

November 7, 2006

**BY FAX 715-373-6153 AND  
MAIL**

Kay L. Cederberg  
Clerk of Circuit Court  
Bayfield County Courthouse  
117 East Fifth Street  
Washburn, WI 54891-0536

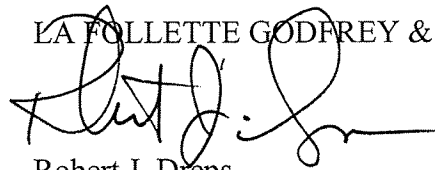
RE: J.B. Van Hollen v. Greater Wisconsin Committee, et al  
Case No. 06-CV-119

Dear Ms. Cederberg:

Enclosed for filing in the above action is Greater Wisconsin Political Fund's Notice of Motion and Motion to Dismiss and Greater Wisconsin Political Fund's Notice of Motion and Motion to Transfer Venue. A copy of these motions was served today by mail on counsel for plaintiff, J.B. Van Hollen.

Sincerely,

LA FOLLETTE GODFREY & KAHN



Robert J. Dreps

RJD:jlm  
Enclosures  
cc: Michael P. Crooks (w/enc)

mn295307\_1

J.B. VAN HOLLEN,

Plaintiff,

v.

Case No. 06-CV-000119

Case Code: 30106-Intentional Tort

GREATER WISCONSIN COMMITTEE

and

KATHLEEN FALK FOR ATTORNEY GENERAL,

Defendants.

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GREATER WISCONSIN POLITICAL FUND'S  
NOTICE OF MOTION AND MOTION TO TRANSFER VENUE

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TO: Michael P. Crooks  
Peterson, Johnson & Murray, S.C.  
3 South Pinckney Street, Suite 900  
Madison, WI 53703  
*Attorneys for J.B. Van Hollen*

**PLEASE TAKE NOTICE** that defendant, Greater Wisconsin Political Fund (“GWPF”), misidentified in the summons and complaint as Greater Wisconsin Committee, by its attorneys, LaFollette Godfrey & Kahn, moves the Court under Wis. Stat. §§ 801.51 and 801.52 to transfer the venue of this action to Dane County Circuit Court. GWPF brings this motion in the alternative, to be decided only if the Court denies GWPF’s contemporaneous motion to dismiss plaintiff’s complaint for failure to state a claim for relief. This motion will be heard at a time, date and place to be set by the Court. In support of its motion, GWPF states that:

1. The plaintiff alleges at paragraph five of his complaint, “on information and belief,” that the television advertisement sponsored by GWPF “was aired throughout the State of

Wisconsin, including to an audience in Bayfield County.” Thus, plaintiff contends this action is properly venued in Bayfield County under Wis. Stat. § 801.50(2)(a) (“In the county where the claim arose.”). This is incorrect.

2. In fact, GWPF’s advertisement was not broadcast on any television station or carried on any cable system that serves residents of Bayfield County. The ad aired, beginning on October 27, 2006, in the Milwaukee market – WTMJ-TV, WISN-TV, WITI-TV and TimeWarner Cable Milwaukee – and in the Wausau market – WSAW-TV, WAOW-TV and WJW-TV (Rhineland). The ad aired, beginning on October 28, 2006, on Charter Cable Wausau. None of these broadcast stations or cable systems serves Bayfield County.

3. The plaintiff’s defamation claim did not arise in Bayfield County simply because the criminal case that is the subject of GWPF’s ad was venued there. A defamation claim ordinarily arises in the county where the plaintiff resides. *Voit v. Madison Newspapers, Inc.*, 116 Wis. 2d 217, 222-24, 341 N.W.2d 693 (1984). J.B. Van Hollen resides in Dane County. Complaint, ¶ 1.

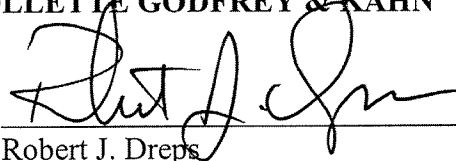
4. GWPF resides and does substantial business in Dane County. Accordingly, the case is properly venued in Dane County under Wis. Stat. § 801.50(2)(c), because it is a “county where a defendant resides or does substantial business.”

**WHEREFORE**, Greater Wisconsin Political Fund requests that, if this action is not dismissed for failure to state a claim for relief, the Court transfer venue of this action to Dane County Circuit Court under Wis. Stat. § 801.51.

Dated: November 7, 2006.

**LA FOLLETTE GODFREY & KAHN**

By:



Robert J. Dreps

State Bar No. 01006643

Mike B. Wittenwyler

State Bar No. 01025895

Attorneys for defendant Greater Wisconsin  
Political Fund

One East Main Street, Suite 500

P. O. Box 2719

Madison, WI 53701-2719

**Ph** (608) 257-3911

**Fx** (608) 257-0609

*LaFollette Godfrey & Kahn is an  
office of Godfrey & Kahn, S.C.*

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J.B. VAN HOLLEN,

Plaintiff,

v.

Case No. 06-CV-000119

Case Code: 30106-Intentional Tort

GREATER WISCONSIN COMMITTEE

and

KATHLEEN FALK FOR ATTORNEY GENERAL,

Defendants.

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GREATER WISCONSIN POLITICAL FUND'S  
NOTICE OF MOTION AND MOTION TO DISMISS

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TO: Michael P. Crooks  
Peterson, Johnson & Murray, S.C.  
3 South Pinckney Street, Suite 900  
Madison, WI 53703  
*Attorneys for J.B. Van Hollen*

**PLEASE TAKE NOTICE** that defendant, Greater Wisconsin Political Fund (“GWPF”), misidentified in the summons and complaint as Greater Wisconsin Committee, by its attorneys, LaFollette Godfrey & Kahn, moves the Court under Wis. Stat. § 802.06(2)6, to dismiss the public figure plaintiff’s defamation claim for failure to state a claim upon which relief can be granted. This motion will be heard at a time, date and place to be set by the Court. In support of its motion, GWPF states that:

1. J.B. Van Hollen is a candidate for the office of Attorney General and he filed his complaint for defamation based on a television political advertisement one day before the November 7, 2006 election.

2. The Greater Wisconsin Political Fund is a limited tax-exempt organization formed in 2006 under section 527 of the Internal Revenue Code as a “political organization.” GWPF sponsored the advertisement that is the subject of the plaintiff’s complaint, paragraphs 4-6 and 16-20.

3. GWPF’s advertisement was available to broadcast and cable television viewers in some, but not all, parts of Wisconsin and contained commentary on Mr. Van Hollen’s performance as the District Attorney of Bayfield County.

4. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint and is intended to dismiss at the pleading stage those actions where, as here, “it is quite clear that under no conditions can the plaintiff recover.” *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 312, 533 N.W.2d 780 (1995).

5. The Court must accept as true the complaint’s factual allegations in deciding this dismissal motion, but it is “not required to assume as true legal conclusions pled by the plaintiff.” *John BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). Accordingly, the Court should disregard the legal conclusions Mr. Van Hollen has pled in paragraphs 14, 15, 17, 18 and 20 of his complaint.

6. The facts alleged in Mr. Van Hollen’s complaint are insufficient to establish the essential common law elements of a defamation claim under Wisconsin law: the communication of a false statement of fact that is both unprivileged and defamatory, to someone other than the person defamed, and that has a tendency to harm the plaintiff’s reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. *See Hart v. Bennet*, 2003 Wis. App. 231, ¶ 21, 267 Wis. 2d 919, 672 N.W.2d 306.

7. Mr. Van Hollen's complaint also fails to properly allege the essential First Amendment elements of his claim challenging GWPF's comment on a matter of substantial public concern. *See Torgerson v. Journal Sentinel, Inc.*, 210 Wis. 2d 524, 535-36, 563 N.W.2d 477 (1997) ("The First Amendment imposes a constitutional privilege on the publication of statements about public figures, even when those statements are false and defamatory.").

### **THE ADVERTISEMENT IS TRUE**

8. Mr. Van Hollen does not allege that any factual statement in GWPF's advertisement is false.

6. The script of the [GWPF] advertisement reads as follows:

A 16-year-old student raped, stabbed 25 times, left to bleed to death. The convicted killer: A known sexual predator [Stanley Newago], who was free on bond after being charged with assaulting a 14-year-old girl. His bond: Five hundred dollars. J.B. Van Hollen took over the assault case when he became district attorney. Before the murder, Van Hollen never question[ed] the predator's release **or tried to revoke his bail**. Tell JB Van Hollen tough "talk" isn't enough. Prosecutors must "be" tough with violent criminals. (Emphasis added [by plaintiff]).

Complaint, ¶ 6. In particular, Mr. Van Hollen does not claim to ever have "question[ed] [Newago's] release or tried to revoke his bail" in the nearly eight weeks between his appointment as District Attorney and the murder. In fact, he made no such attempt.

9. The complaint's allegation that GWPF's advertisement "is false because Mr. Van Hollen had no legal basis to request that a court revoke Mr. Newago's bail before the [murder] . . ." states a legal conclusion, not a claim for defamation.

10. Whether or not Mr. Van Hollen, upon his appointment as District Attorney, had sufficient grounds to move the court to modify the conditions of Newago's release, including an attempt to revoke his bail, under the undisputed facts presented is a matter of legal opinion upon which reasonable attorneys might disagree. Presenting that legal question for decision, now,

would not negate the fact that Mr. Van Hollen never tried to do so at the time. GWPF's advertisement is true.

11. The complaint does not allege that GWPF made a false statement of fact.

**THE ADVERTISEMENT IS NOT DEFAMATORY**

12. Mr. Van Hollen's claim ignores established Wisconsin law governing defamation claims arising from electoral campaigns:

[A] plaintiff seeking to prove defamation must show more than the fact that a misrepresentation caused the candidate to lose votes.

*Tatur v. Solsrud*, 174 Wis. 2d 735, 742, 498 NW.2d 232 (1993). Mr. Van Hollen's complaint repeatedly ignores this principle. See Complaint, ¶ 4 (“[T]he apparent goal of [GWPF's advertisement] was to dissuade voters from voting for J.B. Van Hollen in the upcoming attorney general election.”); ¶ 18 (“[GWPF communicated its advertisement] with the intent to improperly mislead voters in the upcoming attorney general election.”); ¶ 20 (“[GWPF communicated its advertisement] to deter third persons from voting for [Van Hollen] in the upcoming attorney general election.”).

13. Aside from its perceived impact on voters, the complaint alleges no facts showing that GWPF's advertisement “tends so to harm the reputation of [Van Hollen] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Tatur*, 174 Wis. 2d at 741. GWPF's advertisement addressed a matter of legal judgment, on which reasonable attorneys might disagree, not criminal or shameful conduct. The advertisement is incapable of a defamatory meaning under Wisconsin law.

**THE ADVERTISEMENT CONTAINS PRIVILEGED  
COMMENT ON VAN HOLLEN'S PERFORMANCE OF HIS OFFICIAL DUTIES  
AND QUALIFICATIONS AS A CANDIDATE FOR ATTORNEY GENERAL**

14. Wisconsin has long recognized a privilege for fair comment on the performance of public officials and the qualifications of candidates for public office. *See, e.g., Lukaszewicz v. Dziadulewicz*, 198 Wis. 605, 606, 225 N.W. 172 (1929) (“It is thoroughly established that discussions of the qualifications and fitness of candidates for public offices are conditionally privileged.”); *Grell v. Hoard*, 206 Wis. 187, 190, 239 N.W. 428 (1931) (“[P]ublic officers and their official acts are subject to the reasonable criticism of the public.”).

15. GWPF’s advertisement is privileged as fair comment on Mr. Van Hollen’s decision, affirmatively or by omission, upon his appointment as district attorney, not to attempt to revisit Newago’s bail despite Newago’s subsequent conviction for misdemeanor battery and the assignment of a new judge to hear his case.

Charging a public officer with being inefficient and incapable in the performance of the duties of his office when the charge has some fair and reasonable basis in fact is not libelous. What constitutes efficiency and capability must always be matters of opinion. There are no absolute standards by which the conduct of public officials may be judged.

*Grell*, 206 Wis. at 191. Newago’s conviction, the assignment of a new judge, and Mr. Van Hollen’s acts or omissions are matters of public record.

16. GWPF’s commentary on Mr. Van Hollen’s performance of the duties of his office had a fair and reasonable basis in fact. Every prosecutor has the right at any time to petition the court to “increase . . . the amount of bail or . . . alter other conditions of release . . . .” Wis. Stat. § 969.08(1). Mr. Van Hollen’s legal opinion that he lacked sufficient grounds to do so in Newago’s case does not foreclose public comment on his decision.

**VAN HOLLEN CANNOT SATISFY THE FIRST AMENDMENT  
REQUIREMENTS OF HIS CLAIM**

17. For a public official plaintiff suing for defamation, the First Amendment places the burden on Mr. Van Hollen to prove GWPF’s advertisement false. *Torgerson*, 210 Wis. 2d at 543, n. 18. Mr. Van Hollen cannot satisfy this burden, as a matter of law, however, because whether he could have or should have “questioned the predator’s release or tried to revoke his bail” after Newago pled guilty to misdemeanor battery and a new judge was assigned to hear his case is a matter of opinion that cannot be proved true or false. *See Milkovich v. Lorain Journal Co.*, 497 U.S.1, 20 (1990) (“[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law . . .”).

18. As a public official plaintiff, the First Amendment requires Mr. Van Hollen to plead and prove that GWPF communicated its advertisement with actual malice, “that is, knowing the [challenged] statement was false or with reckless disregard for its truth.” *Torgerson*, 210 Wis. 2d at 542. Mr. Van Hollen cannot satisfy this burden, as a matter of law, however, because GWPF’s advertisement is literally true – he never “questioned the predator’s release or tried to revoke his bail” before the murder – and because GWPF’s commentary on that prosecutorial decision enjoys full constitutional protection.

[T]his case [must be considered] against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

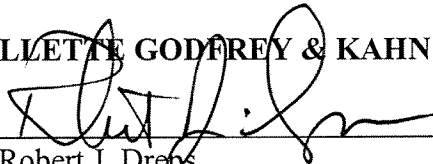
*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

**WHEREFORE**, the plaintiff’s complaint against defendant Greater Wisconsin Political Fund should be dismissed, with prejudice, for failure to state a claim for defamation.

Dated: November 7, 2006.

**LA FOLLETTE GODFREY & KAHN**

By:



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Robert J. Dreps

State Bar No. 01006643

Mike B. Wittenwyler

State Bar No. 01025895

Attorneys for defendant Greater Wisconsin  
Political Fund

One East Main Street, Suite 500

P. O. Box 2719

Madison, WI 53701-2719

**Ph** (608) 257-3911

**Fx** (608) 257-0609

*LaFollette Godfrey & Kahn is an  
office of Godfrey & Kahn, S.C.*

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