



## OFFICE OF THE CLERK

**Supreme Court of Wisconsin**

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December 15, 2009

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You are hereby notified that the following order is entered:

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No. 2007AP2931

DeBraska v. Quad Graphics, Inc. L.C.#2007CV4783

BRADLEY, J. A petition for review pursuant to Wis. Stat. § 808.10 was filed on behalf of plaintiff-respondent-petitioner, Bradley DeBraska, Sr.;

Chief Justice Shirley Abrahamson, Justice Patience D. Roggensack, Justice Annette K. Ziegler and Justice Michael J. Gableman are not participating in the consideration or decision of this matter on its merits. Article VII, § 4 of the Wisconsin Constitution provides that "[a]ny 4 justices shall constitute a quorum for the conduct of the court's business." Accordingly, there is no quorum of justices qualified to sit on this matter.

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Because of the absence of a quorum, the petition for review is dismissed.

Abrahamson, C.J. and Roggensack, Ziegler and Gableman, J.J., did not participate.

DAVID T. PROSSER, J. (*concurring*). The petitioner, Bradley DeBraska, Sr., served as president of the Milwaukee Police Association from 1989 to 2005. During part of that time, he also served as a member of the Board of Regents of the University of Wisconsin. By virtue of his positions and the force of his personality, DeBraska was a significant influence in the political life of metropolitan Milwaukee. As a result, he is known both professionally and personally to all members of the Wisconsin Supreme Court.

Because of these associations, four members of the court have recused themselves from hearing DeBraska's libel case. The results that flow from these recusals are troubling.

First, DeBraska is deprived of any possibility of review by the supreme court. No litigant has a right to review of his case by the supreme court: a requisite number of members of the court must vote to grant the litigant review. Here, however, even if three members of the court were to vote to grant DeBraska's petition, his case could not be heard because the court would lack a quorum. Wis. Const. art. VII, § 4.

Second, by their recusals, four members of the court have deprived the other three members of the ability to exercise their constitutional responsibilities. In other words, four members of the court have not only deprived a litigant of the opportunity to be heard, but also deprived three justices of the opportunity to hear the litigant.

Third, because the Wisconsin Supreme Court cannot review the case, the published decision of the court of appeals will stand. See DeBraska v. Quad Graphics, Milwaukee Magazine & Kurt Chandler, 2009 WI App 23, 316 Wis. 2d 386, 763 N.W.2d 219. The court of appeals decision reversed a circuit court decision on technical grounds and denied DeBraska any right to go forward with his libel suit. The decision also establishes binding precedent in other libel cases in the court of appeals, see Cook v. Cook, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997), as well as the circuit courts, and thus it affects the rights of other alleged victims of libel who seek to navigate Wis. Stat. § 895.05(2).

The present case represents one extreme manifestation of the current debate over recusal. Here, four members of the court have voluntarily recused themselves from participation in review because they subjectively believe that their participation is, or might appear to be, inappropriate. No party has asked the justices to withdraw.

In 1853 the Wisconsin Supreme Court confronted a situation in which two of its three members had previously been involved in a pending case. Clearly, these two justices should not have participated in an appeal. Nonetheless, the court then had the wisdom to devise a way to preserve its ability to provide appellate review. See Walker v. Rogan, 1 Wis. 597 (1853). That has not happened here.

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Recently, this court has been bombarded with external motions asking a majority of justices to remove other justices involuntarily, thereby seeking to nullify elections, alter the composition of the court, and potentially change the outcome of individual cases. These motions represent a frontal assault on the integrity of the Wisconsin judicial system, and they, too, could have serious and profound consequences for parties, citizens, and the court.

This present case is troubling because I am forced to concur in a procedure that is manifestly unjust.

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David R. Schanker  
Clerk of Supreme Court