

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
BOONE COUNTY, ILLINOIS

RMS INSURANCE SERVICES, INC D/B/A
Plaintiff/Petitioner

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)

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v

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SATTLER, DONALD G ET AL

)

Defendant/Respondent

)

Reviewing Court No: 4-23-0143

Circuit Court No: 2021L30

Trial Judge: Balogh

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

RMS INSURANCE SERVICES,)
INC., an Illinois)
corporation d/b/a/)
FLANDERS INSURANCE)
AGENCY, INC., and OWEN G.)
COSTANZA, an individual,)

Plaintiffs,)

vs.)

CASE NO. 2021-L-30

DONALD G. SATTLER, an)
individual, MARION)
THORNBERRY, an)
individual, ELISABETH M.)
RODGERS, an individual,)

Defendants.)

ARGUMENT

REPORT OF PROCEEDINGS of the electronic
recording of the hearing before The Honorable Stephen E.
Balogh on November 10, 2022.

APPEARANCES:

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

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

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 1:28 p.m.)

6 THE COURT: We're here for argument on the combined
7 motion to dismiss in RMS Insurance Services and Owen
8 Constanza versus Donald Sattler, Marion Thornberry and
9 Elisabeth Rodgers.

10 Before we get going, could we have counsel
11 introduce themselves and tell us who they're here with.

12 MR. DONOHUE: Good afternoon, Your Honor. Timothy P.
13 Donohue on behalf of the plaintiffs.

14 THE COURT: Hello, Counsel.

15 MR. MADONIA: Joseph J. Madonia, Judge, on behalf of
16 plaintiffs.

17 THE COURT: Hello.

18 MR. MADONIA: Hi, Judge.

19 MR. FERGUSON: Good afternoon, Judge. Trent Ferguson
20 on behalf of the defendants. All defendants are present.

21 THE COURT: All right. And it appears that the
22 plaintiff is also present.

23 MR. DONOHUE: Yes, he is, Your Honor. I'm sorry.

24 THE COURT: All right. Gentlemen, I will tell you

1 that I have read all of the briefs, read all of the cases
2 associated with both of your memoranda and I think I have
3 a pretty good handle on the facts and the arguments, and
4 the reason I'm sharing that with you is rather than just
5 have the parties regurgitate what they've done in their
6 motions --

7 I guess since it's your motion, Mr. Ferguson, I'd
8 like to have you make any brief statement you'd like to
9 make and then I might start interrupting you with
10 questions, and then before we're done, I'll hear from
11 plaintiffs' counsel.

12 Is just one of you going to speak or do you both
13 plan to --

14 MR. DONOHUE: I think probably I'll do most, if not
15 all, of the speaking, Judge.

16 THE COURT: All right. And this is -- essentially
17 we're set for argument. I want to make sure I understand
18 everything before I make a decision on the motion because
19 you don't always get -- you know, I find that I don't
20 always get things right just by reading the briefs.

21 So with that, Mr. Ferguson.

22 MR. FERGUSON: Thank you, Judge. There's two pending
23 motions, a motion to dismiss and a motion for summary
24 judgment. Does the Court have a preference on which

1 one --

2 THE COURT: The motion to dismiss -- let's focus more
3 on the motion for summary judgment because it's -- takes
4 care of the whole complaint if I find in your favor.

5 MR. FERGUSON: That's my understanding, Your Honor.

6 So the motion for summary judgment is based on the
7 fact of -- or the theory of substantial truth, as the
8 Court's aware. We were previously here on a SLAPP
9 motion, which is a newer act in Illinois, and that was a
10 motion to dismiss and at that time, as the Court's aware,
11 the Court, then Judge Barch, decided that the majority --
12 just over the majority of the allegations -- specific
13 allegations in the political flyer were true; however, he
14 didn't -- he stated in his ruling that the other ones may
15 be substantially true but that's an affirmative defense
16 so now we're here coming back today saying, well, they
17 are substantially true. The test, of course, as the
18 Court is aware, is whether or not the gist or the sting
19 is true, not the real facts that go with it.

20 THE COURT: Well -- and let me ask you something.
21 Judge Barch in his ruling talked about -- essentially
22 read in the context of the whole this is somehow
23 defamatory or could be construed by a jury as being
24 defamatory. How does that change in the con- -- in the

1 construct of a motion for summary judgment?

2 MR. FERGUSON: Well, again, that was a motion to
3 dismiss so we had to find that everything was true under
4 the -- or not meritless or basically true under the
5 SLAPP --

6 THE COURT: That it was absolutely meritless.

7 MR. FERGUSON: Correct.

8 THE COURT: I understand that, but bottom line is if
9 it's substantially true, isn't it meritless?

10 MR. FERGUSON: No. It's a different test. The
11 standard, of course, for a motion for summary judgment
12 and a motion to dismiss are different.

13 THE COURT: There can't be any issue of fact.

14 MR. FERGUSON: Correct, correct, and the standard is
15 again not if it's -- not if it's true, if it's
16 substantially true, and that's what the Court didn't
17 decide, whether the gist or the sting --

18 THE COURT: Okay.

19 MR. FERGUSON: -- is correct. And again, I've
20 provided in the motion plenty of case law that gives
21 examples. One is there is substantial truth to the
22 statement that somebody was convicted of domestic battery
23 when, in fact, it was just a simple battery that was
24 later expunged. Substantially true. It's whether the

1 sting or the hurt holds true so that's what we didn't
2 rule on.

3 So the remaining allegations -- there are six of
4 them plus the overall characterization of the criminal
5 record. I can go through those.

6 THE COURT: Yeah. Where did that come from?

7 MR. FERGUSON: They always talked about last
8 argument --

9 THE COURT: I know, but I --

10 MR. FERGUSON: -- from the plaintiffs' counsel --

11 THE COURT: And that's maybe a question I'll address
12 to you but --

13 Go ahead.

14 MR. FERGUSON: I don't know if the Court wants me to
15 go -- they've seen the reports.

16 THE COURT: I will -- I will -- I think that's one
17 that's better for the plaintiffs because you're right.
18 Judge Barch talked about -- and the plaintiffs talked
19 about in their brief quite a bit about the fact that he
20 was -- that Mr. Costanza has never been criminally
21 convicted of anything having to do with fraud and
22 especially as regard to -- in regard to insurance fraud;
23 right?

24 MR. FERGUSON: Correct. The insurance fraud is a

1 separate issue outside the overall criminal.

2 THE COURT: But there's no allegation that he has
3 been, is there?

4 MR. FERGUSON: There's not.

5 THE COURT: Nobody has ever said he was, have they?

6 MR. FERGUSON: That's our position. Every statement
7 is carefully worded and 100 percent absolutely true, is
8 backed up by official state documents, by court documents
9 and by admissions of the plaintiff, some of which
10 overlap, and we have multiple uncontested evidence of
11 each statement.

12 THE COURT: Okay. Let me ask you a couple of context
13 questions. At the time the flyer was disseminated, at
14 the time that the blog, which basically repeated the
15 allegations of the flyer, was online, at the time that
16 this was going on, the public dissemination of the
17 allegations at the heart of this, wasn't there an ongoing
18 election for village president -- well, there was an
19 election for probably more than just village president,
20 but wasn't one of the defendants running for village
21 president and Mr. Costanza was the incumbent?

22 MR. FERGUSON: Correct. Defendant Sattler was
23 running against Mr. Costanza and ultimately Mr. Sattler
24 won, which is I think why we're here.

1 THE COURT: Okay. I don't know if it makes a
2 difference, but one of the allegations in the plaintiffs'
3 complaint is that -- Mr. Sattler or Stattler?

4 MR. FERGUSON: Sattler.

5 THE COURT: Sattler. Thank you. Mr. Sattler was at
6 the time prior to the election but he was on the village
7 zoning board.

8 MR. FERGUSON: Correct.

9 THE COURT: And was apparently asked to resign or be
10 fired.

11 MR. FERGUSON: That's my understanding.

12 THE COURT: All right. Does it matter -- do I need
13 to know why he was asked to resign? Does it make any
14 difference at all?

15 MR. FERGUSON: None in my opinion, none at all.

16 THE COURT: Okay. Okay. Because I don't and it's --
17 there's -- all right. So your defense is, you know,
18 you've got to prove that the statement was made, that it
19 was false, and that at the time it was made, the
20 individual publishing the statement knew it to be false,
21 and at least in the context of his business or his
22 ability to do business, is that not per se defamation?

23 MR. FERGUSON: Per se defamation I think is a
24 different category where it's specific allegations --

1 THE COURT: Well, if it impugns somebody's ability to
2 conduct their profession or business.

3 MR. FERGUSON: Correct.

4 THE COURT: That's a category of per se defamation.

5 MR. FERGUSON: And then we get back to the defense,
6 of course --

7 THE COURT: Right.

8 MR. FERGUSON: -- is whether --

9 THE COURT: And truth is always a defense. And
10 essentially you're saying that there is no way that this
11 could be read as being false?

12 MR. FERGUSON: Correct.

13 THE COURT: All right. I got it.

14 Go. Counsel, do you --

15 MR. DONOHUE: Oh, for me?

16 THE COURT: Yeah.

17 MR. DONOHUE: Well, our position is that this motion
18 for summary judgment is just repeating their reply to the
19 SLAPP motion.

20 THE COURT: So what?

21 MR. DONOHUE: Well, there's been -- in the SLAPP
22 motion, there's a finding of record that --

23 THE COURT: So what? I'm not bound by that.

24 MR. DONOHUE: Well, there are found that there's

1 genuine issues here and this last motion --

2 THE COURT: No. They found that your suit wasn't
3 meritless.

4 MR. DONOHUE: And they found that there was questions
5 on the defamation that needed to go to the jury.

6 THE COURT: And what were those questions?

7 MR. DONOHUE: The specific -- that we set out in our
8 response.

9 THE COURT: Well, I read your brief and that's this
10 idea that it could be construed as false when taken on
11 the whole.

12 MR. DONOHUE: Right. And it's construed as false
13 after --

14 THE COURT: How can it be construed as false?

15 MR. DONOHUE: Well, the entire flyer, if you will,
16 has highlights on it in big bold on the corners that say
17 "Insurance fraud" and the bottom says, you know, stop
18 Mr. Costanza from defrauding our community.

19 THE COURT: Okay. "We cannot allow a repeat criminal
20 like Mr. Costanza to defraud our village like he has
21 defrauded his creditors, customers, past employers and
22 the Wisconsin, Indiana and Illinois Department of
23 Insurance. What else has he done to us." Is that what
24 you're referring to?

1 MR. DONOHUE: Yeah. That's the gist of that flyer.

2 THE COURT: Well, and that's the -- kind of the
3 closing statement.

4 MR. DONOHUE: It's also -- it's also highlighted in
5 the corners "Insurance fraud." Insurance fraud is a
6 felony.

7 THE COURT: Well, it's also a civil problem. There's
8 a civil action for fraud. The regulatory departments
9 treat it administratively.

10 MR. DONOHUE: And I don't think that the general
11 public can make that decision based on that flyer.

12 THE COURT: So what?

13 MR. DONOHUE: Well, they're saying that "My
14 opponent's criminal record is," and he's committed
15 insurance fraud.

16 THE COURT: They never say that. I got the flyer
17 right here in front of me.

18 MR. DONOHUE: "My opponent's criminal record is."

19 THE COURT: A repeat criminal like Mr. Costanza to
20 defraud our village like he has -- well, he -- I mean, as
21 a matter of truth, doesn't he have one plea of guilty and
22 two convictions in the criminal context?

23 MR. DONOHUE: On misdemeanors that were both over ten
24 years old.

1 THE COURT: So?

2 MR. DONOHUE: They're not admissible.

3 THE COURT: They're not admissible but they're not
4 false.

5 MR. DONOHUE: And they're not -- they're painting him
6 as a career criminal. One of those is a DUI.

7 THE COURT: So what?

8 MR. DONOHUE: That tens of thousands of people in
9 this state --

10 THE COURT: But they're true. How does that make
11 them defamatory?

12 MR. DONOHUE: But the other ones were found not to be
13 true.

14 THE COURT: Okay. Well, does it make a difference --

15 MR. DONOHUE: The majority --

16 THE COURT: Does it make a difference in the context
17 that he was running for village president and that this
18 all concerned a matter of public interest?

19 MR. DONOHUE: No, it doesn't because that was
20 adjudicated on their SLAPP motion.

21 THE COURT: What?

22 MR. DONOHUE: That was adjudicated on the SLAPP
23 motion.

24 THE COURT: I don't even understand what you're

1 talking about.

2 MR. DONOHUE: Okay. Well, they filed a motion to
3 dismiss under 2-619 --

4 THE COURT: All right. Correct me if I'm wrong, but
5 neither party has raised this as far as I can tell. I
6 know Judge Barch didn't raise it. But in the context of
7 the law of defamation, right, if it concerns either a
8 party of a matter of public interest or a public person,
9 then there is a heightened standard.

10 MR. DONOHUE: And we did argue that and it's in the
11 transcripts from the hearing.

12 THE COURT: The matter of privilege?

13 MR. DONOHUE: The matter -- privilege never came up
14 and the matter of -- the defendants never argued that
15 they had a privilege.

16 THE COURT: No, they haven't, but you still have
17 to -- you know --

18 MR. DONOHUE: We got to Mr. Costanza being a public
19 figure. We covered --

20 THE COURT: And Judge Barch said he absolutely is a
21 public figure.

22 MR. DONOHUE: He did and we argued the actual malice
23 and the reckless disregard for the truth.

24 THE COURT: Where -- okay.

1 MR. DONOHUE: It's in this -- it is in the
2 transcript --

3 THE COURT: Show me -- tell me one single untrue
4 statement.

5 MR. DONOHUE: Can I have the flyer, Joe?

6 All right. Well, the two huge Xs that say
7 "Insurance fraud" are not true.

8 THE COURT: He was administratively found to have
9 committed fraud by the Wisconsin Department of Insurance,
10 by the Illinois Department of Insurance, and he in each
11 case affirmatively responded in applications for
12 producer's licenses that he had no criminal convictions
13 and that he had no prior discipline.

14 MR. DONOHUE: Right. And in his affidavit we went
15 through that and we discussed it with the Court that
16 those were mistakes in a computer application --

17 THE COURT: Well, I -- apparently those departments
18 of insurance felt differently because one of them refused
19 to issue a license for 30 days. One of them fined him
20 for \$1500 and one of them suspended his business's
21 license permanently and fined his business \$30,000.

22 MR. DONOHUE: And we can go through every issue of
23 that. That involved a partner of his business that was
24 stealing money from the business and it was litigated in

1 the circuit --

2 THE COURT: There is -- I went through those records,
3 which were all produced by FOIA, and there is nothing --
4 or pursuant to FOIA request -- and there is nothing in
5 there except for the department's findings that
6 Mr. Costanza provided fraudulent information to those
7 departments, and the Department of Insurance in Illinois
8 got him for repeated instances of fraud and mis-
9 representation and misuse of funds.

10 MR. DONOHUE: And again, that was a partner that was
11 litigated in the Circuit Court of Cook County that was
12 stealing --

13 THE COURT: But he's the licensed producer, and if he
14 is the sole member of the propriety interest, isn't he
15 responsible for those things? Why else would they fine
16 him in the course -- in the course of the LLC? Why else
17 would they fine him \$30,000? They didn't fine his
18 partner \$30,000.

19 MR. DONOHUE: Well, I wasn't at that so I don't know,
20 but I do know that there were allegations that his
21 partner was the one stealing the money and I'm not sure,
22 but I believe --

23 THE COURT: Why is it not his fault that when asked
24 if he had ever had a criminal conviction or had ever had

1 prior discipline, that he affirmatively answered no on
2 those applications?

3 MR. DONOHUE: Because on the Wisconsin application,
4 it was a new form on the computer rather than a
5 handwritten one and he made a mistake and he let
6 Wisconsin know that he made a mistake and they held his
7 license for 30 days while they cleared it up.

8 THE COURT: That isn't -- that isn't what they --
9 they said that we are going to hold it for 31 days I
10 think it was because of the misrepresentation.

11 MR. DONOHUE: Right, but the misrepresentation was
12 found to be de minimis because it was a mistake on
13 clicking a box on a computer.

14 THE COURT: What about Indiana? They did the same
15 thing. They said we're not -- not only are we not going
16 to give you a producer's license, we're going to fine you
17 \$1500.

18 MR. DONOHUE: Again, I believe it was the same
19 situation. These were not intentional. Fraud has to be
20 intentional, Your Honor. We both know that. You know,
21 if there's a mistake made on an application, usually it
22 gets corrected and there's usually information that says
23 to the best of my knowledge and belief.

24 THE COURT: Let's go down this one at a time because

1 I think I'm missing something.

2 1995, pleads guilty to filing a false report in
3 Boone County. True or correct?

4 MR. DONOHUE: That's true.

5 THE COURT: True or false?

6 MR. DONOHUE: That's true.

7 THE COURT: 1999, terminated from Liberty -- and
8 there's a mistake here. It should say Liberty Mutual
9 Insurance for fraud misrepresentation.

10 MR. DONOHUE: I believe that's false.

11 THE COURT: And how do you believe that's false
12 knowing that the records have been produced in this -- in
13 this case?

14 MR. DONOHUE: I believe on this case with Liberty
15 Mutual there was a claim made, there was an investigation
16 and they found that it was not fraudulent and they gave
17 him his severance and his retirement, if I'm correct.

18 THE COURT: Okay. Well, Counsel, I read through the
19 record and it says in the record -- and I'm
20 paraphrasing -- that Liberty Mutual Insurance, the
21 company, filed an administrative complaint with the
22 Wisconsin Department of Insurance accusing him of fraud
23 and misrepresentation and that it, therefore, terminated
24 his employment for cause. That's what Liberty Mutual

1 did.

2 MR. DONOHUE: That's what they did. They filed
3 something accusing him. The ultimate finding was no
4 fraud.

5 THE COURT: And he was terminated because of that
6 reported fraud --

7 MR. DONOHUE: Because of that accusation, which was
8 later found to be not fraud. You're basing it on an
9 accusation, Judge.

10 THE COURT: No. In 1999 Costanza was terminated by
11 Liberty Mutual Insurance Company for fraud and
12 misrepresentation.

13 MR. DONOHUE: He was accused of fraud and
14 misrepresentation.

15 THE COURT: Mr. -- I'm parsing here. The statement
16 says that Liberty Mutual fired him for fraud and
17 misrepresentation. Is that untrue?

18 MR. DONOHUE: I believe it is. I believe that he was
19 accused of it.

20 THE COURT: Why did Liberty Mutual fire him?

21 MR. DONOHUE: I don't know.

22 THE COURT: For fraud and misrepresentation. That's
23 what they told the Wisconsin Department of Insurance.

24 MR. DONOHUE: But this is only half of the story.

1 THE COURT: It doesn't matter.

2 MR. DONOHUE: Yes, it does, Judge.

3 THE COURT: The statement -- the statement is
4 verifiably true.

5 MR. DONOHUE: So is the fact that he was found not to
6 have committed fraud after the investigation, which
7 negates that statement.

8 THE COURT: Okay. In 1999 Costanza pled guilty to
9 writing bad checks. True or false?

10 MR. DONOHUE: That's true.

11 THE COURT: In 2000 Costanza suffered a home
12 foreclosure in Boone County, Illinois.

13 MR. DONOHUE: It's true.

14 THE COURT: All right. In 2000 Costanza completed a
15 bankruptcy filing.

16 MR. DONOHUE: That's true.

17 THE COURT: In 2007 Costanza pled guilty to drunk
18 driving.

19 MR. DONOHUE: That's true.

20 THE COURT: In 2008 the State of Wisconsin denies
21 Costanza's request for an insurance license due to a
22 false application.

23 MR. DONOHUE: That's true and we discussed it.

24 THE COURT: Right. 31 days. Correct?

1 MR. DONOHUE: Again, yes, but he got his license so
2 it wasn't denied. It was held.

3 THE COURT: Right, for -- but it was denied.

4 MR. DONOHUE: But this says denied, meaning he never
5 got his license to the general public. We're talking
6 about the general public.

7 THE COURT: In 2010 the State of Indiana fined
8 Costanza for a false application and revoked his
9 insurance license.

10 MR. DONOHUE: Did they revoke his license or did they
11 revoke RMS's license?

12 THE COURT: It was denied. He was not allowed to
13 have an insurance license. That was an application for
14 an insurance license so they just said you can't have
15 one.

16 MR. DONOHUE: I don't believe that that's true.

17 THE COURT: So the word revoked is incorrect. Your
18 client wants to tell you something.

19 MR. DONOHUE: Excuse me.

20 (Brief pause.)

21 MR. DONOHUE: He's telling me, Judge, that his
22 license was issued. It was not revoked.

23 THE COURT: Okay. Well, the records in the file
24 indicate that he was fined \$1500 and that that

1 application was denied. The order of discipline -- the
2 \$1500 fine was entered by consent.

3 MR. DONOHUE: And he still got his license.

4 THE COURT: Later.

5 MR. DONOHUE: So basically it's a traffic ticket.

6 THE COURT: Okay. And then there are three all
7 concerning an Illinois Department of Insurance
8 investigation.

9 MR. DONOHUE: That stems from the litigation with his
10 former partner in Cook County.

11 THE COURT: And in 2015 -- this is the state -- this
12 is the one that matters. In 2015 the Illinois Department
13 of Insurance disciplined and fined Costanza \$30,000 for
14 multiple repeat violations. Is that true?

15 MR. DONOHUE: He was fined, yes.

16 THE COURT: For multiple repeat violations?

17 MR. DONOHUE: Right.

18 THE COURT: All right. And then there's that
19 statement we already read, which I think your argument is
20 that it's -- creates the impression that he has been
21 criminally convicted of fraud.

22 MR. DONOHUE: Yeah, especially when you read the
23 entire flyer in context and the very first words on it
24 are "My opponent's criminal record is."

1 THE COURT: Where does it say "My opponent's criminal
2 record" --

3 MR. DONOHUE: May I approach? Judge, may I approach
4 the bench?

5 THE COURT: Hold on. I've got it right here. Where
6 does it say "My opponent's criminal record" --

7 MR. DONOHUE: May I approach the bench?

8 THE COURT: Sure.

9 MR. DONOHUE: Here, Judge. This is the flyer.
10 (Tenders document.)

11 THE COURT: I'm looking.

12 MR. DONOHUE: Right there.

13 THE COURT: Oh, yeah. "My opponent's criminal record
14 is." Okay. And that's where we get this idea that the
15 context that a lot of this isn't criminal.

16 MR. DONOHUE: Correct. This is the headline. This
17 is the headline and the gist -- the meaning of this
18 document is Owen is a criminal who has committed
19 insurance fraud and defrauded the people of Poplar Grove.
20 There's no evidence here that he's defrauded anyone in
21 Poplar Grove. This is --

22 THE COURT: It doesn't say that he has. It says we
23 can't give him the chance to defraud us like he has
24 defrauded --

1 MR. DONOHUE: We cannot allow him to defraud our
2 village.

3 THE COURT: Like he has defrauded his creditors,
4 customers, past employers and all of these insurance
5 departments.

6 MR. DONOHUE: And since we're not required to prove
7 our case at the pleadings -- or at the summary judgment
8 stage and the only thing we're here for today is to
9 determine, A, on a motion for summary judgment only
10 whether there's a genuine issue of material --

11 THE COURT: There is no genuine issue that I can see.
12 I'm telling you and -- and this is -- he didn't raise it.
13 You didn't raise it. Judge Barch didn't raise it. This
14 is an election. In this case there is a First Amendment
15 privilege.

16 MR. DONOHUE: I would -- I respectfully disagree with
17 you that we didn't raise it.

18 THE COURT: I am telling you that they raised the
19 fact that he was a public person.

20 MR. DONOHUE: And I raised the fact --

21 THE COURT: But the standard for defamation in this
22 case is that it not only has to be false, it has to have
23 been published maliciously. Not only knowing that it was
24 false but knowing that it would cause damage, knowing --

1 it has to be reckless disregard for the truth.

2 MR. DONOHUE: And I argued that in the hearing.

3 THE COURT: Where is there reckless disregard for the
4 truth here?

5 MR. DONOHUE: Again, we're going back to the
6 substantial truth argument. The gist of this flyer --

7 THE COURT: If it's substantially true, it can't be
8 reckless disregard for the truth.

9 MR. DONOHUE: It's not substantially true. This is
10 saying that he is -- got a criminal record and a career
11 criminal.

12 THE COURT: He does -- it does not say career
13 criminal. It doesn't even apply that. It says he has a
14 criminal record, which is true.

15 MR. DONOHUE: Repeat criminal.

16 THE COURT: Which is true.

17 MR. DONOHUE: Which is true on a DUI. They're
18 elevating something like a DUI --

19 THE COURT: Aren't you parsing?

20 MR. DONOHUE: Yes, I'm parsing.

21 THE COURT: Well, you can't do that in a defamation
22 case.

23 MR. DONOHUE: Yes, I can. There are more than one
24 allegation about him.

1 THE COURT: Give me one that's false.

2 MR. DONOHUE: All right.

3 THE COURT: Give me one that's false. Give me one
4 that could be --

5 MR. DONOHUE: These are not criminal. This whole --

6 THE COURT: That doesn't -- no. I said give me one
7 that is false, one allegation on here that is out and out
8 false, untrue.

9 MR. DONOHUE: Wisconsin did not deny his license.

10 THE COURT: They did.

11 MR. DONOHUE: No. They held it while they
12 investigated it.

13 THE COURT: No. They said he was denied for 31 days.

14 MR. DONOHUE: 31 days is not a denial. A denial in
15 the text of this message is that he didn't get his
16 license. There's nothing in there that explains --

17 THE COURT: Counsel, I got to be -- I got to be
18 honest with you. I don't know these people. I don't
19 live in Poplar Grove. This is an election.

20 MR. DONOHUE: I understand that.

21 THE COURT: And one of the parties is posting
22 something on the internet, publishing something that is,
23 in fact, verifiably substantially true. The guy is
24 running to be the village president, which is a fiduciary

1 position, a position of trust, and the defendants are
2 saying he's not worthy of your trust. I can't think of
3 any more privileged speech. It's got to be untrue, and
4 to say, well, it's not a criminal conviction, it's an
5 administrative finding --

6 MR. DONOHUE: Because they wrapped it under the
7 umbrella of all of this is criminal. I didn't produce
8 this. Mr. Sattler produced this, and it says "My
9 opponent's criminal record is."

10 THE COURT: Do you think -- do you think that any
11 reasonable person would construe that every allegation
12 made in there is criminal, especially when it says
13 something like he was fired by Liberty Mutual?

14 MR. DONOHUE: For fraud.

15 THE COURT: Right.

16 MR. DONOHUE: Yes, I would.

17 THE COURT: There's nothing in there that says he was
18 ever criminally convicted of fraud.

19 MR. DONOHUE: Then why is it underneath this "My
20 opponent's criminal record is"?

21 THE COURT: Because you want to wrap it all in
22 that --

23 MR. DONOHUE: I didn't do this.

24 THE COURT: No. I mean you as an advocate want to

1 wrap it all in that blanket.

2 MR. DONOHUE: Absolutely because the blanket is right
3 here in front of my face.

4 THE COURT: Okay. Do you have anything better than
5 that that I can hang my hat on?

6 MR. MADONIA: Well, Judge, if I could say that this
7 was carefully considered. It was parsed and it was
8 evaluated, each individual claim, by Judge Barch.

9 THE COURT: Right.

10 MR. MADONIA: And he specifically said with each of
11 these claims --

12 THE COURT: I'm not bound by what Judge Barch said.

13 MR. MADONIA: I understand, Judge, but again, for
14 example, the paperwork attached does not support the
15 assertions that Costanza filed a fraudulent license
16 renewal application. It does not appear that he ever
17 filed a fraudulent insurance renewal application with the
18 Illinois Department of Insurance. And what he says is
19 the gist of this and what the case law says each of these
20 isolated instances may or may not be true. The fact of
21 the matter is is when you hand out a flyer to -- 5,000
22 flyers to 5,000 people and you do it after the
23 election -- when the election is done and gone, you still
24 continue to disseminate it everywhere.

1 THE COURT: Wasn't this started during the election?

2 MR. MADONIA: It was started during the -- well,
3 Judge, the dispute started far before that.

4 THE COURT: There's no allegation in here that this
5 was -- that this continued after the fact.

6 MR. DONOHUE: It's in the complaint, Judge.

7 MR. MADONIA: With respect, Judge, there are
8 allegations absolutely and that's part of the case.

9 THE COURT: In what regard?

10 MR. MADONIA: If I can answer --

11 MR. DONOHUE: There's an allegation in Mr. Costanza's
12 complaint that as late as February 2022 Mr. Sattler was
13 showed this -- this --

14 THE COURT: Okay. Somebody else showed it to him.

15 MR. DONOHUE: No. Mr. Sattler --

16 THE COURT: Showed the flyer.

17 MR. DONOHUE: Showed it to a state representative and
18 that state representative is available to testify.

19 THE COURT: How did that harm him?

20 MR. MADONIA: If I could finish and state, Judge, to
21 conclude my statement. This clearly -- and again, this
22 is not going to lawyers. This is going to members of the
23 community which are not lawyers.

24 THE COURT: It sure is.

1 MR. MADONIA: And as the judge said, when you look at
2 the totality of this flyer -- in the context of the
3 flyer, "My opponent's criminal record is," including with
4 that limitation civil and criminal -- this does not say
5 that. It says "My opponent's criminal record is" and it
6 enumerates all of these things that are crimes. They're
7 not crimes, Judge. And right there -- that in and of
8 itself -- the judge said to look at this as a whole,
9 there are questions of fact. He concluded his opinion --

10 THE COURT: Give me a question of fact.

11 MR. MADONIA: The question of fact right there is he
12 was not -- well, Judge, you're saying that the denial for
13 30 days, which would be a suspension, is a denial.
14 That's not a denial.

15 THE COURT: It's not a suspension because there's no
16 license to suspend.

17 MR. MADONIA: Well, that's a question of material
18 fact.

19 THE COURT: And what difference does it make?

20 MR. MADONIA: Well, the balance of the statements --
21 as Judge Barch said, the balance of the statements
22 whether they're intended to be false, misleading,
23 defamatory, injurious to the plaintiff are questions of
24 fact for the jury.

1 THE COURT: Isn't the fact that his license was held
2 up because he submitted a false -- and I'm not asking
3 about intent so don't fight with me. Because he
4 submitted a false application for a producer's license.
5 He submitted an application on which he had checked --
6 affirmatively checked, not just left blank, no, I have
7 never had a criminal conviction; no, I have never been
8 disciplined by any other insurance agency.

9 MR. MADONIA: No, Judge, it was not, and it was never
10 determined to have been false. We're making that
11 assumption looking at that based on what they're saying,
12 but the earlier judge and anybody else looking at that
13 can say --

14 THE COURT: Wait a second. Those documents that are
15 electronic applications in the file here. You can see
16 that he checked no. He submitted it pursuant to a FOIA
17 request. Am I wrong?

18 MR. FERGUSON: I believe you're right and there's --
19 the State of Wisconsin uses the word denied and Owen
20 Costanza himself in a letter to Montana says denied.

21 THE COURT: Denied. And the electronic -- there's
22 one electronic application and the box is checked no.

23 MR. MADONIA: Yes, Judge, and the judge says -- the
24 earlier judge says Wisconsin insurance license was not

1 permanently or --

2 THE COURT: It was not permanently denied. I do
3 not -- I do not --

4 MR. MADONIA: Another question --

5 THE COURT: But I'm saying that you're taking the
6 word denied and saying that's the important word. Well,
7 isn't the important word that he misrepresented to the
8 Wisconsin Department of Insurance?

9 MR. MADONIA: That's not what this says, Judge, and
10 in addition, my opponent's criminal record is a home
11 foreclosure.

12 THE COURT: No. I don't think you understood the
13 question. It says Wisconsin denies insurance license for
14 false application, and as I read that, the important
15 allegation of that sentence is false application. Right?

16 MR. MADONIA: Well, I would argue no, Judge, and I
17 would also argue that there is no finding anywhere of
18 insurance fraud. There's none. That's the whole gist of
19 this. My -- if we want to look at the big red print and
20 the primacy/recency effect if it came down to experts
21 analyzing the first and last thing they see, "My
22 opponent's criminal record is," right there that red X,
23 "Insurance fraud." We cannot allow a repeat criminal to
24 continue. He was never included -- never convicted of

1 insurance fraud. There's a question of fact right there.
2 The other question of fact is whether a home foreclosure
3 is a criminal record, whether the bankruptcy is a
4 criminal record. It's not --

5 THE COURT: Who would -- who would possibly read a
6 home foreclosure to be criminal?

7 MR. MADONIA: The client -- the client --

8 MR. DONOHUE: Mr. Sattler.

9 MR. MADONIA: The client who called him and said we
10 understand you were convicted of insurance fraud so we're
11 discontinuing our relationship with you.

12 THE COURT: Who called him and said that?

13 MR. DONOHUE: Family Dental. It's in the complaint.
14 In the allegations in the complaint.

15 THE COURT: But they didn't -- but he was -- he
16 had -- he was disciplined for insurance fraud.

17 MR. MADONIA: He was not convicted ever of insurance
18 fraud.

19 THE COURT: I didn't say convicted. I said
20 disciplined.

21 MR. DONOHUE: But again, under the totality of this,
22 the headline is "My opponent's criminal record is." This
23 is saying Owen Costanza is a criminal.

24 THE COURT: Okay. Okay.

1 MR. DONOHUE: And that's what Mr. Sattler intended.

2 MR. MADONIA: And, Judge, I think the important point
3 to say, too, is this continued well after the election,
4 and while that was going on, Mr. Costanza did nothing to
5 curtail his speech. He did nothing to stop it as the
6 judge very carefully analyzed when they threw out that
7 SLAPP motion.

8 THE COURT: Who? Mr. Costanza didn't?

9 MR. MADONIA: Mr. Costanza never took any action
10 during the course of the election, and after he lost the
11 election, he didn't take action until his --

12 THE COURT: What kind of action?

13 MR. MADONIA: The lawsuit. Until his business
14 started dwindling away, until people started
15 affirmatively telling him we hear you're a criminal, we
16 hear you've been convicted of insurance fraud.

17 THE COURT: Well, and that makes me -- and that makes
18 me wonder why if this stuff was all false he didn't say
19 something about it at the time?

20 MR. MADONIA: Because he respected the right of
21 freedom of speech. He respected the election. He let
22 them say what they were going to say and let bygones be
23 bygones after the election. They didn't do that, Judge.
24 They won the election and they continued to try to drive

1 him down. They said in their affidavits it is our intent
2 to interfere with him in their affidavits. They didn't
3 respond to the motion --

4 THE COURT: Interfere with him in what regard?

5 MR. DONOHUE: With his career in local politics.

6 THE COURT: With his career in local politics.

7 MR. DONOHUE: Right.

8 THE COURT: That's not as an insurance agent.

9 MR. DONOHUE: Except that in this community the two
10 are irretrievably intertwined.

11 THE COURT: I know. I get it. I get it. I get it.

12 MR. DONOHUE: And the allegations in the affidavit
13 were in the present tense, Judge.

14 THE COURT: Well -- and there's an allegation -- and
15 that's something else I wanted to -- there's allegations,
16 for example, that -- and the one specific example that's
17 given is that they interfered with the prospective
18 business advantage by destroying relationships with
19 potential customers and then it says specifically -- I
20 think it's the North Boone School District.

21 MR. DONOHUE: Correct.

22 THE COURT: All right. But there's no -- but there's
23 no allegation of any expectation in a future relationship
24 with the school district. In other words, it just says

1 they stopped returning my calls.

2 MR. DONOHUE: Correct.

3 THE COURT: Okay. But did he have any kind of -- a
4 reasonable expectation that they were going to --

5 MR. DONOHUE: I believe he did.

6 THE COURT: How so? That's not alleged.

7 MR. DONOHUE: It was in his affidavit.

8 THE COURT: No.

9 MR. DONOHUE: Yes, it was, Judge.

10 THE COURT: No. It says that he had made calls to
11 them and they stopped returning his calls.

12 MR. DONOHUE: Right. If you look at the report that
13 Mr. Ferguson attached to the motion, it says that they
14 only considered two so he had a 50/50 chance at worst and
15 he was being told that, you know, we're just -- we're
16 looking at it and then he was not notified of the meeting
17 to make a presentation and this was in time relation we
18 believe with Mrs. Rodgers' FOIA request --

19 THE COURT: Did anybody from the school district ever
20 say, you know, we plan on making this deal with you?

21 MR. DONOHUE: I don't know. You'd have to ask
22 Mr. Costanza.

23 THE COURT: Counsel, tell me about that.

24 MR. FERGUSON: About the school district?

1 THE COURT: This reasonable expectation.

2 MR. FERGUSON: There isn't one. I mean, it's just as
3 simple as that. I believe -- and I missed the part where
4 I said it was down to two -- I said that? I think there
5 was nine applicants and I believe the school board went
6 with the person they were going with before. This is all
7 kind of technical. The school board said, well, this is
8 a different type of insurance that we haven't done
9 before.

10 THE COURT: It doesn't matter.

11 MR. FERGUSON: It doesn't even -- even if you had a
12 contract --

13 THE COURT: But the point is did he ever -- you know,
14 was he ever told by the school board that you're -- you
15 know, you're one of two or three finalists for this?

16 MR. FERGUSON: No, and even if he was, it still
17 doesn't have --

18 THE COURT: I understand. I understand. Because
19 there's no expectation that he's got the contract.

20 MR. FERGUSON: Right. My understanding is there was
21 no conversations that he was.

22 THE COURT: And that goes back to your motion to
23 dismiss those three counts.

24 Counsel, you know, I'm going to be honest with

1 you -- and I can read your frustration, but I'm not
2 persuaded that there is any -- as a matter of law any
3 defamation here. You know, there's nothing to go to a
4 jury.

5 MR. DONOHUE: What about the findings that the
6 statements impugn his character to conduct business, the
7 statements --

8 THE COURT: If they're true --

9 MR. DONOHUE: But this is -- these are not overall
10 true.

11 THE COURT: They are -- each one of those statements
12 is verifiably true.

13 MR. DONOHUE: Verifiably true in a matter of law, not
14 in a matter of, hey, this is on the laundromat in Poplar
15 Grove --

16 THE COURT: But that's the standard for malicious --

17 MR. DONOHUE: No. It's reckless disregard for the
18 truth.

19 THE COURT: Malicious --

20 MR. DONOHUE: These are half truths.

21 THE COURT: Malicious defamation is what needs to
22 be --

23 MR. DONOHUE: There's no such thing --

24 (Simultaneous speaking.)

1 THE COURT: -- shown by the plaintiff if it is --

2 MR. DONOHUE: It's not malicious --

3 THE COURT: You know, you're -- now you're
4 interrupting me.

5 MR. DONOHUE: I'm sorry.

6 THE COURT: Malicious defamation is what you have to
7 show as the plaintiff if this is speech concerning a
8 public person and/or a matter of public interest and
9 malicious defamation may be shown by demonstrating
10 reckless disregard for the truth. There are several ways
11 whether you can see or test whether there is reckless
12 disregard for the truth and if -- let me see if I can
13 find in my notes.

14 Here we go. Do the statements have a precise and
15 readily understood meaning. Are the statements
16 objectively verifiable and whether the statements' social
17 context signals that it has factual content. All right?
18 That last one goes to this idea of is it an opinion.
19 Does the social context -- okay. I think in this
20 context, the social context is it's in the midst of an
21 election and it pretty much was intended to demonstrate
22 factual content. Right?

23 MR. DONOHUE: Again, yes.

24 THE COURT: Okay. And the statements are each

1 objectively verifiable. Is that not true?

2 MR. DONOHUE: I don't think so.

3 MR. MADONIA: Judge, I would argue that, no,
4 absolutely not as the other judge said.

5 THE COURT: How are they not?

6 MR. MADONIA: Because what they say, Judge, is they
7 say half truths and innuendoes that lead someone down to
8 a path that's a dead end just as the judge said; they
9 decline to find it. That it was -- it was this
10 allegation and this assumption that his license was
11 permanently denied. It wasn't. It issued as they said.

12 THE COURT: You're adding so much to that statement.

13 MR. MADONIA: I'm reading right from the opinion,
14 Judge.

15 THE COURT: His opinion is not binding on me. That
16 opinion is meaningless.

17 MR. MADONIA: But there not only is -- okay. Judge,
18 is there a question. Is there a dispute of fact. We
19 would argue absolutely.

20 THE COURT: And I've been sitting here for --

21 MR. MADONIA: Absolutely there are many disputes --

22 THE COURT: -- almost an hour now saying what fact is
23 in dispute.

24 MR. MADONIA: The fact is in dispute of whether the

1 home foreclosure, the bankruptcy, these other elements,
2 these elements of insurance --

3 THE COURT: No one in there --

4 MR. MADONIA: -- are criminal matters when they are
5 civil matters.

6 THE COURT: No one in there says that those are all
7 criminal matters. That statement that his criminal
8 record is --

9 MR. MADONIA: Well, we would argue that that's
10 another question of fact.

11 THE COURT: Who would reasonably interpret that to
12 mean that when someone says their home was foreclosed
13 that that is a criminal matter? Who?

14 MR. DONOHUE: Mr. Sattler who put the thing together.
15 His intent was to have people believe --

16 THE COURT: No. I'm not asking you what his intent
17 was.

18 MR. DONOHUE: You asked me who would believe.

19 THE COURT: He can't -- it's not defamation if he
20 published it to himself. I'm saying what reasonable
21 voter in the Village of Poplar Grove is going to look at
22 that and say, oh, look, he had a criminal foreclosure;
23 oh, look, his insurance license was criminally denied?

24 MR. MADONIA: Well, the people that canceled that

1 business, Judge, sure did.

2 THE COURT: How did --

3 MR. MADONIA: Because they thought he was convicted
4 of insurance fraud, which is a felony, and he was not.
5 That's the gist of this.

6 THE COURT: He was disciplined for insurance fraud.
7 He was. It's a verifiably objectively true fact.

8 MR. DONOHUE: I think the actual statement was
9 because you're under investigation for insurance fraud
10 because after the election there was at least one false
11 report to the insurance commissioner that Owen was --

12 THE COURT: Who made that?

13 MR. DONOHUE: We believe it was Mrs. Rodgers.

14 THE COURT: But you don't know that.

15 MR. DONOHUE: Well, we'll get it. We're fairly
16 certain. She was a competing agent at Broadmoor
17 Insurance and was consistently --

18 THE COURT: Yeah. You talk about that in your
19 pleadings.

20 MR. DONOHUE: Yes. We also talked about it in the
21 affidavit. I'd like to say something about the --

22 THE COURT: We're at a summary judgment right now.

23 MR. DONOHUE: We are in summary judgment right now.

24 THE COURT: Where are your facts?

1 MR. DONOHUE: The facts are in the --

2 THE COURT: You have the burden of adducing facts in
3 the face of a motion for summary judgment.

4 MR. MADONIA: Your Honor --

5 THE COURT: You can't say we'll do more discovery
6 later.

7 MR. DONOHUE: I'm not saying that.

8 MR. MADONIA: Your Honor, we did present the facts in
9 the affidavit and the case law is very clear that says if
10 we present an affidavit -- and they just fail to even
11 respond. What is in that affidavit is deemed to be true.
12 We have good support in the case law for that. They
13 didn't even respond to this. They didn't respond --

14 THE COURT: But your affidavit -- 90 percent of your
15 affidavit isn't even properly part of an affidavit. You
16 just regurgitate what Judge Barch said.

17 MR. MADONIA: So that makes that facts that we state
18 in there that are deemed --

19 THE COURT: No. In a 1-109 affidavit, he can't
20 testify to anything he doesn't have personal knowledge
21 of.

22 MR. MADONIA: He does have personal knowledge, Judge,
23 as he stated and the fact that they didn't even
24 respond --

1 THE COURT: You're trying to tell me that quoting a
2 judge's opinion in an affidavit makes it true?

3 MR. MADONIA: Your Honor, it wasn't simply quoting
4 the judge's --

5 THE COURT: Over and over and over again you
6 wholesale --

7 MR. MADONIA: He went there -- he went there with the
8 facts. He stated the affidavit. Under *Purtill vs. Hess*,
9 defendants have admitted as true all facts averred in the
10 affidavit. They never responded. They never counter --
11 they never contradicted anything in there.

12 THE COURT: The only facts in that affidavit are that
13 he has never been criminally convicted of insurance
14 fraud.

15 MR. MADONIA: Which he has not. And again, an
16 arguable issue of fact is what would this be -- what
17 would a jury determine that is the gist -- the nature of
18 this, and I would argue absolutely that this -- that they
19 would think these elements are criminal.

20 THE COURT: You know, Counsel, under 1-109, an
21 affidavit must contain allegations of fact of which the
22 affiant is personally aware to the best of his knowledge
23 and belief. To quote case law in an affidavit, to quote
24 a judge's opinion at length is not facts of which he is

1 personally aware. That's what I'm trying to tell you.

2 The only facts of which he is personally aware in
3 his affidavit are those facts saying I stopped getting
4 calls back from the school district, I lost the Pumilia
5 family business, I have never been criminally convicted
6 of fraud or -- well, I've never been criminally convicted
7 of fraud. Those are facts to which he can swear. That's
8 all I'm trying to say.

9 MR. MADONIA: In addition, Your Honor, from
10 Paragraph 25 on, that he states the facts of them
11 continuing to go after him and to defame him and to
12 tortiously interfere with him on social media and other
13 postings --

14 THE COURT: By repeating these same allegations that
15 are in the flyer.

16 MR. MADONIA: No, no, Judge. These go -- no, Your
17 Honor. In addition to that, he says other things where
18 they called him a habitual criminal and did accuse him of
19 fraud and other acts in addition to the flyer.

20 THE COURT: Correct me if I'm wrong, but that's based
21 on hearsay. He says someone else told me -- they told
22 him that he has been convicted of fraud or is a habitual
23 criminal.

24 MR. MADONIA: They're in the post, Judge. They're in

1 the post, the repeated postings on social media from each
2 of the three defendants.

3 THE COURT: But you didn't produce any of those.

4 MR. DONOHUE: Actually I think we did, Judge.

5 THE COURT: The blog? I read that blog and it's
6 essentially the same stuff that's in the --

7 MR. DONOHUE: I think there's at least a post from
8 Marion Thornberry that has some personal interpretation
9 of the law that says two misdemeanors equals a felony in
10 Illinois and why is Owen Costanza still in office.

11 THE COURT: But she's just wrong; right? But that
12 part of it -- to say two misdemeanors equals a felony is
13 a statement of opinion.

14 MR. DONOHUE: An opinion is not protected anymore.

15 THE COURT: She doesn't --

16 MR. DONOHUE: He. Marion Thornberry is a man.

17 THE COURT: Yeah. But it --

18 MR. DONOHUE: Also, Judge, this motion only seems to
19 be directed at the defamation counts. There are
20 13 counts in this --

21 THE COURT: But the whole thing falls if there's no
22 defamation.

23 MR. DONOHUE: I don't think so.

24 THE COURT: If the statements are made -- if the

1 statements are made and they are true, then it's not
2 tortious interference with a business advantage. It goes
3 away if the statements are true because it's an element
4 of everything you plead.

5 MR. DONOHUE: Yes, it is. And their intent is to
6 interfere with his career.

7 THE COURT: As a politician.

8 MR. DONOHUE: Which is irretrievably intertwined with
9 his -- what he does in the community as an insurance
10 agent with Flanders. This is a character assassination.
11 He sponsors little league teams. He's active in the
12 Lions Club. The Masons refuse to let him join because
13 they said he was under investigation for insurance fraud.

14 Is that correct?

15 MR. COSTANZA: They said I was under indictment.

16 MR. DONOHUE: Indictment. They said that Owen was
17 under indictment.

18 THE COURT: Unless you can prove one of them said
19 that to the Masons, then that's irrelevant.

20 MR. MADONIA: Well, Judge, we do say and we do allege
21 in the complaint that they went around pretty much to
22 every residence and every business and posted this --
23 handed it to everyone in the community and posted it at
24 each of these businesses. They widely disseminated this.

1 THE COURT: They did that during the election.

2 MR. DONOHUE: They continued to do it.

3 MR. MADONIA: The fact, Your Honor, that they
4 continued to do it -- we did not file anything for him
5 after the election, Your Honor, until well after the
6 election when their actions continued. They weren't
7 satisfied to try to defeat him in an election. They went
8 for this cancel type culture kind of thing to destroy his
9 business and him in the community. That's the gist of
10 what the complaint says. It was their continued
11 actions --

12 THE COURT: But do you agree --

13 MR. MADONIA: It is harming him.

14 THE COURT: Do you agree that if it's true, it
15 doesn't matter?

16 MR. MADONIA: Judge, I do not --

17 THE COURT: I'm not saying that it is true or not
18 true. I'm not saying that your argument that it has to
19 all be read in context is wrong. I'm just asking the
20 question. If it is true, then all of those other --
21 whether they're continuing to do it, whether it's
22 intentional -- whether it's interference with a
23 prospective business advantage, those all fall by the way
24 side.

1 MR. DONOHUE: Yes. And truth is an absolute defense
2 of defamation.

3 MR. MADONIA: Not in certain aspects of defamation
4 per se, Judge. There can be -- there can be truthful
5 statements but here -- the problem here is --

6 THE COURT: What?

7 MR. MADONIA: These are not true.

8 THE COURT: What? I want you to find me a case that
9 says that defamation per se can exist where it's true.

10 MR. MADONIA: Reckless disregard for the truth or
11 falsity.

12 THE COURT: Okay. Well, then it's not true.

13 MR. MADONIA: But, Judge, these aren't true. As
14 Judge Barch said is that -- stated in the opinion. When
15 you look at the totality of this as a whole, what you
16 look at is red print "My opponent's criminal record is
17 insurance fraud." That's what it says. He was never
18 ever convicted of insurance fraud. That's the gist I
19 think if we're going to get down to it.

20 THE COURT: He wasn't convicted -- you keep -- you're
21 hanging your hat on that argument and I'm saying what
22 difference does it make if he was administratively or
23 civilly disciplined or terminated for fraud?

24 MR. DONOHUE: Because Mr. Sattler characterized it as

1 a crime and it's not a crime.

2 THE COURT: But the harm that arises -- the sting
3 that arises out of the defamatory statement is the same.

4 MR. DONOHUE: No, it's not. You're looking --

5 THE COURT: He was fired from Liberty Mutual because
6 he committed fraud.

7 MR. DONOHUE: He was accused of fraud.

8 THE COURT: By Liberty Mutual and that's why they
9 fired him.

10 (Simultaneous speaking.)

11 MR. DONOHUE: Later found no fraud.

12 THE COURT: No. The Indiana Department of Insurance
13 later let him enter into a consent agreement in a
14 settlement.

15 MR. DONOHUE: I think there was an internal
16 investigation with Liberty Mutual.

17 THE COURT: They closed their file as part of a
18 consent agreement. That's what happened in that file
19 because Liberty Mutual were the ones that instituted the
20 complaint.

21 MR. DONOHUE: Liberty Mutual -- his job was in
22 Illinois. It wasn't in Indiana.

23 THE COURT: He was working as a producer for Liberty
24 Mutual Insurance Company and they terminated his

1 relationship because they filed a complaint with the
2 Illinois -- or the Wisconsin Department of Insurance
3 saying he was engaging in fraud and they let the
4 Wisconsin Department of Insurance know we fired him for
5 this so they were, in essence, turning themselves in
6 because one of their agents was in their estimation
7 engaged in fraud.

8 MR. MADONIA: Judge, the Court determined that that
9 was misleading and false and defamatory.

10 THE COURT: No, it didn't. I haven't determined that
11 at all.

12 MR. MADONIA: Well, the earlier -- the earlier judge
13 who I think is --

14 THE COURT: Well, what if I think he got it wrong?

15 MR. DONOHUE: Well, then shouldn't this be a motion
16 to reconsider?

17 MR. MADONIA: Yeah.

18 THE COURT: No. No. You got to file a motion to
19 reconsider within 30 days.

20 MR. DONOHUE: On a final judgment.

21 THE COURT: We started out today by saying this whole
22 thing is under a different standard than a SLAPP Act
23 where you have to find that there is no possible merit,
24 and I could think Judge Barch got it wrong. There's no

1 law of the case, there's no appellate opinion. I could
2 just say he got it wrong, he should have dismissed it the
3 first time. I haven't but I could.

4 This is a motion for summary judgment and I'll
5 just share with counsel. Before I became a judge, I
6 practiced primarily in federal court. In federal court
7 they love motions for summary judgment. In state court
8 not so much and I think you guys probably both know that.

9 You know, the appellate court if I decide this in
10 favor of the defendants is going to look at this de novo.
11 So if I find there is anything that creates a question of
12 fact that is in dispute -- a material question of fact
13 that is in dispute, I have to deny their motion, you
14 know, and that's one of the reasons I'm pressing you guys
15 so hard is because if there is a question of fact, I need
16 to be able to set it for -- in a manner that is a little
17 more -- a little less amorphous as this distinction
18 between criminal fraud and civil fraud.

19 MR. MADONIA: Your Honor, if I could say. In doing
20 that -- you know, absolutely that is your task to do
21 that, Judge, but the courts are very clear that it says
22 that the record is to be construed strictly against the
23 movant --

24 THE COURT: It absolutely does.

1 MR. MADONIA: -- and liberally in favor of the
2 nonmoving party and that summary judgment should not be
3 allowed unless the moving party's right to judgment is
4 clear from doubt because the plaintiffs are not required
5 to prove their cases at the summary judgment stage.

6 THE COURT: You're absolutely correct. You are
7 allowed -- you must produce some evidence which creates a
8 material question of fact.

9 I have been grilling these guys like a bad bear,
10 Mr. -- how often have I done this?

11 MR. FERGUSON: Ferguson, Your Honor?

12 THE COURT: Yeah, I know.

13 MR. FERGUSON: Of course.

14 THE COURT: I don't know why I was going there. I
15 will tell you that the Illinois Supreme Court has said
16 that whether a statement is a factual assertion that
17 could give rise to a defamation claim is a question of
18 law for determination by the Court. That comes from a
19 case called *Imperial Apparel* and is talking about this
20 idea of privileged statements and the need to show
21 reckless disregard for the truth or maliciousness.

22 Mr. Ferguson, you know, you've been listening
23 intently. Is there anything that you'd like to say?

24 MR. FERGUSON: Just to clear the record -- and I

1 don't know if it matters -- Mr. Costanza continued to be
2 a precinct committeeman, a chairman for the Republican
3 Central Committee, represented himself to be the village
4 president after the election was over.

5 THE COURT: Wasn't he for at least a short period of
6 time?

7 MR. FERGUSON: Until maybe a few months ago and maybe
8 it's still going on. He still posts on Costanza Village
9 President so -- and that was talked about last time and
10 it was -- it was considered -- he was still a public
11 figure after the election, if it makes a difference.

12 THE COURT: Well, and I would think that this
13 litigation is perpetuating this whole thing on both sides
14 I mean in a place like Poplar Grove.

15 MR. FERGUSON: There is a -- very true. There's a
16 lot going on still. Attendance at meetings. A meeting
17 last night even that occurrences have happened. There's
18 factions and groups.

19 THE COURT: The pro Costanza and pro Sattler type of
20 groups?

21 MR. FERGUSON: It's not quite like that but yes.
22 There's been a lot of --

23 THE COURT: And there is effectively no Democratic
24 party.

1 MR. FERGUSON: Correct, correct. It's -- I wouldn't
2 say there's a pro Sattler group. More of an anti Sattler
3 group for some reason, but it's all part of the bigger
4 picture.

5 THE COURT: When's the next election?

6 MR. FERGUSON: I'm assuming for village president
7 another three and a half years maybe.

8 UNIDENTIFIED SPEAKER: Something like that.

9 UNIDENTIFIED SPEAKER: Two. Two and a quarter.

10 MR. FERGUSON: Two and a quarter.

11 THE COURT: Okay. I should -- I guess now that you
12 say that, years ago -- and this doesn't have anything --
13 I was in federal court defending the Poplar Grove village
14 president for terminating somebody. It was a
15 Section 1983 claim. And at that time the village
16 president was a lawyer who was very politically involved
17 in the republican party. I forget his name. He was the
18 defendant. What was his name?

19 MR. COSTANZA: Brad Rightnowar.

20 THE COURT: Yeah, Rightnowar.

21 MR. COSTANZA: He's actually the one that asked me to
22 run long ago.

23 THE COURT: What now?

24 MR. COSTANZA: He's the -- he's the person who asked

1 me to run for trustee 12 years ago.

2 THE COURT: Yeah. Brad Rightnowar, yeah. I'm not --
3 is he still in Poplar Grove right now?

4 MR. COSTANZA: He's in Springfield.

5 THE COURT: Yeah. He told me he wanted to -- he
6 eventually wants to run for governor or that used to be
7 his ambition.

8 I'm curious on a more one-to-one scale, is
9 there -- is there any chance of resolution of this by
10 something other than motion or trial?

11 MR. FERGUSON: I can't imagine -- opposing counsel is
12 more creative than I am, and if we wish to take a chance
13 to do that, I'd be open, of course.

14 THE COURT: Is there --

15 MR. DONOHUE: Sure. We'd love to talk to
16 Mr. Ferguson.

17 MR. MADONIA: I'm a big fan, Judge, of pretrial
18 mediation with Your Honor in an in-chambers session if
19 that's something that you would entertain.

20 THE COURT: Well, here's what I'm thinking. I'm
21 thinking that I'm going to set a date -- and I'm talking
22 out loud -- and I am going to sit on -- I'm going to get
23 a decision ready because I always need to have one ready
24 to go one way or the other, but then maybe we can proceed

1 sometime in the near future and even do it by Zoom
2 without the clients if you'd like. I could be in
3 chambers and we could do it very informally by Zoom
4 because you guys come in from Chicago?

5 MR. DONOHUE: Barrington and Chicago.

6 MR. MADONIA: Chicago.

7 MR. DONOHUE: I'm in Lake in the Hills so I'm not
8 that far away. I'm in McHenry County.

9 THE COURT: Okay. But do a -- you know, a pretrial
10 conference, a settlement conference, whatever you want to
11 call it. And it strikes me that, you know, if there's
12 ever going to be a chance to settle, it's going to have
13 to be sooner than later because attorneys' fees come into
14 play, if they haven't already.

15 But, you know, then you and Mr. Ferguson are going
16 to have to chat. Mr. Ferguson my guess is is being
17 employed by some sort of risk management association and
18 those guys generally only know how to talk about money.

19 Are you guys working the week -- and this is for
20 all three of you -- the week between -- well, the 26th is
21 a court holiday of December. The 27, 28, 29 and 30 I'll
22 be here and I would have time to have a pretrial
23 conference with you guys either the 29th in the afternoon
24 or the 30th in the afternoon.

1 MR. DONOHUE: I'm not going anywhere, Judge.

2 MR. FERGUSON: The 29th would be good.

3 MR. MADONIA: Yeah. The sooner the better, Judge.

4 MR. DONOHUE: The 29th is the consensus, Judge.

5 THE COURT: All right. Normally I would ask for
6 position statements, but I think I got a pretty good
7 handle on what the relative positions are. I would,
8 though, if, you know -- if you would like to send me a
9 confidential -- in other words, you don't show each
10 other, but a confidential statement about potential
11 settlement -- and I won't disclose either parties'
12 position without consent or permission. Right? It would
13 help me to know what your guys' we'll say -- and I know
14 you won't give me your floor, but what your floor for
15 purposes of mediation is and what your ceiling for
16 purposes of mediation is because it's not necessarily
17 going to be money. As a matter of fact, I would assume
18 there's going to have to be some sort of non-
19 disparagement agreement on a going-forward basis from his
20 point of view.

21 MR. FERGUSON: Right. Poplar Grove being what it
22 is --

23 THE COURT: Yeah, I know. How do you ever enforce
24 something like that.

1 MR. FERGUSON: Yeah. And if there's going to be
2 continued involvement -- if this was a one time thing,
3 absolutely, or if this was nonpolitical, absolutely, but
4 I don't see how that would -- to put it out there. I
5 don't want any surprises at this pretrial. I don't see
6 how that would ever work.

7 THE COURT: I understand. I understand, but let's
8 give it a shot.

9 MR. MADONIA: Your Honor, if I could say being the
10 eternal optimist, I think that I've found life is better
11 without stress, without tension, without arguing,
12 especially when the argument, at least from some people's
13 standpoint, crosses the line. I think it's better that
14 we do try to advocate civility between the parties and
15 nondisparagement --

16 THE COURT: And the parties are all here except for
17 Cheryl, who's not really a party anymore.

18 MR. DONOHUE: Yeah. We dismissed her.

19 THE COURT: Oh, she is here.

20 Hi.

21 Her I know but that's because she practices in
22 front of me.

23 MR. DONOHUE: I understand.

24 THE COURT: Right now I'm pretty sure both sides of

1 this deal are for the most part walking around on
2 eggshells and Poplar Grove not only includes that little
3 village, but there's a big residential area out there
4 called Candlewick Lake, right, and it's indescribable.

5 Candlewick Lake is kind of an entity unto itself
6 and it's just -- it is. Okay? And I think that
7 something like this for these folks to hear what you all
8 are saying and what I'm saying is in and of itself a
9 little bit helpful. I would hope, you know, because now
10 they I think probably understand that you got to be
11 careful or you end up talking to somebody like me. And
12 they already lost -- well, lost -- but they essentially
13 lost once in front of Judge Barch, you know, and I
14 haven't made a decision today and that's why I wanted to
15 explain at the end why I'm being so tough on you is
16 because I want to make sure whatever I decide I don't get
17 it wrong. I mean, I don't mind being appealed. I don't
18 mind being reversed, but I want to make sure I'm doing
19 what I think is right. So, yeah, I'm kind of optimistic
20 about at least using this as an opportunity to air it
21 out.

22 So we'll say 1:30 on the 29th of December we will
23 have a pretrial conference. I'm going to take the motion
24 for summary judgment under advisement and I will hold my

1 decision in abeyance until we've had the pretrial
2 conference. And after the -- at the end of the pretrial
3 conference, the settlement conference, we will set a new
4 date -- a future date and I will then issue my decision.

5 And I would ask that the parties send me a
6 confidential statement. I will not disclose to the other
7 side any part of your confidential statement without your
8 consent, but just so I can get a handle on where you both
9 are, it would be great if I had that -- you know what, if
10 I had it by Tuesday the 27th, all right, because I'm not
11 going to look at it before then anyway.

12 MR. DONOHUE: Obviously this is a confidential
13 statement. We can just deliver it to Your Honor.

14 THE COURT: Here's what we're going to do. I love
15 e-mail. Send it to me as a PDF or in the body of an
16 e-mail. My e-mail address is my name --

17 Is my name plaque up there?

18 S. Balogh. Rhymes with halo. There is no U in my
19 last name. If there was, you'd pronounce it correctly.
20 So it's *SBalogh@17thcircuit.Illinoiscourts.gov*, and if
21 you lose that, you can get it from the clerk's office.
22 And my -- the Zoom number for the conference -- my Zoom
23 number is static. It's 96397918024. All right?

24 And as I said, I'll be in chambers. You're

1 welcome to appear by Zoom. I guess we should settle this
2 right now. Would you prefer that it be virtual?

3 MR. FERGUSON: I prefer in person, but I understand
4 the distance so I'm going to defer.

5 MR. MADONIA: Yeah. I think that given the holiday,
6 I may be out of town. Zoom would be better for me if
7 that works.

8 THE COURT: Virtual it is. Okay. And we have
9 somebody named John Kraft watching us. Is that one of
10 the defendants -- no.

11 MR. FERGUSON: No.

12 MR. DONOHUE: I think he's a journalist.

13 THE COURT: Ah. Okay. Any questions? Anything else
14 anybody wants to say?

15 MR. DONOHUE: The 2-615 would be taken under
16 advisement with the motion for summary judgment?

17 THE COURT: Yeah. And I shouldn't lose track of
18 that. Yes, absolutely. I'm looking at both motions,
19 and, in fact, we did discuss the 2-615 this morning
20 because of that reasonable expectation -- or this
21 afternoon, excuse me, and, yes, I am considering that
22 and, you know, you saw me looking at it several times.
23 What I have up here is a stack of case law, copies of all
24 your briefs and something -- I know how to type so I make

1 notes on the computer. Okay? And then ultimately I can
2 end up using those notes for a decision if I need to.

3 All right.

4 MR. FERGUSON: Thank you, Judge.

5 THE COURT: Thank you, everybody. Good luck to you.
6 Let's play nice until we -- well, let's just play nice
7 just because it's the right thing to do.

8 MR. DONOHUE: I think Mr. Ferguson and we have played
9 nice since day one.

10 THE COURT: Oh, I'm sure you have. And I've known --
11 I've known Mr. Ferguson for less time, but I've known his
12 father forever, 35 years.

13 Good luck, everybody. Thank you very much.

14 (End of proceedings.)

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

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

Michele Fitch
Official Court Reporter

Dated this 21st day of March, 2023.