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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No.: 2014AP001707

RALPH SASSON,

Plaintiff-Appellant,

v.

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

Defendants-Respondents,

DOES 1-50, INCLUSIVE,

Defendant.

DEFENDANT-RESPONDENT RYAN BRAUN'S RESPONSE BRIEF

Appeal from Final Order Entered June 11, 2014 in Milwaukee County Circuit Court, Case No. 2013CV7014, Honorable Paul Van Grunsven Presiding

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STATEMENT OF THE ISSUES

I. Did the Circuit Court erroneously exercise its discretion when it dismissed Sasson's lawsuit as a sanction for his repeated litigation misconduct?

The circuit court held that Sasson's litigation misconduct warranted the imposition of case-ending sanctions because Sasson acted egregiously and in bad faith.

II. Does Sasson properly raise a constitutional challenge to the seal orders?

This issue was not reached by the circuit court.

III. Did Sasson forego his right to challenge the seal orders?

This issue was not reached by the circuit court.

IV. Can Sasson challenge the Circuit Court's denial of his Motion Vacate the June 11 Dismissal Order and did the Circuit Court erroneously exercise its discretion in denying Sasson's motion?

The circuit court denied Sasson's June 27, 2014 Motion to Vacate the June 11 Dismissal Order.

STATEMENT ON ORAL ARGUMENT AND STATEMENT OF PUBLICATION

Oral Argument is not necessary. Respondent does not request this case to be published.

STATEMENT OF THE CASE

Plaintiff-Appellant, Ralph Sasson ("Sasson"), appeals the Milwaukee County Circuit Court's June 11, 2014 Order (the "Dismissal Order") that sanctioned him, and dismissed his case with prejudice against Defendants-Respondents Ryan Braun ("Braun"), Onesimo Balelo ("Balelo"), and Creative Artists Agency, LLC ("CAA") (Balelo and CAA are collectively referred to as the "Agency Defendants"). The Circuit Court imposed case-ending sanctions against Sasson because he repeatedly engaged in litigation misconduct, which the court found to be egregious and done in bad faith. Sasson now appeals the Circuit Court's decision, contending that it erroneously exercised its discretion by issuing case-ending sanctions and also violated his constitutional rights, which he asserts warrants the reversal of the Dismissal Order.

I. FACTS FORMING THE BASIS OF SASSON'S COMPLAINT.

This case stems from a dispute over roughly $5,000 that Sasson claims he was owed for assisting Braun and Balelo in connection with Braun's Major League Baseball ("MLB") arbitration. (R.6 at ¶ 35.) The parties resolved their dispute in June 2012; Sasson was paid the money he claims he was owed and the parties executed a settlement agreement that Sasson

drafted. (*Id.* at ¶¶ 55-65.) The settlement agreement contained an anti-disparagement provision. (*Id.* at ¶ 55.)

Sasson contends that Braun violated the anti-disparagement provision by defaming him. (*Id.* at ¶ 109.) Sasson also alleges that at the time the settlement agreement was executed, Braun did not intend to honor the anti-disparagement clause. (*Id.* at ¶ 157.) As for the Agency Defendants, Sasson contends that Balelo fraudulently induced Sasson to sign the settlement agreement when Balelo asserted that he had authority to sign the agreement on behalf of CAA. (*Id.* at ¶¶ 195-196.)

II. SASSON FILES HIS LAWSUIT AND THE DEFENDANTS MOVE TO DISMISS HIS CASE.

On July 31, 2013, Sasson filed a complaint against Braun alleging claims for slander, libel, intentional and negligent infliction of emotional distress, and fraudulent misrepresentation. (R.1.) Sasson also filed—thereby placing into the public sphere—his first set of discovery requests.[1] (R.2-4.) These requests included irrelevant and inflammatory topics like:

[1] While Sasson filed these initial discovery requests with the court, he did not serve them on Braun. Sasson later served a similar set of requests on October 7, 2013 that contained the same irrelevant requests, which he also filed with the court. (R. 16-18.)

1. Braun's previous "amorous" relationships including whether Braun has been faithful in these relationships;
2. Braun's alleged steroid use and purported academic misconduct while playing baseball at the University of Miami;
3. Braun's business dealings with Aaron Rodgers and other Milwaukee-area businessmen; and
4. Braun's business dealings with the Milwaukee Brewers.

(R.4; R-App.117-127.)[2]

On August 22, 2013, Sasson amended his complaint to name the Agency Defendants, and added various claims against Braun. (R.6.) All Defendants then moved to dismiss Sasson's Amended Complaint. (*See* R.11-12; R.28-30.)

The Agency Defendants, also faced with a similar set of irrelevant discovery requests, moved the court for a protective order to stay all discovery until the motions to dismiss were decided. (R.33-35.) Braun joined in this motion. (R.37.) The court found good cause to grant the motion, and stayed all discovery pending resolution of Defendants' motions to dismiss. (R.50.)

[2] Defendants-Respondents understand that the Circuit Court clerk transmitted sealed documents as part of the record to the Court of Appeals, and that those documents remain under seal. Accordingly, Defendants-Respondents do not include any sealed filings in their appendix.

III. THE COURT RULES ON THE MOTIONS TO DISMISS.

Following briefing and oral argument, the court issued a January 15, 2014 Order that dismissed the majority of Sasson's claims, thereby limiting the scope of the case to the following causes of action:

1. Count IV. Defamation/Libel (against Braun)
2. Count VI. Negligent Infliction of Emotional Distress (against Braun)
3. Count VII. Fraudulent Misrepresentation (against Braun)
4. Count X. Fraudulent Misrepresentation (against Agency Defendants)
5. Count XI. Fraudulent Inducement (against Agency Defendants)

(*See generally* R.52; R-App.128-144.)

The court's order consequently limited the relevant issues in this case to whether: (a) Braun libeled[3] Sasson; (b) Braun had an intent to do so prior to the execution of the settlement agreement; (c) Balelo had authority to execute the settlement agreement on behalf of CAA; and (d) Sasson sustained damages as a result of the defendants' allegedly tortious conduct. (*See, e.g.,* R.170 at 8; R.241 at 15:16-17:7,

[3] Sasson's negligent infliction of emotional distress claim was predicated on Braun's purported defamation. Thus, to the extent it is even cognizable under these facts, Sasson's negligent infliction claim would fail if he cannot establish his libel claim.

23:25-24:7, 27:1-17; R-App.108, 179-181, 186-187, 190) (discussing the scope of discovery given the claims at issue). Following the court's ruling, the earlier stay was lifted and the parties began taking discovery. (R.239 at 6:24-25; R-App.153.)

IV. THE CIRCUIT COURT EXERCISES ITS DISCRETION AND DISMISSES SASSON'S CASE WITH PREJUDICE.

As the case progressed, however, the Circuit Court exercised its discretion to sanction Sasson, and dismissed his case with prejudice. (*See generally* R.170; R-App.101-116.) The Dismissal Order detailed the basis for these sanctions, which included Sasson's repeated violations of court orders, his obstruction of discovery and misuse of the discovery process, his lack of professionalism, and his repeated insistence on maintaining baseless claims. (*Id.*)

The court found Sasson's conduct to be "extreme, substantial, and persistent." (*Id.* at 15; R-App.115.) The court also found that "[g]iven the number of times Sasson was warned that [it] would not tolerate these violations, Sasson's continued noncompliance was egregious and done in bad faith." (*Id.*) Thus, the court held that "Sasson's unjustifiable behavior threaten[ed] the integrity of the judicial process, and therefore warrant[ed] the most severe sanction available—dismissal of

this case with prejudice." (*Id.*)

V. THE COURT'S BASES FOR DISMISSING SASSON'S CLAIMS AGAINST BRAUN.

The Dismissal Order details Sasson's ongoing litigation misconduct conduct throughout the case. The court identified four bases for dismissing Sasson's claims against Braun: (a) obstructing the discovery process; (b) initiating and maintaining a baseless libel claim; (c) propounding irrelevant and harassing discovery; and (d) repeatedly demonstrating a lack of professionalism towards counsel and the court. (*See generally* R.170; R-App.101-116.) The facts underlying each of the court's findings are set forth below.

A. SASSON'S FAILURE TO COMPLY WITH HIS DISCOVERY OBLIGATIONS AND RESPOND IN GOOD FAITH TO BRAUN'S DISCOVERY REQUESTS.

1. Braun's Discovery Requests and Sasson's Initial Responses.

On January 20, 2014, Braun served his first set of written discovery on Sasson. (R.111 at ¶ 3, Ex. A.) Braun narrowly tailored this discovery to seek the factual underpinnings for Sasson's libel claim. (*See id.*) On January 24, 2014, Braun served his second set of written discovery on Sasson. (*Id.* at ¶ 4, Ex. B.) The second set of discovery likewise sought the facts, witnesses, and documents supporting Sasson's claims and allegations. (*Id.*)

In response to both sets of discovery, however, Sasson: (a) lodged fourteen general objections and incorporated them into each of his responses; (b) asserted other objections stating that Braun's requests were overbroad, irrelevant, vague and ambiguous, and were designed to harass Sasson; (c) contended that Braun spoliated evidence; and (d) refused to produce any documents supporting his claims. (*See id.*, at ¶¶ 5-6, Exs. C-D.) Braun's counsel then sent two meet and confer letters that outlined the deficiencies in Sasson's responses. (*Id.* at ¶¶ 7, 14, Exs. E and H.) Notwithstanding these letters, Sasson refused to amend his responses, which prompted Braun to file a Motion to Compel on March 17, 2014. (R.107-111.)

2. The Court Grants Braun's Motion to Compel.

The court heard oral argument on Braun's Motion to Compel on April 4, 2014. At the hearing, the court analyzed Sections 804.11 and 804.12 of the Wisconsin Statutes in conjunction with Braun's discovery requests and Sasson's responses. (*See generally* R.244 at 4:25-21:9; R-App.197-214.) The court reviewed a sampling of Sasson's responses and concluded that they made "absolutely no sense." (*Id.* at 13:10; R-App.206.) After reading a few of the requests and responses, for example, the court stated:

> You know I read this stuff [Braun's discovery requests], and then I look at Mr. Sasson's response, and I say, what on earth is his reason or rationale for providing meaningless responses as I see here?

(*Id.* at 14:20-23; R-App.207.) In fact, the court found all of Sasson's objections to be baseless:

> All of [Braun's discovery] questions are perfectly appropriate. They're not oppressive. They're not ambiguous. They're not vague. They're not supported – they're not objectionable for any of the 14 general objections that you've stated, nor the specific objections.

(*Id.* at 24:9-16; R-App.217.)

The court then admonished Sasson and stated that it was "time to put up or shut up," and produce the evidence supporting his claims because, as the court continued: "you either have evidence to support these claims or your don't, and if you don't have the evidence to support the claims then they must be dismissed." (*Id.* at 23:18-23; R-App.216.)

Accordingly, the court ordered Sasson to amend his responses and produce all responsive documents—including any libelous documents in Sasson's possession—by April 24, 2014. (*Id.* at 30:8-33:12; R.122; R-App.223-226, 235-236.) The court then scheduled a May 6, 2014 hearing to revisit the propriety of Sasson's amended responses. (*Id.*) It also made clear to Sasson that if the amended responses "don't comply

with our Rules of Civil Procedure and our Code of Evidence, rest assured I will then and there entertain a motion for sanctions." (R.244 at 22:21-25, 29:7-10; R-App.215, 222.)

3. Sasson's Amended Responses to Braun's Discovery Requests.

Sasson served his amended responses on April 24, 2014. (R.126 at ¶¶ 3-4, Exs. A-B.) Again, however, Sasson lodged a host of inappropriate objections for which the court previously admonished him at the prior motion hearing. (*Id.*) Sasson also included new objections to Braun's discovery, which were also baseless. (*Id.*)

Although Sasson produced some documents that he claimed were responsive to Braun's document requests, (*id.* at ¶ 5, Ex. C), Sasson tacitly admitted that he had no libelous documents supporting his claim. (*Id.* at ¶¶ 3-4, Exs. A-B.) Instead, Sasson advanced a new legal theory, and asserted that Braun slandered Sasson, and these allegedly slanderous statements were transformed into libel when Sasson republished them.[4] (*Id.* at ¶ 3, Ex. A; R.245 at 18:7-19:7; R-App.244-245.)

Braun then filed a Supplemental Brief in Support of his Motion to Compel, which again outlined the deficiencies in

[4] Sasson's slander claim was previously dismissed by the court because the statements were not slanderous *per se* and Sasson cannot prove special damages. (R.52 at 7-8; R-App.134-135.)

Sasson's amended responses in advance of the May 6, 2014 continued hearing. (R.125.) This brief prompted Sasson to amend his responses yet again on May 1, 2014, a few days prior to the continued motion hearing. (R.126 at ¶¶ 3-4, Exs. A-B.) Sasson's amended responses reiterated his new legal theory: the transmutation of slander into libel by compelled self-publication. (*Id.*)

4. The May 6, 2014 Continued Motion to Compel Hearing.

At the continued motion hearing on May 6, 2014, the court heard argument concerning Sasson's new legal theory. Sasson contended that because Braun is famous and this case would garner media attention, Braun's alleged slander of Sasson was transformed into libel when Sasson was forced to memorialize these allegedly slanderous words in his Complaint, which was then reported on by the media:

> THE COURT: Your republication rule, your argument is, is that by being forced to file this lawsuit, there's publication, is that what you're saying?
>
> . . .
>
> MR. SASSON: That's correct, your honor.

(R.245 at 18:7-17; R-App. 244.)

Sasson likewise asserted that he would produce additional affidavits from his friends to further support his libel

claim. (*Id.* at 22:17-33:15; R-App.248-259.) The court then ordered Sasson to produce any remaining evidence he had within ten days, which the court would analyze before finally ruling on Braun's Motion to Compel and for Sanctions. (*Id.* at 63:19-21; R-App.264.) The court also afforded Braun's counsel additional time to analyze and brief the sufficiency of Sasson's Second Amended Discovery Responses, which were filed a few days prior to the May 6 hearing. (R.153; R-App.268-269.)

5. Sasson's Final Chance to Gather Relevant Evidence and the Court's June 5, 2014 Hearing.

On May 16, 2014, Sasson filed the affidavits of Randall Sousa, Anna Kelley, and Jerome Williams that he contended supported his libel claim. (*See* R.145, 146, 148.) These affidavits, however, did not contain any information substantiating that Braun libeled Sasson. (*See id.*) Accordingly, on May 27, 2014, Braun filed a Second Supplemental Brief in Support of his Motion to Compel and for Sanctions. (R.158.)

Braun's brief asserted that notwithstanding the court's orders, Sasson's Second Amended Responses nonetheless maintained the same objections for which Sasson was initially admonished. (*Id.*) Moreover, Braun's brief detailed why Sasson's compelled self-publication theory lacked merit, and

why based on the lack of evidence supporting his libel claim, Sasson asserted and maintained this claim in bad faith. (*Id.*)

On June 5, 2014, the court heard argument on these issues and took under advisement whether to issue sanctions against Sasson. (R.246 at 105:4-9; R-App.275.) Despite providing Sasson numerous opportunities to substantiate his libel claim, however, the court found that Sasson failed to produce evidence supporting this cause of action:

> [Y]ou've not in any way of your supplemental pleadings, supplemental responses, provided this Court or opposing counsel ***with anything, any statement made by Braun that's allegedly defamatory.***

(R.246 at 43:21-25; R-App.274) (emphasis added.) The court then closed the record and ordered the parties to appear on June 11, 2014 so it could issue its order on Braun's Motion to Compel as well as a Motion for Sanctions filed by the Agency Defendants (discussed *infra*).

6. The Court's June 11 Order Finding that Sasson Obstructed Discovery.

As the Dismissal Order demonstrates, the court found that Sasson repeatedly obstructed the discovery process by continuously "responding to [Braun's] discovery requests with nonsensical or inapplicable objections." (R.170 at 11; R-App.111.) The court found that Sasson's "refusal to cooperate

in the discovery process and his failure to comply with [its] discovery orders [was] egregious conduct warranting the imposition of sanctions under Wis. Stats. § 805.03." (*Id.*)

Moreover, the court continued, a finding of dismissal was appropriate because Sasson acted in bad faith; the court found his "perpetually meaningless discovery responses and objections [were] offensive to the standards of trial practice and threaten[ed] the integrity of the judicial system." (*Id.* at 12; R-App.112.) Sasson's obstruction of the discovery process, among other reasons (discussed *infra*), formed the basis of its decision to issue case-ending sanctions against Sasson.

B. SASSON'S INSISTENCE ON FILING AND MAINTAINING A BASELESS LIBEL CLAIM.

In its Dismissal Order, the court also found that "Sasson deliberately misled the parties and the Court about the viability of his claims." (R.170 at 2; R-App.102.) When ruling on Braun's Motion to Dismiss, the court initially refused to dismiss Sasson's libel claim. (R.52 at 8-9; R-App.135-136.)

The Court found that Sasson met the heightened pleading requirements set forth in Section 802.03(6) of the Wisconsin Statutes by alleging with particularity the following libelous statements that Braun purportedly authored:

1. "Sasson had been rude to staff at Miller Park";

2. Braun "received word that complaints had been filed due to Sasson's abhorrent behavior";
3. Sasson had "acted like an ass"; and
4. Sasson is "crazy."

(R.6 at ¶ 73; R.52 at 6; R-App.133.) The court also found that Sasson sufficiently alleged a libel claim given his assertion that "Braun purposely sought to publish his false statements to other parties *in written form* thereby libeling Sasson." (R.6 at ¶ 134; R.52 at 9; R-App.136) (emphasis added).

At the Motion to Dismiss hearing, however, Sasson was inconsistent as to whether any allegedly libelous documents existed. (R.52 at 9; R-App.136.) For example, at one point in the hearing, Sasson affirmatively stated he had proof of Braun's supposedly libelous communications:

> THE COURT: Are those the statements [in Paragraph 73 of the Amended Complaint] that you believe and alleged to be the basis for your libel and slander claims?
>
> MR. SASSON: Yes, I have proof of them –
>
> THE COURT: Okay.
>
> MR. SASSON: – in writing.

(R.238 at 37:11-17; R-App.147.) At a later point in the hearing, however, Sasson stated he did not have such proof:

> THE COURT: Okay. So what you're saying is there is nothing in writing generated by Braun that was – that contained these allegedly defamatory statements?
>
> MR. SASSON: I have no proof of that.

(*Id.* at 39:4-8; R-App.149.)

Given this inconsistency, the court confined its review to the "four corners of the complaint," but admonished Sasson that pursuant to Section 802.05(2)(c) of the Wisconsin Statutes, "[a]ll parties are presumed to know that by filing pleadings, they are representing to the Court that the pleaded facts have evidentiary support." (R.52 at 9; R-App.136.)

When Braun served his discovery requests, Sasson initially refused to admit that he lacked any evidence supporting his allegations that Braun libeled him. (R.111 at ¶¶ 5-6, Exs. C-D.) A four-month discovery dispute ensued, until Sasson finally admitted that he never had any evidence to support his libel claim. (R.126 at ¶¶ 3-4, Exs. A-B.)

Even after admitting that he lacked this evidence, however, "Sasson continue[d] to advocate the viability of his libel claim despite having absolutely no evidence that Braun ever published a defamatory statement about him." (R.170 at 14; R-App.114.) The court therefore found that Sasson did not have "a good faith basis to allege that Braun published, in writing, defamatory statements about Sasson." (*Id.*) Accordingly, the court found that Sasson's insistence on pleading and maintaining a baseless libel claim also contributed

to its decision to sanction him. (*Id.*)

C. SASSON'S REPEATED ATTEMPTS TO SERVE IRRELEVANT DISCOVERY.

The Dismissal Order also details Sasson's repeated attempts to propound irrelevant and inflammatory discovery on Braun. Indeed, many of Sasson's initial discovery requests, which he filed with the court along with his complaint, "were completely irrelevant to his claims and highly prejudicial to the defendants." (R.170 at 7; R-App.107.) These requests prompted the court to admonish Sasson at a January 15, 2014 hearing:

> Let me secondly address a warning about discovery. Discovery will be conducted in a professional and civil manner in accordance with our Rules of Civil Procedure and adherence with the Code of Ethics and rules that apply.
>
> . . .
>
> Mr. Sasson's decision to proceed pro se does not in any way affect this Court's insistence that he and all parties comply with all Rules of Civil Procedure, ethical and local rules, and other rules of law that may apply to the conduct of this case.

(R.239 at 7:3-8, 14:5-10; R-App.154-155).

Notwithstanding the court's warnings, Sasson sought to subpoena third-parties such as Tony Bosch and Bill Crafton in an attempt to uncover "evidence" of unrelated, alleged misconduct that Sasson perceived these parties would have about Braun. (R.65-67.) For example, Sasson sought to depose

Bosch about Braun's alleged steroid use; moreover, Sasson alleged that Crafton possessed information about a Ponzi Scheme in which Braun and his mother were purportedly involved. (R.170 at 8; R-App.108.)

But as the court found, this information had no relevance to Sasson's claims against Braun; indeed, the court viewed this as a tactic to obtain "embarrassing information about the defendants through discovery." (*Id.*) Accordingly, the court found that Sasson's discovery misconduct—in conjunction with his other behavior—also warranted the imposition of case-ending sanctions.

D. SASSON'S LACK OF PROFESSIONALISM TOWARDS COUNSEL AND THE COURT.

Finally, the court's Dismissal Order took exception to the lack of professionalism that Sasson exhibited when interacting with opposing counsel. For example, prior to filing his Motion to Compel, Braun's counsel sent a meet and confer letter outlining the deficiencies in Sasson's discovery responses. (R.111 at ¶ 7, Ex. E.) Sasson responded by leaving an inappropriate voicemail that was littered with expletives, in which he repeatedly referred to Braun's counsel as "cupcake," "dude," and "man," and warned Braun's counsel to not "come at [him] with unreasonable shit." (R.244 at 16:22-19:10; R-App.

209-212.) Sasson also made repeated, unsubstantiated allegations that Braun spoliated evidence. (R.170 at 12; R.244 at 17:20; R-App.112, 210.)

Sasson repeatedly accused the court of improprieties as well. He faulted the Circuit Court clerk for allegedly giving him improper legal advice. (R.241 at 3:22-4:16; R-App.176-177.) He accused Judge Van Grunsven of treating him differently and attacking his credibility because he is a *pro se* litigant. (R.246 at 13:25-14:21; R-App.272-273.)

Even after the court dismissed Sasson's case for ongoing litigation misconduct, Sasson increased the personal attacks, accusing the court of lying on the record, advancing a "clearly biased agenda against Sasson," and of having "sinister motives." (R.210 at 8.) Indeed, Sasson's opening brief accuses the circuit court of "obstructing discovery" and preventing him from litigating his claims. (Sasson Br. at 32.) Sasson's persistent and ongoing lack of professionalism also served as one of the many reasons for the court's dismissal of Sasson's claims.

VI. THE COURT'S BASES FOR DISMISSING SASSON'S CLAIMS AGAINST THE AGENCY DEFENDANTS.

The Dismissal Order also detailed the distinct yet related reasons for dismissing Sasson's claims against the Agency

Defendants. (R.170; R-App.101-116.) On January 29, 2014, the Circuit Court issued a seal order based on Sasson's repeated filing of discovery and confidential information that the court deemed highly prejudicial to the defendants. (R.170 at 5; R-App.105.) The Agency Defendants' counsel explained the request for a seal order at the January 29 hearing as follows:

> What [Sasson] does do is lay out a whole mess of irrelevant, prejudicial, privileged information apparently for the same purpose that he originally filed the discovery demands publicly, to embarrass the defendants, and to create press for himself.

(R.240 at 5:13-17; R-App.160) (emphasis added.)

The court granted the seal order, questioned whether Sasson was filing this material on purpose, and admonished him to refrain from making public confidential aspects of the case. (R.240 at 9-10, 18-19, 30-33; R-App.161-162, 164-165, 168-171.) Sasson insisted that he "never intended to harass, annoy…or do anything of that nature to the defendant[s]," that he had no "intention of putting information out there that shouldn't be out there," that this "is not about trying this case in a court of public opinion" or "making a media circus out of this," and that he "would like to contain everything to this courtroom." (*Id.* at 24:19-25:12; R-App.166-167.) Sasson concluded by telling the Circuit Court "I have *no problem* with the ruling you just made,

it's fine." (*Id.* at 35:1-2; R-App.173) (emphasis added).

Sasson deposed Balelo on March 3, 2014, which the court ordered to take place in its chambers given Sasson's history of seeking irrelevant and harassing discovery. (R.170 at 8; R-App.108.) At Balelo's deposition Sasson requested that Balelo's deposition transcript be placed under seal, which the court granted:

> MR. SASSON: Your Honor, you know, I was going to say before we started that pending review of the transcript, ***I think we're going to designate, at least for the time being, everything confidential material pursuant to the Court's request that we keep everything under seal.***
>
> THE COURT: ***The Court will order the deposition transcript sealed.***

(R.170 at 6; R-App.106) (emphasis added).

A few days later, however, Sasson sent an email to MLB's General Counsel, David Prouty, in which Sasson sought to provide "any and all" information he had about Balelo in exchange for assistance in his case. (*See* R.151 at ¶ 2 and Ex. A.) Sasson also mischaracterized Balelo's responses to many deposition questions, going so far as to accuse Balelo of professional misconduct. (*Id.*; R.170 at 7; R-App.107.) The court viewed this conduct as a bad faith and egregious violation of its court orders and, coupled with Sasson's

unprofessionalism, likewise sanctioned Sasson and dismissed his remaining claims against the Agency Defendants.

VII. SASSON'S POST-DISMISSAL MOTIONS.

Following the Circuit Court's discretionary determination to sanction Sasson and dismiss his case, Sasson filed a June 25, 2014 Motion to Vacate the Dismissal Order and a July 11, 2014 Motion to Vacate the Seal Order. (*See* R. 174-176; R.185-187.) The Motion to Vacate the Dismissal Order raised numerous *post hoc* constitutional arguments challenging the seal order and also asserted that the court erred in reaching its determination that case-ending sanctions were warranted. (R.175.) The Motion to Vacate the Seal Order likewise challenged the legitimacy of the court's prior seal orders to which Sasson consented and actively invoked. (R.185.) The Circuit Court denied Sasson's motions to vacate (R. 249 at 10-13; R-App.279-282), which Sasson now appeals in an effort to overturn the Dismissal Order.

ARGUMENT

This Court should affirm the Dismissal Order because the Circuit Court did not erroneously exercise its discretion to sanction Sasson and dismiss his case for repeated, ongoing, and intentional litigation misconduct. The record demonstrates that

Sasson obstructed discovery, initiated and maintained baseless claims, made unsubstantiated allegations, and willfully violated court orders, all while demonstrating a marked level of unprofessionalism towards counsel and the court.

Sasson's appeal is a *post hoc* attempt to manufacture a constitutional violation, which he claims warrants the reversal of the Dismissal Order. But these seal orders had no bearing on the court's decision to dismiss Sasson's claims against Braun. Even if they were relevant to the court's decision to dismiss Sasson's claims against Braun, however, Sasson's argument is specious. The court never issued a gag order that restricted Sasson's speech. All hearings were open to the public.

In fact, Sasson consented to, and actively asserted, the Court's seal orders as a basis to keep confidential various pre-trial filings and discovery, which do not implicate the First Amendment as Sasson now contends. Indeed, Sasson expressly invoked the seal order to place Balelo's transcript under seal and make it confidential; then, days later, he mischaracterized the transcript to a third-party. This misrepresentation to the court—standing alone—demonstrates Sasson's bad faith, which warranted the imposition of case-ending sanctions for Sasson's remaining claims against the Agency Defendants. But as the

record demonstrates, the court identified other reasons why Sasson's claims against the Agency Defendants were dismissed.

Moreover, Sasson waived any purported constitutional violation by not sufficiently raising it below. Likewise, Sasson should be judicially estopped from now challenging the seal orders that he consented to, and specifically sought to enforce. Accordingly, this Court should affirm the Circuit Court's discretionary decision to sanction Sasson and dismiss his case with prejudice.

I. THE COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION TO SANCTION SASSON AND DISMISS HIS LAWSUIT WITH PREJUDICE.

The court's Dismissal Order documents Sasson's repeated, ongoing, and intentional litigation misconduct throughout this case. The court then analyzed the appropriate legal standard to address his ongoing misconduct and reached a reasonable conclusion that the sanction of dismissal was appropriate. As a result, the court's Dismissal Order should be upheld because Sasson has not demonstrated that the Circuit Court erroneously exercised its discretion.

A. STANDARD OF REVIEW.

This Court will "review a Circuit Court's decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion." *Schultz v. Sykes,* 2001 WI App 255, ¶ 8, 248 Wis. 2d 746, 638 N.W.2d 604. Thus, "[a] discretionary decision will be sustained if the Circuit Court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 41, 299 Wis. 2d 81, 726 N.W.2d 898.

Accordingly, to uphold the court's decision, "[t]he record need only reflect the court's 'reasoned application of the appropriate legal standard to the relevant facts in the case.'" *Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549, 572-73, 521 N.W.2d 182 (Ct. App. 1994) (quoting *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982)). "If the record shows that the court exercised its discretion and a reasonable basis exists for its determination, the court properly exercised its discretion." *Id.* Thus, "[t]he issue is not whether [the appellate court], as an original matter, would have imposed the same sanction as the Circuit Court; it is whether the Circuit Court

exceeded its discretion in imposing the sanction it did." *Schultz*, 2001 WI App 255 at ¶ 8.

Indeed, the appellate court will "search the record for reasons to sustain the court's discretionary decision." *Erickson*, 186 Wis. 2d at 572-73 (citing *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968)). The appellate court need not even "affirm the dismissal using the same rationale as the trial court." *Bernegger v. Cooper*, 2014 WI App 24, ¶ 21, 352 Wis. 2d 754, 843 N.W. 2d 710 (unpublished) (R-App.285-289) (citing *The Farmers Auto. Ins. Ass'n v. Union Pac. Ry Co.*, 2008 WI App 116, ¶ 34, 313 Wis. 2d 93, 756 N.W.2d 461).

Dismissal of a litigant's case is an appropriate sanction if the court finds that the "plaintiff has acted in bad faith *or* has engaged in egregious misconduct." *Schultz*, 2001 WI App 255 at ¶ 9. When making a bad faith determination, a court is not required to analyze a specific set of factors; rather, "it should focus on the degree to which the party's conduct offends the standards of trial practice." *Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, ¶ 11, 247 Wis. 2d 521, 634 N.W.2d 544 (citation omitted). A finding of egregiousness hinges on whether "the noncomplying party's conduct . . . is so extreme, substantial and persistent that it can properly be

characterized as egregious." *Dawson v. Goldammer*, 2006 WI App 158, ¶ 22, 295 Wis. 2d 728, 722 N.W.2d 106. A party's conduct can be egregious even though it is unintentional. *Id.*

Wisconsin Courts have found dismissal to be an appropriate remedy in instances where, for example, a litigant: (a) "intentionally or deliberately delayed or obstructed discovery," *Bernegger*, 2014 WI App 24 at ¶ 23 (citing *Dawson*, 2006 WI App 158 at ¶ 22); (b) "refused to follow a discovery order," *id.*; (c) exhibited a "spirit of noncooperation," *id.* (citing *Brandon Apparel Grp., Inc.*, 2001 WI App 205 at ¶ 11); or (d) "repeatedly and flagrantly flout[ed] court orders." *Id.* at ¶ 26.

B. THE COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION TO SANCTION SASSON AND DISMISS HIS CLAIMS AGAINST BRAUN BECAUSE IT FOUND THAT SASSON ACTED EGREGIOUSLY AND IN BAD FAITH.

The court correctly concluded that Sasson's repeated, ongoing, and intentional misconduct warranted dismissal. Any of the individual instances of misconduct identified by the court, standing alone, warranted case-ending sanctions. The court gave Sasson every opportunity to litigate his case within the bounds of the rules of civil procedure and Sasson chose to abuse that privilege at every turn. Considering Sasson's pattern

of behavior, dismissal of all claims based upon a finding that his "noncompliance was egregious and done in bad faith" was a proper exercise of discretion that was well supported by the record.

1. Sasson Acted Egregiously and in Bad Faith By Obstructing the Discovery Process.

"To dismiss a complaint for bad faith, the trial court must find that the noncomplying party intentionally or deliberately delayed, obstructed, or refused the requesting party's discovery demand." *Dawson*, 2006 WI App 158 at ¶ 22. Similarly, a party's "failure to comply with Circuit Court scheduling and discovery orders without clear and justifiable excuse is [considered] egregious conduct." *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App. 1999).

a. Sasson Failed to Produce Any Libelous Documents.

Sasson contends that the Circuit Court abused its discretion when it found that Sasson violated its orders to produce the allegedly libelous documents substantiating his claim because "Sasson was never ordered, expressly or otherwise, to produce evidence supporting the publication

element of this libel claim." (Sasson Br. at 30-31.) Sasson's argument is disingenuous and misleading.

The court's April 10, 2014 Order expressly required Sasson to "sufficiently respond to Ryan Braun's First and Second Set of Discovery Requests *and produce the documents relevant to these requests.*" (R.122 at ¶ 2; R-App.235.) Braun's document requests demanded that Sasson produce the purportedly libelous documents authored by Braun (R.111 at ¶ 3, Ex. A); indeed, by filing his Amended Complaint, Sasson represented he had these documents in his possession because it would be impossible to plead the "particular words complained of" in the libelous documents without knowing whether these documents even exist. (*See* Argument Section I(B)(2), *infra.*)

Moreover, a review of the April 4, 2014 hearing transcript confirms that Sasson was required to produce these allegedly libelous documents. After finding that Sasson's objections to Braun's discovery were baseless, the following dialogue took place:

> THE COURT: So let me be clear [Mr. Sasson], if your responses don't pass the smell test, if they don't rise to the level of meaningful responses, we'll revisit this issue of sanctions.
>
> MR. SASSON: I've got it . . . ***So, you know, I apologize and I will comport with the rules and will respond within 10 days.***

> THE COURT: Yes, you will. You will comport with the rules and if you don't, there may be sanctions. Mr. Barton?
>
> MR. BARTON: Just as a point of clarification, Your Honor, with his – with Mr. Sasson's responses due in 10 days, ***does that include the production of these allegedly libelous documents?***
>
> THE COURT: Well, you know, Mr. Sasson, when you said you can do this in 10 days, I assume that you understood that meant attaching to your responses to the requests for production of documents the documents that you believe are responsive to these requests, ***and I would assume that you would have those documents in your possession, that you would have them available.*** So is 10 days too ambitious? Mr. Barton is kind of extending an olive branch here.
>
> MR. SASSON: Well, I mean, Your Honor, discovery is ongoing.
>
> THE COURT: ***No, no, no, no. This discovery is not ongoing. This discovery is going to be responded to in a meaningful fashion within the deadline I announce here today.***

(R.244 at 29:7-31:5; R-App.222-225) (emphasis added).

Finally, the court's inquiry at the May 6, 2014 hearing makes abundantly clear that Sasson was required to produce the allegedly libelous documents:

> THE COURT: I'm going back to your words, plaintiff has proof of publication. Where on anything that you attach to your supplemental responses filed May 2 amounts to your proof of publication?
>
> . . .

> THE COURT: Do you have one document, one document authored by Ryan Braun that contains defamatory statements about you?
>
> MR. SASSON: What did you say, I'm sorry?
>
> THE COURT: Do you have one document, one document at all, anything?
>
> . . .
>
> THE COURT: The Court notes that libel consists of publication of the defamatory matter by written or printed word. That's under restatement of torts Section 568. Unlike slander an action for libel does not require a plaintiff to plead or prove actual pecuniary damages. That's the Lawrence case, 53 Wis. 2d at 661.
>
> I had previously determined on the motion to dismiss that the alleged libelous statements, the statement underlying the slander claim, could be capable of defamatory meaning. Your complaint alleges that Braun "sought to publish his false statements to other parties ***in written form thereby libeling Sasson,"*** but – your amended complaint, paragraph 134, all right, that's your allegation. You say "sought to publish false statements to other parties in written form thereby libeling Sasson."
>
> ***What do you have that's responsive to this other than what's bates stamped – the bates stamps you referred to?***
>
> MR. SASSON: Well, your Honor, the fact that publication can be alleged –
>
> THE COURT: Don't argue legality. My question is what do you have other than the bates stamp?

(R.245 at 13:13-17; 14:25-15:7; 16:23-17:25; R-App.239-243) (emphasis added).

Accordingly, Sasson's contention that the court never ordered him to produce the libelous documents underpinning

the allegations in his Amended Complaint is belied by the record. Both the court and Braun's counsel demanded that these documents be produced. Sasson ultimately conceded he possessed no libelous documents and was unaware whether any documents even existed. Consequently, Sasson's failure to produce these documents violated the court's orders, and the court's finding in this regard was not unreasonable.

b. Sasson Repeatedly Failed to Meaningfully Respond to Discovery.

Sasson also contends that the court erred in finding that he acted in bad faith because he "actively attempt[ed] to comply with discovery," and "produce[d] meaningful responses" to Braun's discovery requests. (Sasson Br. at 31-32.) Again, however, Sasson has misrepresented the record and ignores his obstruction of the discovery process.

First, Sasson's Second Amended Discovery Responses continue to assert many of the objections for which Sasson was previously admonished. (*Compare* R.111 at ¶¶ 5-6, Exs. C-D *with* R.159 at ¶¶ 3-4, Exs. A-B; *see also* R.170 at 12; R-App.112.)

Second, Sasson's Second Amended Responses lodge additional objections that are incomprehensible. For example, in response to Braun's document requests that demanded

Sasson to produce the libelous documents underpinning his amended complaint, Sasson claimed that these documents were subject to the attorney-client and work-product privileges. (R.170 at 10-11; R-App.110-111.) While Sasson asserts that the court erred in finding these objections inappropriate, (Sasson Br. at 35-36), he fails to identify any authority that a *pro se* litigant may prospectively assert these privileges. Even if these privileges were applicable, however, they cannot be used to withhold evidence substantiating Sasson's claims. *See, e.g., State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 34 Wis. 2d 559, 580, 150 N.W.2d 387 (1967) (stating that "a party cannot conceal a fact merely by revealing it to his lawyer, nor may he secrete a pre-existing document merely by giving it to his attorney.").

Third, Sasson ignores that it took *months* to simply get him to admit that he lacks any documents supporting his libel claim. Sasson could have easily responded to Braun's first set of discovery requests and indicated that he did not have any documents authored by Braun that supported his allegations. Rather than respond in a straightforward manner, however, Sasson objected and stalled until he had no choice but to admit that his libel claims had no basis in fact and were brought in bad

faith. (*See* Argument Section I(B)(2), *infra.*) Accordingly, the court was within its discretion to find that Sasson obstructed discovery in bad faith and sanction him for his conduct.

2. The Court Reasonably Found that Sasson Instituted and Maintained a Baseless Libel Claim.

Section 802.03(6) of the Wisconsin Statutes dictates that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally." Sasson's Amended Complaint pled both libel and slander claims, but his slander claim was dismissed because Sasson could not plead special damages. (R.52 at 7-8; R-App.134-135.)

With respect to his libel claim, however, Sasson affirmatively alleged "the particular words contained of" in these purportedly libelous documents and also stated that "Braun purposely sought to publish his false statements to other parties *in written form* thereby libeling Sasson." (R.6 at ¶ 134; R.52 at 9; R-App.136) (emphasis added). Braun denied these allegations and propounded discovery seeking to determine the basis of this claim. (R.56 at ¶ 134; R.111 at ¶ 3, Ex. A)

In its Dismissal Order, the court found that despite its admonitions that "by filing his pleadings, [Sasson] was affirming that his claims have evidentiary support, Sasson "finally admitted that he has no evidence to support his libel claim." (R.170 at 2; R-App.102.) Instead, Sasson developed a new theory and asserted that his libel claim was nonetheless viable through the doctrine of "compelled self-publication."[5] (*Id.*)

On appeal, Sasson now contends that the Circuit Court "obstructed discovery" and violated his due process rights by prohibiting him from taking discovery on a claim that he pleaded with particularity without even knowing whether libelous documents existed. (Sasson Br. at 32-25.) Sasson misses the point. The court did not obstruct discovery; it refused to endorse Sasson's "'file first and ask questions later' approach to [this] litigation." *Jandrt ex rel. Brueggman v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 568-69, 597 N.W.2d 744 (1999).

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[5] Sasson has abandoned this "compelled self-publication" theory on appeal. As Braun explained to the Circuit Court, a party cannot manufacture his own libel claim by voluntarily memorializing and disseminating defamatory statements. *See, e.g., Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 911-912 (7th Cir. 1994) (discussing the "absurdity" of "self-defamation"); *see also Olivieri v. Rodriguez*, 122 F.3d 406, 408-409 (7th Cir. 1997) (stating that doctrine of self-publication has been "largely discredited"). The doctrine has also been rejected by Section 577 of the Restatement (Second) of Torts (cmt. m), which the Wisconsin Supreme Court has repeatedly relied upon for its defamation jurisprudence. *See, e.g., Voit v. Madison Newspapers, Inc.*, 116 Wis. 2d 217, 222, 341 N.W.2d 693 (1984).

Sasson was required to plead the "particular words complained of" in his libel claim with particularity. Wis. Stat. § 802.03(6). Sasson purported to do so; he alleged that Braun authored documents, which stated that: "Sasson had been rude to staff at Miller Park"; Braun "received word that complaints had been filed due to Sasson's abhorrent behavior"; Sasson had "acted like an ass"; and Sasson is "crazy." (R.6 at ¶ 73; R.52 at 6; R-App.133.)

Therefore, Sasson unmistakably represented that he knew these documents existed because a party could never satisfy the heightened pleading requirements of a libel claim and allege the "particular words complained of," without knowing whether these libelous documents even exist. *See* Wis. Stat. §§ 802.05(2)(c) and 802.03(6). Stated differently, it is a legal impossibility to satisfy the heightened pleadings requirements for a libel claim without knowing whether libel even occurred.

Any other possibility would allow a party to plead a libel claim upon information and belief, take oppressive discovery on whatever he "thinks" the libelous documents say, and when no evidence is produced by the party accused of libel, make hollow contentions that the party accused of libel must have spoliated evidence because discovery failed to reveal any libelous

documents—exactly what Sasson did here. (R.170 at 12; R-App.112.) Thus, Sasson pled a libel claim without any basis in fact and sought to force Braun to prove a negative—that Braun *did not* libel Sasson.

Given Sasson's insistence on serving irrelevant and harassing discovery (discussed *infra*), it was certainly within the court's discretion to limit his ability to conduct discovery until he marshalled even a scintilla of evidence to support his libel claim. Sasson failed to provide this evidence—despite fabricating the "particular words complained of" in non-existent libelous documents—and as a consequence, the court did not erroneously exercise its discretion in finding that he initiated and maintained his libel claim in bad faith.

3. The Court Reasonably Found that Sasson Repeatedly Propounded Irrelevant Discovery.

A party who consistently serves extremely broad discovery in violation of court orders may properly face dismissal as a sanction. *See, e.g., Bernegger*, 2014 WI App 24 at ¶¶ 23-25 (upholding the dismissal of a party's complaint when that party repeatedly served broad discovery in violation of court orders); *see also* Wis. Stat. § 804.12. Applied here, Sasson served embarrassing and harassing discovery requests that had no

nexus to his claims in this case. (*See, e.g.,* R.170 at 7; R-App. 107.)

Prying into Braun's "amorous relationships" had no bearing on whether Braun defamed Sasson; likewise, Braun's alleged steroid use and purported academic misconduct while attending the University of Miami has no nexus to Sasson's claims in this lawsuit. (*Id.*) Moreover, Sasson filed these requests, thereby making them publicly available (*id.*), which is precisely why the court issued a warning to Sasson at the January 15, 2014 hearing. (R.239 at 7:3-8, 14:5-10; R-App.154-155.)

Undaunted by the court's order to proceed with discovery in good faith, Sasson nonetheless attempted to subpoena Anthony Bosch and Marcello Albir to obtain any knowledge they had regarding MLB's steroid investigation against Braun. (R.66-67.) Moreover, Sasson attempted to subpoena Bill Crafton, who Sasson alleged was complicit in a Ponzi Scheme with Braun and Braun's mother. (R.65; R.170; R-App.108.)

As the court found, however, the discovery Sasson requested had no bearing on his claims; it was merely an attempt to "seek irrelevant and embarrassing information about

the defendants through discovery." (R.170 at 8; R-App.108.) Accordingly, the court did not erroneously exercise its discretion in concluding that Sasson's discovery tactics were done in bad faith and could form the basis for dismissing his lawsuit.

4. The Court Reasonably Found that Sasson Failed to Act With Professionalism.

The Dismissal Order presents a clear picture of Sasson's litigation misconduct. He obstructed discovery, flouted court orders, refused to cooperate, and abused the discovery process, all while showing an egregious level of disrespect towards counsel and the court. Referring to Braun's counsel as "cupcake," "dude," and "man," telling Braun's counsel to not "come at [him] with unreasonable shit," (R.244 at 16:22-19:10; R-App.209-212), and accusing Braun of spoliating evidence (R.170 at 12; R-App.112), are just a few of innumerable instances of Sasson's unprofessionalism, which contributed to the court's decision to issue case-ending sanctions. Sasson has not asserted (nor can he) that the court was "unreasonable" in finding that Sasson's unprofessionalism contributed to the court's decision to dismiss his claims.

C. THE COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION TO SANCTION SASSON AND DISMISS HIS CLAIMS AGAINST THE AGENCY DEFENDANTS BECAUSE IT FOUND THAT SASSON ACTED EGREGIOUSLY AND IN BAD FAITH.

The court's dismissal of Sasson's claims against the Agency Defendants was also a proper exercise of discretion due Sasson's similar pattern of misconduct. In addition to Sasson's overall lack of professionalism and decorum when interacting with opposing counsel, several other factors support the finding that Sasson acted egregiously and in bad faith toward the Agency Defendants. (*See generally* R.170; R-App.101-116.)

Sasson's email to David Prouty, in which he misstated and inaccurately summarized Balelo's deposition testimony was: (1) a violation of the Court's specific order to seal the Balelo deposition; (2) a violation of the general seal order; (3) a further example of Sasson's abuse of the discovery process to gather irrelevant information and harassing information; (4) an example of Sasson operating in bad faith by disparaging Balelo and mischaracterizing his testimony to an important figure in his industry. (*Id.*) Additionally, the court properly based the dismissal upon Sasson's unsubstantiated allegations that went well beyond his baseless libel claims against Braun. (*Id.*)

II. SASSON'S ARGUMENTS CHALLENGING THE CONSTITUTIONALITY OF THE SEAL ORDERS LACK MERIT.

A. STANDARD OF REVIEW.

This Court reviews discovery orders for an erroneous exercise of discretion. *Earl v. Gulf & W. Mfg. Co.*, 123 Wis. 2d 200, 204, 366 N.W.2d 160 (Ct. App. 1985). An appellant has the burden of establishing that the trial court erroneously exercised its discretion. *Rademann v. State Dep't of Transp.*, 2002 WI App 59, ¶ 34, 252 Wis. 2d 191, 642 N.W.2d 600. A trial court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense in a discovery proceeding." Wis. Stat. § 804.01(3)(a). The issuance of a protective order in a discovery proceeding is within the trial court's sound discretion. *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981).

The Supreme Court has explicitly stated that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-34 (1984). Pretrial discovery including depositions, interrogatories, and document productions "are not public

components of a civil trial, were not open to the public at common law, and in general, are conducted in private as a matter of modern practice." *Bond v. Utreras*, 585 F.3d 1061, 1074-75 (7th Cir. 2009) (quotations and citations omitted.)

Therefore, a protective order sealing the contents of a deposition and prohibiting the disclosure of this information is not viewed as a gag order. "In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Seattle Times*, 467 U.S. at 34. The discovery process requires that the trial court have "substantial latitude" because "the trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Id.* at 36.

B. SASSON'S ASSERTIONS THAT THE JANUARY 29 SEAL ORDER DID NOT APPLY TO DISCOVERY AND CONSTITUTED A "GAG ORDER" ARE FALSE AND UNSUPPORTED BY THE RECORD.

Sasson argues that the January 29, 2014 Order: (a) did not apply to discovery; and (b) amounted to an unconstitutional prior restraint on his speech. (Sasson Br. at 15-20.) Each of these arguments is wrong and unsupported in the record.

At the January 29, 2014 hearing, the Circuit Court described its intention to keep discovery materials "non-discoverable or non-disclosable" and made clear that the intention of the protective order was to prevent Sasson from making these materials public documents with his filings. (R.240 at 19:18-19; R-App.165.) The court stated:

> [I] don't know if it's incompetence or ingenuity, if it's his understanding that basically things that are exchanged in discovery are immune from release to the media and the public, that those that are filed with the Court become public records, but I think that given the record now before this Court, there needs to be some safeguards put in place […].

(*Id.* at 19:2-9; R-App.165.) Due to these concerns, the court granted the Agency Defendants' Motion for a Protective Order and ordered all filings sealed. Sasson indicated his understanding and agreement with the order at that time: "I'm following your rules. I don't want anything to get out. I have no problem with the ruling you just made, it's fine." (*Id.* at 34:24-35:2; R-App.172-173.)

Despite Sasson's new arguments, the January 29 Seal Order did not prohibit "all commentary" on Sasson's filings. To the contrary, all hearings were open to the public. The order did not place any restriction on Sasson's speech except that the sealed documents "shall not be made public." (R.62 at ¶ 4.) The

objective of the January 29 Seal Order was not to prevent or restrain any speech by the litigants, but was intended to prevent any additional discovery materials or documents containing other confidential information from being made public. Sasson understood the order's purpose and *invoked that order* in connection with Balelo's deposition:

> MR. SASSON: Your Honor, you know, I was going to say before we started that pending review of the transcript, I think we're going to designate, at least for the time being, everything confidential material pursuant to the Court's request that we keep everything under seal.
>
> THE COURT: The Court will order the deposition transcript sealed.

(*See* R.170 at 6; R-App.106.)

Thus, whether the January 29 Seal order was directly applicable to Balelo's deposition is immaterial because Sasson specifically requested that the Balelo deposition transcript be designated as "confidential material." (*Id.*) The Circuit Court then properly sealed the deposition transcript. (*Id.*)

"[F]or good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense in a discovery proceeding." Wis. Stat. § 804.01(3)(a). As discussed above, the court already found good cause to protect

documents from public disclosure due to Sasson's prior inappropriate filings. Sasson then requested Balelo's transcript to be placed under seal in accordance with the January 29 Seal Order. Accordingly the court was able to extend the reasoning of the January 29 Seal Order to specifically order the Balelo deposition sealed.

III. SASSON IS PRECLUDED FROM RAISING ANY CONSTITUTIONAL OBJECTIONS REGARDING THE SCOPE AND EFFECT OF THE SEAL ORDERS.

This Court does not even need to engage in an analysis of Sasson's constitutional arguments related to the seal orders, because they are precluded under the principles of waiver and judicial estoppel.

A. WAIVER AND JUDICIAL ESTOPPEL.

"The party who raises an issue on appeal bears the burden of showing that the issue was raised before the Circuit Court." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. A party who has been complicit in, or consented to, the unpreserved error is viewed with additional skepticism. *In re Ambac Assur. Corp.*, 2012 WI 22, ¶ 23, 339 Wis. 2d 48, 810 N.W.2d 450. "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain

position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *Id.* (citing *State v. Gove,* 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989)).

Similarly, the doctrine of judicial estoppel operates to prevent a litigant from maintaining inconsistent positions in legal proceedings and to "prevent litigants from playing 'fast and loose' with the courts." *Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶ 4, 296 Wis. 2d 716, 723 N.W.2d 713 (citations omitted). "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (citing *Davis v. Wakelee,* 156 U.S. 680, 689 (1895)).

The three required elements of judicial estoppel are: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *State v. Petty*, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996).

Inconsistent positions may be within the context of the same case, especially when a litigant maintains one position at the circuit court and an inconsistent position on appeal. *See Harrison v. Labor & Indus. Review Comm'n*, 187 Wis. 2d 491, 496-98, 523 N.W.2d 138 (Ct. App. 1994) ("[I]nstances where a defendant in a criminal case reverses positions on appeal most often fit these parameters since the facts are the same and it is easier to discern whether the positions are clearly inconsistent.").

B. SASSON'S SEAL ORDER ARGUMENTS ARE WAIVED AND ESTOPPED BY HIS OWN CONDUCT.

Fundamental principles of justice require that either waiver or judicial estoppel operate to prevent Sasson's "fast and loose" approach to this litigation as demonstrated by his arguments concerning the January 29 and Balelo Seal Orders.

1. Sasson Waived the Right to Challenge the Constitutionality or Applicability of Any Seal Order.

Sasson, by his conduct and explicit statements to the Circuit Court, showed his agreement with, and understanding of, the January 29 Seal Order. In response to the court's ruling granting a protective order, Sasson stated "I'm following your rules. I don't want anything to get out. I have no problem with

the ruling you just made, it's fine." (R.240 at 34:24-35:2; R-App.172-173.)

At the outset of Balelo's deposition, Sasson then invoked the January 29 Seal Order in his request to designate the Balelo deposition as "confidential material." (*See* R.170 at 6; R-App.106.) This designation led the Circuit Court to order "the deposition transcript sealed." (*Id.*) This exchange demonstrates that Sasson was aware of, and in agreement with, the application of the January 29 Seal Order to discovery materials. (*See id.*)

Sasson caused the Circuit Court and the parties to believe that the Balelo deposition would be sealed and maintained as confidential. (*Id.*) This constitutes a clear case of waiver. *Cf. In re Ambac Assur. Corp.*, 2012 WI 22 at ¶ 23; *see also Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990) ("One may waive the right to appeal where he has caused or induced a judgment to be entered or has consented or stipulated to the entry of a judgment.").

Sasson likewise waived the argument that the January 29 Seal Order was a prior restraint on his speech. A seal order, by its very nature, aims to prevent disclosure of the contents of documents. *See State v. Gilmore*, 201 Wis. 2d 820, 833, 549 N.W.2d 401 (1996) ("Documents are presented under seal

precisely so that their secrecy might be preserved and disclosure to the public might be prevented.") Because Sasson actively brought about the conditions that led to sealing the Balelo deposition, he agreed to limit the disclosure of information contained in the deposition transcript. Accordingly, the argument that the seal is an unconstitutional prior restraint has been waived. *In re Ambac Assur. Corp.*, 2012 WI 22 at ¶ 23.

"A party cannot complain about an act to which he or she deliberately consents." *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997). Not only did Sasson consent to the application of the seal order to discovery, he took the additional step of designating the Balelo deposition as confidential and requested that the testimony be sealed.[6] Sasson's statements and the action taken by the Circuit Court would leave any observer to conclude that the Balelo transcript was sealed.

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[6] Sasson's arguments may also be analyzed in the context of an "invited error." The Court of Appeals will not review an error which a party invited. *General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc. by Waldschmidt,* 215 Wis. 2d 104, 131, 572 N.W.2d 881 (Ct. App. 1997); *Shawn B.N. v. State,* 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992); *Linden v. Cascade Stone Co.,* 2004 WI App 184, ¶ 29, 276 Wis. 2d 267, 687 N.W.2d 823 (citing *Richards v. Land Star Group, Inc.,* 224 Wis. 2d 829, 842-43, 593 N.W.2d 103 (1999)) ("If a party makes an express concession, [the Court of Appeals] ha[s] no obligation to review such 'invited error.'"); *Soo Line r. Co. v. Office of Comm'r of Transp.,* 170 Wis. 2d 543, 557, 489 N.W.2d 672 (Ct. App. 1992).

Absent Sasson's request, the parties would have taken additional steps to protect the contents of the deposition. It is disingenuous for Sasson to argue that the Balelo deposition was not sealed. Sasson has waived that argument by consenting to, and actively causing the court to take the very action he now laments. It was only after this position was no longer advantageous to Sasson—when he realized that sanctions could result from his violations of the seal—that he developed the "arguments" regarding the constitutionality and applicability of the seal orders.

2. Judicial Estoppel Should Preclude Sasson from Asserting Inconsistent Legal Positions Regarding the Constitutionality and Applicability of the Seal Orders.

Sasson should also be judicially estopped from claiming that: (a) the Balelo deposition was not subject to either the January 29 or the Balelo-specific Seal Orders; and (b) the January 29 Seal Order is unconstitutional. These arguments are inconsistent with Sasson's position throughout the case prior to when he knew he would be sanctioned.

Sasson stated that he had "no problem" with the order when it was instituted. (R.240 at 35:1-2; R-App.173) Sasson also previously acknowledged the applicability of the January 29 Seal

Order to discovery and designated Balelo's deposition as "confidential" in accordance with that order. (R.170 at 6; R-App.106) Sasson's previous position directly led to the court's specific order sealing Balelo's deposition. (*Id.*)

The facts at issue have not changed. Yet on appeal, Sasson is now asserting new positions in an attempt to avoid the consequences of his violation of the Circuit Court's orders. This is the epitome of "playing fast and loose" with the court, and judicial estoppel should preclude him from taking inconsistent positions.

C. SASSON'S UNSUPPORTED DUE PROCESS ARGUMENTS ARE WAIVED AND ESTOPPED.

Sasson also argues that the court violated his due process by hearing the Agency Defendant's Motion for Protective Order on short notice and by granting the January 29 Seal Order without providing him with an opportunity to be heard. (Sasson Br. at 25-29.) This argument is unsupported, disingenuous, and has been waived.

Sasson was provided with notice of the hearing, as well as an opportunity to be heard. Sasson actively participated in the hearing. (*See generally* R.240.) Because due process is flexible to fit the demands of a particular situation, Sasson's notice of the hearing and ability to argue his position afforded him all of the

process that was due under the circumstances. See *State v. Hardwick*, 144 Wis. 2d 54, 58, 422 N.W.2d 922 (Ct. App. 1988).

Sasson's also waived his due process argument given his agreement with, and invocation of, the January 29 Seal Order. *See, e.g., Wengerd v. Rinehart*, 114 Wis. 2d 575, 587, 338 N.W.2d 861 (Ct. App. 1983) ("Due process objections can be waived by subsequent acts.") Sasson was present at the hearing and prefaced his remarks to the court with "I appreciate the Court calling this hearing." (R.240 at 10:25-11:1; R-App.162-163.) Sasson never complained that he had been brought to court on short notice. Sasson was given an opportunity to fully argue his position and at the conclusion of the hearing, Sasson indicated his agreement with the ruling: "I'm following your rules. I don't want anything to get out. I have no problem with the ruling you just made, it's fine." (*Id.*, at 34:24-35:2; R-App.172-173.) By failing to raise any concerns regarding lack of notice, by fully participating in the hearing, by signaling his agreement with the ruling, and then expressly invoking the ruling to seal Balelo's deposition, Sasson waived any due process complaints. *Wengerd*, 114 Wis. 2d at 587.

Similarly, Sasson's agreement, adherence, and invocation of the January 29 Seal Order contradicts any newly concocted

argument that his due process rights were violated when the court issued this order at the outset. Judicial estoppel should likewise operate to preclude Sasson's inconsistent arguments. *Olson*, 2006 WI App 204 at ¶ 4.

IV. SASSON'S MOTION TO VACATE THE DISMISSAL ORDER IS NOT A BASIS FOR RELIEF.

Sasson's June 27, 2014 Motion to Vacate is not a basis for relief from the Dismissal Order because the motion did not present any new issues and the Circuit Court's denial of that motion was not an erroneous exercise of discretion.

A. THE AUGUST 11, 2014 ORDER DENYING SASSON'S MOTION TO VACATE IS NOT AN APPEALABLE ORDER.

"[I]t has frequently been held that an order entered on a motion to modify or vacate a judgment or order is not appealable where, as here, the only issues raised by the motion were disposed of by the original judgment or order." *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972).

The Circuit Court's denial of the June 27, 2014 motion is not an appealable order, as the only issues raised by the motion were those disposed of by the Circuit Court's prior rulings. The Court should decline to review an order entered on a motion to modify or vacate a judgment when such motion does not

present issues other than those determined by the original order. *Gibbons*, 55 Wis. 2d at 25.

In denying the Motion to Vacate, the court stated that "Sasson has not presented any novel arguments demonstrating that a manifest error was committed. Instead Sasson merely repeats arguments he has already asserted in previous briefs. A manifest error is not demonstrated by the disappointment of the losing party or by rehashing old arguments." (R.249 at 13:9-15; R-App.282.) As this statement makes clear, the court considered Sasson's arguments and found that the June 27, 2014 motion merely rehashed prior arguments that were previously addressed. (*See id.*)

B. THE COURT'S DENIAL OF THE MOTION TO VACATE WAS NOT AN ERRONEOUS EXERCISE OF DISCRETION.

Should the Court wish to review the denial of the June 27, 2014 motion, however, Sasson's argument also fails because the Circuit Court did not erroneously exercise its discretion. *See Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶¶ 29, 326 Wis. 2d 640, 785 N.W.2d 493 (reviewing the denial of a motion under Wis. Stat. § 806.07 for an abuse of discretion) (citing *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 698 N.W.2d 610).

Sasson incorrectly asserts that "the court must consider the five interest of justice factors" to properly deny a motion under Section 806.07(1)(h). (Sasson Br. at 44-46.) Sasson neglects to mention the preliminary inquiry set forth by the *Miller* Court. "To determine whether a party is entitled to review under Wis. Stat. § 806.07(1)(h), the Circuit Court should examine the allegations accompanying the motion with the assumption that all assertions contained therein are true." *Miller*, 2010 WI 75 at ¶ 34. Next, only "[i]f the facts alleged constitute extraordinary circumstances such that relief may be warranted under para. (1)(h), a hearing must be held on the truth of the allegations." *Id.*

When ruling upon the motion, the Circuit Court cited *Sukala*, noting that "[t]he party moving for reconsideration has the burden to prove that a requisite ground for relief exists." (R.249 at 12:13-15; R-App.281.) The court then engaged in the proper preliminary analysis and determined that Sasson did not show that extraordinary circumstances, or any other reason for relief under Section 806.07 existed. The court based this decision upon a finding that Sasson "merely repeats arguments already asserted in previous briefs" and "has not presented any newly discovered evidence that would challenge the propriety of

the [...] order. (*Id.* at 13:9-15, 13:17-19; R-App.282.) Accordingly, Sasson has not shown the court committed an erroneous exercise of discretion.

CONCLUSION

FOR THE FOREGOING REASONS, the Court should affirm the Circuit Court's discretionary determination to sanction Sasson and dismiss his claims with prejudice.

Dated this 16th day of January, 2015

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets with 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 footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,919 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief of Defendants-Respondents Ryan Braun, excluding the appendix, which complies with the requirements of § 809(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 the brief filed with the Court and served on all opposing parties.

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CERTIFICATION OF SERVICE

I hereby certify that on January 16, 2015, I filed with the Court by messenger and served copies of Brief of Defendant-Respondent Ryan Braun upon counsel for the parties and the *pro se* plaintiff by electronic and first class mail:

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