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 John Barrett
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 Honorable Timothy
 Witkowiak-22
 Branch 22

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

JILL KAROFSKY and
 JILL FOR JUSTICE,

Plaintiffs,

v.

Case Codes:

30704 – Other Injunction or Restraining Order

30106 – Intentional Tort

WMC ISSUES MOBILIZATION
 COUNCIL, INC., REPUBLICAN STATE
 LEADERSHIP COMMITTEE, and
 REPUBLICAN STATE LEADERSHIP
 COMMITTEE – JUDICIAL FAIRNESS
 INITIATIVE,

Defendants.

**PLAINTIFFS’ BRIEF IN SUPPORT OF THEIR MOTION FOR
 TEMPORARY INJUNCTION**

Plaintiffs Jill Karofsky (“Judge Karofsky”) and Jill for Justice, by their attorneys Davis & Kuelthau s.c., file this brief in support of a temporary injunction pursuant to Wisconsin Statute § 813.02.

This dispute arises out of defamatory advertisements created, distributed, and published by Defendants WMC Issues Mobilization Council, Inc. (“WMC”), Republican State Leadership Committee (“RSLC”), and Republican State Leadership Committee—Judicial Fairness Initiative (“RSLC-JFI”) which were—and still are—being aired upon television stations across Wisconsin. The advertisement contains knowingly false statements in an attempt to harm the reputation of Judge Jill Karofsky, a Dane County Circuit Court Judge running for a seat on the Wisconsin Supreme Court in the April 7, 2020 election.

STATEMENT OF FACTS

Judge Karofsky is a Dane County Circuit Court Judge running for a seat on the Wisconsin Supreme Court. Jill for Justice is Judge Karofsky’s candidate committee. Judge Karofsky is

running against Justice Daniel Kelly, an incumbent justice on the Wisconsin Supreme Court. The election is currently scheduled for April 7, 2020.¹

On or around March 26, 2020, an advertisement created by WMC (the “WMC Ad” or “WMC *Worley* Ad”) was posted on Youtube and began airing on local television stations across the State of Wisconsin and as part of Facebook advertisements. The advertisement claims against Judge Karofsky explicitly rely upon the case of the *State of Wisconsin v. Donald A. Worley*, Dane County Circuit Court Case No. 1999-CF-396. The WMC Ad asserted that Judge Karofsky was responsible for giving “no jail time to a monster who lured a five-year-old girl into a bedroom where he sexually assaulted her” and that the individual also confessed to assaulting the victim’s sister. The advertisement shows pictures of Judge Karofsky, small young children, an image of the case sentence, and ominous figures. Over some of the figures, the advertisement states “went easy on predators that committed unthinkable crimes” next to an image of Judge Karofsky, all the while, displayed clearly on the screen is a citation to the *Worley* case. The full advertisement could be seen at that time here: <https://www.youtube.com/watch?v=16RdtfBP7uE&feature=youtu.be>.

At the same time, the RSLC-JFI created a similar ad based upon *State v. Worley* (the “RSLC *Worley* Ad”), which was distributed, promoted, shared, and aired on television and online by the RSLC and/or the RSLC-JFI. The RSLC *Worley* Ad claims via voiceover that “Liberal Jill Karofsky is dangerously soft on crime” and “as prosecutor, Karofsky even went easy on criminal predators, like no jail time for a monster who sexually assaulted a five-year-old girl.” While the voiceover continues, images of Judge Karofsky and dangerous-looking individuals were shown. The ad then flashes text: “as prosecutor Karofsky even went easy on criminal predators” and “no jail time for sexual predator.” The RSLC *Worley* Ad also cited to *State v. Worley* for its assertions.

¹ The Court may take judicial notices of the public information surrounding the election. Wis. Stat. § 902.01(2)(a).

Judge Karofsky had no involvement in or responsibility for the plea and/or sentence received in March of 2000 in *Worley*. She made one and only one appearance in the case in July of 2001, 16 months after the plea was entered. The plea agreement was reached with the Defendant in March of 2000, and on March 30, 2000, Judge Bartell accepted the Defendant's plea of no contest and then sentenced the Defendant. All of which was completed by a different district attorney, with Judge Karofsky completely uninvolved. *State v. Worley*, Dane County Case No. 1999- CF- 396, available at: <https://wcca.wicourts.gov/caseDetail.html?caseNo=1999CF000396&countyNo=13&index=0&mode=details>. See Compl., Ex. A. But because Judge Karofsky was the most recent assistant district attorney to appear in the case, the Wisconsin CCAP record lists Judge Karofsky as the attorney of record.

To access the Wisconsin CCAP program, the program requires the user to accept terms about the limitations of the program, including that: "Each county began using the circuit court case management system at different times and made independent decisions about the conversion or backlogging of old cases. Converted cases may display less information." *Wisconsin Circuit Court Access*, www.wcca.wicourts.gov (last visited Apr. 2, 2020). One cannot access the CCAP records without agreeing to those terms. *Id.* Thus, WMC and RSLC-JFI, or an agent or employee working for them, must have agreed to those terms before accessing the *Worley* CCAP record, which indicates that in November 2017, the records of prosecution were converted and interested individuals should "see file." *State v. Worley*, Dane County Case No. 1999- CF- 396, available at: <https://wcca.wicourts.gov/caseDetail.html?caseNo=1999CF000396&countyNo=13&index=0&mode=details>.

Apparently, despite these warnings and directions to see the converted file, and without attempting to investigate the history of the case or even requesting to review the entire case file to

ascertain the truthfulness of its advertisements, WMC produced and distributed its ad for view on television, Facebook, and Youtube.

On March 27, 2020, Judge Karofsky's campaign served a cease and desist letter to WMC, explaining that the assertions in the WMC Ad were demonstrably false and thus defamatory. *See* Compl., Ex. B. Despite being informed of the defamatory allegations in its Ad, WMC did not remove it from its Youtube page until April 1, 2020. Declaration of Attorney Tiffany E. Woelfel, ¶¶ 2-4.

Likewise, RSLC-JFI also produced its advertisement without attempting to investigate the history of the case or requesting to review the entire case file, as CCAP cautioned them to do for old, converted cases. RSLC-JFI distributed its ad for view on television, Facebook, and Youtube. On March 27, 2020, Judge Karofsky's campaign served a cease and desist letter to RSLC-JFI explaining that the allegations in the RSLC *Worley* Ad were demonstrably false, and thus, defamatory and offering evidence of the falsities. *See* Compl., Ex. C.

RSLC also distributed the RSLC *Worley* Ad to other parties for their publication. On March 27, Scott Walker posted the following tweet:



See Scott Walker, *Twitter*, <https://twitter.com/ScottWalker/status/1243580627426967556> (last visited Apr. 2, 2020). The Tweet attributes the Ad to RSLC and embedded within the tweet is the

RSLC *Worley* Ad, which begins playing when the tweet is viewed. The RSLC then retweeted Scott Walker's tweet, thus posting Scott Walker's tweet and the Ad on RSLC's timeline:



Both Scott Walker's twitter and the RSLC's twitter accounts are public; therefore, anyone may see the tweet—and the defamatory ad—simply by viewing the account. As of the morning of April 1st, the video embedded within Scott Walker's tweets had been viewed over 2,000 times. Both Scott Walker's tweet and RSLC's retweet remained on their respective accounts as of the time of filing.

Scott Walker not only tweeted the RSLC *Worley* Ad, but on March 27th, he posted the Ad to his Facebook Account with a similar message, reading:

Liberal Jill Karofsky is dangerously soft on crime. Watch this new ad from the Republican State Leadership Committee that spells it out. Counter the Bay Area liberals and Eric Holder who want to defeat Wisconsin Supreme Court Justice Dan Kelly. Don't let them steal an election. Go to MyVote.wi.gov today to get a ballot mailed to your home. I did. You should too!

See Scott Walker, *Facebook*, <https://www.facebook.com/138492335404/posts/10163448887520405/?sfnsn=mo&d=n&vh=e> (last visited Apr. 2, 2020). As of the time of filing, the post and the video remained on Scott Walker's Facebook page, along with his message stating the ad was from the RSLC.

The WMC Ad and the RSLC *Worley* Ad were aired by television stations across the state. WMC spent approximately \$875,400 to air its ads on broadcast television from March 17 through April 7—the Election. *See* Compl., Ex. E. The majority of that spending—55% or approximately \$484,653—was on ads to be aired from March 31–April 6, in the days leading up to the election. *Id.* WMC spent a total of \$434,850 (approximately half of its total broadcast spending) on ads to be aired on Milwaukee television stations. *Id.* Similarly, RSLC and/or RSLC-JFI spent approximately \$598,531 on ads to be aired on broadcast television from March 24–April 7. *Id.* These numbers don’t include the amounts WMC, RSLC, and/or RSLC-JFI spent advertising on cable and satellite television. *Id.*

On March 28, 2020, Judge Karofsky’s campaign sent a letter to various television stations across Wisconsin, providing notice that assertions in the ads based upon *State v. Worley* were false and requesting that those stations no longer air the ads. *See, e.g.*, Compl., Ex. D.

On or around March 31, 2020, RSLC-JFI created, published, and distributed another ad against Judge Karofsky (the “RSLC *Thompson* Ad,” collectively with the RSLC *Worley* Ad “the RSLC Ads” and with the WMC Ad as the “Ads”). A true and accurate copy of the *Thompson* Ad is available at: http://mycmag.kantarmediana.com/KMIcmagvidbin2/STSUPCT_WI_RSLC_SOFT_ON_CRIME_SHOT.mp4. In a voiceover, the RSLC *Thompson* Ad states that “Karofsky is dangerously soft on crime” and that “as judge, even went easy on a sexual predator that shot his girlfriend, allowing a deal that puts him back on the street.” While the voiceover plays, the advertisement shows images of Judge Karofsky, a dangerous-looking person, and a gun being shot. After claiming that Judge Karofsky accepted a deal that puts the offender on the street, the advertisement transitions to an image of a jail cell door being opened and a picture of Judge Karofsky. The clear implication is that the offender is currently on the street and in public because of Judge Karofsky.

Nothing could be further from the truth. The allegations in the advertisement rely upon the proceedings in *State v. Thompson*, Dane County Court Case No. 16-CF-43, available at: <https://wcca.wicourts.gov/caseDetail.html?caseNo=2016CF000043&countyNo=13&index=0&mode=details>. Judge Karofsky sentenced the offender to an eight-year sentence that would not even start until after he completed the time he was serving for other criminal convictions. This information is readily accessible on the Wisconsin CCAP record for *Thompson*.

Not only did Judge Karofsky sentence him to incarceration, Wisconsin Department of Correction's offender movement records indicate that the offender has been in DOC custody since March 2017 through the present. The offender movement records are publicly available online at <https://appsdoc.wi.gov/lop/detail.do>. Because Judge Karofsky sentenced the offender and the offender remains incarcerated, the allegations in the RSLC *Thompson* Ad are defamatory.

The Wisconsin Supreme Court election is on April 7, 2020, just mere days away. Yet, WMC, RSLC, and RSLC-JFI continue to create, publish, and distribute defamatory advertisements to irreparably harm Judge Karofsky and her reputation with the voting public. Additionally, even when informed the advertisements are defamatory, television stations continue to air the defamatory material; further harming Judge Karofsky. Because it is the only way to prevent further harm to Judge Karofsky, the Court should issue a temporary injunction.

ARGUMENT

The Ads were created to influence and affect the April 7, 2020 election by attempting to diminish Judge Karofsky's reputation with the voting public. Because the Ads are demonstrably false, they are not only defamatory, but are also in violation of Wisconsin Statute § 12.05. Every time the defamatory ads air, they cause further irreparable harm to Judge Karofsky and Jill for Justice. Because the Ads are causing irreparable harm and Judge Karofsky and Jill for Justice have an inadequate remedy at law, and because they are likely to succeed in a trial on the merits, the

Court should issue an order requiring WMC, RSLC, and RSLC-JFI to remove their respective defamatory Ads and enjoining them from creating, distributing, publishing, airing, promoting, and/or sharing the Ads or any other similarly false ad based upon the *Worley* or *Thompson* cases. The Court should also order RSLC to require anyone they distributed the RSLC *Worley* Ad to remove it and to provide Judge Karofsky and Jill for Justice with a list of every person and/or entity to whom RSLC distributed the RSLC *Worley* Ad so Judge Karofsky can confirm removal.

I. A TEMPORARY INJUNCTION IS NECESSARY TO PREVENT FURTHER IRREPARABLE HARM TO PLAINTIFFS MERE DAYS BEFORE THE ELECTION.

A party is entitled to a temporary injunction when it appears from the party's pleading that it is entitled to judgment and another party's actions during the litigation would injure the party.

When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02. A plaintiff is entitled to a temporary injunction if it can show: 1) a reasonable probability of ultimate success on the merits and 2) a lack of adequate remedy at law and irreparable harm. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Because all of these factors favor Judge Karofsky and Jill for Justice, the Court should issue a temporary injunction.

A. Judge Karofsky and Jill for Justice Will Suffer Irreparable Harm and Any Remedy at Law Would Be Inadequate.

An irreparable harm is one which is "not adequately compensable in damages." *Pure Milk Prods. Co-op v. Nat. Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). With the Supreme Court election days away, the harm to Judge Karofsky and Jill for Justice is manifest.

Each time the Ads are allowed to continue to play, the WMC, RSLC, and RSLC-JFI are spreading misinformation and damaging Judge Karofsky's reputation with the voting public by erroneously portraying her as a prosecutor that allowed a "monster" to go free.

And any remedy at law, such as damages, would be inadequate. Judge Karofsky is running for a seat on the Wisconsin Supreme Court. If the any of the Ads are determined to be defamatory—and they all will be—the election cannot be redone. Nor is there monetary compensation that would be adequate to compensate Plaintiffs. There simply is no adequate remedy to protect Judge Karofsky or Jill for Justice from the harm of these defamatory Ads other than an injunction.

B. Plaintiffs Have a Reasonable Probability of Ultimate Success on the Merits.

i. Judge Karofsky and Jill for Justice have a reasonable probability of ultimate success on the merits in claims against WMC.

Judge Karofsky and Jill for Justice are likely to be successful in both the claim for defamation and the claim of a violation of Wis. Stat. § 12.05 against WMC. In order to prove defamation, Judge Karofsky must show that the statement: "(1) is false, (2) is communicated (by speech) (by conduct) (in writing) to a third person, and (3) tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person." *Mach v. Allison*, 2003 WI App 11, ¶ 12, 259 Wis. 2d 686, 656 N.W.2d 766 (citing *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997)); *see also* Wis. JI-Civil 2501. For a political figure such as Judge Karofsky, she must also show that WMC acted with actual malice, which is shown the defendant knew the statement was false, entertained serious doubts as to the truth of the publication, or "had a high degree of awareness of falsity." *Torgerson*, 210 Wis. 2d at 542; *see also* Wis. JI-Civil 2511.

The threshold requirements are easily met. A simple review of the *Worley* case file establishes that Judge Karofsky was not the assistant district attorney during the plea bargaining and sentencing of *Worley*. Therefore, the statements made in the WMC Ad are demonstrably false. The statements were communicated by speech and in writing in the advertisements to the general public. Additionally, the WMC Ad harms Judge Karofsky's reputation in the community and attempts to influence individuals from voting for her.

Additionally, Judge Karofsky will be able to show actual malice. WMC acted with reckless disregard as to whether its statements in the WMC Ad were true. First, WMC clearly did not investigate or attempt to confirm the accuracy of its statements prior to making them. In order to access the *Worley* CCAP require, WMC through an employee and/or an agent agreed to the term that older court records that each county determined how old cases would be converted and that “[c]onverted cases may display less information.” *Wisconsin Circuit Court Access*, www.wcca.wicourts.gov (last visited Apr. 2, 2020). The *Worley* CCAP record clearly indicated that it was converted in November 2017 and that interested parties should “see file.” Dane Cty. Case No. 1999CF000396, *State of Wisconsin vs. Donald Worley*, Wisconsin Circuit Court Access, <https://wcca.wicourts.gov/caseDetail.html?caseNo=1999CF000396&countyNo=13&index=0&mode=details> (last visited Apr. 2, 2020). Thus, both the *Worley* CCAP information and the CCAP terms that WMC agreed to put WMC on notice that the *Worley* CCAP information “may display less information” and could not be relied upon as a complete record. Additionally, CCAP clearly states that the official recordkeeper is not CCAP, but rather the “clerk of circuit court, the register in probate, and the juvenile court clerk in each county.” *Wisconsin Circuit Court Access*, www.wcca.wicourts.gov (last visited Apr. 2, 2020).

A simple review of the *Worley* case file highlights the falsity of the WMC Ad. WMC acted recklessly in relying upon a knowingly incomplete record without regard for the accuracy or

completeness of the record. Moreover, even if WMC is viewed not to have acted with malice when it first aired the advertisement, its willful refusal to remove the advertisement from Youtube and the tv airings after having been provided evidence of the Ad's falsehood is more than sufficient. Actual malice occurs when the person (or group) makes or publishes a defamatory statement *knowing, or "a high degree of awareness"* that it was false. *Torgerson*, 210 Wis. 2d at 542; *see also* Wis. JI-Civil 2511. WMC was told on March 27, 2020 that the WMC Ad contained false statements. Yet, it continued to advertise and display the WMC Ad until April 1, 2020, and upon information and belief, has done nothing to remove the ad from distribution on secondary media; thus acting with actual malice. As such, Judge Karofsky is likely to succeed on the merits of her defamation claim against WMC.

Similarly, there is a likelihood of success on the merits of their claim that WMC violated Wis. Stat. § 12.05, which states:

No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

Wis. Stat. § 12.05. WMC is a "person" under Wis. Stat. § 990.01(26); therefore, it must comply with § 12.05. By creating, distributing, publishing, and airing the WMC Ad, and continuing to air and distribute the ad after receiving the cease and desist letter, WMC is knowingly making and/or publishing, or causing the WMC Ad to publish, a false representation about Judge Karofsky's record. Additionally, the fact that WMC paid over \$875,400 to air its ads on broadcast television in the weeks leading up to the election evidence its intention to affect voting at the election. The harm is manifest and the elements are met.

Because Plaintiffs are reasonably likely to succeed in their claims on the merits against WMC, a temporary injunction should be granted.

ii. Similarly, Plaintiffs have a reasonable probability of ultimate success on the merits on claims against RSLC & RSLC-JFI.

Like the WMC Ad, the statements made in the RSLC *Worley* Ad are demonstrably false. The statements were communicated by speech and in writing in the advertisements to the general public. Additionally, the RSLC *Worley* Ad harms Judge Karofsky's reputation in the community and attempts to influence individuals from voting for her.

Additionally, Judge Karofsky will be able to show actual malice. For all the reasons WMC acted with reckless disregard by relying on the CCAP record of an old, converted prosecution record, RSLC-JFI acted recklessly as well. By relying on solely the *Worley* CCAP page, RSLC-JFI acted with reckless disregard and actual malice.

Additionally, RSLC acted—and continues to act—with actual malice by failing to remove the RSLC *Worley* Ad after having been informed of its false content. RSLC was served with a cease and desist letter and provided evidentiary proof of the falsities of their *Worley* Ad. RSLC provided the video to Scott Walker, who embedded it in a tweet and a Facebook post so that the video would start to play when the tweet or post was viewed. RSLC retweeted Scott Walker's tweet, thereby placing his tweet—and thus the video—on RSLC's timeline for the public to view. Any time an individual scrolls through RSLC's timeline, the Scott Walker tweet is visible and the embedded video begins to play the RSLC *Worley* Ad. Thus, RSLC continues to publish and share the defamatory ad with the public, despite knowledge of its defamatory content. As such, RSLC acts with actual malice.

The RSLC continued its reckless disregard for due diligence in its *Thompson* Ad. The Ad's claim that Judge Karofsky put the offender back on the street, coupled with images of an opening jail cell, are patently false. Judge Karofsky sentenced the offender to 8 years in prison and the offender was incarcerated when he was sentenced and he remains incarcerated now. The

Thompson Ad was communicated to the public and was created to harm Judge Karofsky's reputation, mere days before the election. Moreover, RSLC-JFI acted with actual malice in creating, publishing, and distributing the *Thompson* Ad without performing an even cursory review of the *Thompson* case. The *Thompson* CCAP records clearly evidences both that Judge Karofsky sentenced the offender to eight years and that the offender's last location was a correctional institution. RSLC-JFI cannot rely on a portion of the CCAP records and then claim not to have seen the remainder of the record that proved its assertions were false. Such actions are, at minimum, reckless disregard and thus, actual malice.

Similarly, there is a likelihood of success on the merits of the claim that RSLC and RSLC-JFI violated Wis. Stat. § 12.05, which states:

No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

Wis. Stat. § 12.05. WMC is a "person" under Wis. Stat. § 990.01(26) and must comply with § 12.05. By creating, distributing, publishing, and airing the RSLC Ads, and continuing to air and distribute the ad after receiving the cease and desist letter, RSLC-JFI is knowingly making and/or publishing, or causing the Ads to publish, a false representation about Judge Karofsky's record. Likewise, RSLC's distribution of the *Worley* Ad evidences its violation of Wis. Stat. § 12.05. RSLC distributed the *Worley* Ad to Scott Walker, who still displays the ad to his followers and the general public on both Twitter and Facebook. Not only has the RSLC not had Scott Walker remove the Ad, they've retweeted (and thus republished the ad) and therefore continue to both publish the *Worley* Ad and cause the *Worley* Ad to be published. Similarly, the fact that RSLC and/or RSLC-JFI paid over \$598,531 to air its ads on broadcast television in the weeks leading up to the election evidence its intention to affect voting at the election. Plaintiffs are harmed by these false representations that impact a person's willingness to vote for Judge Karofsky.

Because Judge Karofsky and Jill for Justice are reasonably likely to succeed in her claims on the merits against RSLC and RSLC-JFI, a temporary injunction should be granted.

CONCLUSION

Ads such as those at issue here spread exponentially once they are released. They are replicated by users on Twitter, Facebook, Youtube, and other social media, all of which disavow any responsibility for what they distribute. But the First Amendment does not protect the creator of clearly false assertions such as the ones at issue here. No one should be able to spread false accusations about a candidate, without the tiniest bit of due diligence, and especially after it is established that the ad contains documented falsehoods. While we may have reached a point where it is impossible to completely shut down the spread of such ads once they have reached the internet, that only serves to remind us of the importance of ensuring that those who are responsible for making the ads and starting the falsehoods understand the consequences of what they have done. Faced with convincing evidence that its ad was based on a falsehood, WMC, RSLC, and RSLC-JFI obstinately refused to acknowledge the truth, and that is defamation with actual malice.

Because Judge Karofsky and Jill for Justice have a reasonable likelihood of success on the merits and is suffering an irreparable harm every time the defamatory advertisements are viewed on television, Twitter, Youtube, or Facebook, a temporary injunction must be granted.

Dated this 3rd day of April, 2020

DAVIS & KUELTHAU, s.c.
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