Appeal No. 04-0377 **Cir. Ct. No. 03CV000177**

WISCONSIN COURT OF APPEALS
DISTRICT IV

JULIE M. LASSA,

PLAINTIFF-RESPONDENT,

V.

TODD RONGSTAD AND THE VALKYRIE GROUP, LLC,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

DOES 1-5, IN THEIR INDIVIDUAL CAPACITIES,

DEFENDANTS,

AMERICAN FAMILY INSURANCE COMPANY,

INTERVENOR,

V.

ALEX PAUL,

THIRD-PARTY DEFENDANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Deininger, P.J., Dykman and Lundsten, JJ.

This case originated as a defamation action brought by a sitting public official against the publishers of an "attack ad" mailed shortly before an election. It presents an opportunity for the supreme court to explain when the

identity of anonymous speakers must be disclosed in the context of a defamation action brought by a public official. Although several state and federal courts have adopted tests to address this situation, Wisconsin has not.

BACKGROUND

An organization called "Alliance for Working Wisconsin" sent a mailer criticizing Julie Lassa, who was then a state representative, for her supposed connections to State Senator Charles Chvala. Lassa brought a private defamation action against Todd Rongstad and unknown others for their role in publishing and distributing the mailer. Lassa attempted through discovery to ascertain what other people were involved in the production, funding or distribution of the flier, but Rongstad refused to provide her this information. The circuit court ordered Rongstad to comply with discovery demands several times. The court then imposed sanctions against Rongstad and eventually entered an order for default judgment against him for failure to comply. Before the final judgment was entered, however, the parties entered into a stipulation dismissing the underlying defamation claim, setting the amount of sanctions to be levied against Rongstad, and reserving Rongstad's right to appeal the imposition of sanctions.

DISCUSSION

Rongstad claims a First Amendment privilege as his reason for refusing to disclose the names of the members of the Alliance. It is well established that membership lists of groups engaged in political expression are entitled to First Amendment protection, as the United States Supreme Court recognized in the seminal case, ***NAACP v. Alabama***, 357 U.S. 449, 78 S. Ct. 1163 (1958). In ***NAACP***, the Supreme Court held that Alabama could not force the

NAACP to reveal its membership list, explaining that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" because "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective … restraint on freedom of association …." ***Id.*** at 460-62.

NAACP and its progeny establish that a litigant asserting First Amendment privilege must first show that disclosure will place a "substantial restraint" upon the exercise of the constitutional right, which may include fear of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." ***NAACP***, 357 U.S. at 462; ***Bates v. Little Rock***, 361 U.S. 516, 523-524, 80 S. Ct. 412 (1960). Once this showing has been made, the person seeking disclosure must show an interest in obtaining the disclosure that "is sufficient to justify the deterrent effect" that the disclosure may well have the other party's free exercise of their constitutional rights. ***NAACP***, 357 U.S. at 463; ***Bates***, 361 U.S. at 524; ***Crocker v. Revolutionary Communist Progressive Labor Party***, 533 N.E.2d 444, 447 (Ill. App. 1988). This balancing test applies in litigation between private parties because the judicial production order constitutes state action. ***NAACP***, 357 U.S. at 463.

No published Wisconsin case has applied this test in the context of a political attack ad. Although the underlying defamation claim has been dismissed, we believe that this case presents the opportunity for the supreme court to address how a court should balance the respective rights of the parties in a defamation action brought by a public official. The federal and state cases applying ***NAACP*** vary in their discussion of the scope of the balancing test and the burdens each side should bear. For example, is a claim that the defendant in a defamation action is a constituent of a sitting official, by itself, sufficient to show that the person

reasonably fears reprisal should his or her identity be revealed? If so, would the threshold showing of a fear of reprisal be present in every defamation action brought by a sitting official? Or, is a compelling state interest shown where, as here, a public official seeking discovery is unable to proceed with a private defamation action unless discovery is allowed? We believe a decision by the supreme court would clarify how Wisconsin courts should apply this test.

This case also presents a related question. When a Wisconsin court has employed the balancing test and concluded that discovery should be allowed, may a litigant who refuses to comply assert that he or she should not be sanctioned based on ***Burnett v. Alt***, 224 Wis. 2d 72, 589 N.W.2d 21 (1999)? ***Alt*** provides that "a substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery" and, conversely, that "[a]n unsubstantiated and unfounded privilege is not substantial justification for not imposing sanctions." ***Id.*** at 94-5. ***Alt*** does not flesh out what makes a privilege "substantiated." A supreme court decision addressing this question would clarify the law in this area.