IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable Michael J. Gableman,

2008AP002458-J

Wisconsin Judicial Commission,
Complainant,

v.

The Honorable Michael J. Gableman,
Respondent.

ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATION OF DISCIPLINE
OF THE JUDICIAL CONDUCT PANEL,
HARRY G. SNYDER, PRESIDING JUDGE

REPLY BRIEF OF WISCONSIN JUDICIAL COMMISSION

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I.

A Lie Clearly Conveyed by Implication is Still a Lie.

The issue in this case is whether the Advertisement contains a false statement of fact, intentionally made or made with reckless disregard for the statement's truth or falsity. The statement of fact in the Advertisement that is false is that Louis Butler ("Butler") got Reuben Lee Mitchell ("Mitchell") off, enabling him to rape again. That false fact is clearly and unequivocally stated in the Advertisement.

Judge Gableman argues that the Court can only look at each sentence in the Advertisement denuded of any context or meaning when determining the truth or falsity of the Advertisement. In other words, Judge Gableman is asking this Court to completely ignore the way language is used, common sense, and reality. Judge Gableman cites no case to support this proposition. As Judge Fine stated in his concurring opinion, there is no law that permits the sculpting of true facts into a lie. (Appendix A-24.)

Judge Gableman argues that a statement of fact conveyed by implication can never be false, only misleading. Again, Judge Gableman cites no legal authority supporting this conclusion. Further, in arguing his position, Judge Gableman repeatedly misuses the words

"implication" and "implied" and confuses them with inferences. At one point, on page 7 of his brief, Judge Gableman goes so far as to equate false implications with impressions.

To imply a meaning has nothing to do with inferences or misleading statements. To imply in speech is to use words to signify or mean something naturally and logically to be understood. The Commission's position is not based upon the unexpected, unnatural, or unreasonable misunderstanding of listeners, or of any other inference.

The Commission's position has consistently been that the false statement of fact in the Advertisement was purposefully made by the speaker through implication by the use and positioning of words when given their natural and logical meaning in context, convey a false message. There is nothing misleading about the Advertisement. It is a clear falsehood, subject to no other reasonable interpretation then Butler put Mitchell back on the street allowing him to offend again. A lie clearly conveyed by implication is still a lie.

II.

Case Law Does Not Preclude Regulation of a Clear Lie.

Judge Gableman's brief spends a great deal of time discussing propositions that either are not in dispute in this case or are not relevant to the issues presented. The Commission agrees that political speech is at the core of the First Amendment and is subject to its greatest protection. But political speech is not inviable. Indeed, the cases cited by Judge Gableman do not say political speech cannot be regulated, but discuss how it can be regulated.

The speech at issue here is an intentional lie and as such is not protected speech. That is what ***Garrison v. State of Louisiana,*** 379 U.S. 64 (1964), stands for and what the judicial conduct code cases ***In re Chmura,*** 461 MICH 517, 608 N.W.2d 31 (2002), ***Weaver v. Bonner,*** 309 F.3d 1312 (11th Cir. 2002), and ***Butler v. Alabama Judicial Inquiry Commission*** 802 So. 2d 207 (Ala. 2001) stand for. A misrepresentation of fact made knowingly or with reckless disregard for the statement's truth or falsity concerning a judicial candidate or an opponent is not protected speech. The known lie, because it is not protected speech can be regulated. This is undisputable.

Judge Gableman's reliance on ***Buckley v. Valeo***, 424 U.S. 1, (1976), is misplaced. In that case, the issue was whether the language in a federal election statute was sufficiently unambiguous as to provide clear guidance to those wanting to make a campaign expenditure on behalf of a political candidate. The statute in question imposed limits on expenditures to a "clearly identified candidate." The Court concluded that language was too vague to pass constitutional muster. ***Buckley*** is a "void for vagueness" case and has nothing to do with the case under consideration here. This case has to do with a knowing misrepresentation of fact in a judicial campaign advertisement published by Judge Gableman, not statutory language created by a legislative body.

Similarly, ***FEC v. Wisconsin Right to Life*** ("***WRTL***") 551 U.S. 449 (2007) concerns the construction of a federal statute and speech, unlike that in the present case, that is protected by the First Amendment. The Court said that regulation of protected speech must be objective and focus on the substance of the communication rather than on intent and effect. The bright-line test adopted by the majority in ***WRTL*** is:

> In light of these considerations, a court should find that an ad is the functional equivalent of expressed advocacy only if the ad is susceptible of no reasonable

> interpretation other than as an appeal to vote for or against a specific candidate.
>
> 551 U.S. 449, 469-70 (2007).

The Commission's position in this case is not inapposite to ***WRTL***. The Commission has consistently said that the Advertisement is a misrepresentation of fact, susceptible to no other reasonable interpretation other than as a statement that Butler enabled the release of and subsequent criminal conduct by Mitchell. The Commission has not said that determination of the truth or falsity of the statement depends upon intent or effect.[1] The fact that the false message is implied does not change its certainty.

Judge Gableman's brief references ***Watts v. United States***, 394 U.S. 705, 707 (1969) and suggest that it is dismissive of the concept that a misrepresentation can be made by implication. That is not what ***Watts*** says. In ***Watts***, the issue is whether the language used by the petitioner was a threat to the President and therefore a crime under federal law. The Court simply held that what the petitioner said could not reasonably be construed as a threat. To say that a threat could not arise by

[1] The Commission has referred to the intent of the speaker in this case not to assist in interpreting the Advertisement's meaning, but to bolster its position that the only reasonable interpretation of the Advertisement is one which the speaker intended and knew to be false.

implication is wrong. For example, if the petitioner had said, "I have a trunk full of high explosives and I am on my way to the White House. Then we will see how the President likes it.", the outcome in ***Watts*** could very well have been different.

Watts does warn against regulating political hyperbole or robust, caustic, vehement, and unpleasantly sharp political speech. The Commission is not attempting to regulate any of the things about which the court in ***Watts*** warns. The Commission is seeking discipline of a judicial candidate for a known lie.

The argument about the potential chilling effect on constitutionally protected speech of the Commission's position is unfounded. The only speech "chilled" as applied in this case is purposeful lying in a judicial election campaign, speech that enjoys no constitutional protection.

The cases cited above talk about a bright-line rule when the government attempts to regulate protected speech. In this case, clarity is provided by words in the Advertisement given their natural, ordinary, and logical meaning in context. The court need not contort itself to find the misrepresentation of fact. Just read the Advertisement and the false message is clear. The above

cases say even protected speech, which a purposeful lie is not, can be regulated under this circumstance. By contrast, Judge Gableman would have the court remove each sentence from the whole of the Advertisement, parse each sentence to find its individual truth or falsity and, having done so, find that the Advertisement as a whole does not misrepresent the fact. This unnatural process makes the Advertisement meaningless and of no effect. No case law requires this court to engage in such a contorted exercise in order to comply with the Constitution.

III.

This Case is a Constitutional Application of SCR 60.06(3)(c).

The first sentence of SCR 60.06(3)(c) is constitutional and constitutionally applied in this case. The rule is precisely tailored to preclude only political speech that is not constitutionally protected. Misrepresentations of fact that are knowingly false or made with reckless disregard as to the statement's truth or falsity have not been protected speech since 1964.

Judge Gableman's reliance on ***Rickert v. State of Washington***, 161 Wash. 2d 843, 68 P.3d 826 (2007), is ill-advised at best. ***Rickert*** is simply wrong. The majority misapplies well settled constitutional law established by

the U.S. Supreme Court that the state can regulate truth or falsity of political speech.[2] Fortunately for Wisconsin citizens, Washington law is not controlling in this state.

Judge Gableman's assertion, citing the flawed reasoning of the ***Rickert*** majority, that SCR 60.06(3)(c) is unconstitutional because it does not require proof of harm to a candidate's reputation is a red herring. The state interest served by the rule is protection of the integrity of Wisconsin's judicial system, a state interest of the highest order. To say that prohibition of the known lie in a judicial campaign does not serve any compelling state interest or is of dubious value to a state's judicial system is ridiculous.

Judge Gableman would have this court believe that since Wisconsin has chosen to elect judges it cannot regulate judicial campaign speech at all. Let the public sort it all out, he says. This court need not adopt this philosophy and should not. The known lie in a judicial campaign strikes at the very heart of the integrity of a state's judicial system and the preservation of a democratic government.

[2] The Commission encourages the Court to read the dissenting opinion in ***Rickert*** in its entirety for its correct and skillful application of the law.

CONCLUSION

The Advertisement unmistakably conveys the false fact that Butler's conduct allowed Mitchell to rape again. Such calculated falsehood, even in political speech, is not protected speech. The conclusion of law reached by the Judicial Conduct Panel, therefore, should be reversed and Judge Gableman disciplined for his misconduct as the Court deems appropriate.

Lying in judicial election campaigns in Wisconsin cannot and need not be condoned.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) for a brief produced using Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 9 pages.

Dated this 10th day of February 2010.

State of Wisconsin
Judicial Commission

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James C. Alexander

CERTIFICATE OF COMPLIANCE WITH WIS. STAT.§ (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February 2010.

State of Wisconsin
Judicial Commission

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James C. Alexander