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CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

RALPH SASSON,

Plaintiff-Appellant,

v.

RYAN BRAUN, ONESIMO BALELO and CREATIVE ARTISTS AGENCY, LLC.,

Defendants-Respondents,

DOES 1-50 Inclusive,

Defendant

Appeal No: 2014AP001707

Circuit Court Case No.: 13-CV-007014

PLAINTIFF-APPELLANT'S INITIAL BRIEF

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STATEMENT ON ORAL ARGUMENT

The arguments submitted by Appellant are meritorious, supported by relevant state and federal authority, and are not confined solely to questions of fact. The resolution of numerous issues of constitutional and statutory law within the State of Wisconsin would be facilitated by the availability of counsel to elaborate on particularly important issues – some of which involve questions of first impression. Furthermore, because this appeal involves a challenge to findings of fact which were unsupported by the record, Appellant believes that proper resolution of these factual findings would be aided by oral argument.

STATEMENT ON PUBLICATION

The Court's opinion in this case will have far-reaching practical and legal ramifications on the citizens of Wisconsin. Additionally, this case involves matters of substantial and continuing public interest. Finally, the Court's opinion will contribute to the legal literature in the state of Wisconsin by clarifying a number of existing statutory and constitutional issues. Therefore, Appellant believes that publication of this Court's opinion is necessary.

STATEMENT OF ISSUES / QUESTIONS PRESENTED

I. In order to seal documents which have been produced through mechanisms of discovery, a party must motion the court for a protective order pursuant to Wis. Stat. §804.01(3). In the present case, the Jan.29 Order was instituted pursuant to Wis. Stat. §805.03. Did the Jan. 29 Order apply to materials obtained in discovery?

II. An order which prohibits the publication or broadcast of particular information or commentary is designated as imposing a prior restraint on speech. In this case, the Jan.29 Order required that Sasson's filings "not be made public in any respect." Was the Jan. 29 Order a prior restraint?

   A. To establish "good cause" for the institution of a prior restraint, the speech being restrained must pose a clear and present danger to a fair trial. In the present case, the court found that Sasson's filings posed a "substantial risk" to a fair trial. Did good cause exist for the Jan.29 Order's institution?

   B. To pass constitutional muster, a prior restraint must be narrowly tailored and the court must consider less restrictive alternatives. In the present case, the court never considered less restrictive alternatives before ordering

Sasson's filings to not be made public "in any respect". Was the Jan.29 Order unconstitutional?

III. Due process requires notice and opportunity to be heard at a meaningful time and in a meaningful manner. In this case, the court heard and granted CAA's motion for a gag-seal order less than 48 hours after it filed. Did the court violate Sasson's due process?

IV. Dismissal for bad faith in discovery is appropriate when a party intentionally violates discovery orders, obstructs the discovery process, and engages in a spirit of non-cooperation. In this case, Sasson never violated any discovery orders; provided meaningful responses; engaged cooperatively; and never intentionally obstructed discovery. Was dismissal for bad faith appropriate?

V. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than without the evidence. In this case, Sasson sought relevant evidence from David Prouty. If the information Sasson sought was relevant, was it reasonable to conclude that Sasson misused the legal process by contacting Prouty?

VI. A discretionary inference must be the product of a rational mental process by which the facts of record and law are relied

upon in achieving a reasoned and reasonable determination. In this case, the court confabulated facts and instances of misconduct to substantiate its inference that Sasson's actions were motivated by spite, bad faith, and an intention to misuse the legal process. Was the court's inference reasonable?

VII. When ruling on a Wis. Stat. §806.07(1)(h) motion, the court properly exercises its discretion by considering the five interest of justice factors. In this case, the court failed to consider the five interest of justice factors. Did the court misuse its discretion

STATEMENT OF THE CASE

I. NATURE OF THE CASE

On July 31, 2013 Plaintiff-Appellant Ralph Sasson ("Sasson") filed a lawsuit against Defendant-Respondent Ryan Braun ("Braun") for slander, libel, intentional and negligent infliction of emotional distress, and fraudulent misrepresentation. (R.1) On August 22, 2013 Sasson filed an Amended Complaint adding claims against Braun for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent inducement, and quantum meruit. Sasson also added Onesimo Balelo ("Balelo") and Creative Artists Agency (the "Agency") (collectively "CAA") as defendants and sought redress for fraudulent misrepresentation, fraudulent inducement, and negligence. (R.6)

This appeal derives from the entire June 11, 2014 Opinion and Order ("dismissal order"), as well as the August 11, 2014 Post-judgment Order (Aug. 11 Order) of the Milwaukee County Circuit Court (the "court"), the Honorable Paul Van Grunsven presiding. In the dismissal order, the trial court dismissed Sasson's entire case, with prejudice, as a sanction for purported violations of court orders, misuse of the legal process, want of prosecution/non-compliance with discovery orders, lack of professionalism, and unsubstantiated

allegations. (R.170; A-App.101-116) On August 1, 2014 the court summarily denied Sasson's Wis. Stat. §806.07 motions to vacate the seal order and relief from judgment. (R.249, 10:5-17:2; A-App.118-125) Subsequent to Sasson's submission of two separate objections to the proposed order's language (R.216, R.217) – which were ignored – a written order reflecting the court's decision was signed on August 11, 2014. (R.221; A-App.126-27)

II. FACTS OF THE CASE

On November 3, 2011, Sasson, a law student and close friend of Braun for over 15 years, received a call from Balelo, Braun's agent, explaining that a colleague's client, who was a professional baseball player, had tested positive for steroids. (R.6, ¶17) Balelo requested Sasson's help with researching the matter for the purpose of assisting in the player's defense against imposition of administrative discipline in a forthcoming arbitral proceeding with Major League Baseball ("MLB"). Balelo offered Sasson $2,000 for his initial brief and an additional $5,000 contingent upon the player's exoneration. (R.6, ¶18)

Sasson agreed to the foregoing terms and on November 8, 2011, completed a memo citing scientific, legal, and procedural reasons for the player's exoneration. (R.6, ¶¶19, 21) Prior to completing this memo, Balelo emailed Sasson the player's lab report

and two confidential arbitration opinions emanating from from violations of MLB's Joint Drug Prevention Program by Major League Baseball Players Association ("MLBPA") union members Rafael Palmeiro and Ryan Franklin. (R.53-Ex.A, ¶9; A-App.133-37)

On November 11, 2011, Braun contacted Sasson and confirmed that he was the player who had tested positive for the banned substance. (R.6, ¶23) On November 18, 2011, Sasson was compensated for his services with a check in the amount of $2,050. (R.6, ¶27) In February 2012, Braun was exonerated of any wrongdoing relating to his failed drug test. (R.6, ¶33) Despite satisfaction of the condition precedent of $5,000, Sasson did not receive payment as promised. (R.6, ¶35) Sasson was eventually able to reach Balelo in May 2012 and inquired about the $5,000 owed. (R.6, ¶36) Balelo responded that Sasson would not be paid the $5,000 since Braun had already spent over $200,000 in legal fees and Sasson was not as involved in the project as initially expected. (*Id.*)

After his requests for payment were further rebuffed by both Braun and Balelo, Sasson mailed Balelo a draft complaint naming Braun, Balelo, and the Agency as defendants. (R.6, ¶¶51-52) After receiving the complaint, Balelo explained that Sasson would receive the $5,166.75 owed to him as long as Sasson agreed to draft and sign

an agreement ("the Release") releasing all claims against Respondents. (R.6, ¶¶53-54) Balelo demanded that the terms of the Release include a provision that Sasson would not disseminate any documents related to his participation in Braun's defense and that no party would make disparaging comments about the other. (R.6, ¶55-56) Sasson drafted the Release and promised to destroy all documents related to his assistance in Braun's arbitration. (R.6, ¶60, 32-35; A-App.138-140) Sasson also inserted a liquidated damages clause which would compensate Respondents for any expected losses should Sasson disseminate these documents. (R.6-Ex.A) When Sasson inquired who would act as a signatory for the Agency so that he could insert their name into the contract, Balelo told Sasson that he had the authority to sign on behalf of both Braun and the Agency. (R.6, ¶184)

Almost immediately after the document was signed and Sasson was compensated, Braun engaged in making false and defamatory statements about Sasson, thereby breaching the Release. (R.6, ¶67) On July 23, 2013, Sasson's long-standing suspicions concerning Braun's breach were ultimately verified. (R.6, ¶98) On July 24 Sasson contacted Balelo to set up a meeting with Braun and warned Balelo that if Braun was not amenable to meeting with Sasson, Sasson would seek legal redress. At this point, Balelo

informed Sasson that he did not have the authority to sign the Release on the Agency's behalf and that the Agency did not know about the Release. (R.6, ¶190; R.31-Ex.A; A-App.141-145)

Subsequent to being informed that Balelo fraudulently misrepresented his authority to sign on the Agency's behalf, Sasson attempted, for over a month, to meet with the Agency and have the Release ratified. (R.98-Ex.E, 305:12-25) The Agency refused. (R.31-Ex.A) Sasson then amended his original complaint and added Balelo and the Agency as defendants.

III. PROCEDURAL HISTORY

When filing his original complaint against Braun, Sasson unknowingly violated Milwaukee L.R. 1.11 by concurrently filing his discovery requests with the court on July 31 and Oct. 8, 2013. (R.2-4, R.13-21) On Oct. 25, the court conducted a telephonic hearing to set a briefing schedule on Respondents' motions to dismiss and motion to stay discovery. During this hearing, Sasson was made aware of his violation of L.R. 1.11. Since this time, Sasson has fully complied with L.R. 1.11. On Nov. 21 the court granted a motion to stay discovery filed by CAA and postponed discovery until after ruling on the motions to dismiss. (R.50)

On Dec. 20 the court heard oral argument on the motions to dismiss wherein it directed inquiry at Sasson concerning whether he

possesses evidence supporting the publication element of his libel claim. Sasson responded "I have no proof of that." (R.238, 39:4-8; A-App.147). Later in the hearing, the court again asked Sasson about whether he was aware of any libelous writings authored by Braun. Sasson responded "I'm unaware of it, but I believe there are…Considering today's society and the way that people communicate via text message and things of that nature." (R.238, 47:15-48:6; A-App.148-49) On January 15, 2014 the court issued a ruling dismissing 7 of Sasson's 12 claims. The surviving claims were fraudulent misrepresentation and inducement against CAA and negligent infliction, fraudulent misrepresentation, and libel against Braun. (R.52; A-App.150-155)

According to the court, Sasson's contract claims were dismissed because, (1)Sasson's own pleadings "*could be* read to support an allegation that he engaged in the unauthorized practice of law ("UPL") by rendering legal advice and performing legal work for compensation" (R.52-4; A-App.153) (emphasis added); (2)Sasson was not protected by SCR 23.02(2)(e), because "Sasson never participated in any labor negotiations, arbitrations or conciliations" (R.52-5; A-App.154) (emphasis in original); and (3)the language of SCR 23.02(2)(e) is not so broad as to allow

unlicensed legal work as long as it is merely related to an arbitration." (*Id.*) (emphasis in original)

In response to what Sasson believed to be the court's erroneous finding concerning the extent of his participation, Sasson filed a letter with the court on Jan.23 requesting it reconsider its decision. Attached to this letter was a copy of a check Balelo had sent to Sasson, as well as Sasson's own phone records demonstrating that over 900 minutes of phone conversation had taken place between Sasson, Braun, and Balelo from Nov.3, 2011 to Feb. 24, 2012.[1] (R.53-Ex.C&E) These attachments were submitted as evidence to demonstrate the extent of Sasson's participation in Braun's arbitration. (R.53) The court informed the parties it would hold a hearing on Jan. 28 to address Sasson's letter.

The same day, Stephen Kravit ("Kravit"), attorney for CAA, sent a letter to the court which accused Sasson of filing the letter "to harass, annoy and oppress Defendants" and that Sasson's letter "improperly contain[ed] personal identifier information, which is not allowed in the public record."[2] (R.54; A-App.156-57) After being informed that CAA took umbrage with the contents of his

[1] The attachments were Sasson's property and were not obtained through the mechanisms of discovery.

[2] Pursuant to Wis. Stat. §19.36(13), it is not the parties, but the court ("authority" as defined §19.32(1)) who is responsible for preventing public access to personal information.

letter, Sasson contacted clerk Nathan Wohner and instructed him to place the offending documents under seal. (R.176-Ex.4; A-App.162-65) Sasson also apologized to opposing counsel for his confusion. (*Id.*) Notwithstanding Sasson's corrective action, CAA, on Jan. 27, filed a motion pursuant to Wis. Stat. §805.03 requesting a protective order requiring Sasson to submit all of his future filings under seal (R.58, 1; R.59, 6; R.62, 1,; A-App.193; A-App.177; A-App.202), Again, despite Sasson's corrective action, CAA argued Sasson's letter was filed "for the purpose of harassing and embarrassing them." (R.59, 7; A-App.178) CAA further argued that Sasson's filing also violated attorney-client privilege. (R.59, 7-9; A-App.178-180); *but see,* (R.98-Ex.A, 266:1-20; A-App.182); *see also,* (R.186, 1-3, R.187-Ex.2, 102; A-App.183-192)

Even though the Jan. 28 hearing was scheduled to address Sasson's Jan. 23 letter, CAA noticed its Jan. 27 motion for a hearing on Jan. 28 "or at a later time to be set by the Court." (R.58, 1; A-App.193) As a result of inclement weather, the court was closed on Jan. 28. Thus, the hearing to address Sasson's letter was rescheduled for Jan. 29. Despite Sasson's lack of meaningful notice, the court took up and granted CAA's Jan. 27 motion less than 48 hours after it was filed. (R.240, 31:10-21; A-App.197) The court concurrently signed the proposed order accompanying the motion (the "gag-seal"

or "Jan. 29 Order"), which ordered that "all future filings by the Plaintiff Sasson shall be made under seal, directly with my clerk, and shall not be made public in any respect…" (R.62, 3; A-App.204) The written gag-seal order also states that the attachments to Sasson's Jan. 23 letter were filed for the purpose of "reveal[ing] communications protected by the attorney-client and/or work product privileges." (R.62, 2; A-App.203)

On March 17, Braun filed a motion compelling Sasson to properly respond to his discovery requests. (R.109) On April 4, the court granted Braun's motion and ordered that Sasson "provide meaningful responses to these discovery requests" and "not just give written answers, but to produce documents and other information that support your responses." (R.244, 27:23-25, 31:6-9; A-App.208-209) Sasson explicitly notified the court that he originally believed his responses were proper because they were identical in nature to Braun and CAA's responses and given his inexperience, Sasson was merely following their lead. (*Id.*, 21:17-22:10; A-App.206-07) Sasson also expressed his frustration with the hypocrisy of Braun's compel motion when Sasson's manner of responses were identical in nature to Braun's responses. To Sasson's shock, the court's reply to Sasson was that "You brought these claims against very high profile defendants." (*Id*., 31:12-32:4; A-App.209-210)

A hearing to address the propriety of Sasson's responses was scheduled for May 6 and in the interim Sasson amended his responses to comport with the court's order. On April 30, and after getting nowhere in his meet and confer correspondence with Braun, Sasson filed a motion to compel of his own to force Braun to properly respond to Sasson's interrogatories. (R.128). Given the sheer volume of Braun's improper responses, Sasson needed to file 3 separate motions to compel lest he planned to submit one 50 page motion in one fell swoop. (R.128; 1-2)

Concurrently filed with Sasson's motion to compel was a letter to the court which included Sasson's amended responses. (R.132; A-App.211-12) Sasson filed this letter because James Barton ("Barton"), attorney for Braun, attempted to agitate Sasson by accusing him of being uncooperative despite Sasson having implored Barton to immediately inform him if any amended responses were inadequate. (*Id.*-Ex.B, 3; A-App.216) Instead of engaging cooperatively, Barton nonsensically characterizes Sasson's cooperation and intent to do right by the process as "tacitly admitting" that Sasson knew his responses were inadequate. (*Id.*-Ex.B; 6; A-App.219) Barton also refused to explain why Sasson's responses were inadequate because, according to Barton, such explanation would be "unnecessary and counterproductive." (*Id.*-

Ex.B, 7-8; A-App.220-21) After receiving Braun's supplemental motion to compel, Sasson, without being prompted to do so, filed 2nd Amended responses with the court as an attachment to his supplemental reply in opposition. Sasson desperately sought to not only remedy Braun's concerns, but to also demonstrate his good faith commitment to adhering to the court's order. (R.134-Ex.A)

On May 5, Sasson filed a motion to compel aimed at Balelo and a motion for commission to take the out-of-state deposition of David Prouty ("Prouty"), general counsel of MLBPA. (R.137; R.140) The next day, at the May 6 hearing, the court did not rule on Braun's motion to compel but instead, and despite Sasson's own motions to compel sitting in the court's queue, the court ordered as follows:

> "I'm stating here for the record there will be no further discovery. There will be no further motion practice, nothing…I will further order that there will be no discovery, there will be no deposition of Braun until such time as I rule on this motion."

(R.245, 68:10-69:2; A-App.227-228)

On May 15, CAA filed a motion for contempt and sanctions and a motion to lift the stay for the purpose of addressing what CAA claimed to be Sasson's violation of the Jan.29 Order. (R.150) CAA argued that on May 7, Sasson violated the Jan.29 Order and a mythical seal order specific to the Balelo deposition by emailing Prouty and paraphrasing portions of the Balelo deposition. (R.150,

10-11) Despite the court never having expressed that the Jan.29 Order restricted Sasson's speech, and that CAA, ***by its own admission***, acknowledged the seal's restrictions being limited to "distribution" of Sasson's filings (R.97, ¶9; A-App.230), CAA conveniently changed positions and suddenly characterized the seal as placing restrictions on Sasson's speech. CAA further argued that Sasson's email was solely intended to sully Balelo's reputation because Sasson's inquiry to Prouty had no relevance to his claims. (R.150, 11-12, 16)

Sasson responded that no gag order had been issued; that his email was not a violation of the seal; and further explained why his inquiry to Prouty was eminently relevant to each of his claims against Balelo and the Agency.[3] (R.155) On May 29, Sasson filed a motion to vacate the seal order. Sasson argued that if the court had intended to place restrictions on his speech, such restrictions were improper because a seal order is not intended to restrict speech but to prevent public access to sealed filings. (R.162) Sasson concurrently filed a motion to shorten time. (R.165)

[3] Sasson also explained why he never "mischaracterized" Balelo's testimony and how Sasson's paraphrasing of Balelo's testimony was reflective of the fact that, while Balelo denied remembering what documents were transmitted, whatever documents were transmitted, Michael Weiner assented to their transmission. (R.155, 12-15; A-App.233-36)

At the June 5 hearing, the court denied Sasson's motion to shorten time and refused to hear his motion to vacate – this despite granting CAA's motion to shorten time on two separate occasions. (R.246, 33:10-34:21; A-App.238-239) According to the court, the multibillion dollar agency and the 10 lawyer firm representing them did not have enough time (9 days) to respond to Sasson's motion seeking to reclaim his rights. Yet, somehow, the pro se law student was expected to respond, in less than 48 hours, to CAA's Jan. 27 motion which stripped Sasson of those rights.

On June 11, 2014, the court granted Respondents' motion for sanctions and dismissed Sasson's case for numerous instances of purported misconduct – including violating the Jan.29 Order by paraphrasing the Balelo deposition. (R.170) Subsequent to dismissal Sasson filed two Wis. Stat. §806.07 motions – one for relief from the dismissal order and the other to vacate the seal order. (R.175, R.186) On July 13, Sasson posted portions of his videotaped deposition on YouTube. CAA and Braun moved to have Sasson held in both criminal and civil contempt. (R.193; R.201, 4; A-App.246) On July 23, the court granted Respondents' motion for criminal contempt and referred the matter to the Milwaukee DA's Office. (R.209) Sasson was subsequently arrested outside the courtroom but released 2.5 hours later for lack of probable cause. On August 1, the court

summarily denied Sasson's post-judgment motions as well as a motion for recusal. A written order reflecting the court's August 1 ruling was signed on August 11. (R.221; A-App.126-27)

On August 22, Sasson was informed by the DA that he would not be charged with criminal contempt because, as the court explained at a September 30 hearing "the deposition that was put out on Youtube was not an item that was filed under seal, and technically there was no violation of the Court's seal order…" (R.250, 48:25-49:3; A-App.248-49)

STANDARDS OF REVIEW

§I: Whether the Jan.29 Order applied to discovery involves a question of law. *See, e.g., State v. Piddington*, 2001 WI 24, ¶13, 241 Wis.2d 754, 623 N.W.2d 528. Additionally, because the language of the order can be readily established through documentary evidence, this court need not defer to the trial court's findings. *Cohn v. Town of Randall*, 2001 WI App 176, ¶7, 247 Wis.2d 118, 633 N.W.2d 674.

§§II-III: Whether the facts in the record fulfill a constitutionally mandated standard is a question of law and subject to de novo review. *See, e.g., Farrell v. John Deere Co.*, 151 Wis.2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989)

§§IV-VII: "A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the

record and in reliance on the appropriate and applicable law." *Milwaukee Women's Med. Serv., Inc. v. Scheidler*, 228 Wis.2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999). "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Id*. Additionally, whether a factual inference may be drawn, whether it is reasonable, and whether it is the only reasonable inference are all questions of law for the appellate court to decide. *Groom v. Professionals Ins. Co*., 179 Wis.2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993) An erroneous exercise of discretion occurs when the circuit court (1) fails to consider and make a record of the relevant factors; (2) considers clearly irrelevant or improper factors; or (3) gives too much weight to one factor. *See*, *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). It may also occur when the circuit court makes an error of law. *Id.*, 471–72

ARGUMENT

I. BECAUSE THE JAN.29 ORDER WAS NOT INSTITUTED PURSUANT TO §804.01(3), THE BALELO DEPOSITION WAS NOT UNDER SEAL

In order to obtain restrictions on discovery, Wis. Stat. §804.01(3) requires the party or person from whom discovery is

sought to establish "good cause" for a protective order. Therefore, without a protective order covering materials obtained in discovery, such materials may be used by a party for any purpose, including dissemination to the public.

In the present case, the Jan.29 Order was instituted pursuant to Wis. Stat. §805.03 (R.62, 1; A-App.202) and required "[A]ll future *filings* by plaintiff Sasson shall be made under seal, directly with my clerk, and shall not be made public in any respect…" (R.62, ¶4, R.240, 31:10-15; A-App.204, A-App.197) (emphasis added). The order's plain language and the statute pursuant to which the order was instituted establish that its restrictions don't apply to materials obtained through discovery, but rather, apply only to Sasson's filings. Yet, in spite of these unambiguous restrictions, the court misused its discretion and expanded the scope of the order's restrictions by erroneously stating that "Since January 29, 2014, this matter has been subject to a standing seal order under which *all documents* are required to be filed under seal." (A-App.105) (emphasis added). By improperly expanding the Jan.29 Order's scope, the court concluded that "Sasson's disclosure of Balelo's sealed deposition testimony was done intentionally and with conscious disregard for the seal order issued by this Court. This supports a finding that Sasson acted in bad faith." (A-App.106)

As previously stated, the Jan.29 Order only applied to Sasson's filings; not to discovery. And because the Balelo deposition was a document obtained through discovery, it was not under seal. Thus, Sasson's discussion of the Balelo deposition was not a violation of the Jan.29 Order and the court committed judicial error and misused its discretion when it dismissed Sasson's case under an erroneously expanded framework of the Jan.29 Order's restrictions.

With respect to the contention that a seal order specific to the Balelo deposition existed, two well-established legal principles are dispositive of this false proposition. First, an order of the court requires that a juridical pronouncement be made with due regard to certain formalities such as pronouncement in open court. *See, In re Estate of Popp*, 82 Wis.2d 755, 772, 264 N.W.2d 565 (1978). In this case, the court never promulgated an order in open sealing the Balelo deposition.

Second, in order for any stipulation between the parties to have legal force or effect, it must be made on the record in open court or at a telephonic hearing or be written and subscribed by the parties to be bound thereby or their attorneys. These requirements are mandatory. *See, Oostburg State Bank v. United Savings & Loan Ass'n.*, 125 Wis.2d 224, 231-32, 372 N.W.2d 471 (Ct. App. 1985); *see also,* Wis. Stat. §807.05. In the present case, no stipulation

sealing the Balelo deposition was made on the record in open court nor was such stipulation reduced to writing and signed by the parties to be bound.

Based on the foregoing, no existing seal order related to the Balelo deposition existed and Sasson cannot be said to have violated any order of the court by discussing the Balelo deposition with a material witness.

II. BECAUSE IT PROHIBITED ALL COMMENTARY ON SASSON'S FILINGS, THE JAN.29 ORDER WAS A PRIOR RESTRAINT

Within the 7th Circuit, the well-established standard when reviewing prior restraints on lawyer speech are: (1) whether the activity restrained poses a "clear and present danger" or a "serious and imminent threat" to a fair trial, *see, Id.* at 1061; (2) whether the order is narrowly tailored, *see, Id*.; and (3) whether the order utilizes the least restrictive means for achieving its purpose. *See, Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975)

A prior restraint on speech is "[a]n order which prohibits the publication or broadcast of particular information or commentary". *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560, 96 S. Ct. 2791 (1976). Prior restraints are considered to be "the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. Never in its history has the Supreme Court upheld a prior

restraint on "pure speech" because such restraints have consistently been recognized as being "presumptively unconstitutional." *Id.* at 558-59.

Prior to dismissal, Sasson argued that a seal order's restrictions are limited to simply restricting the public's right of access. But in the dismissal order, the court classifies Sasson's argument as an incorrect, "narrow characterization" because "The seal order would be virtually useless if it did not prevent the parties from verbally disclosing the confidential information contained in the sealed record." (A-App.105-06) Incredibly, prior to dismissal, the court never articulated that the "seal" placed prior restraints on Sasson's speech.

To be sure, the court is categorically incorrect in its assessment of a seal order's purpose and the restrictions imposed as a result its imposition. *See, e.g.*, *In re Sealing & Non-Disclosure*, 562 F.Supp.2d 876, 880 (S.D. Tex. 2008) ("Judicial gag orders impinge upon freedom of speech and press under the First Amendment…On the other hand, sealed judicial orders conflict with the common law tradition of public access to judicial proceedings…"); *see also, O'Keefe v. Chisholm*, No. 14-1822 (7th Cir. Sept. 24, 2014) ("The state court entered a comprehensive order *regulating disclosure of documents* in the John Doe proceeding. (*It also issued a gag order*,

forbidding subpoenaed parties to *talk* about what was happening…")) (emphasis added) (A-App.300)

Because the gag-seal placed prior restraints on Sasson's extrajudicial speech, the propriety of the order's restraints must be evaluated within the context of First Amendment jurisprudence. *See, Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970). Incredibly, prior to June 11, 2014, the court never articulated that the "seal" order placed prior restraints on Sasson's speech.

A. THE JAN.29 ORDER LACKED GOOD CAUSE BECAUSE NOT ONLY DID THE COURT UTILIZE AN IMPROPER STANDARD, BUT ALSO IMPROPERLY PREDICATED GOOD CAUSE ON SASSON'S FILINGS AND NOT HIS SPEECH

In order to establish "good cause" for imposing prior restraints on lawyer speech, the speech being restrained must pose a clear and present danger or serious or imminent threat to the right to a fair trial. *See, Chase,* 435 F.2d at 1061. In this case, the court misused its discretion when, instead of utilizing the proper clear and present danger standard, the court found that there would be a "substantial risk that potential jurors would be prejudiced if the information contained in many of Sasson's filings was made public." (A-App.105). The court's improper use of the "substantial risk" standard is similar to, and was most likely derived from the standard used in SCR 20:3.6 which requires a lawyer to not make

extrajudicial statements which will have a substantial likelihood of materially prejudicing an adjudicative proceeding. *See,* SCR 20:3.6; *see also, Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

In the present case, Gentile is instructive as tool of distinction. Gentile involved the State Bar of Nevada's after-the-fact punishment of a lawyer's extrajudicial statements. Unlike Gentile, however, the instant case does not involve after-the-fact punishment, but instead involves a prior restraint on the speech of a trial participant.[4] *See,* Erwin Chemerinsky, *Lawyers have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional,* 17 Loy. L.A. Ent. L. Rev. 311, 316 (1997) ("Gentile only involved the standard for after-the-fact punishment on lawyer speech, not prior restraints.") (A-App.306)

The fact that Sasson has yet to become an attorney is not in dispute. However, Sasson's non-attorney status does not afford the court the power to create special standards of "good cause" for implementing prior restraints on speech. Yet, that is exactly what the court did: It created a special, heretofore nonexistent standard of good cause so that it could implement a prior restraint on Sasson's

[4] Another critical distinction is that Gentile involved the lawyer's extrajudicial speech whereas this case involved Sasson's filings; not Sasson's speech.

speech. Indeed, the court was explicit in its reasoning for implementing the gag-seal when it stated as follows:

> "[T]here just simply cannot be a risk…that something is going to be filed by a nonlawyer, a third year lawyer that gets into the court file that somehow prejudices this Court's ability to conduct a jury trial."

(R.240, 32:9-17; A-App.198)

If the lower court's decision is allowed to stand, this Court would be countenancing a blatantly unconstitutional and discriminatory standard which requires non-attorney litigants to relinquish their First Amendment rights in exchange for the ability to exercise their Sixth Amendment right to self-representation. Not only would this standard violate due process and equal protection, but it would also violate the unconstitutional conditions doctrine which provides that the government cannot condition a benefit on the requirement that a person forego a constitutional right. *See, e.g, Perry v. Sindermann*, 408 US 593, 597, 92 S.Ct. 2694 (1972) (Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.")

The court committed judicial error in utilizing the substantial risk standard, which applies to after-the-fact punishment on lawyer speech, as opposed to the "clear and present danger" standard which, within the 7th Circuit, applies to prior restraints and gag orders.

B. THE JAN.29 ORDER IS UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD AND WAS INSTITUTED WITHOUT CONSIDERING LESS RESTRICTIVE ALTERNATIVES

A law is overbroad when "its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." *Bachowski v. Salamone*, 139 Wis.2d 397, 411, 407 N.W.2d 533 (1987). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called 'chilling effect.'" *Id.* Therefore, even in the presence of sufficient justification for placing restrictions on speech, an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice. *See, Chase, 435 F.2d* at 1061.

In this case, the gag-seal required Sasson's filings to "not be made public in any respect." The order restricted any and all discussion by Sasson about his filings irrespective of whether such discussion was prejudicial or innocuous. Such manner of limitless restrictions are uniformly considered "to be an extreme example of a prior restraint on freedom of speech and expression." *CBS, Inc. v.*

Young, 522 F.2d 234, 239-40 (6th Cir. 1975). Incredibly, even the court acknowledged the gag-seal's overbreadth:

> MR. SASSON: "[I]t shouldn't, impose these wholesale restrictions on my freedom of speech, my ability to conduct this case. It's not warranted.
>
> THE COURT: I know. I know.

(R.246, 102:20-103:3; A-App.241-42)

Additionally, whenever imposing any restrictions on speech, the least restrictive means must be utilized. *See, e.g., Chicago Lawyers* 522 F.2d at 249. If any method other than a prior restraint can effectively be employed to protect a private interest, then the order is invalid. *See, e.g. CBS,* 522 F.2d at 238. In Nebraska Press, the Supreme Court outlined myriad alternatives to prior restraints including, but not limited to, searching questioning of prospective jurors to screen out those with fixed opinions as to guilt or innocence. *See, Nebraska Press* 427 U.S. at 564-65. While not all of the measures mentioned in Nebraska Press will be feasible in every case, they must still be carefully considered before resorting to an order restraining a party's First Amendment rights. In the present case, the court not only failed to explore any alternative practices, but also failed to find that the only way to impanel an impartial jury was through a gag order.

Based on the foregoing, the order is facially invalid and too broad to pass constitutional muster. The court's failure to narrowly tailor the order and utter failure to explore, let alone mention less restrictive alternatives serves as a clear example of judicial error and Sasson requests that this Court reverse the dismissal order as dismissal was predicated on Sasson's purported violation of an invalid order.

III. THE JAN.29 ORDER WAS INSTITUTED IN VIOLATION SASSON'S RIGHT TO DUE PROCESS BECAUSE SASSON WAS NOT PROVIDED NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD

Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g.*, *In Interest of S.D.R.*, 109 Wis.2d 567, 572, 326 N.W.2d 762 (1982). Due process is often referred to as "a flexible concept that varies with the particular situation" *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975 (1990) because what is considered "meaningful" is a matter which is decided on a case-by-case basis. In this case, the gag order deprived Sasson of his First Amendment liberty interests. Therefore, given due process's "flexible" nature, this Court should evaluate the trial court's provision of due process within the context of the First Amendment values at stake.

As a threshold issue, Wis. Stat. §801.15(4) states that "a written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by statute or by order of the court." Wis. Stat. §801.15(4). Notwithstanding §801.15(4)'s provisions, trial courts have discretion to shorten the five-day notice requirement for motions so long as each party has a fair opportunity to prepare and be heard. *See*, *Schopper v. Gehring*, 210 Wis.2d 208, 215, 565 N.W.2d 187 (Ct. App. 1997) A fair opportunity to prepare and be heard envisions providing "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them a meaningful opportunity to present their objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950) In other words, the notice must be sufficient to enable a party to determine what is being proposed and what he must do to prevent a deprivation of his interest. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011 (1970).

On Jan.29, Sasson was deprived of his right to due process in two distinct ways. First, Sasson never received actual notice that CAA's Jan.27 motion would be heard less than 48 hours after it was filed. In fact, neither did CAA as evidenced by their notice of motion

which states "This motion shall be heard on January 28, 2014 at 2:00 p.m., *or at a later time to be set by the Court*." (R.58; A-App.193) (emphasis added) Clearly, CAA lacked notice that the court would address its motion at the next hearing because if such notice existed, it would obviate the need to express that the motion would be heard "at a later time to be set by the Court."

Given this lack of notice, Sasson was not afforded an opportunity to determine what he needed to do to prevent a deprivation of his First Amendment rights. *See, e.g., Goldberg*, 397 U.S. at 267-68. In fact, Sasson was unaware that his First Amendment rights were being implicated. But given the massive fundamental liberties at stake, the court's failure to provide Sasson reasonable notice constitutes a categorical violation of due process. Sasson walked into court on Jan.29 and was ambushed by the court addressing CAA's motion less than 48 hours after it was filed.

Sasson was further deprived of due process by the court's failure to provide Sasson an opportunity to be heard at a meaningful time and in a meaningful manner. To be sure, CAA's motion ultimately had the effect of imposing prior restraints on Sasson's speech. Yet, despite the massive liberty interests at stake, Sasson was denied the opportunity to file a reply brief to CAA's motion. It is indisputable that CAA was able to brief their motion prior to oral

argument (R.59) and that Sasson was denied the opportunity to brief the issue at all. But even if Sasson had time to draft a brief – which he didn't – Sasson would still have been precluded from filing the brief because court was closed on Jan.28.

Again, while a trial court has discretion to shorten the five-day notice requirement for motions, it may only do so if each party has a fair opportunity to prepare and be heard. *See Schopper,* 210 Wis.2d at 215. Given the massive fundamental liberties that were at stake, the court's decision to shorten the notice requirement was categorically unfair as it had the effect of obliterating any meaningful opportunity Sasson had to protect his interests. Sasson was not afforded a meaningful opportunity to be heard because he was not provided any time to file a reply brief.

Accordingly, the Jan.29 Order was imposed in derogation of Sasson's due process thereby rendering the seal order void *ab initio*. *See, e.g., Neylan v. Vorwald,* 124 Wis.2d 85, 95, 368 N.W.2d 648 (1985). Finally, because "[a] void judgment cannot be validated by consent, ratification, waiver, or estoppel" *Id.,* at 97, it would be a legal impossibility for Sasson to have waived or consented to an order after the order had been instituted in violation of Sasson's due process. Additionally, in order for there to be waiver, Sasson would have had to knowingly and intentionally provided such waiver. *See,*

e.g, Gonzalez v. City of Franklin, 137 Wis.2d 109, 128-129, 403 N.W.2d 747 (1987). In the same vein, Sasson cannot be said to have acquiesced by failing to object. *See, e.g., State v. Saunders*, 2011 WI App 156, ¶29 fn.5, 38 Wis.2d 160, 807 N.W.2d 679. (Constitutional rights or issues cannot be deemed waived by mere failure object.)

IV. BECAUSE SASSON ADHERED TO DISCOVERY ORDERS; PROVIDED MEANINGFUL RESPONSES; AND IT WAS NOT SASSON, BUT THE COURT WHO OBSTRUCTED DISCOVERY, SASSON CANNOT BE SAID TO HAVE ENGAGED IN BAD FAITH

The Wisconsin Supreme Court has held that dismissal for discovery violations is appropriate only where the noncomplying party's conduct is egregious or in bad faith without a clear and justifiable excuse. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859 (1991). It is readily understood that bad faith by its nature cannot be unintentional. *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 691, 271 N.W.2d 368 (1978). Similarly, if the noncomplying party's conduct, though unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious, the trial court may dismiss the action. *Johnson*, 162 Wis.2d at 273.

According to the court, Sasson had supposedly engaged in an "intentional obstruction of discovery" (A-App.112) by (1) "refus[ing] to follow discovery orders" (*Id.*); (2) providing

"perpetually meaningless discovery responses and objections" (*Id.*); and (3) generally exhibiting a "spirit of noncooperation." (*Id.*) Thus, the court felt "justified in dismissing Sasson's complaint for bad faith" because not only was Sasson's conduct "offensive to the standards of trial practice", but it also "threaten[ed] the integrity of the judicial system." (*Id.*)

As explained below, the record demonstrates that the court committed both judicial and discretionary error in finding Sasson to have engaged in bad faith and to have violated the discovery order.

A. SASSON NEVER VIOLATED THE DISCOVERY ORDER BECAUSE HE WAS NEVER ORDERED TO PRODUCE EVIDENCE SUPPORTING HIS LIBEL CLAIM

In the dismissal order, the court, for a second time, erroneously expands the scope of a court order by stating that "Sasson was expressly ordered by this Court to produce the evidence underlying his allegation that Braun 'purposely sought to publish his false statements to other parties in written form…" (A-App.114) As it must, the court fails to cite to the record in substantiating this proposition. The fact is, Sasson was never ordered, expressly or otherwise, to produce evidence supporting the publication element of his libel claim. Instead, Sasson was merely ordered to "provide meaningful responses to [Braun's] discovery requests" and to "not

just give written answers, but to produce documents and other information that support your responses." (R.244, 27:23-25, 31:6-9; A-App.208-09) On June 5, the court reiterated the requirements of its order emanating from "the previous proceedings where you were ordered to provide meaningful responses." (R.246, 40:11-15; A-App.240)

In order to sustain a discretionary decision, the court must apply the relevant facts and use a rational process to reach a conclusion that a reasonable judge could reach. *See*, *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis.2d 81, 726 N.W.2d 898. In the present case the court misused its discretion by predicating dismissal on its unreasonable and irrational finding that Sasson's failure to produce the libelous documents violated a court order when the court never ordered Sasson to produce these documents.

B. SASSON'S DISCOVERY RESPONSES WERE MEANINGFUL AND SUBMITTED IN GOOD FAITH

A responding party cannot be said to have engaged in bad faith if they actively attempt to comply with discovery and as a result of such compliance, the responding party answers or addresses the issue which the propounding party sought to explore. *See*, *e.g.*, *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 544, 535 N.W.2d 65

(1995) Thus, while Sasson's responses did not include production of the documents supporting his libel claim, Sasson's responses were appropriate and meaningful because they made explicit that he did not possess such documents. (A-App.111)

Because Sasson's responses answered the issues which the propounding party sought to explore, *to wit*, whether Sasson currently possessed evidence to support his libel claim, Sasson's responses cannot be deemed "meaningless". Thus, the court misused its discretion in finding Sasson to have engaged with a spirit of noncooperation or bad faith. Sasson was simply ordered to produce meaningful responses and that is exactly what Sasson did.

C. IT WAS NOT SASSON, BUT THE COURT WHO OBSTRUCTED DISCOVERY AND VIOLATED §802.05(2)(C)

"[P]retrial discovery is a fundamental due process right." *State v. Maday*, 179 Wis.2d 346, 354, 507 NW 2d 365 (Ct. App. 1993). Thus, while Wis. Stat. §802.05(2)(c) requires that "The allegations and other factual contentions stated in the paper have evidentiary support…", it also adheres to the requirements of due process by allowing a complaining party to aver allegations which, "if specifically so identified[5], are likely to have evidentiary support

[5] "Specifically so identified" refers to allegations made "on information and belief."

after a reasonable opportunity for further investigation or discovery." Wis. Stat. §802.05(2)(c). §802.05, like its procedural counterpart FRCP 11, plainly contemplates that pleadings based on information and belief are particularly appropriate when the allegations concern matters peculiarly within the knowledge or possession of the defendant. *See, Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005). Under such circumstances, it is fair to plead on information and belief if a party believes there is some possibility of discovery. *See, Ivancevic v. Reagan*, 2013 WI App 121, ¶30, 351 Wis.2d 138, 839 N.W.2d 416.

In this case, and despite assertions to the contrary, Sasson has never attempted to mislead the parties or the court with regard to whether he possessed evidence supporting the publication element of his libel claim. (*See*, R.238, 39:4-8; A-App.147) Because Sasson admittedly lacked evidence supporting publication of libel, Sasson was required to plead his libel claim on information and belief. *See, e.g., Ivancevic* at 2013 WI App ¶30. In other words, Sasson's libel claim rested on the belief that because the evidence sought was in Braun's possession, Sasson would be afforded a reasonable opportunity for discovery pursuant to §802.05(2)(c). However, once Sasson reached discovery, his efforts to obtain evidence were frustrated by Braun's obstructionist and evasive responses. (R.134,

¶¶7-8; A-App.223-24) Consequently, Sasson filed a motion to compel on April 30, 2014, with an eye towards having Braun properly respond to Sasson's discovery requests.

Yet, despite Sasson's motion to compel being in the breast of the court, a prejudicial stay on discovery was issued during the May 6, 2014 hearing. (R.245, 62:25; A-App.226) Incredibly, after issuing the stay and refusing to allow Sasson a reasonable opportunity to even complete his first round of discovery, the dismissal order accuses Sasson of violating §802.05 because after Sasson "*realized* that discovery would not produce the necessary evidence of publication", Sasson had an obligation to withdraw his libel claim. (A-App.114) (emphasis added) Given that the record reflects the court (1) cancelling Braun's deposition (R.245, 68:25-69:2; A-App.227-28); (2) ignoring Sasson's motion to compel (R.128); and (3) ignoring Sasson's affidavit swearing under oath to Braun's obstructionist discovery responses (R.134, ¶¶7-8; A-App.223-24), the court's conclusion that Sasson "realized that discovery would not produce the necessary evidence of publication" is not only irrational and unreasonable, but absolutely maddening.

Under any form of analysis, the court misused its discretion, committed judicial error, and violated Sasson's due process by instituting a stay on discovery and after instituting such stay, making

the irrational and unreasonable determination that Sasson violated §802.05 because he "realized that discovery would not produce the necessary evidence of publication" even though Sasson had not even been afforded his statutorily and constitutionally mandated reasonable opportunity for pre-trial discovery.

D. SASSON'S WORK-PRODUCT AND ATTORNEY-CLIENT OBJECTIONS WERE MADE IN GOOD FAITH

The court also erroneously accused Sasson of continuing "to assert baseless objections" (A-App.109) by claiming privilege under the attorney-client and work-product doctrines. The court found these objections improper because "Sasson, a non-lawyer, is representing himself in this litigation. As a result, there is no basis for Sasson to invoke the attorney-client privilege or the work product doctrine." (*Id.*) But on March 11, the court took a wildly contradictory position when it stated as follows:

> "I'm not going to order, Mr. Kravit, Mr. Sasson to provide a list of question outside of the proposed order that you have because I don't think that's necessarily fair to him. He shouldn't be required to disclose his work product."

(R.243; 4:23–5:3; A-App.252-53)

Thus, the court's position that there "is no basis for Sasson to invoke…the work product doctrine" is belied by its own statements during the March 11 hearing. Accordingly, the court misused its discretion and committed judicial error in sanctioning Sasson for

utilizing the conditional work-product objection. The court's discretionary decision was unreasonable in light of its contradictory statements 4 months prior.

With regard to Sasson's conditional attorney-client privilege objections, it has been held that a failure to assert an objection during discovery constitutes waiver of the objection. *See*, *Michael A.P. v. Solsrud*, 178 Wis.2d 137, 155 fn.5, 502 N.W.2d 918 (Ct. App. 1993) Additionally, because Sasson, pursuant to Wis. Stat. §804.01, is under a duty to amend and supplement his responses, Sasson asserted the conditional objection of attorney-client privilege for posterity's sake should Sasson choose to retain counsel in the future and such counsel obtains information that may be responsive to Braun's request for production but may also fall under the attorney-client privilege.

Given Sasson's duty to supplement his responses and need to prospectively assert objections lest he intend to waive them, Sasson vehemently believes that his lodging of the conditional objection of attorney-client privilege for posterity's sake cannot constitute misconduct. If Sasson's beliefs are incorrect, then he simply requests edification on why such is the case. But an incorrect argument, asserted with a reasonable, good faith substantiation for its

advancement, is not grounds upon which to predicate a finding of bad faith, egregious misconduct, or imposition of sanctions.

V. BECAUSE SASSON'S INQUIRY TO PROUTY WAS EMINENTLY RELEVANT TO HIS CLAIMS, THE COURT'S INFERENCE THAT SASSON INTENDED TO MISUSE THE LEGAL PROCESS WAS UNREASONABLE

Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than without the evidence. *See,* Wis. Stat. §904.01. Additionally, "Any evidence that assists in getting at the truth of the issue is relevant; in other words, any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable." *Strelecki v. Firemans Ins. Co. of Newark*, 88 Wis.2d 464, 480, 276 N.W.2d 794 (1979)

The court claims that whether Balelo engaged in misconduct and whether MLBPA had knowledge of Sasson's involvement in Braun's appeal "has no relevance to Balelo's authority to execute an agreement on behalf on CAA". (A-App.107) Therefore, Sasson's inquiry to Prouty constituted a misuse of the legal process.

During his deposition, Balelo testified that (1) he "didn't want the release" (R.176-Ex.8 53:22-23; A-App.168) because "It was research. Who cared" (R.176-Ex.8, 55:17-56:7); and (2) that

"Michael Weiner was aware that you [Sasson] were doing research and that you had to have documents to do the research." (R.176-Ex.8, 85:14-18; A-App.169) To be sure, if Balelo had not been permitted to transmit a confidential lab report and arbitration opinions to Sasson, then Balelo's conduct would constitute a violation of §5(B)(15)[6] of the MLBPA's Rules Governing Player Agents. (R.156-Ex.C, 26) If MLBPA discovered such violation, it could strip Balelo of his agent's license. If CAA discovered this violation, it could terminate Balelo's employment. Either way, Balelo would be out of $2,000,000 in annual salary.

In this case, Sasson contacted Prouty to determine whether Balelo's testimony was truthful because if it wasn't, such false testimony would establish the likelihood of two very important, material facts of consequence. First, Sasson's inquiry concerning Balelo's permission to transmit the documents would go toward making a fact of consequence – the accuracy of the liquidated damages clause – more or less probable than it would be without the evidence. If Balelo didn't have the authority to transmit the documents, then it would establish, contrary to his testimony, that

[6]"No Player Agent or Applicant shall engage in any unauthorized disclosure of confidential information obtained from or about a player, a fellow Player Agent or Applicant, or the MLBPA, or during meetings or conference calls in which the MLBPA participates, except as required by law." (R.176-Ex.12)

Balelo did want the Release to prevent against dissemination of documents which, if ultimately disseminated, could cost Balelo his agent's license, his job, and $2,000,000 in annual salary. Given that Balelo contested the accuracy of the liquidated damages clause (R.155, 8 fn. 2), the information Sasson sought was relevant to damages and damages are a material point in any case where the relief sought isn't exclusively injunctive in nature.

Second, and most importantly, if Balelo did not have permission to transmit the documents, he would be *more likely* to have misrepresented his authority to sign the Release on CAA's behalf as a means of concealing his misconduct. Imagine Balelo bringing the Release to the general counsel of CAA only to tell them that the Release needed to be signed to protect CAA from potential administrative and civil liability which arose as a result of Balelo's unauthorized transmission of confidential documents. To make matter worse, Balelo would be required to explain that the reason the Release was needed in the first place was because Balelo and Braun refused to pay Sasson a $5,000 debt that they do not dispute owing. Balelo's candor would have likely resulted in termination of his employment. Accordingly, establishing Balelo's misconduct would tend to make more probable that Balelo misrepresented his authority

to sign on CAA's behalf for the purpose of concealing his misconduct from his employers. (R.175, 20-22; A-App.255-257)

Lastly, Sasson addresses the contention that his attempt to impeach Balelo's testimony was improper. (A-App.107) Simply put, if Balelo did not have permission to transmit the aforementioned documents, then Balelo's self-interest would biasedly compel him to slant his testimony towards lying about having such permission. Bias of a witness is always a material point and extrinsic evidence may be used to prove that the witness had a motive to testify falsely. *See, e.g., State v. Lock,* 2012 WI App 99, ¶77, 344 Wis.2d 166, 823 N.W.2d 378.

Because establishing Balelo's misconduct provides a link in the chain of facts which would tend to make two material facts of consequence more probable, Sasson's inquiry to Prouty was eminently relevant to his claims. Therefore, the lower court committed judicial error and misused its discretion in finding Sasson's inquiry to have been motivated by a bad faith. The court's conclusion is unreasonable given the manifest relevance of Sasson's inquiry.

VI. THE COURT'S INFERENCE THAT SASSON INTENDED TO ENGAGE IN BAD FAITH IS UNSUPPORTED BY EXISTING FACTS THEREBY RENDERING SUCH INFERENCE UNREASONABLE

Based on Sasson supposed "behavior", the court erroneously inferred that Sasson intended to misuse the process and engage in bad faith. (A-App.107) First, because Sasson's inquiry to Prouty was entirely relevant, this Court should afford no discretionary deference to the lower court's unreasonable inference that Sasson's inquiry was solely intended to sully Balelo's reputation. Affording such discretionary deference would be repugnant to the realities of the legal profession profession. Indeed, "lawsuits are not peace conferences. Feelings are often wounded and reputations are sometimes maligned." *Estate of Mayer v. Lax, Inc.*, 998 N.E.2d 238, 247 (Ind. Ct. App. 2013). Unpleasantness, conflict, division, unhappiness, and anger are inescapable.

Second, the court's examples of Sasson's improper behavior are littered with non-existent facts and irrational chronological inconsistencies. For example, the court accuses Sasson of violating its warnings "that [Sasson's] discovery requests should have some connection to his remaining claims." (A-App.108) The foregoing warnings were issued in March. However, to substantiate its accusation that Sasson violated these warnings issued on March 3

and 11, 2014, the court nonsensically states that "*Notwithstanding* these warnings…in *February* 2014, Sasson sought to depose Tony Bosch about Braun's steroid use."[7] (*Id.*; A-App.108) (emphasis added)

One chronological inconsistency could merely be an aberration, but the court does this a second time when it states that it warned Sasson on March 3 "that all parties were expected to behave professionally throughout this litigation" (*Id.*, 12; A-App.112), but then cites to Sasson's "expletive-laced" deposition[8]" and "inappropriate voicemail" (*Id.*), both of which took place in *February*, as examples of Sasson violating these warnings. The court's reasoning is nonsensical. One cannot retroactively violate a warning prior to the warning's issuance.

Finally, the court also accuses Sasson of making "unsubstantiated allegations." (A-App.113) Sasson has already addressed why his libel claim against Braun cannot be deemed "unsubstantiated." However, the court also calls Sasson's credibility

[7] Sasson's Motion for the Issuance of Commission for Tony Bosch was solely intended to establish that the documents Sasson created for Braun were not privileged. (R.76; 7-8; A-App.262-66) Sasson's inquiry concerning Braun obtaining steroids from Bosch was for the purpose of rebutting Braun's ridiculous argument that Bosch served as his "consultant." One cannot make their drug dealer a consultant.

[8] Sasson's use of blue language at his deposition is not relevant to his conduct as counsel of record because Sasson's testimony was provided as a lay witness.

into question by stating that it found "Sasson's representation that MLB has expressed interest in mediating this case to be unsubstantiated and incredible" (A-App.115) and "Sasson *cannot* substantiate his alleged communications with MLB and/or the Players Association." (*Id*.) (emphasis added)

Contrary to the court's belief that Sasson "cannot" substantiate his communications, Sasson provided the court with an email from Dan Halem, Esq., MLB's Executive Vice President and General Counsel of Labor who confirmed offering to help mediate this case to prevent further "distraction[s] for either the Milwaukee Brewers or Mr. Braun." (R.176-Ex.15; A-App.170-71) Accordingly, Sasson cannot be said to lack credibility because every one of the representations Sasson has made to the court have been substantiated with uncontroverted evidence. Sasson also never made any "Jewish jokes." (A-App.112) There is nothing satirical about Sasson wishing fellow Jews a happy holiday or Good Shabbos. (R.246; 55:24-56:16)

The court's inference that Sasson engaged in bad faith is predicated on confabulated, irrational reasoning or pure confusion. Sasson never violated a court warning or valid order subsequent to its issuance; Sasson never intended to sully Balelo's reputation; and, when given a fair opportunity, Sasson has substantiated every representation he has made to the court. Accordingly, the court has

nothing left on which to base its "inference" that Sasson intended to engage in bad faith.

VII. THE COURT MISUSED ITS DISCRETION IN DENYING SASSON'S §806.07 MOTION FOR RELIEF FROM JUDGMENT BECAUSE IT FAILED TO CONSIDER THE FIVE INTEREST OF JUSTICE FACTORS

Wis. Stat. §806.07(1)(h) states, in relevant part:

> On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, order or stipulation for the following reasons … any other reasons justifying relief from the operation of the judgment.

This provision has been interpreted to mean that relief from a judgment or order may be granted in the event of "extraordinary circumstances" justifying relief in the interests of justice where the sanctity of final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts. *See, e.g.*, *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶35, 326 Wis.2d 640, 785 N.W.2d 493. Before finding that extraordinary circumstances exist, the court must consider the five interest of justice factors. *Id.*, at ¶41. The five interest of justice factors are as follows:

> "(1)[W]hether the judgment was the result of the conscientious, deliberate and well informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; (4) whether there is a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief."

Id., ¶36

When a trial court "fail[s] to consider and make factual findings regarding the subsec. (1)(h) factors, we cannot uphold its decision." *Johnson v. Johnson*, 157 Wis.2d 490, 498, 460 N.W.2d 166 (Ct. App. 1990). In this case, the court did not consider the five interest of justice factors. Instead the court's reasons for denying Sasson's §806.07 motions were as follows:

> "Sasson has not demonstrated…a manifest error of law or fact or that it [dismissal] was otherwise unjust…Sasson merely repeats arguments he has already asserted in previous briefs…Sasson has not presented any newly discovered evidence which would challenge the propriety of the Court's June 11, 2014 order."

(R.249, 11:7-19, 13:2-25; A-App.119-122)

As shown above, the court erroneously utilized a standard for relief sought under Wis. Stat. §805.17 and not §806.07. Because the trial court did not engage in reasoned decision-making on the interest of justice factors, this Court should not search for reasons to affirm the circuit court's conclusion. Instead, this Court should independently review the record to determine whether there was a reasonable basis for the lower court's decision. *Miller* 2010 WI 75, ¶47.

A. HAD THE COURT UTILIZED THE FIVE INTERESTS OF JUSTICE FACTORS, IT WOULD HAVE HAD NO CHOICE BUT TO PROVIDE SASSON RELIEF FROM THE DISMISSAL ORDER

Sasson's §806.07 motion for relief from the dismissal order was predicated on subsections (1)(a) and (1)(h). In his motion, Sasson posited nearly the same arguments set forth herein including (1) that he never violated the seal order because the Balelo deposition was not under seal. (R.175, 14); (2) that an improper standard for good cause was utilized in instituting the gag-seal (*Id.*, 7-8); (3) that the gag-seal was overbroad (*Id*., 8) and not the least restrictive means (*Id.*, 9); (4) that the gag-seal was instituted in violation of Sasson's due process (this was the first time Sasson made this argument). (*Id*., 10-14) Sasson also made the same arguments concerning relevancy of the Prouty inquiry; that he never engaged in bad faith; that his discovery responses were meaningful; that he had not been afforded a reasonable opportunity for discovery; and that he had never made unsubstantiated allegations. (*Id*., 14-23)

Based on these arguments Sasson stated that extraordinary circumstances existed and, accordingly, "the incessant command of justice being done in light of all the actual facts, requires that this Court vacate its June 11 Order." (R.175, 4)

B. WHEN CONSIDERING THE FIVE INTEREST OF JUSTICE FACTORS, IT IS EVIDENT THAT SASSON IS ENTITLED TO RELIEF FROM JUDGMENT

Had the court utilized the five interests, it could not have properly denied Sasson's §806.07 motion for relief from judgment. First, the judgment cannot be said to be a result of the conscientious, deliberate and well-informed choice of the claimant. Without question, the judgment was entered as a result of Sasson's contact with Prouty and Sasson's failure to produce evidence supporting his libel claim. However, Sasson's decision to contact Prouty cannot be said to be a deliberate violation of the Jan.29 Order because the Balelo deposition was not under seal and even if it was, Sasson never was informed that the Jan.29 Order acted as a prior restraint on speech. With respect to Sasson's failure to produce evidence supporting his libel claim, Sasson was never actually ordered to produce such documents. Therefore, dismissal was not the result of Sasson's conscientious, deliberate and well-informed choice.

Second, Sasson was pro se and did not receive any assistance from a licensed attorney.

Third, there has been no judicial consideration of the merits in this case and deciding this case on the merits outweighs finality of judgment for two reasons. First, affording litigants their day in court and a trial on the issues is always of great importance. *See*,

Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc., 2002 WI 66, ¶64, 253 Wis.2d 238, 646 N.W.2d 19. Second, given the egregious violations of Sasson's due process and First Amendment rights, the interest of deciding this case on the merits outweighs finality. Indeed, while finality is of great value and importance, finality without fairness is fool's gold. *See, Slawinski v. Milwaukee City Fire & Police Comm'n*, 212 Wis.2d 777, 816, 569 N.W.2d 740 (Ct. App. 1999)

Fourth, as to whether Sasson has a meritorious claim or defense, "the crux of the inquiry is whether, given another chance, the party seeking to vacate the judgment could reasonably expect a different result." *Allstate Ins. Co. v. Brunswick Corp*., 2007 WI App 221, ¶14, 305 Wis.2d 400, 740 N.W.2d 888. In the present case, Sasson has not even had an opportunity to obtain meaningful discovery from either party. Given that Respondents have utterly failed to properly respond to discovery,[9] Sasson has good reason to believe that he will prevail on his claims against the Agency and Balelo. As for Braun, Sasson expects that, upon reversal, he will be afforded a reasonable opportunity to discover the evidence

[9] CAA provided a completely redacted copy of Balelo's employment contract (R.138-Ex.C; A-App.267-278) and claimed the duties section was "not relevant" and that Sasson was "not entitled to it". (*Id*.-Ex.E, 41-48; A-App.284) By Attorney Aaron Aizenberg's logic, the gun a husband uses to kill his wife is not relevant to the prosecution's murder case against the husband.

supporting his libel claim and that such investigation will result in the discovery of relevant evidence.

Fifth, as to whether it would be inequitable to overturn the trial court's decision, the court stated that "Imposing any lesser sanction would be prejudicial to the defendants, as they have already spent an unreasonable amount of time and money litigating over Sasson's improper conduct." (A-App.115). The irony of the court's statement is that not only has Sasson not engaged in any misconduct, but the "unreasonable amount of time and money" spent in litigating such "misconduct" was a direct result of Respondents' own trial strategy, *to wit*, fabricating instances of Sasson's misconduct for the purposes of having Sasson's case dismissed. (R.156, 3-4; A-App.291-92)

Sasson never violated the seal, never lied about having evidence that he didn't have, never violated any court rules by submitting a check and phone number, never misused the legal process, never made unsubstantiated allegations, and never engaged in bad faith.

Based on the foregoing, Sasson satisfies all five interest of justice factors and Sasson requests that this Court reverse the lower court's Aug. 11 Order denying Sasson's motion for relief from judgment.

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse the trial court's June 11 dismissal order as well as its Aug.11 Order denying Sasson's §806.07 motion for relief from judgment and motion to vacate seal order. Reversal of the dismissal order is appropriate because the gag-seal was instituted pursuant to §805.03, and because its plain language makes explicit that it was not applicable to discovery, Sasson did not violate the gag-seal by discussing a document produced in discovery with a material witness.

Reversal is also appropriate because the gag-seal order's First Amendment and due process infirmities render it invalid and void *ab initio*. As such, even if Sasson had violated the order – which he didn't – it was improper to sanction Sasson for violating an invalid and void order. *See, e.g., Neylin*, 124 Wis.2d at 99 ("A void judgment is something very different than a valid judgment. The void judgment creates no binding obligation upon the parties, or their privies; it is legally ineffective.")[10]

Reversal of the dismissal order is further appropriate because, as explained herein, Sasson never engaged in bad faith during

[10] Sasson's §806.07 motion for relief from judgment was the first time Sasson posited this argument to the court.

discovery, never violated any discovery orders, and by failing to provide Sasson his §802.05(2)(c) mandated reasonable opportunity for discovery, it was the court, and not Sasson, who engaged in obstructing the discovery process. Moreover, because Sasson's inquiry to Prouty was relevant to his claims, and nearly every instance of Sasson's supposed "misconduct" was based on confabulated, nonexistent facts and chronological inconsistencies, the court's inference concerning Sasson's improper motives is unreasonable.

Finally, reversal of the Aug. 11 Order's denial of Sasson's motion for relief from judgment is appropriate because the court misused its discretion in failing to consider the five interest of justice factors. Upon this Court finding that Sasson met those factors, Sasson requests that this Court reverse and remand with instructions that the lower court vacate its June 11 Order, and reinstate Sasson's claims against Respondents.

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,800 words

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

RALPH SASSON, an individual, Plaintiff-Appellant, v. RYAN BRAUN, ONESIMO BALELO and CREATIVE ARTISTS AGENCY, LLC., Defendants-Respondents, DOES 1-50 Inclusive, Defendant	Appeal No: 2014AP001707 Circuit Court Case No.: 13-CV-007014 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the following were dispatched by FedEx 3-day mail to the Wisconsin Court of Appeals on December 15, 2014. I further certify that copies of the following were dispatched by United States Mail and electronic mail to Timothy Hansen, Esq., 316 N. Milwaukee St., Suite 200, Milwaukee, WI 53202 and Stephen Kravit, Esq., 825 N. Jefferson St. – Fifth Floor, Milwaukee, WI 53202, and by electronic mail to Jeremiah Reynolds, Esq., 808 Wilshire Blvd., 3rd Floor, Santa Monica, CA 90401 and on this 15th day of December, 2014.

1. Plaintiff-Appellant's Initial Brief
2. Plaintiff-Appellant's Appendix to Initial Brief
3. Certificate of Service

Dated: December 15, 2014

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