

STATE OF ILLINOIS
IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT
BOONE COUNTY

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RMS INSURANCE SERVICES,)
INC., an Illinois)
corporation d/b/a/)
FLANDERS INSURANCE)
AGENCY, INC., and OWEN G.)
COSTANZA, an individual,)
)
Plaintiffs,)
)
vs.)
)
DONALD G. SATTLER, an)
individual, MARION)
THORNBERRY, an)
individual, ELISABETH M.)
RODGERS, an individual,)
and CHERYL RUSSELL-SMITH,)
an individual,)
)
Defendants.)

CASE NO. 2021-L-30
MOTION TO DISMISS

REPORT OF PROCEEDINGS of the electronic
recording of the hearing before The Honorable Ronald A.
Barch on March 25, 2022.

APPEARANCES:

MR. JOSEPH J. MADONIA,
Joseph J. Madonia & Associates,
for the Plaintiffs appearing
via videoconference;

MR. TIMOTHY P. DONOHUE
Attorney at Law,
for the Plaintiffs appearing
via videoconference;

MR. TRENT A. FERGUSON,
Ray A. Ferguson & Associates,
for the Defendants.

1 (WHEREUPON, the following
2 proceedings were held in open
3 court and transcribed from the
4 digital recording system,
5 commencing at 1:30 p.m.)

6 THE COURT: RMS Insurance Services, Inc., et al.,
7 versus Donald Sattler, et al.

8 Counsel, if you would introduce yourself and the
9 parties you're representing.

10 MR. FERGUSON: Good afternoon, Your Honor. Trent
11 Ferguson for the Defendants Rodgers, Thornberry and
12 Sattler.

13 MR. MADONIA: Good morning, Your Honor. Joe Madonia
14 for Plaintiffs, RMS Insurance Services, Inc., and Owen
15 Costanza.

16 THE COURT: There is one other defendant, Cheryl
17 Russell-Smith. Anybody representing her?

18 MS. RUSSELL-SMITH: Your Honor, if I may speak. I
19 have hired Jack Franks and they've been negotiating and
20 I'm understanding they're going to do a nonsuit today.
21 That's my understanding.

22 THE COURT: All right. We have a motion to dismiss
23 that's scheduled for today. I don't have anybody here
24 representing a request to nonsuit.

1 Mr. Madonia.

2 MR. MADONIA: Yes, Judge. I believe that my
3 co-counsel, Timothy P. Donohue, is on the Zoom call as
4 well.

5 MR. DONOHUE: I am, Your Honor.

6 THE COURT: Mr. Donohue, and who will you be
7 representing today, Counsel?

8 MR. DONOHUE: I'm Mr. Madonia's co-counsel. I
9 represent the plaintiffs.

10 THE COURT: Okay. Give me one --

11 MR. MADONIA: Yes, Judge. As a procedural matter,
12 Your Honor, we have been in discussions regarding
13 settlement for Defendant Ms. Russell-Smith. I think that
14 they've been productive so far and at this time, Judge,
15 yes, we are asking for a nonsuit as to Defendant Cheryl
16 Russell-Smith alone, and pursuant to 735 ILCS 5/2-1009,
17 the Voluntary Dismissal Statute, we would ask that
18 Ms. Russell-Smith be nonsuited without prejudice and with
19 leave to refile, and we respectfully ask that Your Honor
20 would enter that into the order drafted for today's
21 hearing.

22 THE COURT: All right. You don't represent
23 Ms. Russell-Smith.

24 No one is here to contest that, Counsel, so the

1 request will be heard and granted.

2 MR. MADONIA: Thank you, Judge.

3 THE COURT: Look, I've reviewed the names of the
4 parties -- before we get underway with an argument, I
5 reviewed the names of all the parties here. The only
6 party that I'm aware of offhand that I'm familiar with at
7 all is Ms. Russell-Smith and she's just been dismissed so
8 I don't know that there's any basis to sub or if anyone
9 is asking for a substitution. If not, I'm ready to hear
10 arguments.

11 MR. FERGUSON: Very good, Judge.

12 THE COURT: And my connection to Ms. Russell-Smith is
13 only as a judge here in Boone County.

14 The motion to dismiss was filed by the defendants.

15 Mr. Ferguson, are you ready to proceed?

16 MR. FERGUSON: I am. Thank you, Judge. Is it okay
17 if I remain sitting?

18 THE COURT: Yes, by all means.

19 MR. FERGUSON: Thank you, Judge. So Defendant Don
20 Sattler ran against the plaintiff, Costanza, in
21 April 2021 election for Village of Poplar Grove
22 president. Defendant Sattler won the election, and
23 during that campaign, he distributed a political flyer.
24 That's been attached to the plaintiffs' complaint. At

1 least -- I should say that half of it has been attached.
2 There's a back side to it. Per the allegations in the
3 complaint, the other defendants also distributed the
4 flyer. That's why this complaint was filed.

5 The plaintiff is trying to -- he's a political
6 figure and he wishes to silence his opposition, and he
7 thought that he could silence the defendants with this
8 lawsuit and that's what this lawsuit is about. So
9 there's been a history of states, one by one, recognizing
10 an increase in what they call SLAPP lawsuits, Strategic
11 Lawsuits Against Public Participation, in order to
12 silence citizens from participating in government.

13 As a result, in August of 2007, Illinois joined
14 over 20 other states enacting the Citizens Participation
15 Act. And just to back up, these SLAPP lawsuits, they
16 often -- the courts recognize they often consist of a
17 myriad of claims including defamation, tortious
18 interference with prospective business advantage, things
19 like that, exactly like the one we have before this
20 Court.

21 In determining whether a lawsuit should be
22 dismissed under the act, the court engages in a three-
23 part analysis. The first one is is the speaker engaged
24 in an act in furtherance of his right to petition or

1 otherwise participate in government.

2 THE COURT: Are you proceeding under 615 or 619?

3 MR. FERGUSON: 619.

4 THE COURT: Thank you.

5 MR. FERGUSON: And specifically (a) (9). And that
6 includes speech to the electorate. The second
7 determination is are speaker's actions immune from
8 liability if they are aimed at procuring favorable
9 government end result or outcome. If it's found in favor
10 of the defendants in those two circumstances, then the
11 burden shifts to the plaintiff to show by clear and
12 convincing evidence that the acts of the moving party are
13 not immunized from liability.

14 In short, the issue is is the plaintiffs'
15 complaint based on, relates to or in response to any acts
16 or acts of the moving party's that was in furtherance of
17 the moving party's rights to petition or speech or
18 association or otherwise participate in government.
19 That's the issue.

20 So if we look at the complaint, there is quite a
21 few allegations in there, and just breaking them down,
22 they're listed by unlawful acts -- alleged unlawful acts.
23 The first one is alleged unlawful acts against Defendant
24 Smith. Real easy. She received the flyer and circulated

1 it. Unlawful acts by Sattler. It goes through the
2 alleged history of the parties. There's some history
3 there. Not really germane I believe to anything. It
4 alleges that there's private communications between
5 Sattler and law enforcement agencies involving the
6 plaintiff. Of course, that's not defamation.

7 THE COURT: I thought you were talking about Smith.

8 MR. FERGUSON: I moved to Sattler. Smith was simply
9 the allegation that she received the flyer and
10 disseminated that with a group of people.

11 The alleged unlawful acts by Sattler in the
12 complaint -- it goes through the history between the
13 parties. It alleges that he made inquiries to certain
14 local authorities a number of times and that wasn't
15 mutually exclusive, but that's, of course, not
16 defamation, and then it's the alleged false flyer.
17 That's the rest of it, the remaining paragraphs: 17, 18,
18 19, 20, 21, 22, 24 -- over half of the paragraphs
19 regarding Sattler are distribution or dissemination of
20 that flyer. Same with the alleged unlawful acts by
21 Thornberry. It goes through the past history of the
22 parties. Also alleges he has contact with local
23 authorities. Again, not defamation. And then it's a
24 false flyer again. Again, the majority of the paragraphs

1 pertaining to Thornberry in the complaint deal with that
2 alleged false flyer, the flyer itself. And then it's
3 similar with the unlawful acts alleged against Rodgers.
4 You know, allegedly contacted local authorities, did have
5 some complaints whether or not the plaintiff had some
6 conflicts of interest with his business and sitting on a
7 board, but the majority again, of course, is that false
8 flyer so that's what it comes down to.

9 THE COURT: The contacts with the, as you described,
10 various local authorities, it's more than just calling
11 somebody. Wasn't it alleged that there are
12 communications being made to the authorities that the
13 plaintiff is claiming were false?

14 MR. FERGUSON: Correct. He claims they were false.
15 That's not defamation in that there's no publication or
16 dissemination.

17 THE COURT: Are you focused only on defamation or is
18 there libel, slander? There's also a business element
19 that there's --

20 MR. FERGUSON: There is that, too, but there's cases
21 that -- and I don't have them with me, but communications
22 between authorities is somewhat immune from that in that
23 it's not a spreading -- the actual definition of those
24 things is either published or publicly spoken items that

1 are allegedly trying to be injurious to a party's
2 reputation. If that information is given to a local
3 authority, there's no way that can be injurious to that
4 party's reputation. Either nothing ever happens and
5 nothing ever comes of it or something does come of it and
6 then it could be injurious.

7 THE COURT: One of the component -- wasn't there a
8 malicious prosecution component?

9 MR. FERGUSON: Correct, and I'm going to -- that has
10 to go -- that's a little bit later in my argument. I can
11 get to that now --

12 THE COURT: I guess I'm concerned about your broad
13 comment that communications to authorities is nothing.

14 MR. FERGUSON: It wouldn't fall under slander, libel
15 or defamation under the definition of those terms, and it
16 also wasn't mutually exclusive. It was back and forth
17 between the parties. Really nothing ever came to that.
18 It was more of inquiries rather than anything else other
19 than one incident, and that was actually the plaintiff
20 having the defendant removed from a public meeting or
21 trying to for no reason. Really if you look at the
22 complaint, it's focused on -- the majority of the
23 paragraphs by far is that dissemination of a false flyer.

24 In short, the plaintiff brought this complaint as

1 a result of the defendants circulating the flyer and the
2 information contained therein during his campaign for
3 village president. He says that -- the plaintiff says
4 that he's seeking damages for interference with business
5 contracts, but he only alleges one entity that he
6 allegedly lost business from, and the only specifics
7 regarding any defamation is the circulation of the flyer
8 itself. Again, that flyer that was distributed during a
9 contested political campaign.

10 That's what the complaint was alleged on. Now
11 that this motion has been filed -- and in their response,
12 it's our contention that the plaintiff has somewhat
13 shifted their argument. In our motion we attached
14 numerous exhibits that pertain to each of the specific
15 allegations in the complaint showing we believe that
16 they're true and plaintiff doesn't necessarily deny that
17 all of the specific allegations are not true. Instead,
18 they're saying, well, okay, maybe those are true but it's
19 the overall characterization now is what the focus is on.
20 They've also made the argument, too, that most, if not
21 all, of the defendants' tortious conduct occurs after
22 April 6th.

23 THE COURT: Take me back to that point. You're
24 saying now that the plaintiff is acknowledging the

1 accuracy of the communication?

2 MR. FERGUSON: To a large degree. Attached to
3 their --

4 THE COURT: See, that's very -- that's sort of
5 nebulous. What portions of the flyer are being
6 acknowledged as true and which portions of the flyer are
7 not being acknowledged as true? Is it all of it or part
8 of it?

9 MR. FERGUSON: It is I believe -- it's a little
10 difficult. Most of the criminal alleged activity is
11 being admitted in my opinion. It's being admitted, but
12 then there's a defense, well, it wasn't me or it wasn't
13 my fault, it was my wife, it was my assistant, it was the
14 fact I couldn't afford a defense attorney, but there's no
15 denial that there were guilty pleas on all of those
16 charges. And then there's -- it's very confusing. And
17 then there's the allegation, well -- made in the
18 response -- the plaintiffs' response, well, I can't be a
19 criminal because I have an insurance license and I have a
20 FOID card. Well, if you look at the statute, you can even
21 be an ex felon in some circumstances and have a FOID card
22 and certainly you can be a criminal and have a FOID card
23 and an insurance license so I think it would stand as a
24 judicial admission. Whether or not he's trying to admit

1 it or trying not to is a different question, but I think
2 they would stand as judicial admissions. Again, so
3 because most of those have been --

4 THE COURT: Well, one of the components in this -- in
5 these motions to dismiss, according to all the cases, is
6 truth is a potential defense.

7 MR. FERGUSON: Correct.

8 THE COURT: Potentially a fatal problem to some of
9 these causes of action.

10 MR. FERGUSON: Correct.

11 THE COURT: So it's your position that the flyers
12 have been admitted -- the allegations in the flyer -- the
13 accusations in the flyer, those have been admitted as
14 true, although begrudgingly and with qualification --

15 MR. FERGUSON: Correct.

16 THE COURT: -- or excuse?

17 MR. FERGUSON: Correct. And if the Court will
18 recall, we do have other motions to dismiss that have
19 been filed and there are a briefing schedule on, and one
20 of those deals directly with that specific issue only.
21 This was brought under the Citizens Participation Act,
22 and because of the statutory requirements that it be
23 heard within 90 days, that's why we're here ahead of the
24 other ones.

1 And the Citizens Participation Act, that does come
2 into play in the first element where we have to see
3 whether or not the plaintiffs had the right to say what
4 they said and that's what it would fall under. It's
5 truthful. The only thing now is they're saying, okay,
6 even if the items are truthful -- it's the
7 characterization because if the Court can look at the
8 flyer -- and if there's no objection, I'd like to submit
9 that for evidence, the entire flyer, both pages -- or
10 both sides.

11 THE COURT: Counsel, you can't see what he's trying
12 to present.

13 MR. DONOHUE: Judge, I would make an objection.
14 We're not having an evidentiary hearing so, I mean, the
15 flyer is a matter of record. It's on the complaint.
16 It's on their motion so --

17 THE COURT: He just wants to have a hard copy in
18 front of me as we're going along.

19 MR. DONOHUE: That's fine, but, I mean, to
20 characterize it as evidence, I mean, it's not an
21 evidentiary hearing.

22 THE COURT: Your point is well taken. It's not
23 evidence. It's an exemplar copy of the flyer at issue.

24 MR. FERGUSON: And it is attached to the plaintiffs'

1 complaint. So what the argument is now in response to
2 our motion to dismiss is, okay, all of these may be true
3 but it's the characterization of it. It's "My Opponent's
4 Criminal Record Is" and there's a list of items, and
5 admittedly, not all of those items are criminal. Most of
6 them are but there's three issues that are not: One,
7 administrative hearings in front of the Department of
8 Insurance; two, bankruptcy; and three, foreclosure. So
9 they're stating now -- their position has changed, well,
10 it's the characterization of the criminal record and that
11 not everything under there are criminal issues.

12 THE COURT: All right. So that's important for me to
13 appreciate. You're acknowledging that on the back of
14 this flyer there's a bold underlined heading "My
15 Opponent's Criminal Record Is" and some of those items
16 you're acknowledging don't rise to the level of a
17 criminal offense?

18 MR. FERGUSON: Correct.

19 THE COURT: And that was the -- which are those then
20 specifically?

21 MR. FERGUSON: It would be the last three regarding
22 issues or administrative matters with DOI. Well, and
23 there's a fourth -- I guess any of the ones with a DOI.

24 THE COURT: That's the Department of Insurance?

1 MR. FERGUSON: Correct. And then the bankruptcy.

2 THE COURT: Okay. Thank you.

3 MR. FERGUSON: I'm trying to find out -- see where
4 that is on here. I guess that's not on this flyer.
5 Okay.

6 THE COURT: The bankruptcy?

7 MR. FERGUSON: Yep. So there's two issues then.
8 There's two defenses to that. There's the idea of -- let
9 me back up, if I may. All courts, Illinois and the
10 Supreme Court, have all realized that political speech is
11 the exact type of speech that the First Amendment was
12 meant to protect. Courts universally agree that it is
13 the core of the First Amendment. And then the courts
14 look at various factors, but primarily the context of the
15 statement and whether or not a reasonable person would
16 take that statement to be true or hyperbole.

17 Courts realize that -- they're in agreement that
18 political figures have the heightened burden of taking on
19 criticism. In fact, if you look at just any defamation
20 at all, they're allowed to largely be criticized. It
21 comes down to a couple of different issues, but courts
22 are in agreement in recognizing that rhetoric or
23 hyperbole is commonplace in political campaigns, and
24 actually the United States Supreme Court says that it

1 adds a lot of positive discourse to democracy in this
2 nation. In fact, courts have found that the word
3 traitor, terrorist, blackmail, robbed, insane were all
4 found to be hyperbole and that's all this is.

5 Plaintiff in their response to our motion even
6 states that the noncriminal matters are clearly civil
7 matters, quote, Page 9, and that's the other issue. And
8 would a reasonable person think that these are criminal
9 issues or not criminal issues and can they seek the
10 difference, and I think the plaintiff is agreeing that
11 these are obviously civil issues. And then the other
12 issue is would a person take it into the context of that
13 this is a political campaign, and certainly they would
14 and that there is some hyperbole there that you can't
15 take everything to be true.

16 There's also the issue of substantial truth as
17 protected speech. Under substantial truth the defendant
18 need only prove that the gist or the sting of the
19 statement is true. Such protected examples are a
20 statement a person was convicted of defrauding the union
21 when instead it was just an internal disciplinary matter,
22 a statement a person was convicted of domestic violence
23 when, in fact, he was only convicted of simple battery, a
24 statement of sexual assault 30 to 50 times when, in fact,

1 it was only eight, a statement a person was sentenced to
2 a death of six murders when, in fact, it was only one, a
3 statement a person was arrested when he was only being
4 held a material witness. Here, again, all the statements
5 are true and they aren't being denied either in the
6 response or in the affidavit and they're supplemented
7 every single one with exhibits attached to our motion to
8 dismiss.

9 So the question is is this flyer substantially
10 true and it is. Does the plaintiff have a criminal
11 record? Yes, he does. Court records show that. There
12 are guilty pleas. Now there's an argument that guilty
13 pleas somehow don't count, and I'm not sure how to
14 address that but -- so under the substantial truth,
15 there's a defense in this protected speech and under the
16 issue of hyperbole is protected speech and that a
17 reasonable person would look at that and say, well, I see
18 what's criminal and I see what's not and they can make
19 that differentiation very easy.

20 THE COURT: Does the case authority allow me to
21 decide those two arguments as a matter of law?

22 MR. FERGUSON: Yes.

23 THE COURT: Hyperbole and substantial --

24 MR. FERGUSON: Yes.

1 THE COURT: -- accuracy?

2 MR. FERGUSON: Yes.

3 THE COURT: Did you cite a case that says that in
4 your brief?

5 MR. FERGUSON: I believe it is the -- the best one
6 would be the *Sandholm* case. It's an Illinois Supreme
7 Court case. I know I've read it. I'm not sure which
8 case -- and if not that one, it would be the *Maag* case,
9 M-a-a-g, but it should be in the *Sandholm* case.

10 THE COURT: Thank you.

11 MR. FERGUSON: Then as another defense, the plaintiff
12 is stating that, well -- or defendant -- plaintiff is
13 stating that there's issues after this, this flyer was
14 disseminated afterwards, there's Facebook posts that are
15 still up, internet posts that are still up. Well, I
16 think we all know how internet and Facebook works.
17 Things are never taken down.

18 THE COURT: Well, the duration -- I guess there was
19 sort of a big distinction in at least -- what case was
20 it, Counsel? Was it the *Garrido* case?

21 MR. FERGUSON: It was, yep.

22 THE COURT: Where it went on for three years after
23 the political event at issue.

24 MR. FERGUSON: Correct.

1 THE COURT: All right. Now, that's one of their
2 arguments is that this campaign is over.

3 MR. FERGUSON: Correct.

4 THE COURT: Why is this continuing.

5 MR. FERGUSON: Because as Mr. Costanza states, even
6 before he even ran for village president, he was up and
7 becoming. I think it was -- the phrase is he was
8 becoming more successful in politics in Poplar -- or in
9 the village. So even before he ran for village
10 president, he admits he was some sort of a politician.

11 Now, after the election he continues to attend,
12 the plaintiff, village board meetings. He remains very
13 active in the Boone County Republican Committee. He
14 meets with various local and state politicians. He
15 attends such activities as the Northern Illinois
16 Republican Womens' meeting. He co-hosted --

17 THE COURT: But he's not a candidate.

18 MR. FERGUSON: Currently he is a candidate -- we just
19 found out -- again.

20 THE COURT: Well, up until now.

21 MR. FERGUSON: Correct.

22 THE COURT: We're talking about April of '21 he lost,
23 and here we are now in March of '22.

24 MR. FERGUSON: Correct.

1 THE COURT: And the claim is -- there's arguments
2 that this no longer needed to be circulated. This is
3 specifically talking about his capacity as a candidate.

4 MR. FERGUSON: Correct.

5 THE COURT: I know you're saying that he has other --
6 many people have other connections politically, other
7 subcommittees, other groups, fundraising committees,
8 alliances and packs, but does that allow them to remain
9 as a target of this flyer?

10 MR. FERGUSON: Yes, it does. There's court cases
11 that say if you put yourself, push yourself and hold
12 yourself out in the public limelight, you are -- you do
13 have to put up with this heightened standard of scrutiny,
14 and it's not just that. They're all listed in our
15 motion. This whole entire time it's my understanding
16 he's the Boone County Republican Chairman of their
17 committee. I think that alone right there is enough.

18 And, furthermore, he has two Facebook pages, one
19 personal and the other titled "Owen Costanza, Poplar
20 Grove Village President," which he's been posting to
21 regularly since the election was over still holding
22 himself out to be the president of the village. So you
23 just -- the plaintiffs want to say you only state bad
24 things from the date of the -- or not bad things, but you

1 can only disseminate certain information from when you
2 file the papers until the election is over and that's
3 just not true. Once you're a public figure and you
4 continue to be a public figure, you still have that
5 heightened scrutiny.

6 THE COURT: All right. Did you cite any authority
7 that stands for that proposition that even after the
8 election is over, it remains -- he remains potentially
9 subject to any disclosures on accurate information?

10 MR. FERGUSON: I did not cite any, but I would love
11 to brief the matter. I believe that it's just anybody in
12 the public sphere, it's kind of understood.

13 THE COURT: Where do you grab that concept from?

14 MR. FERGUSON: There's a number of cases. I can't
15 cite to any off the top of my head. A lot of them have
16 to do with celebrities and things like that, and I know
17 it's a little bit different, but I think it's still the
18 same. It's just been understood that if you put yourself
19 out there in the public, the public is allowed to -- you
20 have to put up with a certain higher level of criticism.

21 THE COURT: I hear what you're saying. There are
22 public figures out there that are held to different
23 standards and there's private citizens -- there's a
24 middle ground as well. I'm just trying to understand if

1 you have any case authority here in the State of Illinois
2 that allows someone in the public sphere, as you
3 described, to be -- to be -- to fall within the area that
4 we're talking about, whether or not this action would be
5 considered a SLAPP action just because he's, as you
6 describe, in the sphere of public activity?

7 MR. FERGUSON: I cannot cite any off the top of my
8 head. I would be more than happy, though, to brief the
9 matter if the Court wishes to take that issue -- or
10 reserve that issue.

11 THE COURT: So just so we're clear, your position is
12 that even if he's no longer running for this specific
13 political office, his political activities that are
14 ongoing, including the recent campaign of some sort and
15 his role as the republican county chair, all that brings
16 him within the protections of this act from the
17 standpoint of your clients?

18 MR. FERGUSON: Correct, correct, and --

19 THE COURT: He's -- go ahead.

20 MR. FERGUSON: And we're not admitting, of course,
21 that there was any dissemination after the election.
22 It's only alleged without any specifications, but if
23 there were for the purposes of this motion, that he would
24 be under that --

1 THE COURT: Well --

2 MR. FERGUSON: -- umbrella.

3 THE COURT: Well, you read the cases here. The law
4 under 619 -- Section 619 is I have to accept all the
5 allegations in a light favorable to the plaintiff, all
6 inferences in favor of the plaintiff, and the law also
7 states that I have to accept that Mr. Costanza and
8 RMS Insurance Agency doing business as Flanders, that
9 they've stated recognizable causes of action. This is
10 only a question about whether or not your client is
11 immune under the -- because of the protection of this
12 act.

13 MR. FERGUSON: Correct, right, correct. Whether they
14 had a legal ability under the First Amendment to state
15 these things.

16 THE COURT: We're not talking about -- right now
17 we're really not talking about whether they've stated a
18 cause of action. That's assumed as part of this type of
19 motion; correct?

20 MR. FERGUSON: Understood, understood. I want to be
21 clear. Thank you, Judge.

22 THE COURT: Go ahead.

23 MR. FERGUSON: And again, I believe in their response
24 to the motion that the biggest part of that is that these

1 items -- any of these statements that were made on the
2 internet, on Facebook or otherwise, are still up, and I
3 think it's common knowledge that nobody really takes down
4 Facebook posts or anything like that. Once it's on the
5 internet, it's up there and it's never taken down so I
6 don't think that should count, but I guess I'm getting
7 back to the issue that we already resolved.

8 THE COURT: So you believe there's a distinction
9 between -- it's particular in the days of -- and I guess
10 currently because of the internet. It was published and
11 so it's always going to be out there, but it's not being
12 republished or recirculated?

13 MR. FERGUSON: Correct.

14 THE COURT: There's been no additional affirmative
15 acts on the part of your clients to recirculate it or
16 continue to take advantage of it?

17 MR. FERGUSON: Correct. Not on the internet,
18 correct, right, and I think that's what the response
19 says, that they're continuing -- they're continued to be
20 accessible, not that they're being reposted.

21 THE COURT: Go ahead.

22 MR. FERGUSON: Thank you. The flyer itself is again
23 the only specific defamation alleged in the complaint.
24 Does the plaintiff have a criminal record? Yes. Are all

1 of the specific allegations in the flyer true? Yes. Was
2 the purpose of the defendants to address the electorate
3 during a campaign? Yes, absolutely. It's a political
4 flyer. That's what it's for.

5 In the United States we have the right, of
6 course -- an alienable right to speak out with reasonable
7 accuracy and truthfulness without threat of retaliation
8 so I think the only issue for this Court to determine is
9 whether or not a reasonable person would understand that
10 not all of these issues involving administrative hearings
11 are, in fact, criminal, and as such, it qualifies as
12 protected hyperbole; and, two, if not that, whether it
13 falls under substantial truth. That the whole gist or
14 the sting, which is allowed which is protected, is that
15 my opponent has a criminal record. Well, he does, and so
16 for those reasons, this speech is protected. That and
17 the fact that it was for the purpose of addressing the
18 electorate for a known past, at the time present and also
19 current politician.

20 THE COURT: And any theory -- regardless of theory,
21 if it springs from this flyer, they all go away?

22 MR. FERGUSON: Correct, correct.

23 THE COURT: Mr. Madonia, Mr. Donohue, I don't know
24 who's going to --

1 MR. MADONIA: Yes, Judge. I'm going to start off.

2 Thank you, Mr. Ferguson.

3 And, Judge, thank you for your time today and
4 respectfully, Your Honor, to save the Court --

5 THE COURT: Mr. Madonia, just give me -- one
6 second -- Mr. Madonia, hold on. I have a 3:00 o'clock
7 hearing. I think we have plenty of time to be done by
8 then, but I do have another hearing. All right? He went
9 on for about half hour so I'm not intending to curtail
10 you. I just want to make sure that we're allocating the
11 remaining time appropriately.

12 MR. MADONIA: I appreciate that, Your Honor, and as I
13 said, not to take too much of your valuable time, I will
14 attempt not to go down defendants' red herring rabbit
15 hole that totally utterly misses the point of the way
16 SLAPP acts are decided in the State of Illinois and the
17 purpose of the act is red herring radical of 120-page
18 filings, Judge, irrelevant exhibits, nonjurisdictional
19 case decisions outside of Illinois, extraneous secondary
20 materials and law dictionaries that entirely utterly miss
21 the boat, but instead I'd like to focus on the guidance
22 of the Illinois Supreme Court that clearly laid down the
23 law of this state as how to deal with SLAPP acts, which
24 has been good and binding, controlling law for ten years.

1 And as you said, Your Honor, under a 216 argument,
2 it's very difficult to even bring a SLAPP act because
3 the -- because everything is -- because all well-pled
4 complaints are seen in light of the plaintiff's favor in
5 the complaint, the affidavit and all of that.

6 Defendants' reply in their motion does not even directly
7 address the substance of plaintiffs' motions there. So
8 the Illinois State court was very clear when it tried
9 to -- tried to provide case law as to how to construe a
10 SLAPP act.

11 The intent of the legislature was to balance a
12 very definite Constitutional right of citizens to
13 exercise their free speech, to petition government for
14 government action balanced against the plaintiffs very
15 real right to redress grievances and bring lawsuits for
16 actual harm that occurs to it. So what *Sandholm* did very
17 clearly and Mr. Ferguson fails to even address, which is
18 the whole focus of this act and the case law -- before
19 any kind of burden whatsoever shifts over to the
20 plaintiff nonmovant to prove anything. First *Sandholm*
21 very clearly says that we construe the statute to say that
22 this lawsuit filed against defendants has to be solely
23 and only directed at chilling the defendant's right of
24 free speech or to petition government, and in any event,

1 it states very clearly, as does the whole progeny of
2 following case law, where a defendant -- where a
3 plaintiff files suit genuinely seeking relief for damages
4 for the alleged defamation or intentionally tortious acts
5 of defendants, the lawsuit is not solely based on a
6 defendant's right of petition speech, association or
7 participation in the government.

8 And as we've said in the complaint, we allege
9 definite damages, and in the affidavit, which are not
10 refuted, it was not just one and all of these other
11 things which I'll try to refute A, B, C that Mr. Ferguson
12 says. It's many clients.

13 So what happened after that is after the *Sandholm*
14 case came down -- as you may be aware, Your Honor, the
15 Illinois Supreme Court very quickly after that -- well,
16 what *Sandholm* said in the *Sandholm* case that it has to be
17 solely based on that chilling effect and that meant
18 solely means that the movant has to prove that the
19 complaint is both meritless and retaliatory and only then
20 after that would the burden in any way shift to the
21 nonmovant. And again, *Sandholm* really went on to clearly
22 state that where it's seeking damages for defamation
23 other torts, it is not a SLAPP act. So months later --
24 and that was in I believe January of 2012, Judge. Months

1 later in October of 2012, the Illinois Appellate Court
2 gave further direction on how to determine if a case was
3 meritless or retaliatory.

4 And what the *Ryan v. Fox* case said, Judge -- that
5 actually involved judges -- it was a judge that brought
6 the case for a defamatory news program that was brought
7 against that judge. It said that there's two helpful
8 factors that we're going to use and we're going to look
9 to to see if a case is retaliatory: Number one, the
10 proximity and time between the acts that were alleged and
11 the filing of the lawsuit; and number two, we're going to
12 look at the reasonableness of the damages.

13 So in this case, Judge, it wasn't filed to chill
14 any speech, it wasn't filed just for that election.
15 Mr. Costanza sat patiently by and -- when the flyer
16 circulated and he lost the election, which he admitted --
17 he didn't bring the lawsuit after he lost the election.
18 He waited six months until actually he was experiencing
19 tangible definite damages that the defendants knew was
20 going to be caused to him by the circulation of their
21 flyer. Posting this thing about every store in the
22 community. Going door to door handing it to people.
23 Posting it on the internet. Further posting and
24 reposting that and a plethora of other actions and

1 postings not just that flyer as we allege. The flyer was
2 one of many things they do, and as you know, Judge, the
3 purpose of a SLAPP act -- to decide this quickly, it
4 suspends discovery so we even haven't gotten to the
5 discovery of the other acts that they were doing, but it
6 was not until Mr. Costanza started getting calls from his
7 clients what is this about you being a criminal -- a
8 career habitual criminal committing insurance fraud.
9 What are you doing? We're changing. We're out of here.
10 He started dropping clients right and left. He started
11 having clients drop him right and left, which is definite
12 tortious interference with not only prospective
13 businesses advantage as alleged, it's tortious
14 interference of prospective business advantage. It's
15 defamation. It's just the egregious types of things that
16 a plaintiff has a right to bring in a redress.

17 The tangible loss and harm that occurred to his
18 business that he laid out A, B, C in his affidavit, they
19 don't even address it. They say there's one. If you
20 read it, you can see the other claims. So it was not
21 filed in close proximity. He waited six months. In the
22 *Fox* case, there were four episodes of this news program
23 that occurred. He filed after the third one before the
24 fourth one even aired and they've said that that was in

1 proximity. He asked for millions of dollars in damages.
2 I think 7 million per count. They still didn't throw his
3 case -- they still threw the SLAPP act out. Here, he's
4 not asking for millions of dollars like in these other
5 cases. He's just asking for the statutory minimum
6 requirements of the act in bringing this case. So it was
7 filed reasonably and it was filed because these
8 tortious -- these torts that are happening to him are
9 still occurring, Judge. They're still occurring and he's
10 losing business right and left of this so that's the
11 first thing.

12 And then on the issue of merit, just months
13 later -- about six, seven, eight months later -- I think
14 it was in June of 2013 -- the Illinois Appellate Court
15 provided additional guidance to us in how we determine
16 what case is meritless and he says that -- in *Garrido* it
17 clearly says that a real injury that the law provides a
18 legal remedy for cannot be considered meritless. Even if
19 the defendants can prove that the allegedly defamatory
20 statements at issue are substantially true or
21 constitutionally protected, they still cannot carry their
22 burden of showing the claim is meritless.

23 And here, Judge, if we even need to go down that
24 burden shifting thing, we would be glad to, and we can

1 refute all these arguments and show how the majority of
2 the cases that Mr. Ferguson states actually support our
3 position. So only then -- only if it's solely here at
4 chilling speech does the burden shift. So the moving
5 party is -- okay. And again, if it's caused actual
6 injury, which we've shown, which is in that case which is
7 granted in a 216 which is why the case law says good luck
8 on a SLAPP act on a 2-619, try again, it's summary
9 judgment. That's it. The burden does not shift. So,
10 accordingly, we don't even need to go to their issues in
11 the case, but if we did, we can show with clear and
12 convincing evidence that not only was it not
13 substantially true, Judge, it was so egregiously false
14 and defamatory, of course, it caused this. They handing
15 out, as he showed you, a flyer that says "My Opponent's
16 Criminal Record Is" -- and Mr. Ferguson once again gets
17 it wrong.

18 He says there's three things on here, Judge, that
19 are not criminal. No. He's got the opposite, Judge.
20 He's got it wrong. Ten out of thirteen things on this
21 list of a criminal record are not in any way, shape or
22 form criminal. They are civil matters. That's
23 76.9 percent untruths of this supposed substantially
24 similar false flyer. It's egregious that he can come to

1 court and try to -- try to present that argument, Judge.

2 And again, let's go to what the criminal elements
3 are. His criminal element -- his first criminal element
4 was filing a false report in Boone County, and believe
5 me, Judge, upon information and belief, the defendants
6 with others have so gone down the rabbit hole of all of
7 these facts against Mr. Costanza who they've had a
8 vendetta against for years, they know what the situation
9 was. The false police report was --

10 THE COURT: Mr. Madonia, pleads guilty to filing a
11 false report. Was that a criminal case, was it a
12 misdemeanor case, did he plead guilty?

13 MR. MADONIA: Yes, it was, Judge, and what that
14 was -- that was a situation -- very quickly.
15 Mr. Costanza had a home power washing business at the
16 time 27 years ago. He fell off the building when he was
17 power washing. He was laid up in the hospital --

18 THE COURT: Well, there's --

19 MR. MADONIA: -- with a broken back in several
20 places --

21 THE COURT: I'm sure there's details to it, but all
22 it says is he pled guilty to filing a false report.

23 MR. MADONIA: He pled guilty to filing a false
24 report, Judge, but as I said, it was after he broke his

1 back. What happened was his nephew borrowed his car.
2 When he got out of the hospital from a week with his
3 broken back, the car was gone. He filed a police report
4 saying my car was stolen. The next week his nephew
5 brought the car back. He immediately called the Boone
6 County police and said, hey, the car is here. It's not
7 stolen, my nephew had it. They went out and arrested him
8 and he just took a plea.

9 THE COURT: Counsel, then maybe he shouldn't have
10 pled guilty then, all right, but he did.

11 MR. MADONIA: I got you, Judge.

12 THE COURT: All right.

13 MR. MADONIA: The second thing is -- the second thing
14 was he pled guilty to writing a bad check in Boone
15 County. That was his -- his ex-wife -- his wife at the
16 time had wrote a \$20 bad check to Walgreens so he pled
17 guilty to that. He took a plea. He didn't have money at
18 the time 23 years ago to provide a defense. The other
19 thing he got was a DUI. Those were the three things
20 so the gist of this --

21 THE COURT: That's the 2007 DUI guilty plea?

22 MR. MADONIA: Fifteen years ago, Judge, absolutely
23 and those are the only three minor misdemeanors again
24 that were expunged, but what they did is they have been

1 tracking him for a while and other organizations have.
2 In Boone County, as you know, they track everything, and
3 they pulled out from 2010 records of this before they
4 were expunged and before the cases were sealed, but that
5 being what it may, every single one of the other ten of
6 the thirteen is not criminal in any way. It can be
7 explained. We do. We don't even need to get there in
8 terms of where our burden sits, but the home foreclosure,
9 bankruptcy, those aren't criminal. None of these other
10 things are criminal. They were civil matters.

11 The case that they attached that's really largely
12 irrelevant, another red herring, ten out of thirteen
13 civil matters so I ask you, Judge, what layman do we know
14 who walk around Boone County or sit at the cash register
15 and somebody comes in giving them this flyer that they're
16 posting on their door that says here's the criminal
17 record A to Z -- what layman do we know that's going to
18 sit there with *Black's Law Dictionary* out and thumb
19 through definitions to construe what this means. It says
20 "My Opponent's Criminal Record Is" A to Z. The gist of
21 that, the sting of that, the four corners of that doesn't
22 pass the smell test. It doesn't pass the common sense
23 test. I see why he's trying to float this boat, but it
24 just doesn't float, Your Honor. I mean, it's just --

1 it's clearly on its face "My Opponent's Criminal Record
2 Is." He was damaged. He was harmed by that. They don't
3 even meet the burden clearly under a mile-long list of
4 cases that, you know, both of us are citing back and
5 forth. They don't even address it. So the burden
6 doesn't even shift. It's so clear just from the
7 statements we read in the case law.

8 So in terms of some of these other things he said,
9 Judge, it's not -- it's not solely addressed. He says
10 that it was in furtherance of this election campaign. It
11 was not -- it all related to the flyer. The flyer is
12 only part of it, Judge, as we alleged. The other actions
13 that they repeatedly are doing and Facebook posts, online
14 and blogs and other things, handing people even as
15 recently as a month or so ago this flyer and still
16 telling them about it. They want to go out there and
17 crush Mr. Costanza. The problem is that's a tort under
18 Illinois law and you can't do that, and that's just the
19 kind of balancing act that somebody can't just go saying
20 it's a SLAPP act.

21 And these other claims are just patently
22 ridiculous, but everybody knows that if something is
23 posted on Facebook, it stays up there forever. That's
24 ridiculous, Judge. I've been involved in a plethora of

1 cases of what I do that involve posts and defamations and
2 others and people take them down. Anybody that really
3 has a substantial social media presence is actively
4 working their Instagram, their Facebook, their Twitter,
5 and if something has caused them harm, you can easily
6 take it down, Judge. It's just another red herring of
7 this.

8 So, you know, and then -- you know, he says there
9 was no publication. That's another blatant mistruth to
10 the Court that I would give Mr. Ferguson the benefit of
11 the doubt that he hasn't checked or his clients haven't
12 told him about. There were repeated postings beyond the
13 flyer of potentially allegedly defamatory material that
14 they're saying against Mr. Costanza, let alone the oral
15 conversations and handing of the flyer that they continue
16 to do. Nothing ever happened -- you know, if
17 something -- nothing ever happened against him because
18 they posted this flyer, Judge, or if something did
19 happen, it could be actionable. Mr. Ferguson said that
20 about 15 minutes ago, Judge. Well, here it certainly did
21 happen and we laid it out in our affidavit and our
22 complaint. The problem is it's continuing to happen to
23 crush this guy's business. Okay. So the majority --

24 THE COURT: Can I -- can I --

1 MR. MADONIA: -- of the false flyer came from the
2 campaign. No, it didn't. We waited until after the
3 campaign --

4 THE COURT: Mr. Madonia, Counsel.

5 MR. MADONIA: Yes, Judge.

6 THE COURT: All right. So one of the -- you sort of
7 glossed over this notion that -- I think I heard you say
8 that none of this was in furtherance of this political
9 election. All right.

10 MR. MADONIA: I'm sorry, Judge. I misstated that,
11 Your Honor. It certainly was -- it certainly was
12 directed at the campaign at first indeed, and
13 Mr. Costanza --

14 THE COURT: All right. I had some questions.

15 MR. MADONIA: -- sat there and let him post it. He
16 didn't do anything.

17 THE COURT: And I had some questions of Mr. Ferguson
18 on this. I mean, there was definitely an election
19 between these two men. Putting aside this flyer, again,
20 what's your position -- once the election ends, does this
21 protection end? Because he's arguing your client remains
22 an active political figure. He called it in the sphere
23 of the public. I need to hear your position on this as
24 to whether there is this tail associated with the

1 election or not.

2 MR. MADONIA: Yeah. Well, if we're going to go down
3 to political figures, if we're going to go down to
4 celebrities, if we're going to go down to public figures,
5 Judge, I get that. It raises to a standard of actual
6 malice. Well, I'll tell you what, the best -- the best
7 proof of actual malice is each of the three defendants
8 that now remain in the case's own affidavits. In each of
9 their affidavits, Judge, they go in there and they say
10 that -- first off, they say that everything in that flyer
11 is true. Believe me, it's not. Ten out of thirteen of
12 them are not true so there's a dispute right there.

13 THE COURT: Well, I asked you --

14 MR. MADONIA: But they say the sole purpose of the
15 distribution and dissemination of the information is the
16 intent to hinder his --

17 THE COURT: Counsel --

18 MR. MADONIA: -- success in local politics. They
19 don't say hindering his success. That's actionable -- it
20 not only proves the malice of it, Judge, but that's
21 arguably actionable.

22 So after that election they don't have this
23 continuing right to smear somebody just because he stands
24 up there as a politician, but even if they did -- even if

1 they did, the cases are very clear. The cases are very
2 clear from *Sandholm* to *Ryan* to *Garrido*. They say that
3 there could be political right to go out there and
4 exercise your free speech in doing something. That still
5 doesn't -- that still doesn't let you protect yourself
6 under a SLAPP suit unless again you can prove that it was
7 solely meritless and retaliatory and that there's no
8 other torts that caused potential harm to the
9 defendant -- I'm sorry -- to the plaintiff and here
10 there's definite harm. They don't even address that
11 so -- you know, this is just -- Judge, it's so clear that
12 this is the kind of case that is not going to be
13 protected from the SLAPP act so I think that -- back to
14 the point, Judge. Even if it's directed at that -- the
15 other actions that we allege including these insurance
16 actions that were alleged on the part of Ms. Rodgers,
17 they don't have anything to do with this continuing
18 political campaign, that campaign or the continuing
19 campaign, so I think that that's -- that's -- it's
20 another red herring, Judge. It's another red herring.
21 It's just another straw they're grasping on without
22 citing the proper holdings from the cases or the proper
23 cases.

24 THE COURT: I guess my question really is -- maybe I

1 phrased it improperly. I thought I heard Mr. Ferguson
2 argue that your client remains -- he described it as in
3 the public sphere. He's a chairman of a local political
4 committee. He's part of fundraising efforts. He's in
5 communication with other political activists locally.
6 He's now apparently running for a new office. Does the
7 fact that this document is circulating and these
8 additional efforts by these defendants, as you claim, are
9 they still able to try and attempt to bring themselves
10 within the protection of this act if he remains, as they
11 say, a public figure, someone in the sphere of public
12 political activity?

13 MR. MADONIA: Your Honor, not when they circulate
14 something that is 79 percent false and defamatory towards
15 the plaintiff. "My Opponent's Criminal Record Is" --
16 it's clear on the face -- A, B, C, D. It doesn't say my
17 criminal record is three of these thirteen things we list
18 but the other things are misdemeanors. No. They don't
19 have the right to do that and they don't have the right
20 to go out there and exercise actual malice to cause him
21 tangible harm. They are causing him harm. It's listed
22 there and it's accepted on it in a 2-619 in the complaint
23 and in the affidavit and that's end of story, at least
24 what the Supreme Court directs us.

1 THE COURT: So your point is whether it's before or
2 after this election, it doesn't matter; they don't fall
3 within the protection -- or they're not immune on a
4 219 motion to dismiss based upon this act?

5 MR. MADONIA: Correct, Your Honor. They have a
6 better argument that can be made during that election, of
7 course. We didn't bring the suit during the election.
8 We didn't see that it rose to the level of an actionable
9 tort and bring it until it actually did start causing him
10 substantial harm, and it still is, and for the defendants
11 to know that. Did they want to see that someone doesn't
12 win an election? Yes, go out there, debate, stand on
13 your soapbox and exercise your right of freedom of
14 speech, but do you want to crush someone and destroy
15 their business for whatever other reasons by putting
16 something out full of innuendoes and mixed directions
17 that's not true? Well, you can do it, but the Illinois
18 Supreme Court and the legislature said we're going to
19 balance it out, and if that's what you do, you're not
20 going to be protected by a SLAPP act.

21 THE COURT: Does that conclude your comments,
22 Counsel?

23 MR. MADONIA: Yes. I think Mr. Donohue may have a
24 couple of comments, Judge, if that's okay.

1 MR. DONOHUE: Judge, if we have time, if I could just
2 be heard very briefly. I would like to point out that
3 Mr. Ferguson focused primarily on the defamation claim
4 and made some arguments that Mr. Costanza is arguably a
5 public figure, and case law clearly says that if you hold
6 public office, you're a public official, you're a public
7 figure, and the *New York Times v. Sullivan* standard would
8 apply which would require actual malice.

9 Now, I think the distinction to be made on the
10 flyer is that the claim is based on the fact that the
11 defamatory statement is -- the defendants' flyer says
12 that my client has a criminal record and is a career
13 criminal and then lists thirteen specific items only
14 three of which are crimes, but the gist of that flyer
15 under *Parker vs. House O'Lite Corporations* in Illinois is
16 you have to look at -- and it's also in *American*
17 *Hospital vs. Chicago Tribune Companies*. You have to look
18 at the headline in the article so for both -- say for
19 sake of the analogy this is an article, this flyer. It
20 says "My Opponent's Criminal Record Is", which is
21 accusing him of crimes, which is a category of defamation
22 per se. So now because he's a public official, we have
23 to determine whether or not it was done with actual
24 malice.

1 Well, there's two things that I think support our
2 argument that it was done with actual malice. One, are
3 the statements in the defendants' individual affidavits
4 that Mr. Madonia addressed, but, more importantly, in the
5 body of the reply after we filed our response saying that
6 they were not immune because they couldn't prove that it
7 was meritless or it was retaliatory. So it's the
8 *Sandholm* to say it's not solely based on their
9 petitioning under the First Amendment -- I'm trying to
10 truncate the argument because I know we have time
11 constraints. So you now have we say these are not
12 crimes, they're clearly civil matters, and what the
13 defendants did in their reply is they have pivoted trying
14 to bootstrap up an innocent construction argument and a
15 substantial truth argument by saying, well, no reasonable
16 person would believe that a foreclosure or a bankruptcy
17 is a crime.

18 So under *American Hospital* and *Parker*, the gist of
19 that flyer is that these are all crimes, and now when
20 we've pointed out that they're civil matters, the
21 defendants shift and say, well, no one would believe
22 that, and the net effect of the affidavits and that shift
23 is that the defendants have now backed their way into
24 admitting actual malice, which is a knowledge of the

1 falsity of the statement or a reckless disregard for the
2 truth or falsity of the statement, and these are not
3 protected opinions because these are all verifiable.

4 In fact, if I remember correctly -- I don't have
5 the flyer in front of me, Judge, so I'll beg your
6 indulgence, but I do believe on the flyer Mr. Sattler or
7 whoever prepared the flyer as his agent under his
8 direction listed actual administrative case numbers for
9 Department of Insurance like M.L. -- whatever. I can't
10 remember offhand, but in the *Maag* case that Mr. Ferguson
11 stated, the Court -- the Fifth District Appellate Court
12 of which Mr. Maag was a sitting justice at the time said
13 because this flyer -- while it was platuverative
14 (phonetic) and inflammatory, because they could verify
15 it, it wasn't a statement of opinion, but because it was
16 during a political campaign, it was protected. This is
17 not the case here. These are -- we're talking solely
18 about the aftereffect and the *Garrido*, and one of the
19 things that is a problem for the defendants and -- is we
20 didn't choose to make that flyer and say "My Opponent's
21 Criminal Record Is" and then call him a career criminal.
22 He also says he's defrauded his creditors. On the bottom
23 left-hand corner of that flyer it lists other things as
24 an afterthought that specifically names Mr. Costanza.

1 Now, under the Innocent Construction Rule in
2 Illinois, if a statement is susceptible to an innocent
3 interpretation or a reasonable interpretation that the
4 statement was about a person other than the plaintiff,
5 then it's susceptible to an innocent construction and
6 it's a defense. I think that the defendants have thrown
7 that out by saying "My Opponent's Criminal Record Is" and
8 may be Mr. Costanza so that there's no -- there's no way
9 that it can be construed that they're talking about
10 someone else.

11 And if I can go to one more point. This is -- I
12 mean, we're talking about whether or not they're immune
13 from the SLAPP and we -- the *Sandholm* case says
14 specifically a claim subject to dismissal under SLAPP
15 under the CPA -- actually this is Citizens Participation
16 Act -- only if the plaintiff filed the suit solely in
17 retaliation against the acts of the defendants, and
18 Mr. Costanza's affidavit shows that from the election to
19 the time of filing his affidavit, that Plaintiff
20 RMS Insurance of which Mr. Costanza is the sole
21 shareholder so it's kind of an alter ego situation has
22 lost almost \$30,000 in revenue and premiums from people
23 that have canceled, and we then set forth I believe the
24 three or four customers of his agency to this point that

1 have canceled and caused him -- those are readily
2 verifiable and ascertainable damages. That's not a
3 matter of opinion. That happened. In fact, one of his
4 clients said we're going -- we're not going to renew
5 because you're under investigation for insurance fraud.
6 He's not under investigation for insurance fraud.

7 MR. FERGUSON: I'm going to object to that statement,
8 Your Honor.

9 MR. DONOHUE: And we pointed out in our response he's
10 never been charged with insurance fraud.

11 THE COURT: He said it's in the affidavit.

12 MR. DONOHUE: These are just -- I don't know what the
13 defendants' motivation was post the election, you know,
14 but clearly the argument can be made that during the
15 election, you know, it's pretty much all is fair in love
16 and war, but once the election was over, I don't think
17 the defendants can maintain that their actions were
18 genuinely aimed at achieving a favorable outcome for a
19 government action, and they even said in their affidavits
20 our purpose is present tense to inform the electorate and
21 hinder Mr. Costanza's local political success. Well,
22 hinder means to --

23 THE COURT: Counsel, I had the same question of
24 Mr. -- I had the same question of Mr. Ferguson. The

1 SLAPP act immunity defense, you've gone through the
2 factors, he's gone through it. Does it apply to any type
3 of cause of action that may follow if it's based upon the
4 same set of actions that your client protests?

5 MR. DONOHUE: Only if it's solely based on
6 retaliation for their exercising their rights to petition
7 under the First Amendment.

8 THE COURT: Your client's complaint has a lot of
9 different legal theories, but they could all be
10 potentially trumped if the immunity applies; is that
11 right?

12 MR. MADONIA: No, Judge, not if they can show actual
13 harm, an action -- an actual harm from defamation or
14 other tort actions. Then it doesn't apply, and the case
15 says that. Whether you're exercising freedom of speech,
16 yes, maybe that's a SLAPP type thing that could be
17 protected. Even if it's substantially true as *Garrido*
18 says, it still doesn't protect you if there's actual
19 actionable harm.

20 THE COURT: It looks like we lost Mr. Donohue. I
21 appreciate you entering on his behalf.

22 MR. MADONIA: Yes, Judge.

23 THE COURT: Mr. Ferguson, do you wish to make a
24 reply?

1 MR. FERGUSON: Just briefly. Thank you, Judge.
2 First of all, there is nothing in the affidavit that
3 states affirmatively that there was a client that stated
4 that they switched insurance carriers because of this
5 flyer just for the record.

6 There's a lot of discussion that *Sandholm* has been
7 clarified or is no longer good law. No, it is. It's
8 from the Illinois Supreme Court. It still stands.
9 There's been no overturning. It has no negative
10 treatment and so the test is still the same. I don't
11 want to belabor the Court, but were they -- was the
12 speaker engaged in an act which they were allowed to
13 speak to and was it in furtherance of addressing a
14 favorable outcome in the government. That's the test and
15 then the burden shifts.

16 Regarding real injury or actual harm, the
17 plaintiff is contesting that you can't -- this doesn't
18 automatically apply to a SLAPP action because we're
19 stating that we suffered harm. No, that's not how it
20 works. Most of these SLAPP actions usually do -- and the
21 courts recognize this across the board. They include a
22 claim for tortious interference of business advantage and
23 they do claim damages. In fact, if this was true, the
24 SLAPP act would never apply to somebody who is a

1 politician and also a businessman because all they would
2 have to do is say I'm a businessman and because I ran an
3 unsuccessful campaign and because my history came out,
4 therefore, you can never say anything bad of me, and if
5 you do, I'll come after you. That doesn't make sense.
6 Again, the focus is not on the actual harm or the real
7 injury but what was the defendants' or the movant's or
8 speaker's purpose and here it's a political flyer. That
9 is the purpose.

10 Was the statement that, well, a layman would have
11 to get out *Black's Law Dictionary* to understand that
12 being terminated from a job is a criminal activity or
13 administrative matters are not criminal. That's not
14 true. Again, Mr. Donohue said it in his argument. These
15 are all clearly civil matters, clearly civil, and that's
16 what we're stating here. You can numerate them but it's
17 really just a group. It's a group of termination from
18 employment and administrative matters. Those are the
19 groups.

20 So based on the fact that somebody -- a reasonable
21 person could understand that, it makes it a hyperbole and
22 it also makes it a substantial truth. There is an
23 affidavit -- well, and the Court understands and the
24 Court knows, of course, that self-serving statements or

1 conclusions don't belong in an affidavit. It's only
2 those that the person making the statement has actual
3 knowledge of the factual basis for.

4 The gist is -- the gist that stings is the
5 opponent has a criminal record and it's true so we'd ask
6 that the defendants be dismissed from this matter and
7 attorney's fees be awarded to them under the act.

8 THE COURT: Mr. Donohue, we lost you. You froze. I
9 had one pending question that Mr. Madonia answered. I
10 thought you were toward the end, Counsel. Did you have
11 anything else you wanted to add before your screen froze?

12 MR. DONOHUE: Yeah. I just wanted to make it very
13 clear that I think Mr. Ferguson's argument about the
14 truth of the flyer is misplaced. The gist of the flyer
15 is that Mr. Costanza is a criminal, he's committed
16 crimes, and then they shifted and said no reasonable
17 person would believe that foreclosure and bankruptcy are
18 crimes and we're not saying that they're not truth.
19 We're saying that the headline says my criminal record --
20 "My Opponent's Criminal Record Is." He's a career
21 criminal and here's the thirteen crimes, people, and ten
22 of those are not crimes. Accusing someone of a crime is
23 defamation per se.

24 I think I addressed the actual malice in that by

1 saying -- in shifting and pivoting their argument to say
2 that no one would believe that those are crimes, they've
3 admitted their knowledge of the falsity of the entire
4 flyer, which has to be taken in context with the headline
5 and the content under *American Hospital vs. Tribune* and
6 that makes it defamation per se, which the Court has --
7 it's a 2-619 and so we have damages which were not solely
8 based on their participation in government. They've lost
9 business so this is not subject to a SLAPP dismissal
10 under *Sandholm* which is the controlling case in this
11 state.

12 THE COURT: Thank you.

13 MR. DONOHUE: Thank you, Judge.

14 THE COURT: Counsel, I know we have a deadline to get
15 the argument accomplished and then we need a decision.
16 I'm going to need some time to digest this and issue a
17 written decision on it. I'm not ruling from the bench.
18 I'm also mindful of six other written decisions that I
19 have pending from the arguments over the last three weeks
20 so -- and then I have a jury trial in April and a week-
21 long educational conference so I'm not optimistic that
22 I'm going to reach this immediately.

23 MR. DONOHUE: Okay. Well, we also have -- we have
24 responses due on Mr. Ferguson's 2-615 on the 4th of

1 April, too, Judge, so we have work to do.

2 MR. MADONIA: You know, Judge, I would ask -- and
3 I've asked Mr. Ferguson. Do you think it would be
4 appropriate if we suspended or got some extra time on the
5 2-615 just in case, you know, if the -- if this -- if
6 defendants prevail, you know, we can save the parties
7 some money holding off on that briefing?

8 THE COURT: Look, from a judicial economy, economy to
9 the parties, that makes a great deal of sense, but I
10 wouldn't order that if the parties wish to go on with
11 their briefing and argument.

12 MR. FERGUSON: We wouldn't object to suspending the
13 current briefing schedule for the remaining motions.
14 Just for judicial economy, it doesn't make sense, I
15 agree.

16 THE COURT: You would or would not?

17 MR. FERGUSON: Would not object to suspending --

18 THE COURT: Oh, I thought you said you would.

19 MR. FERGUSON: No.

20 THE COURT: So it sounds to me like both sides are
21 willing to stay continued litigation on the other motion
22 until we get a decision on this one.

23 MR. DONOHUE: I think that makes sense, Judge.

24 THE COURT: I'm going to set April -- I'm sorry --

1 May 13 as my deadline for the decision. I'm anticipating
2 a written decision before then.

3 I can see everyone back I think at 9:00 a.m. that
4 morning, Madam Clerk, for status?

5 THE CLERK: 9:15.

6 MR. DONOHUE: Judge, should we keep the April 22nd
7 status?

8 THE COURT: I won't need the April 22nd status. That
9 was on the case overall, was it not?

10 MR. DONOHUE: I think it was the computer generated
11 case management.

12 THE COURT: Yeah, the CMC, case management
13 conference. So we're going to abate the briefing and
14 arguments on the other motion, await the decision on this
15 motion, and I expect to have it in writing to the
16 attorneys by the 13th, if not sooner. It's going to
17 depend on how quickly I address the other motions.

18 MR. DONOHUE: Okay.

19 THE COURT: A docket entry is fine for me unless one
20 of you wants to have an actual order suspending the
21 briefing and argument on the other issue, striking the
22 April 27 date or whatever it was, and then setting this
23 for decision.

24 MR. DONOHUE: I'll defer to Mr. Ferguson but a docket

1 entry stating, that's fine with me, Judge.

2 MR. FERGUSON: A docket entry will suffice.

3 MR. MADONIA: Yes, same, Judge, and if we could list
4 that we are nonsuiting Defendant Cheryl Russell-Smith
5 without prejudice subject to refiling.

6 THE COURT: Yeah. Look, on reflection, I forgot that
7 there was a nonsuit. We should have an order from today.

8 MR. DONOHUE: Okay.

9 THE COURT: So that there's clarity in the record.
10 Circulate that -- send it over -- I guess just exchange
11 the order. Make sure both sides agree to it as to form
12 and then e-file it.

13 MR. DONOHUE: Thank you, Your Honor.

14 THE COURT: All right. Counsel, have a great
15 weekend, parties and everyone else present.

16 MR. FERGUSON: Thank you, Judge.

17 MR. MADONIA: Thank you, Judge. You too.

18 (End of proceedings.)

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1 STATE OF ILLINOIS
2 IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
3 BOONE COUNTY

4 I, Michele A. Fitch, an Official Court Reporter
5 for the Circuit Court of Boone County, 17th Judicial
6 Circuit of Illinois, transcribed the electronic recording
7 of the proceedings in the above-entitled cause to the
8 best of my ability and based on the quality of the
9 recording, and I hereby certify the foregoing to be a
10 true and accurate transcript of the said electronic
11 recording.

12
13 
14 _____
15 Official Court Reporter

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17 Dated this 31st day of March, 2022.
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