

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 30, 1997

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-0594**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**DUANE FLESCH,**

**PLAINTIFF-APPELLANT,**

**v.**

**CHARLES WRANOSKY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Vilas County:  
JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Duane Flesch appeals a summary judgment dismissing his action against Charles Wranosky and finding the action frivolous. Wranosky requests that this court find the appeal frivolous. We conclude that the trial court properly granted summary judgment but that the appeal is not frivolous.

Flesch's complaint alleged numerous causes of action, some of which are not pursued on appeal. His brief also requests review of several interlocutory orders but does not make specific argument regarding those orders. We deem those issues abandoned as well. See *Reiman Assocs. v. R/A Advert.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). Other issues are argued for the first time in the reply brief. We will not decide those issues. See *Schaeffer v. State Personnel Comm'n*, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). The dispositive issues are whether Wranosky's supporting papers were properly considered by the trial court and whether the court properly granted summary judgment dismissing Flesch's defamation, malicious prosecution and conversion claims.

The trial court properly considered Wranosky's supporting papers. Flesch cites statutes and cases that were superseded many years ago to support his argument that Wranosky's supporting papers did not meet statutory requirements. He also argues that the affidavits should not be considered because they conflicted with affidavits presented in another action. We conclude that the trial court properly considered the affidavits under the current statutes. In addition, the affidavits provide almost no factual material upon which the summary judgment depends. Each of Flesch's claims fails for more than one reason. While the challenges to Wranosky's supporting papers might make a difference as to some of the grounds for dismissal, the claims pursued on appeal were properly dismissed without resorting to the facts presented by the affidavits. Facts alleged in Flesch's complaint, his own supporting papers and documents that are subject to judicial notice provide an adequate basis for dismissing each of the claims pursued on appeal.

The defamation claim was properly dismissed because the statute of limitations expired. Flesch contends that Wranosky defamed him by making false accusations suggesting that Flesch stole a chainsaw and a gun from a home owned by Flesch's uncle, George Vlach. The complaint alleges that Wranosky made defamatory statements to the police, courts, attorneys, district attorneys, judges, jury members and numerous other parties. These allegedly defamatory statements were made in Flesch's presence or were made known to him more than two years before he commenced this action. Therefore, the claims are barred by § 893.57, STATS.

The malicious prosecution claim was properly dismissed because there was probable cause for the prosecution. Lack of probable cause is an essential element of an action for malicious prosecution. See *Krieg v. Dayton-Hudson Corp.*, 104 Wis.2d 455, 461, 311 N.W.2d 641, 642 (1981). Flesch was convicted by a jury of burglarizing Vlach's home. The trial court later vacated the judgment of conviction due to some unknown error in the trial. A conviction, even though reversed on appeal, is presumptive evidence of the existence of probable cause in a subsequent malicious prosecution action. *Id.*

The conversion claim was properly dismissed because the undisputed facts contradict Flesch's complaint in which he alleged that he permanently lost ownership of a rifle. Flesch now concedes that the rifle was returned to him by Vlach's heirs who received the rifle from Wranosky after the criminal trial concluded. As a convicted felon, Flesch was not entitled to possession of the rifle until his conviction was vacated. Flesch does not allege that Wranosky or the heirs refused any demand for return of the rifle. In addition, Flesch identifies no specific damages that he incurred as a result of his temporary loss of control over the rifle.

Although we uphold the trial court's dismissal of Flesch's action and its finding that the action was frivolous,<sup>1</sup> we decline to hold the appeal frivolous. Ordinarily, an appeal from a judgment finding an action frivolous will also result in a frivolous appeal because the appellant is put on notice by the trial court's decision that his arguments are untenable. In this case, however, the trial court's decision does not directly address all of the arguments Flesch makes on appeal and, particularly, the grounds that we conclude are dispositive. Flesch's brief raises numerous issues of fact that relate to Wranosky's malice and intent. We conclude that these issues are immaterial because Flesch's claims were properly dismissed regardless of Wranosky's malice or intent. Nonetheless, we cannot conclude that the brief as a whole raises issues that Flesch knew or should have known were non meritorious.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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<sup>1</sup> Whether the action before the trial court was frivolous is one of the issues not properly raised on appeal.

