STATE OF WISCONSIN
SUPREME COURT

JULIE LASSA,

Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal No. 04-0377

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

Appeal from the Circuit Court for Dane County,
the Honorable Maryann Sumi presiding

APPELLANTS' BRIEF AND APPENDIX

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ISSUES PRESENTED FOR REVIEW

This case involves a defamation claim by an elected official, Julie Lassa, against Todd Rongstad, the President of an organization that published a mailer critical of Lassa. Lassa sought to discover the names of the organization's members, stating that she needed the information to identify additional defendants and to help her decide whether to run for an open Senate seat. Rongstad refused to name names, citing the constitutional privilege against compelled disclosure of political associations. The trial court disagreed and ordered disclosure. Rongstad continued to refuse disclosure, filed a motion to dismiss and pursued an interlocutory appeal. The trial court refused to hear the motion to dismiss and refused to stay any issues pending appeal. Instead, the court held Rongstad in contempt and imposed severe monetary sanctions.

Accordingly, the issues presented for review are:

1 Did Rongstad have a valid constitutional objection to discovery seeking disclosure of his political associations, thus making the sanctions invalid?

Answered by the Circuit Court: No.

2. Under *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), did Rongstad have a "substantiated assertion of privilege" providing him with "substantial justification for failing to comply with an order to provide or permit discovery?"

Answered by the Circuit Court: No.

3. Should a litigant seeking to protect a constitutional privilege have a right to an interlocutory appeal before being forced to disclose information that will moot any later appeal of the privilege issue?

   Not addressed by the Circuit Court.

4. Did the trial court erroneously exercise its discretion by imposing sanctions before considering whether Lassa's complaint stated a claim upon which relief could be granted?

   Answered by the Circuit Court: No.

5. Whether the severity of the sanctions, which bore no rational relationship to the alleged offensive conduct or any harm suffered by Lassa, constituted an erroneous exercise of discretion.

   Not addressed by the Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate.

Publication of the Court's decision is warranted. As the Court of Appeals noted, an opinion from this Court will establish when the identity of anonymous speakers must be disclosed in a defamation action brought by a public official, and will explain the meaning of the phrase "substantiated assertion" in *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999).

INTRODUCTION

Two weeks after being served with a defamation complaint by then Representative Julie Lassa, Todd Rongstad was asked to disclose the names of others involved in a political mailer. Lassa wanted the names to identify additional defendants and to help pursue her political aspirations. Rongstad asserted a First Amendment privilege against compelled disclosure of his political associations, citing a line of authority starting with the 1958 decision in *NAACP v. Alabama*. The trial court overruled the objection and ordered Rongstad to disclose the names, ultimately finding Rongstad in contempt and imposing steep monetary sanctions and a default judgment.

The court refused to stay its contempt order while Rongstad attempted an interlocutory appeal. Two months after the initial inquiry and faced with mounting sanctions and a potential default judgment, Rongstad disclosed the names before ever having a chance to appeal the constitutional privilege issue. He was promptly hit with $65,000 in contempt-related sanctions.

As framed by the Court of Appeals, this case "presents an opportunity for the supreme court to explain when the identity of anonymous speakers must be disclosed in the context of a defamation action brought by a public official." Certification, at 1-2. While this is certainly true, the Court is also presented with an opportunity to clarify an equally important and perhaps more fundamental question: can a circuit court use its contempt powers to force a defamation defendant to disclose political associations, over a constitutional objection, where disclosure will render any subsequent appeal of the constitutional issue moot? This Court's decision in *Burnett v. Alt* strongly suggests that a court cannot place parties in such an untenable situation.

Moreover, the case presents the Court with an opportunity to use its superintending powers to instruct that litigants asserting a constitutional privilege have an absolute right to interlocutory appeal before being forced to divulge information that will moot any later appeal of the underlying privilege.

STATEMENT OF THE CASE

Plaintiff-Respondent Julie Lassa ("Lassa") filed this lawsuit on January 16, 2003, alleging defamation by Defendants-Appellants Todd Rongstad ("Rongstad") and The Valkyrie Group, LLC. (R.1-2). The case arose from a November 2002 political mailer directed at Lassa.

During a February 3, 2003 deposition, Rongstad objected to questions requesting disclosure of members of a political organization, based upon the constitutional privilege against disclosure of political associations. The trial court overruled the objection. (Appx. 5-6, 20-35).

On March 11, 2003, the trial court held Rongstad in contempt for refusing to disclose names, and imposed sanctions. (Appx. 7-9, 50-61). Rongstad's request for a stay and an interlocutory appeal of the orders compelling disclosure were denied on April 1, 2003. (R.55, 56). Rongstad subsequently complied with the trial court's order and disclosed the identity of the donor of the funds used to produce the mailer. (R.61, Exh. 1). Despite the disclosure, the trial court ruled on August 15, 2003 that there was no compliance and ordered default judgment against Rongstad. (R.122).

Pursuant to a settlement, the trial court on November 17, 2004 entered a stipulated judgment on the contempt sanctions and dismissal of the defamation claim. (Appx. 12-19).

Notice of Appeal was timely filed on February 4, 2004. (R.142). On December 9, 2004 the Court of Appeals certified the case to this Court, which was accepted by order dated March 8, 2005.

STATEMENT OF FACTS

The Alliance for a Working Wisconsin

At the time this lawsuit was commenced, the Alliance for a Working Wisconsin ("Alliance") was a 501(c)(4) tax-exempt organization dedicated to educating the public about public policy issues related to business, taxes and families in Wisconsin. (R.74, Exh. A). Rongstad was the President of the Alliance, as well as a board member. One of the Alliance's stated purposes was to "utilize First Amendment rights to speak out on issues and attempt to influence the public debate through direct communications." *Id.* The Alliance did not engage in any express advocacy that would require the organization to report its activities with state or federal election officials. *Id.*

The Alliance solicited contributions from individuals and organizations in order to fund public communications on issues of importance to its members. The Alliance guaranteed to members that it would maintain confidentiality with respect to their identities. (Appx. 4). Alliance members informed Rongstad that if he was compelled to disclose their names, they would no longer participate in the organization for fear of public reprisal and potential legal action. *Id.*

The Allegedly Defamatory Mailer

This case arose out of one mailer published in November 2002 by the Alliance highlighting connections between Lassa and newly-indicted Senator Charles Chvala. (Appx. 1-2). The front side of the mailer showed a picture of Lassa jumping rope in front of a group of children, with Chvala's face superimposed over their faces. The phrase "When Chuck said jump ..." was printed under Lassa's feet. (Appx. 1). The bottom of the page displayed the Milwaukee Journal Sentinel headline announcing Chvala's indictment. *Id.* The primary text of the mailer, printed on the back side of the mailer over an enlarged copy of Chvala's mugshot and two smaller pictures of Lassa, stated:

Lassa Wanted To Be A State Senator,
So She Hooked Up with Chuck Chvala.

A Tale of Wisconsin Politics

One day, Representative Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.

Nobody knows for sure what she had to promise to gain his approval. But Chuck wanted a more compliant senator, so he got to work.

What he did best was fundraise with unsubtle threats. Populist Chvala even sponsored a fundraiser at the state's ritziest country club.

Chvala didn't care much for dissent. And he was giddy with the idea of Senator Julie.

Just like the old days when party bosses made decisions for us all.

But then Lassa's mentor was charged with 20 felonies and things fell apart.

The End?

Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa (342-0526) and the rest and ask them the tough questions — did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections? And, most importantly, will you please clean up your act?

A public service announcement from the Alliance for a Working Wisconsin

(Appx. 2).

The Complaint does not deny Lassa's connections to Chvala or that he sponsored a fundraiser for her. Rather, the Complaint alleges that the mailer "asserts . . . that Lassa was involved in the conduct that led to the indictment of Senator Chvala," and "falsely and maliciously asserts to her constituents that Lassa engaged in 'extortion,' 'misconduct in public office,' 'pay to play,' as well as 'lying, cheating and stealing.'" (R.2, ¶¶ 15, 17).

The Trial Court's Initial Ruling Compelling Disclosure

Less than two weeks after being served with the complaint, Rongstad was deposed. Lassa's counsel, Ed Garvey, asked Rongstad to disclose the names of members of the Alliance. Rongstad objected, based upon the First and Fourteenth Amendment freedom of association and free speech rights. (R.144, at 3-5). Counsel called the trial court and asked for a ruling on the objection. The trial court denied Rongstad's request to brief the constitutional issues, asked what cases supported the objection, and stated it would provide a decision the following day. *Id.* at 14-15, 19.

The following day, the trial court overruled the objection, ordering Rongstad to "answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." (Appx. 28).

When Rongstad requested a stay to pursue an interlocutory appeal, Lassa's counsel stated that Lassa needed to get the discovery immediately to help her ***political*** goals:

> There is a special election that is coming up. We now know that that seat is vacant, and therefore, I think it is extremely important that we get to the bottom of this as quickly as possible.

(Appx. 30). The trial court agreed:

> [I]f she is going to seek to clear her name as best she is able in a manner that would have any value to her aspirations to seek the position where that opening has occurred, then it's crucial that that occur at some point prior to the point when that special election is held . . .

(Appx. 34).

Rongstad's deposition then recommenced. Rongstad continued to refuse to disclose the names of members of the Alliance. However, Rongstad did testify that he was the only person "involved" in the "preparation" and "distribution" of the mailer, and that no specific Alliance members were involved in the funding because the Alliance's contributions are not earmarked for specific projects. (R. 42). In other words, Rongstad believed he could comply with the Court's order without disclosing any specific members of the Alliance.[1]

Rongstad filed a motion for reconsideration of the privilege issue, which was denied on February 6, 2003. (R. 146). In denying the motion, the court appeared to express some hostility based upon the content of the issue advocacy piece, accusing Rongstad of engaging in a "cover-up":

> [I]f I get any flavor, it is that Mr. Rongstad has been highly evasive and engaged in a well-planned effort to cover up how he comes to engage in ***the kind of behavior he engages in*** when he is putting out ***these kinds of publications***. And it's a sad day in our political system when somehow ***this kind of activity is covered up and evaded***. Seldom have I seen such an abuse, but we'll deal with future motions when and if they come in.

---

[1] During the February 4, 2003 deposition, Judge Lundsten heard argument on Rongstad's emergency motion for relief under §§ 808.07(2)(a) and 809.52, Wis. Stats. The motion was denied. (R.18).

(Appx. 46) (emphasis supplied).

Rongstad's Motion to Dismiss

On February 11, 2003, Rongstad filed a Motion to Dismiss. (R.24) The trial court refused to schedule the motion for a hearing. Rather, the court issued a briefing schedule running through the end of March, and indicated that the court would decide the motion on the briefs. (R.27).

During the time Rongstad's motion to dismiss was pending without so much as a hearing date, the trial court: (1) heard and decided plaintiff's motion for contempt and for sanctions relating to the constitutional privilege; (2) heard and granted Lassa's motion to quash any discovery by Rongstad; and (3) imposed monetary sanctions and a $1,000 daily forfeiture until disclosures were made. The motion to dismiss was ultimately denied on July 8, 2003, months after the sanctions were imposed.[2] (R.151).

Lassa's Motion for Sanctions and for Contempt

Lassa filed a motion for sanctions and for contempt on February 21, 2003. (R.36). On February 28, 2003, the trial court postponed the motion for procedural reasons, but took the opportunity to issue a second order "clarifying" and "narrowing" the disclosure requirements:

> All right. Here's then what we're going to do. To make this absolutely clear and avoid any confusion on Mr. Rongstad's part, Mr. Rongstad is ordered, at a deposition to be conducted on Monday morning [March 3, 2003], to provide the records and disclose the names of any person who contributed any amount in excess of $100 or more in the aggregate during the

[2] A petition for leave to appeal the motion to dismiss was denied on September 8, 2003. *Lassa v. Rongstad*, Appeal No. 03-2111-LV.

> six months preceding November 1st, so let us say at any time after May 1st of 2002.
>
> * * *
>
> I don't know if there's any way I can express this more adamantly that I am looking for Mr. Rongstad to comply with my prior court order. In this now ***I'm granting him the benefit of narrowing this court order***, but the expectation is that he will in fact comply.

(Appx. 48-49) (emphasis supplied).

On March 3, 2003, Rongstad again asserted the constitutional privilege against compelled disclosure of the Alliance's members.

At the subsequent hearing on the motion for sanctions and contempt, Rongstad conceded that he had not provided the information ordered to be divulged, but explained that he first wanted a chance to exercise his right to an appeal on the issue:

> [Rongstad] understands fully the Court's order, and he's elected to exhaust his appellate remedies with respect to the constitutional issues and has authorized me to represent to the Court that if in fact the Court is correct in its analysis that the constitutional issues do not trump his obligation to disclose the names of the contributors, that he will in fact comply.

3/11/03 Tr. at 8 (R.149). The trial court found Rongstad in contempt, concluding, based solely upon a reading of the deposition transcript, that Rongstad "lied while under oath" because his testimony that he did not remember who contributed to the organization "defies credulity." (Appx. 52). The court added that for Rongstad "to suggest that he doesn't even keep any record of the names or addresses of the people who have contributed except for the deposit slips . . . is so highly unlikely and inconsistent with the way any other organization of a similar

type would maintain their records and suggests to me that his answers were false." (Appx. 52-53).

Accordingly, the trial court imposed the following as civil contempt sanctions:

- Payment of all of Lassa's attorney's fees and costs in connection with the depositions and motions to compel;
- A penalty of $1,000 per day running from March 13, 2003 to April 4, 2003; and
- If Rongstad failed to disclose the names by April 4, 2003, entry of default judgment.

(Appx. 7-9). The trial court denied Rongstad's request for a stay pending a chance to appeal the contempt order, concluding that Rongstad had "no likelihood of success on the merits." 3/11/03 Tr., at 22-23 (Appx. 60-61).

During the same March 11, 2003 hearing, the court granted Lassa's motion to quash Rongstad's discovery efforts, stating:

> Mr. Rongstad seeks to have the right to participate in this litigation by engaging in discovery, but he comes to the court with not simply unclean hands but hands that are muddied to the elbow. He has failed consistently to comply with this Court's order, or orders in the plural, and as a result I think has largely forfeited, until he can demonstrate that he is willing to play by the rules, the right to use the rules to his advantage.

(Appx. 58).

Rongstad's Petitions for Interlocutory Appeal

Three days after the contempt hearing, on March 14, 2003, Rongstad filed a Petition for Leave to Appeal and Petition for Supervisory Writ, along with a motion seeking a stay pending appeal. *Lassa v. Rongstad*, Appeal No. 03-742-LV; *State of Wisconsin ex rel. Todd Rongstad v. Circuit Court for Dane County*, Appeal No. 03-743-W. The Court of Appeals denied both Petitions on April 1, 2003. (R.55-56).

Rongstad's Disclosure of Contributors to the Alliance

On April 4, 2003, the deadline for disclosure under the March 11, 2003 Order, Rongstad disclosed the names of all contributors to the Alliance since January 1, 2002. (R.61, Exh. 1). Despite all of the arguments of delay and obfuscation, this disclosure came less than three months after the lawsuit was filed, and only three days after Rongstad was denied the ability to appeal the constitutional issues.

Lassa's Motion for Default Judgment

Despite receiving the names by the court-imposed deadline of April 4, 2003, Lassa filed a motion for default judgment, contending the disclosures were untimely and insufficient. Rongstad responded that the disclosures—all Alliance contributors in 2002—were precisely what the court ordered in the "narrowed" order on February 28, 2003. (Appx. 49-50). The new trial judge, Honorable Maryann Sumi (who was assigned to the case after a substitution request by a third-party defendant), rejected this argument. Judge Sumi held that Judge Nowakowski had not narrowed his prior disclosure order, and entered default judgment against Rongstad for failing to provide details in addition to the names. (R.152). Rongstad's motion for reconsideration of this default judgment decision was denied on October 3, 2003. (R.139, 155).

Settlement of the Underlying Case

On November 17, 2003, the parties filed and the trial court signed a document entitled "Stipulation and Order for Entry of Combined Judgment, Dismissal and Appellate Rights." (Appx. 12-19). The order provides as follows:

- Lassa's defamation claim was dismissed with prejudice.

- A combined judgment was entered encompassing the contempt and sanctions decisions including "$43,000.00 in contempt-related attorney's fees and $22,000.00 in forfeitures payable to the School Fund."

- Rongstad preserved the right "to appeal the appropriateness of the fees and forfeitures under the First Amendment, [*Burnett v.*] *Alt*, and whether the Courts were justified in the award, and any other applicable legal theories."

(Appx. 13). This appeal followed.

ARGUMENT

The sanctions should be vacated for at least four reasons.

First, Rongstad had a valid constitutional privilege. Applying *NAACP v. Alabama* and its progeny, Rongstad established a reasonable fear of reprisal, where a public official was aggressively seeking the names to add defendants and identify political enemies. Any doubt about the validity of such fears was put to rest when then-Senator Lassa and her counsel, Ed Garvey, both issued press releases blasting a former Lassa staffer as a liar after she gave deposition testimony unfavorable to Lassa. Lassa's alleged urgent need for the information to add defendants and to help her political aspirations was not a "compelling governmental interest."

Second, regardless of whether the Court agrees with Rongstad on the privilege issue, contempt sanctions were inappropriate under *Alt*, where this Court held that a "substantiated assertion" of privilege is "a substantial justification for failing to comply with an order to provide or permit discovery." *Burnett v. Alt*, 224 Wis.2d 72, 94, 589 N.W.2d 21 (1999). If a treating doctor's assertion of a privilege not to give an expert opinion is accorded protection from contempt, as in *Alt*, certainly a constitutionally grounded privilege, backed by decades of authority and a balancing test that has yet to be applied in Wisconsin, is entitled to the same protection. Moreover, given the fundamental nature of the interests involved, this Court should exercise its superintending authority and create a rule, similar to its prior decision regarding qualified immunity, mandating a right to interlocutory appeal in similar cases.

Third, the trial court erred by imposing contempt sanctions before even determining whether Lassa stated a viable defamation claim. Public officials are subject to heightened First Amendment standards when alleging defamation, and should not be allowed to use discovery to advance political goals before demonstrating an actionable claim. Lassa's defamation claim had no merit, as the mailer did not accuse her of illegal conduct, but merely highlighted the fact that she had ties to embattled Senator Charles Chvala.

Finally, the severe sanctions meted out—$65,000 against an individual defendant asserting a constitutional privilege—were not rationally related to the alleged misconduct, warranting reversal. Rongstad ultimately named the names less than three months after the complaint was filed.

I. Rongstad and the Members of the Alliance Had a First Amendment Privilege Against Compelled Disclosure of Their Political Associations.

A. The First Amendment Protects Against Compelled Disclosure of a Political Organization's Membership Absent a Compelling Justification.

"[F]reedom of association for the purpose of advancing ideas and airing grievances" is considered to "lie at the foundation of a government based upon the consent of an informed citizenry." *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960). The Supreme Court has long held that governmental action compelling disclosure of one's associations with advocacy groups is subject to constitutional protection:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of association, particularly where a group espouses dissident beliefs.

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 462. (1958). Thus, where evidence suggests that compelled disclosure could chill political association because of fear of hostility or economic reprisal, the government must demonstrating a "compelling" interest in obtaining the information. *Bates*, 361 U.S. at 524.

This associational privilege relates directly to the First Amendment right to speak anonymously. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334,

357 (1995). *See also Watchtower Bible and Tract Society v. Stratton*, 536 U.S. 150, 166 (2002) ("there are a significant number of persons who support causes anonymously"); *Talley v. California*, 362 U.S. 60, 65 (1960) ("there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified").

In the seminal case on the issue, *NAACP v. Alabama*, an Alabama state court ordered the NAACP to produce its membership lists in an action seeking to enjoin the NAACP from conducting activities in the state. The NAACP refused to disclose the membership list, and was held in contempt and fined $100,000.

The Supreme Court began by holding that the organization had standing to protect the rights of all if its members, and that a judicial production order constitutes state action. *NAACP*, 357 U.S. at 458-60. There is no dispute that Rongstad, as President of the Alliance, had standing to assert the privilege on behalf of himself and other members of the Alliance.

The Court next held that regardless of whether "the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters," state action that "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61. Citing evidence of past "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" against the NAACP, the Court held that compelled disclosure was likely to adversely affect the ability of the NAACP and its members to pursue their collective efforts, and could dissuade others from joining or cause members to withdraw because of fear of exposure. *Id.* at 462-63.

The Court then examined whether the state had a compelling interest in forcing disclosure. Finding the State's alleged justification for the discovery—to determine whether the NAACP was conducting interstate activities in violation of state law—to be less than compelling, the Court reversed the

contempt order: "Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466.

Subsequent cases have further defined the general contours of this constitutional balancing analysis. As set forth below, the evidence submitted by Rongstad was sufficient to establish a *prima facie* showing of potential harm under *NAACP v. Alabama*, and Lassa failed to demonstrate the requisite compelling governmental interest in disclosure.

B. Rongstad and the Alliance Members' Constitutional Interests Outweighed Lassa's Interests in Adding Defendants and Furthering Her Political Career.

This Court owes no deference to the trial court's analysis on the privilege issue. *Alt*, 224 Wis. 2d at 84 (legal privilege determination subject to *de novo* review).

1. Rongstad made a *prima facie* showing of a "reasonable" potential for economic or political reprisal.

"[T]he initial burden to make a *prima facie* showing that the trial court's orders will burden First Amendment rights . . . must be light." *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998). The party must demonstrate "***only a reasonable probability*** that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (emphasis supplied).

The threat of harm may actually be magnified in cases, like this, where the disclosure is sought through discovery in a civil lawsuit:

> The chilling effect on First Amendment rights is not diminished simply because disclosure is compelled pursuant to a litigation-oriented discovery order. Indeed, in some respects, ***the threat to First Amendment rights may be more severe in a discovery context***, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.

Britt v. Superior Court of San Diego County, 574 P.2d 766, 774 (Cal. 1978) (emphasis supplied). In addition, the privilege applies to all "politically oriented associations," regardless of whether they are "unpopular." *Id.* at 772.

A record of past harassment is unnecessary. "[P]otential infringement on an association's First Amendment rights may exist even in the absence of a factual record of harassment." *In re Maurer*, 15 S.W.3d 256, 260 n.4 (Tex. App. 2000). In a case enjoining enforcement of a subpoena seeking records of contributors to a political party in connection with an investigation into a vote-buying scheme, the Court explained:

> While there is no evidence of record in this case that any individuals have as of yet been subject to reprisals on account of the contributions in question, it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.
>
> * * *
>
> Disclosure or threat of disclosure may well tend to discourage both membership and contributions thus producing financial and political injury to the party affected.

Pollard v. Roberts, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968).

Rongstad clearly met this minimal burden.

The trial court initially faulted Rongstad, who had no opportunity to even ***brief*** the issue, for failing to make an evidentiary showing "that disclosure of the names of those involved in the publication of the allegedly libelous mailing would subject him to or those other individuals to threats, harassment or reprisals from anyone." 2/4/03 Tr., at 10 (Appx. 25). Rongstad thereafter requested reconsideration and submitted an affidavit averring in part:

> 3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.
>
> 4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in the organization or any such organization, for fear of public reprisal and potential legal action.

(Appx. 4).[3]

The trial court tersely rejected this uncontroverted affidavit as "conclusory" and "wholly insufficient." (Appx. 41). To the contrary, Rongstad's affidavit established a "reasonable probability" of "threats, harassment or reprisals." *Buckley*, 476 U.S. at 74. Given the context of the demand for disclosure,

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[3] Rongstad and the Alliance members had every expectation that the communication would not be subject to disclosure. The mailer did not trigger any reporting or disclosure requirements under state law. *See, e.g.*, *Elections Board v. WMC*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999) (only "express advocacy" is subject to disclosure); Wis. Admin. Code § ElBd 1.28(2) (only communications using *Buckley* "magic words" or their "functional equivalents" are subject to disclosure). The mailer did not advocate the election or defeat of any candidate, did not reference any election, and did not use any "magic words" or their functional equivalents.

coming from a powerful public official allegedly seeking to clear her name and looking to add more defendants to an aggressive political lawsuit, the fears of public reprisal and potential legal action were eminently reasonable.

The reasonableness of these fears was amply demonstrated by Lassa's actions in this very litigation, wherein she used her position of power to publicly humiliate an adverse witness in the case. A former Lassa intern testified in a deposition that Lassa worked on campaign materials in her office and used the Assembly Democratic Caucus to do graphic art work on the campaign materials. (R. 133, Exh. 3). In response, both Lassa and her politically active counsel, Ed Garvey, issued press releases to Wispolitics.com attacking the witness. Lassa's press release stated:

> The allegations made by [the witness] in a deposition yesterday that she worked on campaign literature while she served on my Assembly staff are completely false.
>
> . . . I had to reprimand [the witness] for habitually arriving late to work, as well as other unprofessional conduct, and was eventually compelled to dismiss her.

(R. 127).[4] Attorney Garvey's press release described the testimony as "false and unsubstantiated." *Id.*

If Lassa were not a public official, a press release concerning a witness in a deposition would hardly be newsworthy. Her stature as an elected official gives her power to publicly harass and punish her critics (not to mention the power to exact political or legislative retribution). It is precisely this power, unflinchingly unleashed on her former intern in response to harmful deposition testimony, which demonstrates a

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[4] The press releases named the witness. Rongstad will not do so here in order to avoid further embarrassment to the individual. Ironically, given Lassa's stated goal of "clearing her name," Lassa ran to court seeking a protective order to prevent disclosure of the deposition testimony. (R.124-127). The motion was denied. (R.154, at 35-37).

"reasonable probability" of potential reprisal or harassment. *See Bay Area Citizens*, 982 S.W.2d at 376. Moreover, the threat of such public reprisal could well dissuade others from joining or becoming associated with the Alliance. *See NAACP*, 357 U.S. at 462-63.

In sum, Rongstad made a *prima facie* showing of potential First Amendment harm from disclosure.

2. Lassa failed to demonstrate a compelling state interest in disclosure.

Once a *prima facie* showing has been made, the party seeking disclosure "must demonstrate that the information required to be disclosed is substantially related to a compelling governmental interest." *Bay Area Citizens*, 982 S.W.2d at 378. *See also NAACP*, 357 U.S. at 463 ("'subordinating interest of the State must be compelling'").

The alleged interests in disclosure are subject to "heightened scrutiny" in light of the significant First Amendment interests at stake. *See Anderson v. Hale*, 2001 WL 503045, at *4 (N.D. Ill. 2001) ("Given the preferred position of First Amendment rights and heightened scrutiny that applies, this is no easy task."); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983) ("This enhanced scrutiny is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents."); *Britt*, 574 P.2d at 773 ("the government's burden is a particularly heavy one").

Lassa never met this heavy burden.

The trial court focused on Lassa's generic interest in "her good name" and the public's interest in "preventing fraud and libel," and held that Lassa's "need for disclosure of the names of those involved is particularly strong here because these are people who may have directly participated in causing her ***alleged harm*** and there is no other source for the information." (Appx. 26-27) (emphasis supplied).

These interests are less than compelling, for three reasons. First, Lassa's allegations had not even been tested on a motion to dismiss, a particularly critical examination where the plaintiff is a public figure. *See* Section IV, infra. Second, Rongstad had taken full responsibility for the mailer in question, and stood ready to defend the lawsuit and presumably pay damages if defamation were proven. There was no "compelling" need for Lassa to round up additional suspects within a month or two of filing the case. Third, if such generalized interests were deemed compelling, the constitutional privilege would be nullified in every defamation case, a result that cannot be squared with the careful balancing mandated by *NAACP v. Alabama*.

Lassa was quite candid that her primary goal in obtaining the names immediately was political. Her counsel explained that it was "extremely important" to get the names "as quickly as possible" so that Lassa could evaluate a potential run for a vacant state senate seat. (Appx. 30). The trial court concurred, explaining that if Lassa "is going to seek to clear her name as best she is able in a manner that would have any value to her aspirations to seek the position where that opening has occurred, then it's crucial that that occur at some point prior to the point when that special election is held . . . ." (Appx. 34).

Lassa's personal political goals, however, do not constitute a compelling governmental interest. There is no special consideration in the law for public officials, and no heightened entitlement to discovery to protect their reputations. In this private lawsuit, Lassa should have been treated like any other litigant, and heaven and earth should not have been moved to force Rongstad to disgorge potentially privileged information within weeks of the filing of the complaint and before any determination of whether the complaint stated a claim.

In a remarkably similar case, *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444 (Ill. App. 1988), the Illinois Court of Appeals reversed an order compelling a defamation defendant to identify members of an organization that allegedly published defamatory material. The

case arose out of statements published in a newsletter circulated in a county hospital accusing plaintiff, a Departmental chair, of being a racist. Plaintiff sued a political organization and the local chair of the organization for libel. Plaintiff sought discovery of the identities of the members of the defendant's organization as well as members of a related organization that defendant claimed was the real publisher. When the defendant refused to divulge the names despite a court order to do so, he was held in contempt and ordered incarcerated until he provided the names.

The Illinois Court of Appeals reversed. Citing *NAACP v. Alabama*, *Buckley* and other cases, the court held:

> [T]he courts have held that a person cannot be compelled to disclose his or her political association, or the names of members of political associations, absent a compelling and overriding public interest. . . . This analysis applies with equal force whether the plaintiff is seeking wholesale disclosure of membership lists or more limited disclosures of the identities of specific members of a dissident organization.

Crocker, 533 N.E.2d at 447. The Court found that members of the organizations reasonably feared that disclosure could subject them to "public and private harassment and reprisals," and that disclosure could "undermine the survival of these organizations and their ability to exercise their First Amendment rights." *Id.*

Noting that the plaintiff had the burden to demonstrate "that the balance of interest weighs in favor of disclosure," the Court inquired whether the information sought went to "the heart of the matter" being litigated. *Crocker*, 533 N.E.2d at 448. Plaintiff's argument that the information was necessary to test the sufficiency of defendant's denial of involvement in the publication was rejected: "'[D]isclosure in the course of a fishing expedition is ruled out in [a] first amendment case.'" *Id.*, *quoting Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977). Accordingly, the Court vacated the order compelling disclosure.

This case raises nearly identical issues. Lassa, like the plaintiff in *Crocker*, aggressively sought discovery of the membership of an organization behind an allegedly defamatory publication. Rongstad, like the defendant in *Crocker*, averred that members of the Alliance feared disclosure, and that compelled disclosure could undermine the viability of the organization. (Appx. 3-4). The *Crocker* court found the fears of reprisal to be "reasonable" in light of plaintiff's position of power as the chair of the pathology department. 533 N.E.2d at 447. Likewise the fears in this case were reasonable in two respects: first, Lassa's counsel specifically stated that Lassa sought the names in order to add individuals as defendants in a costly lawsuit; and second, Lassa occupied a position of power from which she could directly and negatively impact the interests of any Alliance members identified by Rongstad. Lassa's admission that the purposes of her discovery was to identify the persons named as "Doe" defendants and to further her political ambitions reflected just the kind of "fishing expedition" rejected in *Crocker*.

In sum, Rongstad and the Alliance members had a constitutional right against compelled disclosure of the organization's membership. Lassa failed to establish any "compelling" state interest in forcing Rongstad to betray the Alliance's constitutionally-based guarantees of privacy so that she could name additional defendants. The Supreme Court long ago held that the importance of public discussion of "the character and qualifications of candidates . . . more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great." *New York Times Company v. Sullivan*, 376 U.S. 254, 281 (1964). As in *NAACP v. Alabama*, the fact that Rongstad had a constitutional privilege against compelled disclosure mandates reversal of the contempt sanctions.

II. Rongstad's Assertion of Constitutional Privilege was Well-Founded and Precluded Contempt Sanctions Under the Principle Established in *Burnett v. Alt.*

In *Alt*, this Court held that a "substantiated" assertion of privilege serves as a shield against the use of contempt and sanction powers to compel disclosure of potentially protected information. The reason is straightforward—allowing a trial court to use such authority to force disclosure of potentially privileged information would require a litigant to choose between sanctions and a meaningful appeal. This principle applies with force to the present case. Rongstad's assertion of privilege was well-substantiated, as it rested on a First Amendment bedrock, thus heightening the concerns identified in *Alt*, which involved a testimonial privilege for expert witnesses.

Even assuming *arguendo* that Rongstad ultimately loses under the First Amendment balancing analysis, the Court cannot gainsay that the assertion of privilege was well-grounded. Indeed, in addition to decades of Supreme Court jurisprudence generally establishing the right to avoid compelled disclosure of political associations, Rongstad cited on-point precedent wherein defendants in defamation cases successfully asserted the privilege. Moreover, the Court of Appeals in its Certification order recognized that Rongstad's constitutional privilege claim was "well established" and noted that no Wisconsin case has "applied this test in the context of a political attack ad." Certification, at 2, 3.

The trial court's harsh orders at the infancy of this case demonstrate the "between a rock and a hard place" position faced by parties such as Rongstad who are ordered to divulge what they believe to be protected political associations. Rongstad's initial refusal to name names, a mere six weeks into the litigation, was met with the following sanctions: (1) tens of thousands of dollars in attorney's fees; (2) a $1,000 per day forfeiture until disclosure; and (3) if no disclosure by April 4, 2003 (just over two months into the active litigation), imposition of default judgment. The trial court tersely

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rejected Rongstad's request for a stay pending an attempted interlocutory appeal, concluding that Rongstad had "no likelihood of success on the merits." (Appx. 60-61).

The trial court thus put Rongstad into an untenable, even impossible, position: either disclose the information and thereby forfeit the right to meaningful appellate review of the privilege issue, or face enormous sanctions, including a potential default judgment. Forcing litigants into such a Hobson's choice has been expressly rejected by this Court.

A. *Alt* Precludes Sanctions for "Substantiated Assertions" of Privilege.

In *Alt*, a treating doctor, called by plaintiff as a witness, refused to answer a deposition question requesting his expert opinion. The trial court granted a motion to compel and imposed sanctions against the doctor pursuant to § 804.12(2), Wis. Stats.

This Court reversed. First, the Court held expert witnesses have a conditional privilege to refuse to testify absent a showing of "compelling circumstances." *Alt*, 224 Wis. 2d at 84-91. Second, the Court held that where a witness has a "substantiated" privilege claim, the witness can properly refuse to comply with an order compelling disclosure:

> Although the circuit court should not rely on the judgment of the attorneys involved for their self-interested determination that a privilege exists, . . . ***a substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery.***

Id. at 94 (emphasis supplied). Third, the Court explained that it is error for a trial court to impose sanctions for a refusal to comply with a court order before an appellate court can address the legal privilege issue:

> Were we to uphold sanctions in this case, we would be forcing Burnett and Dr. Acosta to make a choice between protecting a privilege and avoiding sanctions. Had Dr. Acosta answered the question regarding whether a gush of blood was abnormal, his privilege to refuse to provide testimony would then have been avoided. Although sanctions would then have been avoided, and even though a reviewing court might later strike the answer, this might be little consolation to the expert who for whatever reason was forced to testify against his will. ***We cannot put attorneys and deponents in this untenable situation.***

Id. at 95 (emphasis supplied).

Perhaps to quell fears that this principle would lead to abusive assertions of privilege, the Court emphasized:

> We caution attorneys that our holding in this case is not a license to assert unsubstantiated privileges. An ***unsubstantiated and unfounded privilege*** is not substantial justification for not imposing sanctions under Wis. Stat. § 804.12(2).

Id. at 95 (emphasis supplied) (citing *B&B Investments v. Mirro Corp.*, 147 Wis. 2d 675, 687-88, 434 N.W.2d 104 (Ct. App. 1988)).

B. The Phrase "Substantiated Assertion" is the Equivalent of "Non-Frivolous."

As the Court of Appeals herein recognized, "*Alt* does not flesh out what makes a privilege 'substantiated.' A supreme court decision addressing this question would clarify the law in this area." Certification, at 4.

Whatever the test, the phrase "substantiated assertion" certainly means something other than ultimately being correct. The very term "assertion" demonstrates that the test focuses on the support for the privilege ***at the time it is asserted***, not at the time it is finally adjudged to be correct or incorrect. Parties are not required to gamble every time a privilege is asserted at the risk of incurring sanctions if ultimately proven wrong. This is precisely the "untenable" situation the Court refused to foist upon attorneys and deponents.

The case cited to demonstrate an "unsubstantiated" assertion of privilege, *B&B Investments*, suggests that the phrase is equivalent to "frivolous." In that case, a principal of the plaintiff, a partnership, refused to answer deposition questions based upon an asserted Fifth Amendment privilege against self-incrimination. Among the questions he refused to answer were whether he was a plaintiff and whether he intended to take the Fifth on every question asked. *B&B Investments*, 147 Wis. 2d at 687 n.2. Suggesting that the key issue was whether the assertion of privilege was "legitimate," the Court concluded that plaintiff's assertions of privilege were "ludicrous" and "meritless," and that the only purpose was to delay the proceedings and deprive defendants of discovery. *Id.* at 686-87.

The word "substantiate" is defined as "to support with proof or evidence; verify." American Heritage Dictionary, at 1791 (3d ed). *See also Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 512, 504 N.W.2d 621 (Ct. App. 1993) ("the ordinary meaning of 'verify' according to Webster's Third New International Dictionary 2543 (unabr.1976) is 'to confirm or substantiate in law by oath.'"). The test, therefore, properly focuses on whether the ***assertion*** of privilege is "legitimate" and whether it is supported with proof or evidence, or, in the legal context, precedent. In all respects, the "unsubstantiated and unfounded" standard of *Alt* equates to the standard of frivolousness in §§ 802.05 and 814.025, Wis. Stats. (requiring pleading to be "well-grounded in fact" and have a "reasonable basis in law").

The initial trial court failed to even consider or analyze *Alt*. Judge Sumi interpreted the term "substantiated" to equate with a trial court's determination of whether a privilege exists:

> How does one go about getting substantiation? Well, it seems that if you're in a deposition, you halt the deposition, you go to the court that has jurisdiction in the case and ask, you know, is this a valid claim, is it substantiated. That's exactly what happened in this case. The deposition was halted; Mr. Rongstad believing he had a privilege, didn't answer. Guidance from the court was sought, guidance was given, the court said, "It's not a substantiated claim of privilege, I don't adopt it." Fine.

10/3/03 Tr. at 17-18, 41-42 (R. 155).[5]

This analysis is circular. If the trial court's rejection of the assertion of privilege in and of itself demonstrates that the privilege was not substantiated, the expert in *Alt* would have been out of luck because the trial court therein rejected his claim of privilege. The entire import of *Alt* is that it is "untenable" to force a witness to choose between "protecting a privilege" all the way to a "reviewing court" or incurring sanctions. 224 Wis. 2d at 95, ¶ 45. The use of the term "substantiated" was intended to forestall the abusive use of privilege claims that, like the claim in *B&B Investment*, are frivolous.

C. Rongstad's Constitutional Privilege Claim Was Well-Grounded in Fact and Law.

Rongstad's constitutional privilege claim was well-grounded in fact and law, including the general constitutional principles espoused in *NAACP v. Alabama*, *Bates* and *Buckley*, and the specific application of those principles to an analogous private defamation action in *Crocker*. Rongstad testified about

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[5] Despite the quotation marks in the transcript, Judge Sumi was not quoting any decision by Judge Nowakowski. In fact, Judge Nowakowski never characterized the privilege claim as "unsubstantiated," and never analyzed the *Alt* issue.

the assurances of confidentiality provided to contributors to the Alliance, and the fears expressed by members that disclosure could result in public reprisal or litigation. One can legitimately argue that the existence of a balancing test by definition provides a substantiated basis for an assertion of privilege. However, there is no need to go this far; Rongstad had a strong and substantial basis, legally and factually, upon which to assert the constitutional privilege against compelled disclosure of his political associations.[6]

Alt requires reversal of the sanctions.

III. The Court Should Exercise Its Superintending Powers to Establish that Interlocutory Appeal is a Matter of Right to Review Claims of Constitutional Privilege.

Given the "untenable" choice identified in *Alt*, and a trial court's interest in enforcing its discovery orders, interlocutory appeal should be a matter of right in cases involving threatened sanctions for refusal to disclose evidence based upon a substantiated claim of privilege.

In an analogous situation, this Court exercised its constitutional superintending power to mandate that parties have an absolute right to interlocutory appeal to determine a legal claim of qualified immunity. In *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996), the Court recognized that qualified immunity exists to provide public officials with "immunity from suit," not simply immunity from liability. The "primary benefit" of such immunity would thus be lost if a case was erroneously allowed to proceed to trial. *Id.* The Court

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[6] At a minimum, the trial court should have stayed its contempt decision while Rongstad pursued an interlocutory appeal. *See Crocker*, 533 N.E.2d at 446-47 ("The trial court noted that the case presented serious constitutional issues and stayed its order pending appeal. The trial court retained jurisdiction for all purposes including the continuation of Clark's deposition on issues other than identifying members of his political associations."); *See also Maurer*, 15 S.W.2d at 259 (contempt stayed if witness sought mandamus relief).

explained that an appeal of the qualified immunity would not be a "sufficient remedy" because the official cannot be "re-immunized" if the initial determination turns out to have been erroneous. *Id.* at 227.

The same reasoning applies here. Faced with the panoply of sanctions imposed and threatened, including a default judgment, Rongstad ultimately disclosed the names of contributors to the Alliance after the Court of Appeals denied interlocutory review. While Rongstad now appeals from the sanctions, he cannot undo the disclosures or obtain any meaningful relief for the violation of his and the contributor's constitutional rights. If he was correct that the constitutional privilege applied, there is no adequate remedy to repair the damage, other than relief from the sanctions.

The Supreme Court of Pennsylvania recently mandated interlocutory appeal in a similar context. *See Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). At issue was an order compelling disclosure of the authors of an allegedly defamatory internet posting. The anonymous authors, named as Doe defendants, argued that the decision was appealable as of right under the Pennsylvania collateral order rule[7], which allows appeal as of right from "separable and collateral" orders "where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably harmed." *Id.*, at 45 (*quoting* Penn. R.App.P. 313). The Court agreed, finding that "the court-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their fundamental rights," and that once the identities were disclosed, the "First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure." *Id.* at 50. *See also Maurer*, 15 S.W.2d at 259 ("When, as here, a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate.").

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[7] The "collateral order rule" is the same doctrine that led the United States Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) to mandate immediate appeal regarding claims of qualified immunity. *See Arneson*, 206 Wis. 2d at 222 & n.4.

Maine has adopted a similar standard, referred to as the "death knell" exception, which allows interlocutory appeal if "substantial rights of a party will be irreparably lost if review is delayed until final judgment." *Moffett v. City of Portland*, 400 A.2d 340, 343 n.8 (Me. 1979). Just last month, the Supreme Court of Maine extended the exception to a claim where a plaintiff was seeking to force Time Warner to disclose the identity of a subscriber who sent an e-mail in the plaintiff's name. *Fitch v. Doe*, 2005 WL 627569 (Me. March 18, 2005). Citing *Moffett* and *Melvin v. Doe*, the Court held:

> We noted that denial of the opportunity to appeal would make a later appeal moot, because the information at issue would already have been released. Such is the case here, where ***disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot.***

Id. at ¶ 10 (emphasis added).

The United States Supreme Court recently held, in the First Amendment arena, that courts should ensure that "procedural rules and practices" are employed to "avoid delay-related First Amendment harm." *City of Littleton v. Z.J. Gifts*, 124 S.Ct. 2219, 2224-25 (2004). At issue in *Littleton* was the ability of an adult bookstore to obtain a "prompt judicial decision" of an adverse licensing decision that could limit its First Amendment activity. The Court rejected a challenge to the local ordinance in part because the state's "ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." *Id.* at 2224. "[W]e have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm." *Id.* at 2225. The Court expressly noted that this principle extended to appellate courts: "[H]igher courts may quickly review lower court decisions." *Id.*

The strong interests in protecting constitutional rights, combined with the public policy established in *Alt* that litigants

should not have to choose between "protecting a privilege and avoiding sanctions," *Alt*, 224 Wis. 2d at 95, counsels strongly in favor of this Court exercising its superintending authority to create a rule mandating the right to interlocutory appeal of a decision compelling disclosure of information over constitutional objection, where disclosure will make a later appeal of the privilege moot.

IV. The Sanctions Cannot Stand Where Lassa Failed to Even State a Claim.

In light of Lassa's aggressive discovery and the trial court's decisions rejecting Rongstad's claims of privilege, Rongstad promptly filed a motion to dismiss on February 11, 2003. (R.24). Judge Nowakowski refused to even schedule a hearing, instead charging ahead on the privilege issues and imposing sanctions before the motion was even briefed. By the time the motion was heard (five months after it was filed), Rongstad had been forced to disclose the names to avoid (he thought) a default judgment.

In this context, the sanctions should be reversed. The court should have heard the motion to dismiss ***before*** ordering any discovery over a constitutional objection, and should have granted the motion because Lassa failed to allege an actionable defamation claim.

A. In Light of the First Amendment Issues Presented, the Motion to Dismiss Should Have Been Decided *Before* Allowing Constitutionally Invasive Discovery.

Rongstad was consistently whipsawed by the trial court's approach to the legal issues presented. On the one hand, Lassa's motions seeking to compel disclosure and sanctions were scheduled and heard immediately, with little (and initially with no) time to adequately brief the issues. The trial court expressly stated that Lassa's alleged need for discovery to further her political aspirations mandated immediate discovery. On the other hand, the trial court refused to consider whether Lassa had

even stated a viable defamation claim before forcing Rongstad's disclosure through the use of discovery and contempt sanctions. Rongstad's constitutional rights were deemed secondary to Lassa's mere allegations of defamation.

In a similar case, a Pennsylvania court was careful to ensure that the sufficiency of a public figure plaintiff's defamation complaint was tested before the court reached constitutional discovery issues. In *Melvin v. Doe*, 49 Pa. D.&C.4th 449 (Pa. Ct. Cmmn. Pleas 2000), plaintiff filed a defamation action alleging that a statement on a website was defamatory, and immediately sought discovery designed to identify the source of the posting. Certain Doe defendants challenged the discovery on First Amendment grounds. Before reaching the constitutional issues, the court stayed discovery "in order to give the defendants the opportunity to show that plaintiff could not make out a prima facie case." *Id.* at 452. The Court explained:

> A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit.

Id. at 451 n.2. In this case the trial court went to great lengths to ensure that Lassa could use the rules of discovery to obtain the identity of individuals before ever considering whether the complaint had merit.

B. There Was No Implied Defamation.

Long after the sanctions at issue on this appeal had been imposed, the trial court denied Rongstad's motion to dismiss. While that decision is not technically before this Court, because the defamation claim was dismissed pursuant to stipulation, the fact that the defamation claim lacked merit is relevant to the propriety of the sanctions imposed. If the Court agrees with Rongstad that Lassa failed to state a claim and that this inquiry should have preceded intrusive discovery backed by contempt sanctions, the sanctions cannot stand.

The legal sufficiency of a complaint is a question of law that this Court reviews *de novo*. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

Trial courts serve as a gatekeeper in defamation actions, determining as a matter of law whether "the communication is capable of a defamatory meaning." *Bauer v. Murphy*, 191 Wis. 2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995). "The test of capability of a defamatory meaning is not whether by ingenuity, or by stretch of the imagination or semantics, the words might be defamatory. Rather, the determination to be made is 'whether the language used is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by plaintiffs is a natural and proper one.'" *Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411 (1959). "[T]he words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered." *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 459 (1966).

In addition, defamation must be pled with particularity. *See* § 802.03(6), Wis. Stats. Accordingly, the focus is not on the plaintiff's spin about what the communication implies, but on "whether an alleged defamatory implication is fairly and reasonably conveyed ***by the words and pictures of the publication*** or broadcast." *Mach v. Allison*, 2003 WI App 11, ¶ 31, 259 Wis. 2d 686, 712, 656 N.W.2d 766 (Ct. App. 2002) (emphasis supplied). Finally, if there is any inconsistency, the language in the actual mailer prevails over the allegations in the complaint. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶ 11, 239 Wis. 2d 78, 85, 619 N.W.2d 271 (Ct. App. 2000).

The First Amendment demands heightened judicial scrutiny of "a libel claim brought by a public official against critics of [her] official conduct." *New York Times*, 376 U.S. at 264. The fact that the statements were made in a negative, issue ad style mailer a few days before the election, as opposed to a scholarly journal, is critical to the appropriate gate keeping

analysis. As argued extensively in the amicus brief submitted by the ACLU, the relative timing of dispositive motion practice and aggressive discovery efforts in lawsuits brought by public officials is critical in order to protect the fundamental First Amendment right to speak out against public officials.

Frinzi is instructive. The case involved a statement by a Democratic Party chairman, just days before a primary election, charging that plaintiff was supported by an "unholy alliance" of "Knowles forces" and "anti John Doe forces," and that the "price apparently is Knowles' support to weakening the anti-gambling laws." The Court found the statement was not defamatory, in large part because "the language must be considered as originating with the state chairman . . . during a party primary concerning a party candidate a few days before the primary election." *Frinzi*, 30 Wis. 2d at 276. Carefully examining both the words and their political context, the Court concluded the "language complained of is not libelous in its direct charge or in any implied meaning." *Id.* at 277. The Court noted that the reference to the "price" being paid of "weakening the anti-gambling laws," which could presumably carry a negative and defamatory implication, "is referable to the Knowles forces and not to Frinzi." *Id.*

This holding is critical—when defamation by implication is alleged or argued relating to a political communication, the court must carefully examine whether the alleged implication even applies to the plaintiff. Defamation by implication is actionable only where the statement in question "implies the allegation of undisclosed defamatory facts," Restatement (2d) of Torts, § 566, and only where "certainty as to the person who is defamed [appears] from the words themselves, for no innuendo can render certain that which is uncertain." *Luthey v. Kronschnabl*, 239 Wis. 375, 379, 1 N.W.2d 799 (1942).

In denying the motion to dismiss, Judge Sumi held: "The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful conduct that Senator Chvala was accused of." 7/8/03 Tr. at 4 (R. 151).

The court further held that although it was unaware of any potentially defamatory meaning of the phrase "hooked up with," Lassa's argument on summary judgment that it implied a sexual relationship with Chvala created a factual issue for the jury. *Id.* at 4-5.[8]

Reading the actual language of the mailer, in its entirety and in the broader electoral and political context in which it was made, it is apparent that Chvala, not Lassa, is the only party accused of criminal conduct.

The cover of the mailer reflects the newspaper headline "Chvala Charged With Extortion." (Appx. 1). The backside is dominated by Chvala's booking photo, while the text expressly states that "Lassa's mentor was charged with 20 felonies . . . ." (Appx. 2). The only factual statements concerning Lassa are that she "wanted to be a State Senator" and that she "asked . . . Chvala if she could." The mailer does not "fairly and reasonably convey," much less imply, that Lassa engaged in ***any*** illegal conduct, but rather conveys that Lassa has political connections to a politician who was charged with numerous crimes, including "extortion," "misconduct in public office" and "pay to play." In the accepted style of issue advocacy, the mailer closes by asking the reader to call Lassa "and the rest" and ask them the "tough questions" about whether they too engaged in improper conduct, clearly implying a lack of knowledge about whether Lassa engaged in criminal or unethical conduct. Lassa's complaint fails to identify *any* particular language that purportedly makes the assertions she alleges—despite the mandate of § 802.03(6), Wis. Stats., that the "particular words complained of" must be set forth in the complaint.

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[8] This assertion was not stated with particularity in the complaint, as required by § 802.03(6), Wis. Stats.

V. The Sanctions Bore No Rational Relationship to Rongstad's Alleged Offensive Conduct and the Potential Harm to Lassa.

The imposition of contempt sanctions and discovery sanctions are matters within the discretion of the trial court. *See Johnson v. Allis-Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). A trial court "erroneously exercises its discretion when it renders a sanction that is not 'just' namely a sanction that is not 'tailor[ed] .... to the severity of the party's misconduct.'" *City of West Allis v. Wisconsin Elec. Power Co.*, 2001 WI App 226, ¶ 51, 248 Wis. 2d 10, 47, 635 N.W.2d 873 (Ct. App. 2001) (*quoting Johnson*, 162 Wis. 2d at 286).

In *West Allis*, the trial court, following a jury verdict including $100 million in punitive damages for alleged environmental contamination, found that defendant misled the plaintiffs by stipulating that it had no insurance for punitive damages when in fact it potentially had such coverage. The court imposed draconian sanctions, enjoining defendant from seeking coverage from its insurers and imposing a default judgment in the alternative for the amount of the verdict, in case defendant's appeal on the merits was successful. The Court of Appeals reversed, finding that evidence of insurance coverage is not admissible in a punitive damages case and thus plaintiffs were not prejudiced by any misrepresentation. *West Allis*, 248 Wis. 2d at 47. The harsh sanctions were "unreasonable" where "no serious harm was done to the opposing party." *Id.* The Court summarized:

> Since the actual impact of WEPCO's allegedly improper conduct did not lead to the consequences contemplated by the trial court, we find the extremely harsh sanctions to be an erroneous exercise of discretion, as ***the sanctions bore no rational relationship to the offensive conduct.***

Id. (emphasis supplied).

This case fits into the same category. The $65,000 in monetary sanctions (not to mention the default judgment entered after the disclosures) bears no rational relationship to Rongstad's refusal to disclose political associations for a mere two months, where Rongstad had a legitimate claim of privilege and sought an interlocutory appeal to preserve his right to a meaningful appeal on the issue. Like the plaintiffs in *West Allis*, Lassa suffered "no serious harm" from Rongstad's attempts to obtain appellate review of the decision rejecting his claim of constitutional privilege. Lassa obtained the requested information less than three months from the filing of the lawsuit.

It is unclear precisely why the trial court was in such a hurry to force Rongstad to reveal the names before he could even attempt an appeal. Rongstad's disclosures were made days after his petition for interlocutory appeal was denied, and Lassa had the names in plenty of time to add new defendants. There was no legally identified hardship to Lassa, as a litigant, from waiting two months for the discovery (she handily won the special election), which allowed Rongstad to at least take a shot at an interlocutory appeal. The only potential hardship for Lassa would relate to her asserted political ambitions at the time which, with all due respect, should not be allowed to provide politicians with greater discovery rights than other litigants.

Like the trial court in *West Allis*, it is apparent that the trial court was piqued at Rongstad's refusal to accede to its orders, and believed it needed to "send a message" to Rongstad. Nevertheless, when the entire context is examined, including the constitutional nature of the privilege at issue, the precedent supporting its assertion, and Rongstad's quick disclosure after interlocutory review was denied, the extremely harsh sanctions imposed were not tailored to the severity of the offense and represented an erroneous exercise of discretion.

With respect to the trial court's various findings that Rongstad was evasive or that he testified falsely (a distressing claim upon a mere reading of deposition testimony)[9], the fact is

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[9] Basing sanctions upon the court's subjective determinations of the

that Rongstad was straightforward with the court that he believed the names of the Alliance members were protected by a constitutional privilege, and that he intended to pursue appellate review of the court's legal determination before disclosing the names. Rongstad's counsel explained at the March 11, 2003 hearing that Rongstad wanted to "exhaust his appellate remedies with respect to the constitutional issues" and that "if in fact the Court is correct in its analysis that the constitutional issues do not trump his obligation to disclose the names of the contributors, that he will in fact comply." 3/11/03 Tr. at 8 (R. 149). Three days after the Court of Appeals denied the request for interlocutory appeal, Rongstad disclosed the names. The trial court's failure to consider these facts was an erroneous exercise of discretion.

CONCLUSION

Neither the trial court's frustration with Rongstad nor its belief that Lassa needed names quickly to help her political career gave the court the right to use its sanctioning power to deprive Rongstad of a meaningful appeal on the constitutional privilege issue. The sanctions should be reversed for at least four reasons: (1) Rongstad's privilege claim was meritorious; (2) sanctions were improper under *Alt* because Rongstad's privilege claim was well substantiated; (3) the trial court erred by imposing sanctions before addressing the merits of plaintiff's

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veracity of testimony, without a hearing and opportunity to dispute the finding, is inappropriate:

> We appreciate the sense of outrage that the district judge apparently experienced upon becoming convinced that the petitioner had not testified truthfully. False swearing, however, not only is a serious offense, but also its proof must be established, if legal consequences are to result, by procedures that fully comport with due process.

U.S. v. Dorszynski, 484 F.2d 849, 852 (7th Cir. 1973), *rev'd on other grounds*, 418 U.S. 424 (1974). *See also Jones v. Lincoln Electric Co.*, 188 F.3d 709, 738 (7th Cir. 1999) ("civil contempt is an improper method by which to punish perjurious or false testimony absent some element of obstruction of justice.").

defamation claim; and (4) the sanctions bore no rational relationship to the alleged misconduct.

For all of the foregoing reasons, Rongstad respectfully requests that the Court reverse the sanctions imposed by the trial court.

Dated at Madison, Wisconsin this 7th day of April, 2005.

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Appellants

Michael P. Crooks
State Bar No. 01008918

P.O. ADDRESS:

131 W. Wilson Street, Suite 200
Madison, WI 53703
(608) 256-5220

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10, 767 words.

Dated at Madison, Wisconsin this 7th day of April, 2005.

Michael P. Crooks
State Bar No. 01008918

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State senator faces 20 felony counts, up to 85 years in prison

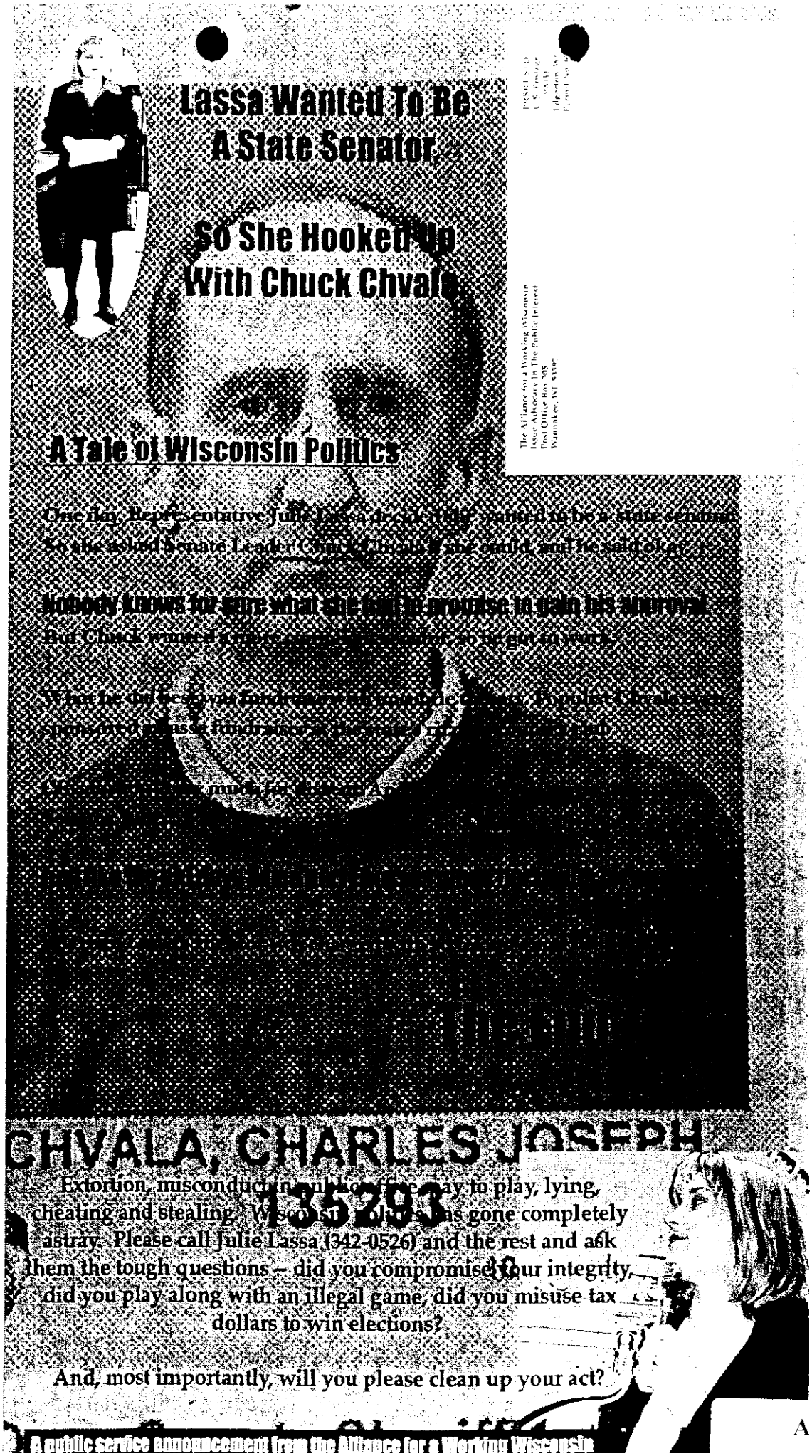
Chvala charged with extortion

Jensen, other GOP
awmakers expected
o be charged today

P NEXT

Democrat to quit majorit
leader post,
are politicall

Appx. 1


Lassa Wanted To Be A State Senator.
So She Hooked Up With Chuck Chvala
A Tale of Wisconsin Politics
One day, Representative Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.
Nobody knows for sure what she had to promise to gain his approval.
But Chuck wanted a more [illegible], so he got to work.
What he did best was fundraising [illegible]. Populist Chvala even sponsored a Lassa fundraiser at the [illegible] club.
[illegible] much for [illegible]
CHVALA, CHARLES JOSEPH
135293
Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa (342-0526) and the rest and ask them the tough questions – did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections?
And, most importantly, will you please clean up your act?
A public service announcement from the Alliance for a Working Wisconsin

Appx. 2

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

Todd Rongstad,
as president of Valkyerie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. Mailing Services, Inc.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

Does, 1-5, in their individual capacities,

Defendants.

AFFIDAVIT OF TODD RONGSTAD

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

TODD RONGSTAD, being first duly sworn under oath, deposes and states as follows:

1. That I am a board member and president of the Alliance for Working Wisconsin.

2. That in that position, I had numerous conversations with members of the association over the last several years and recently specifically related to the lawsuit at issue.

3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization, for fear of public reprisal and potential legal action.

5. That disclosure of the names and the attendant loss of confidentiality will likely ruin my business and force me to find a new career.

Dated at Madison, Wisconsin this 5th day of February, 2003.

Todd Rongstad

Subscribed to and sworn before me
this 5th day of February, 2003.

Notary Public, State of Wisconsin
My Commission expires: Permanent

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

Todd Rongstad,
as president of Valkyerie Group, LLC. and
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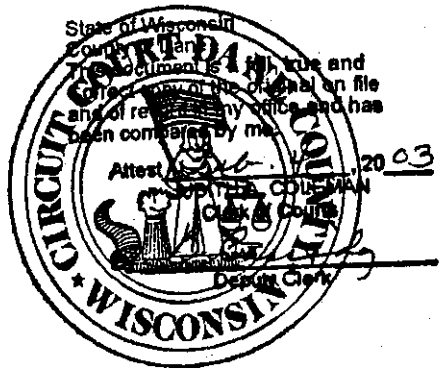
Edgerton, WI 53534-9399,

and

Does, 1-5, in their individual capacities,

Defendants.



ORDER DENYING DEFENDANT'S OBJECTION TO DEPOSITION QUESTIONING REGARDING ALLIANCE MEMBERSHIP

IT IS HEREBY ORDERED: that Defendant's objections to plaintiff's questions as to the identity of persons and their conduct regarding the production of the mailing at issue in this case ~~membership issues~~ on the grounds of relevance, freedom of speech and freedom of association is hereby denied.

IT IS HEREBY FURTHER ORDERED: that the defendant, Todd Rongstad, answer all questions pertaining to the identity of the persons involved in the preparation, funding or distribution of ~~Alliance membership, the alleged contributors, and their involvement in producing~~ the postcard at issue and pertaining to their conduct in this regard.

Entered this 4th Day of February, 2003.

BY THE COURT:

The Honorable Michael Nowakowski
Circuit Court Branch 13

IT IS HEREBY ORDERED: that Defendant's objections to plaintiff's questions as to the identity of persons and their conduct regarding the production of the mailing at issue in this case on the grounds of relevance, freedom of speech and freedom of association is hereby denied.

IT IS HEREBY ORDERED: that the defendant, Todd Rongstad, answer all questions pertaining to the identity of the persons involved in the preparation, funding or distribution of the postcard at issue and pertaining to their conduct in this regard.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

COPY

Julie M. Lassa,

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

Todd Rongstad,
The Valkyrie Group, LLC,

and

Does 1-5, in their individual capacities,

APR - 4 2003

Defendants.

ORDER

On March 11, 2003, the Honorable Michael Nowakowski, Chief Circuit Judge, heard argument on 1) Plaintiff Julie M. Lassa's March 3, 2003 Motion for Sanctions for Failure to Comply With Court-Ordered Discovery; 2) Plaintiff's March 10, 2003 Motion to Stay Defendant's Discovery; and 3) Defendant's motion for a stay pending appeal. Attorneys Michael Crooks and Anthony Conlin of Peterson, Johnson & Murray S.C. appeared on behalf of Defendants and Attorneys Edward Garvey, Glenn Stoddard and Pamela McGillivray of Garvey & Stoddard, S.C. appeared on behalf of Plaintiff.

The Court granted Plaintiff's motion to impose sanctions on Defendant Rongstad and her motion to stay Defendant's discovery and denied Defendants'

motion for a stay pending appeal for the reasons set forth in the transcript of the motion hearing on March 11, 2003 attached hereto.

IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions for Failure to Comply With Court-Ordered Discovery is GRANTED, and it is further ordered as follows:

1) Defendant Rongstad shall pay all actual and reasonable attorneys fees of Plaintiff that have been incurred in the conduct of the depositions of Rongstad to date, plus all of the enforcement proceedings, including but not limited to the March 11, 2003 motion hearing, plus the various hearings that have been conducted previously, but excluding attorneys fees related to the motion to intervene regarding coverage under Rongstad's homeowner's insurance policy, in the amount of $32,587.00*, supported by the attached affidavit of counsel for Plaintiff.

2) Defendant Rongstad shall pay a forfeiture in the amount of $1,000 per day beginning March 13, 2003, and every day thereafter until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

3) ~~A judgment by default shall be entered against all Defendants and in favor of Plaintiff.~~ If by April 4, 2003, Rongstad fails to comply with the Court's discovery orders, the court will entertain a motion for judgment on all issues of liability in favor of the plaintiff and against all original named defendants as a further sanction for the [illegible]

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Defendants' Discovery is GRANTED, and it is further ordered as follows:

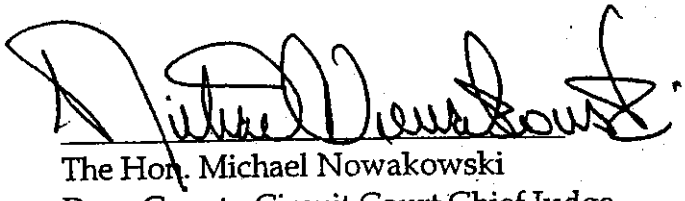
1) The subpoenas issued to the twelve non-party witnesses identified by Exhibit A of Plaintiff's Motion to Stay Defendants' Discovery are quashed.

2) Defendants shall not conduct discovery until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

IT IS FURTHER ORDERED that Defendant's Motion for a Stay pending appeal is DENIED.

Dated this 2nd day of ~~March~~ April, 2003.

BY THE COURT:



The Hon. Michael Nowakowski
Dane County Circuit Court Chief Judge

* The itemized statements of plaintiff's counsel in his affidavit of 3/12/03 and the objection letter of defendants' counsel dated 3/19/03 have been reviewed in the context of the court's awareness of the nature of the submissions made and proceedings conducted. No response from plaintiff's counsel to the letter of 3/19/03 was received. The amount awarded is a reflection of the adjustment noted directly on the affidavit of 3/12/03.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

Julie M. Lassa,

Plaintiff,

v.

Todd Rongstad,
The Valkyrie Group, LLC,

and

Does, 1-5, in their individual capacities,

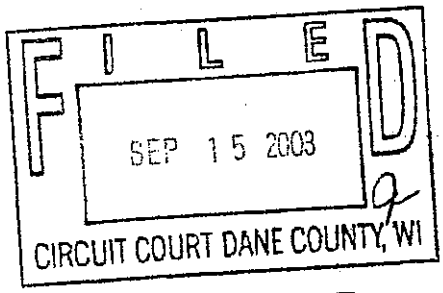
Defendants,

v.

Alex Paul,

Third-Party Defendant.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT



ORDER

On August 15, 2003, the Honorable Maryann Sumi, Circuit Judge, heard argument on Defendants' Motion for Relief from Sanctions and Discovery Stay and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC. Michael Crooks of Peterson, Johnson & Murray, S.C., appeared on behalf of Defendants, Matthew O'Neill of Freibert, Finerty & St. John, S.C., appeared on behalf of Third-Party Defendant, and Edward Garvey, Glenn Stoddard, and Pamela McGillivray of Garvey & Stoddard, S.C., appeared on behalf of Plaintiff.

The Court denied Defendants' motion for relief and granted Plaintiff's motion for default judgment for the reasons set forth in the transcript of the motion hearing on August 15, 2003 attached hereto.

IT IS HEREBY ORDERED that Defendants' Motion for Relief from Sanctions and Discovery Stay is DENIED and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC is GRANTED.

It is further ordered as follows:

1. A scheduling conference has been set for September 2, 2003 at 3:30 p.m. in Branch 2, Dane County Courthouse.

2. Parties may submit a letter to the Court regarding proposed issues for the pretrial conference, including the role of the third-party defendant and whether a jury trial on damages is appropriate, by 4:30 p.m. on August 28, 2003.

3. All discovery is stayed until the pretrial conference.

4. Pending issues regarding the amount of monetary sanctions due shall be held is abeyance until the pretrial conference.

Dated this 15th day of ~~August~~ September, 2003.

BY THE COURT:

The Hon. Maryann Sumi
Dane County Circuit Court Judge

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Does, 1-5, in their individual capacities,

Defendants,

Todd Rongstad,
as president of Valkyrie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

Defendants and
Third-Party Defendants,

v.

Alex Paul
96 River Ridge Road
Wisconsin Rapids, WI 54494,

Third-Party Defendant.

Case No.: 03-CV-0177
Case Code: 30106
INTENTIONAL TORT

NOV 20 2003

STIPULATION AND ORDER FOR ENTRY OF COMBINED JUDGMENT, DISMISSAL, AND APPELLATE RIGHTS

IT IS STIPULATED AND AGREED, by and between the parties, through their respective attorneys, that an order may be entered without notice to any party dismissing this action, together

with all claims and causes of action set forth in the pleadings, on the merits, with prejudice and without costs, with the exception of the third-party complaint for contribution, as follows:

1. That the settlement agreement attached hereto as Exhibit A constitutes the entire agreement between the parties to settle the case at issue.

2. That the underlying defamation action filed by Julie Lassa against Todd Rongstad, The Valkyrie Group, and any named or unnamed Does, be and the same is hereby dismissed with prejudice and without costs and fees to any party, other than those set forth in Exhibit A.

3. That the third-party complaint shall remain viable and be amended to allege a contribution claim associated only with the attorney's fees and forfeitures discussed in Exhibit A, but all discovery and further action on it shall be stayed until all appeals have been exhausted.

4. That a combined judgment, encompassing all earlier judgments, orders of the Court, and proceedings be entered against Todd Rongstad in the amount of $65,000.00, with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund. That the combined judgment shall not be collectible until all appellate avenues have been exhausted. Additionally, no interest shall accrue on the judgment during the pendency of any appeal.

5. That it is understood that the defendants do not concede the appropriateness of the judgment, nor do they waive any appellate rights with respect thereto. The defendants intend to appeal the appropriateness of the fees and forfeitures under the First Amendment, Alt, and whether the Courts were justified in the award, and any other applicable legal theories. Rongstad and The Valkyrie Group retain the right to appeal the contempt ruling on all issues for the stipulated amount of $65,000.00 with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund.

6. That if the defendants ultimately prevail on appeal, the defendants will owe nothing to the plaintiff or the School Fund. If the defendants ultimately lose on appeal, interest shall start to run, at the applicable statutory rate, on the judgment from the point of the final appellate decision until the judgment are paid in their entirety.

PETERSON, JOHNSON & MURRAY, S.C.

DATE: 11/03/03

By: _____
Michael P. Crooks
State Bar No. 01008918

GARVEY & STODDARD, S.C.

DATE: 10/23/03

By: _____
Edward R. Garvey
State Bar No. 1010028

FRIEBERT, FINERTY & ST. JOHN, S.C.

DATE: 11/6/03

By: _____
Matthew W. O'Neill
State Bar No. 1019269

On reading and filing the foregoing stipulation and on motion of Garvey & Stoddard, S.C., attorneys for plaintiffs,

IT IS ORDERED:

1. The stipulation and settlement agreement are adopted by this Court and that this matter be and the same is hereby dismissed, with the exception of the third-party complaint, which

shall be amended as set forth herein, continue to pend, and be stayed until the conclusion of the appeals.

Dated at Madison, Wisconsin, this 17th day of November, 2003.

BY THE COURT:

Honorable Maryann Sumi
Circuit Court Judge

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Does, 1-5, in their individual capacities,

Defendants,

Todd Rongstad,
as president of Valkyrie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

Defendants and
Third-Party Defendants,

v.

Alex Paul
96 River Ridge Road
Wisconsin Rapids, WI 54494,

Third-Party Defendant.

Case No.: 03-CV-0177
Case Code: 30106
INTENTIONAL TORT

SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through themselves and through their respective counsel, that the defamation claims filed against Todd Rongstad, The Valkyrie Group, and various Does, are settled as follows:

1. Although the defamation issue in this case is unresolved, the parties, Plaintiff Julie M. Lassa ("Lassa"), Defendants Todd Rongstad ("Rongstad") and The Valkyrie Group, LLC, desire to settle this matter because of the significant legal expense associated with further litigation.

2. Lassa agrees to dismiss this case with prejudice against all defendants or potential defendants. Such dismissal includes any claims plead in this action, as well as any statements made by any of the parties about each other or the lawsuit during its pendency.

3. Rongstad and The Valkyrie Group will allow a combined judgment, encompassing all earlier judgments, orders and proceedings of the Court, to be entered against them for the stipulated amount of $65,000.00, with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund. That the combined judgment shall not be collectible until all appellate avenues have been exhausted. Additionally, no interest shall accrue on the judgment during the pendency of any appeal. The contempt sanctions arose from Rongstad's initial refusal to disclose the names of the contributors to the Alliance for a Working Wisconsin. The total of all fees, costs, and forfeitures, and as such the total of the entire judgment, cannot exceed $65,000.00.

4. While a combined judgment would be entered as a result of the stipulation between the parties, the defendants do not concede that the award was legally appropriate in the first place. Rather, the defendants shall have the right to pursue an appeal with respect to the attorney's fees and forfeitures on First Amendment grounds, including the arguments revolving around the Alt case, and any other applicable legal theories. While the appeal is pending, Lassa agrees that no interest would accrue relative to the combined judgment, and the judgment would not be collectible, until the appeals are completed. Once all of the appellate avenues are exhausted, including but not limited to the Supreme Court of Wisconsin or the United States Supreme Court, should either of the parties

choose to go that far, interest would start accruing on the combined judgment at the statutory rate. If Rongstad and The Valkyrie Group ultimately prevail on the appeal, that shall end the matter. If Lassa ultimately prevails on the appeal, the judgment will become due and owing, with statutory interest running until paid.

5. The defendants agree to, either by stipulation or through filing an amended third-party complaint, limit the claims against Paul for contribution to the amount of the attorney's fees and forfeitures set forth above. Because the underlying defamation action will be dismissed by Lassa as part of the agreement. Rongstad and Paul agree that in litigating the third-party contribution claims against Paul, they will not call or name Lassa, her husband or any of her current or former staff or volunteers, as discovery or trial witnesses, and they will not engage in any further discovery relative to the underlying defamation issue.

6. Lassa and Rongstad agree to issue the following statement and reserve the right to comment further on the settlement:

> For a variety of reasons, including the significant legal expense associated with moving forward with this litigation, the parties have agreed to a dismissal of the underlying lawsuit. Mr. Rongstad has agreed to have a combined judgment entered against him and The Valkyrie Group for the attorney's fees and costs awarded as a result of the contempt orders and the default hearing. The plaintiffs have allowed him to appeal the legal validity of those awards with no interest to accrue on the judgment until after those appeals have been decided. Lassa and Rongstad are satisfied that this settlement is in their mutual interest and they are pleased that the underlying claims in this matter have been dismissed.

7. That third-party defendant, Alex Paul, agrees to the provisions in this agreement, that limit the scope of any further discovery and proceedings related to the amended third-party complaint.

PETERSON, JOHNSON & MURRAY, S.C.

DATE: 10/8/03

By: _____
Michael P. Crooks
State Bar No. 01008918

DATE: 10/8/3

_____
Todd Rongstad, and The Valkyrie Group

GARVEY & STODDARD, S.C.

DATE: 10/23/03

By: _____
Edward R. Garvey
State Bar No. 1010028

DATE: 10/23/03

_____
Julie M. Lassa

FRIEBERT, FINERTY & ST. JOHN, S.C.

DATE: 11/6/03

By: _____
Matthew W. O'Neill
State Bar No. 1019269

DATE: 11/7/03

_____
Alex Paul

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

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JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

COPY

RULING ON OBJECTION TO
DEPOSITION QUESTIONS
Case No. 03-CV-177

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A.M. Mailing Service, Inc.

Laura Stuessy, RMR, CRR
Official Court Reporter

1 particular situation is a fairly complex issue.

2 THE COURT: Well, certainly I started out

3 our conversation yesterday with exactly that lack of

4 information that you allude to. I don't want to

5 pretend to have been made privy to all of what was

6 testified to by Mr. Rongstad during the preceding

7 three or four hours, but certainly, let us say I was

8 further educated. I don't pretend now to hold a

9 master's degree on the topic, but I did get further

10 instruction and elucidation.

11 As a result, at this point I'm prepared to go

12 ahead and rule on these objections or the objection

13 that was made, and I think I understand the positions

14 that both of the attorneys were making. And

15 certainly the cases which were cited, and I'll recite

16 them in a moment, were ones that I had a chance last

17 evening to review, and I understand the relevance of

18 the case law to the arguments that primarily Mr.

19 Crooks was making last evening.

20 MR. GARVEY: Your Honor, this is Ed Garvey.

21 May I just ask the Court if your court reporter is

22 taking this down, or should we have our reporter in

23 here?

24 THE COURT: No. I have my court reporter

25 now, which of course I would always prefer rather

1 than relying on whatever may be happening on the
2 other end of a telephone with somebody else who's not
3 an official reporter, and I say that with the
4 greatest respect for the qualifications of the
5 free-lance reporters.
6 Now, the defendant Rongstad contends that he has
7 the right to refuse to disclose the names of members
8 of his organization that were directly involved in
9 the publication of the allegedly defamatory mailing
10 concerning the plaintiff on the basis of his and
11 their rights to free speech and to free association
12 under the First and Fourteenth Amendment.
13 Let me at this point interject to respond to the
14 further objection or the further ground for objection
15 that Mr. Crooks has lodged on today's date, namely
16 that an inquiry concerning the names of other members
17 of the organization would be irrelevant and would not
18 lead to the discovery of relevant information. That
19 I think can summarily be disposed of by pointing out
20 that Mr. Garvey and his client are not required to
21 accept at face value the testimony of Mr. Rongstad
22 that these other people really were not the
23 principals, they were not the primary movers behind
24 this, that he was in fact the principal participant
25 and that the entire mailing was of his making and at

his instigation.

Instead, Mr. Garvey is free to pursue further discovery, and perhaps it will lead, if he knows who the people are, to the conclusion that they are people who have liability and that he can, consistent with his obligations under section 802.05, join them in an action where it would be necessary for him to make an allegation of express malice and intent to harm given the admitted status of the plaintiff as a public figure. Therefore, the objection grounded on relevance will be overruled.

Now, in support of Mr. Rongstad's objection based on constitutional grounds, his counsel cited several cases, NAACP v Alabama, Buckley v Valeo, McIntyre v Ohio Elections Commission, Wisconsin Socialist Workers 1976 Campaign Committee v McCann, (phonetic) and Elections Board v WMC.

As I indicated, at Mr. Crooks' invitation I've now had a chance to review each of these cases. At the outset, it's important to recall the context in which this issue arises. This is a private lawsuit in which an individual citizen seeks injunctive relief and damages on the basis of her allegations that she has been defamed by the named defendants, including the defendant Rongstad and other unknown

1 individuals. The suit asserts common law rights and
2 is not based on any regulation or statute. It is,
3 thus, different than each of the cases noted earlier
4 where it was direct governmental regulation that was
5 at issue.
6 I point out this distinction not because it is
7 determinative, for First Amendment rights are still
8 implicated where the judicial power of the state is
9 sought to be used to compel disclosure, but because
10 the interests to be weighed are different in this
11 setting than in the pure government enforcement
12 arena.
13 The Supreme Court's decision in NAACP v Alabama
14 provides the framework of analysis. There the court
15 stated, and I quote -- and this is at 357 U.S. 463,
16 "We turn to the final question whether Alabama has
17 demonstrated an interest in obtaining the disclosures
18 it seeks from petitioner which is sufficient to
19 justify the deterrent effect which we have concluded
20 these disclosures may well have on the free exercise
21 by petitioner's members of their constitutionally
22 protected right of association."
23 In Buckley v Valeo, the court made it clear at
24 page 69 and following of 424 U.S. that a person
25 claiming that disclosure of information would violate

1 their associational rights must make a "requisite
2 factual showing" before the strict scrutiny of NAACP
3 v Alabama would prevent that disclosure.
4 The court went on to describe the necessary
5 showing at page 74, and it said, "The evidence
6 offered need show only a reasonable probability that
7 the compelled disclosure of a party's contributors'
8 names will subject them to threats, harassment or
9 reprisals from either government officials or private
10 parties."
11 Here Mr. Rongstad and his counsel have failed to
12 present any assertion, much less any evidence, that
13 disclosure of the names of those involved in the
14 publication of the allegedly libelous mailing would
15 subject him to or these other individuals to threats,
16 harassment or reprisals from anyone. The cases cited
17 by the defendant do not grant to membership
18 information a sacred constitutional status of
19 absolute immunity and privilege simply on the basis
20 that it can be categorized as such. Such a reading
21 of NAACP v Alabama trivializes the interests of the
22 members found compelling there and of the
23 constitution itself.
24 Even if were I to conclude that disclosure here
25 would have some impact on the associational interests

1 of defendant Rongstad and the other members of his
2 organization, the competing interests of the
3 plaintiff and public interests at stake are more than
4 sufficient to outweigh them.
5 The purely private interest of any citizen in
6 his or her good name has long been recognized as
7 worthy of the careful protection of the law. While
8 the plaintiff by voluntarily injecting herself into
9 the public spotlight by becoming a candidate for
10 public office is expected to live with certain
11 attacks on her good name that a purely private person
12 might not have to suffer, she does not forfeit
13 entirely the law's protection.
14 Moreover, there is a public interest at stake
15 here that has been identified as particularly worthy
16 of concern. In McIntyre v Ohio Elections Commission,
17 514 U.S. at 349, the Supreme Court noted, "The state
18 interest in preventing fraud and libel stands on a
19 different footing. We agree with Ohio's submission
20 that this interest carries special weight during
21 election campaigns when false statements if credited
22 may have serious adverse consequences for the public
23 at large."
24 The court went on at page 352 to note that this
25 interest is heightened when the allegedly libelous

1 publication is disseminated "on the eve of an
2 election when the opportunity for reply is limited".
3 The Complaint in this case alleges that the mailing
4 at issue was distributed to voters in the plaintiff's
5 district only days prior to the election.
6 Finally, the plaintiff's need for disclosure of
7 the names of those involved is particularly strong
8 here because these are people who may have directly
9 participated in causing her alleged harm and there is
10 no other source for the information.
11 As the Court's discussion of the law at issue in
12 McIntyre reveals, disclosure of identifying
13 information is more likely to be constitutionally
14 permissible where no less intrusive step will
15 accomplish the government's legitimate interests.
16 Defendant Rongstad has failed to identify what less
17 intrusive measure is available to the plaintiff to
18 seek redress under the law.
19 As the Supreme Court aptly noted in NAACP v
20 Alabama, 357 U.S. 463, "It is important to bear in
21 mind that petitioner asserts no right to absolute
22 immunity from state investigation and no right to
23 disregard Alabama's laws."
24 Were I to sustain the objection to the questions
25 at issue here on the record before me, the practical

1 effect would be to grant these unknown participants
2 in the alleged defamation of the plaintiff the
3 absolute immunity that the Supreme Court was so
4 careful to eschew.
5 The objections are overruled, and the defendant
6 Rongstad is ordered to answer all questions inquiring
7 as to the names and behavior of any other persons
8 involved in the preparation, funding or distribution
9 of the mailing.
10 MR. CROOKS: Your Honor? Pursuant to Wis.
11 Statute section 808.07(2)(a), we'd request a stay of
12 your Honor's order until we have an opportunity to
13 seek a supervisory writ from the Court of Appeals.
14 MR. GARVEY: Your Honor, this is Ed Garvey.
15 We would certainly oppose that and also ask for costs
16 and fees in connection with this matter.
17 The Court has clearly pointed out our need for
18 this information to determine who Does 1 through 5
19 are, and we see absolutely nothing to be served by
20 staying this matter, which would just continue what
21 has been going on in this matter, which is an effort
22 by Mr. Crooks to delay this matter beyond the time
23 that it would be of help to the plaintiff.
24 MR. CROOKS: Your Honor, there is no
25 attempt to delay. There's attempt to deal with the

1 serious constitutional issues that the Court has
2 obviously given a great deal of thought to, and the
3 statutes clearly require me to request this relief
4 from the court. A supervisory writ needs to be filed
5 with the Court of Appeals within 10 days, and I can
6 assure your Honor that I have every intent in filing
7 it long before that.
8 MR. GARVEY: We certainly oppose it as
9 vigorously as we can, your Honor, because the
10 deposition is almost -- well, now we're ready for our
11 second day, and we think it's terribly important for
12 us to determine who indeed is involved, and we don't
13 think that the defendants have come up with any
14 constitutional argument that warrants a stay in this
15 matter. It's not a close question at all.
16 THE COURT: Anything further, Mr. Crooks?
17 MR. CROOKS: Well, just I guess briefly,
18 your Honor, that the two things your Honor pointed
19 out, that we haven't shown any consequence to the
20 membership or any, I guess, ramifications of the
21 disclosure and the fact that we haven't provided the
22 Court with any less intrusive means to get to the
23 same end of this fishing expedition, we were not
24 presented with an opportunity to do that. We
25 requested an opportunity to brief, and were denied

1 that opportunity.

2 So, I believe that these are important enough

3 issues that we should take a few days in light of the

4 fact that the plaintiff waited in excess -- nearly

5 three months before filing the suit and that an

6 answer isn't due for 30 days. A five or six or

7 10-day delay isn't going to change the playing field

8 largely, and these are important enough issues that

9 we as officers of the court and the Court itself

10 ought to take them seriously and allow for due

11 consideration.

12 MR. GARVEY: Your Honor, I don't know if

13 you want me to respond or not.

14 THE COURT: Go ahead.

15 MR. GARVEY: The mailing was received

16 November 1st. The suit was filed January 15th. We

17 acted as quickly as possible under the circumstances

18 after meeting with our client, and so it's not for

19 months.

20 There is a special election that is coming up.

21 We now know that that seat is vacant, and therefore,

22 I think it is extremely important that we get to the

23 bottom of this as quickly as possible.

24 As a suggestion it's a fishing expedition, it's

25 called the discovery, and what we're trying to do is

1 discover who was involved. And as we don't care who
2 members are, we care who was involved in ordering
3 this, paying for it, mailing it, designing it and all
4 the rest of it.
5 THE COURT: All right. The request for a
6 stay to permit appeal or to permit a petition for
7 supervisory writ will be denied.
8 The defendant Mr. Rongstad has made no showing
9 of any likelihood of success. It appears to me after
10 consulting the very cases that he cites, that those
11 cases stand for propositions that are contrary to the
12 basis for the objection that was lodged to these
13 questions.
14 The suggestion that he and his counsel have been
15 denied the opportunity to make presentation on the
16 two issues that were alluded to by Mr. Crooks is
17 simply unfair, is an unfair characterization of what
18 transpired between last evening when I was
19 unexpectedly confronted with this issue and this
20 moment.
21 Mr. Crooks obviously had at his disposal a
22 series of cases, which he concedes he had consulted
23 prior to the deposition. As a result, he was as
24 familiar or should have been as familiar with the
25 standards that the Supreme Court has laid out for

1 when the constitutional principles identified in
2 cases such as NAACP v Alabama could be utilized to
3 prevent what is otherwise a perfectly relevant and
4 legitimate question at a deposition or any of the
5 things that were at issue in those Supreme Court
6 cases. No argument was made to suggest anything
7 about harm or threats, or reprisals or chilling
8 effect of the disclosure or what the disclosure would
9 have on Mr. Rongstad or on his cohorts or other
10 members of his organization.
11 Indeed, we were not in a setting in which
12 evidence was being taken and where I was making an
13 evidentiary ruling, and Mr. Crooks and his client
14 should not be slighted for failing to have presented
15 evidence, but there was no assertion made. There was
16 no argument made that anything of the sort identified
17 as the kind of harm or threat that would implicate
18 these constitutional principles was at stake here or
19 was something that reasonably could have been shown
20 if an evidentiary proceeding were to have been
21 conducted.
22 Instead, what I was asked is to submit a brief,
23 not to submit affidavits but to submit a brief. And
24 the fact that I declined the invitation to receive
25 briefs was in part a reflection of the fact that Mr.

1 Rongstad was going to be there this morning. It
2 struck me that it would be valuable to try to, if it
3 was possible, resolve this issue in a way that would
4 be most efficient for Mr. Rongstad and for the
5 attorneys involved in the deposition.
6 In addition, and this is a further reason why
7 the stay will be granted --
8 MR. GARVEY: Denied you mean?
9 THE COURT: -- I not only have to consider
10 the question of the likelihood of success on the
11 merits by the plaintiff, I have to also in the mix
12 consider the harm that granting a stay would visit on
13 the party opposing it. And here, the record that has
14 been presented, not simply in the context of these
15 proceedings but also in the context of a motion for a
16 protective order that was sought and partially
17 granted last week, is that the plaintiff when the
18 allegedly libelous mailing was done was a candidate
19 for public office and apparently was successful in
20 winning an election that was the regular election
21 held in November of last year.
22 The harm that she experienced certainly could
23 not have been remedied in any way that would have any
24 bearing whatsoever on her election of last fall. As
25 a result, the urgency of her immediately filing a

1 lawsuit such as the one she has now filed was, as a
2 practical matter, simply not there.
3 The affidavit that was submitted in reference to
4 the motion for the protective order reveals she
5 apparently is now considering running in a special
6 election that in November of last year she would not
7 have known was even going to take place, and it was
8 only when a vacancy was created in I guess early
9 January that that reality even became something
10 worthy of her consideration.
11 Without commenting on the merits of her
12 allegations that this mailing was in fact defamatory
13 or that it was prompted by express malice, if she is
14 going to seek to clear her name as best she is able
15 in a manner that would have any value to her
16 aspirations to seek the position where that opening
17 has occurred, then it's crucial that that occur at
18 some point prior to the point when that special
19 election is held, and I don't know for sure when that
20 will be. But in any event, delay would clearly be
21 harmful to her legitimate interest in seeking to
22 correct the harm done by the mailing that she
23 alleges.
24 Now, a moment ago I may have misspoke and said
25 this was an additional reason that the stay would be

1 granted. I'm sorry. I should have said that the
2 stay will be denied.
3 So primarily the confluence of the two factors,
4 that there is very little likelihood of success in
5 this effort to obtain a supervisory writ and the harm
6 that would befall the plaintiff's interest from delay
7 which this necessarily would cause, combined to lead
8 me to not grant a stay and instead to reaffirm the
9 order that I just issued that the questions be
10 answered.
11 MR. CROOKS: Your Honor, just briefly.
12 With respect to the consequences to the membership, I
13 think your Honor accurately pointed out we weren't in
14 a forum where we were taking evidence and where I was
15 able to present evidence in that regard. With the
16 request to file briefs, necessarily in my thought
17 process was submitting briefs in conjunction with an
18 affidavit explaining how the entire organization was
19 put together, including the membership.
20 And furthermore, your Honor, I think the
21 consequences to the membership are fairly obvious in
22 that Mr. Garvey has indicated that he plans on
23 inviting to this lawsuit any other individuals he
24 could discover who had any involvement with respect
25 to the card at issue. And the showing, as the Court

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

MOTION FOR RECONSIDERATION
Case No. 03-CV-177

COPY

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 6th day of February, 2003, commencing at 10:05 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

Laura Stuessy, RMR, CRR
Official Court Reporter

1 And to indicate that he has not answered the
2 questions and that he has continued to flaunt the
3 Court's order is not accurate. He answered all
4 questions with respect to the postcard as your Honor
5 ordered and as your Honor will see in the transcript
6 at issue.
7 What we're here about and the constitutional
8 issue before the Court is whether he has to disclose
9 the membership of the Alliance whether it had
10 anything to do with this postcard or not and that is
11 not what your Honor ruled. Your Honor ruled that he
12 had to disclose individuals and members who had
13 something to do with the postcard at issue. He has
14 done that. The membership list in general is clearly
15 protected by the First and Fourteenth Amendment, and
16 that's why we're here.
17 THE COURT: Okay. Here's what's going to
18 be determined today. The motion for reconsideration
19 was provided to us yesterday, and I did have a chance
20 to review the copies of the cases, and I appreciate
21 Mr. Crooks' attaching copies of the new authority
22 that he was citing.
23 The response to that was received this morning.
24 And again as to that, I had a chance to read the
25 briefs, and I have not because of the short duration

1 of time available had the chance to read all of the
2 attachments and follow up with any of the cases that
3 those cases may have cited, but I think I am
4 sufficiently clear on the positions that are taken by
5 both counsel to at this time deny this motion, and I
6 will deny it.
7 Now, in Mr. Rongstad's brief and again on
8 today's date, I think he as a preliminary matter
9 simply misconstrues the basis for the decision that I
10 originally made. The suggestion that somehow the key
11 to coming to a different result was to find cases
12 where the issues under the First and Fourteenth
13 Amendment of the constitutional right to associate
14 had arisen in a private action, and that that would
15 ultimately be the missing piece, so to speak, ignores
16 what I had to say when I made the decision. And now
17 hearing it again, I looked up in the transcript to be
18 sure that I had in fact said it as I recalled saying
19 it.
20 Indeed, the cases which Mr. Crooks cited to me
21 was a limited number of cases, and under the
22 circumstances Mr. Crooks did not ask, nor did I
23 indicate that I was going to do an exhaustive search
24 for every conceivable case. Instead, I was going to,
25 as I promised, look at the ones that he had cited,

1 and I did. I noted that each of the cases that he
2 had cited involved a situation of direct governmental
3 regulation, direct governmental action taken against
4 somebody, and it was in that context that the cases
5 ultimately were decided.
6 But I then said, "I point out," and now I quote
7 from page nine of the transcript, "I point out this
8 distinction not because it is determinative for First
9 Amendment rights are still implicated where the
10 judicial power of the state is sought to be used to
11 compel disclosure but because the interests to be
12 weighed are different in this setting than in the
13 pure governmental enforcement arena."
14 So I think, frankly, the suggestion that finding
15 a case where in a private litigation setting First
16 Amendment rights were upheld is not the point, and
17 that is not a key and that is not determinative any
18 more than the distinction that I pointed out.
19 Instead, one again has to look at the framework
20 of analysis, and no one has suggested to me, and this
21 motion for reconsideration does not suggest to me,
22 that the framework provided by NAACP v Alabama as it
23 has been clarified in later cases is not the correct
24 framework. I continue to believe it is, and as a
25 result I have attempted to apply it as I applied it

1 previously.

2 The second main thrust of this motion for

3 reconsideration is that now, unlike the argument that

4 had previously been made, Mr. Rongstad is presenting

5 evidence to support the notion that the requisite

6 factual showing has been made to implicate these

7 First Amendment concerns, and I now have an affidavit

8 of Mr. Rongstad.

9 What appears to be the singular representation

10 that pertains to the harm that would befall members

11 of the organization were Mr. Rongstad to disclose

12 their identity is found in paragraph four. It says,

13 "That members have told me that if I am compelled to

14 disclose the identity of members of the organization,

15 that they will no longer be interested in

16 participating in the organization or any such

17 organization" -- and here's the key language -- "for

18 fear of public reprisal and potential legal action."

19 For fear of public reprisal.

20 Now, Buckley v Valeo said that the standard of

21 proof, the quantum of proof that needed to be

22 presented to make out the case that there should be

23 confidentiality associated with the membership

24 information of a minor party or minority party or a

25 small organization, that the bar ought to be set

1 pretty low, and I follow that. I followed it in the
2 original decision. There the bar really didn't have
3 to be set anywhere because there was nothing that was
4 presented.
5 But here, even with the generous standard of
6 Buckley v Valeo, a simple conclusory statement that
7 somebody told Mr. Rongstad that they had fear of
8 public reprisal were their name to be revealed is
9 wholly insufficient. The description in Buckley of
10 what that low standard of proof might consist of was
11 certainly not intended by the Supreme Court to be
12 comprehensive of everything that could be presented
13 or that it was necessary to have those precise kinds
14 of statements or evidence on those precise points,
15 but it is suggestive that something more than simply
16 a bald-face conclusory statement that "I am fearful,"
17 or that "Somebody said to me that they would be
18 fearful of public reprisal" was necessary.
19 The obvious question is why? What is it about
20 this group that membership in this group would lead
21 anyone to engage in public reprisals against their
22 members?
23 Why would simply the fact of associating with
24 this group be anything that would lead to threats, or
25 harassment, or public reprisals or the kinds of

1 things that had been demonstrated in NAACP v Alabama
2 to form the basis for the court's quite appropriate
3 recognition that that was the kind of thing that
4 people ought not to be subjected to because of their
5 association with an organization or with beliefs of
6 certain types?
7 Now, here fear of a lawsuit is on a very low
8 standing. Indeed, I think there's probably
9 legitimate fear on the part of the others involved in
10 the funding and preparation and distribution of this
11 postcard that they will become enmeshed in this
12 lawsuit. Mr. Garvey's pleading on behalf of his
13 client lists other John Does or other Does as the
14 fictitiously named defendants. One ordinarily does
15 not plead a case naming fictitious defendants without
16 the intent to later upon discovery of who they may be
17 to join them in the lawsuit.
18 But the First Amendment is not at its core
19 designed to provide protection for someone's fear
20 of -- better stated, it is not designed to provide
21 immunity for someone's criminal or civil liability
22 for their behavior. It may on occasion have the
23 result of making it difficult to prosecute civilly or
24 criminally someone, but that is not at its core the
25 purpose for the protections afforded by the First and

1 Fourteenth Amendments.

2 As a result, these conclusory allegations and
3 the references to fear of a lawsuit are simply so low
4 that they do not satisfy the Buckley requisite
5 factual showing. And if they do, they do so by
6 simply skimming by and being barely sufficient.

7 And even once some showing is made, the
8 balancing test is still necessary, and nothing that
9 has been presented on this motion for reconsideration
10 changes the conclusions that I reached when I made
11 the decision back on February 4, and there's no
12 reason to repeat those points at this time.

13 Now, on today's date Mr. Crooks makes an
14 additional contention, and that is that he apparently
15 now no longer is as concerned about the Court's order
16 because he says his client has complied with it. And
17 apparently if his client has fully complied with it,
18 then we must be engaged in much ado about nothing by
19 continuing to argue about whether there should be a
20 court order that requires him to answer questions.

21 From the information that has been presented in
22 the motion for reconsideration and the response to
23 that motion about what happened and what answers had
24 been provided by Mr. Rongstad thus far, it appears to
25 me that Mr. Crooks has provided the very point that

1 justifies further inquiry of Mr. Rongstad, and that
2 is that the organization of which Mr. Rongstad is
3 apparently the CEO has a board of directors, and the
4 board of directors makes decisions about what
5 projects to fund. Mr. Garvey is entitled to find
6 out, and Mr. Rongstad shall answer, as to who are the
7 board of directors and who were the people who are
8 the board of directors.
9 MR. CROOKS: Judge, he has answered those
10 questions already.
11 MR. GARVEY: We do know two other board of
12 directors who -- the two members who reside in
13 Minnesota. There are three listed in the DFI
14 documents.
15 THE COURT: And so, what more are you
16 asking for then?
17 MR. GARVEY: Well, for example, your Honor,
18 we took Mr. Rongstad's affidavit and asked him to
19 disclose the identity of the members who approached
20 him. He refused on grounds of First and Fourteenth.
21 We asked him who the members are who have contributed
22 the funds for this, and he says again it's the First
23 and Fourteenth. And so, we reminded him of your
24 Honor's order, and he will not answer any question
25 about any person who hired him, suggested to him that

1 THE COURT: We'll see whether he complies
2 on Tuesday. And if he fails to, whether or not
3 quashing a subpoena of your client is an appropriate
4 response to that, and I don't want to give you any
5 sort of advisory opinion about that, we'll see what
6 comes to pass.
7 MR. GARVEY: That's fine. Thank you.
8 MR. CROOKS: Your Honor, may I inquire as
9 to the topics that are now at play at the deposition
10 Tuesday morning?
11 THE COURT: Mr. Crooks, I don't ask the
12 questions, but it is clear that as of yesterday you
13 thought there were additional matters that should not
14 be disclosed. You brought a motion for
15 reconsideration. Mr. Garvey's response was not to
16 say, "It's now a moot point because I think Mr.
17 Rongstad has provided everything I need." Instead,
18 he opposed the motion.
19 I've now denied the motion, and Mr. Garvey tells
20 me he wishes to continue to ask questions.
21 MR. CROOKS: Judge, he --
22 THE COURT: If I get any flavor -- and I
23 will tell you that the flavor comes from no other
24 source than what I've heard in the courtroom and
25 what's been in the written submissions because I have

1 not seen any transcripts, and of course I've never
2 laid eyes on Mr. Rongstad, to my knowledge.
3 But if I get any flavor, it is that Mr. Rongstad
4 has been highly evasive and engaged in a well-planned
5 effort to cover up how he comes to engage in the kind
6 of behavior he engages in when he is putting out
7 these kinds of publications. And it's a sad day in
8 our political system when somehow this kind of
9 activity is covered up and evaded. Seldom have I
10 seen such an abuse, but we'll deal with future
11 motions when and if they come in.
12 MR. CROOKS: Judge?
13 THE COURT: We're adjourned.
14 MR. CROOKS: Can I just as required move
15 for the Court to stay the order pursuant to
16 808.07(2)(a)?
17 THE COURT: That motion will be denied for
18 the same reasons as my previous, or your previous
19 motion in that regard was denied.
20 MR. CROOKS: Thank you.
21 THE COURT: 8 o'clock at Mr. Garvey's
22 office on Tuesday morning.
23 MR. GARVEY: Thank you, your Honor.
24 (Which concluded these proceedings)
25 (10:50 o'clock a.m.)

STATE OF WISCONSIN CIRCUIT COURT Branch 13 DANE COUNTY

JULIE M. LASSA,

COPY

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel **EDWARD R. GARVEY and CHRISTA O. WESTERBERG**, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:
ATTORNEY DAVID J. PLINER, Corneille Law Group, LLC

Laura Stuessy, RMR, CRR
Official Court Reporter

1 different position that he could not hold at the same
2 time as he is a State Senator.
3 The planners of the postcard, if they in fact
4 had the intent that Mr. Garvey has ascribed to them
5 of undercutting Miss Lassa's efforts to seek to
6 replace Senator Shibilski, wouldn't have known that
7 there was a need to replace Senator Shibilski until
8 he lost in the -- well, I take that back. If he had
9 won in the primary, he likewise would have faced the
10 prospect of losing his seat if he became Lieutenant
11 Governor, so I guess this does go to an earlier date.
12 All right. Here's then what we're going to do.
13 To make this absolutely clear and avoid any confusion
14 on Mr. Rongstad's part, Mr. Rongstad is ordered, at a
15 deposition to be conducted on Monday morning, to
16 provide the records and to disclose the names of any
17 person who contributed any amount in excess of, say
18 $100 or more in the aggregate during the six months
19 preceding November 1st, so let us say at any time
20 after May 1st of 2002.
21 Now, I will limit this to $100 or more because,
22 frankly, it is hard to imagine how anything less than
23 that would qualify as the necessary degree of
24 personal involvement and intentional conduct to get
25 past the defamation standard under Sullivan. And I

1 never get anything back. So if we're talking about
2 the members and the contributions, wherever those
3 records exist under his control, I would hope that it
4 would be clear to Mr. Crooks that that information
5 should be produced.
6 THE COURT: That's certainly my intent. I
7 don't know if there's any way I can express this more
8 adamantly that I am looking for Mr. Rongstad to
9 comply with my prior court order. In this now I'm
10 granting him the benefit of narrowing this court
11 order, but the expectation is that he will in fact
12 comply.
13 MR. GARVEY: One other item, if I may, your
14 Honor. I understand the Court's reasoning, and I'm
15 not arguing, but I want to say that Mr., or Senator
16 Shibilski was running for Lieutenant Governor in the
17 democratic convention which I attended in June of
18 2001. And so, it's been no secret that he was
19 running with now Governor Doyle from that point
20 forward, so that those who were looking at this
21 matter would have been projecting ahead in terms of
22 the control of the Senate, which your Honor can take
23 judicial notice had been pretty close in terms of the
24 majority between the democrats and the republicans.
25 And so, while I appreciate the narrowing and the

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

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JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

COPY

CONTEMPT HEARING
Case No. 03-CV-177

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 11th day of March, 2003, commencing at 1:15 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

Laura Stuessy, RMR, CRR
Official Court Reporter

1 Julie Lassa and the defamation that has caused her a
2 great discomfort. And until we know the names of
3 Does 1 through 5, and these are the people known to
4 Mr. Rongstad, we're not going to be able to proceed
5 by naming them in this suit, so that there can be no
6 question now I guess with Mr. Crooks' statement that
7 he's not going to follow the Court's order, and
8 therefore, we would again urge the Court to find
9 Mr. Rongstad in contempt.
10 THE COURT: All right. The hearing on
11 today was scheduled to consider the motion brought by
12 the plaintiff seeking to have Mr. Rongstad held in
13 contempt of this Court's order that was clarified and
14 limited back on February 27th or 28th.
15 Mr. Rongstad's counsel has in effect conceded
16 that Mr. Rongstad has failed to comply with that
17 order, and today if Mr. Rongstad had any factual
18 information to support the view that he was not in
19 contempt, that he had some excuse for his failure to
20 comply, of course today was the opportunity that was
21 available to him to present that. And he has not
22 appeared, and no other evidence has been offered to
23 rebut the evidence provided in the form of the
24 transcript of the deposition that was conducted on,
25 March 3rd I believe.

1 I had a chance to review that transcript, and it
2 appears to me that even apart from the concession
3 made by Mr. Crooks today that his client was not in
4 compliance, it appears obvious that Mr. Rongstad has
5 intentionally violated the provisions of the Court's
6 order and, frankly, has from my review of the
7 transcript itself -- and of course that is without
8 the benefit of seeing Mr. Rongstad because I didn't
9 take advantage of the opportunity to watch the
10 videotape. Instead, I just simply read the
11 transcript, so I don't have the demeanor evidence
12 that might come from reading or from watching the
13 video.
14 But from all of my review of the written
15 transcript, it appears that Mr. Rongstad, frankly,
16 has lied while under oath. His continual contention
17 that he had no recollection of any of the information
18 that was sought in the questions asked of him and
19 that the only way in which that information could be
20 obtained is to look at the deposit slips for the
21 contributions that were made to his organizations
22 defies credulity.
23 Mr. Rongstad from the deposition transcripts
24 operates businesses that depend on these kinds of
25 contributions, and for him to suggest that he doesn't

1 even keep any record of the names or addresses of the
2 people who have contributed except for the deposit
3 slips where he puts a name on each line to indicate
4 who the deposit came from simply is so highly
5 unlikely and inconsistent with the way any other
6 organization of a similar type would maintain their
7 records and suggests to me that his answers were
8 false.
9 It is also clear from the testimony that Mr.
10 Rongstad gave in his deposition on March 3rd and the
11 answers provided at a variety of other of the
12 previous depositions where the transcripts were in
13 the court's file and I had a chance to look them
14 over, that his answers were highly evasive and were
15 designed to avoid providing information that the
16 plaintiff was justifiably entitled to under the laws
17 of the State of Wisconsin and, more specifically,
18 under the orders of this Court.
19 I do not on today's date intend to revisit the
20 rationale for why those orders were previously
21 issued, other than to make it clear that Mr.
22 Rongstad's attempts to cloak himself in the
23 constitution were previously found to be empty and
24 without any merit.
25 Mr. Rongstad has no entitlement for all of the

1 reasons I have recited previously to claim that
2 somehow he has available to him the kind of
3 protection that the NAACP was granted in the State of
4 Alabama in the 1950s. He has never made any
5 sufficient showing that he or his organization has
6 suffered from or is likely to suffer from the kinds
7 of harm that members of the NAACP experienced in
8 Alabama in the 1950s.
9 Now, Mr. Rongstad had the opportunity to seek an
10 appeal from my previous orders, and he exercised his
11 right to ask the Court of Appeals to intervene. The
12 Court of Appeals on the one hand rejected his effort
13 to obtain a stay of my order, and therefore, that
14 order remained an order of the court that he was
15 required to comply with.
16 But beyond that, Mr. Rongstad failed to pursue
17 his further opportunity, which was to ask the Court
18 of Appeals to address the merits of my order on an
19 interlocutory appeal basis. Mr. Garvey makes
20 reference to a recent order from the Court of Appeals
21 that dismissed the preliminary petition that sought
22 an interlocutory appeal, and the Court of Appeals did
23 so because it was simply not pursued. It was, in
24 effect, abandoned.
25 And that having been said, Mr. Rongstad's most

1 recent claims that he is going to seek vindication in
2 the Court of Appeals and that that is what explains
3 his conduct and his defiance of this Court's order
4 likewise falls on rather hollow footing. Instead,
5 what it appears virtually certain to be is simply
6 another in the variety of steps that Mr. Rongstad has
7 taken in this litigation to seek delay and to avoid
8 his responsibilities under the law.
9 Based upon his contempt, which I do find to be
10 actual and his conduct to be intentional, I will
11 order that he pay all of the actual reasonable
12 attorneys' fees of the plaintiff that have been
13 incurred in the conduct of the depositions of Mr.
14 Rongstad to date, plus all of the enforcement
15 proceedings, including but not limited to the motion
16 hearing on today's date, plus the various hearings
17 that have had to be conducted previously.
18 No attorneys' fees for time spent in dealing
19 with the motion to intervene that has been brought
20 because of Mr. Rongstad's efforts to have what
21 appears to be his homeowner's insurance policy cover
22 his liability in this case will be awarded. Any time
23 devoted to that clearly should be excluded.
24 Mr. Garvey, I'll ask you to submit a statement
25 of the time that you and your firm have devoted to

1 the activities for which you are to be compensated as
2 a remedy for Mr. Rongstad's contempt, and provide a
3 copy to Mr. Crooks and give him a period of seven
4 days to object.
5 Any objection that you make in that regard ought
6 to be itemized and specific, just as I would expect
7 Mr. Garvey's affidavit submission to be itemized and
8 specific.
9 And in the order that you prepare, Mr. Garvey,
10 you can simply leave a blank for the amount of the
11 attorneys' fees. And after the seven-day opportunity
12 for objection, if I think there is any need for
13 further hearing, I'll schedule it. But my hope would
14 be that based on the specificity of the objections,
15 I'll be able to insert a number that comports with
16 what I determine to be a reasonable amount.
17 In addition to the payment of the costs of the
18 plaintiff's attorneys' fees, I will impose a
19 forfeiture in the amount of $1,000 per day that will
20 begin to run, and the first day for which a
21 forfeiture will be assessed will be Thursday, March 13th,
22 and it will be assessed every day thereafter until
23 Mr. Rongstad has made himself available for further
24 deposition and has fully complied with the
25 requirements to provide the information that I had

1 previously ordered that he provide.

2 Finally, if Mr. Rongstad fails to provide the

3 information, a judgment will be entered by default in

4 favor of the plaintiff and against the defendant,

5 Mr. Rongstad, as well as the groups that are parties

6 to this litigation, and that will be done if he fails

7 to comply with the Court's orders by April 4th, 2003.

8 And Mr. Garvey, if he has failed to comply, then

9 I would urge that you file a motion seeking a default

10 judgment, and this will be a remedy under not only

11 the contempt provisions but also under section

12 804.12, the sanctions for failure to provide

13 discovery. And if such a motion is brought and it is

14 demonstrated that Mr. Rongstad has failed to comply,

15 then we'll schedule a hearing which will be aimed at

16 only the question of the damages of the plaintiff,

17 but liability will be determined on the basis of that

18 default.

19 All right. If you can prepare an appropriate

20 order, submit it to me and do so with your affidavit

21 of attorneys' fees. And the form of the order will

22 likewise be subject to that seven-day opportunity to

23 object. And I think that's probably all we can do

24 today.

25 MR. GARVEY: Your Honor?

1 where presumably she would have a chance to do some
2 planning and schedule around it.
3 Those kinds of considerations are no longer
4 present, and therefore, to the extent I grant the
5 request to stay further discovery of anyone by the
6 defense, I'm not doing so for reasons that have to do
7 with the timing of that discovery, but I do on
8 today's date grant the motion and will stay any
9 further discovery by the defense until such time as
10 Mr. Rongstad has complied with the orders of this
11 Court regarding discovery.
12 Mr. Rongstad seeks to have the right to
13 participate in this litigation by engaging in
14 discovery, but he comes to court with not simply
15 unclean hands but hands that are muddied to the
16 elbow. He has failed consistently to comply with
17 this Court's order, or orders in the plural, and as
18 a result I think has largely forfeited, until he can
19 demonstrate that he is willing to play by the rules,
20 the right to use the rules to his own advantage.
21 Secondly, there is little purpose to be served
22 and much harm to be done by going forward with
23 depositions of people at a time when the full cast of
24 characters in this litigation is unknown. And Mr.
25 Garvey refers to these people as the Does 1 through 5,

1 and to this point in time I'm uncertain whether there
2 is one person, or five people, or 10 people who are
3 involved in a way that would allow them to be joined
4 in this kind of defamation action or whether
5 conceivably there are zero people. But to undertake
6 discovery where who the defendants are and,
7 therefore, questions pertaining to the deponent's
8 association with, or relationship to, or knowledge of
9 those named defendants invites inefficiency and
10 suggests the virtual certainty that the person whose
11 deposition might be taken once additional defendants
12 are joined would have to have their deposition taken
13 all over again.
14 And no good reason has been suggested to me why
15 from the standpoint of the defendant's interests that
16 there is any urgency to taking these depositions.
17 Now, I hesitate and disclaim any intent to attribute
18 to Mr. Rongstad or his counsel intimidation motives
19 about why he is trying to take all of these
20 depositions, but I think it should be clear from a
21 procedural standpoint that if a judgment is going to
22 be entered against Mr. Rongstad on liability as a
23 result of a trial, the opportunity for discovery will
24 of course be there in the future. No such trial is
25 going to occur for many, many months.

1 If, on the other hand, judgment is going to be
2 entered against Mr. Rongstad because of his egregious
3 failure to comply with the orders of the Court and to
4 comply with the discovery laws of the State of
5 Wisconsin, then no discovery on liability issues will
6 be necessary because judgment will be entered against
7 him and there won't be a trial. If and when that
8 occurs and a hearing on damages is scheduled, then I
9 will, with some narrowed focus, allow Mr. Crooks to
10 seek to engage in discovery that is focused certainly
11 on damage questions, but we'll cross that bridge when
12 we get to it.
13 So with that in mind, the motion, to the extent
14 it is seeking to quash subpoenas, it will be granted,
15 and no depositions will go forward on behalf of the
16 defendant.
17 MR. GARVEY: Thank you, your Honor.
18 MR. CROOKS: Judge, one final thing. I'd
19 ask the Court at this time to stay the entrance of
20 the contempt order until we have a chance to appeal
21 the constitutional issues as mentioned.
22 THE COURT: For reasons that I have recited
23 in response to previous requests to stay, that motion
24 will be denied. And in summary, I find that there is
25 not a substantial likelihood of success on the

1 merits, there is no likelihood of success on the
2 merits, and there is, therefore, no reason to stay.
3 All right. We're adjourned.
4 MR. GARVEY: Thank you, your Honor.
5 MR. CROOKS: Thank you, Judge.
6 (Which concluded these proceedings)
7 (2:00 o'clock p.m.)
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STATE OF WISCONSIN
SUPREME COURT

JULIE LASSA,
Plaintiff-Respondent,

v. Appeal No. 04-0377

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,
Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,
Defendants,

AMERICAN FAMILY INSURANCE COMPANY,
Intervenor,

v.

ALEX PAUL,
Third-Party Defendant.

On Appeal from the Circuit Court of Dane County
The Honorable Maryann Sumi
Trial Court Case No. 03-CV-177

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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ISSUES FOR REVIEW

This case comes to the Supreme Court in an unusual posture. The underlying claim is a tort action for defamation against a state legislator, Julie Lassa.[1] The trial court entered default judgment against defendants Todd Rongstad and the Valkyrie Group (hereinafter collectively referred to as "Mr. Rongstad") as a result of a number discovery abuses and a finding that Mr. Rongstad was in contempt of court. Prior to granting the default judgment, the trial court denied the unsubstantiated First Amendment associational privilege asserted by Mr. Rongstad on behalf of his organization, the Alliance for a Working Wisconsin (hereinafter "AWW"). After the default judgment was granted, the parties settled the underlying claim, but stipulated that Mr. Rongstad may proceed with an appeal of the denial of his First Amendment claims. (Appx. 17; R. 140:2.)

The Court of Appeals sought certification to the Supreme Court on two issues: 1) the proper balancing test to employ in weighing "the respective rights of the parties in a defamation action brought by a public official"; and 2) when discovery has been found by the trial court to be appropriate, whether "a litigant who refused to comply [may] assert that he or she should not be sanctioned" on grounds of privilege under *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999). (Dec. 9, 2004 Certification by Wis. Ct. of App., at 3-4.) With due respect to the Court of Appeals, the first issue unnecessarily creates a distinct standard for a "public official" who has brought a private action as a private individual, not

[1] At the time this case was filed, plaintiff Julie Lassa was a State Representative; she now serves as a State Senator.

as a representative of the government. And the second issue unnecessarily creates a second balancing test once the trial court has properly applied the balancing test laid out in *NAACP v. Alabama* and *Buckley v. Valeo* and their progeny that require a *prima facie* showing of constitutional privilege, or a "substantiated privilege," before the respective rights of the parties are weighed.

Similarly, Mr. Rongstad unnecessarily complicates the questions presented to this Court by listing five issues for review. Those issues can all be resolved by answering the following questions:

1. Did the trial court correctly decide that Mr. Rongstad's First Amendment rights of freedom of association would not be violated when it ordered him to fully respond to Julie Lassa's relevant discovery requests to enable her to identify proper defendants?

The trial court answered: Yes.

2. If the first question is answered in the affirmative, did the trial court reasonably exercise its discretion by imposing monetary sanctions and a default judgment against Mr. Rongstad for his repeated refusals to abide by the court's orders?

The trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate.

As for publication, Senator Lassa believes that the defendants' attempt to hide behind the First Amendment to avoid allowing plaintiff to prosecute her defamation case against those who are liable is of great public concern and she would respectfully request the Court to order publication of its decision.

STATEMENT OF THE CASE

If defendants prevail in this matter, the First Amendment privilege articulated in *NAACP v. Alabama* and its progeny will be expanded to shield the disclosure of names of otherwise properly-named defendants who engaged in defamation. In effect, they will have created an absolute immunity to suit in a defamation claim any time a membership organization claims that a person, corporation, union or other entity is part of the group. As the trial court articulated, if the court

> sustained the objection to the questions at issue on the record before [it], the practical effect would be to grant these unknown participants in the alleged defamation of the plaintiff the absolute immunity that the Supreme Court was so careful to eschew . . . .

(Appx. 27-28; R. 145: 12-13 (citing *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976); *McIntyre v. Ohio Elections Comm'n*,

514 U.S. 334, 115 S. Ct. 1511 (1995).) Under this interpretation, the First Amendment privilege could be misused with the purpose of providing alleged members of any group, whether a legitimate advocacy group or not, a cover for defamation. This is a distortion of the protections afforded the plaintiffs in *NAACP v. Alabama* whose members were subjected to real threats to their physical safety.

I. Nature of the Case

The case began on January 16, 2003, when the plaintiff Julie Lassa filed a civil action in Dane County Circuit Court, alleging the intentional tort of defamation arising out of the mailing of an oversized postcard, a negative political mailer directed at Ms. Lassa, only a few days before the November 5, 2002, general election in which Ms. Lassa was running for reelection to the State Assembly. (Appx. 1-2; R. 2.)[1]

[1] The supplemental appendix contains a color copy of the mailer (Supp. Appx. 1-2; R. 2:10-11); whereas, defendants' appendix contains a black-and-white copy (Appx. 1-2).

Ms. Lassa named the following as defendants:

- Todd Rongstad, in his capacity as president of both the Valkyrie Group, L.L.C., and the Alliance for a Working Wisconsin;
- The Valkyrie Group, L.L.C.; and
- "Does, 1-5, in their individual capacities," persons whose identities she did not then know but believed were likely involved in the production, mailing, and financing of the postcard.[2]

(R. 2.)

Defendants Todd Rongstad and the Valkyrie Group (hereinafter collectively referred to as "Mr. Rongstad"), named Alex Paul as a third-party defendant on April 18, 2003, alleging that Mr. Paul had contributed money used in producing the postcard, and had done so through Sinjay Sood.[3] (R. 64.) As discussed below, Mr. Paul was the only person disclosed as a contributor for the mailer and was Ms.

[2] She also named defendant A.M. Mailing Services, which was dismissed as a defendant on February 5, 2003. (R. 19:2.)
[3] Elsewhere in this record, Mr. Sood is referred to as "Sunjay Sood."

Lassa's opponent in the primary race for the State Senate seat at issue on the postcard.

Ms. Lassa brought the suit for the legitimate purpose of clearing her name in the eyes of her constituents as a State Assemblyperson and a potential candidate for State Senate after being subjected to defamatory attacks by Mr. Rongstad and members of his group, the Alliance for a Working Wisconsin ("AWW"). In order for her to prosecute her defamation claims, she had to know who was involved in the production and distribution of the mailer.

II. The Defamatory Attack Mailer

As the trial court found, the oversized postcard is on its face defamatory. (*See* Supp. Appx. 1-2; R. 2:10-11.) The front of the mailer shows a photo of Lassa jumping in front of a crowd of students, with photos of former State Senate Majority Leader Chuck Chvala superimposed over their faces. (R. 2:3, 11.) Below this scene is the phrase, "When

Chuck Said Jump . . ." as well as a newspaper headline reading, "Chvala charged with extortion" and "State senator faces 20 felony counts, up to 85 years in prison." (R. 2:4, 10.)

On the back of the mailer, Chvala's booking information from the Dane County Sheriff's office is superimposed across most of the text. (R. 2:4-5, 11.) The mailer also refers to Senator Chvala as Ms. Lassa's "mentor." (*Id.*) The text charges that Julie Lassa "hooked up" with Senator Chvala and that "no one knows for sure what she had to promise to gain his approval," suggesting sexual impropriety. Two photos of Julie Lassa appear on the back of the photo; one of those is a head shot of Ms. Lassa directly to the right of the paragraph beginning, "[e]xtortion, misconduct in public office, pay to play, lying, cheating and stealing. . . ." (*Id.*) The next sentence begins, "[p]lease call Julie Lassa

(342-0526) and the rest and ask them the tough questions . . . ."

The "tough questions" that the reader is supposed to ask Julie Lassa are (1) "did you compromise your integrity;" (2) "did you play along with an illegal game;" (3) "did you misuse tax dollars to win elections;" and (4) "most importantly, will you please clean up your act?"

The mailer repeatedly charges Ms. Lassa with illegal, dishonorable, unethical, and unprofessional conduct.

III. Summary of Todd Rongstad's Testimony at the Depositions

During the series of his depositions between February 3 and March 11, 2003, Mr. Rongstad testified that he was the president and founder of the Valkyrie Group, a company named for the ancient Norse goddesses of the battlefield. Because the Valkyrie "had a hand in deciding who lived and who died," he thought it "appropriate" to name his business

after them, explaining that "you're more likely to survive as a politician if you hire us, and you're more likely to lose if I'm working against you." (R. 30:16-17.) Mr. Rongstad has been referred in the press as a "political assassin," a name which he regards as "part of the business." (R.30:69.) He refers to the mailers he produces, such as the one targeting Julie Lassa, as "hit pieces." (R. 30:71.)

Mr. Rongstad also claimed to be the president and CEO of the AWW, which he purports is an issue advocacy organization. (R. 30: 19, 21.) Mr. Rongstad admitted to producing the Julie Lassa attack postcard on behalf of the AWW. (R. 30:36-37.) He admitted to mailing it out just before the 2002 State Assembly elections (R. 30:44); yet, the postcard referred to Ms. Lassa's candidacy for State Senator, not Assemblyperson (Appx. 2; R. 11). While Ms. Lassa was not a candidate for State Senate as alleged in the text of the mailer-postcard, the senate seat that she now holds became

vacant by then-Senator Kevin Shibiliski's appointment to the position of Secretary of the Wisconsin Department of Tourism after the mailer was distributed. (R. 2:3-4.) Ms. Lassa was contemplating running for that seat if it became vacated at the time the mailer attacking her was published. (R. 2:4.)

Mr. Rongstad's testimony shifted between admitting that he discussed the Lassa matter with a couple of members of the AWW (R. 30:77, 81) to claiming that he discussed it with nobody (R. 30: 82). He testified that the AWW had more than ten members (R. 30:77), but the articles of incorporation of AWW stated that it "shall have no members." (R. 30: 108.) Mr. Rongstad testified that no dues were required for membership and that there were no specific criteria for determining who is a member. (R. 30:77-79, 108). In fact, "supporters of the organization are often considered as members of the organization," according to Mr. Rongstad.

(R. 30:108.) It was simply up to Mr. Rongstad, as the president of the organization, to determine who was a "member." (R. 30:77, 108-09.) Members had no voting authority, and did not receive newsletters or regular communications with Mr. Rongstad. (R. 30:111.) The standing of the organization was further called into question when it was revealed to the court on March 11, 2003, that AWW had changed its name to the Thomas Paine Democracy Network on February 17, 2003. (R. 149:3.)

Mr. Rongstad refused to testify concerning those AWW members with whom he had discussed the postcard. (R. 30: 81; *see also* R. 30:48 ("I am not going to answer any questions related to individuals that might relate to my membership that are involved with the situation.").) After revealing a few non-members (R.30:77), he stated that the other people with whom he discussed the mailer were all members, and that he would not answer whether or not any

one else was involved because it would identify AWW members. (R. 30:82.) In other words, by asserting that everyone else involved was a "member," Mr. Rongstad attempted to shield them from disclosure.

Mr. Rongstad also refused to say who contributed money that paid for the postcard. (R. 30:82.) Throughout his depositions, Mr. Rongstad tried to take sole responsibility for targeting Ms. Lassa (R. 30:47, 75, 83, 139), and yet he ultimately admitted receiving at least one contribution to AWW during the three months leading up to the Lassa mailing (R. 47: 42). The source of that money was Ms. Lassa's primary race opponent, Mr. Paul, though the money was contributed through Mr. Sood.

IV. Proceedings and Disposition in the Trial Court

Most of the events in the circuit court related to Ms. Lassa's efforts to identify the unnamed defendants through

numerous depositions of Mr. Rongstad and his persistent refusal to produce those names.

A. February 4, 2003 Discovery Order

On January 22, 2003, Ms. Lassa's attorneys served Mr. Rongstad with a notice of deposition for January 30, 2003. (R. 4:3-5.) Mr. Rongstad moved the court for an order quashing the deposition based on inconvenience, a claim of "absolute immunity" and a claim that the lawsuit was filed for the illegitimate purpose of allowing plaintiff to determine whether to run for State Senate. (R. 143:3.) Judge Nowakowski granted Mr. Rongstad's request to postpone the deposition until February 3, 2003, as a matter of convenience; the court denied Mr. Rongstad's other claims. (*Id.* at 7-15.) Finally, the court took judicial notice of the fact that the State Senate seat in question had opened the day before the hearing and found that "clearing [Ms. Lassa's] name is quite a legitimate purpose of a defamation case" and that "further

delay to the extent she chooses to run for this seat will exacerbate the impact . . . of the mailing. . . ." (*Id.* at 10.)

The deposition was held on February 3, 2003. (R. 144.) During the deposition, Mr. Rongstad refused to answer proper deposition questions and attorneys for Ms. Lassa moved to compel Mr. Rongstad to respond to questions regarding the identities of those who supported the Lassa postcard campaign. The trial court heard argument by the parties. Mr. Rongstad's counsel, Attorney Michael Crooks, asserted that Mr. Rongstad would not answer any questions regarding who was involved with the decision to create and distribute the mailer because that would require identifying members of AWW. (Supp. Appx. 16; R.144:9.)

Mr. Crooks argued such disclosure would violate the First and Fourteenth Amendment and provided the trial court with a list of case law he believed supported Mr. Rongstad's

claim of privilege.[4] Mr. Crooks requested to brief the issue; however, he did not proffer any evidentiary support for his privilege or assert that he would provide any by affidavit to the court. While the court declined Mr. Crooks' request to provide further argument through briefing, Judge Nowakowski informed the parties that he would consult the cases cited and rule on the asserted constitutional privilege the following morning. (Supp. Appx. 20-21; R. 144:18-19.)

During the February 4, 2003 telephonic hearing, the trial court allowed for further argument by Mr. Crooks. The court summarized Mr. Rongstad's constitutional objection to the discovery questions as follows:

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[4] Defendant's counsel listed the following cases: *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Wisconsin Socialist Workers v. E. Michael McCann*, 433 F. Supp. 540 (1977); *Gitlow v. New York*, 268 U.S. 652; *Elections Board v. WMC*, 227 Wis. 2d 650; *New York Times v. Sullivan*, 376 U.S. 254; *Torgerson v. Journal Sentinel*, Inc., 210 Wis. 2d 524 (1997); and *McIntyre v. Board of Elections*, 115 S. Ct. 1511. (Supp. Appx. 17-21; R.144:15-19.) Mr. Crooks did not cite *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W. 2d 21 (1999).

> [T]he defendant Rongstad contends that he has the right to refuse to disclose the names of members of his organization that were *directly involved in the publication of the allegedly defamatory mailing concerning the plaintiff* on the basis of his and their rights to free speech and to free association under the First and Fourteen Amendment.

(Appx. 22; R.145: 7 (emphasis added).)

In examining the propriety of the constitutional privilege, Judge Nowakowski noted that the privilege was asserted in a private defamation action against Mr. Rongstad and other unknown defendants, not in a state action involving direct governmental regulation. (Appx. 23-24; R.145: 8-9.) The court held that the distinction was not determinative because First Amendment rights are also implicated by judicial action; however, because this was a private suit, the court noted that there are different interests to be weighed in determining whether a protective order based on constitutional protections should be issued. (Appx. 23; R.

145: 8.) Applying cases cited by Mr. Rongstad's counsel, the court weighed the interests of Mr. Rongstad and AWW members in concealing membership information against the interests of Ms. Lassa in clearing her name and discovering who was involved in the mailer, as well as the public's interest in preventing libel during an election cycle. (Appx. 24-28; R. 145:9-13 (applying *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511 (1995)).

The court found that the interests of Ms. Lassa and the public prevailed because, in part, no less intrusive measures had been demonstrated that would allow her to seek redress under the law against the unknown defendants. (Appx. 27; R. 145: 12.) The court ordered Mr. Rongstad to "answer all questions inquiring as to the names and behavior of any other

persons involved in the preparation, funding or distribution of the mailing." (Appx. 27-28; R. 145:12-13.)

After the court's ruling, Mr. Rongstad moved for a stay to have an opportunity to seek a supervisory writ from the Court of Appeals. (R. 145:13.) In denying the stay, the court found very little likelihood of success in the petition for a supervisory writ and considered the harm to the plaintiff in further delay due to the upcoming special election for State Senate. (Appx. 34; R. 145:19.) Moreover, the court considered defendant's objection to not having had an opportunity to brief the matter and found it to be an unfair characterization of the proceedings. (Appx. 32; R. 145:17.)

Following the court's ruling, the Rongstad deposition continued. Mr. Rongstad again refused to respond to questions about AWW, asserting the same argument rejected by the court earlier that day. (R. 30: 81.)

Also on February 4, 2003, Mr. Rongstad moved the Court of Appeals for a supervisory writ to stay the order of Judge Nowakowski.[5] Finding no misuse of discretion by the trial court, the Court of Appeals denied the request for a stay. (R. 18.) However, Mr. Rongstad continued to refuse to answer questions regarding persons involved in AWW who engaged in the planning, preparation, and funding of the Lassa postcard or who had discussions with Rongstad about the targeting of Ms. Lassa. (R. 30:107.)

B. February 6, 2003 Motion for Reconsideration Hearing

On February 5, 2003, Mr. Rongstad filed a motion in the trial court to reconsider the court's February 4th order. (R. 14.) Meanwhile, Mr. Rongstad's deposition continued. Mr. Rongstad again refused to answer questions that could identify AWW members or contributors to AWW, asserting

[5] Mr. Rongstad's motion was captioned as a petition for supervisory writ; however, Mr. Crooks informed the Court that the motion should be treated as a request for a stay. (R. 30:89.)

the constitutional protections addressed by the trial court on February 4, 2003. (R. 30:107.)

The motion for reconsideration was heard on February 6, 2003, after being fully briefed by the parties. During that hearing, counsel for Ms. Lassa explained that Mr. Rongstad was the sole source from which Ms. Lassa could ascertain the persons responsible for the decision to target Ms. Lassa and financing the attack piece. (Supp. Appx. 23-24; R.146: 20-21.) The unnamed defendants could not be discovered except by Mr. Rongstad abiding by the court's order. (Supp. Appx. 25; R.146: 23.)

For the reconsideration hearing, Mr. Rongstad provided an affidavit stating that he would not disclose members' names due to their "fear of public reprisal and potential legal actions." (Appx. 4; R. 16:2.) The affidavit is the only evidence presented by Mr. Rongstad that his members would be subject to such fear.

Citing *NAACP v. Alabama* and *Buckley v. Valeo*, the trial court found that Mr. Rongstad's "conclusory allegations and references to fear of a lawsuit are simply so low that they do not satisfy the *Buckley* requisite factual showing." (Appx. 33-34; R. 146: 18-19.) Finding that Mr. Rongstad had asserted no new grounds that would trigger a constitutional privilege, the court ordered Mr. Rongstad to appear at a continued deposition on February 11, 2003. (R.146: 29.)

At the continuation of Mr. Rongstad's deposition, Mr. Rongstad again asserted that he would not disclose his contributors or members.[6] (R. 30: 130-31.)

Moreover, Mr. Rongstad refuted his own testimony provided in his February 5, 2003 affidavit in which he testified that he had discussed this lawsuit with AWW

[6] On February 13, 2003, Mr. Rongstad produced some documents, however, none of these documents provided any information related to the membership of AWW or was otherwise useful in identifying the unnamed defendants. (R. 30: 1.)

members and that they were concerned because he had previously guaranteed that their identities would remain confidential. (Appx. 4; R. 16:2.) On February 11, 2003, he testified that *no* members contacted him about this lawsuit. (R. 30: 134.) Moreover, Mr. Rongstad had claimed that there were some contracts with confidentiality clauses, but that he would not produce those documents. (R. 30:106-07.) Yet, he later testified that the sole basis for the confidentiality protection was the promise in AWW's brochure to potential clients. (R. 30:133.)

C. Motion for Finding Mr. Rongstad in Contempt

On February 21, 2003, Ms. Lassa moved the trial court to find Mr. Rongstad in contempt of the court's discovery orders and impose sanctions for his repeated failures to produce properly requested discovery. (R. 36.) On February 28, 2003, after briefs were filed by the parties, the court heard argument on the motion for contempt. Mr. Rongstad, by his

counsel, again asserted the same constitutional privilege. (Supp. Appx. 27; R. 148:10.) Again denying the privilege, the circuit court ordered petitioner to appear at a continued deposition on March 3, 2003 to address the questions of who supported AWW as it related to the Lassa attack piece and specifically to identify those who contributed more than $100 to AWW after January 1, 2002, rather than leaving the amount and date open-ended. (Appx. 48; R. 148:18, 25.) The court set the continued hearing on the contempt motion for March 11, 2003.

On March 3, 2003, the deposition continued. Rongstad's counsel renewed the same constitutional privilege and Mr. Rongstad refused to answer questions directed by the circuit court's orders of February 4, 6, 11, and 28. (R. 47: 35-36.)

On March 11, 2003, the contempt hearing continued. Mr. Rongstad did not dispute that he failed to comply with

the court's discovery order; however, he asserted that he continued to have a constitutional privilege justifying his noncompliance and that he planned to seek appellate relief from the court's orders. (Supp. Appx. 29; R. 149:7.) The circuit court referred to its earlier rulings denying the constitutional objection, stating that "Mr. Rongstad's attempts to cloak himself in the constitution were previously found to be empty and without merit." (Appx. 53; R. 149:12.)

The circuit court found Mr. Rongstad's contempt "to be actual and his conduct to be intentional" and ordered sanctions, including attorneys fees and costs and a $1,000 per day forfeiture until Rongstad "has made himself available for further deposition and has fully complied with the requirements to provide the information [the court] had previously ordered he provide." (Appx. 56-57; R. 149:15-16). Additionally, the trial court stated that it would entertain a motion for default judgment if, by April 4, 2003, Mr.

Rongstad did not comply with the discovery orders. (Appx. 57; R. 149:16.)

The circuit court also noted that petitioner had earlier claimed that he would seek relief from its discovery orders but, in fact, did not do so and found that "Mr. Rongstad's most recent claims that he is going to seek vindication in the Court of Appeals and that that is what explains his conduct and his defiance of this Court's order likewise falls on rather hollow footing." (Appx. 54-55; R. 149:13-14.) On March 4, 2003, the Court of Appeals had denied Mr. Rongstad's petition for leave to appeal the court's February 4, 2003 discovery order "[b]ecause it appears that Rongstad no longer wishes to seek interlocutory review of the circuit court's order." (Supp. Appx. 40; Mar. 4, 2003, Order, Ct. App. Case No. 03-0309-LV .) Mr. Rongstad had let the time run for filing argument on the merits of the petition for leave and, thus, the petition was denied. (*Id.*)

D. No permissive appeal sought by Mr. Rongstad

On April 1, 2003, the Court of Appeals denied a second petition for leave to appeal and motion for temporary relief filed by Mr. Rongstad seeking review of the court's February 28 and March 11, 2003 orders because the Court does not take permissive appeal on oral orders. Those sanctions orders were reduced to written order on April 2, 2003. (R. 57.) Mr. Rongstad did not seek leave for appeal of the April 2, 2003 order.

Also on April 1, 2003, the Court of Appeals dismissed Mr. Rongstad's petitions for supervisory writ regarding the court's February 28 and March 11, 2003 orders, finding that "Rongstad has not shown that the circuit court has a duty to vacate its orders." (R.56.)

E. Denial of the Motion to Dismiss

After the court had issued its initial discovery orders, on February 11, 2003, Mr. Crooks on behalf of Mr. Rongstad

and American Family Mutual Insurance Company (hereinafter "American Family") filed a motion to dismiss on the grounds that plaintiff had failed to state a claim upon which relief can be granted. (R. 24.) On February 13, 2003, the court set a briefing schedule for the motion to dismiss with reply briefs to be filed by March 28, 2003. (R.27.)

The motion to dismiss hearing was delayed by a stay on the merits of the case until there was disposition of the question of insurance coverage. (*See* R. 32.) Mr. Crooks did not indicate objection to the scheduling set by the court or to the motion to stay the merits proceedings. (R. 148:28; R. 96.) The stay was lifted on June 26, 2003. (R. 99.)

After the motion to dismiss was fully briefed by the parties, the court held a hearing on the sufficiency of the

pleadings on July 8, 2003.[7] (R. 151.) In denying Mr. Rongstad's motion, the court found as follows:

> Reading words and viewing the picture of the mailer in the plain and ordinary sense, I do reach the conclusion that there is language capable of defamatory meaning.
>
> The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful and unethical conduct that Senator Chvala was accused of. . . .

(R. 151:4.)

F. Ruling on the Motion for Default Judgment

Despite the April 4, 2003 deadline set by the court for Mr. Rongstad to comply with its discovery orders of February 4, 6, and 28, 2003, by producing the requested information, Mr. Rongstad refused to comply. The only information plaintiff's counsel received from Mr. Rongstad was the last-

[7] Contrary to the ACLU's assertion, no supporting affidavits were filed in relation to the motion to dismiss that would have warranted it being treated as a motion for summary judgment. (*See* ACLU Br. at 21.)

minute production of an affidavit dated April 1, 2003, with several illegible photocopies of documents attached purporting to name contributors to the AWW for the period from January 1, 2002 to April 4, 2003. (Supp. Appx. 4-14; R.61:11-21.)[8] The documents were limited to photocopies of a few checks from federal government, the Valkyrie Group, and Mr. Sood, as well as deposits slips. (*Id.*) The only contributor's name Mr. Rongstad provided was Mr. Sood. Yet, during deposition, Mr. Rongstad had testified that "lots of different people" made contributions to AWW. (R. 30:81.)

Also on April 4th, Mr. Paul, Ms. Lassa's opponent in the primary election for the State Senate seat that was held on April 1, 2003, revealed that he was the source of the money received by AWW from Mr. Sood. (R. 61:4.) Mr. Rongstad provided no other information as to how Mr. Sood or Mr.

[8] The blurred and illegible photocopies in the supplemental appendix are how they were provided to plaintiff's counsel.

Paul were involved in the production or distribution of the mailer.

Judge Sumi replaced Judge Nowakowski after the April 28, 2003 hearing on Ms. Lassa's objection to Mr. Paul's request for substitution.[9] (R. 79.)

On August 15, 2003, Judge Sumi ruled on two pending motions: Mr. Rongstad's motion for relief from the sanctions and Senator Lassa's motion to enter a default judgment. Summarizing the discovery dispute in this case, the trial court noted that on February 6, 2003, Judge Nowakowski stated that seldom had he seen such an abuse of the discovery process, and that while Judge Sumi was not adopting that view, she stated that it demonstrated Judge Nowakowski's

[9] Judge Nowakowski found that the purpose of naming Mr. Paul as a third party was done "with the intent by Todd Rongstad and his attorney to allow Alex Paul to seek a substitution of judge because Todd Rongstad and his attorney believed things were going badly for him and they hoped to obtain a more favorable tribunal." (R. 150:35). However, in granting a default judgment against defendants, Judge Sumi, who substituted Judge Nowakowski, did not rely in any way "on a claim of collusion between Mr. Paul and Mr. Rongstad." (R. 152:39.)

belief that the dispute had taken on an abusive persistence and pattern early in the proceedings. (Supp. Appx. 31; R. 152:23.)

The court ruled that Mr. Rongstad continued to be in contempt of Judge Nowakowski's two written orders and denied Mr. Rongstad's motion for relief from sanctions. (Supp. Appx. 32; R. 152: 28.) At the same hearing, the trial court granted Ms. Lassa's motion for default judgment, finding that Mr. Rongstad's conduct fit "both the standard of egregious conduct and bad faith" (Supp. Appx. 33; R. 152:45) and "that no lesser sanction would allow the case to proceed or address the persistence of the violation that we have seen in this case." (Supp. Appx. 34; R. 152:46.)

G. Reconsideration of the Default Judgment.

On October 3, 2003, after full briefing, the court heard Mr. Rongstad's motion for reconsideration of the default judgment. At the outset of the hearing, Judge Sumi made it

clear that, while she adopted Judge Nowakowski's statements about whether there had been violations of discovery orders, her decision in granting the default judgment was not based on Judge Nowakowski's findings that Mr. Rongstad lacked truthfulness in his statements and did not make an independent finding on Mr. Rongstad's credibility. (Supp. Appx. 36-37; R.155:4-5.)

Judge Sumi denied Mr. Rongstad's assertions that Judge Nowakowski's discovery order had been limited to those who gave funding to AWW and that Mr. Rongstad had complied by producing the one name, that of Mr. Sood, and stating that AWW paid for the postcard. (Supp. Appx. 38, 39; R.155:37, 41.) The court found that Judge Nowakowski was seeking compliance with all of the court's discovery orders, "everything that would lead to the full disclosure of the information necessary to enable this case to proceed." (R.

155:41.) Those orders were not complied with and the default judgment was appropriate.

In support of that motion, *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999),[10] was argued for the first time after being raised in the brief of third-party defendant Mr. Paul. (R.123:4.) The trial court found that Judge Nowakowski properly applied the law to determine whether the privilege was "a legitimate, a valid, a substantiated privilege, that has to be honored" and exercised his judgment to find there was no substantiated claim of privilege. (Supp. Appx. 39; R. 155:41.)

H. Final Disposition of the Case through Settlement

Judge Sumi's final order approved a settlement agreement drafted by the parties dismissing the underlying

[10] Referred to as "*Alt v. Cline*."

cause of action, keeping intact the monetary sanctions, but permitting this appeal. (Appx. 12-19; R. 141.)

SUMMARY OF ARGUMENT

The constitutional privilege against compelled disclosure of the names of members in a political organization is important but not absolute. It cannot be a rock behind which a sham "advocacy" organization hides so-called "members" to avoid legal responsibility for defamation or any other tortious conduct. That is the essence of this case. As Ms. Lassa has pursued her right to uncover the names of individuals behind the election-eve attack mailer that smeared her good name and reputation, Mr. Rongstad has attempted to shield those responsible under the First Amendment. Defendants attempt to create an absolute immunity from suit against a defendant who belongs to a group that claims to be an advocacy organization.

Litigants may have a conditional freedom of associational privilege allowing them to refrain from giving testimony in the course of discovery, but only when they belong to a legitimate membership organization and make a *prima facie* showing that disclosure would objectively cause harassment or reprisals and, if they meet that burden, only if the interest in disclosure does not outweigh their interest in anonymity.

Because Mr. Rongstad's organization is not a legitimate membership organization, he has no basis to claim privilege. Even assuming AWW deserves associational protections, Mr. Rongstad did not meet his *prima facie* showing that members would be objectively harmed by disclosure. Finally, even if the Court finds that he has demonstrated his *prima facie* showing, Senator Lassa's interest in clearing her name and the public's interests in clean elections outweigh AWW members' interests in

avoiding liability for their defamatory acts. Therefore, the trial court's imposition of sanctions did not violate Mr. Rongstad's constitutional rights.

Mr. Rongstad's claim that the trial court erred in ordering compliance with Senator Lassa's discovery demands and in imposing sanctions before formally ruling on Mr. Rongstad's motion to dismiss does not entitle him to any relief. First, Mr. Rongstad did not object to the court's scheduling order or the stay of the proceedings on the merits. Second, because the trial court ultimately denied the motion, he has suffered no harm and the result would have been the same. The issue is moot.

The trial court properly exercised its discretion in sanctioning Mr. Rongstad and finding him in contempt of the court's discovery orders for his intentional and unjustified refusal to provide Senator Lassa with the information she

properly sought through discovery and to which she was entitled.

STANDARD OF REVIEW

Mr. Rongstad seeks to reverse the trial court's imposition of sanctions, including its granting a default judgment. A default judgment may be entered by the circuit court as a sanction for egregious or bad faith conduct where the noncomplying party is without a clear and justifiable excuse. *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.*, 2001 WI App 205 ¶ 11, 247 Wis. 2d 521, 530-31, 634 N.W.2d 544. The trial court's decision to impose sanctions, including the granting of a default judgment, is discretionary. This Court reviews such sanctions under the erroneous exercise of discretion standard and will not disturb the trial court's order unless a party claiming to be aggrieved by the decision establishes the court has abused its discretion. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470

N.W. 2d 859 (1991). "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (citation omitted); *see also Brandon Apparel*, 2001 WI App 205 ¶ 11.

Because the record confirms the circuit court's finding that Mr. Rongstad's conduct was both egregious and in bad faith, without "a clear and justifiable excuse," the trial court's decision to issue sanctions, including a default judgment, should be upheld.

ARGUMENT

I. IN THE CONTEXT OF CIVIL DISCOVERY, THE FIRST AMENDMENT RIGHTS OF ASSOCIATION AND SPEECH DO NOT CREATE AN ABSOLUTE PRIVILEGE TO AVOID THE COURT-ORDERED DISCLOSURE OF THE NAMES OF MEMBERS OF AN ORGANIZATION WHEN THE ORGANIZATION HAS ENGAGED IN DEFAMATION.

Mr. Rongstad argues that his refusal to comply with the trial court's discovery orders requiring him to produce properly requested discovery was privileged under the First and Fourteenth Amendments to the United States Constitution. The trial court considered his constitutional claim and correctly rejected it, ruling that Julie Lassa had the right to inquire into the membership of Mr. Rongstad's organization to ascertain the identity of other potential defendants in her defamation suit.

Despite Mr. Rongstad's assertions to the contrary, the courts have emphasized that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v. Letter Carriers*, 413 U.S. 548, 567, 93 S. Ct. 2880, 2891 (1973). "Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of

associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 637 (1976) (internal quotation marks omitted) (quoting and citing *Cousins v. Wigoda*, 419 U.S. 477, 488, 95 S. Ct. 541, 548 (1975); *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247 (1960)). Mr. Rongstad's attempts to create an absolute immunity should be denied.

A. Mr. Rongstad Did Not Make A *Prima Facie* Showing That The Members Of AWW Would Be Subject To Harassment Or Reprisals.

While "all legitimate organizations" are entitled to the First Amendment's privacy of association protections, *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 556, 83 S. Ct. 889 (1963), AWW is a sham organization that Mr. Rongstad has used in attempt to hide individuals or corporations who are responsible for publishing the defamatory mailer attacking Senator Lassa. While the incorporation documents state that

AWW "shall have no members," Mr. Rongstad testified that he alone decided who was a member and what criteria existed for becoming a member. The organization is not one of long-standing. In fact, upon commencement of this litigation, the name of the organization was changed.

Even assuming that the organization was "legitimate" to trigger First Amendment protections, Mr. Rongstad has failed to make even a *prima facie* showing that compelled disclosure would subject members to threats, harassment or reprisals.

In *Buckley v. Valeo*, the United States Supreme Court set forth the burden in establishing a *prima facie* showing: "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. Such a showing may include "specific evidence of past or present harassment of members

due to their associational ties, or of harassment directed against the organization itself." *Id.*

Conclusory predictions of harassment or reprisals are not sufficient to meet a *prima facie* showing. In interpreting the requirements of *NAACP v. Alabama*, the Ninth Circuit found that demonstrating a threat to First Amendment associational rights requires "more than an argument that disclosure leads to exposure." *Dole v. Local Union 375, Plumbers Int'l Union*, 921 F.2d 969, 974 (9th Cir. 1990). Rather, parties must demonstrate "that exposure either is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization." *Id.* In finding that the *prima facie* showing was not met, the *Dole* court distinguished the showing in *NAACP v. Alabama*, which entailed demonstrations of rank-and-file members being exposed to "economic reprisal, loss of employment, threat of

physical coercion, and other manifestations of public hostility" and the subjective, conclusory assertions made by the union in *Dole*. *Id.*; *see also McLaughlin v. Serv. Employees Union, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989) (quoting *Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 350 n.1 (9th Cir. 1988)) ("The record must contain 'objective and articulable facts, which go beyond broad allegations or subjective fears.'").

Similarly, in *Friends Social Club v. Secretary of Labor*, a Michigan federal district court found that affidavits alleging that, if disclosure is compelled, "political opponents may learn of associations, derive strategic advantage from it, and use it against [the member]," which would lead members to hesitate to contribute to the organization in the future, demonstrated only subjective fears and was not a proper basis to show that First Amendment rights would be chilled. 763 F. Supp. 1386, 1394 (E.D. Mich. 1991); *see also Laird v. Tatum,*

408 U.S. 1, 13-14, 92 S. Ct. 2318 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376-77 (Tex. 1998) (finding a *prima facie* showing where "[t]he evidence shows actual, non-speculative hostility and demonstrates a reasonable probability of economic reprisals against contributors").

During the first hearing on Mr. Rongstad's claim of constitutional privilege, Mr. Rongstad offered the court no evidentiary support for any past or present threats, harassment or reprisals of AWW's members. Then, on a motion for reconsideration, Mr. Rongstad produced his own affidavit claiming disclosure of members' names would cause "fear of public reprisal and potential legal actions." (Appx. 4; R. 16:2.) The affidavit is the only evidence presented by Mr. Rongstad to the trial court that his members would have such

fear.[11] Yet, he later testified in deposition that he talked to no members of AWW regarding this litigation. Additionally, he alleged that members would not be interested in participating in AWW if he revealed their identities. However, he later refuted that he had ever promised to maintain confidentiality. His claims of "fear" are simply too speculative to meet the *prima facie* burden to show a "reasonable probability" of harassment directed toward its members.

Further, Mr. Rongstad provided only conclusory allegations that disclosure would negatively impact his business, as opposed to his members' businesses, and that his members feared being drawn into a lawsuit. (Appx. 4; R. 16:2.) First, Mr. Rongstad's business concerns are not relevant to a showing that his members would be harmed.

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[11] For the first time on appeal, Mr. Rongstad claims that such fears were demonstrated by various press releases dated September 18, 2003 as evidence of legitimate fear of reprisals. (Def. Br. at 11, 18.) These assertions were not made to the trial court and have been waived. *Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977).

Second, fear of a legitimate lawsuit does not rise to the level of harassment and reprisal that was at issue in *NAACP v. Alabama*.[12]

The trial court correctly held that Mr. Rongstad's assertions that his members fear disclosure does not meet the requisite *prima facie* showing that AWW members' associational rights are triggered. (Appx. 33-34; R. 149:18-19.)

B. Applying the Proper Balancing Test, the Circuit Court Correctly Found that Ms. Lassa Had a Right to Information That Would Allow Her to Name the Defendants.

[12] ACLU mistakenly equates the underlying action in this matter with a "SLAPP suit," or a strategic lawsuit against political participation. (ACLU Br. at 10-11.) Such a designation turns this case on its head. Ms. Lassa was publicly attacked with a defamatory mailer by undisclosed members of the AWW. As a private litigant, she sued the president and CEO of the organization and other responsible parties to clear her name in the estimation of her constituents. True SLAPP suits are frivolous civil actions with the purpose to prevent citizens from exercising their rights or to punish them for doing so. 47 SMU L. REV. 95 (1993). As discussed below, the circuit court correctly found that Ms. Lassa met her *prima facie* showing for defamation—in other words, her suit had merit.

The courts have recognized that the interests of private parties in enforcing court orders to obtain information related to litigation are different than the interests of the government in cases directly involving compelled governmental disclosure, such as through legislation prohibiting anonymous political leafleting. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511 (1995) (recognizing the important interest in preventing fraud to the electorate and noting that fraud could be enforced by a private defamation action).

In *Black Panther Party v. Smith*, the court addressed whether civil litigants may refuse to respond to discovery on the grounds of associational privilege. 661 F.2d 1243, 1268 (D.C. Cir. 1981), vacated with direction to dismiss the complaint, 458 U.S. 1118, 102 S. Ct. 3503 (1982). The court applied the following balancing test:

> Before granting a motion to compel discovery and forcing a plaintiff to choose between disclosure or sanctions, the plaintiff's First Amendment claim should be measured against the defendant's need for the information sought. If the former outweighs the latter, then the claim of privilege should be upheld. In this way the interests of both parties can be protected.

Id. The court went on to require that the interests in disclosure be considered. "First, courts must consider the relevance of the information sought." *Id.* at 1268. The interest is strong where the information "goes to the heart of the matter," or is "crucial to the party's case." *Id.* (citations and internal quotations omitted). "Second, courts must determine whether the litigants seeking disclosure have pursued alternative sources." *Id.* (citation omitted). Disclosure is appropriate where the litigant has exhausted alternative sources. *Id*; *see also Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 205 (N.D. Cal. 1983) (adopting the *Black Panther Party* test).

A similar test was applied in *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571 (S.D.N.Y. 2004). There, defendants sought to stay anonymous in a private lawsuit involving copyright and trademark ownership rights. *Id.* at 574-75. The defendants alleged economic injury without any particular allegations of the nature of the harm or the likelihood that it would occur. *Id.* at 573. In ordering that the defendants' names be disclosed, the court found that there was "no substantiated showing of harm that individuals will incur" and that the primary motivation to conceal their identities was to promote the organization. *Id.* at 575-76.

That is exactly what has happened here. Mr. Rongstad has not substantiated that any actual harm would come to AWW's members. Whereas, Ms. Lassa has demonstrated her interest in finding out exactly who should be held accountable in a defamation suit.

i. *Ms. Lassa's interests in disclosure for purposes of discovering who was responsible for the defamatory mailer outweigh Mr. Rongstad's interests and the interests of AWW members in anonymity.*

The trial court noted that members of AWW may have First Amendment rights of association but held that they must bend to Julie Lassa's right to know who was behind the defamatory campaign. (Appx. 24-28; R. 145:9-13.)

First, as discussed above, the court examined Mr. Rongstad's interest maintaining anonymity of AWW members and found the fear of being named in a legitimate lawsuit and Mr. Rongstad's own business concerns did not meet the threshold.

Second, the trial court found that Ms. Lassa's interest in obtaining the names of those who were responsible for publishing the defamatory postcard was necessary for her to proceed with her lawsuit. She had an interest in clearing her

name in the estimation of her constituents in her assembly district and in clearing her name so that she may run for a recently vacant State Senate seat. The court also recognized the public's interest in preventing false statements regarding a candidate for public office. (Appx. 26-27; R. 146:11-12 (quoting *McIntyre*, 514 U.S. at 349, 352).) Thus, the public's interest provided additional weight toward disclosure of those responsible for the mailer.

Third, the court found that no less intrusive measures were available that would allow her to discover who the unknown defendants were. The only way for Ms. Lassa to continue her lawsuit was to get the names of the other responsible parties from Mr. Rongstad.

Mr. Rongstad obviously disagrees with the results of the court's balancing but there was no legal error and the court did not abuse its discretion in applying the facts to the balancing test.

ii. The Court's Finding that the Attack Mailer was Defamatory Supports Ms. Lassa's Interests in Disclosure.

Mr. Rongstad takes issue with the court's denial of his motion to dismiss on the basis that the sanctions were not appropriate. (Def.'s Br. at 31-35.) The trial court correctly found the postcard defamatory on its face, and Mr. Rongstad's and the AWW's responsibility for the postcard is undisputed. Thus, the information Ms. Lassa sought was highly relevant under the first prong of the *Black Panther* test. *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444, 448 (Ill. 1988) (finding privilege because disclosure did not go to "the heart of the matter" where defendants denied responsibility for allegedly defamatory material). Because the trial court's finding of defamation was correct, its application of the balancing test is further supported and the court's discovery orders, and the sanctions that followed, were not an abuse of discretion.

In order to test the legal sufficiency of Julie Lassa's claim, the trial court determines whether the words at issue are capable of a defamatory meaning, which is a question of law. *Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411, 414 (1959). A defendant's intent is not relevant to whether the words have a defamatory meaning; the inquiry is whether the words could be understood as defamatory in the community by reasonable persons. *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 6, 259 N.W.2d 691, 693 (1977); *Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259, 262 (1966).

A statement is capable of a defamatory meaning by what it implies: "One may be libeled by implication and innuendo quite as easily as by direct affirmation." *Frinzi*, 30 Wis. 2d at 277, 140 N.W.2d at 262.

Some words are capable of defamatory meaning as a matter of law: "[w]ords which charge an individual or a corporation with dishonorable, unethical or unprofessional

conduct in a trade, business or profession are capable of a defamatory meaning." *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 483, 309 N.W.2d 125 (Ct. App. 1981) (citation omitted). Words that impute to the person the commission of a criminal act are also capable of a defamatory meaning as well. *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 263, 258 N.W.2d 712 (1977) (footnote omitted). Thus, words that fall into either of these categories are capable of a defamatory meaning as a matter of law.

Mr. Rongstad asserts that Ms. Lassa cannot show any defamation because Chuck Chvala is the only person accused of criminal conduct in the postcard. (Def. Br. at 34-35.) This argument is contrary to the rule of *Frinzi*, which recognizes the defamation by implication and innuendo.

The postcard repeatedly charges Senator Lassa with dishonorable, unethical, and unprofessional conduct in her profession, if not directly, then certainly by insidious

implication and association; she is accused of extortion, misconduct in office, pay to play, lying, cheating, stealing, felonious conduct that resulted in Senator Chvala's indictment, and even sexual impropriety.

Additionally, most of the activities named in the above paragraph are criminal acts—extortion and stealing, to name a few. Plus, by tightly associating Ms. Lassa with Senator Chvala and his indictment on twenty felony counts, the mailer implies that she engaged in the same activities that resulted in those felony charges.

Finally, readers of the postcard are directed to ask Julie Lassa: "And, most importantly, will you please clean up your act?" This question assumes a defamatory fact, that Julie Lassa's "act" was "dirty" in the first place. The unspoken but necessarily implied predicate of the final question is certainly defamatory, just as the question, "When did you stop beating your wife?" states by implication a most vile accusation.

iii. Mr. Rongstad's Intentional Refusal to Comply with the Court's Order Prevented Ms. Lassa From Establishing Actual Malice.

Contrary to the assertions made by *amicus* (ACLU Br., at 18-22), the actual malice test, necessary to an ultimate finding of defamation of a public figure under *New York Times v. Sullivan*, does not apply in a motion to dismiss. *See, e.g., Dilworth v. Dudley*, 75 F.3d 307, 309-10 (7th Cir. 1996); *Frinzi*, 30 Wis. 2d at 276, 140 N.W.2d at 261; *Maguire v. Journal Sentinel, Inc.*, 2000 WI App. 4 ¶ 18, 232 Wis. 2d 236, 248, 605 N.W.2d 881, 888. Rather, the actual malice standard is only applicable when the elements and merits of a public figure defamation case are considered, i.e. on summary judgment or before a jury. *See Torgerson v. Journal/ Sentinel, Inc.,* 210 Wis. 2d 524, 535, 563 N.W.2d 472 (1997).

Given the evasiveness of Mr. Rongstad in identifying other potential defendants, it would not have been possible

for Ms. Lassa to show actual malice on a motion to dismiss. His refusal to comply with the court's orders prevented plaintiff from discovering the identities of the unnamed defendants and conducting further discovery of them to ascertain their motives. Requiring a finding of actual malice before Mr. Rongstad would be required to disclose AWW members would have thwarted Ms. Lassa's attempt to clear her name while rewarding Mr. Rongstad for his egregious and bad faith conduct. That is not the holding of *NAACP v. Alabama* or the purpose of the First Amendment's associational protections.

Because Julie Lassa has shown that the AWW postcard is reasonably capable of a defamatory meaning, which demonstrates her legitimate interest in clearing her name, Mr. Rongstad cannot claim that the trial court violated his rights by requiring him to comply with Lassa's discovery demands to disclose the identities of those behind the mailer

or that he was in any way justified in his refusal to comply with the trial court's orders.

C. The Private Lawsuit Cases Cited By Mr. Rongstad Do Not Support His Interest In Maintaining His Members' Anonymity.

Mr. Rongstad cites to *In re Maurer*, 15 S.W.3d 256 (Tex. App. 2000) for the proposition that he need not show a record of past harassment. (Def. Br. at 16.) *Maurer* involved a defamation lawsuit by a sheriff, in his individual capacity, against unknown individuals who were members of an organization that had run an ad attacking him. The sheriff requested disclosure of the identities of its members and the court issued a discovery order directing disclosure of those individuals in the group who "were responsible for the ads." *Id.* at 261. Reasoning that without the information, the sheriff could not prove who defamed him and obtain redress on the claims, the appellate court upheld the discovery order.

Similarly, here, Judge Nowakowski found that Mr. Rongstad was the only source of information from which Ms. Lassa could discover who was responsible for the attack mailer and ordered Mr. Rongstad to produce the names of the responsible parties. (Appx. 5; R. 13.) Thus, *Mauer* actually assists Ms. Lassa's case.

Additionally, Mr. Rongstad's reliance on *Crocker v. Revolutionary Communist Progressive Labor Party* is misplaced. In that case, employees at a hospital, who were members of a political group, allegedly libeled their supervisor in a newsletter that was circulated in the hospital. The group's organizer was asked at deposition to disclose, among other things, names of the members of his organization that circulated the newsletter. He refused on the basis of freedom of association. He was particularly concerned that disclosing the member names would subject them to threats, intimidation, and reprisals on the job. The

Illinois Court of Appeals found that the fear of reprisal was substantiated given the authority of the plaintiff over the members of the group. *Id.* at 447-48.

The case at hand is clearly distinguishable. As the trial court found, Mr. Rongstad's claim that he and members of AWW will suffer public reprisals if their names are disclosed and will thus be discouraged from exercising their rights to free association (Appx. 4; R. 17) is speculative at best (Appx. 33; R. 146:18-19). It is nothing so concrete as the fear of firing or discipline that the employees in *Crocker* faced.

Likewise, Mr. Rongstad relies on *Britt v. Superior Court of San Diego*, 574 P.2d 766 (Cal. 1978), which is inapposite. In *Britt*, at issue was a wide-ranging discovery request by an airport into the associational interests of a group of citizens who brought an action against the airport for damage to property. The discovery request was extremely broad, requesting plaintiffs' membership in organizations

opposed to the airport's practices, names of people who had attended meetings of those organizations, the content of discussions regarding the meetings, the identity of persons with whom the meetings were discussed, records of financial contributions to anti-airport organizations, and unlimited disclosures of their medical histories. *Id.* at 769.

The information request in *Britt* was far broader and more invasive than the one in this case. While Ms. Lassa only asked for the members of AWW who have information that would lead to the discovery of admissible evidence regarding the political postcard at issue here, the defendant in *Britt* asked for disclosures that "directly impinge on the constitutional rights of numerous individuals who have taken no action whatsoever with respect to the underlying lawsuit." *Id.* at 775. Because the information request was vastly broader from the one at bar, this case is not useful here.

D. *Burnett v. Alt* Is An Inapposite Case Involving An Evidentiary Expert Opinion Privilege And Is Not Controlling In This Case.

On appeal, Mr. Rongstad relies on *Burnett v. Alt,* 224 Wis. 2d 72, 589 N.W.2d 21 (1999), to support his claim that he presented a "substantiated assertion of privilege" as justification for not complying with the court's discovery orders. (Def. Br. at 23-28.) As Mr. Rongstad implicitly recognized by not addressing *Alt* to the trial court as a basis for his claim of privilege, the case has no application here where the United States Supreme Court has set out a balancing test for associational privileges under the First Amendment.[13] Mr. Rongstad's reliance for the first time on appeal of *Alt*'s finding of an evidentiary privilege, not a constitutional privilege, is misplaced.

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[13] Mr. Rongstad's assertion that the fact of a balancing test "by definition provides a substantiated basis for an assertion of privilege" is illogical. If that were the case, the privilege would be elevated to an absolute, rather than a conditional, privilege. (*See* Def. Br. at 28.)

To the extent that it may be instructive, however, *Alt* simply indicates that the circuit court correctly reviewed Mr. Rongstad's assertion of privilege based on the conclusory allegations of harm to members of AWW. (*See* Supp. Appx. 39; R. 155:41.)

In *Alt*, this Court held that an expert witness could not be compelled to provide opinion testimony without a showing of compelling need for the testimony. *Alt,* at 89, 589 N.W.2d at 27. The Court found that the expert testimony was available elsewhere. Thus, after balancing the litigant's need for the testimony and the expert's right to be free from compulsion to provide opinion, the court granted a qualified privilege to expert opinion testimony. *Id.*

Thus, unlike in the plaintiff in *Alt*, Senator Lassa had no alternative source of the information in Mr. Rongstad's possession (i.e., information about others involved in the defamatory postcard). Therefore, Ms. Lassa presented exactly

the kind of "compelling circumstances," namely, the lack of any alternative source of necessary information, that were lacking in the *Alt* case.

Moreover, Mr. Rongstad disregards the Court's admonition in *Alt*:

> We caution attorneys that our holding in this case is not a license to assert unsubstantiated privileges. *An unsubstantiated and unfounded privilege* is not substantial justification for not imposing sanctions under Wis. Stat. § 804.12(2).

Id. at 95, 589 N.W.2d at 29 (emphasis added). Mr. Rongstad has asserted only an unsubstantiated and unfounded privilege.

Closer to the circumstances in this case, in *B&B Investments v. Mirro Corp.*, 147 Wis. 2d 675, 681-82, 434 N.W. 2d 104, 107 (Ct. App. 1988), the Court of Appeals found that the deponent had asserted an unsubstantiated constitutional privilege in bad faith and, therefore, dismissal of the case as a sanction under Wis. Stat. § 804.12(2)(a)3. was

appropriate. In *Mirro Corp.*, the deponent refused to answer questions during his deposition, alleging that his answers may incriminate himself and claimed a Fifth Amendment right to remain silent. *Id.* The trial court dismissed the deponent's case for his refusal "to answer properly propounded questions at deposition on the improperly asserted ground of privilege." *Id.* at 686. The trial court found the "claim of privilege 'meritless' and that 'its only purpose was to delay these proceedings and to deprive the defendants of their rights to civil discovery.'" *Id.* (emphasis added) (quoting the trial court's decision). The Court of Appeals upheld the trial court's dismissal of the action because of the bad faith dilatory tactics deponent had engaged in. *Id.* at 688, 434 N.W. 2d at 110.

While Mr. Rongstad urges the Court to equate "unsubstantiated" with "frivolous," citing *Mirro Corp.* (Def. Br. at 26), that case simply provides an egregious example of

a abused claim of privilege that falls considerably short of the *prima facie* showing of *NAACP v. Alabama* and *Buckley v. Valeo*. It is does not define the upper bounds of what must be presented before a constitutional privilege is "substantiated."

Here, however, as in *Mirro Corp.*, Mr. Rongstad asserted a meritless constitutional privilege each time he has refused to answer proper deposition questions. The circuit court addressed his claim of privilege numerous times.[14] Each time, the circuit court found that Mr. Rongstad failed to substantiate grounds for a constitutional privilege and that he was to respond to questions regarding membership in AWW.

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[14] Mr. Rongstad (Def. Br. at 17) and ACLU (ACLU Br. at 3) assert that defendants should have had an opportunity to brief the matter. This claim is simply untrue. First, as listed above, for the February 4, 2003, motion to compel hearing, Judge Nowakowski reviewed at least nine cases presented by Mr. Crooks and heard argument on two occasions related to the claim of privilege before ruling for the first time that there was no substantiated privilege. *See* supra n.4. After the February 4, 2003 discovery order was issued, this matter was briefed by both parties at least six times to the trial court and twice to the Court of Appeals. There were eight hearings on the issue of privilege before the trial court. As the lengthy record in this case indicates, there was no lack of briefing on the issue. Each time the courts found that the privilege was not substantiated.

Mr. Rongstad was purposefully evasive, presumably to conceal the unnamed defendants. As the trial court held, Mr. Rongstad's conduct was egregious and in bad faith.

Finally, Mr. Rongstad's citation to the Court of Appeals' certification petition is not persuasive. (Def. Br. at 23, 25.) A certification to the Supreme Court is not a decision on the merits, but a recognition that "unusual circumstances exist" that warrant direct review by this Court. *See State v. Schillcutt*, 119 Wis. 2d 788, 806, 350 N.W.2d 686 (1984). The Court of Appeals' decision denying Mr. Rongstad's supervisory writ, however, is a finding that the trial court did not act lawlessly in finding that Mr. Rongstad had not presented a substantiated claim of privilege.

II. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION WHEN IT IMPOSED SANCTIONS BEFORE FORMALLY RULING ON RONGSTAD'S MOTION TO DISMISS.

Mr. Rongstad asserts in his brief that the trial court "refused" to schedule a hearing on his motion to dismiss. (Def.'s Br. at 31; *see also* ACLU Br. at 16-17.) The record reveals no such refusal; to the contrary, the court set a briefing schedule on the motion. Nothing in the voluminous trial court record indicates that he objected to the court's scheduling order on the motion to dismiss or to the motion to stay the merits proceedings pending disposition of the insurance coverage claims. He did nothing to advance the motion to dismiss. Therefore, Mr. Rongstad has waived this argument that is brought up for the first time on appeal. *See Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 255 (1977).

In any event, the motion was not filed until *after* the trial court ruled that Mr. Rongstad had to comply with Senator Lassa's discovery demands. (R. 24 (The motion to dismiss was filed on February 11, 2003, after Judge Nowakowski had issued his discovery orders.).)

Additionally, the record shows that Judge Nowakowski found urgency in resolving the discovery disputes. In deciding the discovery dispute immediately, he noted that if Ms. Lassa were to clear her name in a meaningful way, she needed to discover the parties responsible for the mailer before the special election for the State Senate seat. (Appx. 34; R. 145:19; R. 143:10.)

Mr. Rongstad also argues, without any citation to legal authority, that the sanctions should now be reversed simply because the trial court should have explicitly ruled on his motion to dismiss before ordering him to comply with Ms. Lassa's discovery demands, even though the court ultimately denied his motion. His argument about the timing of the motion to dismiss is moot and should not be grounds for overturning the circuit court's decision. *See Evelyn C.R. v. Tykila S. (in re Jayton S.)*, 2001 WI 110 ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768 ("For an error to 'affect the substantial

rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." (quoting Wis. Stat. § 805.18(2))). As discussed above, because the trial court correctly found the mailer was on its face defamatory, Mr. Rongstad cannot show any prejudice from the trial court's failure to issue a formal decision on a different timetable and the sanctions should stand.

III. THIS RECORD DOES NOT SUPPORT THE COURT'S EXERCISE OF ITS SUPERINTENDING AUTHORITY.

Mr. Rongstad claims that he should have an absolute right to appeal an assertion of privilege and asks the Court to create such a rule by exercising its state constitutional superintending authority. (Def. Br. at 28-31.) Mr. Rongstad's request for the Court to adopt such a broad rule is unwarranted based on the record in this case.

First, Mr. Rongstad did not even attempt to appeal the matter through a timely permissive appeal upon the trial court issuing its written discovery orders. On March 4, 2003, the Court of Appeals denied Mr. Rongstad's petition for leave to appeal the court's February 4, 2003 discovery order because Mr. Rongstad did not submit argument on the merits before the time had lapsed to do so. (Supp. Appx. 40; Mar. 4, 2003, Order, Ct. App. Case No. 03-0309-LV.) Additionally, Mr. Rongstad did not seek leave to appeal the court's written contempt order of April 2, 2003. Instead he sought leave on the oral orders of the court and a supervisory writ directing the court to reverse its contempt sanctions. (R. 57; R. 56.) Therefore, he has no basis to claim that the system that is now in place was inadequate for his purposes. *See Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996) ("This court will not exercise its superintending power where

there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court") (internal quotation omitted).

The Seventh Circuit concluded that discovery orders in which privilege has been asserted need not be subject to a "blanket rule" that such an order is immediately appealable. *Simmons v. City of Racine*, 37 F.3d 325, 328 (7th Cir. 1994); *see also Reise v. Board of Regents of the University of Wisconsin System*, 957 F.2d 293, 295 (7th Cir. 1992) ("even orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone"). In *Simmons*, the court noted that the party asserting the privilege may petition for a writ of mandamus if the party is convinced the court was wrong, *id.* at 329, just as Mr. Rongstad did in light of the court's discovery orders here. The Court of Appeals properly denied the supervisory writ, but Mr. Rongstad was afforded an adequate remedy to present this issue to a higher court.

Second, as discussed above, Mr. Rongstad's assertion of privilege was not substantiated. What he is therefore seeking is an automatic stay any time a party claims a meritless constitutional privilege that would allow otherwise properly named parties to delay litigation. As would be the case here, this could be used as a tactic to thwart a plaintiff from discovering who is responsible for a defamatory mailer and prevent her from clearing her name in a timely manner.

Finally, here, the circuit court has properly exercised its discretion to examine whether a substantiated privilege has been asserted and to weigh the interests of the parties involved. Given that there is no basis to overturn the court's exercise of discretion in this case, asserting superintending power based on Mr. Rongstad's assertions would cause a miscarriage of justice.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING THE DEFENDANTS.

As demonstrated above, the trial court correctly applied the proper balancing test and found no grounds for Mr. Rongstad to continue to conceal those responsible for the mailer. Additionally, the court correctly ruled that Ms. Lassa had stated a claim for defamation as a matter of law. Therefore, the court's discretionary decision to impose contempt sanctions should stand.

Mr. Rongstad argues that the trial court imposed "harsh" sanctions upon him. In granting the default judgment, Judge Sumi found Mr. Rongstad's conduct to be both egregious and in bad faith and that no lesser sanction would "address the persistence of the violation" by Mr. Rongstad in this case. (Supp. Appx. 34; R. 152:46.); *see Brandon Apparel*, 2001 WI App 205 ¶ 11.

Mr. Rongstad is incorrect when he claims that sanctions for violating court-ordered discovery must consider

the harm to the other party in choosing from a range of possible sanctions. (Def. Br. at 36.) "Willful failure to respond to deposition is a serious abrogation of a [party's] statutory duties, and harsh sanctions are within the trial court's discretion precisely for the purpose of discouraging such behavior." *Mirro Corp.*, 147 Wis. 2d at 688. A trial court is to tailor its sanction not to the harm suffered by the other litigant, but rather to the severity of the offending party's misconduct. *Allis Chalmers Corp.*, 162 Wis. 2d at 286.

Mr. Rongstad also argues that the trial court "[based] sanctions upon subjective determinations of the truth or falsehood of [his] testimony." (Def. Br. at 37-38, n.9.) The simple fact is the trial court did not rely on the apparent inconsistencies and probable falsehoods in Mr. Rongstad's deposition when it imposed sanctions and certainly made no actual findings of perjury or false swearing. The court simply

ruled that Senator Lassa had not been able to move her case ahead due to the intentional contemptuous behavior of Mr. Rongstad.

Mr. Rongstad repeatedly and openly flaunted the trial court's orders, making it impossible to proceed with the litigation. The court did not err in its decision to grant sanctions, including the default judgment. (*See* Supp. Appx. 34; R.152:46; *see also generally* R.152:43-46.)

CONCLUSION

Mr. Rongstad has not demonstrated that AWW's members are entitled to a First Amendment protection because it is a sham organization. Even in applying the balancing tests set out in *NAACP v. Alabama* and *Buckley v. Valeo*, Senator Lassa's interests in discovering the proper parties to her defamation action prevail. Senator Lassa presented a *prima facie* case of defamation arising out of the negative postcard accusing her, by implication and innuendo,

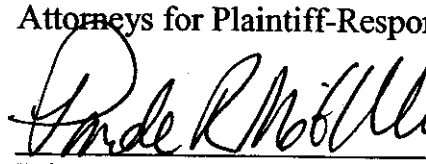
of unethical and illegal conduct. Therefore, Mr. Rongstad had no legitimate First Amendment privilege to justify his refusal to abide by the rules of discovery and the trial court's orders. Hence, sanctions were appropriate. The timing of the trial court's decision on Mr. Rongstad's motion to dismiss affords him no relief; at worst, it was harmless error.

For these reasons, Julie Lassa respectfully requests that the Court affirm the order of the trial court and the sanctions imposed, requiring Todd Rongstad to pay the $65,000.00 to Senator Lassa's attorneys and to the School Fund and granting the default judgment.

Dated this 27th day of April, 2005.

Respectfully submitted,

GARVEY & STODDARD, S.C.
Attorneys for Plaintiff-Respondent



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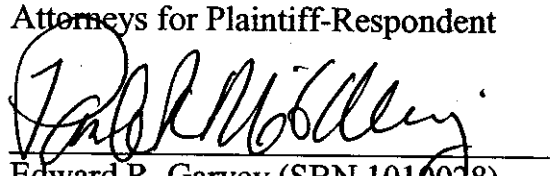
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,971 words.

Dated this 27th day of April, 2005.

Respectfully submitted,

GARVEY & STODDARD, S.C.
Attorneys for Plaintiff-Respondent



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SUPPLEMENTAL APPENDIX

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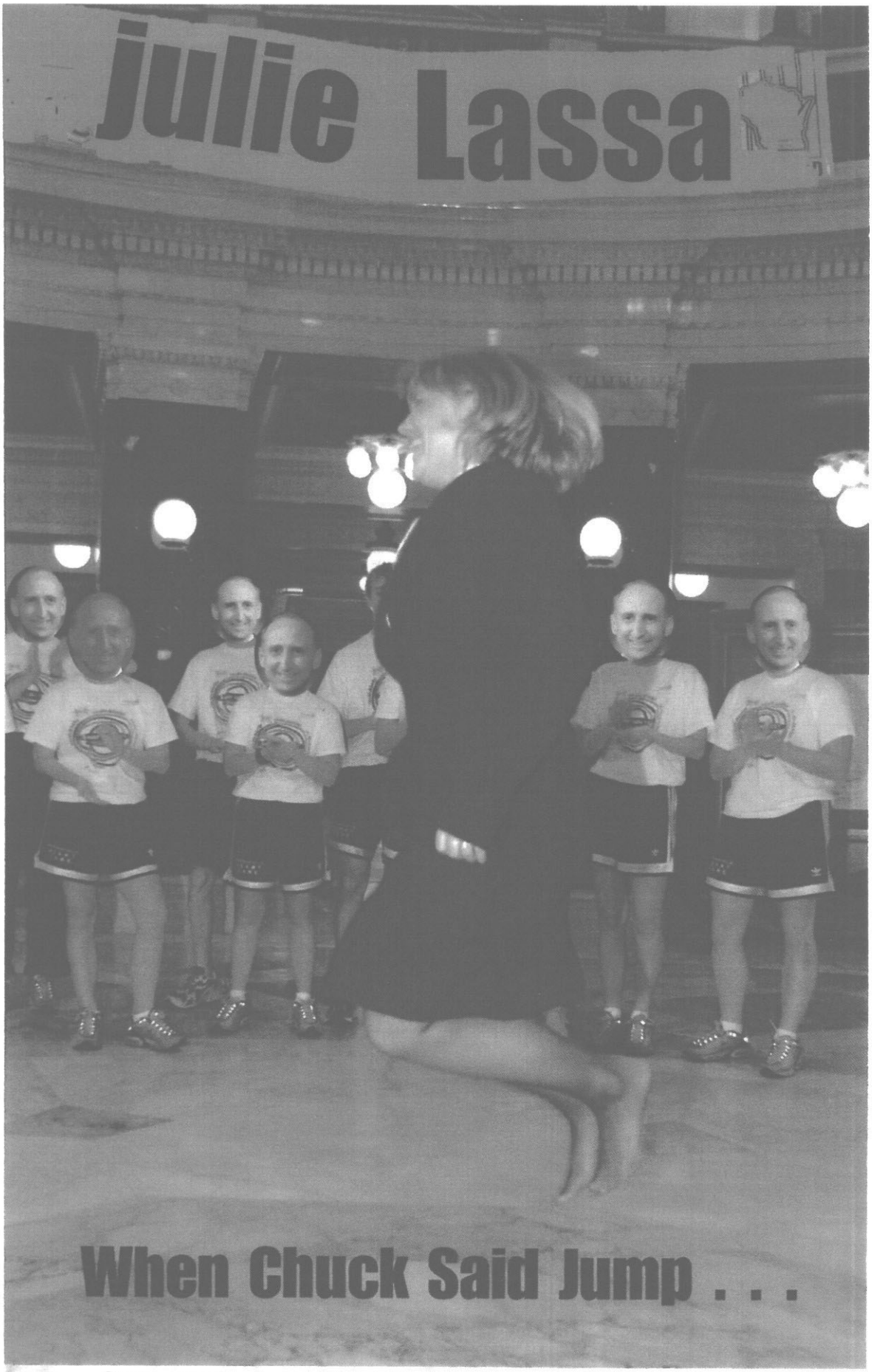

State senator faces 20 felony counts, up to 85 years in prison

Chvala charged with extortion

Jensen, other GOP
awmakers expected

Lassa Wanted To Be A State Senator,

So She Hooked Up With Chuck Chvala.

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Issue Advocacy In The Public Interest
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A Tale of Wisconsin Politics

One day, Representative Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.

Nobody knows for sure what she had to promise to gain his approval. But Chuck wanted a more compliant senator, so he got to work.

What he did best was fundraise with unsubtle threats. Populist Chvala even sponsored a Lassa fundraiser at the state's ritziest country club.

Chvala didn't care much for dissent. And he was giddy with the idea of Senator Julie.

Just like the old days when party bosses made decisions for us all.

But then Lassa's mentor was charged with 20 felonies and **things fell apart.**

The End?

CHVALA, CHARLES JOSEPH

Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa (342-0526) and the rest and ask them the tough questions -- did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections?

And, most importantly, will you please clean up your act?

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Julie M. Lassa,

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

Todd Rongstad,
The Valkyrie Group, LLC,
and
Does 1-5, in their individual capacities,

Defendants.

AFFIDAVIT OF EDWARD R. GARVEY

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

NOW COMES Edward R. Garvey, being duly sworn and upon oath, deposes and states as follows:

1. That I am an attorney with the law firm of Garvey & Stoddard, S.C., who represents the plaintiff in the above-captioned matter.

2. That on April 4, 2003, Defendant Rongstad, by his counsel Michael Crooks, provided me illegible photocopies of documents purporting to name contributors to the Alliance for a Working Wisconsin ("AWW") for the period of January 1, 2002 to April 4, 2003. These documents (attached hereto as Exhibit 1) were accompanied by a cover letter from Attorney Crooks, and were attached as exhibits to an Affidavit

All

AWW

LARGE

Deposits

2002

EXHIBIT C

DEPOSIT TICKET

FIRSTAR BANK, N.A.

DATE 1-4-2

CURRENCY

COIN

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1227.61

TOTAL ITEMS

PLEASE BE SURE ALL ITEMS ARE PROPERLY ENDORSED

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ALLIANCE FOR A WORKING WISCONS
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WAUNAKEE, WI 53597

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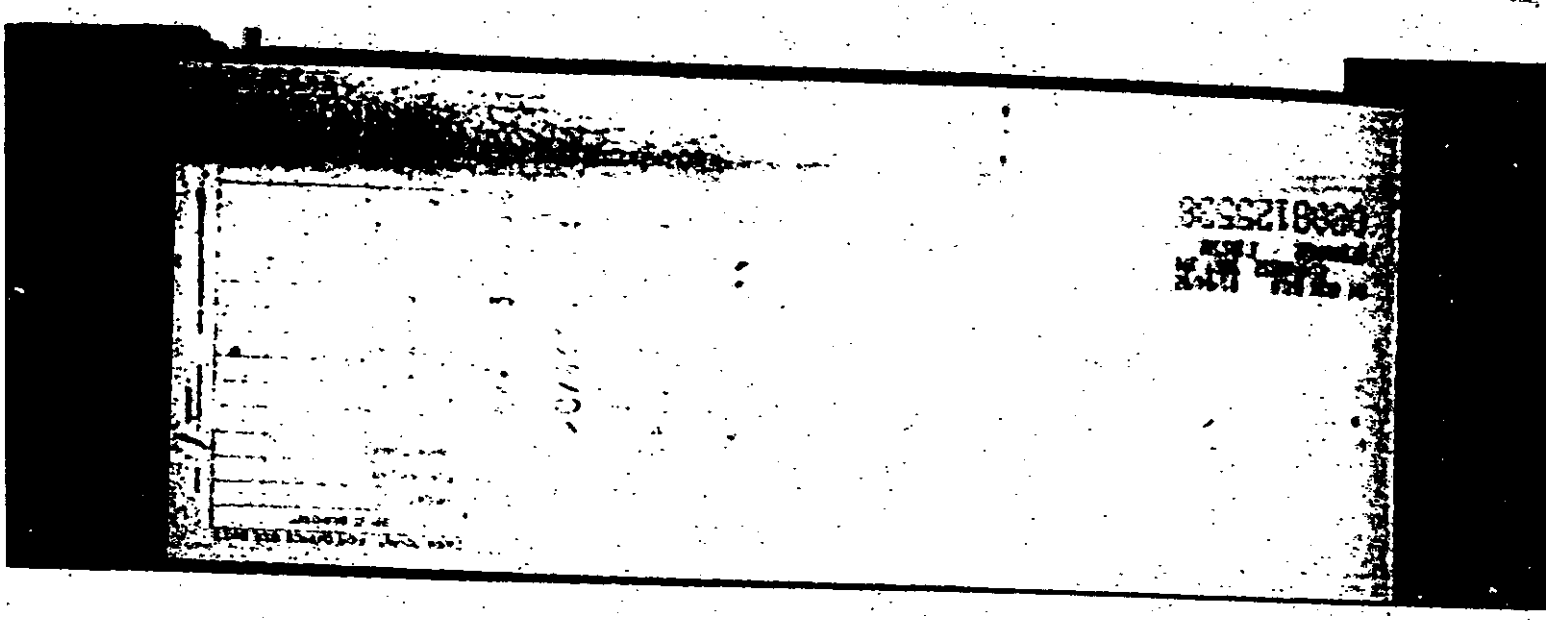

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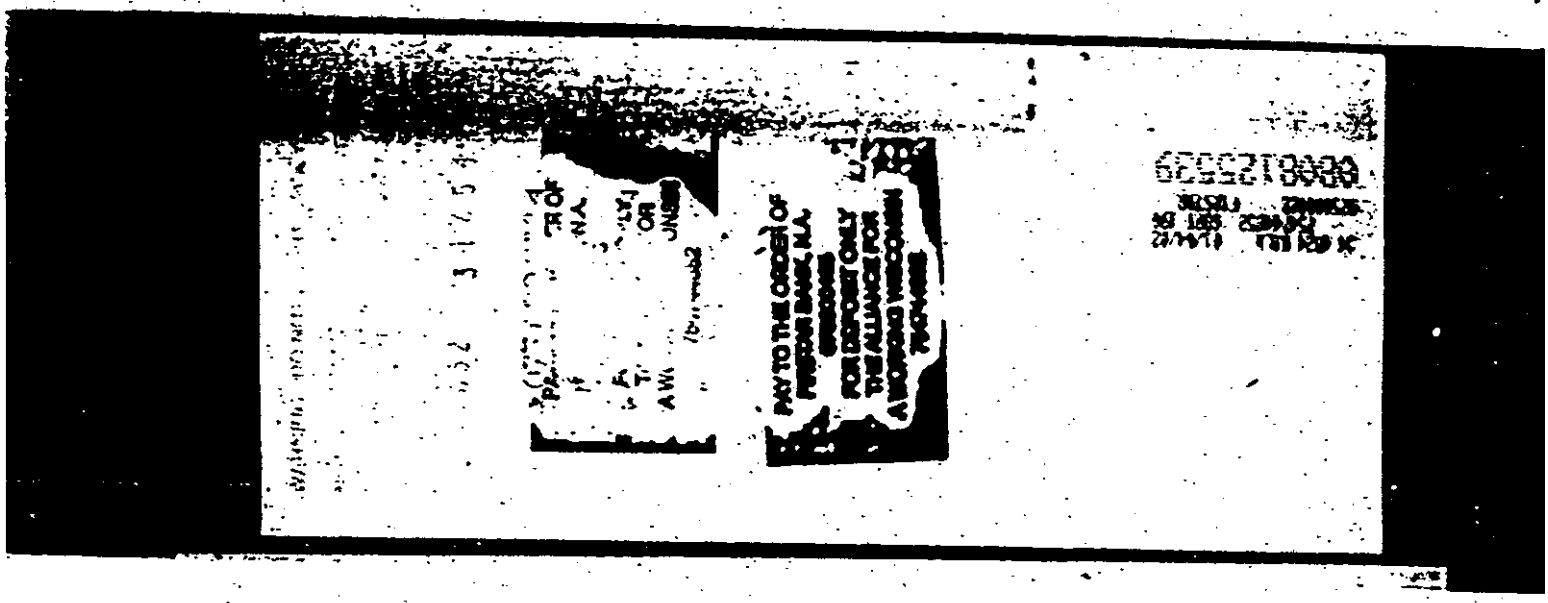
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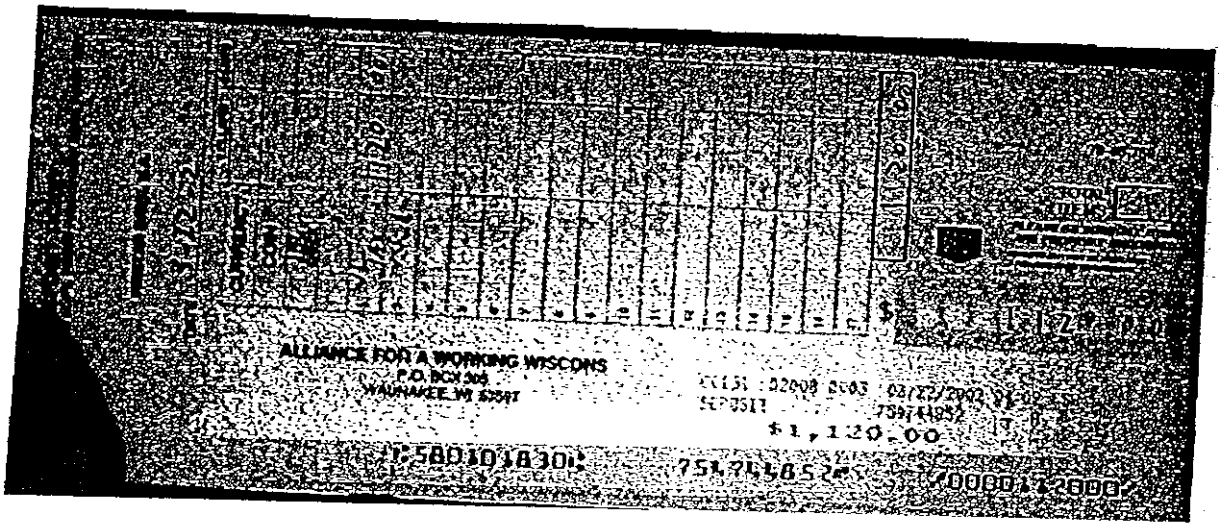
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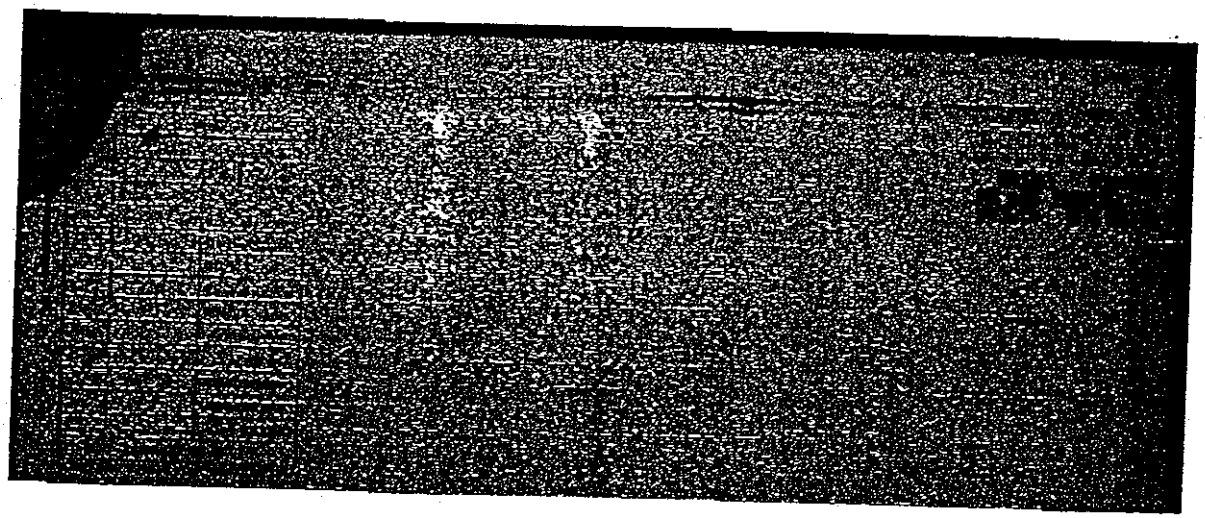

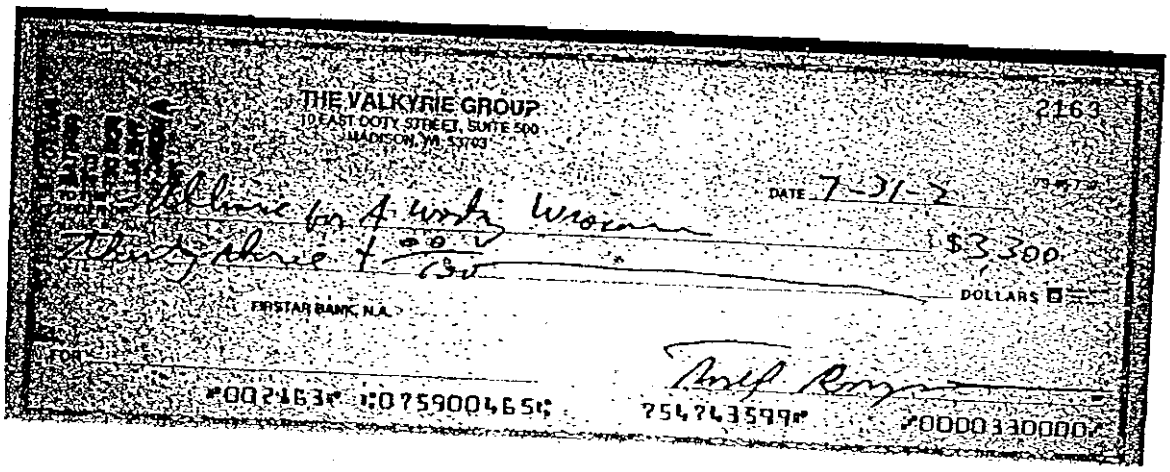
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10 EAST DOTY STREET, SUITE 500
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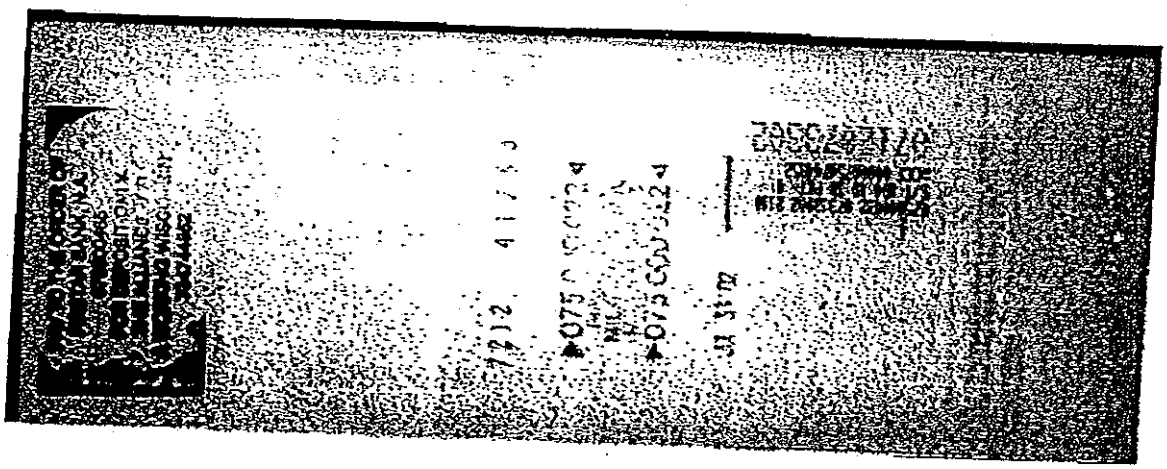

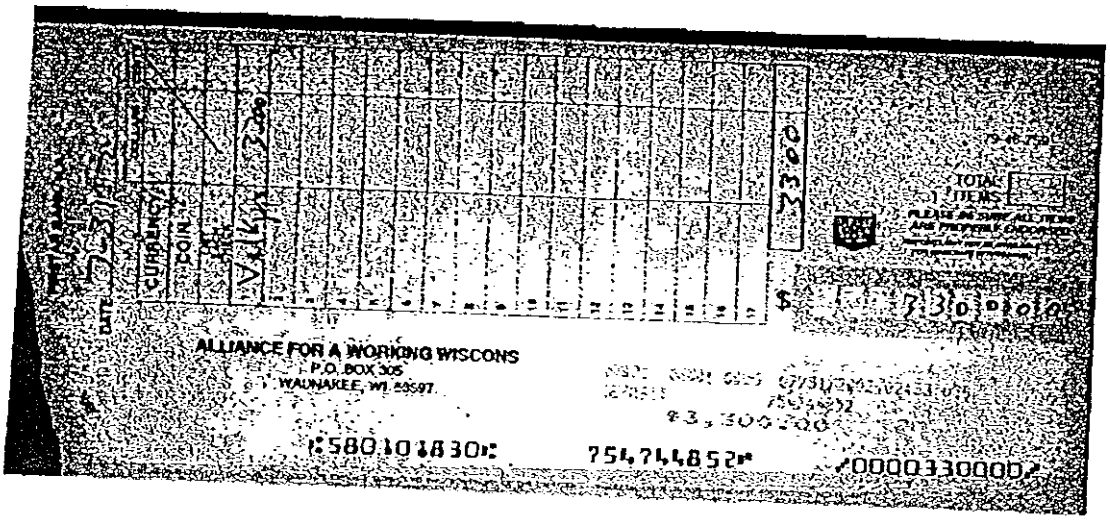
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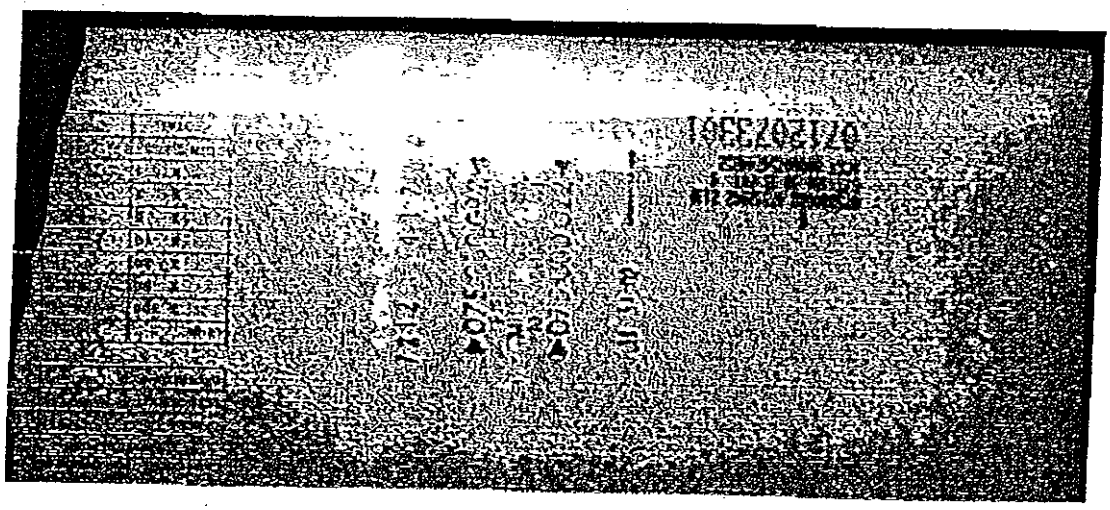

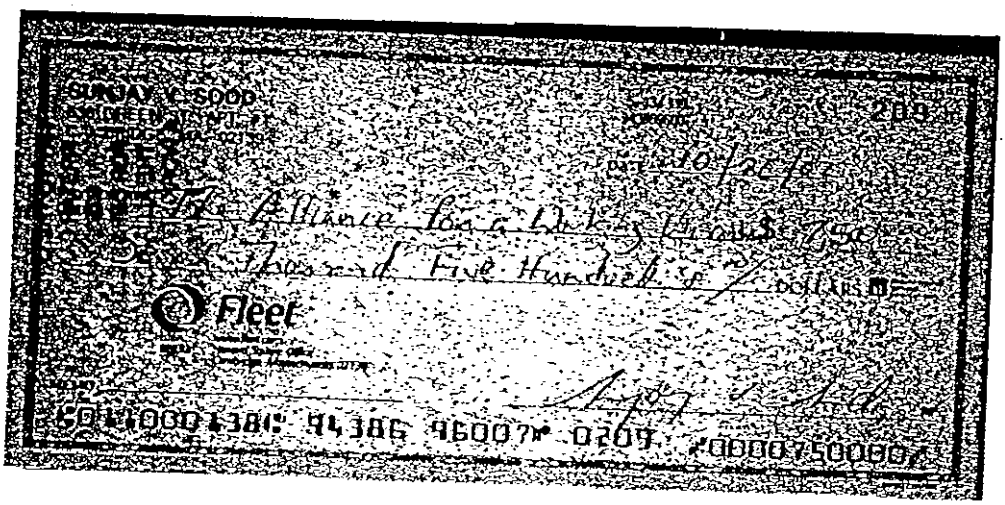
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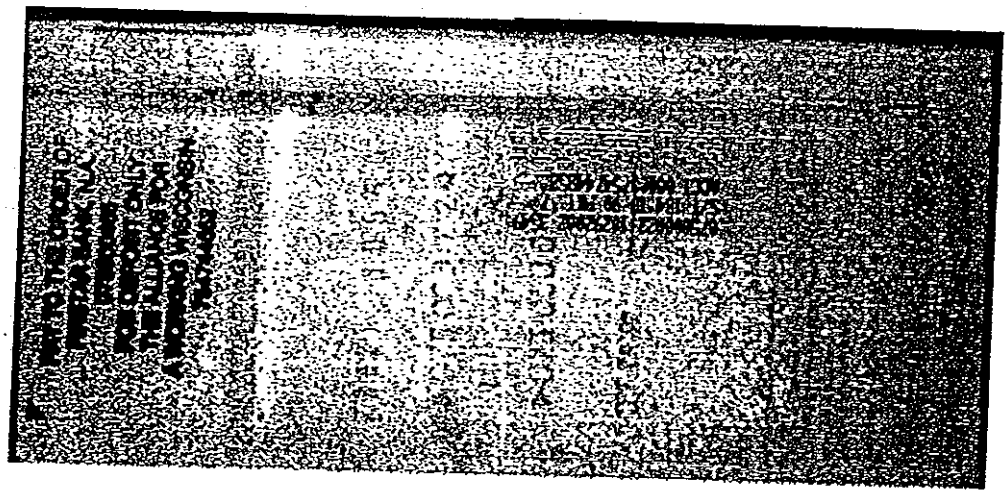

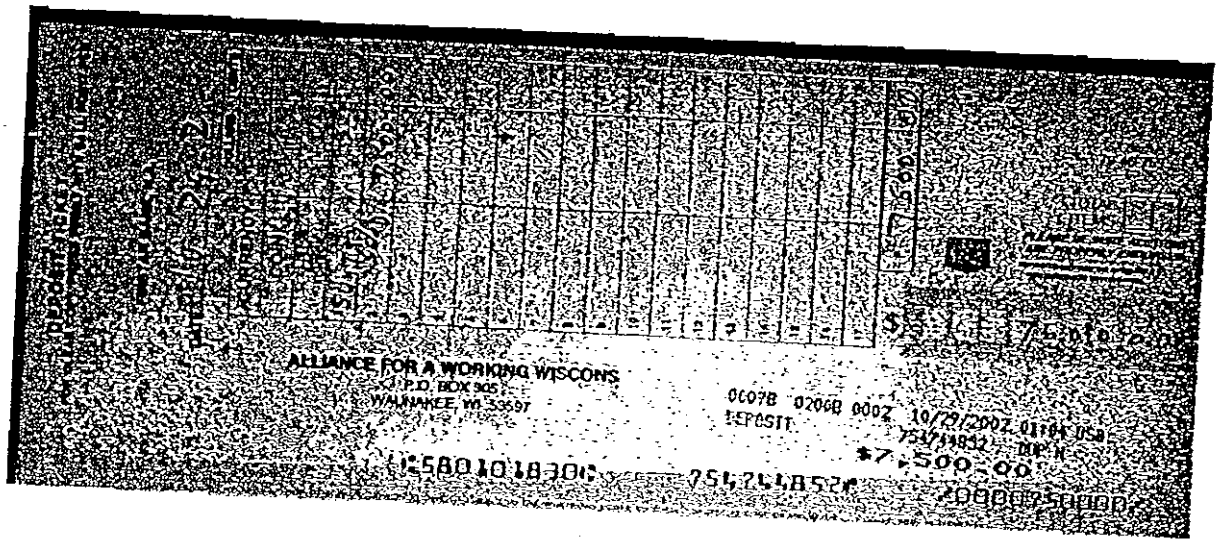
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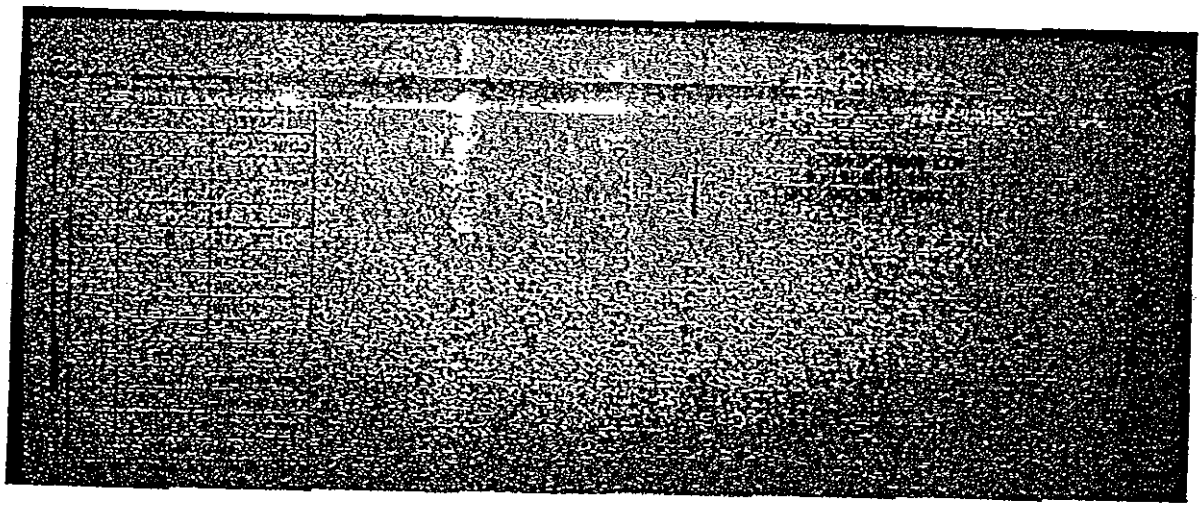

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

- -

JULIE M. LASSA,

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC.,

and

Does, 1-5, in their individual capacities,

Defendants.

- -

TRANSCRIPT OF PROCEEDINGS,

taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, JESSICA WENDORFF, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Madison, Wisconsin, on the 3rd day of February 2003, commencing at 4:16 o'clock in the afternoon.

1 in the deposition. But it goes much further
2 than that and indicates once we get into issues
3 of membership, which we're now into, that they
4 don't have a right to have that information.
5 MR. GARVEY: Why are we into it if
6 all we're asking is who he talked to about
7 this? We're not asking whether they're members
8 of this Alliance for a Working Wisconsin issue
9 advocacy and public interest group.
10 MR. CROOKS: Because the very people
11 he spoke with about it are members of the
12 Alliance, and that goes to membership. And
13 those are questions the courts have said need
14 not be answered under the 1st and 14th
15 Amendments.
16 MR. GARVEY: This is your testimony
17 and not Mr. Rongstad. He has not said those he
18 talked to are members. He just said he won't
19 answer the question.
20 MR. CROOKS: Your Honor, so you get a
21 favor, he's saying, did you talk to Joe Wineke?
22 Did you talk to Governor Doyle? Did you talk
23 to -- and if by indicating that the membership
24 and the people he talked to are the same thing,
25 that is quite clearly going to the membership

1 that you are relying on.
2 MR. CROOKS: I will be happy to do
3 so, your Honor. They are numerous, but the
4 primary citation is NAACP versus State of
5 Alabama. And that is found at 357 U.S. 449.
6 It's a 1958 case. Buckley versus Valeo found
7 at 424 U.S. 1 (1976). Wisconsin Socialist
8 Workers versus E. Michael McCann, which is
9 found at 433 F. Supp. 540.
10 THE COURT: 433 F. Supp.
11 MR. CROOKS: 540.
12 THE COURT: How old is that case?
13 MR. CROOKS: How old, you Honor?
14 THE COURT: Yes.
15 MR. CROOKS: 1977.
16 THE COURT: All right.
17 MR. CROOKS: Then Gitlow versus
18 New York 268 U.S. 652.
19 THE COURT: When is this case from?
20 MR. GARVEY: From the 1800s.
21 MR. CROOKS: Bear with me, your
22 Honor.
23 MR. GARVEY: 1700s.
24 MR. CROOKS: Elections Board versus
25 WMC found at 227 Wis. 2nd 650.

1 MR. GARVEY: Is that it? Your
2 Honor -- well, are you finished, Mike?
3 MR. CROOKS: Bear with me a second.
4 Yes, your Honor, those are the primary cases.
5 THE COURT: Mr. Garvey, do you have
6 anything you want to state?
7 MR. GARVEY: Well, your Honor, we
8 have a defamation action. This is not a matter
9 before the Elections Board. It is not, as
10 Mr. Crooks argued in the Wilcox matter, a
11 matter of issue advocacy. We're trying to find
12 out who was involved in defaming our client and
13 is totally outside the realm of the Elections
14 Board rules and regulations. And we don't see
15 any 1st Amendment issue of asking who he talked
16 with to produce this piece of literature since
17 it was not designed for a particular election.
18 He wasn't employed by the candidate against
19 whom she was running when the election took
20 place three days later, and we just don't see
21 that NAACP versus Alabama or any of the others
22 have anything to do with it.
23 If you look at New York times versus
24 Sullivan, which, if you remember, Mr. Crooks in
25 your court argued gave absolute immunity,

1 which, of course, it does not. It was a matter
2 of whether something was written with malice
3 and intentional falsehood. That is in reality
4 probably the best authority. I don't have the
5 cite in front of me, Judge. But when a public
6 official is defamed, it's a heavy burden, of
7 course. But, nevertheless, it is not protected
8 speech as such. It's malice and whether there
9 has been an intentional falsehood.
10 MR. CROOKS: It's 376 U.S. 254, your
11 Honor. I would also direct the Court along the
12 same lines to a Wisconsin case
13 Torgerson versus Journal Sentinel found at
14 210 Wis. 2nd 524.
15 THE COURT: Where are you all in your
16 deposition other than --
17 MR. GARVEY: Well, we finished --
18 THE COURT: -- this line of
19 questioning?
20 MR. GARVEY: We've gone through
21 practically everything, except -- in fact,
22 Mr. McLeod kindly allowed me to ask the
23 questions for his client so we don't have to
24 worry about that anymore. We're at the point
25 now of getting into all the details regarding

1 the key element, which is the piece that we say
2 defamed our client. And if we can't get
3 answers to those questions, we're at somewhat
4 of a dead end at the moment. If we can, then
5 we can wrap it up rather quickly, I think, in
6 terms of who the other defendants should be.
7 MR. CROOKS: Judge, given the
8 importance of this issue -- and I think it's
9 really pivotal in the case itself -- I still
10 would request the opportunity to submit a short
11 brief to your Honor and can have it to your
12 Honor by the end of the day tomorrow, if that's
13 what you require.
14 MR. GARVEY: I mean if the answer is
15 we can't ask these questions, I don't know how
16 we can find out Does 1 through 5. I mean I
17 think we're at that point because Mr. Rongstad
18 has that information and no one else does.
19 Someone may, but we don't know who.
20 THE COURT: Well, I think I
21 understand the position you're taking. I am
22 not certain it is consistent with the law, and
23 that's why I'm going to take a look at the
24 cases that you've relied upon. And I'll do
25 that tonight. My understanding is that your

1 deposition was going to continue tomorrow.
2 What I would suggest is, Mr. Garvey, why don't
3 you set up a telephone conference at 9:30
4 tomorrow morning.
5 MR. GARVEY: All right.
6 THE COURT: I have got a 9 o'clock
7 motion hearing. I've got several other cases
8 before that but a 9 o'clock motion hearing that
9 should be done at 9:30, and I'll give an answer
10 at that point.
11 MR. CROOKS: I'm assuming your Honor
12 is denying the opportunity to file briefs?
13 THE COURT: I am. I'm just saying I
14 will consult cases that you've just cited to
15 me, and, as I say, we'll give you a ruling on
16 this tomorrow.
17 MR. GARVEY: We'll suspend the
18 deposition until then.
19 MR. CROOKS: Judge, let me just give
20 you one more then if your Honor's going to look
21 at them tonight. It's McIntyre versus the
22 Board of Elections. I will fax this cite to
23 your Honor and to Mr. Garvey because I don't
24 have it on my summary memo. Actually, I do.
25 Here, your Honor. It is 115 Supreme Court 1511

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

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JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

MOTION FOR RECONSIDERATION
Case No. 03-CV-177

COPY

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 6th day of February, 2003, commencing at 10:05 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

1 justifies further inquiry of Mr. Rongstad, and that
2 is that the organization of which Mr. Rongstad is
3 apparently the CEO has a board of directors, and the
4 board of directors makes decisions about what
5 projects to fund. Mr. Garvey is entitled to find
6 out, and Mr. Rongstad shall answer, as to who are the
7 board of directors and who were the people who are
8 the board of directors.
9 MR. CROOKS: Judge, he has answered those
10 questions already.
11 MR. GARVEY: We do know two other board of
12 directors who -- the two members who reside in
13 Minnesota. There are three listed in the DFI
14 documents.
15 THE COURT: And so, what more are you
16 asking for then?
17 MR. GARVEY: Well, for example, your Honor,
18 we took Mr. Rongstad's affidavit and asked him to
19 disclose the identity of the members who approached
20 him. He refused on grounds of First and Fourteenth.
21 We asked him who the members are who have contributed
22 the funds for this, and he says again it's the First
23 and Fourteenth. And so, we reminded him of your
24 Honor's order, and he will not answer any question
25 about any person who hired him, suggested to him that

1 they do this hit piece on Miss Lassa.

2 If we're to listen to Mr. Rongstad, because he

3 will not answer questions about who is involved in

4 the actual determination of the selection of this

5 particular target, we're at a loss. And so, despite

6 the Court's order and without any urging from

7 counsel, from Mr. Crooks, he simply continues to

8 refuse to answer the key questions about where the

9 money's coming from and with whom he discussed the

10 design and the decision really, which is even more

11 important because, as your Honor knows, this race is

12 coming up. Next Tuesday the Governor will announce

13 when the special election is going to be held.

14 And so, since he won't tell us who decided why

15 this district out of 99 was selected for this hit

16 piece dealing with a Senate seat when Miss Lassa was

17 about to be reelected to the Assembly again, all we

18 can do is ask him the names of anybody that comes to

19 mind that might have an interest in politics in the

20 Stevens Point area.

21 So he is continuing, and I think your Honor will

22 see the transcript to assert that he knows what his

23 First and Fourteenth Amendment rights are, and he's

24 not going to be deterred by the Court.

25 MR. CROOKS: Judge, that's simply not an

1 according to Mr. Rongstad he makes a mental decision
2 who's going to be admitted, and we know that it now
3 can be entities, including parties or ideological
4 groups or unions or others.
5 And so, if we knew who those entities are that
6 may have contributed, then we can add Does 1 through
7 5. Without that information, Mr. Rongstad says he
8 will fall on his sword, say it was totally his idea
9 because he was taking directions from the Alliance
10 For Working Wisconsin, which he heads, but he won't
11 tell us anything about it other than what it doesn't
12 do. It doesn't get financial reports, doesn't get
13 newsletters, has no vote, doesn't make
14 determinations. But some entity or some human being
15 within that group consulted with him to decide they
16 were going to go after Miss Lassa. He won't answer
17 those questions.
18 MR. CROOKS: Judge?
19 THE COURT: Mr. Crooks, if I understand
20 correctly, this is an amorphous organization, but
21 apparently people contribute money to it?
22 MR. CROOKS: In some instances. People
23 contribute money. People -- Mr. Rongstad went
24 through five things, and I don't recall them off the
25 top of my head as to what people can do to become

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

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JULIE M. LASSA,

COPY

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

==========

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel **EDWARD R. GARVEY and CHRISTA O. WESTERBERG,** Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:
ATTORNEY DAVID J. PLINER, Corneille Law Group, LLC

1 Additionally, your Honor, I think that bearing
2 in mind that what we're dealing with here is a
3 situation where once the answers come out, once any
4 members are disclosed or once any contributors are
5 disclosed, it's a situation where the bell can't be
6 unrung by an appellate court.
7 And the Court knows there are at least, in our
8 viewpoint, significant constitutional issues involved
9 here, free speech and freedom of association. The
10 Court has, after careful consideration, essentially
11 ruled that you do not believe that those outweigh the
12 rights of Miss Lassa to know the information that has
13 now been disclosed at the deposition. I don't think
14 the Court's order goes beyond that.
15 If the Court disagrees and thinks that the
16 orders go beyond what is down on paper, in that
17 instance I would ask that the Court consider the
18 issues that we're dealing with and the Court also
19 recognize that you are not the court of last resort
20 with respect to these constitutional issues and that
21 until a court of last resort passes on the issues
22 here, that the Court be lenient with respect to any
23 order it may enter.
24 The plaintiffs have asked for something in the
25 neighborhood of $2,000 per day. I think that's,

STATE OF WISCONSIN CIRCUIT COURT Branch 13 DANE COUNTY

==========

JULIE M. LASSA,

COPY

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

==========

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 11th day of March, 2003, commencing at 1:15 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

Laura Stuessy, RMR
Official Court Rep

1 confronted on the 3rd, the 4th, the 5th, the 6th,
2 the 11th, the 28th and then the 3rd of March.
3 THE COURT: Mr. Crooks?
4 MR. CROOKS: Judge, most of what Mr. Garvey
5 says is accurate. There are a few issues that I'd
6 like to bring to the Court's attention.
7 First of all, I don't think Mr. Rongstad has
8 exhibited any disdain for the Court's order. The
9 only rationale given for not complying with the
10 Court's order and the consistent rationale throughout
11 has been his belief in his constitutional rights in
12 that once he discloses the name of the contributor or
13 the names of the contributors the Court has ordered
14 him to disclose, that those constitutional rights are
15 without any appeal. There's no value to the appeal
16 in this particular case.
17 To indicate that he hasn't -- that he showed up
18 without any documents and that he hasn't produced any
19 documents is simply not accurate, Judge. We've
20 probably produced, I don't know, a foot or so worth
21 of documents throughout the course of this; and in
22 fact, at the deposition he appeared with all of the
23 bank statements, or those that he had, and records of
24 deposits and what had happened to the money. The
25 only thing he has not disclosed is the name of the

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 2

* *

JULIE M. LASSA,
Plaintiff,
-vs-
DOES 1-5, In Their Individual Capacities,
Defendants,
TODD RONGSTAD and
THE VALKYRIE GROUP, LLC,
Defendants and
Third-Party Plaintiffs,
-vs-
ALEX PAUL,
Third-Party Defendant.

Case No. 03-CV-177

* *

DATE: August 15, 2003

PROCEEDINGS: Oral Arguments and Court's Decision

BEFORE: The Honorable **MARYANN SUMI**

A P P E A R A N C E S

EDWARD GARVEY and **PAMELA McGILLIVRAY**,
GARVEY & STODDARD, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appearing on behalf of the plaintiff;

MICHAEL CROOKS,
PETERSON, JOHNSON & MURRAY, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appearing on behalf of defendants Todd Rongstad and The Valkyrie Group;

MATTHEW O'NEILL,
FRIEBERT, FINERTY & ST. JOHN, S.C., Attorneys at Law, Two Plaza East, Suite 1250, 330 East Kilbourn Avenue, Milwaukee, Wisconsin, appearing on behalf of third-party defendant Alex Paul.

COPY

Reported by **Geri Elveru**
Official Court Reporter

1 In the affidavit that was submitted in support of the motion
2 for reconsideration, Mr. Rongstad had told the court: "My
3 members have told me that if I'm compelled to disclose who
4 they are that they would no longer be interested in
5 participating in the organization for fear of public reprisal
6 and potential legal action."
7 Judge Nowakowski said that's not enough. Under the
8 *NAACP* case and *Buckley vs. Valeo*, simply fear of potential
9 legal action doesn't trigger the kind of constitutional
10 protection that Mr. Rongstad was seeking.
11 Also, in denying the motion for reconsideration and
12 requiring the deposition to continue, Judge Nowakowski said,
13 "Seldom have I seen such an abuse of the discovery process."
14 I say that not because I'm necessarily adopting that view,
15 but that as early as February 6th of 2003 Judge Nowakowski
16 was viewing this dispute as having taken on a persistence and
17 a pattern that he labeled abusive. Okay.
18 Next, on February 18th, we have the plaintiff's
19 motion for a protective order, asking that Julie Lassa's
20 deposition be delayed. And the court granted the motion in
21 part as I read it. He said well, only until March 15th. But
22 again, he notes that having reviewed the file between the
23 parties' appearance in court on February 6th and
24 February 18th, he said it still appears that Rongstad is
25 violating the court's order. And he said this after having

1 orders in this case are the law of the case, and I believe I
2 have to follow them. As we sit here today, we are no closer
3 to finding the answers to the questions that were propounded
4 to Mr. Rongstad by deposition and by other means than we were
5 back on April 4th, except for one provision, and that is
6 Mr. Rongstad did make himself available for deposition. He
7 said that he would be deposed on April 15th, and it was
8 Mr. Garvey who declined that opportunity.
9 But that in itself does not -- that's only a partial
10 answer to the question. Mr. Garvey should have, obviously,
11 deposed him, but given the state of the record on April 4th,
12 which was the date of compliance, when compliance should have
13 been made, the record was such that there was clear
14 noncompliance with Judge Nowakowski's orders.
15 So I will find that Mr. Rongstad continues to be in
16 contempt of Judge Nowakowski's two written orders in this
17 case, those dated February 4, 2003 and the order dated
18 April 2, 2003. For that reason I'm denying his motion to
19 grant him relief from orders.
20 Now, that takes us to the sanctions motion from
21 Mr. Garvey. Go ahead.
22 MR. GARVEY: Your Honor, so much has been covered
23 already, I'll try to be as brief as I can and not go over
24 ground that's already been discussed. But we find ourselves
25 in a position where as I said, thousands of dollars later,

1 his conduct without knowing that he was doing something that
2 was clearly unacceptable in the eyes of the law is not, is
3 just not in the realm of reality. He has proceeded without
4 justifiable excuse. Indeed, all of the excuses, reasons for
5 failure to comply have been made and rejected by the Court of
6 Appeals, by Judge Nowakowski, and today by me. He proceeded
7 without justifiable reason, knowing that his conduct could
8 put him in jeopardy of this very sanction, default.
9 I believe his conduct fits both the standard of
10 egregious conduct and bad faith. Mr. Garvey says, "Happily,
11 we have both." I don't think it's a happy day when someone
12 so disregards the process established under the law for the
13 orderly progress of a lawsuit, that we end up where we sit
14 today and the court having to make the orders that it has had
15 to make.
16 On a sanctions motion for discovery violations, the
17 court needs to consider whether a lesser sanction would be
18 sufficient. There is language under one of the cases that
19 suggests that a court need not consider a lesser sanction if
20 conduct is intentional. That's the *Brandon Apparel Group vs.*
21 *Pearson* case. Again, a 2001 case, Wisconsin Appeal 205. But
22 despite that holding, I have tried to consider what would
23 restore this case on a footing that allows it to go forward.
24 What could I do as a judge to compel compliance with not just
25 Judge Nowakowski's orders, but the law, the discovery

1 provisions that all parties are bound to comply with.
2 Frankly, ordering a deposition is not an adequate remedy. It
3 simply is not an adequate remedy at this point. That's been
4 tried, and Mr. Rongstad has stonewalled repeatedly in the
5 plaintiff's attempts to get the information that Judge
6 Nowakowski found the plaintiffs were entitled to have.
7 There is no lesser sanction than default judgment
8 that would address both my goal of trying to get this lawsuit
9 back on a footing that would allow it to proceed, or that
10 would address the persistence of the violation that we have
11 seen in this case.
12 So for all those reasons and with great regret, I
13 grant the motion for default judgment. It is not a judgment
14 on the merits, as you know. It is a judgment on liability
15 only. It reserves the question of damages for further court
16 hearing. I interpret that to be an evidentiary hearing. I
17 think that's what is required under the law. In my own mind
18 I'm not sure whether that's a jury issue or not, and I would
19 invite parties to address that issue. I'm not ready to
20 address it today, and I don't think we need to. What I would
21 do today is schedule this for a scheduling conference at
22 which we will address what further proceedings are going to
23 take place in this case, whether that is a jury trial or an
24 evidentiary hearing.
25 Before we close the record, is there anything else?

1 STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 2

2 ---

JULIE LASSA,
3 Plaintiff, TRANSCRIPT OF PROCEEDINGS
vs. Case No. 03-CV-177
4 DOES 1-5, in Their Individual
Capacities,
5 Defendants,
vs.
6 TODD RONGSTAD and
THE VALKYRIE GROUP, LLC,
7 Defendants and
Third-Party Plaintiffs,
8 vs.
ALEX PAUL,
9 Third-Party Defendant.

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10 ---

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CIRCUIT COURT DANE COUNTY, WI

11 DATE: October 3, 2003;
Madison, Wisconsin;
12
PRESIDING: The Honorable MARYANN SUMI
13 Circuit Court Judge;

14 APPEARANCES: The Plaintiff appears by ED GARVEY
and PAMELA McGILLIVRAY, Attorneys,
15 Madison, Wisconsin;

16 The Defendants appear by MICHAEL CROOKS,
Attorney, Madison, Wisconsin;
17
The Third-Party Defendant appears by
18 MATTHEW O'NEILL, Attorney, Milwaukee,
Wisconsin;
19
PROCEEDINGS: Motion for Reconsideration.
20
21
DEBORAH ZWIEBEL MANKE, RPR
22 Official Court Reporter
23
24 ORIGINAL
25

1 when you had, I think, the impression that you were bound
2 by what Judge Nowakowski said and what he thought relative
3 to the credibility of witnesses and whether that --
4 specifically the credibility of Mr. Rongstad, and whether
5 that raised to the level sufficient to allow for the entry
6 of default judgment.
7 THE COURT: I just --
8 MR. CROOKS: Go ahead.
9 THE COURT: I just want to straighten something
10 out here I think. As I reread the transcript of that
11 hearing, it appears that somehow my remarks about Judge
12 Nowakowski's statements about credibility were a basis for
13 my decision. They were not. I made no independent
14 finding on Mr. Rongstad's credibility. I wasn't in a
15 position to do that. I still am not today.
16 So if anyone here believes that I made some boot
17 strap credibility finding because Judge Nowakowski
18 inferred a lack of truthfulness from the statements that
19 were given, that's not the reason I made the decision I
20 did, and I think that's pretty clear from the transcript,
21 but I wanted to set that out right at the beginning.
22 MR. CROOKS: Well, just for the record, Judge, my
23 interpretation of the court's reliance on Judge
24 Nowakowski's finding on credibility is based upon the
25 transcript from the hearing of August 15th of '03 at pages

1 27 and 28 wherein the court indicates that Judge
2 Nowakowski has, in fact, found that Mr. Rongstad was not
3 truthful and that Your Honor did not sit at some sort of
4 trial de novo of what Nowakowski found and that you
5 believed that was the order or the law of the case. So
6 that was my misinterpretation then of what the court said,
7 if I'm understanding what the court is saying today.
8 THE COURT: Well, the credibility finding would
9 be a law of the case anyway. I adopted Judge Nowakowski's
10 statements about whether there had been compliance with
11 discovery orders, whether there had been violation of
12 discovery orders, but certainly not a finding about
13 credibility. But go ahead.
14 MR. CROOKS: With that clarification then I'll
15 leave Judge Nowakowski out of the remainder of the
16 argument. For the same reasons that the court in this
17 case denied the motion to dismiss, this court ought to
18 reverse its finding with respect to the default judgment
19 and let a jury decide the salient and relevant issues in
20 this case.
21 Take a look at the two discovery orders at issue.
22 The February 4th order, which is Exhibit B to my affidavit
23 to today's hearing, indicates due to Judge Nowakowski's
24 changes what is really at issue with respect to that
25 order. I came away from that hearing with the -- with a

1 yourself -- "I'm ordering him to disclose who it was that
2 gave the funding to the Alliance for a Working Wisconsin."
3 The question of who funded the postcard has already been
4 answered in his deposition. And Mr. Rongstad says, "My
5 organization paid for the postcard." So Mr. Garvey wants
6 to get beyond the organization and go to *well, okay who*
7 *funded the organization.* And that was what was at issue
8 in Judge Nowakowski's orders.
9 THE COURT: I think you're parsing those orders
10 into oblivion.
11 MR. CROOKS: Judge, there is no more information
12 available other than who funded the Alliance during the
13 period that Judge Nowakowski ordered and what the Alliance
14 did with the money. They funded the postcard. Sunjay
15 Sood gives a check to the Alliance, the Alliance uses that
16 check and its proceeds to fund the mailer. Mr. Garvey
17 says we haven't identified the contributor to the
18 postcard, namely Alex Paul. Well, Mr. Rongstad didn't
19 receive anything from Alex Paul. He received a check from
20 Sunjay Sood. He didn't know Alex Paul was the source of
21 the funds and that's been disclosed as well. And Alex
22 Paul came out at the end and said, "I was the source of
23 the funds to Sunjay Sood." The court asked how can this
24 litigation move forward. There's no other way for this to
25 move forward. With the information they have, the way to

1 believe, that there was a continuing failure to comply
2 with discovery -- with the discovery orders that Judge
3 Nowakowski entered in this case. I don't accept the
4 notion that he narrowed the scope of discovery to a single
5 question as has been posed by Mr. Rongstad's counsel. I
6 believe that what Judge Nowakowski was seeking was
7 compliance with all discovery orders, everything that
8 would lead to the full disclosure of the information
9 necessary to enable this case to proceed. That
10 information was required of Mr. Rongstad who, I believe,
11 as of this day he himself has not complied. Others have
12 stepped forward to provide information but the obligation
13 ran to Mr. Rongstad and not to other people.
14 I think I've already commented enough on the
15 claim of privilege. I said that I think it's a serious
16 question, when one does invoke a privilege, it needs to be
17 examined, and if it's a legitimate, a valid, a
18 substantiated privilege, that has to be honored. But in
19 this case it was thoroughly examined and the claim of
20 privilege was rejected by a court, not this court, but a
21 predecessor court who examined the relevant law and
22 exercised his judgment to decide that there was not a
23 substantiated claim of privilege. And I believe that
24 means a party then needs to pursue what remedies it has
25 but cannot continue to withhold discovery or refrain from

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DISTRICT IV

March 4, 2003

To:

Edward R. Garvey
Garvey & Stoddard, S.C.
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Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

You are hereby notified that the Court has entered the following order:

03-0309-LV Julie M. Lassa v. Todd Rongstad, Valkyrie Group, LLC, A.M. Mailing Services, Inc., and Does 1-5

Before Vergeront P.J., Dykman and Roggensack, J.J.

On February 24, 2003, we denied Todd Rongstad's request for a stay pending disposition of his petition for leave to appeal. The time for Rongstad to submit argument on the merits of the petition for leave itself and the time for filing a response has now elapsed without any filings by either party. Because it appears that Rongstad no longer wishes to seek interlocutory review of the circuit court's order,

IT IS ORDERED that the petition for leave to appeal is denied.

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN
SUPREME COURT

JULIE LASSA,

Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal No. 04-0377

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

Appeal from the Circuit Court for Dane County,
the Honorable Maryann Sumi presiding

REPLY BRIEF

PETERSON, JOHNSON & MURRAY, S.C.
Michael P. Crooks
State Bar No. 01008918

Attorneys for Appellants

P.O. ADDRESS:
131 W. Wilson Street, Suite 200
Madison, WI 53703
(608) 256-5220

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INTRODUCTION

As the Court of Appeals noted and the amicus briefs demonstrate, this case presents fundamental questions concerning whether and when a public official can use a defamation complaint to compel disclosure of her anonymous critics. Rongstad believes the answer is obvious—consistent with the admonition in *City of Littleton v. Z.J. Gifts*, 124 S.Ct. 2219, 2224-25 (2004) that "procedural rules and practices" should be tailored to "prevent First Amendment harms," trial courts should be instructed to ***first*** determine whether the public official has stated a viable defamation claim ***before*** allowing any discovery, and thereafter should allow parties to at least seek interlocutory review of constitutional privilege issues before resorting to the use of sanctions.

ARGUMENT

Ultimately, all of the issues presented by this case focus on a central question:

> Did the trial court act properly by imposing $65,000 in contempt sanctions on Rongstad for continuing to refuse to disclose names, pursuant to a constitutional privilege, after an order compelling him to do so?

Rongstad identified four reasons why the sanctions were inappropriate: (1) Rongstad asserted a valid First Amendment privilege; (2) *Burnett v. Alt* precludes the use of sanctions to force a party to choose between protecting a privilege and a meaningful appeal; (3) a court should decide a motion to dismiss before forcing a defendant to respond to constitutionally sensitive discovery; and (4) the sanctions were not rationally related to Rongstad's conduct.

Senator Lassa's primary response is to label Rongstad a bad actor, to label any case supporting the privilege as "inapposite," and to simply ignore the critical holdings of *Alt* and *City of Littleton*. Lassa also argues that the First Amendment does not apply, and that if it does it must "bend" to

her political needs. Finally, Lassa tries to create a "waiver" argument by misrepresenting a Court of Appeals decision. As demonstrated below, none of these arguments supports the trial court's actions.

I. The First Amendment Applies With Full Force to Defamation Claims Brought By Public Officials.

The first issue on appeal is whether Rongstad had a First Amendment privilege against compelled disclosure. Lassa tries to diminish the importance of the First Amendment privilege in several ways, each of which fails.

First, Lassa suggests the privilege must be strictly limited because it could otherwise "be misused [as] a cover for defamation." Lassa Br. at 2. Lassa cites ***no*** authority for the curious suggestion that First Amendment rights should be curtailed for fear that they might be "misused" to criticize public officials. To the contrary, First Amendment rights are at their zenith in the context of public criticism of elected officials. *See, e.g., Stromberg v. California*, 283 U.S. 359, 369 (1931) ("free political discussion . . . is a fundamental principle of our constitutional system"); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

Second, Lassa contends First Amendment protections extend only to "legitimate organizations," and that the Alliance "is a sham organization." Lassa Br. at 38, 74. In support, Lassa cites a decision ***reversing*** a contempt conviction against an NAACP official for refusing to produce membership records in a McCarthy-era communism investigation. *See Gibson v. Florida Investigation Committee*, 372 U.S. 539 (1963). Not only does *Gibson* fully support Rongstad's privilege claim (noting the "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs," 372 U.S. at 555), but nowhere does the opinion suggest what might be an "illegitimate" or "sham" organization. Surely, if First Amendment protections are to be cast aside, one must establish

more than Lassa's meager contention that Rongstad's testimony was inconsistent with the incorporation documents or that the organization is "not one of long-standing." Lassa Br. at 38-39. Indeed, Lassa does not and cannot gainsay that the Alliance was a registered 501(c)(4) organization engaging in free speech, critical of a public official, on behalf of a member of the organization.

Finally, Lassa argues that because she "presented a *prima facie* case of defamation" Rongstad "had no legitimate First Amendment privilege." Lassa Br. at 74-75. The Supreme Court memorably and forcefully rejected an identical argument that "the Constitution does not protect libelous publications":

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, ***libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.***

New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (emphasis supplied). *See also id.* at 273 ("[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct.").

II. Lassa Has No Meaningful Answer to Rongstad's *Prima Facie* Showing of a "Reasonable Probability" of Harassment or Reprisal.

Rongstad demonstrated that the requisite showing of a "reasonable probability" of harassment or reprisal is a "light" burden, and does not require any past record of harassment. *See* Rongstad Br. at 15-16, citing several defamation cases, including *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998), *In re Maurer*, 15 S.W.3d 256, 260 n.4 (Tex. App. 2000), and *Britt v. Superior Court of San Diego County*, 574 P.2d 766, 774 (Cal. 1978). Rongstad's affidavit detailed that Alliance members informed him that public

disclosure would dissuade them from further association for fear of public reprisal and legal action. *See* Appx. 4.

In response, Lassa labels Rongstad's affidavit as "conclusory" and cites a series of interrelated cases involving Department of Labor investigations of labor unions. Lassa Br. at 40-42, citing *Dole v. Local Union 375*, 921 F.2d 969, 974 (9th Cir. 1990), *McLaughlin v. Serv. Employees Union*, 880 F.2d 170, 175 (9th Cir. 1989), and *Friends Social Club v. Sec. of Labor*, 763 F. Supp. 1386 (E.D. Mich. 1991). None of these cases involved defamation claims. Moreover, the courts in each case noted that Department of Labor policy "protects the subpoenaed information from public disclosure." 921 F.2d at 974; 880 F.2d at 175; 763 F. Supp. at 1394. Not so here, as demonstrated by Lassa's immediate public censure of the former staffer who testified that Lassa used the caucus to help with campaign materials. Rongstad Br. at 18; (R. 127). Lassa's only rejoinder to this evidence of actual reprisal is to contend that these "assertions" were not made below and thus were "waived." Lassa Br. at 43 n.11. This is but one of the many Catch-22's posed by Lassa to defend the sanctions, as her vituperative actions were undertaken long ***after*** the trial court imposed the sanctions appealed here.

Ultimately Lassa's position boils down to the assertion that one must show a history of past harassment to make a *prima facie* assertion of privilege. Analogous defamation cases demonstrate this is not the law. *See, e.g., Maurer*, 15 S.W.3d at 260 n.4 ("mere potential for reprisals, even if only perceived by the party seeking protection, may be sufficient"). This makes sense, for without revealing the identities of Alliance members, there is little more that Rongstad could do to but testify himself about potential harm, and point out, properly, that Lassa's aggressive litigation itself demonstrated a potential for reprisal.

III. Lassa's Purported Interests in Disclosure Centered on Her Political Needs, Confirming the Importance of Carefully Employing Procedural Rules to Protect Core First Amendment Rights.

In Senator Lassa's view, the very fact that she ***alleged*** that a negative public mailer was defamatory, combined with her interest in "clearing her name in the estimation of her constituents" so that she could "run for a recently vacant State Senate seat," trumped any First Amendment rights that Alliance members may have had. Lassa Br. at 48-49. *See id.* at 48 (First Amendment rights "must bend to Julie Lassa's right to know").[1]

This position aptly demonstrates why defamation claims brought by public officials against their critics stand on a different footing than those brought by a private citizen. Plainly, Lassa's claim that she brought a "private action" as a "private litigant," Lassa Br. at ix & 44 n.12, is inconsistent with her actions. She brought this case and aggressively pursued constitutionally intrusive discovery for overtly political purposes, and used every ounce of her status as a public official to her benefit. An ordinary private litigant will not be heard to claim that constitutional interests must "bend" to their political needs. Senator Lassa should not be heard now to complain that the heightened standards applicable to public officials claiming defamation should not apply to her.

Equally hollow is Senator Lassa's attempt to dismiss the on-point authority cited by Rongstad as "private lawsuit cases." Lassa Br. at 57. By her own account this is also a "private" lawsuit. Lassa's substantive distinctions are unavailing. She claims that *In re Maurer* "assists" her case. Lassa Br. at 57. In that case, however, the defendant was allowed to appeal the

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[1] Lassa suggests (in a heading no less) that the trial court actually made a "finding" that the "mailer was defamatory." Lassa Br. at 50. This is false. The trial court found only that the mailer was "capable" of a defamatory meaning. (R. 154:4-5.) This overstatement of the record is consistent with Lassa's overstatement of the contents of the mailer, which neither states nor implies that Lassa broke the law, but merely highlights Lassa's ties to then-Senator Chvala. *See* Rongstad Br. at 32-35.

privilege issue ***before*** being forced to disclose names or face sanctions. 15 S.W.3d at 259. Lassa suggests that reliance on *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444 (Ill. App. 1988) is "misplaced" because the fear of reprisal here is "nothing so concrete" as the fear of being disciplined at work. Lassa Br. at 57-58. Yet Lassa's own actions in this case are far more "concrete" than anything at issue in *Crocker*. Finally Lassa contends *Britt* is "inapposite" because the discovery request was "vastly broader" than Lassa's requests here. *Id.* at 59. However, not only were Lassa's discovery requests every bit as broad (*see* R. 30 & R. 74), the nature of the discovery was not the basis for the critical legal holdings that the "threat to First Amendment harms may be more severe in a discovery context" and that the privilege applies to all "politically oriented associations." *Britt*, 574 P.2d at 772, 774.

The fact is that while Lassa's political desire for immediate discovery of the names of those behind the mailer may have been a compelling need for her campaign, it was not a compelling governmental interest outweighing the legitimate associational rights identified by Rongstad on behalf of the members of the Alliance.

IV. Lassa's Discussion of *Alt* Avoids the Dispositive Holding That It Is Error to Force a Party to "Make A Choice Between Protecting A Privilege And Avoiding Sanctions."

Rongstad faced a dilemma below. After being sanctioned—to the tune of $32,000, $1,000 per day until disclosure and possible default judgment—Rongstad informed the trial court that he wanted to at least attempt an interlocutory appeal ***before*** disclosing any Alliance members. (Appx. 7-9; R. 149 at 8.) *See Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003) (once "identities are disclosed" the "First Amendment claim is irreparably lost"). When the court refused to stay the sanctions pending an attempt at appeal, Rongstad was forced to choose between disclosing the names and thereby forfeiting his right to

a meaningful appeal, or protecting the privilege and facing continuing monetary sanctions and a default judgment.

Rongstad chose to immediately file petitions for interlocutory appeal and a supervisory writ. When those petitions were denied, Rongstad disclosed the names to prevent a default judgment.

Addressing a nearly identical situation, this Court held in *Alt* that it was error for a trial court to force a witness "***to make a choice between protecting a privilege and avoiding sanctions***." *Burnett v. Alt*, 224 Wis. 2d 72, 95, 589 N.W.2d 21 (1999) (emphasis supplied). Lassa simply ignores this dispositive holding, arguing that: (1) Rongstad failed to cite *Alt* "as a basis for his claim of privilege," and (2) *Alt* is "inapposite" because it involved an evidentiary privilege, not a constitutional privilege. Neither assertion has merit.

First, Rongstad had no reason to cite *Alt* with respect to the substantive privilege issue; that question revolved around *NAACP v. Alabama* and its progeny. Lassa's suggestion that the issue was "raised for the first time on appeal," Lassa Br. at 13 n.4 & 60, is baseless. Lassa stipulated and the trial court ordered that Rongstad could appeal the sanctions based upon *Alt*. *See* Appx. 13, 17. Moreover, Rongstad raised *Alt* as a bar to the sanctions before the trial court, R. 115 at 8, and in the petition for leave to appeal. *See* Appeal No. 03-742-LV.

Second, the *ratio decidendi* of *Alt* for purposes of this case is the holding that a trial court cannot use sanctions to force a party to abandon a substantiated assertion of privilege. Whether the plaintiff therein had an alternative source for the information is utterly irrelevant here. The closest Lassa comes to acknowledging the critical "rock and a hard place" holding of *Alt* is her argument that Rongstad's privilege claim was not "substantiated" because it was "meritless" and rejected by the trial court "numerous times." Lassa Br. at 63-64. The number of times the trial court addressed the issue cannot answer the question, however, because the point of *Alt* is that a court cannot use sanctions to make itself the court of last resort on a privilege

claim. With respect to the merits, Rongstad continues to believe strongly that the privilege applied and was violated. Even if ultimately rejected by a court of last resort, however, the claim itself was well-substantiated in the present circumstances, where supported by evidence and on-point authority.[2]

Ultimately Lassa has no answer to the common sense holding of *Alt*, consistent with basic notions of fairness and due process, that parties asserting legitimate privilege claims should not be forced to choose between protecting a privilege and avoiding sanctions.

V. The Court Should Exercise Its Superintending Powers to Protect First Amendment Rights.

Building on the core principle of *Alt*, Rongstad urges the Court to exercise its superintending powers to create a mandatory right to interlocutory appeal of a decision compelling disclosure over a constitutional privilege objection. Rongstad Br. at 28-31. In support, Rongstad cited the recent Supreme Court decision in *City of Littleton*, as well as recent decisions from the Supreme Courts of Pennsylvania and Maine holding that interlocutory appeal is a matter of right where "substantial" and "fundamental rights" could otherwise be lost. *See Melvin*, 836 A.2d at 50; *Fitch v. Doe*, 869 A.2d 722, 725 (Me. 2005).

Lassa fails to even cite these cases, demonstrating she has no good answer to the fundamental logic of ensuring that a party maintains the right to appellate review of a constitutional privilege.

Instead, Lassa argues that an exercise of the Court's superintending authority is "unwarranted," citing two Seventh Circuit cases holding that discovery orders involving privilege claims are not appealable under the collateral order exception to 28 U.S.C. § 1291. Lassa Br. at 68-71. Neither case involved a

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[2] Lassa also suggests that the trial court "ruled" that there was no "substantiated privilege." Lassa Br. at 64 n.14. While the trial court certainly rejected the privilege claim on multiple occasions, it never once suggested the claim of privilege was either frivolous or not "substantiated."

fundamental constitutional right. Rather, they involved routine discovery orders subject to "deferential" review that in "almost all" cases would be affirmed. *See Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992); *Simmons v. City of Racine*, 37 F.3d 325, 327 (7th Cir. 1994).

Here, the constitutional privilege is subject to *de novo* review, *Alt*, 224 Wis. 2d at 84, and there is no reason to believe that trials courts will be upheld in "almost all" cases. It is precisely because trial courts should ***not*** have the final say on constitutional privilege issues that the Court should heed the Supreme Court's instruction in *City of Littleton* that "procedural rules and practices" should be employed to "prevent First Amendment harms," 124 S.Ct. at 2224-25, and create a rule allowing interlocutory appeal as of right from orders compelling disclosure of a party's political associations.

VI. Lassa's Suggestion that Rongstad Did Not Timely Seek Interlocutory Relief Highlights the Impropriety of the Trial Court's Actions.

Finally, Lassa suggests that "Rongstad did not even attempt to appeal the matter through a timely permissive appeal." This argument is grossly misleading. The Court will recall the following chronology:

March 11, 2003	Sanctions order with daily forfeitures and April 4, 2003 default judgment deadline
March 14, 2003	Rongstad files petitions for leave to appeal and for supervisory writ
April 1, 2003	Court of Appeals denies petitions
April 2, 2003	Trial court enters written order
April 4, 2003	Rongstad discloses names

Lassa argues that the Court of Appeals denied the petition for leave "because the Court does not take permissive appeal from oral orders," and that Rongstad's failure to appeal from the April 2nd order effectively constitutes a waiver. Lassa Br. at 24, 69-70. Lassa ***fails*** to inform the Court that the Court of Appeals also stated that "[e]ven if the orders had been reduced to writing" it would have "den[ied] the petition" for failure to meet the statutory criteria. April 1, 2003 Order, at 2. Any petition from the subsequent written order would have been frivolous, and the decision not to pursue such a petition cannot now be deemed a waiver.

This sleight-of-hand waiver argument illustrates the impropriety of the trial court's failure to employ minimal procedural safeguards to protect the First Amendment rights at issue. Rongstad was certainly not defending ***himself*** by asserting the privilege; he already taken responsibility for the mailer. Yet in the wake of imposing severe sanctions, including daily forfeitures and a looming default judgment, the trial court not only refused to stay its order but failed to enter a written order until ***after*** the Court of Appeals decision, ***after*** $20,000 in forfeitures had accumulated, and just ***two days*** before the default judgment deadline.

CONCLUSION

Senator Lassa brought this defamation claim seeking the names of her critics in order to serve her political goals. The trial court wrongly concluded that Lassa's immediate political interests outweighed Rongstad's constitutional claims, and compounded the error by using sanctions to force Rongstad to forego the right to a meaningful appeal on the privilege. This Court should reverse the sanctions, and instruct that, consistent with *Alt* and *City of Littleton*, careful and deliberate procedural safeguards, including the opportunity for interlocutory review of constitutional privilege claims, must be employed where public officials allege defamation.

Dated at Madison, Wisconsin this 9th day of May, 2005.

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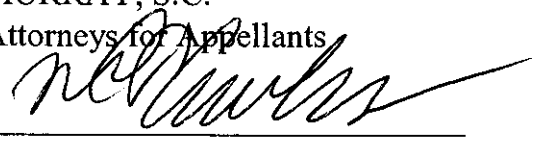

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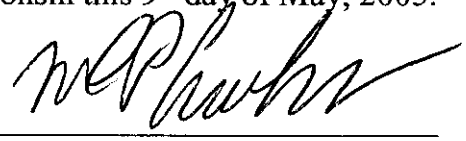
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

Dated at Madison, Wisconsin this 9th day of May, 2005.



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STATE OF WISCONSIN SUPREME COURT

JULIE LASSA,

Plaintiff-Respondent,

v.

Appeal No. 2004AP0377

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal from the Circuit Court for Dane County,
Hon. Maryann Sumi presiding,
On Certification from the Court of Appeals

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, WISCONSIN NEWSPAPER ASSOCIATION, WISCONSIN BROADCASTERS ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, WISCONSIN REALTORS ASSOCIATION, WISCONSIN BANKERS ASSOCIATION AND WISCONSIN BUILDERS ASSOCIATION

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May 9, 2005

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The facts of this case are, to say the least, unusual. Yet the principles at stake are universal.

The remarkably diverse group of organizations filing this non-party brief has little interest in the outcome of this particular dispute involving a state legislator and a political consultant. However, these organizations do care about the bedrock First Amendment values implicated whenever public officials bring defamation lawsuits against individuals or organizations daring to criticize them.

This Court should use this case to establish—and, in part, to reiterate—basic guidelines for defamation actions filed by public officials and public figures. If the Court does not do so, this lawsuit may become a roadmap for litigants hoping to hijack the legal system for political or retaliatory purposes.

The First Amendment interests raised by a public official's defamation action require a balanced, measured and

incremental litigation schedule with built-in safeguards to ensure that meritless suits do not adversely affect a defendant's constitutional rights or the public's interest. While justice delayed may sometimes be justice denied, there is no reason to trample due process in a stampede toward discovery or trial.

Here, long before the trial court ever determined whether the postcard at issue contained any language even capable of a defamatory meaning, it forced an organization to disclose information at the heart of its constitutional privacy rights. That should not have happened.

Where there are legitimate questions about the merits of a public official's defamation lawsuit on the face of the complaint, the court should provide an opportunity for the defendant to file and argue a motion to dismiss to a decision before allowing any discovery. Without at least a threshold determination of the merits of the case, it will be far too easy

for a public official to file a lawsuit, notice depositions to obtain the information or publicity desired (notwithstanding the assertion of a constitutional privilege), and drop the litigation. Careful trial court supervision of these cases, with a meaningful opportunity for interlocutory review, is essential. Without it, the First Amendment becomes an empty promise.

I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO CRITICIZE PUBLIC OFFICIALS, ESPECIALLY WHEN THAT CRITICISM IS DISPARAGING, ACERBIC AND EVEN INACCURATE.

Public officials need thick skin. They are under constant scrutiny and, by definition, cannot please everyone on every issue. Critics abound.

The role of the critic in the American political system, however, is every bit as crucial as the role of the public official. *See New York Times Co. v. Sullivan*, 376 U.S. 254,

282 (1964) ("It is as much [the citizen's] duty to criticize as it is the official's duty to administer."); *Arnold v. Ingram*, 151 Wis. 438, 457, 138 N.W. 111 (1912) (criticism of public officials is "the best security for the proper discharge of public duties."). People with the courage to speak their minds drive social and political change. Vocal dissent today can become commonly accepted wisdom tomorrow. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931).

For the last forty years, the United States Supreme Court has vigorously safeguarded the First Amendment right to criticize public officials. In its landmark *Sullivan* decision, the Court explained that "erroneous statement is inevitable in free debate, and...must be protected if the freedoms of expression are to have the 'breathing space'" needed to survive. 376 U.S. at 271-72. The threat of liability for "erroneous reports of the political conduct of officials," said

the Court, would countenance the "obsolete doctrine that the governed must not criticize their governors." *Id.* at 272.

Any standard that imposed liability for mere falsity would cripple public debate because, under any such standard, "would-be critics of official conduct may be deterred from voicing their criticism…doubt[ing] whether it can be proved in court or fear[ing] the expense of having to do so." *Id.* at 279. Accordingly, the Court held that the Constitution requires:

> a … rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "*actual malice*" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80 (emphasis added).

This "actual malice" standard has become a well-known and applied principle in Wisconsin, a barrier to public official defamation actions that threaten the public discourse that is the hallmark of democracy. *See, e.g.*,

Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 563 N.W.2d 472 (1997); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982). Make no mistake about it: political criticism can be acerbic and ugly. But courts have never required critics to wear kid gloves, nor should they. *See Sullivan*, 376 U.S. at 270 (debate on public issues will include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

There is a point, of course, at which speech can cross the constitutional line. *See Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). When political criticism includes demonstrably false and defamatory statements of fact, deliberately used, a public official has a right to seek redress through a defamation lawsuit. *See, e.g.*, *Garrison v. Louisana*, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with

the orderly manner in which economic, social, or political change is to be effected.").

Any defamation lawsuit brought by a public official, however, clashes directly and inevitably with First Amendment principles. These competing interests have collided in this lawsuit, giving this Court the opportunity to provide guidance on the procedure for resolving these competing interests when they arise again in Wisconsin.

Defamation plaintiffs may well feel far stronger non-economic motives than the typical commercial plaintiff and, thus, may sue even when they have little chance of "winning."[1] For example, a public official may feel that she can discourage, if not entirely silence, critics merely by

[1] Indeed, the very definition of "winning" is different in a defamation case. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 876 (2000) ("[L]ibel plaintiffs often sue because they believe that the social and psychological benefits of suing make it worthwhile, even if they never recover a money judgment from the defamer.").

forcing those critics to endure extensive litigation costs that may make them think twice about speaking up again. *See, e.g.*, David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 St. Louis U. L.J. 1207, 1208-09 (1995) (noting the "ability of well-financed and motivated plaintiffs to use defamation litigation not to correct serious mistakes but to deter criticism....").

To reduce these incentives and, correspondingly, to reduce the potential impact of defamation lawsuits on free speech, the active judicial supervision of defamation lawsuits is essential. *See id.* at 1210. If procedures are in place to help resolve questionable defamation suits before litigation costs build, the quality and quantity of public discourse can only improve.

II. THE ACTUAL MALICE STANDARD SHOULD APPLY UNIVERSALLY IN ALL DEFAMATION CASES BROUGHT BY PUBLIC OFFICIALS OR PUBLIC FIGURES.

Although this case settled before it reached the summary judgment stage, that may not be true the next time a public official brings a defamation lawsuit. Here, had the case continued, the defendants would likely have filed a motion for summary judgment contending that the plaintiff could not establish "actual malice." That, too, would have triggered a constitutional confrontation that the Court, with its decision here, can preclude.

The actual malice standard that emerged from *Sullivan,* now firmly entrenched in Wisconsin law, applies to "public figures" as well as public officials. *See Denny*, 106 Wis. 2d at 649-50; *Wiegel v. Capital Times Co.*, 145 Wis. 2d 71, 77-78, 426 N.W.2d 43 (Ct. App. 1988).

The law has generally evolved in news media cases, however, and it remains unclear whether, in Wisconsin at least, public officials and public figures must prove actual malice only when they sue the media or whether that constitutional standard also protects non-media defendants. Thus, the public official plaintiff in this case may well have argued that she did not have to establish actual malice against these non-media defendants. Neither this Court nor the court of appeals has ever decided this issue:

> We note that the United States Supreme Court has only required that the [actual malice standard] be applied to media defendants facing defamation claims from public officials or public figures. It has not yet ruled on whether non-media defendants facing defamation claims from public figures have the same constitutional privilege....[T]he Wisconsin Supreme Court has not definitively addressed this issue either.

Bay View Packing Co. v. Taff, 198 Wis. 2d 653, 674 n.5, 543 N.W.2d 522 (Ct. App. 1995); *but see Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting) ("[A]t least six [justices]...agree

today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.").

In *Denny*, 106 Wis. 2d 636, this Court specifically held that a *private individual* does not have to prove actual malice to recover damages for defamation against a non-media defendant. *Id.* at 661. The Court was less clear whether a *public official* or *public figure* still would have to establish actual malice against a non-media defendant:

> [I]t is unclear...whether the majority is [rejecting the actual malice standard] for all non-media defendants, irrespective of the nature of the plaintiff (public officer, public figure or private person), or is restricting [its rejection of the actual malice standard] to cases of a private person suing a non-media defendant.

Id. at 671-72 (Abrahamson, J., dissenting). In her dissent, then Justice Abrahamson criticized the majority for potentially drawing a distinction between media and non-media defendants, explicitly and appropriately

concluding that "[D]efamation law should apply equally to media and non-media defendants alike." *Id.* at 674.

There should be no distinction between media and non-media defendants in defamation actions brought by public officials or figures. The actual malice standard should apply to all defendants, regardless of their "press credentials," as many states have explicitly recognized.[2] Non-media

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[2] In all the following cases, the courts have applied the actual malice standard to non-media defendants:

California	*Miller v. Nestande*, 192 Cal. App. 3d 191, 200 (Ct. App. 1987) ("[W]hether criticism of public officials is published by the media or disseminated by individuals, ... it is protected by the constitutional [actual malice] standard....").
Georgia	*Miller v. Woods*, 349 S.E.2d 505, 507 (Ga. 1986).
Hawaii	*Rodriguez v. Nishiki*, 653 P.2d 1145, 1150 (Haw. 1982) ("[W]e adopt the prevailing view that the 'actual malice' standard in defamation actions brought by public officials and public figures should be applied without regard to the publisher's designation as a 'media' or 'nonmedia' defendant.").
Indiana	*Near East Side Community Org. v. Hair*, 555 N.E.2d 1324, 1329 (Ind. Ct. App. 1990) ("[W]e find the [actual malice] standard is equally applicable to a nonmedia defendant....").
Iowa	*Anderson v. Low Rent Hous. Comm'n*, 304 N.W.2d 239, 247 (Iowa 1981).

(continued...)

(...continued)

Louisiana	*Landry v. Roberson Advertising Service*, 660 So.2d 194, 197 (La. Ct. App. 1995) ("The *New York Times* 'actual malice' standard equally applies to media and non-media defendants.").
Maine	*Michaud v. Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978) ("The protections afforded by the *New York Times* rule to discussions of a public official's conduct are not limited to the media.").
Maryland	*Hanlon v. Davis*, 545 A.2d 72, 80 (Md. Ct. Spec. App. 1988).
Minnesota	*Britton v. Koep*, 470 N.W.2d 518, 521 (Minn. 1991) ("Minnesota affords to nonmedia defendants the same first amendment protection for criticism of public officials that it grants to the mass media.").
Missouri	*Ramacciotti v. Zinn*, 550 S.W.2d 217, 220, 225 (Mo. Ct. App. 1977).
Nevada	*Posadas v. City of Reno*, 851 P.2d 438, 454 (Nev. 1993).
Oregon	*Wheeler v. Green*, 593 P.2d 777, 783 (Or. 1979) ("The *New York Times* rule ... applies to all defendants, not only to those connected with the media.").
Rhode Island	*De Carvalho v. Da Silva*, 414 A.2d 806, 813 (R.I. 1980) ("[T]he trial justice was correct in drawing no distinction between defendant in this case and so-called 'media defendants.'").
Tennessee	*Moore v. Bailey*, 628 S.W.2d 431, 433 (Tenn. Ct. App. 1981).
Texas	*Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989) ("[W]e are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens.... We, thus, join those states which have extended the *New York Times* standard to defamation suits by public officials and public figures against non-media defendants.").
Utah	*Cox v. Hatch*, 761 P.2d 556, 560 (Utah 1988) (noting actual malice is not limited "to instances where the defendants are institutional media organizations").

defendants like those in this case deserve the First Amendment protection that the actual malice standard affords.

A public figure's reputational interest does not vary with the defendant's status. *See Underwager v. Salter*, 22 F.3d 730, 735 (7th Cir. 1994).[3] Nor does the public policy interest in free and open debate. Further, because media defendants may profit from their endeavors, the actual malice requirement is certainly no less necessary to protect non-media defendants, especially individuals who could be silenced by the mere threat of retaliatory litigation. *Id.*

More than twenty years after then Justice Abrahamson noted the inherent difficulty of drawing lines between media and non-media defendants, advances in technology and

[3] The U.S. Court of Appeals for the Seventh Circuit has predicted that this Court would apply the actual malice standard to both media and non-media defendants. *Underwager*, 22 F.3d at 734-35.

communication have continued to blur the line between the "traditional" media and everyone else, rendering the distinction essentially meaningless. *See* Sarah Maguire, *A Misplaced Focus: Libel Law and Wisconsin's Distinction Between Media and Nonmedia Defendants*, 2004 Wis. L. Rev. 191, 217-19 ("[D]etermining who counts as media is a complicated, amorphous process that leaves miles of discretion to the definer.").

In addition to these practical difficulties, there is no sound First Amendment basis for distinguishing between media and non-media defendants. Whether the speaker is media or non-media, the right to criticize public officials and to debate public issues occupies the "'highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). The traditional media have no monopoly on the First Amendment or on the ability to inform

the public, or engage in the unfettered exchange of ideas, or criticize public officials. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 782 (1978).[4]

For all these reasons, practical and principled, this Court should affirmatively hold that the actual malice standard applies in all public official and public figure defamation lawsuits, regardless of whether the defendant is part of the media. By reaching that conclusion now, this Court can provide non-media speakers some measure of comfort that they too are entitled to the full protections of the First Amendment.

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[4] The proliferation of "blogs," websites where individuals freely question public officials and journalists, reflects these values. *See* Katharine Q. Seelye, *Bloggers as News Media Trophy Hunters*, N.Y. Times, Feb. 14, 2005, at C1. A recent CNN/USA Today/Gallup poll showed that 44 percent of Americans aged 18-29 read blogs often. "The most popular bloggers now get as much traffic individually as the opinion pages of most newspapers." *Yesterday's Papers*, THE ECONOMIST, April 21, 2005, at 59.

III. NEITHER A PUBLIC OFFICIAL NOR A PUBLIC FIGURE SHOULD BE ALLOWED DISCOVERY IN A DEFAMATION ACTION UNTIL ANY MOTIONS TO DISMISS HAVE BEEN RESOLVED.

The plaintiff, then a member of the state assembly, now a state senator, started taking depositions two weeks after filing her lawsuit. Despite the defendants' requests for time for a motion to dismiss to be briefed and decided, the trial court refused to stay discovery. The plaintiff presented two reasons for speed: first, she wanted to immediately identify the Doe defendants; and, second, she wanted to "clear her name" before the spring election, in which she might be a candidate.

Neither reason should have been sufficient to lead the trial court to permit discovery before deciding whether the allegedly offending statements were even capable of a defamatory meaning. Discovery to determine potential defendants could have and should have awaited a decision on

the motion to dismiss. The identity of any additional defendants has no bearing on whether the statements at issue are, on their face, defamatory.

Moreover, having filed her lawsuit—in Madison, tellingly, not in her own district—in mid-January, there was simply no way for the plaintiff to obtain a trial to "clear her name" before the election in early April.[5] All of this highlights the need for a rule that public officials and public figures not be allowed discovery in a defamation action until they have defeated any motions to dismiss.

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[5] A public official may "clear her name" in any number of ways. Absent extreme circumstances, however, a defamation action should not be a common tool for politicians to respond to their critics. Public officials have ample opportunity to address their critics, immediately and with few restrictions, especially during an election campaign, where voters are the ultimate judges. *See Wiegel*, 145 Wis. 2d at 88-89 (discussing the ability of public figures to rebut criticism through the media); *see also Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (explaining that candidates, no less than any others, have a "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly ... advocate [their] own election ...."). The political arena is a forum far more suited than the courts to vindicate reputation and repair political damage, real or perceived.

For a plaintiff to succeed in a defamation action, she must establish that the offending statement was:

- false, and
- communicated to another person, and
- unprivileged, and
- defamatory—that is, the statement tended to harm her reputation so as to lower her in the estimation of the community or to deter third persons from associating or dealing with her.

Torgerson, 210 Wis. 2d at 534.

This last requirement, whether a communication is capable of a defamatory meaning, is without doubt a question of law. *See Tatur v. Solsrud*, 174 Wis. 2d 735, 740, 498 N.W.2d 232 (1993); *Hoan v. Journal Co.*, 238 Wis. 311, 329, 298 N.W. 228 (1941). It is also a question that can and should be resolved on a motion to dismiss. *See Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 461, 113 N.W.2d 135 (1962); *see also Giwosky v. Journal Co.*, 71 Wis. 2d 1, 5,

237 N.W.2d 36 (1976) ("threshold question" is whether the allegedly defamatory communication is even capable of a defamatory meaning). In short, the trial court must determine whether the words at issue are "reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by [the plaintiff] is a natural and proper one." *See Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411 (1959).

A plaintiff is required to set forth the "particular words complained of" in the complaint, Wis. Stat. § 802.03(6), so the defendant and the court know from the very outset of the case the precise language the plaintiff believes is false and defamatory. If the court finds that language incapable of a defamatory meaning, it should dismiss the case for failure to state a claim. Moreover, if a plaintiff has failed to identify the precise language that is allegedly defamatory, the court should dismiss the case as well.

The statutory mandate to specify the "particular words complained of" helps dissuade meritless defamation suits: "A requirement that the plaintiff plead the exact words which she claims are defamatory should deter filing by those who have only a vague feeling that they have been wronged but cannot point to any specific factual error in the article." *See* Susan Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1799 (1998).

Here, by the time the plaintiff had to specify the words she found defamatory in the postcard—in response to the defendants' motion to dismiss—she had already obtained the information that she wanted and that the defendants had sought to protect with a constitutional shield. A rigorous application of Wis. Stat. § 802.03(6) would prevent public officials from filing first and finding defamation theories later. *See Tatur*, 174 Wis. 2d at 740.

When the defendant challenges whether the allegedly defamatory statements are even capable of a defamatory meaning, that challenge should be resolved first and foremost. Similarly, any other defenses that might be raised on a motion to dismiss should be resolved before any discovery.[6] By staying discovery and entertaining motions to dismiss first, the court can test the merits of the lawsuit, eliminating cases that do not belong in the legal system without putting the defendant to unnecessary expense and further damaging First Amendment principles.

This approach would parallel the procedure adopted by states with anti-SLAPP (Strategic Lawsuit Against Public Participation) statutes. *See, e.g.*, Cal. Civ. Proc. Code § 425.16; 10 Del. Code §§ 8136-8138; Ga. Code § 9-11-11.1;

[6] Examples include challenges based on: 1) section 802.03(6); 2) section 895.05(2) (requiring plaintiff to provide opportunity for newspaper, magazine or periodical to correct allegedly libelous material before filing suit); and 3) various privileges.

Mass. Gen. Laws ch. 231, § 59H; Neb. Rev. Stat. §§ 25-21, 241–246. Under those statutes, in cases arising out of free speech on public issues, a defendant can file a special motion to strike at the outset of a case, challenging the plaintiff to make a *prima facie* showing of the merits of his case. While such a motion is pending, courts generally are required to stay discovery and, if successful, defendants can recover attorneys' fees.

Although this Court obviously cannot legislate, it does have the ability to advise trial courts on discovery in public official/public figure defamation lawsuits. The significant First Amendment concerns raised by these lawsuits make it essential to stay discovery pending the resolution of a motion to dismiss. *See* Boies, *supra,* at 1211 ("The same policy reasons that support special rules for determining defamation liability also support special rules designed to control the

litigation burden and expense of defending defamation claims.").

There is no reason for discovery before the trial court has determined whether the allegedly offending communication is even capable of a defamatory meaning. At this stage of the case, only the words matter, not the identity or motive of the speaker.[7] The plaintiff is unlikely to suffer any injury from a slight delay in the discovery schedule. By contrast, without a stay of discovery, the defendant may be forced to disclose confidential information in a lawsuit that has no merit and, in the process, be compelled to abandon constitutional defenses without due process.

[7] Indeed, on July 8, 2003, the trial court finally did rule on the defendants' motion to dismiss and found the postcard capable of a defamatory meaning. The defendants' identities had no bearing on this threshold decision.

IV. PUBLIC FIGURES SHOULD NOT BE ABLE TO USE DISCOVERY TO OBTAIN AN ORGANIZATION'S CONSTITUTIONALLY-PROTECTED INFORMATION WITHOUT A COMPELLING NEED FOR IT.

One of the plaintiff's primary goals appears to have been learning who was "behind" the Alliance for a Working Wisconsin, the organization that published and distributed the postcard. The state senator may have had other objectives as well, but there is no denying that the lawsuit settled after she persuaded the court to order the consultant to divulge the names of financial contributors. Thus, without first having to establish that the Alliance's postcard was even capable of a defamatory meaning, she gained access to information not publicly available and constitutionally protected. Moreover, she also convinced the trial court to hold the defendants in contempt, ordering their payment of her legal fees.

The fact that a public official might be able to file a lawsuit and immediately use discovery to acquire this type of

information directly threatens the organizations filing this brief. They zealously guard the identities of their donors, members or supporters against involuntary public disclosure. *See Elections Bd. v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999).[8] And for good reason.

Wisconsin politicians, without regard to party affiliation, naturally are aware of those working against them, either on policy issues or politically. But awareness can lead to intimidating, if not inappropriate, conduct. For example, just this past November, the Assembly Speaker instructed his Republican colleagues not to meet with a former Democratic Governor and his lobbying firm. The former Governor

[8] In *Elections Bd. v. WMC*, for example, four defendants were charged with violating Wisconsin's campaign finance laws. WMC and its political action committee, WMC-Issues Mobilization Council, were named defendants. For privacy reasons, the named defendants refused to disclose the identity of their financial supporters, the two unnamed defendants. Hence, the unnamed defendants were identified simply as ABC Corporation and XYZ Corporation. 227 Wis. 2d at 654.

allegedly had raised money for an organization that the Speaker felt had unjustly attacked Republican candidates during the fall election season. *See* Patricia Simms, *Assembly Speaker Tells GOP Legislators Not to Meet with Members of Firm That Worked Against Republican Candidates*, Wisconsin State Journal, Nov. 16, 2004, at A1.

Similarly, the former Democratic Senate Majority Leader now faces multiple criminal charges for, it is alleged, inappropriately helping individuals who contributed to Democratic Senate campaigns, including his own, and punishing those who did not. *State v. Chvala*, No. 2002 CF 2451, Complaint, ¶¶ 14, 27-33 (Wis. Cir. Ct. Dane County) (trial tentatively scheduled for Oct. 31, 2005). The complaint alleges that the senate leader monitored contributions to his opponents, threatened to take retribution against organizations whose members contributed to his opponents, and demanded that organizations offset any

amount contributed by their members to his opponents by making a matching contribution to his campaign and causes. *Id.* at ¶¶ 34-39.

These examples illustrate the problem the United States Supreme Court recognized almost fifty years ago in establishing privacy as a critical component of the First Amendment right of association in *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). What was true then is just as true today: compelled disclosure of private membership, contribution and supporter information significantly and adversely affects the exercise of the right of free association.

Organizations allow individuals and entities to marshall their voices and their resources to have a significant

collective impact on government.[9] To that end, organizations also can choose donors, allow their members or supporters to remain anonymous, so that they do not bear the brunt of retribution from powerful interests disgruntled by the organization's activities. If that anonymity can be easily stripped away through discovery, a cornerstone of the right of association will be undermined.

Courts regularly have recognized that the use of discovery to uncover confidential membership information has very significant First Amendment consequences. *See, e.g.*, *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998); *Britt v. Superior Court of San Diego County*, 574 P.2d 766, 772, 774 (Cal. 1978); *Crocker v. Revolutionary Communist Progressive Labor Party*, 533

[9] The parties filing this brief are nonprofit, tax-exempt organizations formed under sections 501(c)(4) and 501(c)(6) of the federal tax code. While the names of their directors and officers are public, by law, the names of their individual donors, members or supporters generally are not. *See* 26 U.S.C. § 6104(b).

N.E.2d 444, 447 (Ill. App. Ct. 1988). Parties seeking that information should have to demonstrate a compelling need for it before a court orders it disclosed and moots a constitutional issue without due process.

In most defamation cases against an organization, the plaintiff will not be able to make that showing because the identity of the members, contributors and supporters of the organization will have absolutely no relevance to the case. The information, in other words, will not go to "the heart of the matter" at issue. *See Crocker*, 533 N.E.2d at 448; *see also Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). The organization will be the proper defendant, not the individual members.

The only apparent reason the public figure plaintiff will want to discover the names of an organization's members, contributors and supporters will be to further identify his political adversaries. But that is not a sufficient

reason to compel the disclosure of confidential membership information. These concerns are magnified during the early stages of a lawsuit, before the plaintiff has had to establish that the communication is even capable of a defamatory meaning. At that point, there is absolutely no reason a plaintiff needs to know the names of those involved with the organization.

In short, whatever its decision here, this Court should ensure that the procedural history of this case never recurs. The next time a public official sues his critics for defamation, the process should be deliberate and incremental with questions of law resolved before constitutional rights are decided or even put at risk. The very nature of these cases calls for ample procedural safeguards. Without them, a defendant's First Amendment interests are too easily disregarded in a rush to justice.

CONCLUSION

This case offers the Court the opportunity to define the appropriate procedural approach to public official/public figure defamation lawsuits. The Court can and should set guidelines that deter meritless defamation suits, giving ample deference to First Amendment rights, yet recognizing those cases that may have some merit.

The citizens of Wisconsin should be able to criticize their public officials, even irresponsibly, without fear their criticism will be met with a defamation lawsuit. If the residents of this state feel free to speak their minds on public affairs, everyone will benefit. If they do not, everyone will suffer.

Dated: May 9, 2005.

Respectfully submitted,

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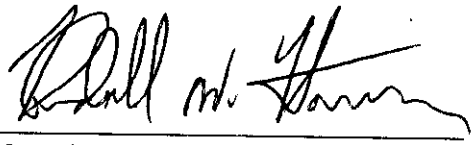
By: 

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,985 words.

Dated: May 9, 2005.

Respectfully submitted,

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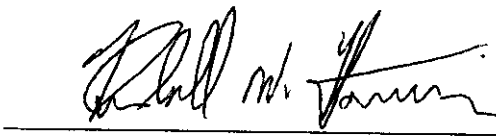
By: 

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STATE OF WISCONSIN
SUPREME COURT

JULIE LASSA,
Plaintiff-Respondent,

v. Appeal No. 04-0377

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,
Defendants,

AMERICAN FAMILY INSURANCE COMPANY,
Intervenor,

v.

ALEX PAUL,
Third-Party Defendant.

On Appeal from the Circuit Court of Dane County
The Honorable Maryann Sumi
Trial Court Case No. 03-CV-177

NON-PARTY BRIEF OF WISCONSIN DEMOCRACY CAMPAIGN, INC. AND MADISON TEACHERS, INC.

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INTRODUCTION

The Wisconsin Democracy Campaign, Inc. (hereinafter "WDC") is a non-profit, non-partisan, political watchdog group working for clean government and democracy in Wisconsin. To carry out its mission, WDC tracks the influence of money in Wisconsin politics and works for reforms that will improve the electoral process and opportunities for public participation. WDC is particularly concerned with the impact of issueless political attack advertising on democracy.

Madison Teachers, Inc. (hereinafter "MTI") is a labor union representing approximately 5,500 teachers, other educational professionals, and educational support staff in the Madison Metropolitan School District, and in the Middleton-Cross Plains School District. MTI members regularly engage in political activities and have a strong interest in clean and fair elections. MTI also has a strong interest in ensuring that public-oriented candidates are able to run fair, issue-oriented campaigns without being subjected to malicious smear campaigns.

As WDC and MTI understand the facts in this case, Mr. Rongstad and others sent an advertising mailer attacking Senator Lassa to the Senator's constituents in and around Stevens Point. The attack ad appeared approximately two days before the November 2002 election, providing little or no time to respond. Senator (then Representative) Lassa sued Rongstad and five unknown co-conspirators for defamation. Litigation of the defamation claim was unnecessarily delayed by Rongstad's repeated refusals to provide discovery, including deliberate contempt for the circuit court's orders compelling such discovery. After several orders compelling discovery and numerous warnings to Rongstad, the Dane County Circuit Court found Rongstad in contempt and entered default judgment against him. Before granting the default judgment, the circuit court denied Rongstad's Motion to Dismiss, finding the attack ad mailer to be defamatory on its face.

WDC and MTI address the procedures necessary to balance Senator Lassa's rights as a victim of defamation with the association rights provided by the First Amendment. WDC and MTI believe that actual First Amendment rights

must not only be protected, but vigorously defended. However, the First Amendment does not extend to false attack ads. Fair elections and the right to participate in politics without being victimized by defamatory character attacks must also be vigorously defended. Existing Wisconsin law provides strong association protections, while also protecting fair elections and active participation. The circuit court properly applied the law and its decisions should be upheld.

ARGUMENT

The First Amendment does not protect all speech. The Amendment does not provide a right to lie and get away with it. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). In fact, the United States Supreme Court has held that defamation falls outside First Amendment protections, and that chilling lies is consistent with the Constitution.

> Spreading false information in and of itself carries no First Amendment credentials. There is no constitutional value in false statements of fact...
>
> Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs... to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Herbert v. Lando, 441 U.S. 153, 171-72 (1979). Rongstad and *amici* ask this Court to create rules that would introduce delay and obfuscation into defamation cases. The Court

should reject this invitation for three reasons: (1) the Rongstad attack ad is unprotected libel; (2) the circuit court sufficiently considered Rongstad's constitutional rights; and (3) additional hurdles for defamation plaintiffs unduly interfere with a victim's constitutional right to a remedy.

I. RONGSTAD'S MAILER UNDERMINES THE PURPOSE OF THE FIRST AMENDMENT.

The First Amendment "was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). In this case, however, Rongstad's attack ad did not invite an "unfettered interchange of ideas." Rather, the ad was intended to put lies before voters at a time where there could be no meaningful response. Such attack ads are not modern-day Federalist Papers and Rongstad is no patriotic pamphleteer.

By design, these kinds of attack ads seek to avoid any exchange, much less an "unfiltered interchange of ideas."[1] Evan Richman, *Deception In Political Advertising: The Clash Between First Amendment And Defamation Law*, 16 Cardozo Arts & Ent. L.J., 667, 675 (1998) ("blatant misrepresentations in political advertising" negates "the very essence of the First Amendment..."). They deploy character assassination as their tools and are strategically timed to prevent any opportunity to respond. Purveyors of such ads can be recognized by their common traits: appearing on the eve of elections under assumed aliases, disseminating lies, and then disappearing after the election to avoid being called to account for the lies.

Lance Conn, *Mississippi Mudslinging: The Search for Truth In Political Advertising*, 63 Miss. L.J. 507, 514 (1994) ("last minute character assaults ...occur when there is little time for correction or rebuttal."). Such tactics are too prevalent in modern elections and are the scourge of voters and candidates alike.

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[1] In the *amicus* brief filed by the American Civil Liberties Union ("ACLU Brief"), the ACLU indirectly attempts to characterize this suit with the pejorative of a "SLAPP" (Strategic Lawsuit Against Public Participation). This acronym has no place in this case. If the Court is tempted to accept a "coined" acronym, it might characterize this lawsuit as a defense against "SLIME" (Strategic Lies Influencing Many Elections).

Rongstad's ads are prototypical issueless political attacks. The ads accusing Senator Lassa of being a felon arrived in voters' mailboxes on the eve of an election. (R. 2, p. 3). The attackers, Rongstad and Does 1 through 5, then attempted to escape responsibility. Judge Nowakowski recognized these evasive attempts:

> [I]f I get any flavor, it is that Mr. Rongstad has been highly evasive and engaged in a well-planned effort to cover up how he comes to engage in the kind of behavior he engages in when he is putting out these kinds of publications. And it's a sad day in our political system when somehow this kind of activity is covered up and evaded. Seldom have I seen such an abuse...

(R. 146 at 30-31; A-App. at 45-46).

Therefore, if Rongstad's First Amendment pleas appear hollow in this case, it is because the attack ad at issue is, in fact, contrary to the policies behind the First Amendment. Lies are "at odds with the premise of democratic government" and with the social and political values of the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

II. JUDGE NOWAKOWSKI AND JUDGE SUMI PROVIDED ALL THE PROCESS RONGSTAD WAS DUE.

As a public figure, Senator Lassa must prove actual malice by Rongstad, in addition to showing that Rongstad's attack ads were false communications that tend to harm her reputation. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 534, 534-35, 563 N.W.2d 472 (1997). This heightened burden of proof for public figures is intended to provide First Amendment protections in defamation cases. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964). The trade-off for that that protection, however, is plaintiffs' need for increased discovery of the alleged defamers. As the ACLU correctly points out in its *amicus* brief,[2] the increased standard of proof for public figure defamation suits necessitates significant discovery to prove the factually-based element of "actual malice." *See* ACLU Br. at 17 (observing that although actual malice standard was formulated to

[2] The American Civil Liberties Union of Wisconsin Foundation, Inc., submitted a motion with this Court to participate as a non-party, "standing on its brief filed in the Court of Appeals." That motion, dated April 8, 2005, included the ACLU's Court of Appeals brief. The ACLU later joined other non-party *amici* in a brief, dated May 9, 2005. The references to the ACLU's brief refer to the earlier, April 8, 2005, brief.

protect free expression, the standard triggers extensive discovery).

It should be noted that Rongstad and the ACLU champion the heightened "actual-malice" standard for public figure libel cases, while also seeking to apply the First Amendment to prevent the extensive factual discovery necessitated by that heightened standard. App. Br. at 28-35; ACLU Br. at 13-18. This attempt to eviscerate defamation law with conflicting First Amendment "protections" should be avoided.

There is no need to further delay a victim's remedy. There is no law permitting a libel defendant to avoid discovery until he files every possible motion. There is also no benefit to be gained by additional procedures in this case because Rongstad's position simply had no merit.

A. The First Amendment's Protection Stops Where Defamation Begins.

There is no First Amendment right to defame another. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) ("freedom of speech ... does not embrace certain categories of speech, including defamation..."). In fact, the

Supreme Court recognizes that "preventing fraud and libel stands on a different footing... this interest carries special weight during election campaigns when false statements if credited may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 349 (1995). This is especially true "on the eve of an election when the opportunity for reply is limited." *Id.* at 352.

The Supreme Court has upheld public-figure defamation plaintiffs' right to discovery, noting that discovery is inevitable given the heightened burden of proof for a public figure. *See Herbert v. Lando*, 441 U.S. 153, 158-63, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Addressing the interplay between the First Amendment and discovery in defamation cases, the Court has allowed broad discovery. *Id.* (rejecting limits on discovery into the state of mind of a publisher, despite editorial-process privileges).

The message from the Supreme Court is that its First Amendment decisions are not intended to protect liars and frauds. *McIntyre*, 514 U.S. at 357 & n.13 (noting fraud can be punished directly and libel is properly addressed by direct

suits for defamation). The circuit court recognized this distinction.

> As the Supreme Court aptly noted in NAACP v. Alabama, 257 U.S. 463, 'It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation and no right to disregard Alabama's laws.'
>
> Were I to sustain the objection to the questions at issue here on the record before me, the practical effect would be to grant these unknown participants in the alleged defamation of the plaintiff the absolute immunity that the Supreme Court was so careful to eschew.

(R. 141 at 12-13; A-App 27-28).

B. Additional Procedures Cannot Cure Rongstad's Erroneous Interpretation of Law and Deficient Factual Showing.

Rongstad clamors for the Court to make special rules protecting defamation defendants but cannot show that existing rules are inadequate and new rules warranted. Rather, the procedural history of this case shows just the opposite.

Existing rules were more than adequate to protect Rongstad's alleged constitutional rights, as illustrated by the fact that he was provided numerous opportunities to make his First Amendment arguments to the circuit court. The ACLU and Rongstad contend that the circuit court should have

delayed Senator Lassa's case for months or more, while Rongstad continued his ill-fated attempts to dismiss the case. App. Br. at 28-35; ACLU Br. at 9-11, 13-18. However, Rongstad and the ACLU ignore the fact that Rongstad argued his purported First Amendment rights to the court at least eight times. Rongstad employed a variety of tactics to make these arguments, including procedural (motion to quash Lassa's notice of deposition based on a claim of absolute immunity, R.143:2, 7-15; motion for reconsideration, R. 14, 16), discovery-based (objecting to deposition questions, R. 145:5-6), and appellate (motion for a supervisory writ to the Court of Appeals, R. 3:81, R. 18, R. 30:107). Rongstad could have used existing rules more effectively, like filing an earlier motion to dismiss, but his failure to do so hardly suggests that existing rules are inadequate.

Despite numerous opportunities to argue his case, the court properly held that "Mr. Rongstad's attempts to cloak himself in the constitution were previously found to be empty and without merit." (R. 149:12). In this case Rongstad failed to make the requisite factual showing that would entitle him to First Amendment protections. (R. 146 at 19; A-Appx at

43). Rongstad was ordered to comply with discovery and sanctioned, not because the circuit court refused to hear his First Amendment claims, but because the court did hear them and–multiple times– properly found them without merit. Rongstad's quarrel does not appear to be with the existing rules, but with their legitimate result.

Undeterred, Rongstad now asks this Court to provide protection for defamers by creating a rule whereby discovery must be stayed to allow additional attempts to make a losing First Amendment argument.

He also asks the Court to provide a right to an immediate interlocutory appeal for failed First Amendment arguments. Rongstad and the ACLU put form before substance. The record demonstrates that additional briefing to the circuit court would have achieved the same result. The circuit court denied Rongstad's Motion to Dismiss, finding that the attack ad is "capable of defamatory meaning... that Lassa is Senator Chvala's lackey... that she has also engaged or is about to engage in the same kind of allegedly unlawful and unethical conduct that Senator Chvala was accused of..." (R. 152:5-6).

Moreover, Rongstad admits to his contempt of the circuit court's discovery orders. (R. 149 at 10-11; A-App. at 51-52). There is no rule that a party can disobey the rules of discovery and a circuit court's multiple orders. Simply stated, additional requests for reconsideration, stays, and additional briefing cannot cure a deficient factual and legal showing by Rongstad.

Rongstad and the ACLU's arguments also imply that Wisconsin's circuit court judges are incapable of understanding and properly applying the First Amendment. However, circuit court judges hear constitutional arguments every day. They are more than capable of doing so. This Court should avoid any holding that gives Rongstad, and future defamatory attackers, a ninth, tenth, or eleventh attempt to make a losing constitutional argument. This Court should also not provide a right to an immediate interlocutory appeal for failed First Amendment arguments. Either of Rongstad's proposed rules would unnecessarily stall defamation cases, including the very discovery necessitated by the heightened First Amendment standard in *New York Times v. Sullivan.*

Should the Court agree with Rongstad that existing rules should be modified to fit defamation defendants, or that new, special rules are required, the Court should also implement rules that protect the rights of defamation victims and give them a meaningful day in court.

III. THE CIRCUIT COURTS' RULINGS PROTECTED SENATOR LASSA'S CONSTITUTIONAL RIGHT TO A REMEDY.

In all of the discussion of Rongstad's purported constitutional rights, the Senator's rights should not be ignored. Victims of defamation, including victims of campaign SLIME attacks, have rights under Wisconsin law. *Polzin v. Helmbrecht*, 54 Wis. 2d 578, 587-88, 196 N.W.2d 685, 690-91 (1972); *see also Herbert*, 441 U.S. at 168-69 (refusing to expand discovery privileges because of prior Supreme Court ruling acknowleding "the rights preserved to defamation plaintiffs in Sullivan, Butts, and like cases."). In fact, as a victim of defamation, Senator Lassa has a constitutional right to an effective remedy. Wis. Const. art. I, sec. 9; *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, 174 Wis. 107, 117, 182 N.W. 919, 923 (1921) ("The conferring of a

right without a remedy is but an empty gift."). This right should not be undermined by additional procedures increasing the costs of a victim's case. "[I]f procedural innovation to advance one substantive value compromises another substantive value, the competing substantive value should temper procedural reform." Scott M. Matheson, *Procedures in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 230 (1987).

The United States Supreme Court has rejected attempts by defamation defendants to erect hurdles for a defamed plaintiff in the name of First Amendment protections. In doing so, the Court cited "the individual's interest in his reputation" as overriding the need for additional evidentiary protections. *Herbert*, 441 U.S. at 169-71.

The circuit court was not only justified in ordering Rongstad to answer deposition questions, but the circuit court effectively protected Senator Lassa's constitutional right to a remedy for the SLIME attack against her. This Court has long held that Article I, section 9 of the Wisconsin Constitution counsels against erecting unnecessary hurdles for claimants.

> The declaration contained in section 9, art. 1, of the Constitution of this state that every person ought to obtain justice fairly, without being obliged to purchase it, completely, without being denied, promptly, without delay, in conformity with the law, is not mere rhetoric. It lays upon every officer of this state, especially upon administrative and judicial officers, an imperative duty, which should be performed without hesitation.

Strange v. Harwood, 172 Wis. 24, 177 N.W. 862, 864 (Wis. 1920) (holding that a frivolous appeal for purposes of delay violates Article I, section 9). Any additional procedure that would further lengthen the time, and increase the expense, for Senator Lassa to realize a remedy for Rongstad's defamation would effectively deny her a remedy as well as her day in court. Additional obstacles prior to discovery provides little additional First Amendment protections in this case, while unnecessarily threatening Senator Lassa's.

CONCLUSION

First Amendment rights neither include the right to defame, nor provide a blanket protection for anonymous co-conspirators in a lie. Victims of defamation, however, do have recognized rights. This Court should avoid duplicitous

procedures that offer no additional First Amendment protection, while hampering victims' rights to a remedy. The decisions of the circuit court should be upheld.

Respectfully submitted this 11th day of May, 2005.

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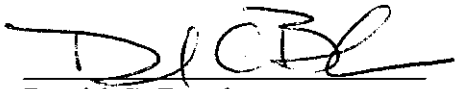

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with proportional serif font.

The length of this brief (including footnotes) is 2,992 words.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

JULIE LASSA,

Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal No. 04-0377

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

Appeal from the Circuit Court for Dane County,
the Honorable Maryann Sumi Presiding

APPELLANTS' BRIEF AND APPENDIX

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ISSUES PRESENTED FOR REVIEW

State Representative Julie Lassa brought this defamation action against Todd Rongstad based upon a negative issue advocacy mailer published by the Alliance for a Working Wisconsin. Lassa immediately sought discovery of the identity of Alliance members involved in the mailer, stating that she needed the information to identify additional defendants and to help her decide whether to run for an open Senate seat. Rongstad refused to divulge the names of any Alliance members, citing the constitutional privilege against compelled disclosure of political associations. The trial court disagreed and ordered disclosure. Rongstad continued to refuse disclosure, filed a motion to dismiss and pursued an interlocutory appeal. The trial court refused to hear the motion to dismiss and refused to stay any issues pending appeal. Instead, the court held Rongstad in contempt and imposed severe monetary sanctions.

Accordingly, the issues presented for review are:

1. Whether the trial court's order compelling Rongstad to disclose the contributors to the Alliance for a Working Wisconsin and the subsequent order finding Rongstad in contempt of court and imposing harsh sanctions violated Rongstad's First Amendment rights of freedom of association and free speech.

2. Whether, under the rule established in *Burnett v. Alt*, Rongstad had a "substantiated assertion of privilege" providing him with "substantial justification for failing to comply with an order to provide or permit discovery."

3. Whether the trial court erroneously exercised its discretion by imposing sanctions before considering whether Lassa's complaint stated a claim upon which relief could be granted.

4. Whether the severity of the sanctions, which bore no rational relationship to the offensive conduct or any harm suffered by Lassa, constituted an erroneous exercise of discretion.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Appellant requests oral argument.

Publication of the Court's decision is warranted. Among other things, it will establish the appropriate parameters for individuals who have asserted a constitutional privilege against the disclosure of information in discovery, and who thereafter are ordered by the trial court to disclose the information or face contempt sanctions.

STATEMENT OF THE CASE

Plaintiff-Respondent Julie Lassa ("Lassa") filed this lawsuit on January 16, 2003, alleging defamation by Defendants-Appellants Todd Rongstad ("Rongstad") and The Valkyrie Group. (R. 1-2) Rongstad was first deposed on February 3, 2003. During the deposition Rongstad objected to questions requesting disclosure of members of a 501(c)(4) organization, based upon the constitutional privilege against disclosure of political associations. On February 4, 2003, the trial court overruled the objection and ordered specific disclosures. (Appx. 5-6, 20-35)

On March 11, 2003, the trial court held Rongstad in contempt of court for refusing to disclose names, and imposed sanctions including plaintiff's attorney's fees and a daily $1,000 forfeiture until the disclosure was made. (Appx. 7-9, 50-61) Rongstad's request for a stay and an interlocutory appeal of the orders compelling disclosure were denied on April 1, 2003. (R. 55, 56)

Pursuant to a settlement agreement, the parties filed a stipulation and order for entry of a combined judgment on the contempt sanctions and dismissal of the defamation claim. (Appx. 12-19) The Order specified that Rongstad had the right to appeal the sanctions imposed.

Notice of Appeal was timely filed on February 4, 2004. (R. 142)

STATEMENT OF FACTS

The Alliance for a Working Wisconsin

At the time this lawsuit was commenced, the Alliance for Working Wisconsin ("Alliance") was a 501(c)(4) tax-exempt organization dedicated to educating the public about public policy issues related to business, taxes and families in Wisconsin. (R. 74, Exh. A). Rongstad was the President of the Alliance, as well as a board member. One of the Alliance's stated purposes was to "utilize First Amendment rights to speak out on issues and attempt to influence the public debate through

direct communications." *Id.* The Alliance did not engage in any express advocacy, such as direct political communications, that would subject the organization to potential registration and reporting requirements with the State Elections Board or the FEC. *Id.*

The Alliance solicited contributions from individuals and organizations in order to fund public communications on issues of importance to its members. The Alliance guaranteed to members that it would maintain confidentiality with respect to their identities. (Appx. 4) Alliance members informed Rongstad that if he was compelled to disclose their names, they would no longer participate in the organization for fear of public reprisal and potential legal action. *Id.*

The Allegedly Defamatory Mailer

This case arose out of a mailer published by the Alliance highlighting the connections between State Representative Julie Lassa and then-recently indicted Senator Charles Chvala. (Appx. 1-2) The front side of the mailer showed a picture of Lassa jumping rope in front of a group of children with Chvala's face superimposed over their faces with "When Chuck said jump ..." printed under her feet. (Appx. 1) The bottom of the page displayed the Milwaukee Journal Sentinel headline announcing Chvala's indictment. *Id.* The primary text of the mailer, printed on the back side of the mailer over an enlarged copy of Chvala's mugshot and two smaller pictures of Lassa, stated:

Lassa Wanted To Be A State Senator,
So She Hooked Up with Chuck Chvala.

A Tale of Wisconsin Politics

One day, Representative Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.

Nobody knows for sure what she had to promise to gain his approval. But Chuck wanted a more compliant senator, so he got to work.

What he did best was fundraise with unsubtle threats. Populist Chvala even sponsored a fundraiser at the state's ritziest country club.

Chvala didn't care much for dissent. And he was giddy with the idea of Senator Julie.

Just like the old days when party bosses made decisions for us all.

But then Lassa's mentor was charged with 20 felonies and things fell apart.

The End?

Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa (342-0526) and the rest and ask them the tough questions — did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections? And, most importantly, will you please clean up your act?

A public service announcement from the Alliance for a Working Wisconsin

(Appx. 2).

The Complaint does not deny Lassa's connections to Chvala, or that Chvala sponsored a fundraiser for Lassa. Rather, the Complaint alleges in relevant part that the mailer "asserts . . . that

Lassa was involved in the conduct that led to the indictment of Senator Chvala," and "falsely and maliciously asserts to her constituents that Lassa engaged in 'extortion,' 'misconduct in public office,' 'pay to play,' as well as 'lying, cheating and stealing.'" (R. 2, ¶¶ 15, 17).

The Trial Court's Initial Ruling Compelling Disclosure

On February 3, 2003 (less than two weeks after being served with the complaint) Rongstad was deposed for the first time. Lassa's counsel asked Rongstad to disclose the names of members of the Alliance, the issue advocacy group behind the mailer. Rongstad's counsel objected, based upon the First and Fourteenth Amendment freedom of association and free speech rights, as well as the privacy rights implicit in IRS Code § 501(c)(4). (R. 144, at 3-5) Lassa's counsel then called the trial court and asked for a ruling on the objection. The trial court denied Rongstad's request to brief the constitutional issues, asked what cases supported the objection, and stated it would provide a decision the following day. *Id.* at 14-15, 19.

The following day, February 4, 2003, the trial court overruled the objection, ordering Rongstad to "answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." 2/4/03 Tr., at 13 (Appx. 28)

When Rongstad requested a stay pending an attempted interlocutory appeal, Lassa's counsel stated that Lassa needed to get the discovery immediately to help her political goals:

> There is a special election that is coming up. We now know that that seat is vacant, and therefore, I think it is extremely important that we get to the bottom of this as quickly as possible.

Id. at 15 (Appx. 30) The trial court agreed that Lassa's political aspirations warranted denial of a stay: "[I]f she is going to seek to clear her name as best she is able in a manner that would have any value to her aspirations to seek the position where that opening has occurred, then it's crucial that

that occur at some point prior to the point when that special election is held . . . ." *Id.* at 19 (Appx. 34)

Rongstad's deposition then recommenced. Rongstad continued to refuse disclosure of any contributors to the Alliance, based upon his constitutional privilege against compelled disclosure. However, Rongstad testified that he was the only person "involved" in the "preparation" and "distribution" of the mailer, and that no specific Alliance members were involved in the funding because the Alliance's contributions are not earmarked for specific projects. (R. 42) In other words, Rongstad believed he could comply with the Court's order without disclosing any specific members of the Alliance.[1]

On February 6, 2003, the trial court denied Rongstad's motion for reconsideration. (R. 146) In doing so, the court tipped its hand concerning its personal views about negative issue advocacy by scolding Rongstad and accusing him of engaging in a "cover-up":

> [I]f I get any flavor, it is that Mr. Rongstad has been highly evasive and engaged in a well-planned effort to cover up how he comes to engage in ***the kind of behavior he engages in*** when he is putting out ***these kinds of publications***. And it's a sad day in our political system when somehow ***this kind of activity*** is covered up and evaded. Seldom have I seen such an abuse, but we'll deal with future motions when and if they come in.

2/6/03 Tr. at 31 (emphasis supplied) (Appx. 46)

Rongstad's Motion to Dismiss the Complaint

On February 11, 2003, two weeks after being served, Rongstad filed a Motion to Dismiss. (R. 24) The original trial court, Judge Nowakowski, refused to promptly schedule the motion for

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[1] During the February 4, 2003 deposition, Judge Lundsten heard a telephonic argument on Rongstad's emergency motion for relief under §§ 808.07(2)(a) and 809.52, Wis. Stats., pending an interlocutory appeal. Judge Lundtsen denied the motion. (R. 18).

a hearing, and in fact refused to schedule any hearing. Rather, the court issued a briefing schedule running through the end of March and indicating the court would decide the motion on the briefs. (R. 27)

During the time Rongstad's motion to dismiss was pending without so much as a hearing date, the trial court, as set forth below, scheduled, heard and decided plaintiff's motion for contempt and for sanctions relating to the constitutional privilege, as well as Lassa's motion to quash any discovery by Rongstad. Before ever considering whether Lassa had stated a claim, the court imposed monetary sanctions, a daily forfeiture, and precluded Rongstad from engaging in any discovery whatsoever. The motion to dismiss was ultimately heard by Judge Sumi, who denied the motion on July 8, 2003, months after the imposition of sanctions against Rongstad.[2] (R. 151)

Lassa's Motion for Sanctions and for Contempt

Lassa filed a motion for sanctions and for contempt on February 21, 2003, which the court agreed to hear a week later. (R. 36) On February 28, 2003, the trial court postponed the motion to March 11, 2003 because Lassa failed to personally serve Rongstad as required by § 801.14(2), Wis. Stats. However, having reviewed Rongstad's argument that the previous order did not require disclosure of any specific names, the trial court took the opportunity to issue a second order "clarifying" and "narrowing" the disclosure requirements:

> All right. Here's then what we're going to do. To make this absolutely clear and avoid any confusion on Mr. Rongstad's part, Mr. Rongstad is ordered, at a deposition to be conducted on Monday morning [March 3, 2003], to provide the records and disclose the names of any person who contributed any amount in excess of $100

[2] Third party defendant Alex Paul filed a petition for leave to appeal the motion to dismiss, which was denied on September 8, 2003. *Lassa v. Rongstad*, Appeal No. 03-2111-LV.

> or more in the aggregate during the six months preceding November 1st, so let us say at any time after May 1st of 2002.
>
> * * *
>
> I don't know if there's any way I can express this more adamantly that I am looking for Mr. Rongstad to comply with my prior court order. In this now I'm granting him the benefit of narrowing this court order, but the expectation is that he will in fact comply.

2/28/03 Tr., at 18, 23 (Appx. 48-49) On March 3, 2003, Rongstad once again asserted his constitutional privilege against compelled disclosure of his political associations.

At the March 11, 2003 hearing, Rongstad conceded that he had not provided the information ordered to be divulged, because to do so would deprive him of any meaningful appeal on his constitutional objections:

> [Rongstad] understands fully the Court's order, and he's elected to exhaust his appellate remedies with respect to the constitutional issues and has authorized me to represent to the Court that if in fact the Court is correct in its analysis that the constitutional issues do not trump his obligation to disclose the names of the contributors, that he will in fact comply.

3/11/03 Tr., at 8 (R. 149) The trial court found Rongstad in contempt, concluding, based only upon a reading of the deposition transcript, that Rongstad "lied while under oath" because his testimony that he did not remember who contributed to the organization "defies credulity." *Id.* at 11 (Appx. 52) The court added that for Rongstad "to suggest that he doesn't even keep any record of the names or addresses of the people who have contributed except for the deposit slips . . . is so highly unlikely and inconsistent with the way any other organization of a similar type would maintain their records and suggests to me that his answers were false." *Id.* at 11-12 (Appx. 52-53). Accordingly, the court imposed the following as civil contempt sanctions:

- Payment of all of Lassa's attorney's fees and costs in connection with the depositions and motions to compel;
- A penalty of $1,000 per day running from March 13, 2003 to April 4, 2003; and
- If Rongstad failed to disclose the names by April 4, 2003, entry of default judgment.

(Appx. 7-9) The trial court denied Rongstad's request for a stay pending a chance to appeal the contempt order, concluding that Rongstad had "no likelihood of success on the merits." 3/11/03 Tr., at 22-23 (Appx. 60-61)

During the same hearing, the court granted Lassa's motion to quash Rongstad's discovery efforts, stating:

> Mr. Rongstad seeks to have the right to participate in this litigation by engaging in discovery, but he comes to the court with not simply unclean hands but hands that are muddied to the elbow. He has failed consistently to comply with this Court's order, or orders in the plural, and as a result I think has largely forfeited, until he can demonstrate that he is willing to play by the rules, the right to use the rules to his advantage.

3/11/03 Tr., at 20 (Appx. 58)

Rongstad's Petitions for Interlocutory Appeal

Three days after the contempt decision, on March 14, 2003, Rongstad filed a Petition for Leave to Appeal and Petition for Supervisory Writ, along with a motion seeking a stay pending appeal. *Lassa v. Rongstad*, Appeal No. 03-742-LV; *State of Wisconsin ex rel. Todd Rongstad v. Circuit Court for Dane County*, Appeal No. 03-743-W. On April 1, 2003, this Court denied both

Petitions, concluding summarily that Rongstad did not meet the criteria for interlocutory appeal and did not show that the circuit court had a duty to vacate its orders.[3] (R. 55, 56)

Rongstad's Disclosure of Contributors to the Alliance

On April 4, 2003, three days after interlocutory appeal was denied, Rongstad disclosed the names of all contributors to the Alliance since January 1, 2002, pursuant to the trial court's February 28, 2003 Order. (R. 58) Despite all of the arguments of delay and obfuscation, this disclosure came less than three months after the lawsuit was filed.

Lassa's Motion for Default Judgment

Despite receiving the names by the court-imposed deadline of April 4, 2003, Lassa filed a motion for default judgment, contending the disclosures were untimely and insufficient. Rongstad responded that the disclosures – all Alliance contributors in 2002 – were precisely what the court ordered in the "narrowed" order on February 28, 2003. (Appx. 49-50) The new trial judge, Honorable Maryann Sumi[4], rejected this argument, concluding that Judge Nowakowski had not narrowed his prior disclosure order and entered default judgment against Rongstad for failing to provide additional details. (R. 152) Rongstad's motion for reconsideration was denied on October 3, 2003. (R. 139, 155)

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[3] Rongstad did not pursue a petition for leave to appeal after Judge Lundsten denied original motion for emergency relief on February 4, 2003. Rongstad determined that he could in fact comply with the trial court's order without disclosing the membership of the Alliance. Despite Rongstad's explicit statement that he was going to pursue an interlocutory appeal, the trial court suggested that Rongstad had "abandoned" his attempt to seek interlocutory relief by not pursuing a petition after Judge Lundsten's decision. (Appx. 55)

[4] The original trial judge was substituted against by third-party defendant Alex Paul. (R. 67) Lassa filed a motion seeking to block the substitution, which was denied on April 28, 2003. (R. 84)

Settlement of the Underlying Case

On November 17, 2003, the parties filed and the trial court signed a document entitled Stipulation and Order for Entry of Combined Judgment, Dismissal and Appellate Rights. (Appx. 12-19) The stipulation and order provided as follows:

- Lassa's defamation action was dismissed with prejudice.
- A combined judgment was entered encompassing the contempt and sanctions decisions including "$43,000.00 in contempt-related attorney's fees and $22,000.00 in forfeitures payable to the School Fund."
- Rongstad preserved the right "to appeal the appropriateness of the fees and forfeitures under the First Amendment, *Alt*, and whether the Courts were justified in the award, and any other applicable legal theories."

(Appx. 13) This appeal followed.

ARGUMENT

Rongstad had a constitutional privilege against compelled disclosure of the members of the Alliance for a Working Wisconsin. Alliance members had reasonable fears of public or economic reprisal, putting the burden on Lassa to demonstrate a compelling need for the disclosure under *NAACP v. Alabama* and its progeny. Lassa failed to make such a showing.

Moreover, even if Rongstad's claim of privilege ultimately is unsuccessful, a "substantiated" assertion of privilege is "a substantial justification for failing to comply with an order to provide or permit discovery." *Burnett v. Alt*, 224 Wis.2d 72, 94, 589 N.W.2d 21 (1999). Rongstad's assertion of privilege was well-supported by Supreme Court precedent and several on-point authorities. Therefore even if the Court concludes that Lassa's interests in obtaining the names of additional defendants outweighs Rongstad's and the Alliance members' constitutional interests,

the sanctions imposed should be reversed under *Alt*. To hold otherwise renders the trial court the final authority in interpreting constitutional rights, with sanctions serving as a barrier to appeal.

The trial court also erred by forcing Rongstad to disclose Alliance members before even considering whether Lassa's complaint had merit. In light of the strong First Amendment interests implicated in a defamation claim filed by a public official, and the associational interests implicated in requests for disclosure of a political organization's members, a trial court should first address whether a defamation claim has been stated. As demonstrated below, Lassa's complaint had no merit – the mailer did not include any false or defamatory assertions about Lassa.

Finally, the severe sanctions meted out – $63,000 against an individual defendant – were not rationally related to the alleged misconduct, warranting reversal under *City of West Allis v. Wisconsin Electric Power Co.*, 2001 WI App 226, 248 Wis.2d 10, 635 N.W.2d 873 (Ct. App. 2001).

I. Rongstad and the Members of the Alliance Had a First Amendment Privilege Against Compelled Disclosure of Their Political Associations

A. The Mailer Was an "Issue Advocacy" Piece, Not Subject to Any Reporting or Disclosure Requirements

It is important that the Court recognize, at the outset, that the mailer at issue constituted "issue advocacy" that is not subject to any reporting or disclosure requirements under state law. *See, e.g., Elections Board v. WMC*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999) (explaining that only "express advocacy" is subject to public reporting and disclosure under Chapter 11); Wis. Admin. Code § ElBd 1.28(2) (only communications using one of the "magic words" or their "functional equivalents" is subject to Chapter 11 regulation). The mailer, while critical of Lassa, neither references any election nor uses any of the "magic words" identified in § ElBd 1.28(2). Thus

Rongstad and the Alliance had every expectation that the communication would not give rise to any requirement that the members of or contributors to the Alliance be disclosed.

The mailer identified that it came from the Alliance, but did not identify any members of the Alliance. (Appx. 1-2) Contrary to popular opinion, there is nothing inherently wrong with anonymous speech. Rather, it is precisely the type of robust public dialogue concerning political issues that the First Amendment strives to protect. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."); *Watchtower Bible and Tract Society v. Stratton*, 536 U.S. 150, 166 (2002) ("there are a significant number of persons who support causes anonymously"); *Talley v. California*, 362 U.S. 60, 65 (1960) ("there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified").

B. The First Amendment Protects Against Compelled Disclosure of a Political Organization's Membership Absent a Compelling Justification

"[F]reedom of association for the purpose of advancing ideas and airing grievances" is considered to "lie at the foundation of a government based upon the consent of an informed citizenry." *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960). The Supreme Court has long held that governmental action compelling disclosure of one's associations with advocacy groups is subject to constitutional protection:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to

> preservation of association, particularly where a group espouses dissident beliefs.

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 462. (1958). Thus, where evidence suggests that compelled disclosure could chill political association because of fear of hostility or economic reprisal, the government must demonstrating a "compelling" interest in obtaining the information. *Bates*, 361 U.S. at 524.

In the seminal case on the issue, *NAACP v. Alabama*, an Alabama state court ordered the NAACP to produce its membership lists in an action seeking to enjoin the NAACP from conducting activities in the state. The NAACP refused to disclose the membership list, and was held in contempt and fined $100,000.

The Court began by holding that the organization had standing to protect the rights of all if its members, and that a judicial production order constitutes state action. *NAACP*, 357 U.S. at 458-60. By the same token, there is no dispute that Rongstad, the President of the Alliance, had standing to assert a constitutional privilege on behalf of members of the Alliance.

The Court held that regardless of whether "the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters," state action that "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61. Citing evidence of past "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the Court held that compelled disclosure was likely to adversely affect the ability of the NAACP and its members to pursue their collective efforts, and that it might dissuade others from joining or cause members to withdraw because of fear of exposure. *Id.* at 462-63. Finding the State's alleged justification for the discovery – to

determine whether the NAACP was conducting interstate activities in violation of state law – to be less than compelling, the Court reversed the contempt order: "Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466.

Subsequent cases have fleshed out the balancing analysis created in *NAACP v. Alabama*.

1. The Party Asserting the Privilege Must Make a *Prima Facie* Showing of a "Reasonable" Potential for Economic or Political Reprisal

"[T]he initial burden to make a *prima facie* showing that the trial court's orders will burden First Amendment rights . . . must be light." *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998). The party must demonstrate at least "some probability that disclosure will lead to reprisal or harassment." *Black Panther Party v. Smith*, 661 F.2d 1243, 1267-68 (D.C. Cir. 1981). *See also Buckley v. Valeo*, 424 U.S. 1, 74 (1976) ("reasonable probability" of "threats, harassment or reprisals" by government or private parties).

A record of actual past harassment is unnecessary. "[P]otential infringement on an association's First Amendment rights may exist even in the absence of a factual record of harassment." *In re Maurer*, 15 S.W.3d 256, 260 n.4 (Tex. App. 2000). In a case enjoining enforcement a District Attorney's subpoena seeking records of contributors to a political party in connection with an investigation into a vote-buying scheme, the Court cogently explained:

> While there is no evidence of record in this case that any individuals have as of yet been subject to reprisals on account of the contributions in question, it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.

* * *

> Disclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected.

Pollard v. Roberts, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968).

2. The Party Seeking Disclosure Bears a Heavy Burden of Demonstrating a Compelling State Interest

Once a *prima facie* showing has been made, the party seeking disclosure "must demonstrate that the information required to be disclosed is substantially related to a compelling governmental interest." *Bay Area Citizens*, 982 S.W.2d at 378. *See also NAACP v. Alabama*, 357 U.S. at 463 ("'subordinating interest of the State must be compelling'"); *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444, 447 (Ill. App. 1988).

The alleged interests in disclosure are subject to "heightened scrutiny" in light of the significant First Amendment interests at stake. *See Anderson v. Hale*, 2001 WL 503045, at *4 (N.D. Ill. 2001) ("Given the preferred position of First Amendment rights and heightened scrutiny that applies, this is no easy task."); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983) ("This enhanced scrutiny is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents."); *Britt v. Superior Court of San Diego County*, 574 P.2d 766, 773 (Cal. 1978) ("the government's burden is a particularly heavy one").

3. The Privilege Against Compelled Disclosure Applies to All Political Organizations, and Applies to Discovery in Private Litigation

While many cases involve groups that have historically suffered harassment, such as the NAACP or Communist Party, the privilege applies to all "politically oriented associations," regardless of whether they are "unpopular." *Britt*, 574 P.2d at 772.

It is further well established that the constitutional right against compelled disclosure fully applies to discovery in a private lawsuit:

> The chilling effect on First Amendment rights is not diminished simply because disclosure is compelled pursuant to a litigation-oriented discovery order. Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.

Id. at 744.

C. Lassa's Interests in Obtaining the Names of Alliance Members to Add Additional Defendants is Neither Compelling Nor Does It Outweigh the Interests of Alliance Members in Avoiding Disclosure

This Court owes no deference to Judge Nowakowski's analysis on the privilege issue. *Alt*, 224 Wis. 2d at 84 (legal privilege determination subject to de novo review). Nevertheless the lower court's analysis is instructive.

In rejecting Rongstad's assertion of a constitutional privilege, the trial court initially faulted Rongstad, who had no opportunity to even *brief* the issue, for failing to make an evidentiary showing "that disclosure of the names of those involved in the publication of the allegedly libelous mailing would subject him to or those other individuals to threats, harassment or reprisals from anyone." 2/4/03 Tr., at 10 (Appx. 25) Rongstad thereafter requested reconsideration and submitted an affidavit averring in part:

> 3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

> 4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in the organization or any such organization, for fear of public reprisal and potential legal action.

(Appx. 4) This uncontroverted affidavit was rejected as "conclusory" and "wholly insufficient" by the trial court. 2/6/03 Tr., at 17 (Appx. 41)

On the other side of the coin, the court cited Lassa's interest in "her good name," the public's interest in "preventing fraud and libel," and held that Lassa's "need for disclosure of the names of those involved is particularly strong here because these are people who may have directly participated in causing her *alleged harm* and there is no other source for the information." 2/4/03 Tr., at 11-12 (Appx. 26-27)

The trial court, apparently guided by a personal dislike of negative issue advocacy, was simply wrong. Rongstad's affidavit confirming his guarantees of confidentiality to Alliance members, and reflecting the members' fear of reprisal, need only be "reasonable," not conclusive or compelling. Given the context of the demand for disclosure, coming from a powerful public official seeking to publicly clear her name and looking to add more defendants to an aggressive political lawsuit, the fears of public reprisal and potential legal action were eminently reasonable.[5]

The trial court likewise overstated Lassa's interests in forcing disclosure, particularly on the strength of a mere *allegation* of defamation. Lassa's allegations had not even been tested on a motion to dismiss, a particularly critical examination where the plaintiff is a public figure. *See*

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[5] Ironically, given Lassa's stated goal of clearing her name, when a former staffer testified that Lassa had in fact used the state-funded caucuses to prepare her campaign literature, Lassa ran to court seeking a protective order to prevent any disclosure of the harmful testimony. (R. 124-127) The motion was denied. (R. 154, at 35-37)

Section III, infra. Moreover, Rongstad had taken full responsibility for the mailer in question, and stood ready to defend the lawsuit and presumably pay damages if defamation were proven. There was no "compelling" need for Lassa to round up additional defendants within a month or two of filing the case. On balance, given the very early stage of the litigation and the untested nature of the allegations, Rongstad's and the Alliance's constitutional privilege against disclosure were not outweighed by Lassa's interests in adding additional defendants.

In a remarkably similar case, the Illinois Court of Appeals reversed an order compelling a defamation defendant to identify members of an organization that allegedly published defamatory material. In *Crocker v. Revolutionary Communist Progressive Labor Party*, the Departmental chair at County hospital filed a libel action against a political organization and the local chair of the organization. The action arose out of statements published in a newsletter circulated in the hospital accusing plaintiff of being a racist. Plaintiff sought discovery of the identities of the members of the defendant's organization as well as members of a related organization that defendant claimed was the real publisher. When defendant refused to divulge the names despite a court order to do so, defendant was held in contempt and ordered incarcerated until he provided the names.

The Court of Appeals reversed. Citing *NAACP v. Alabama*, *Buckley* and other cases, the court held:

> [T]he courts have held that a person cannot be compelled to disclose his or her political association, or the names of members of political associations, absent a compelling and overriding public interest. . . . This analysis applies with equal force whether the plaintiff is seeking wholesale disclosure of membership lists or more limited disclosures of the identities of specific members of a dissident organization.

Id. The Court found that members of the organizations reasonably feared that disclosure could subject them to "public and private harassment and reprisals," and that disclosure could "undermine the survival of these organizations and their ability to exercise their First Amendment rights." *Id*

Noting that the plaintiff had the burden to demonstrate "that the balance of interest weighs in favor of disclosure," the Court inquired whether the information sought went to "the heart of the matter" being litigated. *Crocker*, 533 N.E.2d at 448. Plaintiff's argument that the information was necessary to test the sufficiency of defendant's denial of involvement in the publication was rejected: "'[D]isclosure in the course of a fishing expedition is ruled out in [a] first amendment case.'" *Id.*, *quoting Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977). Accordingly, the Court vacated the order compelling disclosure.

This case raises nearly identical issues. Lassa, like the plaintiff in *Crocker*, aggressively sought discovery of the membership of an organization behind an allegedly defamatory publication. Rongstad, like the defendant in *Crocker*, averred that members of the Alliance feared disclosure, and that compelled disclosure could undermine the viability of the organization. (Appx. 3-4) The *Crocker* court found the fears of reprisal to be "reasonable" in light of plaintiff's position of power as the chair of the pathology department. 533 N.E.2d at 447. Likewise the fears in this case were reasonable in two respects – first, Lassa's counsel specifically stated that Lassa, a public official, sought the names in order to add individuals as defendants in a costly lawsuit; and second, as a State Representative Lassa occupied a position of power from which she could directly and negatively impact the interests of any Alliance members identified by Rongstad. Lassa's admission that one of the purposes of her discovery was to identify the persons named as "Doe" defendants belied just the kind of "fishing expedition" rejected in *Crocker*.

In sum, Rongstad and the Alliance members had a constitutional right against compelled disclosure of the organization's membership. Lassa failed to establish any "compelling" state interest in forcing Rongstad to betray the Alliance's constitutionally-based guaranties of privacy so that she could name additional defendants. In fact, the Supreme Court expressly stated that the importance of public discussion of "the character and qualifications of candidates . . . more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great." *New York Times Company v. Sullivan*, 376 U.S. 254, 281 (1964). As in *NAACP v. Alabama*, the fact that Rongstad had a constitutional privilege against compelled disclosure mandates reversal of the contempt sanctions.

II. Rongstad's Assertions of Constitutional Privilege were Well-Founded and Constituted a Substantial Justification for His Refusal to Comply With the Trial Court's Order Under *Burnett v. Alt*

Even if the trial court was correct that Rongstad's assertion of a constitutional privilege fell short on a "balancing" test, that does not justify the sanctions imposed. If it did, trial courts could use contempt and sanction authority to become the court of last resort on a disclosure issue. The trial court's harsh orders at the infancy of this case demonstrate, with some flair, the "between a rock and a hard place" position faced by parties such as Rongstad who are ordered to divulge what they believe to be protected political associations. Rongstad's initial refusal to disclose the names of Alliance members, a mere six weeks into the litigation, was met with fierce and unyielding sanctions: (1) over $32,000 in attorney's fees; (2) a $1,000 per day forfeiture until disclosure; and (3) if no disclosure by April 4, 2003 (just over two months into the active litigation), imposition of default judgment. The trial court tersely rejected Rongstad's request for a stay pending an attempted

interlocutory appeal, concluding that Rongstad had "no likelihood of success on the merits." 3/11/03 Tr., at 22-23 (Appx. 60-61)[6]

The trial court thus put Rongstad into an untenable position: either disclose the information and thereby forfeit the right to meaningful appellate review of the privilege issue, or faces enormous sanctions, including a potential default judgment. Such a Hobson's choice has been expressly rejected by the Wisconsin Supreme Court.

A. *Burnett v. Alt* Precludes Sanctions for Substantiated Assertions of Privilege

In *Burnett v. Alt*, the Wisconsin Supreme Court rejected the use of a court's sanctioning authority when the discovery concerns legitimate assertions of privilege. There a treating doctor, called by plaintiff as a witness, refused to answer a deposition question requesting his expert opinion. The trial court granted a motion to compel and imposed sanctions against the doctor pursuant to § 804.12(2), Wis. Stats.

The Wisconsin Supreme Court reversed. First, the Court held expert witnesses have a conditional privilege to refuse to testify absent a showing of "compelling circumstances." *Alt*, 224 Wis. 2d at 84-91. Second, the Court held that where a witness has a substantiated privilege claim, the witness can properly refuse to comply with an order compelling disclosure:

> Although the circuit court should not rely on the judgment of the attorneys involved for their self-interested determination that a privilege exists, . . . ***a substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery.***

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[6] Recognizing the constitutional interests at issue and the irreparable harm if disclosure is made, other courts have routinely stayed contempt decisions pending appeal. *See, e.g., Crocker*, 533 N.E.2d at 446-47 (trial court recognized "that the case presented serious constitutional issues and stayed its order pending appeal."); *Maurer*, 15 S.W.2d at 259 (contempt stayed if witness sought mandamus relief).

Id. at 94 (emphasis supplied). Third, the Court explained that it is error for trial court's to impose sanctions for a refusal to comply with a court order before an appellate court can address the legal privilege issue:

> Were we to uphold sanctions in this case, we would be forcing Burnett and Dr. Acosta to make a choice between protecting a privilege and avoiding sanctions. Had Dr. Acosta answered the question regarding whether a gush of blood was abnormal, his privilege to refuse to provide testimony would then have been avoided. Although sanctions would then have been avoided, and even though a reviewing court might later strike the answer, this might be little consolation to the expert who for whatever reason was forced to testify against his will. ***We cannot put attorneys and deponents in this untenable situation.***

Id. at 95 (emphasis supplied).

Perhaps to quell fears that this principle would lead to abusive assertions of privilege, the Court emphasized:

> We caution attorneys that our holding in this case is not a license to assert unsubstantiated privileges. An unsubstantiated and unfounded privilege is not substantial justification for not imposing sanctions under Wis. Stat. § 804.12(2).

Id. at 95, *citing B&B Investments v. Mirro Corp.*, 147 Wis. 2d 675, 687-88, 434 N.W.2d 104 (Ct. App. 1988).

The *Alt* Court did not define the term "substantiated." However, it is evident that it means something other than ultimately being correct. Parties are not required to gamble every time a privilege is asserted at the risk of incurring sanctions if ultimately proven wrong. This is precisely the "untenable" situation the Court refused to foist upon attorneys and deponents.

The case cited to demonstrate an "unsubstantiated" assertion of privilege, *B&B Investments*, suggests that the phrase is equivalent to "frivolous." In that case, a principal of the plaintiff, a

partnership, refused to answer deposition questions based upon an asserted Fifth Amendment privilege against self-incrimination. Among the questions he refused to answer were whether he was a plaintiff in the lawsuit and whether he intended to take the Fifth on every question asked. *B&B Investments*, 147 Wis. 2d at 687 n.2. Suggesting that the key issue was whether the assertion of privilege was "legitimate," the Court concluded that plaintiff's assertions of privilege were "ludicrous" and "meritless," and that the only purpose was to delay the proceedings and deprive defendants of discovery. *Id.* at 686-87.

The word "substantiate" is defined as "to support with proof or evidence; verify." American Heritage Dictionary, at 1791 (3d ed). The test, therefore, properly focuses on whether the assertion of privilege is "legitimate" and whether it is supported with proof or evidence, or, in the legal context, precedent. In all respects, the "unsubstantiated" and "unfounded" standard of *Alt* equates to the standard of frivolousness in §§ 802.05 and 814.025, Wis. Stats. (requiring pleading to be "well-grounded in fact" and have a "reasonable basis in law").

Judge Nowakowski failed to even consider or analyze *Alt*. The subsequent trial court, Judge Sumi, interpreted the term "substantiated" to equate with a trial court's determination of whether a privilege exists:

> How does one go about getting substantiation? Well, it seems that if you're in a deposition, you halt the deposition, you go to court that has jurisdiction in the case and ask, you know, is this a valid claim, is it substantiated. That's exactly what happened in this case. The deposition was halted; Mr. Rongstad believing he had a privilege, didn't answer. Guidance from the court was sought, guidance was given, the court said, "It's not a substantiated claim of privilege, I don't adopt it." Fine.
>
> * * *

> I think I've already commented enough on the claim of privilege. I said that I think it's a serious question, when one does invoke a privilege, it needs to be examined, and if it's a legitimate, a valid, a substantiated privilege, that has to be honored. But in this case it was thoroughly examined and the claim of privilege was rejected by a court, not this court, but a predecessor court who examined the relevant law and exercised his judgment to decide that there was not a substantiated claim of privilege. And I believe that means a party then needs to pursue what remedies it has but cannot continue to withhold discovery or refrain from answering a question.

10/3/03 Tr., at 17-18, 41-42 (R. 155) This analysis is circular. If the trial court's rejection of the assertion of privilege in and of itself demonstrates that the privilege was not substantiated, the expert in *Alt* would have been out of luck because the trial court therein rejected his claim of privilege.[7] The entire import of *Alt* is that it is "untenable" to force a witness to choose between "protecting a privilege" all the way to a "reviewing court" or incurring sanctions. 224 Wis. 2d at 95, ¶ 45. The use of the term "substantiated" was intended to forestall the abusive use of privilege claims that, like the claim in *B&B Investment*, are frivolous.

By contrast, Rongstad's constitutional privilege claims were well-grounded in fact and law, including the general constitutional principles espoused in *NAACP v. Alabama*, *Bates* and *Buckley*, and the specific application of those principles to an analogous private defamation action in *Crocker*. Rongstad testified about the assurances of confidentiality provided to contributors to the Alliance, and the fears expressed by members that disclosure could result in public reprisal or litigation. One can legitimately argue that the existence of a balancing test by definition provides a substantiated basis for an assertion of privilege. However, there is no need to go this far – Rongstad had a strong

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[7] Judge Sumi also misstated Judge Nowakowski's conclusions – he never stated that the privilege claim was "unsubstantiated," nor did he analyze the issue.

and substantial basis, legally and factually, upon which to assert the constitutional privilege against compelled disclosure of his political associations.

At a minimum, the trial court should have stayed its decision to allow Rongstad the opportunity to pursue an interlocutory appeal, and its failure to do so was an erroneous exercise of discretion. *See Crocker*, 533 N.E.2d at 446-47 ("The trial court noted that the case presented serious constitutional issues and stayed its order pending appeal. The trial court retained jurisdiction for all purposes including the continuation of Clark's deposition on issues other than identifying members of his political associations.").

B. The Court Should Certify to the Wisconsin Supreme Court the Issue of Whether Interlocutory Appeal Should be Mandatory to Review a Substantiated Assertion of Privilege

Given the "untenable" choice identified in *Alt*, and a trial court's interest in enforcing its discovery orders, interlocutory appeal should be a matter of right in cases involving threatened sanctions for refusal to disclose evidence based upon a legitimate claim of privilege. This Court should consider certifying this issue to the Wisconsin Supreme Court pursuant to § 809.61, Wis. Stats.

In an analogous situation, the Court exercised its constitutional superintending power over lower state courts to mandate that parties have an absolute right to interlocutory appeal to determine a claim of qualified immunity. In *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996), the Court recognized that qualified immunity exists to provide public officials with "immunity from suit," not simply immunity from liability. The "primary benefit" of such immunity would thus be lost if a case was erroneously allowed to proceed to trial. *Id.*

> Although the official could raise qualified immunity on appeal after the circuit court enters a final order, this is not a sufficient remedy. . . . "[T]he official cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation."

Id. at 227, *quoting Tucker v. Resha*, 648 So.2d 1187, 1189 (Fla. 1994).

The instant case is no different. Faced with the panoply of sanctions imposed and threatened, including a default judgment, Rongstad ultimately disclosed the names of contributors to the Alliance after this Court denied interlocutory review. While Rongstad now appeals from the sanctions, he cannot undo the disclosures or obtain any meaningful relief for the violation of his and the contributor's constitutional rights. If he was correct that the constitutional privilege applied, there is no adequate remedy to repair the damage, other than relief from the sanctions.

The Supreme Court of Pennsylvania recently reached this precise conclusion. *See Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). At issue was a trial court order compelling disclosure of the identities of the authors of an anonymous internet posting that was alleged to be defamatory. The anonymous authors, named as Doe defendants, argued that the decision was appealable as of right under the Pennsylvania collateral order rule, which allows appeal as of right from "separable and collateral" orders "where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably harmed." *Id.*, at 45, *quoting* Penn. R. App. P. 313. The Court agreed, finding that "the court-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their fundamental rights," and that once the identities were disclosed, the "First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure." *Id.* at 50.

See also Maurer, 15 S.W.2d at 259 ("When, as here, a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate.").

While it may be beyond this Court's institutional function to establish such a rule, Rongstad raises the issue to prevent any contention of waiver and to suggest a potential issue for certification to the Supreme Court to address the issue under its broad superintending authority.

III. The Sanctions Cannot Stand Where Lassa Failed to Even State a Claim

The trial court's treatment of Rongstad's motion to dismiss was a gross abuse of discretion. In light of Lassa's aggressive discovery and the trial court's decisions dismissing Rongstad's claims of privilege, Rongstad promptly filed a motion to dismiss on February 11, 2003, and asked for a hearing before any final determination on the privilege issue. Judge Nowakowski refused to even schedule a hearing, instead charging ahead on the privilege issues and imposing sanctions before the motion was even briefed. By the time the motion was heard (fully five months after it was filed), Rongstad had been forced to disclose the names to avoid (he thought) a default judgment.

In this context, the sanctions should be reversed. The court should have heard the motion to dismiss *before* ordering any discovery over a constitutional objection, and should have granted the motion because Lassa failed to allege an actionable defamation claim.

A. In Light of the Significant First Amendment Issues Presented, the Motion to Dismiss Should Have Been Decided *Before* Allowing or Compelling Constitutionally Suspect Discovery

Rongstad was consistently whipsawed by the trial court's approach to the legal issues presented. On the one hand, Lassa's motions seeking to compel disclosure and sanctions were scheduled and heard immediately, with little (and initially with no) time to adequately brief the issues. The trial court expressly stated that Lassa's alleged need for discovery to further her political

aspirations gave rise to the need for immediate discovery. On the other hand, the trial court refused to consider whether Lassa had even stated a viable defamation claim before forcing Rongstad's disclosure through the use of discovery and contempt sanctions.

Rongstad's constitutional rights were deemed secondary to Lassa's mere allegations of defamation. In a similar case, a Pennsylvania court was careful to ensure that the sufficiency of a public figure plaintiff's defamation complaint was tested before the court reached constitutional discovery issues. In *Melvin v. Doe*, 49 Pa. D.&C.4th 449(Pa. Ct. Cmmn. Pleas 2000), plaintiff filed a defamation action alleging that a statement on a website was defamatory, and immediately sought discovery designed to identify the source of the posting. Certain Doe defendants challenged the discovery on First Amendment grounds. Before reaching the constitutional issues, the court stayed discovery "in order to give the defendants the opportunity to show that plaintiff could not make out a prima facie case." *Id.* at 452. The Court explained:

> A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit.

Id. at 451 n.2. In this case Judge Nowakowski went to great lengths to ensure that Lassa could use the rules of discovery to obtain the identity of individuals before ever considering whether the complaint had merit.

Wisconsin's Civil Jury Instruction 2500 provides the following law note for trial judges regarding defamation cases:

> The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a Motion to Dismiss. On a Motion to Dismiss, it is the function of the Court to determine whether a communication is capable of a defamatory

> meaning. If the communication is capable of a defamatory as well as a non-defamatory meaning, then a jury question is presented.

This instruction suggests that, unless the statement at issue is capable of a defamatory meaning, neither the resources of the Court nor the resources, time, interests and potential privileges of the parties should be wasted or infringed upon. Simply put, if the statement is not capable of having a defamatory meaning, there is no need for the case to move forward to discovery and potential privilege issues.

B. The Motion to Dismiss Should Have Been Granted – There Was No Implied Defamation

Long after the majority of sanctions at issue on this appeal had been imposed, the second trial court, Judge Sumi, denied Rongstad's motion to dismiss. While that decision is not technically before this Court, because the defamation claim was dismissed pursuant to stipulation, the fact that the defamation claim lacked merit is relevant to the propriety of the sanctions imposed. If the Court agrees with Rongstad that Lassa failed to state a claim, the sanctions cannot stand.

1. The Legal Standards to Determine the Sufficiency of a Defamation Claim by a Public Figure

The legal sufficiency of a complaint is a question of law that this Court reviews de novo. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 245, 593 N.W.2d 445 (1999). Trial courts serve as a gatekeeper in defamation actions, determining as a matter of law whether "the communication is capable of a defamatory meaning." *Bauer v. Murphy*, 191 Wis.2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995). "The test of capability of a defamatory meaning is not whether by ingenuity, or by stretch of the imagination or semantics, the words might be defamatory. Rather, the determination to be made is 'whether the language used is reasonably capable of conveying a

defamatory meaning to the ordinary mind and whether the meaning ascribed by plaintiffs is a natural and proper one.'" *Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411 (1959). "[T]he words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered." *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 459 (1966).

In addition, defamation must be pled with particularity. *See* § 802.03(6), Wis. Stats. Accordingly, the focus is not on the plaintiff's spin about what the communication implies, but on "whether an alleged defamatory implication is fairly and reasonably conveyed ***by the words and pictures of the publication*** or broadcast." *Mach v. Allison*, 2003 WI App 11, ¶ 31, 259 Wis. 2d 686, 712, 656 N.W.2d 766 (Ct. App. 2002) (emphasis supplied). Finally, if there is any inconsistency, the language in the actual mailer prevail over the allegations in the complaint. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶ 11, 239 Wis.2d 78, 85, 619 N.W.2d 271 (Ct. App. 2000).

The First Amendment demands heightened judicial scrutiny of "a libel claim brought by a public official against critics of his official conduct." *New York Times*, 376 U.S. at 264. The fact that the statements were made in a negative, issue ad style mailer a few days before the election, as opposed to a scholarly journal, is critical to the appropriate gatekeeping analysis.

Frinzi is a perfect example. The question there was whether a statement critical of a candidate made days before a primary election was capable of conveying a defamatory meaning. The Court concluded it was not, in large part because "the language must be considered as originating with the state chairman of the Democratic Party during a party primary concerning a party candidate a few days before the primary election." *Frinzi.*, 30 Wis. 2d at 276. The Party Chair had charged that plaintiff was supported by an "unholy alliance" of "Knowles forces" (Republicans) and "anit

John Doe forces," and that the "price apparently is Knowles' support to weakening the anti-gambling laws." Carefully examining both the words and their political context, the Court concluded the "language complained of is not libelous in its direct charge or in any implied meaning." *Id.* at 277. The Court was careful to note that the reference to the "price" being paid of "weakening the anti-gambling laws," which could presumably carry a negative and defamatory implication, "is referable to the Knowles forces and not to Frinzi." *Id.*

This final holding of *Frinzi* is critical – when defamation by implication is alleged or argued relating to a political communication, the court must carefully examine whether the alleged implication even applies to the plaintiff. Defamation by implication is actionable only where the statement in question "implies the allegation of undisclosed defamatory facts," Restatement (2d) of Torts, § 566, and only where "certainty as to the person who is defamed [appears] from the words themselves, for no innuendo can render certain that which is uncertain." *Luthey v. Kronschnabl*, 239 Wis. 375, 379, 1 N.W.2d 799 (1942).

2. Judge Sumi's Decision Denying Rongstad's Motion to Dismiss

In denying the motion to dismiss, Judge Sumi held: "The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful conduct that Senator Chvala was accused of." 7/8/03 Tr., at 4 (R. 151) The court further held that although it was unaware of any potentially defamatory meaning of the phrase "hooked up with," Lassa's argument on summary judgment that it implied a sexual relationship with Chvala created a factual issue for the jury. *Id.* at 4-5. Finally, the court explained that Lassa's status as a public official was irrelevant at the motion to dismiss stage, and

would only become relevant when the question of actual malice was raised at summary judgment. *Id.* at 5-6.

3. Lassa Failed to State a Claim Because Nothing in the Mailer Accused Lassa of Illegal Conduct

Reading the actual language of the mailer, in its entirety and in the broader electoral and political context in which it was made, it is apparent that Chvala, not Lassa, is the only party accused of criminal conduct. The cover of the mailer reflects the Milwaukee Journal Sentinel headline "Chvala Charged With Extortion." (Appx. 1) The back side of the mailer is dominated by Chvala's booking photo, while the text expressly states that "Lassa's mentor was charged with 20 felonies . . . ." (Appx. 2) The only factual statements concerning Lassa are that she "wanted to be a State Senator" and that she "asked . . . Chvala if she could." The mailer does not "fairly and reasonably convey," much less imply, that Lassa engaged in any illegal conduct, but rather conveys that Lassa has political connections to a politician who was charged with numerous crimes, including "extortion," "misconduct in public office" and "pay to play." In fact, in the accepted style of issue advocacy, the mailer closes by asking the reader to call Lassa "and the rest" and ask them the "tough questions" about whether they too engaged in improper conduct, clearly implying a lack of knowledge about whether Lassa engaged in criminal or unethical conduct. Lassa's complaint fails to identify *any* particular language that purported makes the assertions she alleges – despite the mandate of § 802.03(6), Wis. Stats., that the "particular words complained of" must be set forth in the complaint.

IV. The Sanctions Bore No Rational Relationship to Rongstad's Alleged Offensive Conduct and the Potential Harm to Lassa

The imposition of contempt sanctions and discovery sanctions are matters within the discretion of the trial court. *See In re Haeuser v. Haeuser*, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996); *Johnson v. Allis-Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859 (1991). A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and reaches a reasonable conclusion using a demonstrated rational process. *Magyar v. Wisconsin Health Care Liability Ins. Plan,* 211 Wis.2d 296, 302, 564 N.W.2d 766 (1997). "If the circuit court bases the exercise of its discretion upon an error of law, its conduct is beyond the limits of discretion." *Id.*

A. Sanctions Must be Tailored to the Severity of a Party's Misconduct and Must Consider the Harm to the Other Party

"A trial court also erroneously exercises its discretion when it renders a sanction that is not 'just' namely a sanction that is not 'tailor[ed] .... to the severity of the party's misconduct.'" *City of West Allis v. Wisconsin Elec. Power Co.*, 2001 WI App 226, ¶ 51, 248 Wis.2d 10, 47, 635 N.W.2d 873 (Ct. App. 2001) (*quoting Johnson*, 162 Wis.2d at 286).

In *City of West Allis*, the trial court, following a jury verdict including $100 million in punitive damages for alleged environmental contamination, found that WEPCO misled the plaintiffs by stipulating that it had no insurance for punitive damages when in fact it potentially had such coverage. The court imposed draconian sanctions, enjoining WEPCO from seeking coverage from its insurers and imposing a default judgment in the alternative for the amount of the verdict, in case WEPCO's appeal on the merits was successful. The Court of Appeals reversed. The Court concluded that because evidence of insurance coverage was not admissible in a punitive damages

case, plaintiffs were not prejudiced by any misrepresentation. 248 Wis. 2d at 47. Harsh sanctions were "unreasonable" where "no serious harm was done to the opposing party." Finally, the Court rejected the notion that sanctions were necessary to "send a message":

> [T]he trial court conceded its sanction was harsh, but observed that, given the impact of the misrepresentation, it had to "send a message." Since the actual impact of WEPCO's allegedly improper conduct did not lead to the consequences contemplated by the trial court, we find the extremely harsh sanctions to be an erroneous exercise of discretion, as ***the sanctions bore no rational relationship to the offensive conduct.***

Id. (emphasis supplied).

This case fits into the same category. The $63,000 in monetary sanctions (not to mention the default judgment entered after the disclosures) simply bears no rational relationship to Rongstad's refusal to disclose political associations for a mere two months, where Rongstad had a legitimate claim of privilege and sought an interlocutory appeal to preserve his right to a meaningful appeal on the issue. Like the plaintiffs in *City of West Allis*, Lassa suffered "no serious harm" from Rongstad's attempts to obtain appellate review of Judge Nowakowski's legal decision rejecting his claim of constitutional privilege. Lassa obtained the information in two short months, and a mere two and half months from the filing of the lawsuit.

It remains unclear precisely why the trial court was in such a fury to force Rongstad to reveal the names before he could even attempt an appeal. Rongstad's disclosures were made less than two and a half months after the complaint was filed, and a mere two months from the original decision overruling the objection and instructing disclosure. There was no hardship to Lassa from waiting this two months, which allowed Rongstad to at least take a shot at an interlocutory appeal.

Like the trial court in *City of West Allis*, it is apparent that Judge Nowakowski was piqued at Rongstad's refusal to accede to his orders, and believed he needed to "send a message" to Rongstad. Nevertheless, when the entire context is examined, including the constitutional nature of the privilege at issue, the precedent supporting its assertion, and Rongstad's quick disclosure after interlocutory review was denied, the extremely harsh sanctions imposed were not tailored to the severity of the offense and represented an erroneous exercise of discretion.

B. The Trial Court Failed to Examine the Relevant Facts and Instead Focused on Lassa's Political Need for the Information

As set forth above, the "relevant facts" in the context of an assertion of a First Amendment privilege against compelled disclosure are the evidence submitted by the witness reflecting a "reasonable" probability of "threats, harassment, or reprisals," and the evidence submitted by the party seeking disclosure of a "compelling" State interest in forcing disclosure. While the trial court did examine the evidence submitted by Rongstad concerning the potential chilling effects of disclosure (which it rejected out of hand), the court failed to examine the appropriate facts concerning Lassa's interests in compelling disclosure. Rather than focusing on whether the information was critical to Lassa's claim, *see Crocker*, 533 N.E.2d at 448, the court appeared to focus solely on two factors: Lassa's immediate need for the information to further her political career, and what the court perceived to be Rongstad's disdain for its decisions. Neither concern is relevant to the legal inquiry.

As to Lassa's political concerns, there is no special consideration in the law for public officials, and no heightened entitlement to discovery to protect their reputations. In this private lawsuit, Lassa should have been treated like any other litigant, and heaven and earth should not have

been moved to force Rongstad to disgorge potentially privileged information within weeks of the filing of the complaint and before any determination of whether the complaint stated a claim.

With respect to the trial court's various findings that Rongstad was evasive or that he testified falsely (a distressing claim upon a reading of deposition testimony)[8], the fact is that Rongstad was very straightforward with the court that he believed the names of the Alliance members were protected by a constitutional privilege, and that he intended to pursue appellate review of the trial court's legal determination before disclosing the names. Rongstad's counsel explained at the March 11, 2003 hearing that Rongstad wanted to "exhaust his appellate remedies with respect to the constitutional issues" and that "if in fact the Court is correct in its analysis that the constitutional issues do not trump his obligation to disclose the names of the contributors, that he will in fact comply." 3/11/03 Tr., at 8 (R. 149) Three days after this Court denied Rongstad's request for interlocutory appeal, he complied by disclosing the names of all contributors since January of 2002. The trial court's failure to consider these facts was an erroneous exercise of discretion.

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[8] Judge Nowakowski found that Rongstad lied under oath, based only upon a written transcript of Rongstad's *unrefuted* testimony that he did not keep a separate list of contributors. (Appx. 53-54) Basing sanctions upon subjective determinations of the truth or falsity of a witnesses testimony, without a separate hearing and an opportunity to dispute the finding, is inappropriate:

> We appreciate the sense of outrage that the district judge apparently experienced upon becoming convinced that the petitioner had not testified truthfully. False swearing, however, not only is a serious offense, but also its proof must be established, if legal consequences are to result, by procedures that fully comport with due process.

U.S. v. Dorszynski, 484 F.2d 849, 852 (7th Cir. 1973), *rev'd on other grounds*, 418 U.S. 424 (1974). *See also Jones v. Lincoln Electric Co.*, 188 F.3d 709, 738 (7th Cir. 1999) ("civil contempt is an improper method by which to punish perjurious or false testimony absent some element of obstruction of justice.").

CONCLUSION

Neither the trial court's anger at Rongstad nor its belief that Lassa needed names quickly to plan her political career gave the court the right to use its sanctioning power to deprive Rongstad of a meaningful appeal on the constitutional privilege issue. The sanctions should be reversed for at least four reasons: (1) Rongstad's privilege claims were meritorious; (2) Rongstad's privilege claims had a substantial basis in law and fact, making the sanctions improper under *Alt*; (3) Lassa's defamation claim had no merit and the trial court erred by imposing discovery and contempt sanctions before addressing the merits of the claim; and (4) the sanctions bore no rational relationship to the alleged misconduct, and were based upon irrelevant facts.

For all of the foregoing reasons, Rongstad respectfully requests that the Court reverse the sanctions imposed by the trial court.

Dated at Madison, Wisconsin this 9th day of April, 2004.

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CERTIFICATION PURSUANT TO § 809.19(8)(b), WIS. STATS.

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,972 words.

Dated at Madison, Wisconsin this 9th day of April, 2004.

Michael P. Crooks
State Bar No. 01008918

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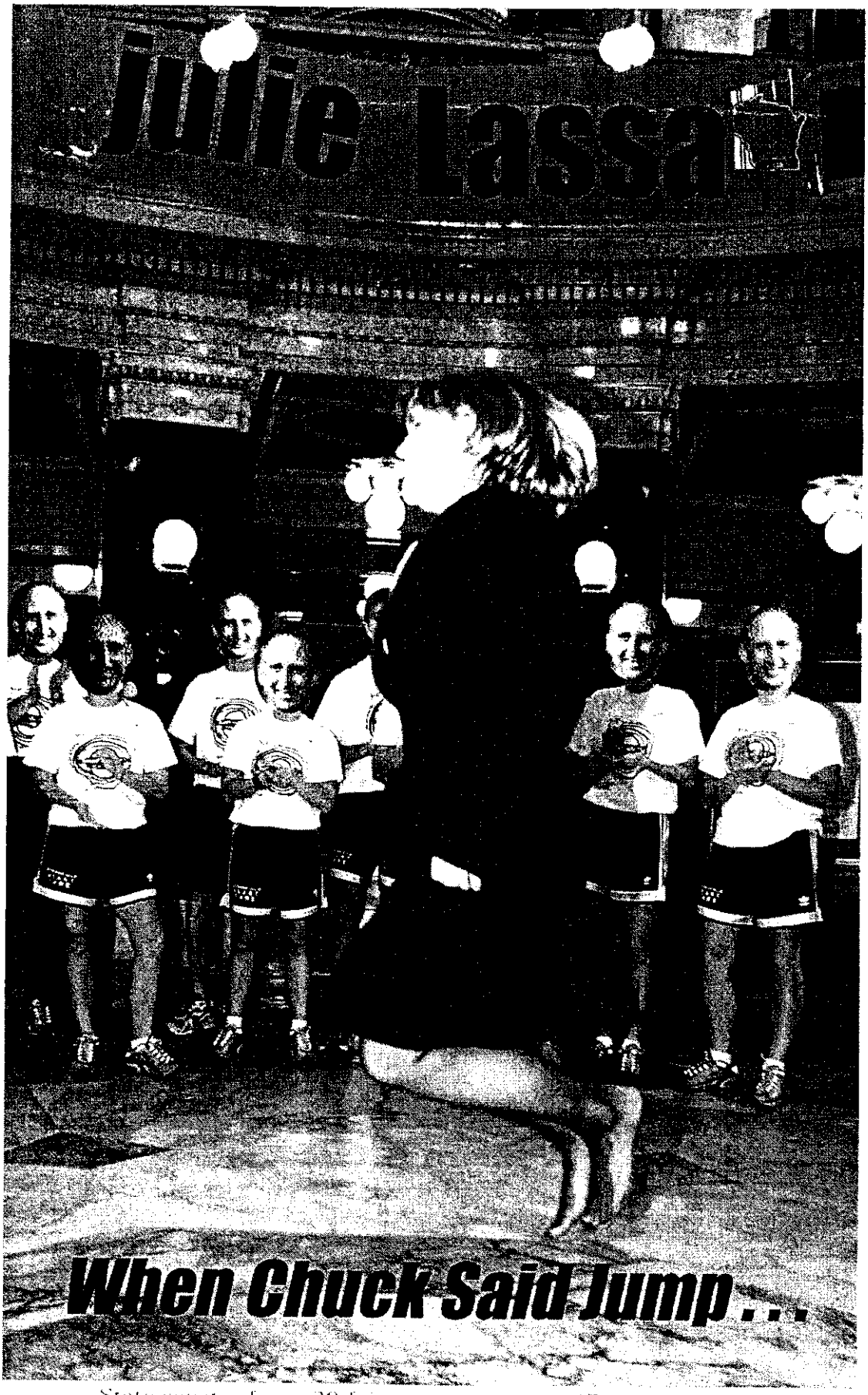
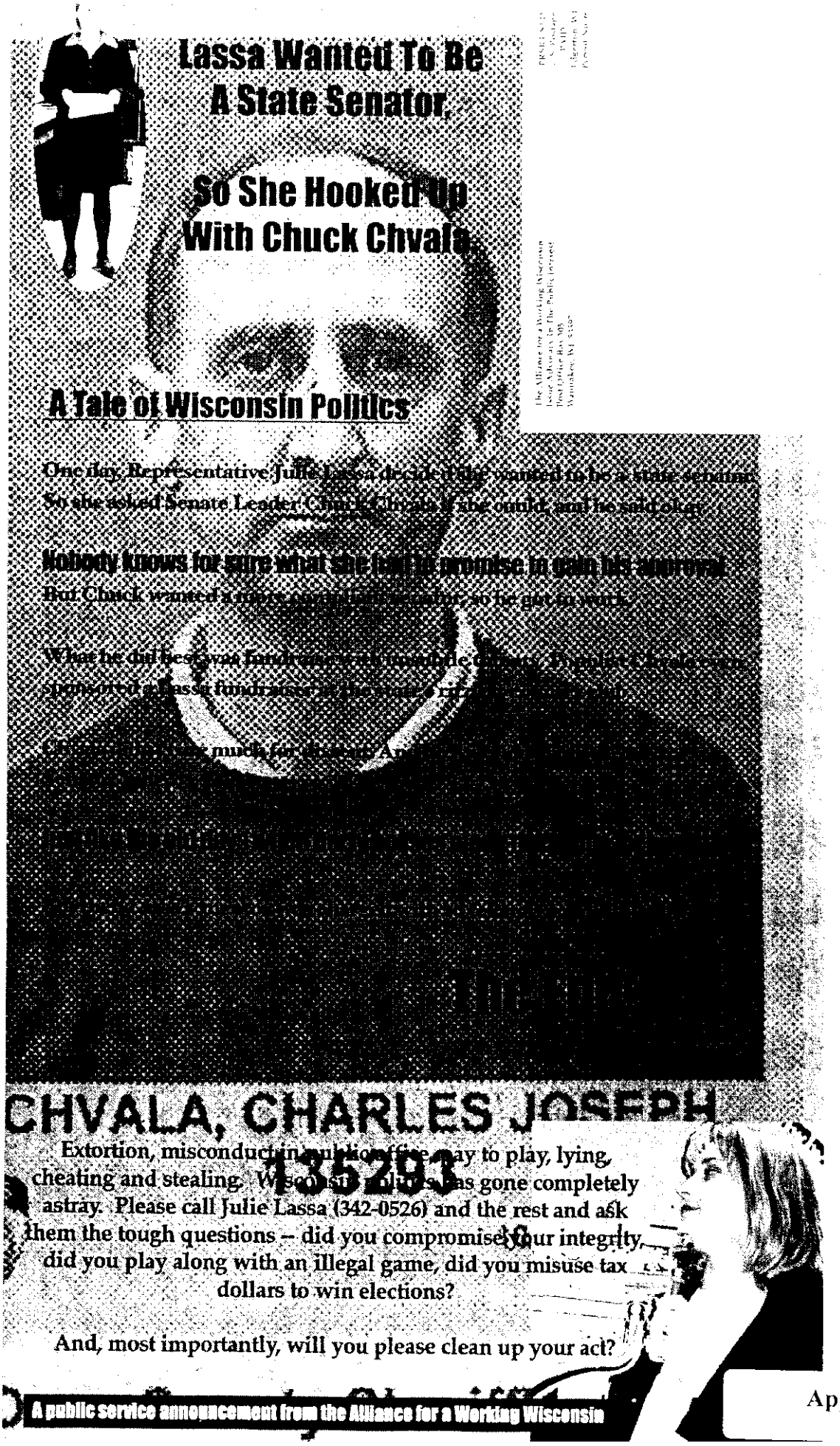


State senator faces 20 felony counts, up to 85 years in prison

Chvala charged with extortion

Jensen, other GOP
awmakers expected
o be charged today

Appx. 1


Lassa Wanted To Be A State Senator,
So She Hooked Up With Chuck Chvala.
A Tale of Wisconsin Politics
CHVALA, CHARLES JOSEPH
Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa (342-0526) and the rest and ask them the tough questions -- did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections?
And, most importantly, will you please clean up your act?
A public service announcement from the Alliance for a Working Wisconsin

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

Todd Rongstad,
as president of Valkyerie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. Mailing Services, Inc.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

Does, 1-5, in their individual capacities,

Defendants.

AFFIDAVIT OF TODD RONGSTAD

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

TODD RONGSTAD, being first duly sworn under oath, deposes and states as follows:

1. That I am a board member and president of the Alliance for Working Wisconsin.

2. That in that position, I had numerous conversations with members of the association over the last several years and recently specifically related to the lawsuit at issue.

3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization, for fear of public reprisal and potential legal action.

5. That disclosure of the names and the attendant loss of confidentiality will likely ruin my business and force me to find a new career.

Dated at Madison, Wisconsin this 5th day of February, 2003.

Todd Rongstad

Subscribed to and sworn before me
this 5th day of February, 2003.

Notary Public, State of Wisconsin
My Commission expires: Permanent

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Case No. O3-CV-0177
Code No. 30106
INTENTIONAL TORT

Todd Rongstad,
as president of Valkyerie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. Mailing Services, Inc.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

Does, 1-5, in their individual capacities,

Defendants.

State of Wisconsin
County of Dane
This document is a full, true and correct copy of the original on file and of record in my office and has been compared by me.
Attest [illegible], 20 03
JUDITH A. COLEMAN
Clerk of Courts
Deputy Clerk

CIRCUIT COURT DANE COUNTY WISCONSIN

ORDER DENYING DEFENDANT'S OBJECTION TO DEPOSITION QUESTIONING REGARDING ALLIANCE MEMBERSHIP

IN

IT IS HEREBY ORDERED: that Defendant's objections to plaintiff's questions as to the identity of persons and their conduct regarding the production of the mailing at issue in this case ~~membership issues~~ on the grounds of relevance, freedom of speech and freedom of association is hereby denied.

IT IS HEREBY FURTHER ORDERED: that the defendant, Todd Rongstad, answer all persons involved in the preparation, funding or distribution of questions pertaining to the identity of the ~~Alliance membership, the alleged contributors, and their involvement in producing~~ the postcard at issue and pertaining to their conduct in this regard.

Entered this 4th Day of February, 2003.

BY THE COURT:

The Honorable Michael Nowakows
Circuit Court, Branch 13

IT IS HEREBY ORDERED: that Defendant's objections to plaintiff's questions as to the identity of persons and their conduct regarding the production of the mailing at issue in this case on the grounds of relevance, freedom of speech and freedom of association is hereby denied.

IT IS HEREBY ORDERED: that the defendant, Todd Rongstad, answer all questions pertaining to the identity of the persons involved in the preparation, funding or distribution of the postcard at issue and pertaining to their conduct in this regard.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Julie M. Lassa,

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

Todd Rongstad,
The Valkyrie Group, LLC,

and

Does 1-5, in their individual capacities,

APR - 4 2003

Defendants.

ORDER

On March 11, 2003, the Honorable Michael Nowakowski, Chief Circuit Judge, heard argument on 1) Plaintiff Julie M. Lassa's March 3, 2003 Motion for Sanctions for Failure to Comply With Court-Ordered Discovery; 2) Plaintiff's March 10, 2003 Motion to Stay Defendant's Discovery; and 3) Defendant's motion for a stay pending appeal. Attorneys Michael Crooks and Anthony Conlin of Peterson, Johnson & Murray S.C. appeared on behalf of Defendants and Attorneys Edward Garvey, Glenn Stoddard and Pamela McGillivray of Garvey & Stoddard, S.C. appeared on behalf of Plaintiff.

The Court granted Plaintiff's motion to impose sanctions on Defendant Rongstad and her motion to stay Defendant's discovery and denied Defendants'

motion for a stay pending appeal for the reasons set forth in the transcript of the motion hearing on March 11, 2003 attached hereto.

IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions for Failure to Comply With Court-Ordered Discovery is GRANTED, and it is further ordered as follows:

1) Defendant Rongstad shall pay all actual and reasonable attorneys fees of Plaintiff that have been incurred in the conduct of the depositions of Rongstad to date, plus all of the enforcement proceedings, including but not limited to the March 11, 2003 motion hearing, plus the various hearings that have been conducted previously, but excluding attorneys fees related to the motion to intervene regarding coverage under Rongstad's homeowner's insurance policy, in the amount of $32,587.00*, supported by the attached affidavit of counsel for Plaintiff.

2) Defendant Rongstad shall pay a forfeiture in the amount of $1,000 per day beginning March 13, 2003, and every day thereafter until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

3) ~~A judgment by default shall be entered against all Defendants and in favor of Plaintiff.~~ If by April 4, 2003, Rongstad fails to comply with the Court's discovery orders, the court will entertain a motion for judgment on all issues of liability in favor of the plaintiff and against all original named defendants as a further sanction for the defendant's failure to provide discovery.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Defendants' Discovery is GRANTED, and it is further ordered as follows:

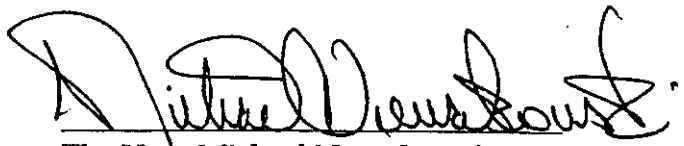
1) The subpoenas issued to the twelve non-party witnesses identified by Exhibit A of Plaintiff's Motion to Stay Defendants' Discovery are quashed.

2) Defendants shall not conduct discovery until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

IT IS FURTHER ORDERED that Defendant's Motion for a Stay pending appeal is DENIED.

Dated this 2nd day of ~~March~~ April, 2003.

BY THE COURT:



The Hon. Michael Nowakowski
Dane County Circuit Court Chief Judge

* The itemized statement of plaintiff's counsel in his affidavit of 3/12/03 and the objection letter of defendants' counsel dated 3/19/03 have been reviewed in the context of the court's awareness of the nature of the submissions made and proceedings conducted. No response from plaintiff's counsel to the letter of 3/19/03 was received. The amount awarded is a reflection of the adjustment noted directly on the affidavit of 3/12/03.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

Julie M. Lassa,

Plaintiff,

v.

Todd Rongstad,
The Valkyrie Group, LLC,

and

Does, 1-5, in their individual capacities,

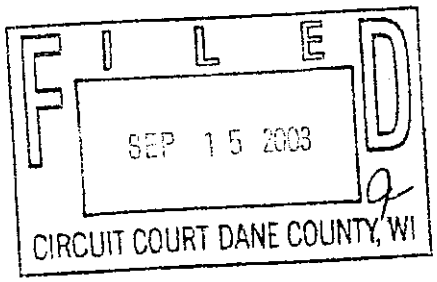
Defendants,

v.

Alex Paul,

Third-Party Defendant.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT



ORDER

On August 15, 2003, the Honorable Maryann Sumi, Circuit Judge, heard argument on Defendants' Motion for Relief from Sanctions and Discovery Stay and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC. Michael Crooks of Peterson, Johnson & Murray, S.C., appeared on behalf of Defendants, Matthew O'Neill of Freibert, Finerty & St. John, S.C., appeared on behalf of Third-Party Defendant, and Edward Garvey, Glenn Stoddard, and Pamela McGillivray of Garvey & Stoddard, S.C., appeared on behalf of Plaintiff.

The Court denied Defendants' motion for relief and granted Plaintiff's motion for default judgment for the reasons set forth in the transcript of the motion hearing on August 15, 2003 attached hereto.

IT IS HEREBY ORDERED that Defendants' Motion for Relief from Sanctions and Discovery Stay is DENIED and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC is GRANTED.

It is further ordered as follows:

1. A scheduling conference has been set for September 2, 2003 at 3:30 p.m. in Branch 2, Dane County Courthouse.

2. Parties may submit a letter to the Court regarding proposed issues for the pretrial conference, including the role of the third-party defendant and whether a jury trial on damages is appropriate, by 4:30 p.m. on August 28, 2003.

3. All discovery is stayed until the pretrial conference.

4. Pending issues regarding the amount of monetary sanctions due shall be held is abeyance until the pretrial conference.

Dated this 15 day of ~~August~~ September, 2003.

BY THE COURT:

The Hon. Maryann Sumi
Dane County Circuit Court Judge

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Does, 1-5, in their individual capacities,

Defendants,

Todd Rongstad,
as president of Valkyrie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

Defendants and
Third-Party Defendants,

v.

Alex Paul
96 River Ridge Road
Wisconsin Rapids, WI 54494,

Third-Party Defendant.

Case No.: 03-CV-0177
Case Code: 30106
INTENTIONAL TORT

NOV 20 2003

STIPULATION AND ORDER FOR ENTRY OF COMBINED JUDGMENT, DISMISSAL, AND APPELLATE RIGHTS

IT IS STIPULATED AND AGREED, by and between the parties, through their respective attorneys, that an order may be entered without notice to any party dismissing this action, together

with all claims and causes of action set forth in the pleadings, on the merits, with prejudice and without costs, with the exception of the third-party complaint for contribution, as follows:

1. That the settlement agreement attached hereto as Exhibit A constitutes the entire agreement between the parties to settle the case at issue.

2. That the underlying defamation action filed by Julie Lassa against Todd Rongstad, The Valkyrie Group, and any named or unnamed Does, be and the same is hereby dismissed with prejudice and without costs and fees to any party, other than those set forth in Exhibit A.

3. That the third-party complaint shall remain viable and be amended to allege a contribution claim associated only with the attorney's fees and forfeitures discussed in Exhibit A, but all discovery and further action on it shall be stayed until all appeals have been exhausted.

4. That a combined judgment, encompassing all earlier judgments, orders of the Court, and proceedings be entered against Todd Rongstad in the amount of $65,000.00, with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund. That the combined judgment shall not be collectible until all appellate avenues have been exhausted. Additionally, no interest shall accrue on the judgment during the pendency of any appeal.

5. That it is understood that the defendants do not concede the appropriateness of the judgment, nor do they waive any appellate rights with respect thereto. The defendants intend to appeal the appropriateness of the fees and forfeitures under the First Amendment, Alt, and whether the Courts were justified in the award, and any other applicable legal theories. Rongstad and The Valkyrie Group retain the right to appeal the contempt ruling on all issues for the stipulated amount of $65,000.00 with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund.

6. That if the defendants ultimately prevail on appeal, the defendants will owe nothing to the plaintiff or the School Fund. If the defendants ultimately lose on appeal, interest shall start to run, at the applicable statutory rate, on the judgment from the point of the final appellate decision until the judgment are paid in their entirety.

PETERSON, JOHNSON & MURRAY, S.C.

DATE: 11/03/03

By: _____
Michael P. Crooks
State Bar No. 01008918

GARVEY & STODDARD, S.C.

DATE: 10/23/03

By: _____
Edward R. Garvey
State Bar No. 1010028

FRIEBERT, FINERTY & ST. JOHN, S.C.

DATE: 11/6/03

By: _____
Matthew W. O'Neill
State Bar No. 1019269

On reading and filing the foregoing stipulation and on motion of Garvey & Stoddard, S.C., attorneys for plaintiffs,

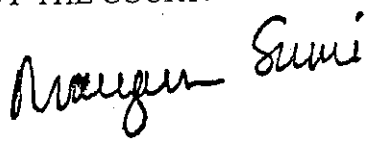
IT IS ORDERED:

1. The stipulation and settlement agreement are adopted by this Court and that this matter be and the same is hereby dismissed, with the exception of the third-party complaint, which

shall be amended as set forth herein, continue to pend, and be stayed until the conclusion of the appeals.

Dated at Madison, Wisconsin, this 17th day of November, 2003.

BY THE COURT:



Honorable Maryann Sumi
Circuit Court Judge

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

Case No.: 03-CV-0177
Case Code: 30106
INTENTIONAL TORT

v.

Does, 1-5, in their individual capacities,

Defendants,

Todd Rongstad,
as president of Valkyrie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

Defendants and
Third-Party Defendants,

v.

Alex Paul
96 River Ridge Road
Wisconsin Rapids, WI 54494,

Third-Party Defendant.

SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through themselves and through their respective counsel, that the defamation claims filed against Todd Rongstad, The Valkyrie Group, and various Does, are settled as follows:

1. Although the defamation issue in this case is unresolved, the parties, Plaintiff Julie M. Lassa ("Lassa"), Defendants Todd Rongstad ("Rongstad") and The Valkyrie Group, LLC, desire to settle this matter because of the significant legal expense associated with further litigation.

2. Lassa agrees to dismiss this case with prejudice against all defendants or potential defendants. Such dismissal includes any claims plead in this action, as well as any statements made by any of the parties about each other or the lawsuit during its pendency.

3. Rongstad and The Valkyrie Group will allow a combined judgment, encompassing all earlier judgments, orders and proceedings of the Court, to be entered against them for the stipulated amount of $65,000.00, with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund. That the combined judgment shall not be collectible until all appellate avenues have been exhausted. Additionally, no interest shall accrue on the judgment during the pendency of any appeal. The contempt sanctions arose from Rongstad's initial refusal to disclose the names of the contributors to the Alliance for a Working Wisconsin. The total of all fees, costs, and forfeitures, and as such the total of the entire judgment, cannot exceed $65,000.00.

4. While a combined judgment would be entered as a result of the stipulation between the parties, the defendants do not concede that the award was legally appropriate in the first place. Rather, the defendants shall have the right to pursue an appeal with respect to the attorney's fees and forfeitures on First Amendment grounds, including the arguments revolving around the Alt case, and any other applicable legal theories. While the appeal is pending, Lassa agrees that no interest would accrue relative to the combined judgment, and the judgment would not be collectible, until the appeals are completed. Once all of the appellate avenues are exhausted, including but not limited to the Supreme Court of Wisconsin or the United States Supreme Court, should either of the parties

choose to go that far, interest would start accruing on the combined judgment at the statutory rate. If Rongstad and The Valkyrie Group ultimately prevail on the appeal, that shall end the matter. If Lassa ultimately prevails on the appeal, the judgment will become due and owing, with statutory interest running until paid.

5. The defendants agree to, either by stipulation or through filing an amended third-party complaint, limit the claims against Paul for contribution to the amount of the attorney's fees and forfeitures set forth above. Because the underlying defamation action will be dismissed by Lassa as part of the agreement. Rongstad and Paul agree that in litigating the third-party contribution claims against Paul, they will not call or name Lassa, her husband or any of her current or former staff or volunteers, as discovery or trial witnesses, and they will not engage in any further discovery relative to the underlying defamation issue.

6. Lassa and Rongstad agree to issue the following statement and reserve the right to comment further on the settlement:

> For a variety of reasons, including the significant legal expense associated with moving forward with this litigation, the parties have agreed to a dismissal of the underlying lawsuit. Mr. Rongstad has agreed to have a combined judgment entered against him and The Valkyrie Group for the attorney's fees and costs awarded as a result of the contempt orders and the default hearing. The plaintiffs have allowed him to appeal the legal validity of those awards with no interest to accrue on the judgment until after those appeals have been decided. Lassa and Rongstad are satisfied that this settlement is in their mutual interest and they are pleased that the underlying claims in this matter have been dismissed.

7. That third-party defendant, Alex Paul, agrees to the provisions in this agreement, that limit the scope of any further discovery and proceedings related to the amended third-party complaint.

PETERSON, JOHNSON & MURRAY, S.C.

DATE: 10/8/03

By: _____
Michael P. Crooks
State Bar No. 01008918

DATE: 10/8/3

_____
Todd Rongstad, and The Valkyrie Group

GARVEY & STODDARD, S.C.

DATE: 10/23/03

By: _____
Edward R. Garvey
State Bar No. 1010028

DATE: 10/23/03

_____
Julie M. Lassa

FRIEBERT, FINERTY & ST. JOHN, S.C.

DATE: 11/6/03

By: _____
Matthew W. O'Neill
State Bar No. 1019269

DATE: 11/7/03

_____
Alex Paul

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

COPY

RULING ON OBJECTION TO DEPOSITION QUESTIONS
Case No. 03-CV-177

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A.M. Mailing Service, Inc.

Laura Stuessy, RMR, CRR
Official Court Reporter

1 particular situation is a fairly complex issue.

2 THE COURT: Well, certainly I started out

3 our conversation yesterday with exactly that lack of

4 information that you allude to. I don't want to

5 pretend to have been made privy to all of what was

6 testified to by Mr. Rongstad during the preceding

7 three or four hours, but certainly, let us say I was

8 further educated. I don't pretend now to hold a

9 master's degree on the topic, but I did get further

10 instruction and elucidation.

11 As a result, at this point I'm prepared to go

12 ahead and rule on these objections or the objection

13 that was made, and I think I understand the positions

14 that both of the attorneys were making. And

15 certainly the cases which were cited, and I'll recite

16 them in a moment, were ones that I had a chance last

17 evening to review, and I understand the relevance of

18 the case law to the arguments that primarily Mr.

19 Crooks was making last evening.

20 MR. GARVEY: Your Honor, this is Ed Garvey.

21 May I just ask the Court if your court reporter is

22 taking this down, or should we have our reporter in

23 here?

24 THE COURT: No. I have my court reporter

25 now, which of course I would always prefer rather

1 than relying on whatever may be happening on the
2 other end of a telephone with somebody else who's not
3 an official reporter, and I say that with the
4 greatest respect for the qualifications of the
5 free-lance reporters.
6 Now, the defendant Rongstad contends that he has
7 the right to refuse to disclose the names of members
8 of his organization that were directly involved in
9 the publication of the allegedly defamatory mailing
10 concerning the plaintiff on the basis of his and
11 their rights to free speech and to free association
12 under the First and Fourteenth Amendment.
13 Let me at this point interject to respond to the
14 further objection or the further ground for objection
15 that Mr. Crooks has lodged on today's date, namely
16 that an inquiry concerning the names of other members
17 of the organization would be irrelevant and would not
18 lead to the discovery of relevant information. That
19 I think can summarily be disposed of by pointing out
20 that Mr. Garvey and his client are not required to
21 accept at face value the testimony of Mr. Rongstad
22 that these other people really were not the
23 principals, they were not the primary movers behind
24 this, that he was in fact the principal participant
25 and that the entire mailing was of his making and at

1 his instigation.

2 Instead, Mr. Garvey is free to pursue further
3 discovery, and perhaps it will lead, if he knows who
4 the people are, to the conclusion that they are
5 people who have liability and that he can, consistent
6 with his obligations under section 802.05, join them
7 in an action where it would be necessary for him to
8 make an allegation of express malice and intent to
9 harm given the admitted status of the plaintiff as a
10 public figure. Therefore, the objection grounded on
11 relevance will be overruled.

12 Now, in support of Mr. Rongstad's objection
13 based on constitutional grounds, his counsel cited
14 several cases, NAACP v Alabama, Buckley v Valeo,
15 McIntyre v Ohio Elections Commission, Wisconsin
16 Socialist Workers 1976 Campaign Committee v McCann,
17 (phonetic) and Elections Board v WMC.

18 As I indicated, at Mr. Crooks' invitation I've
19 now had a chance to review each of these cases. At
20 the outset, it's important to recall the context in
21 which this issue arises. This is a private lawsuit
22 in which an individual citizen seeks injunctive
23 relief and damages on the basis of her allegations
24 that she has been defamed by the named defendants,
25 including the defendant Rongstad and other unknown

1 individuals. The suit asserts common law rights and
2 is not based on any regulation or statute. It is,
3 thus, different than each of the cases noted earlier
4 where it was direct governmental regulation that was
5 at issue.
6 I point out this distinction not because it is
7 determinative, for First Amendment rights are still
8 implicated where the judicial power of the state is
9 sought to be used to compel disclosure, but because
10 the interests to be weighed are different in this
11 setting than in the pure government enforcement
12 arena.
13 The Supreme Court's decision in NAACP v Alabama
14 provides the framework of analysis. There the court
15 stated, and I quote -- and this is at 357 U.S. 463,
16 "We turn to the final question whether Alabama has
17 demonstrated an interest in obtaining the disclosures
18 it seeks from petitioner which is sufficient to
19 justify the deterrent effect which we have concluded
20 these disclosures may well have on the free exercise
21 by petitioner's members of their constitutionally
22 protected right of association."
23 In Buckley v Valeo, the court made it clear at
24 page 69 and following of 424 U.S. that a person
25 claiming that disclosure of information would violate

1 their associational rights must make a "requisite
2 factual showing" before the strict scrutiny of NAACP
3 v Alabama would prevent that disclosure.
4 The court went on to describe the necessary
5 showing at page 74, and it said, "The evidence
6 offered need show only a reasonable probability that
7 the compelled disclosure of a party's contributors'
8 names will subject them to threats, harassment or
9 reprisals from either government officials or private
10 parties."
11 Here Mr. Rongstad and his counsel have failed to
12 present any assertion, much less any evidence, that
13 disclosure of the names of those involved in the
14 publication of the allegedly libelous mailing would
15 subject him to or these other individuals to threats,
16 harassment or reprisals from anyone. The cases cited
17 by the defendant do not grant to membership
18 information a sacred constitutional status of
19 absolute immunity and privilege simply on the basis
20 that it can be categorized as such. Such a reading
21 of NAACP v Alabama trivializes the interests of the
22 members found compelling there and of the
23 constitution itself.
24 Even if were I to conclude that disclosure here
25 would have some impact on the associational interests

1 of defendant Rongstad and the other members of his
2 organization, the competing interests of the
3 plaintiff and public interests at stake are more than
4 sufficient to outweigh them.
5 The purely private interest of any citizen in
6 his or her good name has long been recognized as
7 worthy of the careful protection of the law. While
8 the plaintiff by voluntarily injecting herself into
9 the public spotlight by becoming a candidate for
10 public office is expected to live with certain
11 attacks on her good name that a purely private person
12 might not have to suffer, she does not forfeit
13 entirely the law's protection.
14 Moreover, there is a public interest at stake
15 here that has been identified as particularly worthy
16 of concern. In McIntyre v Ohio Elections Commission,
17 514 U.S. at 349, the Supreme Court noted, "The state
18 interest in preventing fraud and libel stands on a
19 different footing. We agree with Ohio's submission
20 that this interest carries special weight during
21 election campaigns when false statements if credited
22 may have serious adverse consequences for the public
23 at large."
24 The court went on at page 352 to note that this
25 interest is heightened when the allegedly libelous

1 publication is disseminated "on the eve of an
2 election when the opportunity for reply is limited".
3 The Complaint in this case alleges that the mailing
4 at issue was distributed to voters in the plaintiff's
5 district only days prior to the election.
6 Finally, the plaintiff's need for disclosure of
7 the names of those involved is particularly strong
8 here because these are people who may have directly
9 participated in causing her alleged harm and there is
10 no other source for the information.
11 As the Court's discussion of the law at issue in
12 McIntyre reveals, disclosure of identifying
13 information is more likely to be constitutionally
14 permissible where no less intrusive step will
15 accomplish the government's legitimate interests.
16 Defendant Rongstad has failed to identify what less
17 intrusive measure is available to the plaintiff to
18 seek redress under the law.
19 As the Supreme Court aptly noted in NAACP v
20 Alabama, 357 U.S. 463, "It is important to bear in
21 mind that petitioner asserts no right to absolute
22 immunity from state investigation and no right to
23 disregard Alabama's laws."
24 Were I to sustain the objection to the questions
25 at issue here on the record before me, the practical

1 effect would be to grant these unknown participants
2 in the alleged defamation of the plaintiff the
3 absolute immunity that the Supreme Court was so
4 careful to eschew.
5 The objections are overruled, and the defendant
6 Rongstad is ordered to answer all questions inquiring
7 as to the names and behavior of any other persons
8 involved in the preparation, funding or distribution
9 of the mailing.
10 MR. CROOKS: Your Honor? Pursuant to Wis.
11 Statute section 808.07(2)(a), we'd request a stay of
12 your Honor's order until we have an opportunity to
13 seek a supervisory writ from the Court of Appeals.
14 MR. GARVEY: Your Honor, this is Ed Garvey.
15 We would certainly oppose that and also ask for costs
16 and fees in connection with this matter.
17 The Court has clearly pointed out our need for
18 this information to determine who Does 1 through 5
19 are, and we see absolutely nothing to be served by
20 staying this matter, which would just continue what
21 has been going on in this matter, which is an effort
22 by Mr. Crooks to delay this matter beyond the time
23 that it would be of help to the plaintiff.
24 MR. CROOKS: Your Honor, there is no
25 attempt to delay. There's attempt to deal with the

1 serious constitutional issues that the Court has
2 obviously given a great deal of thought to, and the
3 statutes clearly require me to request this relief
4 from the court. A supervisory writ needs to be filed
5 with the Court of Appeals within 10 days, and I can
6 assure your Honor that I have every intent in filing
7 it long before that.
8 MR. GARVEY: We certainly oppose it as
9 vigorously as we can, your Honor, because the
10 deposition is almost -- well, now we're ready for our
11 second day, and we think it's terribly important for
12 us to determine who indeed is involved, and we don't
13 think that the defendants have come up with any
14 constitutional argument that warrants a stay in this
15 matter. It's not a close question at all.
16 THE COURT: Anything further, Mr. Crooks?
17 MR. CROOKS: Well, just I guess briefly,
18 your Honor, that the two things your Honor pointed
19 out, that we haven't shown any consequence to the
20 membership or any, I guess, ramifications of the
21 disclosure and the fact that we haven't provided the
22 Court with any less intrusive means to get to the
23 same end of this fishing expedition, we were not
24 presented with an opportunity to do that. We
25 requested an opportunity to brief, and were denied

1 that opportunity.

2 So, I believe that these are important enough

3 issues that we should take a few days in light of the

4 fact that the plaintiff waited in excess -- nearly

5 three months before filing the suit and that an

6 answer isn't due for 30 days. A five or six or

7 10-day delay isn't going to change the playing field

8 largely, and these are important enough issues that

9 we as officers of the court and the Court itself

10 ought to take them seriously and allow for due

11 consideration.

12 MR. GARVEY: Your Honor, I don't know if

13 you want me to respond or not.

14 THE COURT: Go ahead.

15 MR. GARVEY: The mailing was received

16 November 1st. The suit was filed January 15th. We

17 acted as quickly as possible under the circumstances

18 after meeting with our client, and so it's not for

19 months.

20 There is a special election that is coming up.

21 We now know that that seat is vacant, and therefore,

22 I think it is extremely important that we get to the

23 bottom of this as quickly as possible.

24 As a suggestion it's a fishing expedition, it's

25 called the discovery, and what we're trying to do is

1 discover who was involved. And as we don't care who
2 members are, we care who was involved in ordering
3 this, paying for it, mailing it, designing it and all
4 the rest of it.
5 THE COURT: All right. The request for a
6 stay to permit appeal or to permit a petition for
7 supervisory writ will be denied.
8 The defendant Mr. Rongstad has made no showing
9 of any likelihood of success. It appears to me after
10 consulting the very cases that he cites, that those
11 cases stand for propositions that are contrary to the
12 basis for the objection that was lodged to these
13 questions.
14 The suggestion that he and his counsel have been
15 denied the opportunity to make presentation on the
16 two issues that were alluded to by Mr. Crooks is
17 simply unfair, is an unfair characterization of what
18 transpired between last evening when I was
19 unexpectedly confronted with this issue and this
20 moment.
21 Mr. Crooks obviously had at his disposal a
22 series of cases, which he concedes he had consulted
23 prior to the deposition. As a result, he was as
24 familiar or should have been as familiar with the
25 standards that the Supreme Court has laid out for

1 when the constitutional principles identified in
2 cases such as NAACP v Alabama could be utilized to
3 prevent what is otherwise a perfectly relevant and
4 legitimate question at a deposition or any of the
5 things that were at issue in those Supreme Court
6 cases. No argument was made to suggest anything
7 about harm or threats, or reprisals or chilling
8 effect of the disclosure or what the disclosure would
9 have on Mr. Rongstad or on his cohorts or other
10 members of his organization.
11 Indeed, we were not in a setting in which
12 evidence was being taken and where I was making an
13 evidentiary ruling, and Mr. Crooks and his client
14 should not be slighted for failing to have presented
15 evidence, but there was no assertion made. There was
16 no argument made that anything of the sort identified
17 as the kind of harm or threat that would implicate
18 these constitutional principles was at stake here or
19 was something that reasonably could have been shown
20 if an evidentiary proceeding were to have been
21 conducted.
22 Instead, what I was asked is to submit a brief,
23 not to submit affidavits but to submit a brief. And
24 the fact that I declined the invitation to receive
25 briefs was in part a reflection of the fact that Mr.

1 Rongstad was going to be there this morning. It
2 struck me that it would be valuable to try to, if it
3 was possible, resolve this issue in a way that would
4 be most efficient for Mr. Rongstad and for the
5 attorneys involved in the deposition.
6 In addition, and this is a further reason why
7 the stay will be granted --
8 MR. GARVEY: Denied you mean?
9 THE COURT: -- I not only have to consider
10 the question of the likelihood of success on the
11 merits by the plaintiff, I have to also in the mix
12 consider the harm that granting a stay would visit on
13 the party opposing it. And here, the record that has
14 been presented, not simply in the context of these
15 proceedings but also in the context of a motion for a
16 protective order that was sought and partially
17 granted last week, is that the plaintiff when the
18 allegedly libelous mailing was done was a candidate
19 for public office and apparently was successful in
20 winning an election that was the regular election
21 held in November of last year.
22 The harm that she experienced certainly could
23 not have been remedied in any way that would have any
24 bearing whatsoever on her election of last fall. As
25 a result, the urgency of her immediately filing a

1 lawsuit such as the one she has now filed was, as a
2 practical matter, simply not there.
3 The affidavit that was submitted in reference to
4 the motion for the protective order reveals she
5 apparently is now considering running in a special
6 election that in November of last year she would not
7 have known was even going to take place, and it was
8 only when a vacancy was created in I guess early
9 January that that reality even became something
10 worthy of her consideration.
11 Without commenting on the merits of her
12 allegations that this mailing was in fact defamatory
13 or that it was prompted by express malice, if she is
14 going to seek to clear her name as best she is able
15 in a manner that would have any value to her
16 aspirations to seek the position where that opening
17 has occurred, then it's crucial that that occur at
18 some point prior to the point when that special
19 election is held, and I don't know for sure when that
20 will be. But in any event, delay would clearly be
21 harmful to her legitimate interest in seeking to
22 correct the harm done by the mailing that she
23 alleges.
24 Now, a moment ago I may have misspoke and said
25 this was an additional reason that the stay would be

1 granted. I'm sorry. I should have said that the
2 stay will be denied.
3 So primarily the confluence of the two factors,
4 that there is very little likelihood of success in
5 this effort to obtain a supervisory writ and the harm
6 that would befall the plaintiff's interest from delay
7 which this necessarily would cause, combined to lead
8 me to not grant a stay and instead to reaffirm the
9 order that I just issued that the questions be
10 answered.
11 MR. CROOKS: Your Honor, just briefly.
12 With respect to the consequences to the membership, I
13 think your Honor accurately pointed out we weren't in
14 a forum where we were taking evidence and where I was
15 able to present evidence in that regard. With the
16 request to file briefs, necessarily in my thought
17 process was submitting briefs in conjunction with an
18 affidavit explaining how the entire organization was
19 put together, including the membership.
20 And furthermore, your Honor, I think the
21 consequences to the membership are fairly obvious in
22 that Mr. Garvey has indicated that he plans on
23 inviting to this lawsuit any other individuals he
24 could discover who had any involvement with respect
25 to the card at issue. And the showing, as the Court

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

MOTION FOR RECONSIDERATION
Case No. 03-CV-177

COPY

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 6th day of February, 2003, commencing at 10:05 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

1 And to indicate that he has not answered the
2 questions and that he has continued to flaunt the
3 Court's order is not accurate. He answered all
4 questions with respect to the postcard as your Honor
5 ordered and as your Honor will see in the transcript
6 at issue.
7 What we're here about and the constitutional
8 issue before the Court is whether he has to disclose
9 the membership of the Alliance whether it had
10 anything to do with this postcard or not and that is
11 not what your Honor ruled. Your Honor ruled that he
12 had to disclose individuals and members who had
13 something to do with the postcard at issue. He has
14 done that. The membership list in general is clearly
15 protected by the First and Fourteenth Amendment, and
16 that's why we're here.
17 THE COURT: Okay. Here's what's going to
18 be determined today. The motion for reconsideration
19 was provided to us yesterday, and I did have a chance
20 to review the copies of the cases, and I appreciate
21 Mr. Crooks' attaching copies of the new authority
22 that he was citing.
23 The response to that was received this morning.
24 And again as to that, I had a chance to read the
25 briefs, and I have not because of the short duration

1 of time available had the chance to read all of the
2 attachments and follow up with any of the cases that
3 those cases may have cited, but I think I am
4 sufficiently clear on the positions that are taken by
5 both counsel to at this time deny this motion, and I
6 will deny it.
7 Now, in Mr. Rongstad's brief and again on
8 today's date, I think he as a preliminary matter
9 simply misconstrues the basis for the decision that I
10 originally made. The suggestion that somehow the key
11 to coming to a different result was to find cases
12 where the issues under the First and Fourteenth
13 Amendment of the constitutional right to associate
14 had arisen in a private action, and that that would
15 ultimately be the missing piece, so to speak, ignores
16 what I had to say when I made the decision. And now
17 hearing it again, I looked up in the transcript to be
18 sure that I had in fact said it as I recalled saying
19 it.
20 Indeed, the cases which Mr. Crooks cited to me
21 was a limited number of cases, and under the
22 circumstances Mr. Crooks did not ask, nor did I
23 indicate that I was going to do an exhaustive search
24 for every conceivable case. Instead, I was going to,
25 as I promised, look at the ones that he had cited,

1 and I did. I noted that each of the cases that he
2 had cited involved a situation of direct governmental
3 regulation, direct governmental action taken against
4 somebody, and it was in that context that the cases
5 ultimately were decided.
6 But I then said, "I point out," and now I quote
7 from page nine of the transcript, "I point out this
8 distinction not because it is determinative for First
9 Amendment rights are still implicated where the
10 judicial power of the state is sought to be used to
11 compel disclosure but because the interests to be
12 weighed are different in this setting than in the
13 pure governmental enforcement arena."
14 So I think, frankly, the suggestion that finding
15 a case where in a private litigation setting First
16 Amendment rights were upheld is not the point, and
17 that is not a key and that is not determinative any
18 more than the distinction that I pointed out.
19 Instead, one again has to look at the framework
20 of analysis, and no one has suggested to me, and this
21 motion for reconsideration does not suggest to me,
22 that the framework provided by NAACP v Alabama as it
23 has been clarified in later cases is not the correct
24 framework. I continue to believe it is, and as a
25 result I have attempted to apply it as I applied it

1 previously.

2 The second main thrust of this motion for

3 reconsideration is that now, unlike the argument that

4 had previously been made, Mr. Rongstad is presenting

5 evidence to support the notion that the requisite

6 factual showing has been made to implicate these

7 First Amendment concerns, and I now have an affidavit

8 of Mr. Rongstad.

9 What appears to be the singular representation

10 that pertains to the harm that would befall members

11 of the organization were Mr. Rongstad to disclose

12 their identity is found in paragraph four. It says,

13 "That members have told me that if I am compelled to

14 disclose the identity of members of the organization,

15 that they will no longer be interested in

16 participating in the organization or any such

17 organization" -- and here's the key language -- "for

18 fear of public reprisal and potential legal action."

19 For fear of public reprisal.

20 Now, Buckley v Valeo said that the standard of

21 proof, the quantum of proof that needed to be

22 presented to make out the case that there should be

23 confidentiality associated with the membership

24 information of a minor party or minority party or a

25 small organization, that the bar ought to be set

1 pretty low, and I follow that. I followed it in the
2 original decision. There the bar really didn't have
3 to be set anywhere because there was nothing that was
4 presented.
5 But here, even with the generous standard of
6 Buckley v Valeo, a simple conclusory statement that
7 somebody told Mr. Rongstad that they had fear of
8 public reprisal were their name to be revealed is
9 wholly insufficient. The description in Buckley of
10 what that low standard of proof might consist of was
11 certainly not intended by the Supreme Court to be
12 comprehensive of everything that could be presented
13 or that it was necessary to have those precise kinds
14 of statements or evidence on those precise points,
15 but it is suggestive that something more than simply
16 a bald-face conclusory statement that "I am fearful,"
17 or that "Somebody said to me that they would be
18 fearful of public reprisal" was necessary.
19 The obvious question is why? What is it about
20 this group that membership in this group would lead
21 anyone to engage in public reprisals against their
22 members?
23 Why would simply the fact of associating with
24 this group be anything that would lead to threats, or
25 harassment, or public reprisals or the kinds of

1 things that had been demonstrated in NAACP v Alabama
2 to form the basis for the court's quite appropriate
3 recognition that that was the kind of thing that
4 people ought not to be subjected to because of their
5 association with an organization or with beliefs of
6 certain types?
7 Now, here fear of a lawsuit is on a very low
8 standing. Indeed, I think there's probably
9 legitimate fear on the part of the others involved in
10 the funding and preparation and distribution of this
11 postcard that they will become enmeshed in this
12 lawsuit. Mr. Garvey's pleading on behalf of his
13 client lists other John Does or other Does as the
14 fictitiously named defendants. One ordinarily does
15 not plead a case naming fictitious defendants without
16 the intent to later upon discovery of who they may be
17 to join them in the lawsuit.
18 But the First Amendment is not at its core
19 designed to provide protection for someone's fear
20 of -- better stated, it is not designed to provide
21 immunity for someone's criminal or civil liability
22 for their behavior. It may on occasion have the
23 result of making it difficult to prosecute civilly or
24 criminally someone, but that is not at its core the
25 purpose for the protections afforded by the First and

1 Fourteenth Amendments.

2 As a result, these conclusory allegations and

3 the references to fear of a lawsuit are simply so low

4 that they do not satisfy the Buckley requisite

5 factual showing. And if they do, they do so by

6 simply skimming by and being barely sufficient.

7 And even once some showing is made, the

8 balancing test is still necessary, and nothing that

9 has been presented on this motion for reconsideration

10 changes the conclusions that I reached when I made

11 the decision back on February 4, and there's no

12 reason to repeat those points at this time.

13 Now, on today's date Mr. Crooks makes an

14 additional contention, and that is that he apparently

15 now no longer is as concerned about the Court's order

16 because he says his client has complied with it. And

17 apparently if his client has fully complied with it,

18 then we must be engaged in much ado about nothing by

19 continuing to argue about whether there should be a

20 court order that requires him to answer questions.

21 From the information that has been presented in

22 the motion for reconsideration and the response to

23 that motion about what happened and what answers had

24 been provided by Mr. Rongstad thus far, it appears to

25 me that Mr. Crooks has provided the very point that

1 justifies further inquiry of Mr. Rongstad, and that
2 is that the organization of which Mr. Rongstad is
3 apparently the CEO has a board of directors, and the
4 board of directors makes decisions about what
5 projects to fund. Mr. Garvey is entitled to find
6 out, and Mr. Rongstad shall answer, as to who are the
7 board of directors and who were the people who are
8 the board of directors.
9 MR. CROOKS: Judge, he has answered those
10 questions already.
11 MR. GARVEY: We do know two other board of
12 directors who -- the two members who reside in
13 Minnesota. There are three listed in the DFI
14 documents.
15 THE COURT: And so, what more are you
16 asking for then?
17 MR. GARVEY: Well, for example, your Honor,
18 we took Mr. Rongstad's affidavit and asked him to
19 disclose the identity of the members who approached
20 him. He refused on grounds of First and Fourteenth.
21 We asked him who the members are who have contributed
22 the funds for this, and he says again it's the First
23 and Fourteenth. And so, we reminded him of your
24 Honor's order, and he will not answer any question
25 about any person who hired him, suggested to him that

1 THE COURT: We'll see whether he complies
2 on Tuesday. And if he fails to, whether or not
3 quashing a subpoena of your client is an appropriate
4 response to that, and I don't want to give you any
5 sort of advisory opinion about that, we'll see what
6 comes to pass.
7 MR. GARVEY: That's fine. Thank you.
8 MR. CROOKS: Your Honor, may I inquire as
9 to the topics that are now at play at the deposition
10 Tuesday morning?
11 THE COURT: Mr. Crooks, I don't ask the
12 questions, but it is clear that as of yesterday you
13 thought there were additional matters that should not
14 be disclosed. You brought a motion for
15 reconsideration. Mr. Garvey's response was not to
16 say, "It's now a moot point because I think Mr.
17 Rongstad has provided everything I need." Instead,
18 he opposed the motion.
19 I've now denied the motion, and Mr. Garvey tells
20 me he wishes to continue to ask questions.
21 MR. CROOKS: Judge, he --
22 THE COURT: If I get any flavor -- and I
23 will tell you that the flavor comes from no other
24 source than what I've heard in the courtroom and
25 what's been in the written submissions because I have

1 not seen any transcripts, and of course I've never
2 laid eyes on Mr. Rongstad, to my knowledge.
3 But if I get any flavor, it is that Mr. Rongstad
4 has been highly evasive and engaged in a well-planned
5 effort to cover up how he comes to engage in the kind
6 of behavior he engages in when he is putting out
7 these kinds of publications. And it's a sad day in
8 our political system when somehow this kind of
9 activity is covered up and evaded. Seldom have I
10 seen such an abuse, but we'll deal with future
11 motions when and if they come in.
12 MR. CROOKS: Judge?
13 THE COURT: We're adjourned.
14 MR. CROOKS: Can I just as required move
15 for the Court to stay the order pursuant to
16 808.07(2)(a)?
17 THE COURT: That motion will be denied for
18 the same reasons as my previous, or your previous
19 motion in that regard was denied.
20 MR. CROOKS: Thank you.
21 THE COURT: 8 o'clock at Mr. Garvey's
22 office on Tuesday morning.
23 MR. GARVEY: Thank you, your Honor.
24 (Which concluded these proceedings)
25 (10:50 o'clock a.m.)

STATE OF WISCONSIN CIRCUIT COURT Branch 13 DANE COUNTY

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JULIE M. LASSA,

COPY

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel **EDWARD R. GARVEY and CHRISTA O. WESTERBERG**, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:
ATTORNEY DAVID J. PLINER, Corneille Law Group, LLC

Laura Stuessy, RMR, CRR
Official Court Reporter

1 different position that he could not hold at the same
2 time as he is a State Senator.
3 The planners of the postcard, if they in fact
4 had the intent that Mr. Garvey has ascribed to them
5 of undercutting Miss Lassa's efforts to seek to
6 replace Senator Shibilski, wouldn't have known that
7 there was a need to replace Senator Shibilski until
8 he lost in the -- well, I take that back. If he had
9 won in the primary, he likewise would have faced the
10 prospect of losing his seat if he became Lieutenant
11 Governor, so I guess this does go to an earlier date.
12 All right. Here's then what we're going to do.
13 To make this absolutely clear and avoid any confusion
14 on Mr. Rongstad's part, Mr. Rongstad is ordered, at a
15 deposition to be conducted on Monday morning, to
16 provide the records and to disclose the names of any
17 person who contributed any amount in excess of, say
18 $100 or more in the aggregate during the six months
19 preceding November 1st, so let us say at any time
20 after May 1st of 2002.
21 Now, I will limit this to $100 or more because,
22 frankly, it is hard to imagine how anything less than
23 that would qualify as the necessary degree of
24 personal involvement and intentional conduct to get
25 past the defamation standard under Sullivan. And I

1 never get anything back. So if we're talking about
2 the members and the contributions, wherever those
3 records exist under his control, I would hope that it
4 would be clear to Mr. Crooks that that information
5 should be produced.
6 THE COURT: That's certainly my intent. I
7 don't know if there's any way I can express this more
8 adamantly that I am looking for Mr. Rongstad to
9 comply with my prior court order. In this now I'm
10 granting him the benefit of narrowing this court
11 order, but the expectation is that he will in fact
12 comply.
13 MR. GARVEY: One other item, if I may, your
14 Honor. I understand the Court's reasoning, and I'm
15 not arguing, but I want to say that Mr., or Senator
16 Shibilski was running for Lieutenant Governor in the
17 democratic convention which I attended in June of
18 2001. And so, it's been no secret that he was
19 running with now Governor Doyle from that point
20 forward, so that those who were looking at this
21 matter would have been projecting ahead in terms of
22 the control of the Senate, which your Honor can take
23 judicial notice had been pretty close in terms of the
24 majority between the democrats and the republicans.
25 And so, while I appreciate the narrowing and the

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

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JULIE M. LASSA,

COPY

Plaintiff,

CONTEMPT HEARING
Case No. 03-CV-177

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 11th day of March, 2003, commencing at 1:15 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

Laura Stuessy, RMR, CRR
Official Court Reporter

1 Julie Lassa and the defamation that has caused her a
2 great discomfort. And until we know the names of
3 Does 1 through 5, and these are the people known to
4 Mr. Rongstad, we're not going to be able to proceed
5 by naming them in this suit, so that there can be no
6 question now I guess with Mr. Crooks' statement that
7 he's not going to follow the Court's order, and
8 therefore, we would again urge the Court to find
9 Mr. Rongstad in contempt.
10 THE COURT: All right. The hearing on
11 today was scheduled to consider the motion brought by
12 the plaintiff seeking to have Mr. Rongstad held in
13 contempt of this Court's order that was clarified and
14 limited back on February 27th or 28th.
15 Mr. Rongstad's counsel has in effect conceded
16 that Mr. Rongstad has failed to comply with that
17 order, and today if Mr. Rongstad had any factual
18 information to support the view that he was not in
19 contempt, that he had some excuse for his failure to
20 comply, of course today was the opportunity that was
21 available to him to present that. And he has not
22 appeared, and no other evidence has been offered to
23 rebut the evidence provided in the form of the
24 transcript of the deposition that was conducted on,
25 March 3rd I believe.

1 I had a chance to review that transcript, and it
2 appears to me that even apart from the concession
3 made by Mr. Crooks today that his client was not in
4 compliance, it appears obvious that Mr. Rongstad has
5 intentionally violated the provisions of the Court's
6 order and, frankly, has from my review of the
7 transcript itself -- and of course that is without
8 the benefit of seeing Mr. Rongstad because I didn't
9 take advantage of the opportunity to watch the
10 videotape. Instead, I just simply read the
11 transcript, so I don't have the demeanor evidence
12 that might come from reading or from watching the
13 video.
14 But from all of my review of the written
15 transcript, it appears that Mr. Rongstad, frankly,
16 has lied while under oath. His continual contention
17 that he had no recollection of any of the information
18 that was sought in the questions asked of him and
19 that the only way in which that information could be
20 obtained is to look at the deposit slips for the
21 contributions that were made to his organizations
22 defies credulity.
23 Mr. Rongstad from the deposition transcripts
24 operates businesses that depend on these kinds of
25 contributions, and for him to suggest that he doesn't

1 even keep any record of the names or addresses of the
2 people who have contributed except for the deposit
3 slips where he puts a name on each line to indicate
4 who the deposit came from simply is so highly
5 unlikely and inconsistent with the way any other
6 organization of a similar type would maintain their
7 records and suggests to me that his answers were
8 false.
9 It is also clear from the testimony that Mr.
10 Rongstad gave in his deposition on March 3rd and the
11 answers provided at a variety of other of the
12 previous depositions where the transcripts were in
13 the court's file and I had a chance to look them
14 over, that his answers were highly evasive and were
15 designed to avoid providing information that the
16 plaintiff was justifiably entitled to under the laws
17 of the State of Wisconsin and, more specifically,
18 under the orders of this Court.
19 I do not on today's date intend to revisit the
20 rationale for why those orders were previously
21 issued, other than to make it clear that Mr.
22 Rongstad's attempts to cloak himself in the
23 constitution were previously found to be empty and
24 without any merit.
25 Mr. Rongstad has no entitlement for all of the

1 reasons I have recited previously to claim that
2 somehow he has available to him the kind of
3 protection that the NAACP was granted in the State of
4 Alabama in the 1950s. He has never made any
5 sufficient showing that he or his organization has
6 suffered from or is likely to suffer from the kinds
7 of harm that members of the NAACP experienced in
8 Alabama in the 1950s.
9 Now, Mr. Rongstad had the opportunity to seek an
10 appeal from my previous orders, and he exercised his
11 right to ask the Court of Appeals to intervene. The
12 Court of Appeals on the one hand rejected his effort
13 to obtain a stay of my order, and therefore, that
14 order remained an order of the court that he was
15 required to comply with.
16 But beyond that, Mr. Rongstad failed to pursue
17 his further opportunity, which was to ask the Court
18 of Appeals to address the merits of my order on an
19 interlocutory appeal basis. Mr. Garvey makes
20 reference to a recent order from the Court of Appeals
21 that dismissed the preliminary petition that sought
22 an interlocutory appeal, and the Court of Appeals did
23 so because it was simply not pursued. It was, in
24 effect, abandoned.
25 And that having been said, Mr. Rongstad's most

1 recent claims that he is going to seek vindication in
2 the Court of Appeals and that that is what explains
3 his conduct and his defiance of this Court's order
4 likewise falls on rather hollow footing. Instead,
5 what it appears virtually certain to be is simply
6 another in the variety of steps that Mr. Rongstad has
7 taken in this litigation to seek delay and to avoid
8 his responsibilities under the law.
9 Based upon his contempt, which I do find to be
10 actual and his conduct to be intentional, I will
11 order that he pay all of the actual reasonable
12 attorneys' fees of the plaintiff that have been
13 incurred in the conduct of the depositions of Mr.
14 Rongstad to date, plus all of the enforcement
15 proceedings, including but not limited to the motion
16 hearing on today's date, plus the various hearings
17 that have had to be conducted previously.
18 No attorneys' fees for time spent in dealing
19 with the motion to intervene that has been brought
20 because of Mr. Rongstad's efforts to have what
21 appears to be his homeowner's insurance policy cover
22 his liability in this case will be awarded. Any time
23 devoted to that clearly should be excluded.
24 Mr. Garvey, I'll ask you to submit a statement
25 of the time that you and your firm have devoted to

1 the activities for which you are to be compensated as
2 a remedy for Mr. Rongstad's contempt, and provide a
3 copy to Mr. Crooks and give him a period of seven
4 days to object.
5 Any objection that you make in that regard ought
6 to be itemized and specific, just as I would expect
7 Mr. Garvey's affidavit submission to be itemized and
8 specific.
9 And in the order that you prepare, Mr. Garvey,
10 you can simply leave a blank for the amount of the
11 attorneys' fees. And after the seven-day opportunity
12 for objection, if I think there is any need for
13 further hearing, I'll schedule it. But my hope would
14 be that based on the specificity of the objections,
15 I'll be able to insert a number that comports with
16 what I determine to be a reasonable amount.
17 In addition to the payment of the costs of the
18 plaintiff's attorneys' fees, I will impose a
19 forfeiture in the amount of $1,000 per day that will
20 begin to run, and the first day for which a
21 forfeiture will be assessed will be Thursday, March 13th,
22 and it will be assessed every day thereafter until
23 Mr. Rongstad has made himself available for further
24 deposition and has fully complied with the
25 requirements to provide the information that I had

1 previously ordered that he provide.

2 Finally, if Mr. Rongstad fails to provide the

3 information, a judgment will be entered by default in

4 favor of the plaintiff and against the defendant,

5 Mr. Rongstad, as well as the groups that are parties

6 to this litigation, and that will be done if he fails

7 to comply with the Court's orders by April 4th, 2003.

8 And Mr. Garvey, if he has failed to comply, then

9 I would urge that you file a motion seeking a default

10 judgment, and this will be a remedy under not only

11 the contempt provisions but also under section

12 804.12, the sanctions for failure to provide

13 discovery. And if such a motion is brought and it is

14 demonstrated that Mr. Rongstad has failed to comply,

15 then we'll schedule a hearing which will be aimed at

16 only the question of the damages of the plaintiff,

17 but liability will be determined on the basis of that

18 default.

19 All right. If you can prepare an appropriate

20 order, submit it to me and do so with your affidavit

21 of attorneys' fees. And the form of the order will

22 likewise be subject to that seven-day opportunity to

23 object. And I think that's probably all we can do

24 today.

25 MR. GARVEY: Your Honor?

1 where presumably she would have a chance to do some
2 planning and schedule around it.
3 Those kinds of considerations are no longer
4 present, and therefore, to the extent I grant the
5 request to stay further discovery of anyone by the
6 defense, I'm not doing so for reasons that have to do
7 with the timing of that discovery, but I do on
8 today's date grant the motion and will stay any
9 further discovery by the defense until such time as
10 Mr. Rongstad has complied with the orders of this
11 Court regarding discovery.
12 Mr. Rongstad seeks to have the right to
13 participate in this litigation by engaging in
14 discovery, but he comes to court with not simply
15 unclean hands but hands that are muddied to the
16 elbow. He has failed consistently to comply with
17 this Court's order, or orders in the plural, and as
18 a result I think has largely forfeited, until he can
19 demonstrate that he is willing to play by the rules,
20 the right to use the rules to his own advantage.
21 Secondly, there is little purpose to be served
22 and much harm to be done by going forward with
23 depositions of people at a time when the full cast of
24 characters in this litigation is unknown. And Mr.
25 Garvey refers to these people as the Does 1 through 5,

1 and to this point in time I'm uncertain whether there
2 is one person, or five people, or 10 people who are
3 involved in a way that would allow them to be joined
4 in this kind of defamation action or whether
5 conceivably there are zero people. But to undertake
6 discovery where who the defendants are and,
7 therefore, questions pertaining to the deponent's
8 association with, or relationship to, or knowledge of
9 those named defendants invites inefficiency and
10 suggests the virtual certainty that the person whose
11 deposition might be taken once additional defendants
12 are joined would have to have their deposition taken
13 all over again.
14 And no good reason has been suggested to me why
15 from the standpoint of the defendant's interests that
16 there is any urgency to taking these depositions.
17 Now, I hesitate and disclaim any intent to attribute
18 to Mr. Rongstad or his counsel intimidation motives
19 about why he is trying to take all of these
20 depositions, but I think it should be clear from a
21 procedural standpoint that if a judgment is going to
22 be entered against Mr. Rongstad on liability as a
23 result of a trial, the opportunity for discovery will
24 of course be there in the future. No such trial is
25 going to occur for many, many months.

1 If, on the other hand, judgment is going to be
2 entered against Mr. Rongstad because of his egregious
3 failure to comply with the orders of the Court and to
4 comply with the discovery laws of the State of
5 Wisconsin, then no discovery on liability issues will
6 be necessary because judgment will be entered against
7 him and there won't be a trial. If and when that
8 occurs and a hearing on damages is scheduled, then I
9 will, with some narrowed focus, allow Mr. Crooks to
10 seek to engage in discovery that is focused certainly
11 on damage questions, but we'll cross that bridge when
12 we get to it.
13 So with that in mind, the motion, to the extent
14 it is seeking to quash subpoenas, it will be granted,
15 and no depositions will go forward on behalf of the
16 defendant.
17 MR. GARVEY: Thank you, your Honor.
18 MR. CROOKS: Judge, one final thing. I'd
19 ask the Court at this time to stay the entrance of
20 the contempt order until we have a chance to appeal
21 the constitutional issues as mentioned.
22 THE COURT: For reasons that I have recited
23 in response to previous requests to stay, that motion
24 will be denied. And in summary, I find that there is
25 not a substantial likelihood of success on the

1 merits, there is no likelihood of success on the
2 merits, and there is, therefore, no reason to stay.
3 All right. We're adjourned.
4 MR. GARVEY: Thank you, your Honor.
5 MR. CROOKS: Thank you, Judge.
6 (Which concluded these proceedings)
7 (2:00 o'clock p.m.)
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 04-0377

JULIE LASSA,
Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,
Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,
Defendants,

AMERICAN FAMILY INSURANCE COMPANY,
Intervenor,

v.

ALEX PAUL,
Third-Party Defendant.

On Appeal from the Circuit Court of Dane County
The Honorable Maryann Sumi
Trial Court Case No. 03-CV-177

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES FOR REVIEW

This case comes to the Court of Appeals in an unusual posture. The parties settled the underlying claim, a tort action alleging defamation of a state legislator,[1] but stipulated that defendants Todd Rongstad and the Valkyrie Group (hereinafter collectively referred to as "Mr. Rongstad") may proceed with an appeal of the issue related to their First Amendment rights:

> the defendants shall have the right to pursue an appeal with respect to the attorney's fees and forfeitures on First Amendment grounds, including the arguments revolving around the *Alt* case, and any other applicable theories.

(Appx. 17; R. 140:2.) The circuit court's final order limits the Mr. Rongstad's appellate rights to those negotiated by the parties: "the settlement agreement attached hereto as Exhibit

[1] At the time this case was filed, plaintiff Julie Lassa was a State Representative; she now serves as a State Senator.

A constitutes the entire agreement between the parties to settle the case at issue." (Appx. 13; R.141:2.)

Mr. Rongstad has identified four issues for review (Def.'s Br. at vi), but only the first two are within the scope of issues agreed to by the parties through their negotiated settlement:

1. Whether the trial court's order compelling Rongstad to disclose the contributors to the Alliance for a Working Wisconsin and the subsequent order finding Rongstad in contempt of court and imposing harsh sanctions violated Rongstad's First Amendment rights of freedom of association and free speech.

2. Whether, under the rule established in *Burnett v. Alt*, Rongstad had a "substantial assertion of privilege" providing him with "substantial justification for failing to comply with an order to provide or permit discovery."

The third and fourth issues for review do not implicate any First Amendment grounds but instead challenge only the exercise of the trial court's discretion in imposing sanctions:

3. Whether the trial court erroneously exercised its discretion by imposing sanctions before considering whether Senator Lassa's complaint stated a claim upon which relief could be granted.

4. Whether the severity of the sanctions, which bore no rational relationship to the offensive conduct or any harm suffered by Senator Lassa, constitute an erroneous exercise of discretion.

Senator Lassa respectfully asks this court to decline to consider these last two issues as they have been explicitly waived by the defendants by entering into the settlement agreement.

Thus, the only issues properly before this Court are as follows:

1. Did the trial court violate Mr. Rongstad's First Amendment rights of freedom of association and free speech by ordering him to comply with Julie Lassa's discovery demands in her defamation suit and then by imposing monetary sanctions for Mr. Rongstad's repeated refusals to abide by the court's orders?

The trial court answered: No.

2. Did Mr. Rongstad present a substantiated assertion of his claimed constitutional privilege under *Burnett v. Alt*?

The trial court answered: No.

The other two issues, while not properly before this Court, Ms. Lassa will address are as follows:

3. Did the trial court erroneously exercise its discretion by imposing sanctions before considering whether Lassa's complaint stated a claim upon which relief could be granted?

The trial court answered: No.

4. Did the sanctions imposed, involving the payment of attorneys fees and a forfeiture, constitute an erroneous exercise of discretion?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Senator Lassa does not request oral argument.

As for publication, Senator Lassa believes that the defendants' attempt to hide behind the First Amendment to

avoid allowing plaintiff to prosecute her defamation case against those who are liable is of great public concern and would respectfully request the Court to order publication of its decision to clarify the law on this issue.

STATEMENT OF THE CASE

This case has taken a tortured route through two trial judges, two ill-fated forays into the Court of Appeals[1], then back to the trial court, and finally back to this Court on this appeal. The record is substantial, despite not a single day of trial testimony before a judge or jury. The underlying claim was settled by the parties, leaving for appeal only Todd Rongstad's challenge, on constitutional grounds, to the trial court's imposition of sanctions for failure to comply with court-ordered discovery.

I. Nature of the Case

Defendant Todd Rongstad appeals from the "Stipulation and Order of Combined Judgment, Dismissal, and Appellate Rights" entered in the Circuit Court for Dane

[1] *See* March 4, 2003 Order (03-0309-LV), April 1, 2003 Order (03-0742-LV), and April 1, 2003 Order (03-0743-W).

County on November 17, 2003, by the Honorable Maryann Sumi.[2] (R. 141)

The case began on January 16, 2003, when the plaintiff Julie Lassa filed a civil action in Dane County Circuit Court, alleging the intentional tort of defamation arising out of the mailing of an oversized postcard, a negative political mailer directed at Ms. Lassa, only a few days before the November 5, 2002, general election in which Ms. Lassa was running for reelection to the State Assembly. (Appx. 1-2; R. 2.)[3]

Ms. Lassa named the following as defendants:

- Todd Rongstad, in his capacity as president of both the Valkyrie Group, L.L.C., and the Alliance for a Working Wisconsin;
- The Valkyrie Group, L.L.C.;

[2] The Honorable Michael Nowakowski initially presided over this case and issued most of the decisions and orders relevant to this appeal. Judge Sumi replaced Judge Nowakowski when Third Party Defendant Alex Paul entered the case and requested substitution. (R. 79.)

[3] The record contains a color copy of the mailer (R. 2:10-11), whereas, defendants' appendix contains a black-and-white copy (Appx. 1-2).

- A.M. Mailing Services;[4] and
- "Does, 1-5, in their individual capacities," persons whose identities she did not then know but believed were likely involved in the production, mailing, and financing of the postcard.

(R. 2.)

Mr. Rongstad named Alex Paul as a third-party defendant on April 18, 2003, alleging that Paul had contributed money used in producing the postcard, and had done so through "Sinjay Sood."[5] (R. 64.)

II. Overview of the Procedural Background

A partial recitation of the trial court's findings of fact related to Mr. Paul's substitution request provide a useful summary of relevant factual information through April 28, 2003:

1. Todd Rongstad was sued for his role in the production, publication and dissemination of

[4] Defendant A.M. Mailing Services was dismissed as a defendant on February 5, 2003. (R. 19:2.)

[5] Elsewhere in this record, Mr. Sood is referred to as "Sunjay Sood."

an allegedly defamatory postcard concerning the Plaintiff.

2. Todd Rongstad unlawfully resisted the Plaintiff's efforts to obtain information concerning what other people or persons were also involved in the production, funding or distribution of the postcard.

   Rongstad was found in contempt of court for intentionally violating state law and the orders of this Court on March 11, 2003. He unsuccessfully sought to obtain review of the contempt order and the orders which preceded it by the Court of Appeals on two occasions.

   . . . .

4. On April 4th, 2003, the deadline for Todd Rongstad to comply with the Court's order to provide information required by state law, he purported to comply by filing an affidavit which disclosed that he had received $7500 from Sunjay Sood in the week prior to the mailing of the postcard.

   . . . .

5. That the Third-party Complaint in this action was filed on April 18, 2003 after a hearing had already been scheduled for April 23, 2003 on the Plaintiff's motion for

> a default judgment against Todd Rongstad on the ground that he failed to comply with the Court's deadline for compliance with previous discovery orders.

(Supp. Appx. 114-117; R. 150: 33-36.) Judge Sumi replaced Judge Nowakowski after the April 28, 2003 hearing on Ms. Lassa's objection to Mr. Paul's request for substitution.[6] (R. 79.) Mr. Rongstad's pending motion to dismiss plaintiff's case was heard by Judge Sumi on July 7, 2003. (R. 100.) Then, on August 15, 2003, Judge Sumi heard Ms. Lassa's motion for a default finding on liability, as discussed further below. (R. 152.)

III. Summary of Todd Rongstad's Testimony at the Depositions

During the series of his depositions between February 3 and March 11, 2003, Mr. Rongstad testified that he was the

[6] Judge Nowakowski found that the purpose of naming Mr. Paul as a third party was done "with the intent by Todd Rongstad and his attorney to allow Alex Paul to seek a substitution of judge because Todd Rongstad and his attorney believed things were going badly for him and they hoped to obtain a more favorable tribunal." (Supp. Appx, 116, R. 150:35).

president and founder of the Valkyrie Group, a company named for the ancient Norse goddesses of the battlefield. Because the Valkyrie "had a hand in deciding who lived and who died," he thought it "appropriate" to name his business after them, explaining that "you're more likely to survive as a politician if you hire us, and you're more likely to lose if I'm working against you." (R. 30:16-17.)

Mr. Rongstad also claimed to be the CEO of the Alliance for a Working Wisconsin ("AWW"). (R. 30: 21.) Mr. Rongstad admitted to producing the Julie Lassa attack postcard on behalf of the AWW. (R. 30:36-37.) He admitted to mailing it out just before the 2002 state assembly elections, (R. 30:44); yet, the postcard referred to Ms. Lassa's candidacy for state senator, not assemblyperson (Appx. 2; R. 11). While Ms. Lassa was not a candidate for State Senate as alleged in the text of the mailer-postcard, the senate seat that she now holds was to become vacant by then-Senator Kevin

Shibiliski's appointment to the position of Secretary of the Wisconsin Department of Tourism. (R. 2:3-4.) Ms. Lassa was contemplating running for that seat if it became vacated. (R. 4.)

Mr. Rongstad's testimony shifted between admitting that he discussed the Lassa matter with a couple of members of the AWW (R. 30: 83) to claiming that he discussed it with nobody (R. 30: 82). He testified that the AWW had more than ten members (R. 30:49), but the articles of incorporation of AWW stated that it "shall have no members." (R. 74: 5.) Mr. Rongstad refused to testify concerning those AWW members with whom he had discussed the postcard. (R. 30: 81.) He also refused to say who contributed money that paid for the postcard. (R. 30: 82.) Throughout his depositions, Mr. Rongstad tried to take sole responsibility for the postcard (R. 30: 47, 75, 83, 139), and yet he ultimately admitted

receiving at least one contribution to AWW during the three months leading up to the Lassa mailing (R. 47: 42).

IV. Proceedings and Disposition in the Trial Court

Most of the events in the circuit court related to Ms. Lassa's efforts to identify the unnamed defendants through numerous depositions of Mr. Rongstad and his persistent refusal to produce those names.

A. February 4, 2003 Discovery Order

On January 22, 2003, Ms. Lassa's attorneys served Mr. Rongstad with a notice of deposition for January 30, 2003. (R. 4:3-5.) Mr. Rongstad moved the court for an order quashing the deposition based on inconvenience and a claim of "absolute immunity," citing *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). (R. 143:2.) Judge Nowakowski granted Mr. Rongstad's request to postpone the deposition until February 3, 2003. The postponement was a

matter of convenience; the court denied Mr. Rongstad's claim of "absolute immunity." (R. 143: 7-15).

During the February 3, 2003 deposition, after Mr. Rongstad refused to answer properly-asked deposition questions, attorneys for Ms. Lassa moved to compel Rongstad to respond to questions regarding the identities of those who supported the Lassa postcard campaign. The same day, the trial court heard argument by the parties and informed the parties that he would rule on the asserted constitutional privilege at 9:30 a.m. the following morning, after allowing for further argument. (Supp. Appx. 102-103; R. 145: 5-6)

During the February 4, 2003 telephonic hearing, the court summarized Mr. Rongstad's constitutional objection to the discovery questions as follows:

> [T]he defendant Rongstad contends that he has the right to refuse to disclose the names of members of his organization that were directly involved in the publication of the allegedly defamatory mailing concerning the plaintiff on

> the basis of his and their rights to free speech and to free association under the First and Fourteen Amendment.

(Appx. 22; R.145: 7.)

In examining the propriety of the constitutional privilege, Judge Nowakowski noted that the privilege was asserted in a private defamation action against Mr. Rongstad and other unknown defendants, not in a state action to prevent direct governmental regulation. (Appx. 23-24; R.145: 8-9.) The court held that the distinction was not determinative because First Amendment rights are also implicated by judicial action; however, because this was a private suit, the court noted that there are different interests to be weighed in determining whether a protective order based on constitutional protections should be issued. (Appx. 23; R. 145: 8.) Applying cases cited by Mr. Rongstad's counsel, the court weighed the interests of Mr. Rongstad and AWW members in concealing membership information against the

interests of Ms. Lassa in clearing her name and in discovering who was involved in the mailer, as well as the public's interest in preventing libel during an election cycle. (Appx. 24-28; R. 145:9-13 (applying *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511 (1995)).

The court found that the interests of Ms. Lassa and the public prevailed because, in part, no less intrusive measures had been demonstrated that would allow her to seek redress under the law against the unknown defendants. (Appx. 27; R. 145: 12.) The court ordered Mr. Rongstad to "answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." (Appx. 28; R.145: 13.)

Following the court's ruling, the Rongstad deposition continued. During that deposition, Mr. Rongstad again

refused to respond to questions about AWW, asserting the same argument rejected by the court earlier that day. (R. 30: 81.) Also on that date, Mr. Rongstad moved the Court of Appeals for a supervisory writ to stay the order of Judge Nowakowski.[7] The Court of Appeals denied the request for a stay (R. 18), but Mr. Rongstad continued to refuse to answer questions regarding persons involved in AWW who engaged in the planning, preparation, and funding of the Lassa postcard or who had discussions with Rongstad about the targeting of Ms. Lassa. (R. 30: 107.)

B. February 6, 2003 Motion for Reconsideration Hearing

On February 5, 2003, Mr. Rongstad filed a motion in the trial court to reconsider the court's February 4th order. (R. 14.) Meanwhile, Mr. Rongstad's deposition continued. Mr. Rongstad again refused to answer questions that could

[7] Mr. Rongstad's motion was captioned as a petition for supervisory writ; however, Judge Lundsten treated the motion as a request for a stay.

identify AWW members or contributors to AWW, asserting the constitutional protections addressed by the trial court on February 4, 2003. (R. 30:107.)

The motion for reconsideration was heard on February 6, 2003. During that hearing, counsel for Ms. Lassa explained that Mr. Rongstad was the sole source from which Ms. Lassa could ascertain who was responsible for the decision to target Ms. Lassa and who funded the attack piece. (Supp. Appx. 107-108; R.146: 20-21.) The unnamed defendants could not be discovered except by Mr. Rongstad abiding by the court's order. (Supp. Appx. 109; R.146: 23.)

For the reconsideration hearing, Mr. Rongstad provided an affidavit stating that he would not disclose members' names due to their "fear of public reprisal and potential legal actions." (Appx. 4; R. 16:2.) Citing *NAACP v. Alabama* and *Buckley v. Valeo*, the trial court found that Mr. Rongstad's "conclusory allegations and references to fear

of a lawsuit are simply so low that they do not satisfy the *Buckley* requisite factual showing." (Supp. Appx. 105-106; R. 146: 18-19.) The court continued, "[a]nd even once some showing is made, the balancing test is still necessary, and nothing that has been presented on this motion for reconsideration changes the conclusions [reached on February 4, 2003]." (Supp. Appx. 106; R.146: 19.) Finding that Mr. Rongstad had asserted no new grounds that would trigger a constitutional privilege, the court ordered Mr. Rongstad to appear at a continued deposition on February 11, 2003. (Supp. Appx. 110; R.146: 29.)

At the continuation of Mr. Rongstad's deposition ordered by the court, Mr. Rongstad produced none of the requested documents and instead stated that he would not

provide any documents that would disclose his contributors or members.[8] (R. 30: 130-131.)

C. Motion for Finding Mr. Rongstad in Contempt

On February 21, 2003, Ms. Lassa moved the trial court to find Mr. Rongstad in contempt of the court's discovery orders and impose sanctions for his repeated failures to produce properly requested discovery. (R. 36.) On February 28, 2003, the court heard argument on the motion for contempt. Mr. Rongstad, by his counsel, again asserted the same constitutional privilege. (Supp Appx. 132; R. 148: 10.) Again denying the assertion of a constitutional privilege, the circuit court ordered petitioner to appear at a continued deposition on March 3, 2003 to address the questions of who supported AWW as it related to the Lassa attack piece and

[8] On February 13, 2003, Mr. Rongstad produced some documents, however, none of the documents that he produced provided any information related to the membership of AWW or was otherwise useful in identifying the unnamed defendants. (R. 30: 1.)

specifically to identify those who contributed more than $100 to AWW after January 1, 2002. (*Id.*, at 13; R. 148: 18 and 134; R. 148: 25.) The circuit court explained the order as follows: "I'm granting [Mr. Rongstad] the benefit of narrowing this court order, but the expectation is that he will in fact comply." (Appx. 49; R. R. 116, Exh. D.) The court set the continued hearing on the contempt motion for March 11, 2003.

On March 3, 2003, the deposition continued. Rongstad's counsel renewed the same constitutional privilege and Mr. Rongstad refused to answer questions directed by the circuit court's orders of February 4, 6, 11, and 28. (R. 47: 35-36)

On March 11, 2003, the contempt hearing continued. Mr. Rongstad did not dispute that he failed to comply with the court's discovery order; however, he asserted that he continued to have a constitutional privilege justifying his

noncompliance and that he planned to seek appellate relief from the court's orders. (Supp. Appx. 112; R. 149: 7.) The circuit court referred to its earlier rulings denying the constitutional objection, stating that "Mr. Rongstad's attempts to cloak himself in the constitution were previously found to be empty and without merit." (Appx. 53; R. 149:12.)

The circuit court found Mr. Rongstad's contempt "to be actual and his conduct to be intentional" and ordered sanctions, including attorneys fees and costs and a $1,000 per day forfeiture until Rongstad "has made himself available for further deposition and has fully complied with the requirements to provide the information [the court] had previously ordered he provide." (Appx. 56-57; R. 149:15-16). Additionally, the trial court stated that it would entertain a motion for default judgment if, by April 4, 2003, Mr. Rongstad did not comply with the discovery orders. (Appx. 57; R. 149:16.)

The circuit court also noted that petitioner had earlier claimed that he would seek relief from its discovery orders but, in fact, did not do so and found that "Mr. Rongstad's most recent claims that he is going to seek vindication in the Court of Appeals and that that is what explains his conduct and his defiance of this Court's order likewise falls on rather hollow footing." (Appx. 54-55; R. 149:13-14.)

D. Denial of the Motion to Dismiss

On July 8, 2003, Judge Sumi, who was assigned the case after Mr. Paul's substitution request, denied Mr. Rongstad's motion to dismiss, finding as follows:

> Reading words and viewing the picture of the mailer in the plain and ordinary sense, I do reach the conclusion that there is language capable of defamatory meaning.
>
> The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful and unethical conduct that Senator Chvala was accused of. . . .

(Supp. Appx. 119-120; R. 152: 5-6.)

E. Ruling on the Motion for Default Judgment

On August 15, 2003, Judge Sumi ruled on two pending motions, Mr. Rongstad's motion for relief from the sanctions and Senator Lassa's motion to enter a default judgment. Summarizing the discovery dispute in this case, the trial court noted that on February 4, 2003, Judge Nowakowski had "researched the constitutional issues, and what he said was that membership information in this case does not have sacred constitutional status." (Supp. Appx. 121-128; R. 152: 21-28.) The court ruled that Mr. Rongstad continued to be in contempt of Judge Nowakowsi's two written orders and denied Mr. Rongstad's motion for relief from sanctions. (Supp. Appx. 128; R. 152: 28.) At the same hearing, the trial court granted Ms. Lassa's motion for default judgment, finding that Mr. Rongstad's conduct fit "both the standard of

egregious conduct and bad faith" (Supp. Appx. 129; R. 152:45) and "that no lesser sanction would allow the case to proceed or address the persistence of the violation that we have seen in this case" (Supp. Appx. 130; R. 152:46).

F. Final Disposition of the Case through Settlement

Judge Sumi's final order approved a settlement agreement drafted by the parties dismissing, with prejudice, the underlying cause of action, and keeping intact the monetary sanctions. (Appx. 12-19; R. 141) The agreement defined the scope of this appeal (*see supra*, at x.) and also stipulated to the amount of money that Mr. Rongstad would have to pay should he lose this appeal: $43,000 in attorneys fees and a $22,000.00 forfeiture payable to the School Fund, for a total of $65,000.00. (Appx. 16-19; R. 140:3.)

Additional facts, as necessary to the development of Julie Lassa's argument, will be stated in the Argument section of the brief.

SUMMARY OF ARGUMENT

The constitutional privilege against compelled disclosure of the names of members in a political organization is important but not absolute. It cannot be a rock behind which a group's members hide to avoid legal responsibility for defamation or any other tortious conduct. That is the essence of this case. As Ms. Lassa has pursued her right to uncover the names of members of the Alliance for a Working Wisconsin who were behind the vicious election-eve mailer that smeared her good name and reputation, members of the group have attempted to hide from liability under the First Amendment.

As the trial court found on July 8, 2003, the oversize postcard that was the basis for Senator Lassa's lawsuit was,

on its face, defamatory. Mr. Rongstad's characterization of the mailer as an "issue advocacy" piece is not supported by the record. Furthermore, that characterization is further undermined by a recent decision of the United States Supreme Court, *McConnell v. Federal Election Commission*, __ U.S. __, 124 S.Ct. 619 (2003).

Litigants may have narrowly-defined constitutional privileges allowing them to refrain from giving testimony in the course of discovery, but only when they are substantiated and well-founded privileges. Because Mr. Rongstad's claim of privilege was unsubstantiated and unjustified, the trial court's imposition of sanctions did not violate his constitutional rights.

Mr. Rongstad's claim that the trial court erred in ordering compliance with Senator Lassa's discovery demands and in imposing sanctions before formally ruling on Mr. Rongstad's motion to dismiss does not entitle him to any

relief. First, Mr. Rongstad could have requested to schedule time on the trial court's calendar for the motion to dismiss to be heard but chose not to do so. Second, because the trial court ultimately denied the motion, he has suffered no harm and the result would have been the same.

The trial court properly exercised its discretion in approving the terms of the settlement agreement that stipulated to $65,000.00 in monetary sanctions upon Mr. Rongstad for his continuing and unjustified refusal to provide Senator Lassa with the information she properly sought through discovery and to which she was entitled.

ARGUMENT

I. IN THE CONTEXT OF CIVIL DISCOVERY, THE FIRST AMENDMENT RIGHTS OF ASSOCIATION AND SPEECH DO NOT CREATE AN ABSOLUTE PRIVILEGE TO AVOID THE COURT-ORDERED DISCLOSURE OF THE NAMES OF MEMBERS OF AN ORGANIZATION WHEN THE

ORGANIZATION HAS ENGAGED IN DEFAMTION.

Mr. Rongstad argues that his refusal to comply with the trial court's discovery orders requiring him to produce properly requested discovery was privileged under the First and Fourteenth Amendments to the United States Constitution. The trial court considered his constitutional claim and correctly rejected it, ruling that Julie Lassa had the right to inquire into the membership of Mr. Rongstad's organization to ascertain the identity of other potential defendants in her defamation suit.

A. The First Amendment Rights of Association and Speech Are Not Absolute

Despite Mr. Rongstad's assertions to the contrary, the courts have emphasized that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v. Letter Carriers*, 413 U.S. 548, 567, 93 S.Ct. 2880, 2891 (1973). "Even a significant interference with protected

rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. at 25, 96 S.Ct. at 638 (1976) (internal quotation marks omitted) (quoting and citing *Cousins v. Wigoda*, 419 U.S. 477, 488, 95 S.Ct. 541, 548 (1975); *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247 (1960)).

Mr. Rongstad relies on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995), for the general proposition that the First Amendment protects anonymous speech. An accurate reading of *McIntyre* reveals that the case supports Senator Lassa's position and that of the circuit court, not that of Mr. Rongstad.

In *McIntyre*, the Court struck down an Ohio statute that barred the making and dissemination of anonymous

political leaflets designed to influence voters in an election. The State of Ohio had argued that its statute was an important tool to prevent fraud upon the electorate. The Court recognized the validity of that interest but held that its general prohibition on all anonymous leafleting was too broad. 514 U.S. at 350. The Court also acknowledged the dangers of a particular kind of fraud, namely, libel and defamation, pointing out the remedy for those abuses: "To the extent those provisions may be under-inclusive, Ohio courts also enforce the common-law tort of defamation." 514 U.S. at 350, n.13.

That is exactly what has happened here. The State of Wisconsin has not attempted on its own volition to disgorge the names of those who participated in the making and production of a particular political mailer. Instead, Julie Lassa, the object of the attack piece, is relying on the common-law tort of defamation to hold accountable those

who have muddied her name. As is the case in any tort action, Julie Lassa has used her statutory rights of discovery to find out exactly who should be held accountable in a defamation suit, precisely as *McIntyre* envisioned.

Mr. Rongstad's argument that because the postcard was not subject to any reporting or disclosure requirement under state law, citing *Elections Board v. WMC*, 227 Wis.2d 650, 597 N.W.2d 721 (1999), misses the point. This is not a matter of enforcement by the elections board, but a private suit alleging defamation. Mr. Rongstad mistakenly leaps to the conclusion that the Wisconsin Administrative Code has somehow preempted the common law of defamation.

The trial court findings have been reinforced by the recent United States Supreme Court's decision upholding the major provisions of the Bipartisan Campaign Reform Act of 2002, *McConnell v. Federal Election Commission*, __ U.S. __, 124 S.Ct. 619 (2003). The joint majority opinion of

Justices O'Connor and Stevens considered many of the evils of modern politics that the new federal laws were trying to correct, including the unchecked power of soft money and the proliferation of so-called "issue ads." Regarding "issue ads" the majority noted:

> While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words."

124 S.Ct. at 650-651(footnotes omitted).

The high court recognized the importance of measures aimed at protecting the integrity of the political process in weighing the various constitutional challenges before it. (*Id.* at 644-654.) It had no difficulty justifying even significant interference with associational rights so long as that interference was closely drawn to match a sufficiently

important interest. (*E.g., id.* at 690-691.) Here, of course, the "interference" in Mr. Rongstad's associational rights is in the arena of a legitimate defamation action, surely the kind of "important interest" envisioned by the Supreme Court as a means of protecting the integrity of the electoral process.

The trial court recognized that Todd Rongstad and the members of AWW have First Amendment rights of association but held that they must bend to Julie Lassa's right to know who was behind the defamatory campaign. (Appx. 24-28; R. 145:9-13.) That is precisely the kind of balancing that the courts require, consistent with the rule and reasoning of *McConnell v. Federal Election Commission*, as well as *Buckley v. Valeo* and *NAACP v. Alabama* before it.

Mr. Rongstad obviously disagrees with the results of the court's balancing but there was no legal error. Additionally, Mr. Rongstad takes issue with the court's denial of his motion to dismiss. (Def.'s Br. at 31.) The basis for the

trial court's denial of the motion to dismiss is the mailer itself, the smoking gun of Senator Lassa's case. Because the postcard presented a *prima facie* case for defamation, the trial court's balancing must be affirmed.

B. The postcard created a *prima facie* case of defamation.

1. The offending postcard was no mere "issue advocacy" piece.

Rongstad urges the Court to view the offending postcard as "issue advocacy." (Def.'s Br. at 11)

Abraham Lincoln once asked a man: "If you call a cow's tail a leg, how many legs does the cow have?" "Five," replied the man. "Wrong!" said Lincoln, "because calling a tail a leg doesn't make it a leg."[9] Likewise, the mailer is not "issue advocacy" because Mr. Rongstad calls it one. The

[9] A Lexis ™ search ("Abraham w/2 Lincoln w/20 tail") found 38 instances of judges illustrating opinions with this story (two of these cases were unpublished decisions of the Wisconsin Court of Appeals). *See, e.g., Bellas v. CBS. Inc.*, 221 F.3d 517, 540 (3d Cir. 2000) (Shadur, J., concurring).

postcard is, on its face, a personal attack piece – and a vicious one at that.

The postcard neither advocates nor raises any "issue." The mailer at issue here is strikingly similar to the one featured in the in *McConnell v. Federal Election Commission* as an example of the often meaningless distinction between "express" advocacy and "issue" advocacy:

> The ad stated:
>
> "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments -- then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> *The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.*

124 S.Ct. at 690, n.78 (emphasis added). The argument that Mr. Rongstad's mailer targeting Julie Lassa discusses any legitimate issue strains credulity with equal pain and discomfort.

No matter what we call the postcard, the only issue of moment for this court is whether the trial court applied the correct legal standard in permitting discovery to proceed. If Senator Lassa had a reasonable claim of defamation, the lower court acted properly in allowing her to require Mr. Rongstad to disclose the names of those who were part of the defamation campaign.

As the court found, the oversized postcard is on its face defamatory. (*See* Appx. 1-2; R. 2:10-11.) The front of the mailer shows a photo of Lassa jumping in front of a crowd of students, with photos of former State Senate Majority Leader Chuck Chvala superimposed over their faces. (R. 2:3, 11.) Below this scene is the phrase, "When

Chuck Said Jump . . ." as well as a newspaper headline reading, "Chvala charged with extortion." (R. 2:4, 10.)

On the back of the mailer, Chvala's booking information from the Dane County Sheriff's office is superimposed across most of the text. (R. 2:4-5, 11.) The mailer also refers to Senator Chvala as Ms. Lassa's "mentor." (*Id.*) The text charges that Julie Lassa "hooked up" with Senator Chvala and that "no one knows for sure what she had to promise to gain his approval." Two photos of Julie Lassa appear on the back of the photo; one of those is a head shot of Ms. Lassa directly to the right of the paragraph beginning, "[e]xtortion, misconduct in public office, pay to play, lying, cheating and stealing. . . ." (*Id.*) The next sentence begins, "[p]lease call Julie Lassa (342-0526) and the rest and ask them the tough questions . . . ."

The "tough questions" that the reader is supposed to ask Julie Lassa are (1) "did you compromise your integrity;"

(2) "did you play along with an illegal game;" (3) "did you misuse tax dollars to win elections;" and (4) "most importantly, will you please clean up your act?"

2. *In order to withstand a motion to dismiss, an allegedly defamatory writing must only be reasonably capable of a defamatory meaning that may exist either by direct affirmation or by implication or innuendo.*

In order to test the legal sufficiency of Julie Lassa's claim, the trial court had to determine whether the words at issue are capable of a defamatory meaning, which is a question of law. *Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411, 414 (1959). Making a determination on this question does not require the court to put a defendant's words through the common law elements of defamation, as it would in summary judgment. *See id.* Rather, as the Seventh Circuit suggests, the court must ask whether a reasonable jury could find the terms at issue defamatory. *Dilworth v. Dudley*, 75

F.3d 307, 310 (7th Cir. 1996). If the court finds that the disputed words are capable of both a defamatory and non-defamatory meaning, then a jury question is presented and any motion to dismiss must fail. *Wozniak v. Local 1111, United Elec., Radio & Mach. Workers*, 57 Wis. 2d 725, 733, 205 N.W.2d 369, 374 (1973).

A defamatory communication is one that "tends to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Tatur v. Solsrud*, 174 Wis. 2d 735, 741, 498 N.W.2d 232, 233-34 (1993) (citation omitted). A defendant's intent is not relevant to whether the words have a defamatory meaning; the inquiry is whether the words could be understood as defamatory in the community by reasonable persons. *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 6, 259 N.W.2d 691, 693 (1977); *Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259, 262 ("[One

accused of defamation] is responsible for the understanding his language reasonably conveys to its recipients under the circumstances, whether that exact meaning was intended or not.").

The "capable of a defamatory meaning" test requires a court to reasonably interpret the allegedly defamatory words and ascribe to them their plain, natural, and popular meaning. *Meier*, 30 Wis. 2d at 276, 140 N.W.2d at 276. In addition to examining the words themselves, context and circumstance are essential to determining whether the words are capable of a defamatory meaning. *Westby*, 81 Wis. 2d at 6, 259 N.W.2d at 693 (footnote omitted); *Frinzi*, 30 Wis. 2d at 276, 140 N.W.2d at 261 (citations omitted). This means that words cannot be severed from one another or read independently of the piece of literature in which they appear: "One may not dissect the alleged defamatory statement into nondefamatory parts and lose the vital overall meaning." *Frinzi*, 30 Wis. 2d

at 277, 140 N.W.2d at 262; *see also Wozniak,* 57 Wis. 2d at 733-34, 205 N.W.2d at 374 ("The term 'scab' must be examined in its relationship to the whole leaflet . . . .").

Context also means that a court can find a statement is capable of a defamatory meaning by what it implies: "One may be libeled by implication and innuendo quite as easily as by direct affirmation." *Frinzi*, 30 Wis. 2d at 277, 140 N.W.2d at 262.

Additionally, words that qualify the disputed language do not necessarily rob it of its defamatory meaning: "The authorities agree that communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions or beliefs." *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 263-64, 258 N.W.2d 712, 715 (1977) (finding the words "apparently" and "appear to be" did not change the nature of defendants' defamatory language). The Supreme Court has likewise

rejected the contrived labeling of speech as opinion: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 2705-06 (1990).

Some cases have established whole categories of words that are capable of a defamatory meaning. For example, "[w]ords which charge an individual or a corporation with dishonorable, unethical or unprofessional conduct in a trade, business or profession are capable of a defamatory meaning." *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 483, 309 N.W.2d 125, 134 (Ct. App. 1981) (citing *Converters Equip. Corp.*, 80 Wis. 2d at 263, 258 N.W.2d at 715). Words that impute to the person the commission of a criminal act are also capable of a defamatory meaning as well. *Converters Equip. Corp.*, 80 Wis. 2d at 263, 258 N.W.2d at 715 (footnote omitted). Thus, words that

fall into either of these categories are capable of a defamatory meaning as a matter of law.

The actual malice test, necessary to an ultimate finding of defamation of a public figure under *New York Times v. Sullivan*, does not apply in a motion to dismiss. Courts have not applied or taken into account the actual malice standard when determining whether words are capable of a defamatory meaning in public figure cases, presumably because the determination is focused on the words themselves. *See, e.g., Dilworth*, 75 F.3d at 309-10; *Frinzi*, 30 Wis. 2d at 276, 140 N.W.2d at 261 (1966); *Maguire v. Journal Sentinel, Inc.*, 2000 WI App. 4 ¶ 18, 232 Wis. 2d 236, 248, 605 N.W.2d 881, 888 . As the *Frinzi* court put it on review of a demurrer: "In this case we do not reach any question of fair comment or whether the statement made is protected under the First Amendment's constitutional guaranty of free speech as discussed in *New York Times Co. v. Sullivan* . . . or whether

the *Times* doctrine applies to a candidate for public office." *Frinzi*, 30 Wis. 2d at 276, 140 N.W.2d at 261. Thus, rather than applying to motions to dismiss, the actual malice standard is only applicable when the elements and merits of a public figure defamation case are considered, i.e. on summary judgment or before a jury. *See, Torgerson v. Journal/ Sentinel, Inc.,* 210 Wis. 2d 524, 535, 563 N.W.2d 472 (1997).

3. *The trial court correctly ruled that the postcard presented a prima facie case of defamation.*

As the trial court found, Mr. Rongstad's statements are "capable of a defamatory meaning" (Supp. Appx. 119; R. 152:5) and therefore the trial court's ruling should be upheld. In straining to manipulate the statements into protected speech, Mr. Rongstad urges that the Court overlook the words' natural and popular meaning and to ignore the context in which those words appear. Moreover, Mr. Rongstad does not acknowledge *per se* categories of defamatory speech.

While he admittedly targeted Senator Lassa, Mr. Rongstad conveniently disregards the obvious implication and innuendo that the postcard uses to defame Julie Lassa. In short, Mr. Rongstad fails to show that the mailer is *incapable* of a defamatory meaning.

Mr. Rongstad's primary argument is that Julie Lassa cannot complain of any defamation because Chuck Chvala is the only person accused of criminal conduct in the postcard. (Def.'s Br. at 32.) This argument is contrary to the rule of *Frinzi*, which recognizes the devastating power of defamation by implication and innuendo.

"[W]ords which charge an individual or a corporation with dishonorable, unethical or unprofessional conduct in a trade, business or profession are capable of a defamatory meaning." *Christensen*, 103 Wis. 2d at 483, 309 N.W.2d at 134. Here, the postcard repeatedly charges Senator Lassa with dishonorable, unethical, and unprofessional conduct in

her profession, if not directly, then certainly by insidious implication and association; she is accused of extortion, misconduct in office, pay to play, lying, cheating, stealing, felonious conduct that resulted in Senator Chvala's indictment, and even sexual impropriety.

Additionally, most of the activities named in the above paragraph are criminal acts—extortion and stealing, to name a few. Plus, by tightly associating Ms. Lassa with Senator Chvala and his indictment on twenty felony counts, it is not unreasonable to read the mailer as implying that Lassa engaged in the same activities that resulted in those felony charges.

Finally, readers of the postcard are directed to ask Julie Lassa: "And, most importantly, will you please clean up your act?" This question assumes a defamatory fact, that Julie Lassa's "act" was "dirty" in the first place. Why would anyone have to "clean up" anything that is not dirty to begin

with? The unspoken but necessarily implied predicate of the final question is certainly defamatory, just as the question, "When did you stop beating your wife?" states by implication a most vile accusation.

If the record is not complete as to Senator Lassa's showing of "actual malice" (even though it was not necessary to overcome the motion to dismiss), it is only because she could not ascertain the identity of all who conspired to defame her because of Mr. Rongstad's dilatory tactics. That was all the more reason to force Mr. Rongstad to disclose the names of those behind the piece. To rule otherwise would be to put public figures victimized by anonymous defamatory piece in a Catch-22.

The First Amendment rights of freedom of association and freedom of speech do not apply to defamation, even in the rough and tumble world of politics. Because Julie Lassa has shown that the AWW postcard is reasonably capable of a

defamatory meaning, Todd Rongstad cannot claim that the trial court violated his rights by requiring him to comply with Lassa's discovery demands to disclose the identities of those behind the mailer or that he was in any way justified in his refusal to comply with the trial court's orders.

C. The out-of-state cases that Rongstad cites to support his First Amendment claim are either distinguishable or not controlling.

Crocker v. Revolutionary Communist Progressive Labor Party, 533 N.E.2d 444 (Ill. App.1988) is an Illinois state court case involving employees at a hospital who allegedly libeled their supervisor in a newsletter that was circulated in the hospital. The employees were members of a political group, an unincorporated association named as a defendant; the association's "political organizer," who was also an employee of plaintiff, was also named as a defendant. During the organizer's deposition, he was asked to disclose, among other things, names of the members of his

organization that circulated the newsletter. He refused on the basis of freedom of association and was found in contempt by the circuit court. The employees were particularly concerned that disclosing the member names would subject them to threats, intimidation, and reprisals, particularly on the job.

On appeal, the Illinois court of appeals agreed with the defendant: "the concern here seems reasonable since the plaintiff, as the chairman of the pathology department and carrying the authority which that position holds, is the person from whom members of [the defendant organizations] fear reprisals if their identities are discovered." *Id.* at 447-48. Also, the appeals court found that the plaintiff had not met her burden of showing that the balance of interests weighed in favor of disclosure under the two-step test in *Black Panther Party v. Smith.* 661 F.2d 1243, 1268 (D.C. Cir. 1981) (holding that (1) the information sought must be so relevant that it goes to the heart of the matter, and (2) the party

seeking information must have exhausted every reasonable alternative source of information).

The case at hand is distinguishable. First, as the trial court found, Mr. Rongstad's claim that he and members of AWW will suffer public reprisals if their names are disclosed and will thus be discouraged from exercising their rights to free association (Appx. 4; R. 17) is speculative at best (Supp. Appx. 105-106; R. 146:18-19). It is nothing so concrete as the fear of firing or discipline that the employees in *Crocker* faced. Mr. Rongstad also alleges that a loss of confidentiality will ruin his business and force him to find "a new career." (Appx. 4; R. 17.) However, Rongstad's financial interests do not strongly implicate his First Amendment rights to free association; his interest in continuing his work as a political hitman is not analogous to protecting the speech and free association rights of members of the "dissident organization[s]" described in *Crocker*. 533 N.E.2d at 405.

Secondly, unlike the plaintiff in *Crocker*, Julie Lassa has shown that the balance of interests weighs in favor of disclosure. Applying the two-step balancing test used in *Black Panther Party*, Senator Lassa has shown that the information is relevant, as the trial court found. (Appx. 22-23; R. 145: 7-8.) The postcard that has defamed Ms. Lassa and sparked this action was sent by AWW. Unlike *Crocker*, therefore, where defendants had requested summary judgment because they denied involvement in the newsletter, AWW's involvement (and that of Mr. Rongstad) is clear. Requiring Rongstad to disclose member names is not a "fishing expedition," but an attempt to hold those that spent thousands of dollars to publish false and malicious statements about Ms. Lassa directly accountable and get to "the heart of the matter."

As to the second prong of *Black Panther Party*, Senator Lassa has attempted to get the requested information

from other sources and has failed. As Mr. Rongstad's affidavit states, "[t]hat as a board member and president of the association, I and the [AWW] have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the [AWW]." (Appx. 4; R. 17.) Nowhere is the information Ms. Lassa seeks available because it is clearly a practice to keep the identities of members of AWW confidential. Any attempts to get information about the group therefore had to be directed to him; thus, there were no alternative sources of information to "exhaust."

Thus, *Crocker* is factually and legally distinguishable from the case at hand and, as an Illinois state court case, it is not binding on this Court.

The second case Rongstad cites is likewise inapposite. In *Britt v. Superior Court of San Diego*, 574 P.2d 766 (Cal. 1978), the California Supreme Court found that a wide-

ranging discovery request by an airport into the associational interests of a group of citizens who brought an action against the airport for damage to property. The discovery request was extremely broad; for example, defendants requested plaintiffs' membership in organizations opposed to the airport's practices, names of people who had attended meetings of those organizations, the content of discussions regarding the meetings, the identity of persons with whom the meetings were discussed, records of financial contributions to anti-airport organizations, and unlimited disclosures of their medical histories. The information request in *Britt* was far broader and more invasive than the one in this case. While Ms. Lassa only asked for the members of AWW who have information that would lead to the discovery of admissible evidence regarding the political postcard at issue here, the defendant in *Britt* asked for much more. Because the information request was vastly different from the one at bar,

this case is not useful here. Also, like *Crocker*, it is a state court opinion from another jurisdiction. Thus, not only is *Britt* distinguishable on the facts, it has not been recognized by our courts and, therefore, does not provide sufficient basis to overturn the trial court's decision.

II. TODD RONGSTAD'S UNSUPPORTED AND SELF-SERVING DECLARATIONS ABOUT FEARS OF REPRISAL AGAINST MEMBERS OF HIS ORGANIZATION DID NOT CONSTITUTE A "SUBSTANTIAL JUSTIFICATION" FOR HIS REFUSAL TO OBEY THE TRIAL COURT'S DISCOVERY ORDERS.

Rongstad relies on *Burnett v. Alt,* 224 Wis. 2d 72, 589 N.W.2d 21 (1999), to support his claim that he presented a "substantiated assertion of privilege" as justification for not complying with the court's discovery orders. In *Alt*, the court held that an expert witness could not be compelled to provide opinion testimony without a showing of compelling need for the testimony and payment of reasonable compensation. *Id.* at 89, 589 N.W.2d at 27. In *Alt*, the court found that the

expert testimony was available elsewhere. Thus, after balancing the litigant's need for irreplaceable testimony and the expert's right to be free from compulsion to provide opinion testimony, the court granted a qualified privilege to expert opinion testimony. *Id.* Mr. Rongstad disregards the Wisconsin Supreme Court's admonition in *Alt*:

> We caution attorneys that our holding in this case is not a license to assert unsubstantiated privileges. *An unsubstantiated and unfounded privilege* is not substantial justification for not imposing sanctions under Wis. Stat. § 804.12(2).

Id. at 95, 589 N.W.2d at 29 (emphasis added). Mr. Rongstad has asserted only an unsubstantiated and unfounded privilege.

Applying *Alt*, the problem for Mr. Rongstad is that Senator Lassa had no alternative source of the information in Mr. Rongstad's possession (i.e., information about others involved in the defamatory postcard). Therefore, Ms. Lassa presented exactly the kind of "compelling circumstances,"

namely, the lack of any alternative source of necessary information, that were lacking in the *Alt* case.

In *B&B Investments v. Mirro Corp.*, 147 Wis. 2d 675, 681-82, 434 N.W. 2d 104, 107 (Ct. App. 1988), this Court found that the deponent had asserted an unsubstantiated constitutional privilege in bad faith and, therefore, dismissal of the case as a sanction under Wis. Stat. § 804.12(2)(a)3. was appropriate.

In *Mirro Corp.*, the deponent refused to answer questions during his deposition, alleging that his answers may incriminate himself and claimed a Fifth Amendment right to remain silent. *Id.* The trial court dismissed the deponent's case for his refusal "to answer properly propounded questions at deposition on the improperly asserted ground of privilege" under Wis. Stat. § 804.12(2)(a). *Id.* at 686, 434 N.W. 2d at 109. The trial court had "familiarized itself with the criminal complaint and concomitant proceedings" alleged by the

deponent as the grounds for needing to assert the constitutional privilege. *Id.* The court found that the deponent, through his counsel, was "unable to set forth the requisite nexus between those [criminal] proceedings and the civil action[,]" noting that deponent's unsubstantiated "feeling" he needed to stay silent was not sufficient. *Id.* at 686-87, 434 N.W. 2d at 109.

The trial court stated that "[o]ne cannot assert the Fifth Amendment as a bar to answering *any* question" and found the "claim of privilege 'meritless' and that 'its only purpose was to delay these proceedings and to deprive the defendants of their rights to civil discovery.'" *Id.* (emphasis added) (quoting the trial court's decision).

The Court noted that the trial court had

> rejected imposition of lesser sanctions. To do so would diminish the seriousness of [the party deponent's] conduct. *Willful failure to respond to deposition is a serious abrogation of a [party's] statutory duties*, and harsh sanctions

> are within the trial court's discretion precisely for the purpose of discouraging such behavior.

Id. (emphasis added). The Court of Appeals upheld the trial court's finding of bad faith and upheld the dismissal of the action because of the bad faith dilatory tactics deponent had engaged in. *Id.*, at 688, 434 N.W. 2d at 110.

As in *Mirro Corp.*, Mr. Rongstad asserted a meritless constitutional privilege each time he has refused to answer proper deposition questions. The circuit court addressed his claim of privilege numerous times. Each time, the circuit court found that Mr. Rongstad failed to substantiate grounds for a constitutional privilege and that he was to respond to questions regarding membership in AWW. Mr. Rongstad was purposefully evasive to protect the unnamed defendants and, by doing do, prevented Senator Lassa from seeking recourse under the law against those individuals. As the trial court found, Mr. Rongstad's conduct was egregious and in

bad faith and was not then--or is it now--supported by a clear and justifiable excuse.

III. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION WHEN IT IMPOSED SANCTIONS BEFORE FORMALLY RULING ON RONGSTAD'S MOTION TO DISMISS.

Mr. Rongstad asserts in his brief that the trial court "refused" to schedule a hearing on his motion to dismiss. (Def.'s Br. at 5-6.) The record reveals no such refusal. Although Mr. Rongstad filed a motion to dismiss with the court (R. 24), nothing in the voluminous trial court record indicates that he contacted the court to schedule a specific time for a hearing on the motion. In any event, the motion was not filed until *after* the trial court ruled that Mr. Rongstad had to comply with Senator Lassa's discovery demands. (R. 24 (The motion to dismiss was filed on February 11, 2003, after Judge Nowakowski had issued his discovery orders.).)

Mr. Rongstad also takes issue with the timing of the trial court's ultimate formal decision on his motion to dismiss. (Def.'s Br. at 27.) He argues, without any citation to legal authority, that the sanctions should now be reversed simply because the trial court should have explicitly ruled on his motion to dismiss before ordering him to comply with Ms. Lassa's discovery demands, even though the court ultimately denied his motion. This is, at best, much ado about timing and nothing else. Because the trial court's ruling was correct, Mr. Rongstad cannot show any prejudice from the trial court's failure to issue a formal decision on his preferred timetable.

What would Mr. Rongstad have this court do? Remand to the trial court to decide the motion that the court has already decided? In the context of a case that the parties have settled, this resolution makes no sense.

IV. THE TRIAL COURT DID NOT COMMITT ERROR BY APPROVING THE SETTLEMENT AGREEMENT'S STIPILATED SANCTIONS.

A. This court should decline to rule on this issue because it is beyond the scope of the settlement agreement and because the parties have stipulated to the amount of monetary sanctions.

If Mr. Rongstad means to challenge the amount of money that the court has imposed as sanctions, the settlement agreement forecloses that issue:

> Rongstad and The Valkyrie Group will allow a combined judgment, encompassing all earlier judgments, order and proceedings of the Court, to be entered against them for the *stipulated* amount of $65,000.00, with $43,000.00 in contempt related attorney's fees and $22,000.00 in forfeitures payable to the School Fund.

(Appx. 17; R. 140:2 (emphasis added).)

The only reasonable interpretation of this provision of the settlement agreement is that if Mr. Rongstad prevails on his First Amendment claim, the sanctions disappear and he owes nothing by way of attorneys fees or forfeitures. If he

does not prevail on that issue, he pays the $65,000.00. *The amount is not an issue for appeal.*

Nevertheless, Julie Lassa will address the merits of this issues.

B. Standard of Review for the Sanctions Decision

Pursuant to Wis. Stat. § 804.12(2)(a)3, a circuit court has authority to grant a default judgment against a defendant for his failure to comply with discovery orders if his noncompliance was either egregious or in bad faith and his conduct is without a clear and justifiable excuse. *See Brandon Apparel Group, Inc., v. Peason Properties, LTD*, 247 Wis. 2d 521, 531, 634 N.W. 2d 544, 549 (Ct. App. 2001). Bad faith can be demonstrated by an unsubstantiated claim of privilege. *Mirro Corp.*, 147 Wis. 2d at 681-82, 434 N.W. 2d at 107.

This Court recently delineated the standard of review of a trial court's imposition of sanctions for discovery violations:

> The decisions whether to impose sanctions on a party and which sanctions to impose are committed to the trial court's discretion. *See Schultz v. Sykes*, 248 Wis. 2d 746, 638 N.W.2d 604. We affirm discretionary decisions if the court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). When the issue is whether the court applied the proper legal standard in exercising its discretion, we review that issue de novo. *Sulzer v. Diedrich*, 2002 WI App 278, P9, 258 Wis. 2d 684, 654 N.W.2d 67.

Teff v. Unity Health Plans Insurance Corporation, 2003 WI App. 115, ¶ 12, 265 Wis. 2d 703, 716, 666 N.W.2d 38 (Ct. App. 2003).

In *Teff*, this Court affirmed the trial court's imposition of the extreme and drastic sanction for violation of a discovery order--a default judgment--when it was satisfied

from the record that the trial court had (1) applied the correct legal standard; (2) considered the facts of record; and (3) made a reasonable decision to impose the sanction. 2003 WI App. 115, ¶ 17.

C. The trial court applied the correct legal standard, considered the facts of record, and acted reasonably in imposing sanctions on Todd Rongstad for his continuing willful refusal to comply with a valid discovery order.

Mr. Rongstad argues that the trial court imposed "harsh" sanctions upon him. When a litigant has engaged in a defiant and obstructionist course of conduct designed to frustrate the legitimate discovery demands of a plaintiff seeking redress for a venomous campaign of defamation, that litigant should expect more than a mere slap on the wrist. Mr. Rongstad cites *City of West Allis v. Wisconsin Elec. Power Co.*, 2001 WI App. 226, 248 Wis. 2d 10, 635 N.W.2d 873 (Ct. App. 2001) as authority for his claim that the *stipulated* amount of $65,000 was excessive. The *West Allis* case

involved the imposition of *$100 million in punitive damages*, not a sanction for violating a discovery order. 2001 WI App. 226, ¶ 10. The interests involved are *not* comparable.

Additionally, Mr. Rongstad's reliance on *West Allis* misses the point of court-imposed sanctions for failure to comply with a court's discovery orders:

> Each time the court's orders are disregarded, the administration of justice suffers because the court's time is misused to accommodate the non-complying party's dilatoriness at the expense of the other party and all other litigants awaiting the court's attention.

Johnson v. Allis Chalmers Corp., 162 Wis.2d 261, 282, 470 N.W. 859, 867 (1991) (upholding dismissal of action for attorney's failure to comply with discovery orders). The court in *Allis Chalmers* recognized the harm in not sanctioning this kind of dilatory behavior: "A continuing failure to sanction may be perceived by the noncomplying party and litigants as a green light to flaunt court orders." *Id.*

Mr. Rongstad is incorrect when he claims that sanctions for violating court-ordered discovery must consider the harm to the other party in choosing from a range of possible sanctions. "Willful failure to respond to deposition is a serious abrogation of a [party's] statutory duties, and harsh sanctions are within the trial court's discretion precisely for the purpose of discouraging such behavior." *Mirro Corp.*, 147 Wis. 2d at 688. A trial court is to tailor its sanction not to the harm suffered by the other litigant, but rather to the severity of the offending party's misconduct. *Allis Chalmers Corp.*, 162 Wis. 2d at 286.

The linchpin of Mr. Rongstad's entire argument is his claim that he had a "legitimate claim of privilege." (Def.'s Br. at 34.) With no legitimacy to that claim, as the trial court has found and Ms. Lassa has demonstrated above, his argument fails.

Mr. Rongstad's argument that Julie Lassa's political concerns were entitled to no "special consideration" (Def.'s brief at 35-36) misses the point. The trial court gave no "special consideration" to politics but recognized that it was important for Senator Lassa to clear her name under the particular circumstances of her case because an event – which happened to be an election – was soon approaching.

Contrary to Rongstad's colorful argument, the trial court was not moving "heaven and earth." (Def.'s Br. at 35-36.) It was trying to move something more stubborn and intractable: an obstructive litigant with no respect for the judicial system. Claiming that Ms. Lassa suffered no harm or hardship by having to wait for Mr. Rongstad to finally comply (and Lassa does *not* concede that Rongstad has divulged the names of all persons responsible for the hit piece) mocks the authority of trial courts to enforce their orders. Mr. Rongstad repeated and openly flaunted the trial

court's orders making it impossible to proceed with the litigation. (*See e.g.*, R. 47:36 ("I don't have that information, so the court's just not going to get its way.")) Noting that a default judgment is the harshest sanction that a court can impose, the court granted the default judgment because "no lesser sanction than default judgment would address both [the court's] goal of trying to get this lawsuit back on a footing that would allow it to proceed, or that would address the persistence of the violation that we have seen in this case." (Supp. Appx. 130; R.152:46; *see also generally* R.152:43-46.) The court did not err in its decision to grant the default judgment, and it certainly did not err in its decision to approve the settlement agreement's $65,000 stipulated sanction amount.

Rongstad's final argument is that the trial court "[based] sanctions upon subjective determinations of the truth or falsehood of [his] testimony." (Def.'s Br. at 36, n.8). The

simple fact is the trial court did not rely on the apparent inconsistencies and probable falsehoods in Mr. Rongstad's deposition when it imposed sanctions and certainly made no actual findings of perjury or false swearing. The court simply ruled that Senator Lassa had not been able to move her case ahead due to the intentional contemptuous behavior of Mr. Rongstad.

CONCLUSION

Mr. Rongstad raises claims that he has waived by entering the Settlement Agreement dismissing this case. Regardless, Mr. Rongstad does not demonstrate that the trial court's decision on the merits should be overturned. Senator Lassa presented a *prima facie* case of defamation arising out of the negative postcard accusing her, by implication and innuendo, of unethical and illegal conduct. Therefore, Mr. Rongstad had no legitimate First Amendment privilege to justify his refusal to abide by the rules of discovery and the

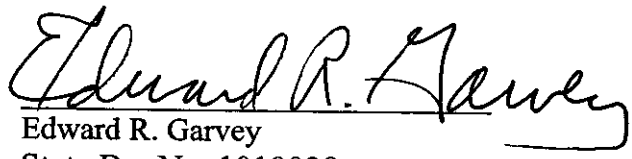
trial court's orders. Hence, sanctions were appropriate. The timing of the trial court's decision on Mr. Rongstad's motion to dismiss affords him no relief; at worst, it was harmless error.

For these reasons, Julie Lassa respectfully requests that the Court affirm the order of the trial court and the sanctions imposed, requiring Todd Rongstad to pay the $65,000.00 to Senator Lassa's attorneys and to the School Fund, as set forth in the Settlement Agreement.

Dated this 17th day of May, 2004.

Respectfully submitted,

GARVEY & STODDARD, S.C.
Attorneys for Plaintiff-Respondent



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9932 words.

Dated this 17th day of May, 2004.

Respectfully submitted,

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 04-0377

JULIE LASSA,
Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,
Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,
Defendants,

AMERICAN FAMILY INSURANCE COMPANY,
Intervenor,

v.

ALEX PAUL,
Third-Party Defendant.

On Appeal from the Circuit Court of Dane County
The Honorable Maryann Sumi
Trial Court Case No. 03-CV-177

PLAINTIFF-RESPONDENT'S SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

==========

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

RULING ON OBJECTION TO DEPOSITION QUESTIONS
Case No. 03-CV-177

COPY

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A.M. Mailing Service, Inc.

Laura Stuessy, RMR, CRR
Official Court Reporter

1 factual background to address how Mr. Rongstad and
2 the group all fit together.
3 Now, the Court certainly has discretion to do
4 whatever the Court is going to do in this case, but
5 with all due respect, I don't think the Court has
6 enough information and foundation to rule.
7 When there is no emergency, we typically proceed
8 with a motion to compel under 804.10 through briefs
9 and give the parties a full opportunity to be heard.
10 I just don't believe that's taken place in this
11 particular instance. And if the Court forces Mr.
12 Rongstad to answer the questions, there are
13 significant constitutional issues and IRS issues at
14 play. So with that background, I await the Court's
15 ruling.
16 THE COURT: Well, Mr. Crooks, apart from
17 putting your arguments in written form in a brief,
18 what more is it that you think I need to know?
19 MR. CROOKS: Your Honor, yesterday you said
20 you really didn't have the benefit of the factual
21 background here, how Mr. Rongstad related to the
22 alliance, how the alliance was comprised or even what
23 type of entity the alliance was. Those are all key
24 considerations under the case law cited to the Court
25 yesterday, and how those cases apply to this

1 particular situation is a fairly complex issue.

2 THE COURT: Well, certainly I started out

3 our conversation yesterday with exactly that lack of

4 information that you allude to. I don't want to

5 pretend to have been made privy to all of what was

6 testified to by Mr. Rongstad during the preceding

7 three or four hours, but certainly, let us say I was

8 further educated. I don't pretend now to hold a

9 master's degree on the topic, but I did get further

10 instruction and elucidation.

11 As a result, at this point I'm prepared to go

12 ahead and rule on these objections or the objection

13 that was made, and I think I understand the positions

14 that both of the attorneys were making. And

15 certainly the cases which were cited, and I'll recite

16 them in a moment, were ones that I had a chance last

17 evening to review, and I understand the relevance of

18 the case law to the arguments that primarily Mr.

19 Crooks was making last evening.

20 MR. GARVEY: Your Honor, this is Ed Garvey.

21 May I just ask the Court if your court reporter is

22 taking this down, or should we have our reporter in

23 here?

24 THE COURT: No. I have my court reporter

25 now, which of course I would always prefer rather

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

==========

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

MOTION FOR RECONSIDERATION
Case No. 03-CV-177

COPY

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TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 6th day of February, 2003, commencing at 10:05 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

1 things that had been demonstrated in NAACP v Alabama
2 to form the basis for the court's quite appropriate
3 recognition that that was the kind of thing that
4 people ought not to be subjected to because of their
5 association with an organization or with beliefs of
6 certain types?
7 Now, here fear of a lawsuit is on a very low
8 standing. Indeed, I think there's probably
9 legitimate fear on the part of the others involved in
10 the funding and preparation and distribution of this
11 postcard that they will become enmeshed in this
12 lawsuit. Mr. Garvey's pleading on behalf of his
13 client lists other John Does or other Does as the
14 fictitiously named defendants. One ordinarily does
15 not plead a case naming fictitious defendants without
16 the intent to later upon discovery of who they may be
17 to join them in the lawsuit.
18 But the First Amendment is not at its core
19 designed to provide protection for someone's fear
20 of -- better stated, it is not designed to provide
21 immunity for someone's criminal or civil liability
22 for their behavior. It may on occasion have the
23 result of making it difficult to prosecute civilly or
24 criminally someone, but that is not at its core the
25 purpose for the protections afforded by the First and

1 Fourteenth Amendments.

2 As a result, these conclusory allegations and
3 the references to fear of a lawsuit are simply so low
4 that they do not satisfy the Buckley requisite
5 factual showing. And if they do, they do so by
6 simply skimming by and being barely sufficient.

7 And even once some showing is made, the
8 balancing test is still necessary, and nothing that
9 has been presented on this motion for reconsideration
10 changes the conclusions that I reached when I made
11 the decision back on February 4, and there's no
12 reason to repeat those points at this time.

13 Now, on today's date Mr. Crooks makes an
14 additional contention, and that is that he apparently
15 now no longer is as concerned about the Court's order
16 because he says his client has complied with it. And
17 apparently if his client has fully complied with it,
18 then we must be engaged in much ado about nothing by
19 continuing to argue about whether there should be a
20 court order that requires him to answer questions.

21 From the information that has been presented in
22 the motion for reconsideration and the response to
23 that motion about what happened and what answers had
24 been provided by Mr. Rongstad thus far, it appears to
25 me that Mr. Crooks has provided the very point that

1 justifies further inquiry of Mr. Rongstad, and that
2 is that the organization of which Mr. Rongstad is
3 apparently the CEO has a board of directors, and the
4 board of directors makes decisions about what
5 projects to fund. Mr. Garvey is entitled to find
6 out, and Mr. Rongstad shall answer, as to who are the
7 board of directors and who were the people who are
8 the board of directors.
9 MR. CROOKS: Judge, he has answered those
10 questions already.
11 MR. GARVEY: We do know two other board of
12 directors who -- the two members who reside in
13 Minnesota. There are three listed in the DFI
14 documents.
15 THE COURT: And so, what more are you
16 asking for then?
17 MR. GARVEY: Well, for example, your Honor,
18 we took Mr. Rongstad's affidavit and asked him to
19 disclose the identity of the members who approached
20 him. He refused on grounds of First and Fourteenth.
21 We asked him who the members are who have contributed
22 the funds for this, and he says again it's the First
23 and Fourteenth. And so, we reminded him of your
24 Honor's order, and he will not answer any question
25 about any person who hired him, suggested to him that

1 they do this hit piece on Miss Lassa.

2 If we're to listen to Mr. Rongstad, because he

3 will not answer questions about who is involved in

4 the actual determination of the selection of this

5 particular target, we're at a loss. And so, despite

6 the Court's order and without any urging from

7 counsel, from Mr. Crooks, he simply continues to

8 refuse to answer the key questions about where the

9 money's coming from and with whom he discussed the

10 design and the decision really, which is even more

11 important because, as your Honor knows, this race is

12 coming up. Next Tuesday the Governor will announce

13 when the special election is going to be held.

14 And so, since he won't tell us who decided why

15 this district out of 99 was selected for this hit

16 piece dealing with a Senate seat when Miss Lassa was

17 about to be reelected to the Assembly again, all we

18 can do is ask him the names of anybody that comes to

19 mind that might have an interest in politics in the

20 Stevens Point area.

21 So he is continuing, and I think your Honor will

22 see the transcript to assert that he knows what his

23 First and Fourteenth Amendment rights are, and he's

24 not going to be deterred by the Court.

25 MR. CROOKS: Judge, that's simply not an

1 according to Mr. Rongstad he makes a mental decision
2 who's going to be admitted, and we know that it now
3 can be entities, including parties or ideological
4 groups or unions or others.
5 And so, if we knew who those entities are that
6 may have contributed, then we can add Does 1 through
7 5. Without that information, Mr. Rongstad says he
8 will fall on his sword, say it was totally his idea
9 because he was taking directions from the Alliance
10 For Working Wisconsin, which he heads, but he won't
11 tell us anything about it other than what it doesn't
12 do. It doesn't get financial reports, doesn't get
13 newsletters, has no vote, doesn't make
14 determinations. But some entity or some human being
15 within that group consulted with him to decide they
16 were going to go after Miss Lassa. He won't answer
17 those questions.
18 MR. CROOKS: Judge?
19 THE COURT: Mr. Crooks, if I understand
20 correctly, this is an amorphous organization, but
21 apparently people contribute money to it?
22 MR. CROOKS: In some instances. People
23 contribute money. People -- Mr. Rongstad went
24 through five things, and I don't recall them off the
25 top of my head as to what people can do to become

1 exactly what time, but I know that he's not available
2 until Tuesday, and I am going to be trying a case in
3 front of Judge DeChambeau on Monday, Tuesday and
4 Wednesday of next week.
5 THE COURT: Mr. Rongstad will be at Mr.
6 Garvey's office at 8 o'clock on Tuesday morning and
7 the deposition will continue.
8 MR. GARVEY: Your Honor, may I raise one
9 other issue with you?
10 THE COURT: Go ahead.
11 MR. GARVEY: I got a call last night about
12 11 o'clock from Miss Lassa. A process server had
13 been at her home to take her deposition with a
14 subpoena duces tecum signed by Mr. Crooks.
15 I'm used to attorneys handing people something
16 saying will you accept service for your client. I'm
17 not used to having something like this occur, but the
18 deposition interestingly would come approximately one
19 week after the Governor announces the date of the
20 special election.
21 Secondly, I do not understand how we can prepare
22 if we don't even know who Does 1 through 5 are or
23 what this organization is, and so we'll submit a
24 request that your Honor quash this until such time as
25 Mr. Rongstad has complied with the Court's order.

STATE OF WISCONSIN CIRCUIT COURT Branch 13 DANE COUNTY

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

COPY

CONTEMPT HEARING
Case No. 03-CV-177

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 11th day of March, 2003, commencing at 1:15 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

1 confronted on the 3rd, the 4th, the 5th, the 6th,
2 the 11th, the 28th and then the 3rd of March.
3 THE COURT: Mr. Crooks?
4 MR. CROOKS: Judge, most of what Mr. Garvey
5 says is accurate. There are a few issues that I'd
6 like to bring to the Court's attention.
7 First of all, I don't think Mr. Rongstad has
8 exhibited any disdain for the Court's order. The
9 only rationale given for not complying with the
10 Court's order and the consistent rationale throughout
11 has been his belief in his constitutional rights in
12 that once he discloses the name of the contributor or
13 the names of the contributors the Court has ordered
14 him to disclose, that those constitutional rights are
15 without any appeal. There's no value to the appeal
16 in this particular case.
17 To indicate that he hasn't -- that he showed up
18 without any documents and that he hasn't produced any
19 documents is simply not accurate, Judge. We've
20 probably produced, I don't know, a foot or so worth
21 of documents throughout the course of this; and in
22 fact, at the deposition he appeared with all of the
23 bank statements, or those that he had, and records of
24 deposits and what had happened to the money. The
25 only thing he has not disclosed is the name of the

1 STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

2 ==========

3 JULIE M. LASSA,

4 Plaintiff,

5 -vs- **MOTION HEARING**
Case No. 03-CV-177

6 DOES 1-5, In Their Individual Capacities,

7 Defendants,

8 TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,

9

10 Defendants and
Third-Party Plaintiffs,

11 -vs-

12 ALEX PAUL,

13 Third-Party Defendant.

14 ==========

COPY

15 TRANSCRIPT OF PROCEEDINGS held in the

16 above-entitled matter before the HONORABLE MICHAEL N.

17 NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse,

18 in the City of Madison, Wisconsin, on the 28th day of

19 April, 2003, commencing at 10:05 o'clock a.m.

20

21 PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

22 APPEARANCES:

23 **EDWARD R. GARVEY, GLENN M. STODDARD, PAMELA R.**
McGILLIVRAY and CHRISTA O. WESTERBERG,

24 Garvey & Stoddard, S.C., Attorneys at Law,
634 West Main Street, Suite 101, Madison,

25 Wisconsin, appeared on behalf of the plaintiff;

1 determination of the issues involved in the action."
2 Whether two parties are united in interest in a
3 particular case is a mixed question of fact and law.
4 As a result, I make the following findings of fact:
5 1. Todd Rongstad was sued for his role in
6 the production, publication and dissemination of
7 an allegedly defamatory postcard concerning the
8 plaintiff.
9 2. Todd Rongstad unlawfully resisted the
10 plaintiff's efforts to obtain information concerning
11 what other people or person was also involved in the
12 production, funding or distribution of the postcard.
13 Rongstad was found in contempt of court for
14 intentionally violating state law and the orders of
15 this Court on March 11th, 2003. He unsuccessfully
16 sought to obtain review of the contempt order and the
17 orders which preceded it by the Court of Appeals on
18 two occasions.
19 3. Todd Rongstad has asserted under oath and
20 through his attorney in this case, and publicly as he
21 has attempted to try this case in the media, that the
22 decision to publish the postcard was his alone and
23 that no other person urged or requested him to do so,
24 no other person suggested that the plaintiff be the
25 target of any mailing he did, no other person knew

1 that he was thinking about targeting the plaintiff or
2 intended to do so, and no other person was in any way
3 involved in the production of the postcard or the
4 choice of the language, or the design or the
5 photographs that were a part of that postcard.
6 4. On April 4th, 2003, the deadline for Todd
7 Rongstad to comply with the Court's orders to provide
8 information required by state law, he purported to
9 comply by filing an affidavit which disclosed that he
10 had received $7500 from Sunjay Sood in the week prior
11 to the mailing of the postcard.
12 Within one hour of providing this affidavit to
13 plaintiff's counsel, Alex Paul's attorney faxed a
14 letter to plaintiff's counsel conceding that Alex
15 Paul had in fact given the $7500 to Mr. Sood to give
16 to Todd Rongstad to fund the postcard at issue in
17 this case.
18 5. From late January, 2003, Alex Paul's
19 attorney had ongoing conversations with Todd
20 Rongstad's attorney concerning motions being made,
21 the Court's rulings on motions and the appeals taken
22 by Todd Rongstad. During this period, Alex Paul's
23 attorneys did not themselves tell Todd Rongstad's
24 attorney who they were representing.
25 And I have nothing that would contradict the

1 affidavit statement to that effect by Mr. Friebert,
2 but I infer that it was highly likely that Alex Paul
3 or others told Todd Rongstad, his attorney or a
4 third-party intermediary that Alex Paul was the
5 person on whose behalf Mr. Friebert and his law firm
6 were consulting with Mr. Crooks, Todd Rongstad's
7 attorney.
8 6. That the Third-party Complaint in this
9 action was filed on April 18th, 2003 after a hearing
10 had already been scheduled for April 23rd, 2003 on
11 the plaintiff's motion for a default judgment against
12 Todd Rongstad on the ground that he had failed to
13 comply with the Court's deadline for compliance with
14 previous discovery orders.
15 The Third-Party Complaint was filed with the
16 intent by Todd Rongstad and his attorney to allow
17 Alex Paul to seek a substitution of judge because
18 Todd Rongstad and his attorney believed things were
19 going badly for him and they hoped to obtain a more
20 favorable tribunal.
21 I infer from the sequence of events and the
22 history of consultation between the attorneys for
23 Alex Paul and Todd Rongstad that this plan was known
24 to and agreed upon by Alex Paul and his attorney.
25 The request for substitution was in fact filed within

1 hours of the filing of the Third-Party Complaint.

2 I reach the following conclusions of law:

3 1. That Todd Rongstad participated in the

4 hearing of a number of preliminary contested matters

5 in this action.

6 2. That given Todd Rongstad's assertions that

7 no one but he had any involvement in the decision to

8 publish or the production of the postcard at issue

9 here, the allegations in his Third-Party Complaint

10 that are made to create a claim against Alex Paul

11 border on being a sham.

12 3. That the Supreme Court's decision in Carkel

13 makes the intent of parties to get around the

14 limitations on the substitution of judges a relevant

15 consideration in assessing whether those parties are

16 united in interest, but this factor is not

17 determinative. The standard established in Carkel

18 still requires that all matters be considered in

19 determining whether Alex Paul and Todd Rongstad are

20 similarly interested in and will be similarly

21 affected by the determination of the issues in the

22 action.

23 Considering all matters, I conclude that Alex

24 Paul has met his burden of proof to show that he is

25 not united in interest with Todd Rongstad, as that

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 2

* *

JULIE M. LASSA,
Plaintiff,
-vs-
DOES 1-5, In Their Individual Capacities,
Defendants,
TODD RONGSTAD and
THE VALKYRIE GROUP, LLC,
Defendants and
Third-Party Plaintiffs,
-vs-
ALEX PAUL,
Third-Party Defendant.

Case No. 03-CV-177

* *

DATE: August 15, 2003

PROCEEDINGS: Oral Arguments and Court's Decision

BEFORE: The Honorable **MARYANN SUMI**

A P P E A R A N C E S

EDWARD GARVEY and **PAMELA McGILLIVRAY**,
GARVEY & STODDARD, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appearing on behalf of the plaintiff;

MICHAEL CROOKS,
PETERSON, JOHNSON & MURRAY, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appearing on behalf of defendants Todd Rongstad and The Valkyrie Group;

MATTHEW O'NEILL,
FRIEBERT, FINERTY & ST. JOHN, S.C., Attorneys at Law, Two Plaza East, Suite 1250, 330 East Kilbourn Avenue, Milwaukee, Wisconsin, appearing on behalf of third-party defendant Alex Paul.

COPY

Reported by **Geri Elveru**
Official Court Reporter

1 in nature. Mr. Garvey in his brief recently submitted to the
2 court at page five concedes that he himself views the
3 contempt sanctions as remedial.
4 So what it really comes down to and what relief from
5 the contempt sanctions comes down to is whether the court
6 believes that Rongstad has complied with the orders of Judge
7 Nowakowski to disclose the contributors. We think without
8 question, he has.
9 Mr. Garvey claims that while he disclosed the
10 information, it wasn't a legitimate disclosure because the
11 documents were illegible. Well, we disclosed the best
12 documents we had at the time. Everybody could read the
13 checks. And just to make sure, I sent a follow-up letter to
14 Mr. Garvey saying in case you can't read this stuff, here's
15 what it says. And in case you really want to take
16 Mr. Rongstad's deposition, he's available. I'll produce him
17 at my office and you can ask him any questions you want about
18 the additional information. Mr. Garvey at that time elects
19 not to do that. He says I think it would be a waste of my
20 time. And then he comes in here and he says they haven't
21 complied, your Honor. Let's enter default. We got to enter
22 default judgment against them because they haven't complied
23 with the court's order.
24 The fact of the matter is, your Honor, we have
25 complied. Every piece of paper, 58 deposition exhibits,

1 hundreds of pages of material has been disclosed in response
2 to request for production of documents. All Mr. Garvey can
3 cite to is a few requests that he made during the various
4 depositions of Mr. Rongstad where he says we would like to
5 see those documents, we would like to see those documents.
6 We have produced every shred of paper that exists related in
7 any way, shape or form to this postcard and this mailing. We
8 have complied with every discovery request that is out there.
9 We have complied with every one of Judge Nowakowski's orders.
10 And as a result, we seek relief from the remedial contempt
11 order issued by Judge Nowakowski, if it is in fact remedial
12 as we argue and as Mr. Garvey concedes. It is by its very
13 nature purgeable.
14 That's what we seek, your Honor. We seek a purge of
15 the contempt order to allow us to (a) have the sanctions
16 removed, and (b) be able to go forward with discovery so we
17 can finally get to the merits of the allegations in this
18 lawsuit so we can prove the truths of the matters asserted in
19 the postcard and we can prove the truths of the inferentially
20 asserted matters, all of which we believe we'll be able to do
21 if we're given the opportunity to go forward. Thank you.
22 THE COURT: All right. Thank you. I don't know if
23 you really have standing on this issue, Mr. O'Neill, if you
24 want to say something.
25 MR. O'NEILL: The only comment that I have on the

1 don't know how anyone can argue (a) that the order was not
2 narrowed, but even if the court views the order as not being
3 narrowed, all information ordered by Judge Nowakowski to be
4 provided to the best of Rongstad's ability has now been
5 provided.
6 THE COURT: Thank you. It's useful to walk through
7 the history of the discovery dispute in this case with
8 reference to the transcripts of the many hearings that have
9 been held on discovery disputes.
10 Starting with February 4, 2003 when the parties
11 appear in Judge Nowakowski's court on the plaintiff's motion
12 to compel Mr. Rongstad's disclosure of the membership of
13 Alliance for a Working Wisconsin, and you will remember that
14 a deposition was interrupted so that Judge Nowakowski could
15 hear and answer this question, and the grounds that were
16 asserted were constitutional grounds at that point. It was
17 citing *NAACP vs. Alabama* and other cases, that one should not
18 be required to disclose membership names, people in
19 organizations, that there was a First Amendment protection
20 there.
21 And during that hearing Judge Nowakowski noted that
22 he had researched the constitutional issue, and what he said
23 was that membership information in this case does not have
24 sacred constitutional status. And he required Mr. Rongstad
25 to answer the questions that had been propounded to him in

1 the deposition.

2 He orders orally Mr. Rongstad to answer all questions
3 regarding the names and behavior of any other persons
4 involved in the preparation, funding or distribution of the
5 mailing. That order was of course reduced to written form,
6 and I've already read into the record today what Judge
7 Nowakowski said, clearly making it his order that
8 Mr. Rongstad disclose the names and answer all questions
9 pertaining to people involved in the preparation, funding or
10 distribution of the postcard at issue, and pertaining to
11 their conduct in this regard.

12 The next day or the same day Mr. Rongstad went to the
13 Court of Appeals, as is his right, to seek a stay of Judge
14 Nowakowski's order. The court the very next day denies the
15 stay, and then Mr. Rongstad moves Judge Nowakowski for
16 reconsideration of his order. And that's important to me
17 because at that time it had to be clear. There could have
18 been no misunderstanding on Mr. Rongstad's part as to what
19 the breadth of Judge Nowakowski's order was. Otherwise he
20 would not have moved to reconsider it.

21 The judge held a hearing on the defendant's motion
22 for reconsideration. And by the way, for Mr. Paul's benefit,
23 when I refer to the defendant I'm referring to Mr. Rongstad
24 in this hearing today unless I say otherwise. And at that
25 hearing the court declined to reconsider his earlier ruling.

1 In the affidavit that was submitted in support of the motion
2 for reconsideration, Mr. Rongstad had told the court: "My
3 members have told me that if I'm compelled to disclose who
4 they are that they would no longer be interested in
5 participating in the organization for fear of public reprisal
6 and potential legal action."
7 Judge Nowakowski said that's not enough. Under the
8 *NAACP* case and *Buckley vs. Valeo*, simply fear of potential
9 legal action doesn't trigger the kind of constitutional
10 protection that Mr. Rongstad was seeking.
11 Also, in denying the motion for reconsideration and
12 requiring the deposition to continue, Judge Nowakowski said,
13 "Seldom have I seen such an abuse of the discovery process."
14 I say that not because I'm necessarily adopting that view,
15 but that as early as February 6th of 2003 Judge Nowakowski
16 was viewing this dispute as having taken on a persistence and
17 a pattern that he labeled abusive. Okay.
18 Next, on February 18th, we have the plaintiff's
19 motion for a protective order, asking that Julie Lassa's
20 deposition be delayed. And the court granted the motion in
21 part as I read it. He said well, only until March 15th. But
22 again, he notes that having reviewed the file between the
23 parties' appearance in court on February 6th and
24 February 18th, he said it still appears that Rongstad is
25 violating the court's order. And he said this after having

1 read the transcript of the continued deposition of Todd
2 Rongstad. And Judge Nowakowski made a point of that.
3 We move then to the filing of the sanctions motion on
4 February 21st, I believe. And at that point the plaintiff
5 was asking for discovery sanction and a default finding and
6 further discovery stay for Miss Lassa. On February 27th
7 Mr. Rongstad files an affidavit that says he alone made the
8 decision to create, produce and distribute the Lassa piece
9 without consultation with any other individual. He says he
10 refuses and will refuse to disclose members of the Alliance
11 for a Working Wisconsin, the entity that funded the postcard.
12 So that is before the court, before Judge Nowakowski
13 on February 28th when he has the hearing. On February 28th
14 Judge Nowakowski orders Rongstad to provide records and
15 disclose names of any person who contributed more than $100
16 after -- first he said May 1st, and then he went back to
17 January 1st of 2002. He said that means corporations,
18 unions, political committees, "anyone."
19 He continues the contempt hearing at that point
20 because there was some discussion about whether Mr. Rongstad
21 had been served, and personal service is required when one is
22 seeking the sanctions associated with contempt.
23 Judge Nowakowski on February 28th says, at page 23 of
24 the transcript, "I am looking for Mr. Rongstad to comply with
25 my prior court order." We then go to the continued contempt

1 hearing on March 11th of 2003, and at that hearing we find
2 that on February 17th Mr. Rongstad has changed the name of
3 the corporation from Alliance for a Working Wisconsin to the
4 Thomas Paine Democracy Network.
5 Mr. Crooks at the hearing says to Judge Nowakowski:
6 "There's no dispute, your Honor, that he has not answered the
7 question that your Honor ordered him to answer." Now, that's
8 on March 11th, 2003. Judge Nowakowski says, since it is
9 obvious to him that Mr. Rongstad has intentionally violated
10 the provisions of the court's order, and in fact it even
11 appears that he has lied under oath. He says at page 11 of
12 the March 11th transcript, this is Judge Nowakowski: "His
13 continual contention that he had no recollection of any of
14 the information that was sought in the questions asked of
15 him, and that the only way in which that information could be
16 obtained is to look at the deposit slips for the
17 contributions that were made to his organizations defies
18 credulity."
19 It is also clear from the testimony, says Judge
20 Nowakowski, that Mr. Rongstad gave in his deposition on
21 March 3rd and the answers provided at a variety of other of
22 the previous depositions that he says he read, "that his
23 answers were highly evasive and were designed to avoid
24 providing information that the plaintiff was justifiably
25 entitled to under the laws of the state of Wisconsin, and

1 more specifically, under the orders of the court."
2 And what's important about that is it's not just the
3 obligation of parties to assure that all appropriate parties
4 are in the lawsuit who need to be, the Does one through five,
5 but also to ensure compliance with the orders of the court.
6 He again addresses the constitutional arguments, says
7 that they are without merit. He notes that Mr. Rongstad has
8 appealed twice, and both times had been denied motions to
9 stay by the Court of Appeals. And then he notes that
10 Mr. Rongstad abandoned an earlier Court of Appeals'
11 proceeding that may have given him the answer to the question
12 that he wanted.
13 He then finds, Judge Nowakowski, based on his
14 contempt, which I do find to be actual and his conduct to be
15 intentional, he orders, makes the order that is later reduced
16 to writing on April 2nd, 2003, and that order says, "If by
17 April 4, 2003, Rongstad fails to comply with the court's
18 discovery orders," in the plural, "the court will entertain a
19 motion for judgment on all issues of liability in favor of
20 the plaintiff as a further sanction for the defendant
21 Rongstad's failure to provide discovery."
22 That brings us to April 4th and what occurred on
23 April 4th, and that was the disclosure through Mr. Alex Paul
24 that it was in fact he who provided -- that he provided
25 money. He didn't say the funding, but that he provided

1 funding for the postcard.

2 So where we are at this point is does that satisfy

3 Judge Nowakowski's orders. And again, "orders" is the

4 operative word here. I decline to interpret what occurred on

5 March 11th as Judge Nowakowski limiting the question of

6 compliance to simply disclosing the names of contributors or

7 people who contributed more than $100 after January 1st,

8 2002. Clearly, without any doubt, Judge Nowakowski was

9 incorporating his earlier discovery orders and commanding

10 that those orders be followed.

11 Based on my review of all of the documents that have

12 been provided in this case, I will find at this time that

13 there has not been compliance by Mr. Rongstad with Judge

14 Nowakowski's discovery orders. He has not answered the

15 question who are the members of the Alliance for a Working

16 Wisconsin or whatever the changed name of that entity is who

17 contributed, who had a role in preparing and making the

18 decision to go ahead with the postcard that was used. While

19 Mr. Crooks' argument that his taking on of responsibility,

20 Mr. Rongstad's taking on of responsibility for that himself

21 answers that question, Judge Nowakowski previously found that

22 it did not. He found that it was not believable, that it was

23 simply not believable.

24 Now, today, I don't sit as some sort of superior

25 court for trial de novo of what Judge Nowakowski found. His

1 orders in this case are the law of the case, and I believe I
2 have to follow them. As we sit here today, we are no closer
3 to finding the answers to the questions that were propounded
4 to Mr. Rongstad by deposition and by other means than we were
5 back on April 4th, except for one provision, and that is
6 Mr. Rongstad did make himself available for deposition. He
7 said that he would be deposed on April 15th, and it was
8 Mr. Garvey who declined that opportunity.
9 But that in itself does not -- that's only a partial
10 answer to the question. Mr. Garvey should have, obviously,
11 deposed him, but given the state of the record on April 4th,
12 which was the date of compliance, when compliance should have
13 been made, the record was such that there was clear
14 noncompliance with Judge Nowakowski's orders.
15 So I will find that Mr. Rongstad continues to be in
16 contempt of Judge Nowakowski's two written orders in this
17 case, those dated February 4, 2003 and the order dated
18 April 2, 2003. For that reason I'm denying his motion to
19 grant him relief from orders.
20 Now, that takes us to the sanctions motion from
21 Mr. Garvey. Go ahead.
22 MR. GARVEY: Your Honor, so much has been covered
23 already, I'll try to be as brief as I can and not go over
24 ground that's already been discussed. But we find ourselves
25 in a position where as I said, thousands of dollars later,

1 his conduct without knowing that he was doing something that
2 was clearly unacceptable in the eyes of the law is not, is
3 just not in the realm of reality. He has proceeded without
4 justifiable excuse. Indeed, all of the excuses, reasons for
5 failure to comply have been made and rejected by the Court of
6 Appeals, by Judge Nowakowski, and today by me. He proceeded
7 without justifiable reason, knowing that his conduct could
8 put him in jeopardy of this very sanction, default.
9 I believe his conduct fits both the standard of
10 egregious conduct and bad faith. Mr. Garvey says, "Happily,
11 we have both." I don't think it's a happy day when someone
12 so disregards the process established under the law for the
13 orderly progress of a lawsuit, that we end up where we sit
14 today and the court having to make the orders that it has had
15 to make.
16 On a sanctions motion for discovery violations, the
17 court needs to consider whether a lesser sanction would be
18 sufficient. There is language under one of the cases that
19 suggests that a court need not consider a lesser sanction if
20 conduct is intentional. That's the *Brandon Apparel Group vs.*
21 *Pearson* case. Again, a 2001 case, Wisconsin Appeal 205. But
22 despite that holding, I have tried to consider what would
23 restore this case on a footing that allows it to go forward.
24 What could I do as a judge to compel compliance with not just
25 Judge Nowakowski's orders, but the law, the discovery

1 provisions that all parties are bound to comply with.
2 Frankly, ordering a deposition is not an adequate remedy. It
3 simply is not an adequate remedy at this point. That's been
4 tried, and Mr. Rongstad has stonewalled repeatedly in the
5 plaintiff's attempts to get the information that Judge
6 Nowakowski found the plaintiffs were entitled to have.
7 There is no lesser sanction than default judgment
8 that would address both my goal of trying to get this lawsuit
9 back on a footing that would allow it to proceed, or that
10 would address the persistence of the violation that we have
11 seen in this case.
12 So for all those reasons and with great regret, I
13 grant the motion for default judgment. It is not a judgment
14 on the merits, as you know. It is a judgment on liability
15 only. It reserves the question of damages for further court
16 hearing. I interpret that to be an evidentiary hearing. I
17 think that's what is required under the law. In my own mind
18 I'm not sure whether that's a jury issue or not, and I would
19 invite parties to address that issue. I'm not ready to
20 address it today, and I don't think we need to. What I would
21 do today is schedule this for a scheduling conference at
22 which we will address what further proceedings are going to
23 take place in this case, whether that is a jury trial or an
24 evidentiary hearing.
25 Before we close the record, is there anything else?

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

==========

JULIE M. LASSA,

COPY

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
DOES 1-5, In Their Individual Capacities,

Defendants.

==========

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel **EDWARD R. GARVEY and CHRISTA O. WESTERBERG,** Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:
ATTORNEY DAVID J. PLINER, Corneille Law Group, LLC

1 Additionally, your Honor, I think that bearing
2 in mind that what we're dealing with here is a
3 situation where once the answers come out, once any
4 members are disclosed or once any contributors are
5 disclosed, it's a situation where the bell can't be
6 unrung by an appellate court.
7 And the Court knows there are at least, in our
8 viewpoint, significant constitutional issues involved
9 here, free speech and freedom of association. The
10 Court has, after careful consideration, essentially
11 ruled that you do not believe that those outweigh the
12 rights of Miss Lassa to know the information that has
13 now been disclosed at the deposition. I don't think
14 the Court's order goes beyond that.
15 If the Court disagrees and thinks that the
16 orders go beyond what is down on paper, in that
17 instance I would ask that the Court consider the
18 issues that we're dealing with and the Court also
19 recognize that you are not the court of last resort
20 with respect to these constitutional issues and that
21 until a court of last resort passes on the issues
22 here, that the Court be lenient with respect to any
23 order it may enter.
24 The plaintiffs have asked for something in the
25 neighborhood of $2,000 per day. I think that's,

1 different position that he could not hold at the same
2 time as he is a State Senator.
3 The planners of the postcard, if they in fact
4 had the intent that Mr. Garvey has ascribed to them
5 of undercutting Miss Lassa's efforts to seek to
6 replace Senator Shibilski, wouldn't have known that
7 there was a need to replace Senator Shibilski until
8 he lost in the -- well, I take that back. If he had
9 won in the primary, he likewise would have faced the
10 prospect of losing his seat if he became Lieutenant
11 Governor, so I guess this does go to an earlier date.
12 All right. Here's then what we're going to do.
13 To make this absolutely clear and avoid any confusion
14 on Mr. Rongstad's part, Mr. Rongstad is ordered, at a
15 deposition to be conducted on Monday morning, to
16 provide the records and to disclose the names of any
17 person who contributed any amount in excess of, say
18 $100 or more in the aggregate during the six months
19 preceding November 1st, so let us say at any time
20 after May 1st of 2002.
21 Now, I will limit this to $100 or more because,
22 frankly, it is hard to imagine how anything less than
23 that would qualify as the necessary degree of
24 personal involvement and intentional conduct to get
25 past the defamation standard under Sullivan. And I

1 against the very unpopular Governor, that planners
2 were at work well before the primary in the months
3 before that.
4 THE COURT: Well, as I was looking at this
5 and thinking about it originally, I was thinking,
6 well, how could Senator Shibilski have gotten an
7 appointment unless he lost in the primary, and only
8 after the primary would anyone have known that there
9 was a chance that he would get an appointment because
10 of the potential that a democrat would win the
11 election. But in point of fact, Senator Shibilski
12 would have vacated his Senate seat even if he did win
13 the primary.
14 MR. GARVEY: That's right.
15 THE COURT: So the premise of my original
16 analysis was inaccurate, and, as I am prone to do
17 from time to time more often these days than in the
18 past, I got a little thick headed there and didn't
19 think of it correctly.
20 But let's do this. Let's use the first of the
21 year, and that will also allow Mr. Crooks' client to
22 use records that are organized on an annual basis,
23 and it will be easier than ferreting out something in
24 the middle of the year.
25 MR. GARVEY: Thank you, your Honor.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

JULIE LASSA,

Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal No. 04-0377

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

Appeal from the Circuit Court for Dane County,
the Honorable Maryann Sumi Presiding

APPELLANTS' REPLY BRIEF

PETERSON, JOHNSON & MURRAY, S.C.
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INTRODUCTION

Forty years ago the Supreme Court declared that defamation "must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). In a desperate attempt to justify the sanctions imposed against speech of which she disapproves, Lassa brashly claims the law is just the opposite: "The First Amendment rights of freedom of association and freedom of speech do not apply to defamation, even in the rough and tumble world of politics." Response Brief, at 43. This single, misguided and unsupportable assertion aptly sums up Lassa's dismissive attitude toward free speech, especially speech by her critics.

The First Amendment applies with particular force to defamation claims by public officials. However, even if the trial court correctly held that Lassa's interests outweighed Rongstad's interests under the balancing analysis, Rongstad was entitled to a meaningful appeal. The trial court's use of sanctions to force Rongstad to abandon meaningful appellate review was foreclosed by *Alt.*

I. LASSA MISSTATES THE CONTROLLING PRINCIPLES REGARDING RONGSTAD'S CONSTITUTIONAL PRIVILEGE

A. Lassa's Primary Privilege Argument – That the First Amendment Does Not Apply to Defamation Claims – Was Rejected Forty Years Ago

The first issue in this appeal is whether Rongstad had a First Amendment privilege against compelled disclosure. Astonishingly, without citing any authority, Lassa contends the First Amendment doesn't apply at all:

> The First Amendment rights of freedom of association and freedom of speech ***do not apply to defamation***, even in the rough and tumble world of politics.

Response Brief, at 43-44 (emphasis supplied).

New York Times v. Sullivan demonstrates the baselessness of Lassa's contention. Rejecting the State's identical argument that "the Constitution does not protect libelous publications," the Court resoundingly held:

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, ***libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.*** (Emphasis supplied).

376 U.S. at 269. *See also id.* at 273 ("[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct"); *id.* at 283 ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.").

The *New York Times* Court recounted the repeated historical repudiation of attempts by government officials to use charges of libel to stifle free speech. The most notable was the Sedition Act of 1798, which made it a crime to publish "false, scandalous and malicious" statements with "intent to defame" a public official. This Act "first crystallized a national awareness of the central meaning of the First Amendment," with James Madison condemning it as an "alarming infraction" of the Constitution. *Id.* at 273-74. President Jefferson pardoned all those convicted under the Act, commenting: "'I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'" *Id.* at 276 (citation omitted).

Lassa's alarming assertion that because she can shout "Defamation!" her critics do not enjoy constitutional protection deserves the same emphatic response.

B. Lassa's Secondary Privilege Argument – That a "Reasonable Claim of Defamation" Resolves the Balancing Analysis Mandated by *NAACP v. Alabama* – Is Unsupportable

Lassa similarly contends, again without citing any authority, that a "reasonable" claim of defamation, by itself, defeats any First Amendment association rights:

> If Senator Lassa had ***a reasonable claim of defamation***, the lower court acted properly in allowing her to require Mr. Rongstad to disclose the names of those who were part of the defamation campaign.
>
> * * *
>
> Because Julie Lassa has shown that the AWW postcard is ***reasonably capable of a defamatory meaning***, Todd Rongstad cannot claim that the trial court violated his rights . . . or that he was in any way justified in his refusal to comply with the trial court's orders.

Response Brief, at 32, 43-44 (emphasis supplied).[1]

There is no authority for this proposition. To the contrary, several privilege cases cited by Rongstad involved defamation claims, and in none was the mere claim of defamation dispositive of the balancing analysis mandated by *NAACP v. Alabama*, 357 U.S. 449 (1958). *See, e.g.*, *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444, 447 (Ill. Ct. App. 1988); *Melvin v. Doe*, 836 A.2d 42, 49-50 (Pa. 2003). As

---

[1] Lassa's argument that the mailer was "capable of a defamatory meaning" devolves to the contention that she is accused of extortion "by insidious implication and association." Response Brief, at 42. To the contrary, the postcard clearly pegged Chvala as the individual charged with criminal conduct, and fairly asked citizens to push for answers regarding the conduct of Lassa and other elected officials in light of the caucus scandal.

discussed below, a defamation plaintiff's interest in discovery is merely one factor to be weighed in the constitutional analysis.

C. Regardless of the Pejorative Labels Used by Lassa, Rongstad's Speech is Entitled to Full First Amendment Protection

Lassa takes issue with the description of the postcard as "issue advocacy," claiming it is "a personal attack piece – and a vicious one at that." Response Brief, at 30-31. At other points Lassa describes the speech as "insidious," "vile," "malicious," and "venomous." Her point, apparently, is that the negative tone of the postcard somehow accords it less than full protection under the First Amendment.

Lassa is wrong. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times*, 376 U.S. at 271 (citation omitted). Where criticism of public officials is concerned, First Amendment protections are at their zenith, reflecting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. While the postcard at issue was hard-hitting, it undeniably addressed a matter of intense public interest – the widespread illegal use by incumbents of the taxpayer-funded caucuses for campaign-related work.[2]

---

[2] Lassa also argues that *McConnell v. FEC*, 124 S.Ct. 619 (2003) somehow "reinforced" the trial court's decision. That case had nothing to do with either constitutional privileges or defamation claims in general. Rather, the Court upheld the provisions in BCRA banning soft money and prohibiting issue advocacy by corporations and unions within 60 days of a federal election. The decision has no impact whatsoever on Wisconsin campaign finance law, and would not subject the Lassa postcard to any regulation or disclosure requirements.

II. THE ALLIANCE MEMBERS' FEARS OF REPRISAL WERE BOLSTERED BY LASSA'S ACTIONS DURING THE LITIGATION

Rongstad's opening brief explained that when a litigant attempts to compel disclosure of a witnesses's political associations, the First Amendment requires a balancing analysis:

> (1) The party asserting the privilege must demonstrate "some probability" of potential reprisal or harassment if disclosure is compelled; and
>
> (2) If such a showing is made, the party seeking to compel disclosure must demonstrate a compelling governmental interest in disclosure.

See Appellant's Brief, at 12-16.

Lassa contends Rongstad's concerns about potential reprisal or harassment are "speculative at best" and involve "nothing so concrete as the fear of firing or discipline that the employees in *Crocker* faced." Response Brief, at 46. Lassa's public attack on a witness in this case, however, demonstrates that Rongstad's concerns were well warranted.

A former Lassa intern, appearing in response to a subpoena, testified that Lassa worked on campaign materials in her office and used the Assembly Democratic Caucus to do graphic art work on the campaign materials. (R. 133, Exh. 3) In response, Lassa issued a press release charging the witness with perjury and smearing the witness's character:

> The allegations made by [the witness] in a deposition yesterday that she worked on campaign literature while she served on my Assembly staff are completely false.
>
> . . . I had to reprimand [the witness] for habitually arriving late to work, as well as other unprofessional conduct, and was eventually compelled to dismiss her.

(R. 127). Lassa's statement (as well as her counsel's written statement describing the testimony as "false and unsubstantiated") was immediately published. *Id.*

If Lassa were not a public official, her unsworn attack on a witness would not be newsworthy. Her stature as an elected official gives her power to publicly harass and punish her critics (not to mention the power to exact political or legislative retribution). It is precisely this power, unflinchingly unleashed on her former intern in response to harmful testimony, that demonstrates that Rongstad satisfied the undisputedly "light" burden of demonstrating a reasonable probability of potential reprisal or harassment. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998).

Lassa thus had the burden to demonstrate a compelling state interest in disclosure. While there is certainly a *legitimate* interest in allowing parties to pursue defamation claims, *see Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."), this interest was less than *compelling* here. Not only had the court not determined whether Lassa had stated a claim, but Lassa had not demonstrated any damages (she resoundingly won the election that took place shortly after the postcard). *See Melvin*, 836 A.2d at 50 (vacating order compelling disclosure and remanding to determine "whether the First Amendment requires a public official defamation plaintiff to establish a *prima facie* case of actual economic harm prior to obtaining discovery of an anonymous defamation defendant's identity."). On balance, Lassa failed to meet the "particularly heavy" burden of demonstrating a compelling governmental interest in forcing disclosure of Rongstad's political associations. *See Britt v. Superior Court of San Diego County*, 574 P.2d 766, 773 (Cal. 1978).

III. LASSA'S DISCUSSION OF *ALT* AVOIDS THE DISPOSITIVE HOLDING THAT IT IS ERROR TO FORCE A PARTY TO "MAKE A CHOICE BETWEEN PROTECTING A PRIVILEGE AND AVOIDING SANCTIONS"

It is critical that this Court understand the dilemma Rongstad faced below. Rongstad wanted to appeal the privilege decision *before* disclosing any Alliance members. Once names were disclosed, any appeal would be moot. *See Melvin*, 836 A.2d at 50 ("[O]nce Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to cure such disclosure.").[3] Rongstad made this point explicitly. (R. 149, at 8). Nevertheless Judge Nowakowski imposed hefty sanctions, threatened default if disclosure was not made within three weeks, and assessed a $1,000 per day forfeiture for each day Rongstad continued to refuse disclosure. (Appx. 7-9)

Rongstad thus had the following options:

(1) Disclose the names and thereby forfeit his right to appeal the privilege issue;

(2) Pursue interlocutory relief while incurring $1,000 per day in additional penalties; or

(3) Refuse to disclose and suffer default judgment, thereby forfeiting his substantive defenses to Lassa's claims (such as failure to state a claim and lack of actual malice).

Ultimately Rongstad attempted an interlocutory appeal, and when that was denied, disclosed the required information rather than risk a default.[4]

---

[3] While this appeal can relieve Rongstad of the sanctions unjustly imposed, nothing can remedy the fact that the identity of Alliance members was disclosed.

[4] Ironically, Judge Sumi later imposed default judgment, finding that Judge Nowakowski's statement that he was "narrowing this court order" did not actually narrow anything. (R. 152).

In *Alt*, the Wisconsin Supreme Court addressed a nearly identical situation, holding that it was error for a trial court to force a witness "***to make a choice between protecting a privilege and avoiding sanctions***." *Burnett v. Alt*, 224 Wis. 2d 72, 95, 589 N.W.2d 21 (1999) (emphasis supplied).

Lassa ignores this dispositive holding entirely, arguing that *Alt* turned on whether the party seeking disclosure has an "alternative source" for the information. That portion of *Alt*, however, had nothing to do with the holding prohibiting the use of sanctions to force a party to abandon a privilege before appeal; rather, it reflected the Court's adoption of a qualified, as opposed to an absolute, privilege for experts to refuse to testify against their will.

The relevant question here is whether Rongstad's assertion of a constitutional privilege was "substantiated," in which case sanctions were inappropriate, or whether it was "unsubstantiated and unfounded." *Id.* at 95. Lassa's only response to this question is to label Rongstad's assertion of privilege as "meritless" and state that the trial court "found that Mr. Rongstad failed to substantiate grounds for a constitutional privilege . . . ." Response Brief, at 54. These conclusory statements simply restate the question.

As explained in Rongstad's opening brief, "substantiated" means something less than ultimately prevailing. Otherwise the term "substantiated" becomes mere surplusage – the analysis would simply turn on whether the witness had the privilege asserted. The Court was concerned that using sanctions to force a party to abandon a claim of privilege and lose the right to an effective appeal wrongly made the trial court the final arbiter of a legitimate and contested issue. Explaining that a successful appeal after disclosure would be "little

consolation" to the party whose privilege was forfeited, the Court held: "We cannot put attorneys and deponents in this untenable situation." *Alt*, 224 Wis. 2d at 95.

Lassa offers no response to Rongstad's observation that "unsubstantiated and unfounded" equates with "frivolous" under §§ 802.05 and 814.025, Wis. Stats. The fact is, whether Rongstad is ultimately correct that the constitutional privilege applied in this case, his assertion of privilege was well-grounded in fact and law, including several analogous cases involving privilege claims in defamation actions. The trial court's rejection of the privilege claim was not a finding that the claim was "unsubstantiated and unfounded," and the court's use of sanctions to force Rongstad to choose "between protecting a privilege and avoiding sanctions" was an erroneous exercise of discretion under *Alt*.

IV. LASSA'S WAIVER ARGUMENT IS FRIVOLOUS

Citing the stipulated *amount* of the sanctions, Lassa suggests Rongstad "explicitly waived" any challenge other than the First Amendment and *Alt* issues. Response Brief, at x-xii, 57, 65. Perhaps Lassa simply forgot about the following provision from the Stipulation and Order that her counsel signed and the trial court entered:

> [I]t is understood that the defendants do not concede the appropriateness of the judgment, nor do they waive any appellate rights with respect thereto. The defendants intend to appeal the appropriateness of the fees and forfeitures under the First Amendment, Alt, and whether the Courts were justified in the award, and any other applicable legal theories.

(Appx. 13) Rongstad preserved the right to challenge any aspect of the sanctions.

V. THE TRIAL COURT'S ABUSE OF DISCRETION IN IMPOSING SANCTIONS BEFORE CONSIDERING WHETHER LASSA STATED A CLAIM WAS NOT RENDERED MOOT BY THE SUBSEQUENT DECISION DENYING THE MOTION TO DISMISS

Lassa argues that the decision denying Rongstad's motion to dismiss, issued four months after the sanctions ruling, moots any challenge to the timing of the decision, as "Rongstad cannot show any prejudice." Response Brief, at 55-56. This assertion is wrong for two reasons.

First, Rongstad is not appealing the decision on the motion to dismiss (although the fact that the decision was wrong independently supports reversal of the sanctions), but contends that when constitutional rights are implicated by discovery it is an abuse of discretion to compel disclosure of potentially privileged information before first ascertaining whether a claim has been stated. Whether the decision on the motion to dismiss was right or wrong, Rongstad's rights were violated when the discovery was compelled and sanctions imposed.[5]

Second, an issue is moot only "when a determination is sought which, when made, cannot have any practical effect upon an existing controversy." *City of Racine v. J-T Enterprises of America, Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974). Here the "practical effect" of a decision that the trial court failed to timely address the motion to dismiss (or erred in denying the motion) is very real – it mandates reversal of the sanctions.

---

[5] Contrary to Lassa's suggestion that Rongstad's argument was "without any citation to legal authority," Rongstad cited *Melvin v. Doe*, 49 Pa. D.&C.4th 449, 452 (Pa. Ct. Cmmn. Pleas 2000), which held: "A plaintiff should not be able to use the rules of discovery to obtain the identity of an anonymous publisher simply by filing a complaint that may, on its face, be without merit." Moreover, this position appears to be strongly supported by amicus curiae ACLU.

VI. LASSA MISUNDERSTANDS RONGSTAD'S CHALLENGE TO THE SANCTIONS AS "UNJUST" UNDER *CITY OF WEST ALLIS*

Lassa interprets Rongstad's argument, based on *City of West Allis v. WEPCO*, 2001 WI App 226, 248 Wis.2d 10, 635 N.W.2d 873 (Ct. App. 2001), that the sanctions were not "just" as an assertion that the sanctions were "excessive." Respondent's Brief, at 60. Such is not the case. The imposition of ***any*** sanction for Rongstad's conduct was unjust, and thus an erroneous exercise of discretion.

While Lassa describes Rongstad's conduct as "defiant and obstructionist," Response Brief, at 60, Rongstad explained to the trial court that he wanted to "exhaust his appellate remedies with respect to the constitutional issues," and if unsuccessful would thereafter provide the names. (R. 149, at 8). Days after this Court denied interlocutory review, Rongstad disclosed the names. He did not "flaunt" the trial court's authority, but simply wanted a fair chance at an appeal before forever abandoning the privilege. While undeniably intentional, his conduct was also forthright and defensible. Trial courts simply are not, and should not be, the final word on issues of constitutional privilege.

CONCLUSION

Given a chance to explain why Rongstad's assertion of a First Amendment privilege against compelled disclosure of his political associations was so "unfounded" as to merit the severe sanctions imposed, Lassa's primary response is that the First Amendment does not apply to defamation claims. This argument was resoundingly rejected forty years ago, and this Court should reject it again today.

Rongstad respectfully requests that the Court reverse the sanctions imposed by the trial court.

Dated at Madison, Wisconsin this 4th day of June, 2004.

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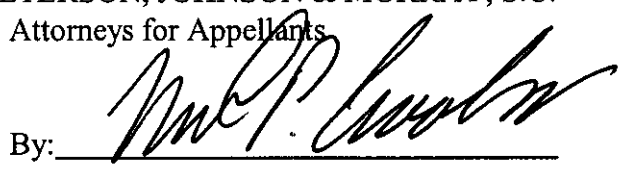

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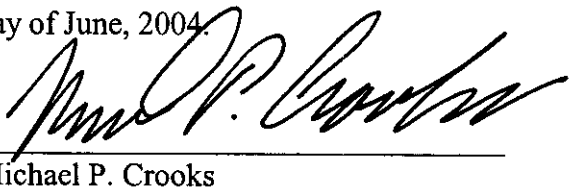
CERTIFICATION PURSUANT TO § 809.19(8)(b), WIS. STATS.

I hereby certify that this reply brief conforms to the rules contained in § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,996 words.

Dated at Madison, Wisconsin this 4th day of June, 2004.



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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

JULIE LASSA,

Plaintiff-Respondent,

v.

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, in their individual capacities,

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AMERICAN FAMILY INSURANCE COMPANY,

Intervenor,

v.

ALEX PAUL,

Third-Party Defendant.

Appeal No. 04-0377

Trial Court Case No. 03-CV-177
(Dane County Circuit Court)

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION

Appeal from the Circuit Court for Dane County,
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INTRODUCTION

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 2,000,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Wisconsin Foundation, Inc. (ACLUWF) is a charitable, nonprofit affiliate of the ACLU, whose purpose is to maintain and advance civil liberties, including the freedoms of association, press, religion, and speech, and the rights to franchise, to due process of law, and to equal protection under the laws for all people throughout the state of Wisconsin.

As part of its mission, the ACLU has participated, either as counsel or as *amicus*, in numerous cases supporting individuals' First Amendment rights. As the United States Supreme Court noted in *In Re Primus*, 436 U.S. 412 (1978):

> The ACLU and its local chapters ... ha[ve] engaged in the defense of unpopular causes and unpopular defendants and has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy. For the ACLU, as for the NAACP, litigation is not a technique for resolving private differences; it is a form of political expression and political association.

Id. at 427-28 (citations and internal quotations omitted).

The ACLUWF files this *amicus* brief because the trial court's ruling in this defamation case threatens to have a chilling effect on public criticism of political figures. Specifically, this appeal raises two issues of particular concern to the ACLUWF: (1) whether the trial court's decision to compel discovery was an erroneous exercise of discretion, in light of the fact that a motion to dismiss on the pleadings was pending, resolution of which could have alleviated the need to disclose anonymous donors and infringe unnecessarily on rights of free speech and association; and (2) whether the First Amendment requires more careful judicial attention to the political context of speech in determining whether a campaign advertisement is "capable of defamatory meaning" at the pleadings stage in a public figure defamation case.

In this case, the ACLUWF understands that on January 16, 2003, Julie Lassa, then a member of the Wisconsin Assembly considering a run for State Senator, filed a defamation claim against Todd Rongstad, President and Board Member of the Alliance for a Working Wisconsin, alleging that Rongstad's organization, the Alliance, prepared and distributed a campaign mailer that falsely asserted she was in the camp of Senator Chuck Chvala, who was then under indictment on twenty felony

charges. The ACLUWF further understands that on February 3, 2003, Lassa's counsel deposed Rongstad, seeking disclosure of the identities of members of the Alliance, the group that funded the mailer in question, but that Rongstad immediately objected and refused to divulge member names, claiming protection against disclosure of political associations under the First and Fourteenth Amendments.

The trial court failed to properly balance the competing interests of speech and reputation. First, when Lassa approached the trial court seeking to compel Rongstad to disclose his political associations, it denied Rongstad's request to brief the constitutional issues involved and ultimately ordered him to disclose the names of all those individuals in the Alliance who were involved in the preparation, funding or distribution of the mailer. Second, after Rongstad moved for judgment on the pleadings and continued to refuse to disclose his political associations, the trial court heard and decided Lassa's motion for contempt and sanctions against Rongstad, which had been filed <u>after</u> Rongstad's motion, finding him in contempt and ordering that if he did not disclose the member names, the court would enter default judgment against him.

The trial court's refusal to promptly dismiss this action on the pleadings and persistence in endorsing intrusive discovery constituted an abuse of discretion and resulted in the premature and unnecessary disclosure of anonymous speakers. The trial court put the cart before the horse needlessly trampled First Amendment rights. As the U.S. Supreme Court noted earlier this month, "[c]ourts [must] remain sensitive to the need to prevent First Amendment harms and administer its procedures accordingly.... [W]e have no reason to doubt the willingness of ... judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm." *Littleton v. Z.J. Gifts D-4, L.L.C.*, __ U.S. __, __ S. Ct. __, 2004 WL 1237360 *5-6 (U.S. Sup. Ct. June 7, 2004) (citation omitted).

Here, because the trial court was not sensitive to the need to administering procedures in such a way as to avoid needless harms, the ACLUWF respectfully requests that this Court reverse the order granting sanctions and issue a published opinion that would lend guidance to trial courts faced with similar challenges to constitutionally protected anonymous speech.

ARGUMENT

"Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). As the Supreme Court has explained:

> For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring).

With respect to political candidates, history reveals that venom on the campaign trail is nothing new. Faucheux, Ron, *Campaign Ads: Déjà vu All Over Again?*, CAMPAIGNS AND ELECTIONS (May 26, 2004):

> It started in 1796. It was a campaign that featured handbills, pamphlets and articles in party newspapers that "denounced, disparaged, damned, decried, denigrated and declaimed ... Presidential Campaigns[.]"
>
> That year supporters of John Adams accused presidential rival Thomas Jefferson of religious heterodoxy and condemned his dangerous sympathy for the revolutionary French, with all their "guillotines" and "terror."
>
> ... Jefferson's supporters did their share of sniping, too, labeling nemesis Adams a "monarchist" a tough charge in days when monarchy was a sore subject.
>
> ....

> The prickly tone of 1796 turned even nastier and more personal in the 1800 race that pitted President Adams, a Federalist, against Vice President Jefferson, leader of the rival Democratic-Republicans, for the young nation's top job.
>
> Adams was called everything from a fool to a criminal. Claims were made that he wanted to marry off his son to the daughter of George III, creating an American dynasty under British rule. Even Alexander Hamilton, a prominent fellow Federalist, ripped into Adams, saying his defects of character made him unfit to hold office. A furious Adams lashed back, calling Hamilton, the nation's first treasury secretary, "the greatest intriguant in the world [is] a man devoid of every moral principle a bastard."
>
> Federalist campaigners accused Jefferson of being a cheat, a fraud, a coward and a robber. One went so far as to call the man who wrote the Declaration of Independence "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father...raised wholly on hoe-cake made of coarse-ground Southern corn, bacon and hominy, with an occasional change of fricasseed bullfrog."

Id.

While many of these accusations against future President Jefferson bordered on the ridiculous, others hit closer to home, literally. In an 1873 article in *The Atlantic Monthly*, discussing the bitter political campaign leading up to the presidential election of 1800, James Parton highlighted some of the then-scurrilous-and-unfounded accusations about Jefferson's relationship with Sally Hemings:

> There were allusions to a certain "Dusky Sally," otherwise Sally He[m]ings, whose children were said to resemble the master of Monticello in their features and the color of their hair. In this particular Campaign Lie there was just that fractional portion of

> truth which was necessary to preserve it fresh and vigorous to this day. There is even a respectable Madison He[m]ings now living in Ohio who supposes that Thomas Jefferson was his father. Mr. He[m]ings has been misinformed. The record of Mr. Jefferson's every day and hour, contained in his pocket memorandum books, compared with the record of his slave's birth, proves the impossibility of his having been the father of Madison He[m]ings.
>
> ....
>
> So much for this poor Campaign Lie, which has been current in the world for seventy-three years, and will, doubtless, walk the earth as long as weak mortals need high examples of folly to keep them on endurable terms with themselves.

Parton, James, *The Presidential Election of 1800*, THE ATLANTIC MONTHLY (July 1873).

Despite all of the controversial attacks against his character – whether accurate or not – during his inaugural address after the election of 1800, Jefferson emphasized the importance that freedom of expression plays in the functioning of our government: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." *See Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 159 (1961) (citing Jones, Primer of Intellectual Freedom, 142 (Harvard University Press, 1949)).

The election of 1800 is just one example of this country's longstanding tradition of protecting the right to express one's views on political issues and candidates without fear of retaliation. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 343 n.6 (1995) (citing, *inter alia,* ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA 220 (J. Faragher ed.1990); THE COMPLETE ANTI-FEDERALIST (H. Storing ed.1981); PAPERS OF JAMES MADISON 66-73 (T. Mason, et al. eds.1985); DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 246-362 (M. Jensen & R. Becker eds.1976); PAPERS OF ALEXANDER HAMILTON 33-43 (H. Syrett ed.1969)).

"The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government." Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 883 (1963). Reaching back through history again to the words of Thomas Jefferson, if one accepts the premise of the Declaration of Independence, *i.e.*, that governments derive "their just powers from the consent of the governed," then, in order

to give their informed consent, the governed must have full freedom of expression in voicing their views about candidates for public office. *Id.*

I. DISCOVERY OF ANONYMOUS SPONSORS OF POLITICAL SPEECH IS REVERSIBLE ERROR WHEN A MOTION FOR JUDGMENT ON THE PLEADINGS IS PENDING.

This rich tradition of First Amendment protection for political discourse extends to unpopular viewpoints expressed by anonymous citizens who would often not speak if attribution were always required. *See McIntyre*, 514 U.S. at 342-43; *see also Talley v. California,* 362 U.S. 60, 64-65 (1960) (because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance," the state in certain circumstances "may not compel members of groups engaged in the dissemination of ideas to be publicly identified").

In fact, the right to speak anonymously was of fundamental importance to the very establishment of our Constitution:

> Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.

Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (citation omitted).

This founding principle of anonymous free speech extends to the modern political arena:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," the most effective advocates have sometimes opted for anonymity.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342-43 (1995) (citations omitted).

There is no doubt that defamation lawsuits can create a "chilling effect" on the ability of citizens to speak out on matters of public concern and challenge their own elected representatives for fear of being sued by them. Several factors combine to create this chilling effect: (1) even if the court or jury ultimately finds the claim without merit, the legal path to arrive at this result is often time-consuming and expensive; (2) there is a reasonable fear that one may be found liable for damages based on the likelihood of an erroneous judgment; (3) appeal from an erroneous judgment does not lend much comfort as it promises extended litigation, and

a continued drain on financial resources; and (4) there is no guarantee that an appeal will reverse the initial judgment. *See* David J. Abell, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment – "Strategic Lawsuits Against Political Participation,"* 47 SMU L. Rev. 95, 99 and 113 (1993) (footnotes omitted). "Also complicating the scenario is unfamiliarity with complex tort laws that the lay citizen must face when considering the legality of his protected First Amendment activities." *Id.*

Therefore, courts must carefully balance the rights of our elected officials to root out unfounded claims against their character with the First Amendment protections of freedom of speech by citizens who wish to engage in the political process anonymously. In order to maintain this balance, a court must not compel answers to discovery questions that require disclosure of potentially constitutionally protected political associations until it has first considered the arguments raised in any pending motions for judgment on the pleadings.

As will be seen, a decision from this Court outlining the proper role and timing of discovery in defamation cases concerning potentially constitutionally protected political expression and association would not

only remedy a wrong in this case, but also prevent the needless trampling of First Amendment rights in the future.

1. SLAPP Actions Have the Potential to Freeze Free Speech.

A SLAPP action refers to either a "Strategic Lawsuit Against Public Participation" or a "Strategic Lawsuit Against Political Participation." *See generally*, George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation,* 7 Envtl. L. Rev. 3 (1989); David J. Abell, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment--"Strategic Lawsuits Against Political Participation,"* 47 SMU L. Rev. 95 (1993). These kinds of suits threaten citizens who have petitioned their government, stated opinions about public policy, challenged the actions of elected officials, or otherwise exercised their constitutional rights by raising political concerns in public forums.[1]

"The message sent by SLAPP suits is that if you participate in legitimate . . . public discussion, you should be prepared to litigate." *Id.* at 96. As previously discussed, a SLAPP suit not only deters the defendants in the particular suit from further exercising their First Amendment rights,

[1] While the SLAPP acronym is most often used in reference to suits against private individuals, many SLAPP suits are also filed against public officials, who often serve for little or no compensation. Jennifer Silles, *SLAPPs: How Can the Legal System Eliminate their Appeal?* 25 Conn. L. Rev. 547, 566 (1993). Such SLAPP actions against public officials can sour their willingness to participate in the governmental process. *See id.* (citing *Carr v. Bridgewater*, 1990 WL 284340 (Conn. Super. Ct. 1990), *rev'd*, 616 A.2d 257 (1992)).

but also has a "chilling effect" on society: "The ripple effect of such suits in our society is enormous.... Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

Relevant to the present dispute, it is not merely the filing of the lawsuit, but rather how the lawsuit is managed once it enters our legal system that greatly affects First Amendment rights: (1) the longer a SLAPP suit continues, the more a plaintiff satisfies the goal of burdening the defendant and chilling speech; and (2) SLAPP plaintiffs often use the discovery process to impose costly and time-consuming depositions and interrogatories upon a defendant. *See* Jennifer Silles, *SLAPPs: How Can the Legal System Eliminate their Appeal?* 25 Conn. L. Rev. 547, 566 (1993). Therefore, "[i]n order to blunt the effectiveness of a SLAPP suit, a SLAPP defendant must be able to terminate the suit as quickly as possible." *Id.*

2. The Timing of Discovery in SLAPP Actions is Crucial.

Because SLAPP actions are so dangerous to free speech, it is crucial to the continued protection of First Amendment freedoms of speech that

courts recognize and dismiss these suits in a timely manner, upon proof of failure to state a claim upon which relief may be granted, before compelling answers to discovery questions that require disclosure of potentially constitutionally protected political associations. Any other procedure would unnecessarily drag outspoken citizens through litigation and create a chilling effect on free speech, without considering the free speech issue. Meanwhile, the defendant burdened with litigation would regret having ever entered the political arena in the first instance.

On the one hand, a circuit court has "discretion whether to compel discovery." *See, Alt v. Cline*, 224 Wis. 2d 72, 83, 589 N.W.2d 21 (1999). On the other hand, a trial court may dismiss a defamation claim at the pleadings stage if the language at issue is not capable of a defamatory meaning as a matter of law. *See, e.g., Frinzi v. Hanson*, 30 Wis. 2d 271, 274-75, 140 N.W.2d 259 (1966). The interplay of these two standards is at the heart of the issue at hand:

> Courts have a special responsibility for the impact of their proceedings on constitutional rights. In public person defamation cases, the court itself poses a danger to first amendment values.... Because fundamental rights can be meaningless without procedures to enforce or protect them, courts also have a duty to give meaning and effect to those rights through their application of procedural law. In short, courts should not permit their own processes to be turned into tools of injustice or used as a means of

> undermining constitutional values. They should embrace procedures that secure and enforce those constitutional values.

Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 225-26 (1987) (footnotes omitted); *see also, Littleton, supra*, (judges must "exercise [procedural] powers wisely so as to avoid serious threats of ... First Amendment harm").

Moreover, when deciding constitutional issues, courts must first make sure that the issues are thoroughly presented and briefed and that all underlying facts are properly examined. *See State v. Horn*, 139 Wis. 2d 473, 486, 407 N.W.2d 854 (1987) (citing *State v. Johnson,* 74 Wis. 2d 169, 174-75, 246 N.W.2d 503 (1976)); *Just v. Marinette County*, 56 Wis. 2d 7, 26, 201 N.W.2d 761, 772 (1972) ("We think that when a constitutional issue is now presented to the trial courts of this state, it is the better practice for those courts to recognize its importance, have the issue thoroughly briefed, and fully presented.").

Here, the trial court failed on both fronts. First, the record does not reflect that the trial court offered any reasoned legal analysis as to why it continued to compel answers to discovery before it even considered defendant's motion for judgment on the pleadings. Second, although both

the discovery dispute and the motion for judgment on the pleadings concerned complex constitutional issues that should have been fully briefed and presented to the trial court, the trial court decided these issues before they were fully vetted through briefs and argument.

3. The Trial Court Erred in Compelling Discovery Before Considering Defendant's Motion for Judgment on the Pleadings.

Because truly defamatory speech does not enjoy the First Amendment's broad protections, courts in defamation case may compel disclosure of political associations and sponsors. However, because defamation is a narrow exception to the First Amendment's generous protection of political speech, courts should first determine whether a plaintiff has pled a defamation claim upon which relief can be granted, before finding that the exception applies and ordering disclosure of anonymous authors or sponsors of the allegedly defamatory speech.

"[T]he First Amendment does indeed protect, in some cases, the right to speak anonymously." *Melvin v. Doe*, 836 A.2d 42, 47 (Pa. 2003) (citing *Talley v. California*, 362 U.S. 60 (1960)). However, there is an exception to the First Amendment's protection of anonymous speech – disclosure may be necessary as "a way to identify those responsible for

fraud, false advertising and libel." *Talley*, 362 U.S. at 64; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

Accordingly, in order to determine if an anonymous author, sponsor or other political association must be disclosed, courts should first determine whether the speech in question is capable of defamatory meaning as a matter of law. As Justice Powell declared in an analogous case, *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring), "Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated."

This interdependent relationship between procedural and substantive law highlights the anomalous effect of the "actual malice" standard on public figure defamation cases involving anonymous speech: Although formulated to protect free expression, the standard triggers extensive discovery that may actually produce a dampening effect on speech. Accordingly, in compelling discovery in a defamation suit by a public figure, a trial court has the duty to consider First Amendment interests and

properly exercise its discretion to regulate discovery with a view to protect those substantive interests.

In the instant case, because the trial court failed to apply a "reasoned application of the appropriate legal standard to the relevant facts in the case," *Hedtcke v. Sentry Ins., Co.,* 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982), it erroneously exercised its considerable discretion in compelling disclosure of anonymous political associations before ruling on the pending motion for judgment on the pleadings.

II. THE U.S. CONSTITUTION REQUIRES JUDICIAL SENSITIVITY TO THE UNIQUE CONTEXT OF POLITICAL CAMPAIGNS IN EVALUATING WHETHER SPEECH IS CAPABLE OF DEFAMATORY MEANING AS A MATTER OF LAW.

In the seminal case in this area, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Supreme Court of the United States held that, pursuant to First Amendment protections of free speech, a public official cannot recover damages for a statement that relates to official conduct unless the official proves not only that the statement was false, but also that the statement was made with actual malice, *i.e.*, knowledge that the statement was false or with reckless disregard as to whether it was false. *Id.* at 279-

80.[2] The "actual malice" rule is operative only after a statement has been determined to be defamatory, *i.e.*, false and tending to harm one's reputation. But its motivating principle, the need to protect robust political debate, should be applied at all stages of a case – including a motion on the pleadings asserting not capable of defamatory meaning.

The *New York Times* rule is premised on a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Melvin v. Doe*, 836 A.2d 42, 46 n.8 (Pa. 2003) (citing *New York Times,* 376 U.S. at 270-71; *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949); *De Jonge v. Oregon,* 299 U.S. 353, 365 (1937)). The actual malice requirement and the requirement that the plaintiff prove the falsity of the statements are central to First Amendment protections for defendants in defamation suits: "When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a ... defendant than is raised by the common law." *Philadelphia*

[2] The *New York Times* requirements have since extended to libel suits brought by public figures. *See, e.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

Newspapers v. Hepps, 475 U.S. 767, 775 (1986); *see also Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997).

To constitute actual malice, the public figure plaintiff must show the false publication was made with a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). The standard of review of determination of actual malice in defamation actions subject to the standards of *New York Times* must be faithful to both the clearly-erroneous standard, which applies to review of findings of fact, and the rule applied in *New York Times*, which requires independent review of the whole record to make sure that the judgment does not constitute a forbidden intrusion on free expression. *See Bose Corp. v. Consumer Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

This independent appellate review has a two-fold purpose:

> In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.
>
> ....
>
> The requirement of independent appellate review ... reflects a deeply held conviction that judges ... must exercise such review in order to preserve the

> precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at p. 505 and 511.

Thus, "[t]his Court has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and in doing so ... cannot avoid making an independent constitutional judgment on the facts of the case." *Id.* at p. 508 n. 27 (internal quotations omitted) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). In Wisconsin, "[a] motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." *Friends of Kenwood v. Green*, 2000 WI App 217, ¶11, 239 Wis. 2d 78, 619 N.W.2d 271. Whether the complaint states a claim for relief is a question of law that the Court of Appeals reviews *de novo*. *See id.* While Rongstad's motion was captioned as one to dismiss the complaint – a motion confined to the pleadings themselves – the trial court also had additional materials before it relating to the claims. Under Wis. Stat. § 802.06(3), when, "on a motion for judgment on the pleadings,

matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."

The elements of a defamatory communication are: (1) a false statement; (2) communicated by speech, conduct, or in writing to a person other than the person defamed; and (3) a communication that is unprivileged and defamatory, that is, tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. *Torgerson*, 210 Wis. 2d at 534.

In addition, a complaint alleging defamation must set forth "the particular words complained of," *see* Wis. Stat. § 802.03(6), because a defendant in a defamation action is entitled to notice of the specific statements or implications that are alleged to be defamatory. *Mach v. Allison*, 2003 WI App 11, ¶ 28, 259 Wis. 2d 686, 656 N.W.2d 766.

Finally, when the subject of the defamation is a public figure, upon a motion for summary judgment, the plaintiff must also prove actual malice in addition to the above-listed common law elements. *See Torgerson*, 210 Wis. 2d at 535; *see also Mach v. Allison*, 2003 WI App at ¶13 n.7.

Extrapolating from cases that are concerned with defamation of public figures in the print media, we are instructed that the "gist of the matter" is the "natural and reasonable import" of the words and images on the viewer, and we consider the broadcast as a whole, "not in detached fragments." *Mach*, 2003 WI App 11 at ¶13 (citing *Woods v. Sentinel-News Co.,* 216 Wis. 627, 629-30, 258 N.W. 166 (1935)).

Several cases throughout the United States exhibit the difficulty a political candidate has in recovering damages for allegedly defamatory statements. *See Ribaudo v. Bauer,* 982 S.W.2d 701, 706 (Mo. Ct. App. 1998); *see also Krueger v. Austad,* 545 N.W.2d 205 (S.D. 1996); *Carr v. Brasher,* 776 S.W.2d 567 (Tex. 1989); *Hein v. Lacy,* 616 P.2d 277 (Kan. 1980); *Clark v. Allen,* 204 A.2d 42 (Penn. 1964); *Beilenson v. Superior Court (Sybert),* 52 Cal. Rptr. 2d 357 (Cal. Ct. App. 1996).

For example, in *Clark*, Joseph Clark, who was running for re-election to the United States Senate, was accused by the defendants of having "communist tendencies" due to his voting record, during a time when such accusations could cripple an individual's career. *Clark v. Allen,* 204 A.2d at 43. In affirming the dismissal of the Senator's libel action, the Supreme Court of Pennsylvania made the following statements regarding

the need of judges to be aware of the context of speech in political campaigns:

> It is deplorable but true that during a political campaign, candidates and their supporters often indulge in gross exaggeration, invectives, distorted statements, charges of being unfit for the office sought, gross incompetence, disregard of the public interest or the welfare of our Country, prophecies of war or doom if the opponent is elected, mudslinging, half truths and outright lies which are so defamatory that they not only deeply wound the feelings of the person attacked, but undoubtedly damage his political aspirations and often (for a time) his reputation. Nevertheless, the Supreme Court has apparently taken the position that the free expression of thoughts and opinions, charges, accusations, criminations and recriminations regarding men in public life and political matters are so valuable and so essential to the preservation or improvement of our Government that they must be permitted and constitutionally protected unless they are made with actual malice.
>
> Such charges, which are frequently made against candidates for President or Governor or Senator or for local office--irrespective of whether the office sought is elective or appointive--are apparently privileged under the theory (a) that the people are entitled to know and discuss the life, the character and qualifications, the finances, and the innermost thoughts, motives, connections and associations of public, officials and candidates for public office, as well as the likely or inevitable result of the official's candidate's actions, connections, statements or votes, and (b) that the importance to the State and to Society of such information, charges and discussions and the advantages likely to be derived therefrom are so great, that they overbalance the harm which is often inflicted upon the persons maligned.

Id. at 44 (emphasis added).

Here, in the context of a political campaign, the postcard in question hardly rises to the level defamation. In fact, this is exactly the type of

questions that the public, and at least the candidate, expect during a hard-fought political campaign. As observed nearly forty years ago in *Clark*, while the postcard engaged in various types of puffery, exaggeration and mudslinging that challenged the character, qualifications and political associations of Lassa, because the voting public is entitled to know and discuss the life and character of their elected officials, the Supreme Court has taken the position that the free expression of thoughts and opinions regarding people in public life and political matters are so valuable and so essential to the preservation and improvement of our Government that they must be permitted.

Dismissal of such lawsuits is based on the premise that the discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. *See Roth v. United States,* 354 U.S. 476, 484 (1957). The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political changes desired by the people. *See id.* As such, in order to guarantee our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and

wide-open," *see New York Times,* 376 U.S. at 270, the trial court should have dismissed Lassa's claim as a matter of law.

CONCLUSION

Exercise of the right of free speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." *Sullivan*, 376 U.S. at 270-71. The First Amendment demands that the courts provide substantial "breathing space" to such expression, because allowing otherwise would intolerably chill "would-be critics of official conduct ... from voicing their criticism." *Id.* at 272. To this end, at minimum, courts must first settle pending motions for judgment on the pleadings before compelling disclosure of potentially constitutionally protected anonymous sponsors of political speech.

Dated this 22nd day of June, 2004.

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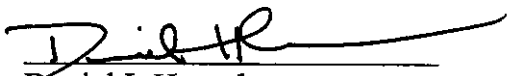
CERTIFICATION OF FORM AND LENGTH OF BRIEF

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§809.19(8)(b) and (c) and 809.62(4) for a brief and appendix produced with a proportional serif font, in that in its June 1, 2004 Order, the Court of Appeals graciously granted *amicus* size limitations imposed on respondent briefs. The length of the brief is 5,615 words.



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