or should have known, that a claim is without reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law presents a mixed question of law and fact. ***Jandrt v. Jerome Foods Inc.***, No. 98-00885, slip op. at 13 (Wis. July 7, 1999). What a reasonable party or attorney knew or should have known with regard to the facts require the trial court to determine what those facts were. ***Id.*** We do not overturn findings of fact unless they are clearly erroneous. ***Id.*** However, the legal significance of those findings of fact, in terms of whether those facts would lead a reasonable attorney or litigant to conclude the claim is frivolous, presents a question of law, which we review de novo. ***Id.*** at 14.

> 1. The action was commenced in bad faith or for harassment purposes.
>
> 2. The action was devoid of arguable basis in law or equity.

Section 814.025, STATS., provides in part:

> **Costs upon frivolous claims and counterclaims**. (1) If an action … commenced or continued by a plaintiff … is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> (3) In order to find an action … frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action … was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Any doubts about the reasonableness of a claim is resolved in favor of the attorney or party subject to the motion for sanctions. ***Id.*** at 19.

Whether a party or counsel acted in bad faith and solely for the purpose of harassing or maliciously injuring another is analyzed under a subjective standard. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 235-36, 517 N.W.2d 658, 663 (1994). The court must determine what was in the person's mind and whether his or her actions were deliberate or impliedly intentional with regard to harassment or malicious injury. ***Id.*** The findings must be specific. ***Id.*** at 236, 517 N.W.2d at 664. The requirement that the "sole" motivation be harassment or malicious injury is a "high standard [that] typically would require a finding of bad faith based upon some statements and actions, including, for example, threats." ***Id.*** at 239-40, 517 N.W.2d at 665. This inquiry also involves a mixed question of fact and law. ***Id.*** at 236, 517 N.W.2d at 664. Since the inquiry is subjective and not generally susceptible to direct proof, the state of mind of the person must be inferred from the acts and statements of the person in view of the surrounding circumstances. ***Id.*** at 236-37, 517 N.W.2d at 664. A determination of frivolousness on this ground must be based on an evidentiary foundation separate from that supporting frivolousness due to lack of a reasonable basis in law or equity. ***Id.*** at 239, 517 N.W.2d at 665.

We conclude that the trial court's determinations under §§ 895.50(6) and 814.025, STATS., must be reversed and remanded for the following reasons. First, the party against whom a claim of frivolousness is made must have notice and an opportunity to respond. *See* ***Swartwout v. Bilsie***, 100 Wis.2d 342, 356, 302 N.W.2d 508, 517 (Ct. App. 1981). Although Borgelt alleged in its answer that the complaint was frivolous and asked for attorney fees, its motion for summary judgment did not ask for attorney fees. In its brief in support of its motion it did

briefly address § 895.50(6), but we conclude that Borgelt's motion, submissions and briefs do not provide adequate notice that it was asking the court to decide that all of Hannigan's claims were frivolous at the same time that it decided the motion for summary judgment. We reach the same conclusion with respect to Liberty Mutual. Liberty Mutual did not ask for attorney fees on the ground of frivolousness in its answer, nor in its motion for summary judgment, and it addressed § 895.50(6) only briefly in its brief in support of that motion. Hannigan's briefs opposing summary judgment were extensive but addressed the merits, not attorney fees. The record does not reflect that Hannigan was provided any further opportunity to address the question of frivolousness before the trial court issued its decision and order granting summary judgment, in which it decided that the privacy claims were frivolous under § 895.50(6) and all other claims were frivolous under § 814.025.

Second, summary judgment is not the appropriate methodology for resolving determinations of frivolousness when there are disputed issues of fact. ***Kelly v. Clark***, 192 Wis.2d 633, 653, 531 N.W.2d 455, 461 (Ct. App. 1995). We conclude that an evidentiary hearing is necessary in this case to resolve disputed issues of fact concerning what Hannigan and his attorney knew or should have known and what their motives were.[22] The fact that there were no genuine factual

[22] After the trial court entered its decision and order on summary judgment, Hannigan's attorney in this action submitted a very detailed affidavit explaining the legal research he had done before bringing this case, the factual investigation, and the way he viewed the facts he gathered in support of the claims. Although this is part of the record before us, we do not consider it in reaching our decision because it was not before the trial court when the court decided the motion for summary judgment and made its decision on frivolousness. Nevertheless, we observe that the affidavit contains the type of information that Hannigan and his attorney are entitled to present to the court before the court decides whether the respondents are entitled to attorney fees. The affidavit also demonstrates that the court will need to resolve issues of credibility and conflicting inferences from undisputed facts, which cannot be resolved without an evidentiary hearing.

disputes material to the issues we have decided on this appeal does not mean that there were no material factual disputes material to the issue of frivolousness. Without addressing each of the instances that the trial court cited as examples of misstatements or falsehoods by Hannigan or his counsel, we simply observe that, at the very least, some required the resolution of credibility issues or the drawing of competing inferences from undisputed facts, functions that cannot properly be performed without an evidentiary hearing.[23]

Third, the trial judge referred to his "personal awareness of Newcomb's legal abilities and behavior during trial proceedings," stated that he "holds the highest respect for her," and stated that "Borgelt, Powell is a well-known and well respected law firm and has been for many years." It appears that this was a factor that influenced the court's decision that the claims were frivolous. A trial court sitting as fact finder may derive inferences from the testimony and take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish an adjudicative fact based on his or her personal experience. ***State v. Peterson***, 222 Wis.2d 449, 458, 588 N.W.2d 84, 88 (Ct. App. 1998).

Finally, the court's decision that the claims had no reasonable basis in law or equity were based, at least in part, on legal analyses that we have concluded were not correct. We have concluded that Hannigan's claims for a violation of §§ 146.81-84 and 51.30(6) STATS., because of the manner in which

[23] As an aid for proceedings on remand, we do decide that Hannigan's statement at the beginning of his second affidavit that "I am counsel of record in this case," does not give rise to a reasonable inference that he or his counsel were misleading or attempting to mislead anyone, as the trial court apparently determined. Hannigan's first and third affidavits described himself as the plaintiff in this action, as did numerous other pleadings and submissions. And, in Hannigan's third affidavit, he stated that the quoted phrase was an error that occurred because he used, as a model for his affidavit, a form given him by his attorney, and he neglected to modify that statement.

Borgelt allegedly requested or obtained the release of Hannigan's records was a reasonable construction of the statutes and that §§ 146.83(4) and 51.30(4)(dm) apply to persons in addition to health care and treatment providers and custodians of their records, specifically, persons who receive records from the forgoing. We have also decided that the bringing of a personal injury lawsuit putting one's health in issue does not, in itself, mean that there can be no claim under § 895.50, STATS., with respect to one's health care or treatment records.[24]

We therefore reverse the court's determination regarding frivolousness, and remand for an evidentiary hearing and such other proceedings as the court may consider appropriate consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[24] We do not decide whether there are other grounds for concluding that the claims had no reasonable basis in law or equity.