Disk:

From: Robert Bauman
Sent: Thursday, March 01, 2007 9:56 AM
To: Martin Collins
Cc: Clifton Crump
Subject: RE: 2713 W. Richardson Pl.

Please take immediate action regarding West Samaria, 2713 W. Richardson Pl.. The fact that a resident died and was not discovered for 4 days suggests that the facility is not operating in compliance with their plan of operation or operating in a manner consistent with the health, safety and welfare of the public.

Please issue the appropriate orders revoking their special use permit so this matter can be brought back before BOZA at the earliest possible time.

Bob Bauman

EXHIBIT 1

FOR IMMEDIATE RELEASE

COMMON COUNCIL
CITY OF MILWAUKEE
NEWS RELEASE
CITY CLERK COMMUNICATIONS CENTER

FOR INFORMATION CALL

March 23, 2007

Ald. Robert J. Bauman
286-2886

Order On West Samaria Facility Preserves Status Quo, Enables County To Continue Shirking Its Responsibility

The unanimous vote yesterday by the city Board of Zoning Appeals to uphold an order to close the West Samaria rooming house has the effect of preserving the "deplorable" status quo, Ald. Robert J. Bauman said today.

The BOZA vote Thursday to uphold the Department of Neighborhood Services order requiring West Samaria to vacate the premises at 2713 W. Richardson Pl. because recent events, including the death of Joseph Droese in January, violated its plan of operation, includes a provision staying the enforcement of the DNS order and allowing Tri Corp Housing, Inc., the owner and operator of West Samaria, to stay open indefinitely provided it amends its plan of operation and adopts several reporting requirements.

"The problem with BOZA's action is that West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who live there," Ald. Bauman said. "Over the years they have repeatedly promised to do a better job yet nothing improves. The BOZA action last night essentially permits West Samaria to continue business as usual once they have amended some documents and agree to submit reports. But there is still no accountability. There are no consequences if West Samaria fails to improve."

-More-

BOZA Action/ADD ONE

The alderman said it was also apparent from last night's hearing before BOZA that Milwaukee County does not know what goes on at West Samaria despite the fact that most of the facility's residents are under the care of the county's Division of Behavioral Services.

"Milwaukee County officials from Scott Walker on down have their head stuck in the sand. The residents of West Samaria are Milwaukee County clients. Milwaukee County is ultimately responsible for their care and treatment. Unfortunately Scott Walker and Milwaukee County have abdicated their responsibility," said Ald. Bauman, whose 4th Aldermanic District includes the West Samaria facility.

"I once again call upon Scott Walker to step up to the plate and immediately act to assume ownership and control of West Samaria," he said, adding: "Someone needs to be accountable for what goes on at West Samaria. It should be Milwaukee County."

-30-

Prioletta, Maria

m: Prioletta, Maria
t: Friday, October 19, 2007 6:07 PM
To: Brown, Martha
Subject: West Samaria

Had our meeting this afternoon. Present: the two Jims from the County, Antonio, Rae Ellen, Bill Boerigter and Adam from WHEDA, Andrew Geer from Heartland and Alderman Bauman.

Here's what was discussed:

It's not a matter of if WHEDA is going to foreclose, it's when. They want Tri Corp out.

They are thinking about the need to appoint some type of temporary receiver - to manage things while everything shakes out.

They don't want to proceed until they know where things are going - both on a temporary basis with a receiver managing the building and long term.

Bauman said he still wants to ask BOZA to revoke their occupancy permit, and would not support any redevelopment of the project, and has told Heartland that, as well as the fact he thinks it would be a bad idea for them. He said that the property is a combination of three things - bad design, bad location and bad operator. Even if you changed the operator, you can't overcome the other two. Also said that given the needs of the clients, this really should be a CBRF, and should be licensed and monitored by the State.

'eartland rep said they had only looked at it - had not done any work, and were not making any commitments to move yard. In past deals - where they had taken over an SRO - they usually would reduce density by about half - and would ommend the same thing here, plus the addition of onsite case management and services.

There are currently some vacant units, County thought 82 of the 91 units are occupied.

As I was listening to all of this, Antonio said he had mentioned it in passing to the Mayor (not discussed it, just said that they were working on it) and wanted to know what the City thought.

I replied

Like all the people in the room, our primary concern regardless of what was going to be proposed, was the welfare of the residents.

In regard to alternatives, I asked if they had done even some type of preliminary analysis of what it would cost to pursue a "Heartland" like alternative - reducing the density, rehabbing the building, creating more common space. And, had they considered where the money for this would come from. They had not - or at least, they indicated they had not.
I said I thought that it might be helpful to do this even from a very conceptual standpoint, so you could weigh the economic costs of pursuing that vs. any other alternative. Also told him that we respected their investment in the project.

I suggested if it's feasible, that regardless of what alternative they are going to pursue, it is going to involve some at least temporary relocation for a portion of the tenant base. Perhaps the County should stop placing tenants there.

WHEDA said they were going to "debrief" from the meeting, and perhaps go through the exercise of looking at the potential costs for various alternative.

Talked to Bauman afterwards - I might be wrong, but I think he could conceivably go along with a new owner, operator alternative. He didn't say this, but I think if it was a little more detailed alternative, and perhaps you had at least gone 'hrough the exercise of looking at other options, he would give careful consideration to it. I myself would like to know the ancial costs of two alternatives - the possible Heartland alternative, and the tear it down alternative. In regard to the ter, I know it's an extreme, and that above all, there would have to be someplace good for the existing tenants to go, but if there is significant cost to reinventing it, and it's still not a good special needs project..... To be fair, even if you did do that, I think it would be a while before you would attract any other type of development to the site.

Ex 132

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 22

TRI-CORP HOUSING, INC.,

Plaintiff,

v.

Case No. 07-CV-013965

ROBERT BAUMAN, ALDERMAN,

Defendant.

PRETRIAL MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Defendant, Alderman Robert J. Bauman, by his attorneys, Davis & Kuelthau, s.c., and brings the following motion for partial summary judgment pursuant to Wis. Stat. §802.08. This motion is also made to clarify issues that will impact the presentation of the case and in particular the special verdict and jury instructions. *See* Wis. Stat. §805.13(3). There are fundamental questions of law that have not yet been addressed by the Court. If granted, this motion will significantly narrow the issues to be tried and reduce the time needed for the trial.

STATEMENT OF UNDISPUTED FACTS

Plaintiff, Tri-Corp Housing, Inc., has contended that the following facts are not disputed[1]:

1. West Samaria existed as a housing facility for cognitively disabled persons at 2713 West Richardson Place, Milwaukee since before 1993.

[1] *See* ***Plaintiff's*** *Br. in Opp'n to Def's Mot. for Summ. J.*, (Doc. 286) pp. 2-3, which identified these facts as undisputed.

2. In 1997, Alderman Bauman bought a home approximately two blocks from West Samaria.

3. In 2003, the Wisconsin Housing and Economic Development Authority (WHEDA) gave Tri-Corp a multi-family mortgage for approximately $1.6 million which was secured by two buildings: a) West Samaria and b) New Samaria, located at 6640 West Beloit Road in West Allis, Wisconsin.

4. Both facilities were operated by Tri-Corp to provide housing and meals for cognitively disabled persons.

5. Approximately two-thirds of the residents of these facilities were referred to Tri-Corp by Milwaukee County.

6. Rent was paid by each resident from funds provided to the resident by Milwaukee County and/or managed for the resident by Milwaukee County employee.

7. In the Spring 2004 election, Mr. Bauman was elected Alderman for District 4 in which West Samaria was located.

8. Alderman Bauman had been a vocal opponent of the West Samaria facility since at least 2005 and publicly opposed Tri-Corp's special use permit to operate West Samaria in 2005 and 2006.

9. Antonio Riley was the Executive Director of WHEDA at times material to this motion.

10. Alderman Bauman and Mr. Riley knew each other and were friends.

11. In 2006 the Board of Zoning Appeals (BOZA) granted Tri-Corp the special use permit that Alderman Bauman opposed.

12. Tri-Corp failed to make its June 2007 mortgage payment and on July 2, 2007 WHEDA noticed Tri-Corp of its default.

13. In August 2007 Alderman Bauman and Mr. Riley met and discussed West Samaria. Alderman Bauman's handwritten notes dated August 8, 2007 stated that the "goal" regarding West Samaria was to "relocate residents and RAZE" (emphasis in original).

14. On August 10, 2007 WHEDA recovered the amount of the missed June payment plus late fees from the Tri-Corp account. This is the last mortgage payment WHEDA received from Tri-Corp.

15. On October 19, 2007 WHEDA held a meeting with representatives from Milwaukee County responsible for residential referrals to West Samaria. Other attendees of the meeting included Alderman Bauman, representatives from the Milwaukee County Department of City Development, and Heartland Housing, an entity with a potential interest in taking over the operation of West Samaria. Tri-Corp was not invited by WHEDA to attend. Options for how to proceed with the West Samaria facility were discussed. WHEDA announced that there would likely be a foreclosure of its mortgage loan on the facility.

Alderman Bauman again expressed his concerns about the health, safety, and viability of West Samaria.[2]

16. On November 8, 2007 WHEDA told Tri-Corp it was going to foreclose. On November 19, 2007 WHEDA filed a foreclosure action.

SUPPLEMENTAL FACTS FOR THIS MOTION:

Resident Deaths and Financial Woes Bring West Samaria into the Public Eye.

Tri-Corp entered into a loan transaction in 2003 with the WHEDA. As noted above, the loan pledged both West Samaria and New Samaria as security. While the undisputed facts above established that Tri-Corp defaulted on its loan in June 2007, its problems started before that.

i. Death of David Rutledge.

On July 4, 2004, David Rutledge, a resident of West Samaria, was assaulted very near West Samaria by a street gang. *See Third-Party Pl., Tri-Corp Housing, Inc., Proposed Am. Defamation Cause of Action*, pp. 2-3, ¶7. Rutledge was helped by another resident, brought back to West Samaria, and was transported to the hospital where he ultimately died. *Id.*

After the Rutledge death in 2004, questions about West Samaria were raised. In response, the City of Milwaukee Comptroller's Office advised Milwaukee Common Council that Tri-Corp's business posed major concerns.

[2] Alderman Bauman, referring to West Samaria, allegedly said that "the property is a combination of three things – bad design, bad location and bad operation" and that changing operators would not overcome the problems of bad design and bad location. This is the first of four alleged defamatory statements, which will be at issue at trial. (*See Aff. of Matthew R. McClean*, ¶2, Ex. 1).

(*McClean Aff.*, ¶3, Ex. 2). A subsequent City audit report in 2005 confirmed financial problems with and misdeeds by Tri-Corp. (*McClean Aff.* ¶4, Ex. 3).

ii. Initial BOZA proceedings.

These issues caused Tri-Corp to have its operating license for West Samaria denied in 2005. In a series of hearings before the Milwaukee Board of Zoning Appeals (BOZA) in 2005 and 2006, Tri-Corp applied for a special use permit, which was denied, but had a reasonable accommodation granted. A special use permit was issued June 8, 2006 despite objection from Alderman Bauman and others. (*McClean Aff.*, ¶5).

iii. Death of Joseph Droese.

On February 28, 2007, the Milwaukee Journal Sentinel reported that another resident of West Samaria, Joseph Droese, was found dead in his room. *Am. Third-Party Compl.*, p. 4, ¶14. The incident happened in January, and the Journal Sentinel reported that Mr. Droese was not discovered for several days. (*McClean Aff.*, ¶6, Ex. 4).

On March 1, 2007, Alderman Bauman sent an email to the City of Milwaukee Department of Neighborhood Services (DNS):

> Please take immediate action regarding West Samaria, 2713 W. Richardson Pl. The fact that a resident died and was not discovered for 4 days suggests that the facility is not operating in compliance with their plan of operation or operating in a manner consistent with the health, safety and welfare of the public.
>
> Please issue the appropriate orders revoking their special use permit so this matter can be brought back before BOZA at the earliest possible time.[3]

[3] This is the second of four alleged defamatory statements, which will be at issue at trial.

Third-Party Pl., Tri-Corp Housing, Inc.'s, Proposed Am. Defamation Cause of Action, p. 4, ¶11.

DNS issued an order to revoke the special use permit. *Am. Third-Party Compl.,* p. *5,* ¶16. Then, on March 2, 2007, Alderman Bauman emailed constituents stating:

> The Department of Neighborhood Services has determined that the recent events at West Samaria violated the plan of operation, DNS is going to issue an order revoking the Special Use Permit and order the property vacated.[4]

Third-Party Pl., Tri-Corp Housing, Inc.'s, Proposed Am. Defamation Cause of Action, pp. *4-5,* ¶13.

iv. 2007 BOZA proceedings.

This triggered another round of hearings before BOZA as Tri-Corp appealed its revocation.

First, BOZA issued a stay of the revocation. In response to the stay, Alderman Bauman released a press statement on March 23, 2007, which said "the problem with BOZA's action is that West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there."[5] *Third-Party Pl., Tri-Corp Housing, Inc.'s, Proposed Am. Defamation Cause of Action,* p. *5,* ¶15.

BOZA ultimately conducted a hearing, and despite the efforts of Alderman Bauman and others, it upheld Tri-Corp's permit to operate West Samaria for its mentally ill residents at a hearing in September, 2007. *Am. Third-Party Compl.,* p. *5,* ¶20.

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[4] This is the third of four alleged defamatory statements, which will be at issue at trial.
[5] This is the fourth of four alleged defamatory statements, which will be at issue at trial.

v. The public events provide important context for the required legal analysis.

The September 2007 BOZA hearing was the culmination of a two-year legal process involving Tri-Corp's special use permit. There were no less than eight BOZA hearings on the subject. (*McClean Aff.*, ¶¶5,7, Ex. 5). In written submissions and before the committee, Alderman Bauman repeatedly objected to Tri-Corp's plan of operation and its ability to meet the safety, health, and welfare needs of the residents to justify a special use permit. (*McClean Aff.*, ¶8). Tri-Corp submitted plans of operation and defended its service model, including a revised plan in September 2007 that required regular reports to DNS and BOZA. (*McClean Aff.*, ¶9, Ex. 6).

Thus, between 2004-2007, Tri-Corp experienced publicly documented problems with resident safety and financial distress. These issues were subject to multiple BOZA hearings over that time period relating directly to Tri-Corp's special use permit. Milwaukee County monitored the situation and even revised its service plans for residents at West Samaria. (*McClean Aff.*, ¶9, Ex. 6, pp. 14-19). It is with context that Tri-Corp's lawsuit against Alderman Bauman must be assessed.

LEGAL ARGUMENTS

A. The Tortious Interference Claims are Subject to the Public Concern Privilege.

i. The prior summary judgment hearing did not address a key question of law.

Alderman Bauman previously moved for summary judgment on the tortious interference claim involving Milwaukee County, asserting that there

was no interference, and citing Affidavit of Milwaukee County Official James Hill.[6] Mr. Hill's sworn statement arguably removed any dispute of fact surrounding the reason Milwaukee County ceased sending patients to West Samaria. *Br. in Supp. of Def's Mot. for Summ. J.* (Doc. 234, pp. 8-12). In a footnote, Alderman Bauman also moved to dismiss the tortious interference with WHEDA claim, attacking the factual predicate. (*Id.* p. 8). Tri-Corp opposed, arguing that Alderman Bauman's intent created a question of fact. (Doc. 286, pp. 13-16). Judge Witkowiak denied the motion, finding that a dispute of fact remained. (*McClean Aff.,* ¶10, Ex. 7, 7/2/19 Tr. p. 13).

In the prior motion, Alderman Bauman also raised a First Amendment privilege argument based on the Seventh Circuit's decision against Tri-Corp prior to remand to this Court. (Doc. 234, pp. 12-14, citing *Tri-Corp Housing, Inc. v. Bauman,* 826 F.3d 446, 449-50 (7th Cir. 2016)). A review of the hearing transcript shows that Judge Witkowiak did not specifically address any First Amendment issue related to the tortious interference claims, only applying a First Amendment analysis to the defamation claims. (*See generally McClean Aff.*, Ex. 7 and *specifically*, Tr. p.15).

ii. If the alleged interference involved a matter of public concern, it is protected by the First Amendment.

In neither party's brief discussing privilege defenses for a tortious interference case, nor in the Court's summary judgment record, is there any analysis of, or even reference to, the public concern doctrine of the First

[6] Mr. Hill was the Director of the Milwaukee County Behavioral Health Division in 2007. His affidavit is in the record. (Doc. 235.)

Amendment. Under the public concern doctrine, the free speech clause of the First Amendment serves as a complete defense to state tort suits where the alleged interference involves a public rather than private concern. *See Dumas v. Koebel*, 2013 WI App 152, ¶ 27, 352 Wis. 2d 13, 841 N.W.2d 319. In *Dumas*, the Wisconsin Supreme Court quoted U.S. Supreme Court precedent:

> Speech deals with the matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it "is a subject of legitimate news interest; that is, a subject of general interest and a value and concern to the public[.]

Id. ¶ 26 (internal citations omitted).

The Wisconsin Supreme Court noted that in deciding whether speech is of a public or private concern, it follows the U.S. Supreme Court directive to independently examine the whole record and analyze the content, form, and context of the speech, noting that no factor is dispositive. *Id.* ¶ 27. *See also, Augustine v. Anti-Defamation League of B'Nai B'Rith,* 75 Wis. 2d 207, 218, 249 N.W.2d 547 (1977). The *Dumas* Court ultimately upheld the dismissal of the plaintiff's intentional infliction of emotional distress and intentional interference with contract claims based on the public concern doctrine. *Dumas,* 2013 WI App 152, ¶ 33. Of significance, the Court recognized that whether a defendant's speech or interference is a matter of public concern presents a question of law to be decided by the court. *Id.* ¶ 32. Where a matter is of public concern, communications related thereto are protected speech, and thus not interference, and summary judgment is the appropriate result. *Id.* ¶ 27.

Here, the Court must decide: 1) whether Alderman Bauman's communications with WHEDA about Tri-Corp's mortgage, even if harmful to Tri-Corp, involved a matter of public concern, and 2) whether Alderman Bauman's communications with Milwaukee County about the viability of West Samaria, even if harmful to Tri-Corp, was a matter of public concern. These are questions of law not yet considered or decided by any trial court in this case. If either or both of these communications involved matters of public concern, then they cannot subject Alderman Bauman to liability.

iii. The content, form, and context of the alleged interference plainly support that the matter was a public concern.

The law directs the court – not the jury – to evaluate the content, form, and context of the speech alleged to be interference. Despite Tri-Corp's prior argument, Alderman Bauman's intent is not a relevant consideration to determine whether the matter was of public concern. (Doc. 286, pp. 13-16). *Dumas*, 2013 WI App 152, ¶¶ 27-28. West Samaria's operation had certainly become newsworthy from 2004 and forward. (*McClean Aff.*, ¶11, Ex. 8).

Here, Alderman Bauman's communications with WHEDA – as alleged – were in the context of the ongoing special use permit dispute before BOZA. They came after reports of negative financial information being presented to the Milwaukee Common Council by the Milwaukee Comptroller's Office and the resulting audit report. In 2007, a direct issue before BOZA regarding the special use permit was whether Tri-Corp had the financial wherewithal to

satisfy the requirements of the permit itself and, more importantly, to meet the needs of the residents of the facility:

CHAIRMAN ZETLEY:	Mortgage is paid?
MR. BREVER:	Yes.
CHAIRMAN ZETLEY:	So we're not worried – and then what you're saying is that if there is a shortfall up until June 19th of '08 this Board doesn't have to worry that Tri-Corp is going to close down and these residents and the County have a problem.
MR. BREVER:	No.

(*McClean Aff.*, ¶7, Ex. 5, p. 18)[7].

It cannot be lost that there had been the two disturbing resident deaths while under the care of the facility in the prior three years. These incidents were heavily reported in the local news. It is within this context that Alderman Bauman discussed Tri-Corp's mortgage with WHEDA. (*McClean Aff.*, ¶12, Ex. 9).

Similarly, Alderman Bauman's communications with Milwaukee County related to the ongoing Tri-Corp permit matter before BOZA and directly implicated his role as a member of the Milwaukee Common Council, given that West Samaria was located in his 4th District. Milwaukee County was tasked with not just sending the residents to West Samaria but also to providing financial backing and case workers to assist at West Samaria. Because Milwaukee County was involved in the placement decisions, they were also integral to the process and understandably concerned about the viability of Tri-Corp. West Samaria fell in Alderman Bauman's District, was subject to DNS oversight, and its permits subject to City zoning. Any direct and open

[7] Michael Brever, as Tri-Corp's Executive Director, knew that the mortgage was in default when he gave this false testimony.

communication and coordination of efforts between Milwaukee County, the City of Milwaukee, and Alderman Bauman not only dealt with a matter of public concern, the need was essential and obvious to a functioning governmental system. The summarizing email from the City of Milwaukee employee who attended the meeting demonstrated that West Samaria was very much an ongoing public concern. (*See McClean Aff.*, Ex. 1).

Because Alderman Bauman's alleged interference involved matters of public concern, his actions are privileged as a matter of law and cannot be the basis of any liability under United Supreme Court precedent and *Dumas*. The Court should address this issue.

iv. In addressing this motion, the Court can provide clarity on the tortious interference claim before trial.

The case law, when compared to the jury instruction on tortious interference, creates confusion. As outlined above, whether the claimed interference was a matter of public concern presents a question of law. *Dumas*, 2013 WI App 152 ¶ 32. *See also Liebe v. City Finance Co.* 98 Wis. 2d 10, 295 N.W.2d 16 (1980) (affirming a directed verdict to the defendant and dismissal of a tortious interference claim based on the truth "privilege").

Jury Instruction 2780 addresses tortious interference. The instruction includes the following guidance:

> In determining whether (defendant's) conduct was justified, you should weigh all the circumstances of the case. Among the factors you should consider are (1) the nature, type, duration, and timing of the conduct; (2) whether (defendant) had an improper motive; (3) whether (defendant) was motivated by self-interest as opposed to a public interest; (4) the type of interest allegedly interfered with; (5) society's interest in protecting both freedom of action on

> (defendant's) part and contractual relationship of parties; (6) the closeness or remoteness of (defendant's) conduct to the alleged interference; (7) whether (plaintiff) and (defendant) are competitors; and (8) whether (defendant's) conduct, even though intentional, was fair and reasonable under the circumstances.
>
> A defendant's conduct may only be found justified if the means employed by the defendant were lawful. A person's conduct cannot be justified if the person acted from ill will or improper motive towards the plaintiff. Some ill will does not preclude the possibility of justification, so long as defendant acted in substantial part with a proper motive in mind.

Wis. JI – Civil 2780 (2020).

This language on justification says nothing with respect to the public concern doctrine nor does it address its legal implications. Presumably, this is because a court is to rule on the issue not the jury. However, in the absence of a court determination on the public concern doctrine, the case law and the instruction create a contrary set of legal considerations. Are the eight factors above the subject of the trial? Or is the open issue the question presented above regarding the content, form, and context of Alderman Bauman's statements as to whether they were of public or private interest?

The Court should address this issue in advance of the trial. At a minimum, the Court must recognize that Jury Instruction 2780 is inadequate as structured, and with the parties, the Court should develop legal standards that will apply to the claims to be tried prior to the start of trial. *See* Wis. Stat. §805.13(3) ("[A]t the conference, *or at such earlier time as the Court reasonably directs,* counsel may file written motions that the Court instruct the jury on the law, and submit verdict questions, as set forth in the motions. *The Court shall inform counsel on the record of its proposed action on the motions and of the*

instructions and verdict it proposes to submit.") (Emphasis added). The issues to be tried should not be guesswork, nor should we wait until a conference at the close of evidence to understand them.

The special verdict presents related problems. Tri-Corp's proposed verdict includes 13 questions on the tortious interference issues, without addressing anything related to this public concern question. This is both unwieldy and unnecessary.

Based on the legal framework set forth above and below, the appropriate result is for the Court to dismiss the tortious interference claims based on the application of the public concern doctrine. If, to the extent that Alderman Bauman said things that may have allegedly impacted Tri-Corp's business relationships, then Tri-Corp's remedy lies in defamation law, where an abuse of privilege analysis can be applied. (*See* **Section B** below). Indeed, the facts alleged for the interference claims and those alleged for defamation involve nearly the same conduct.

B. The Court Should Rule Whether Alderman Bauman's Alleged Defamatory Statements are Conditionally Privileged.

i. The court previously addressed absolute privilege, but did not consider potential conditional privileges.

During the summary judgment proceedings, at issue was whether the absolute privilege arising out of statements made in legislative or judicial settings barred the statements made by Alderman Bauman. The Court found that three of the statements made during BOZA hearings were absolutely privileged on this basis. (*McClean Aff.,* Ex. 7, Tr. p. 21). However, the four

remaining statements, which were not made under oath or as part of BOZA proceedings, were not subject to the absolute privilege. (*Id.*, pp. 24-25). The Court rejected that blanket First Amendment protection applied to these four statements despite the ruling of the Seventh Circuit Court of Appeals applying the Noerr-Pennington doctrine. (*Id.* pp. 23-24). Instead, the Court cited to an old Wisconsin case, *Hotel and Restaurant Employees International Alliance v. Wisconsin Employment Relations Board*, 236 Wis. 329, 295 N.W. 634 (1941), where the Supreme Court permitted liability where a public official intentionally and recklessly made false statements. (*McClean Aff.*, Ex. 7, Tr. pp. 24-25).

However, the Court did not determine whether Alderman Bauman's statements were subject to any *conditional privilege.* Specifically, Wisconsin law recognizes that a conditional privilege exists for government officers acting in their official capacity. *Ranous v. Hughes*, 30 Wis. 2d 452, 465, 141 N.W. 251 (1966). The conditional privilege strikes a balance between:

> [I]nsuring that government officials not be deterred from performing their public duties for fear of being held individually liable for what they may say or publish and (2) of protecting private citizens from having their private or professional reputations damaged by defamatory matter uttered or published by public officials.

Id. at 466.

Because the privilege is conditional, it can be lost under certain conditions. The *Ranous* Court adopted the Restatement of Torts analysis for abuse of the privilege. *Id.* at 468.

The Court, as a matter of law, must first determine whether Alderman Bauman held a conditional privilege when he made the statements at issue. To date, the Court has not been asked to do.

ii. The four alleged defamatory statements were each made by Alderman Bauman in his public capacity, and therefore, should be deemed conditionally privileged.

The following four alleged defamatory statements by Alderman Bauman remain:

(1) Bauman's email to DNS regarding Tri-Corp's operation being inconsistent with the plan of operation after Joseph Droese's death. (*McClean Aff.*, ¶13, Ex. 10).

(2) Bauman's email to his constituents that states DNS had determined Tri-Corp violated its plan of operation. (*McClean Aff.*, ¶14, Ex. 11).

(3) Bauman's news release regarding Tri-Corp's failure to provide quality care. (*McClean Aff.*, ¶15, Ex. 12).

(4) Bauman's statement that West Samaria was a combination of three things – bad design, bad location, and a bad operator – at the October 19, 2007 meeting among Bauman, County Officials, a city employee, WHEDA representatives, and a representative from a prospective buyer. (*McClean Aff.*, Ex. 1).

In each instance, Alderman Bauman was serving in his public role when making the statement in question. In the midst of the ongoing BOZA proceedings, Alderman Bauman made statements about Tri-Corp and West Samaria to: 1) DNS; 2) his District 4 constituents; 3) the press (and by extension, his constituents again) about the BOZA proceedings; and 4) other public officials at a meeting specifically about West Samaria. Under *Ranous,* all of these statements should be presumed protected from liability.

Based on the prior rulings of the Court in this case, however, there may be a question of fact as to whether Alderman Bauman's statements went too far and could be deemed an abuse of the privilege. (*McClean Aff.*, Ex. 7, Tr. pp. 21-25). Thus, a jury can determine whether Alderman Bauman lost his conditional public office privilege by the nature of the statements.

iii. The Court should provide guidance on the defamation issues in advance of the trial.

There are multiple civil jury instructions addressing defamation. (*See* Wisconsin JI - Civil 2500 through 2520). None of these instructions, however, specifically address the public official conditional privilege described in the *Ranous* case. Again, this is likely because the privilege requires that the trial court determine whether the privilege exists as a matter of law. If so, then the jury can be instructed on abuse of privilege with the assistance of Wisconsin Civil Jury Instruction 2511.

A ruling on the conditional privilege from the Court in advance of the trial will facilitate the evidentiary needs of the parties and allow the parties to address the issues identified in the instruction. In particular, this will help focus witness testimony and narrow the scope of the trial presentation. For instance, Alderman Bauman would not have to "prove" what he did in the service of his District, nor detail municipal government process to establish the "how, when, and why" regarding his actions as a public official. In short, the trial should not be about what it means to be an alderman or how public officials have freedom to act on behalf of constituents. Government action and accountability is not a matter for this jury. *See also*, Wis. Stat. §893.80(4). *See*

e.g., Legue v. City of Racine, 2014 WI 92, ¶¶40-42, 357 Wis. 2d 250, 849 N.W.2d 837 (outlining the public policy for municipal immunity). Instead, the focus would be on what was said and whether the statements when made were either true, or knowingly and recklessly false.

SUMMARY

Based on these legal questions, the Court should find that the tortious interference claims are barred based on the public concern doctrine. The Court should also find that the remaining defamatory statements, if determined by the jury to be both not true and defamatory, are subject to a conditional privilege. Thus, the trial would address the alleged defamatory statements; specifically, whether those statements were both untrue and defamatory, and if so, whether Alderman Bauman abused his privilege in making the statements.

Dated this 11th day of March, 2021.

DAVIS & KUELTHAU, s.c.
Attorneys for Defendant,
ROBERT BAUMAN, ALDERMAN

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 22

TRI-CORP HOUSING, INC.,

Plaintiff,

v.

Case No. 07-CV-013965

ROBERT BAUMAN, ALDERMAN,

Defendant.

MOTION FOR DIRECTED VERDICT

NOW COMES the Defendant, Alderman Robert J. Bauman, by his attorneys, Davis & Kuelthau, s.c., and submits the following motion for directed verdict pursuant to Wis. Stat. §805.14(4). There were fundamental questions of law that were not addressed by the Court prior to trial. With the benefit of the factual record established during the trial, the Court can how apply the law and find for the Defendant.

LEGAL STANDARD FOR THE MOTION

A motion for a directed verdict challenges the sufficiency of the evidence. *Marquez v. Mercedes-Benz USA, LLC* (2012) 815 N.W.2d 314, 341 Wis. 2d 119. In ruling upon a motion for directed verdict, the trial court may grant the motion if it finds, as a matter of law, that no jury could disagree on the proper facts or inferences to be drawn therefrom, and that there is no credible evidence to support a verdict for the plaintiff. *Mueller v. Harry Kaufmann Motorcars, Inc.* (App. 2014) 859 N.W.2d 451, 359 Wis. 2d 597, review denied 862 N.W.2d 899,

366 Wis. 2d 60. A verdict ought to be directed if, taking into consideration all facts and circumstances as they appear in evidence, there is but one inference or conclusion that can be reached by a reasonable man. *Zillmer v. Miglautsch* (1967) 151 N.W.2d 741, 35 Wis. 2d 691; *Rusch v. Sentinel-News Co.* (1933) 250 N.W. 405, 212 Wis. 530. When the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.* (1978) 267 N.W.2d 652, 84 Wis. 2d 455.

STATEMENT OF UNDISPUTED FACTS

The trial record establishes all of these facts, previously noted by the Court of Appeals in *WHEDA v. Tri-Corp Housing*, 800 N.W.2d 957 (Ct. App. 2010):

1. West Samaria existed as a housing facility for cognitively disabled persons at 2713 West Richardson Place, Milwaukee since before 1993.

2. In 1997, Alderman Bauman bought a home approximately two blocks from West Samaria.

3. In 2003, the Wisconsin Housing and Economic Development Authority (WHEDA) gave Tri-Corp a multi-family mortgage for approximately $1.6 million which was secured by two buildings: a) West Samaria and b) New Samaria, located at 6640 West Beloit Road in West Allis, Wisconsin.

4. Both facilities were operated by Tri-Corp to provide housing and meals for cognitively disabled persons.

5. Approximately two-thirds of the residents of these facilities were referred to Tri-Corp by Milwaukee County.

6. Rent was paid by each resident from funds provided to the resident by Milwaukee County and/or managed for the resident by Milwaukee County employee.

7. In the Spring 2004 election, Mr. Bauman was elected Alderman for District 4 in which West Samaria was located.

8. Alderman Bauman had been a vocal opponent of the West Samaria facility since at least 2005 and publicly opposed Tri-Corp's special use permit to operate West Samaria in 2005 and 2006.

9. Antonio Riley was the Executive Director of WHEDA at times material to this motion.

10. Alderman Bauman and Mr. Riley knew each other and were friends.

11. In 2006 the Board of Zoning Appeals (BOZA) granted Tri-Corp the special use permit that Alderman Bauman opposed.

12. Tri-Corp failed to make its June 2007 mortgage payment and on July 2, 2007 WHEDA noticed Tri-Corp of its default.

13. In August 2007 Alderman Bauman and Mr. Riley met and discussed West Samaria. Alderman Bauman's handwritten notes dated August 8, 2007 stated that the "goal" regarding West Samaria was to "relocate residents and RAZE" (emphasis in original).

14. On August 10, 2007 WHEDA recovered the amount of the missed June payment plus late fees from the Tri-Corp account. This is the last mortgage payment WHEDA received from Tri-Corp.

15. On October 19, 2007 WHEDA held a meeting with representatives from Milwaukee County responsible for residential referrals to West Samaria. Other attendees of the meeting included Alderman Bauman, representatives from the Milwaukee County Department of City Development, and Heartland Housing, an entity with a potential interest in taking over the operation of West Samaria. Tri-Corp was not invited by WHEDA to attend. Options for how to proceed with the West Samaria facility were discussed. WHEDA announced that there would likely be a foreclosure of its mortgage loan on the facility. Alderman Bauman again expressed his concerns about the health, safety, and viability of West Samaria.[1]

16. On November 8, 2007 WHEDA told Tri-Corp it was going to foreclose. On November 19, 2007 WHEDA filed a foreclosure action.

SUPPLEMENTAL FACTS:

Resident Deaths and Financial Woes Bring West Samaria into the Public Eye.

Tri-Corp entered into a loan transaction in 2003 with the WHEDA. As noted above, the loan pledged both West Samaria and New Samaria as security. While the undisputed facts above established that Tri-Corp defaulted on its loan in June 2007, its problems started before that.

[1] Alderman Bauman, referring to West Samaria, allegedly said that "the property is a combination of three things – bad design, bad location and bad operation" and that changing operators would not overcome the problems of bad design and bad location. (Ex. 88).

i. Death of David Rutledge.

On July 4, 2004, David Rutledge, a resident of West Samaria, was assaulted very near West Samaria by a street gang. Rutledge was helped by another resident, brought back to West Samaria, and was transported to the hospital where he ultimately died. There was significant press coverage. *(Ex. 508-511, 514).*

After the Rutledge death in 2004, questions about West Samaria were raised. In response, the City of Milwaukee Comptroller's Office advised Milwaukee Common Council that Tri-Corp's business posed major concerns. (*Ex. 564*). A subsequent City audit report in 2005 confirmed financial problems with and misdeeds by Tri-Corp. (*Ex. 538*).

ii. Initial BOZA proceedings.

These issues caused Tri-Corp to have its operating license for West Samaria denied in 2005. In a series of hearings before the Milwaukee Board of Zoning Appeals (BOZA) in 2005 and 2006, Tri-Corp applied for a special use permit, which was denied, but had a reasonable accommodation granted. A special use permit was issued June 8, 2006 despite objection from Alderman Bauman and others.

iii. Death of Joseph Droese.

On February 28, 2007, the Milwaukee Journal Sentinel reported that another resident of West Samaria, Joseph Droese, was found dead in his room. *(Ex. 517).* The incident happened in January, and the Journal Sentinel reported

that Mr. Droese was not discovered for several days. (*Id.*) Coverage of the incident continued for several days. (*Exs. 518, 519, 520, 521, 523*).

On March 1, 2007, Alderman Bauman sent an email to the City of Milwaukee Department of Neighborhood Services (DNS):

> Please take immediate action regarding West Samaria, 2713 W. Richardson Pl. The fact that a resident died and was not discovered for 4 days suggests that the facility is not operating in compliance with their plan of operation or operating in a manner consistent with the health, safety and welfare of the public.
>
> Please issue the appropriate orders revoking their special use permit so this matter can be brought back before BOZA at the earliest possible time.

(Ex. 577).

DNS issued an order to revoke the special use permit. Then, on March 2, 2007, Alderman Bauman emailed constituents stating:

> The Department of Neighborhood Services has determined that the recent events at West Samaria violated the plan of operation, DNS is going to issue an order revoking the Special Use Permit and order the property vacated.

(Ex. 578).

iv. 2007 BOZA proceedings.

This triggered another round of hearings before BOZA as Tri-Corp appealed its revocation.

First, BOZA issued a stay of the revocation. In response to the stay, Alderman Bauman released a press statement on March 23, 2007, which said "the problem with BOZA's action is that West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the

mentally disabled residents who lived there." *(Ex. 537).* Bauman criticized Tri-Corp, BOZA, and Milwaukee County.

BOZA ultimately conducted a hearing, and despite the efforts of Alderman Bauman and others, it upheld Tri-Corp's permit to operate West Samaria for its mentally ill residents at a hearing in September, 2007.

v. The public events provide important context for the required legal analysis.

The September 2007 BOZA hearing was the culmination of a two-year legal process involving Tri-Corp's special use permit. There were no less than eight BOZA hearings on the subject. In written submissions and before the committee, Alderman Bauman repeatedly objected to Tri-Corp's plan of operation and its ability to meet the safety, health, and welfare needs of the residents to justify a special use permit. Tri-Corp submitted plans of operation and defended its service model, including a revised plan in September 2007 that required regular reports to DNS and BOZA. (*Ex. 543*).

Thus, between 2004-2007, Tri-Corp experienced publicly documented problems with resident safety and financial distress. These issues were subject to multiple BOZA hearings over that time period relating directly to Tri-Corp's special use permit. Milwaukee County monitored the situation, was quoted repeatedly in the news about its concerns, and ultimately developed a revised service plan for Tri-Corp for the residents at West Samaria. It is with context that Tri-Corp's case against Alderman Bauman must be assessed.

LEGAL ARGUMENTS

A. The Court Should Direct the Verdict on the Scope of Employment Question.

Tri-Corp has alleged and maintained that Alderman Bauman acted either outside the scope of his aldermanic duties or was motivated by personal reasons to shut down West Samaria. The issue of "course and scope of employment" was disputed and the Court found a potential question of fact related to the issue. (Hrg. 5/15/18; Recon. Hrg. 7/2/19).

The conduct of an employee is not within the scope of their employment if: (1) it is different in kind from that authorized, (2) far beyond the authorized time or space limits, or (3) too little actuated by a purpose to serve the employer. *Olson v. Connerly*, 156 Wis. 2d 488, 498, 457 N.W.2d 479, 483 (1990); *Finsland v. Phillips Petroleum Co.*, 57 Wis. 2d 267, 276, 204 N.W.2d 1, 6 (1973) (quoting Restatement (Second) of Agency, sec. 228(2) (1958)).

Wisconsin courts have consistently stated that serving the employer need not be the sole purpose of the employee's conduct, nor need it be even the primary purpose. *See Olson*, 156 Wis. 2d at 499–500; *see also Block v. Gomez*, 201 Wis. 2d 795, 806, 549 N.W.2d 783, 788 (Ct. App. 1996). Rather, an employee's conduct is not within the scope of their employment if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purposes. *Olson*, 156 Wis. 2d at 499–500. In other words, if the employee fully steps aside from conducting the employer's business to accomplish an independent purpose of his or her own, the conduct falls outside

the scope of employment. *See Block*, 201 Wis. 2d at 806 and *Olson*, 156 Wis. 2d at 499–500; s*ee also* Restatement (Second) of Agency § 235 (1958), stating "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed."

The evidence produced at trial resolved any factual question on this issue. Tri-Corp submitted NO evidence to establish that Alderman Bauman acted out of a personal motivation to harm Tri-Corp/West Samaria or otherwise deviated from City business. There is nothing in the record to allow even a reasonable inference that Alderman Bauman acted outside his duties. On the other hand, the evidence developed by BOTH SIDES confirms that every activity or statement of Alderman Bauman related to Tri-Corp occurred in his capacity as the District 4 alderman.

The Court should answer the verdict question on scope of employment in the affirmative.

B. The Tortious Interference Claims are Subject to the Public Concern Privilege.

While the scope of employment issue was initially raised for purposes of damages and the application of the municipal damage cap in Wis. Stat. §893.80(3), it carries broader legal implications in this case. Based on the undisputed evidence that Alderman Bauman's complained of activities and statements occurred in the exercise of his duties as a public official, the law does not permit Tri-Corp's claims.

i. The prior summary judgment hearing did not address a key question of law.

Alderman Bauman previously moved for summary judgment on the tortious interference claim involving Milwaukee County, asserting that there was no interference, and citing Affidavit of Milwaukee County Official James Hill. Mr. Hill's sworn statement arguably removed any dispute of fact surrounding the reason Milwaukee County ceased sending patients to West Samaria. *Br. in Supp. of Def's Mot. for Summ. J.* (Doc. 234, pp. 8-12). In a footnote, Alderman Bauman also moved to dismiss the tortious interference with WHEDA claim, attacking the factual predicate. (*Id.* p. 8). Tri-Corp opposed, arguing that Alderman Bauman's intent created a question of fact. (Doc. 286, pp. 13-16). Judge Witkowiak denied the motion, finding that a dispute of fact remained. (*McClean Aff.*, ¶10, Ex. 7, 7/2/19 Tr. p. 13).

In the prior motion, Alderman Bauman also raised a First Amendment privilege argument based on the Seventh Circuit's decision against Tri-Corp prior to remand to this Court. (Doc. 234, pp. 12-14, citing *Tri-Corp Housing, Inc. v. Bauman,* 826 F.3d 446, 449-50 (7th Cir. 2016)). A review of the hearing transcript shows that Judge Witkowiak did not specifically address any First Amendment issue related to the tortious interference claims, only applying a First Amendment analysis to the defamation claims. (*See generally Doc. 361, McClean Aff.*, Ex. 7 and *specifically*, Tr. p.15).

ii. If the alleged interference involved a matter of public concern, it is protected by the First Amendment.

Given the limited scope of the issues presented on summary judgment, the Court did not analyze or rule on the public concern doctrine of the First Amendment. Under the public concern doctrine, the free speech clause of the First Amendment serves as a complete defense to state tort suits where the alleged interference involves a public rather than private concern. *See Dumas v. Koebel*, 2013 WI App 152, ¶ 27, 352 Wis. 2d 13, 841 N.W.2d 319. In *Dumas*, the Wisconsin Supreme Court quoted U.S. Supreme Court precedent:

> Speech deals with the matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it "is a subject of legitimate news interest; that is, a subject of general interest and a value and concern to the public[.]

Id. ¶ 26 (internal citations omitted).

The Wisconsin Supreme Court noted that in deciding whether speech is of a public or private concern, it follows the U.S. Supreme Court directive to independently examine the whole record and analyze the content, form, and context of the speech, noting that no factor is dispositive. *Id.* ¶ 27. *See also, Augustine v. Anti-Defamation League of B'Nai B'Rith,* 75 Wis. 2d 207, 218, 249 N.W.2d 547 (1977). The *Dumas* Court ultimately upheld the dismissal of the plaintiff's intentional infliction of emotional distress and intentional interference with contract claims based on the public concern doctrine. *Dumas,* 2013 WI App 152, ¶ 33. Of significance, the Court recognized that whether a defendant's speech or interference is a matter of public concern presents a question of law

to be decided by the court. *Id.* ¶ 32. Where a matter is of public concern, communications related thereto are protected speech, and thus not interference, and summary judgment is the appropriate result. *Id.* ¶ 27.

With the facts established at trial, the Court must decide: 1) whether Alderman Bauman's communications with WHEDA about Tri-Corp's mortgage, even if harmful to Tri-Corp, involved a matter of public concern, and 2) whether Alderman Bauman's communications with Milwaukee County about the viability of West Samaria, even if harmful to Tri-Corp, was a matter of public concern. These are questions of law not yet considered or decided by any trial court in this case, and are not man issue for the jury to decide.

iii. The content, form, and context of the alleged interference plainly support that the matter was a public concern.

The law directs the court – not the jury – to evaluate the content, form, and context of the speech alleged to be interference. Despite Tri-Corp's arguments, Alderman Bauman's intent is not a relevant consideration to determine whether the matter was of public concern. (Doc. 286, pp. 13-16). *Dumas*, 2013 WI App 152, ¶¶ 27-28. West Samaria's operation had certainly become newsworthy from 2004 and forward. (*Exs. 508-511; 513; 517-521*). As stated above, Alderman Bauman's conduct was within his scope of employment – all his actions were taken as part of his aldermanic duties to address a matter of public concern.

Here, Alderman Bauman's communications with WHEDA were in the context of the ongoing special use permit dispute before BOZA. They came after reports of negative financial information being presented to the Milwaukee

Common Council by the Milwaukee Comptroller's Office and the resulting audit report. In 2007, a direct issue before BOZA regarding the special use permit was whether Tri-Corp had the financial wherewithal to satisfy the requirements of the permit itself and, more importantly, to meet the needs of the residents of the facility:

CHAIRMAN ZETLEY:	Mortgage is paid?
MR. BREVER:	Yes.
CHAIRMAN ZETLEY:	So we're not worried – and then what you're saying is that if there is a shortfall up until June 19th of '08 this Board doesn't have to worry that Tri-Corp is going to close down and these residents and the County have a problem.
MR. BREVER:	No.

(*Ex. 120*, p. 18).

It cannot be lost that there had been the two disturbing resident deaths while under the care of the facility in the prior three years. These incidents were heavily reported in the local news. It is within this context that Alderman Bauman discussed Tri-Corp's mortgage with WHEDA. (*Exs. 27, 588*). This was confirmed by WHEDA witnesses Riley and Packard.

Similarly, Alderman Bauman's communications with Milwaukee County related to the ongoing Tri-Corp permit matter before BOZA and directly implicated his role as a member of the Milwaukee Common Council, given that West Samaria was located in his 4th District. Milwaukee County was tasked with not just sending the residents to West Samaria but also to providing financial backing and case workers to assist at West Samaria. Because Milwaukee County was involved in the placement decisions, they were also integral to the process and understandably concerned about the viability of Tri-Corp. West Samaria fell

in Alderman Bauman's District, was subject to DNS oversight, and its permits subject to City zoning. Any direct and open communication and coordination of efforts between Milwaukee County, the City of Milwaukee, and Alderman Bauman not only dealt with a matter of public concern, the need was essential and obvious to a functioning governmental system. The summarizing email from the City of Milwaukee employee who attended the meeting demonstrated that West Samaria was very much an ongoing public concern. (*Ex. 88*). Ms. Prioletta, Mr. Riley, and Mr. Hill all confirmed the public concerns discussed at the meeting and nothing that deviated.

Because Alderman Bauman's alleged interference involved matters of public concern, his actions are privileged as a matter of law and cannot be the basis of any liability under United Supreme Court precedent and *Dumas*. The Court must dismiss the tortious interference claims.

C. Tri-Corp Claim of Interference with WHEDA Also Fails on the Facts.

Alternatively, Tri-Corp's tortious interference claim against Alderman Bauman involving the WHEDA mortgage should be dismissed based on established and undisputed facts. Testimony from Antonio Riley and Rae Ellen Packard of WHEDA, as well Alderman Bauman, confirm that communications between them related to Tri-Corp all occurred between August 2007 and October 2007. However, Tri-Corp was in default of its WHEDA mortgage and put on notice July 2, 2007. (*Ex.* 584). The mortgage documents provide WHEDA with the right to foreclose. (*Ex. 539*). WHEDA did foreclose consistent with its

contractual right, and the court judgment establishes the propriety of WHEDA's decision. (*Ex. 550*)[2].

That WHEDA acted to enforce its contractual rights prior to any communication with Alderman Bauman defeats any inference that they did so *because of* interference by Bauman. Moreover, even if Tri-Corp argues a jury could infer that WHEDA ultimately foreclosed on the mortgage based on influence by Alderman Bauman, such an action would be perfectly consistent with the contract between WHEDA and Tri-Corp, and therefore, not an interference of it. In sum, urging enforcement of a contract can't be interference by Alderman Bauman. Tri-Corp's claims of bad faith against WHEDA and conspiracy between WHEDA and Alderman Bauman were dismissed years ago.

D. The Court Has Ample Information to Determine That Alderman Bauman's Alleged Defamatory Statements are Conditionally Privileged.

The Court has not determined whether Alderman Bauman's alleged defamatory statements were subject to a conditional privilege. Specifically, Wisconsin law recognizes that a conditional privilege exists for government officers acting in their official capacity. *Ranous v. Hughes*, 30 Wis. 2d 452, 465, 141 N.W. 251 (1966). The undisputed evidence supports the finding that Alderman Bauman was performing his professional duties in advocating for a result in his district. The conditional privilege strikes a balance between:

> [I]nsuring that government officials not be deterred from performing their public duties for fear of being held individually liable for what they may say or publish and (2) of protecting private citizens from

[2] Exhibit 550 is the amended judgment of foreclosure, which was entered earlier in the case.

> having their private or professional reputations damaged by defamatory matter uttered or published by public officials.

Id. at 466.

Because the privilege is conditional, it can be lost under certain conditions. The *Ranous* Court adopted the Restatement of Torts analysis for abuse of the privilege. *Id.* at 468.

The Court, as a matter of law, must find that Alderman Bauman held a conditional privilege when he made the statements at issue. This is not a jury issue. Significantly, a finding that a statement was made by a public official changes the burden of proof from ordinary to middle (See Wis. - JI Civil, 2505, p.10). Thus, it has to be addressed pre-verdict.

i. The four alleged defamatory statements were each made by Alderman Bauman in his public capacity, and therefore, should be deemed conditionally privileged.

There are four alleged defamatory statements by Alderman Bauman:

(1) Bauman's email to DNS regarding Tri-Corp's operation being inconsistent with the plan of operation after Joseph Droese's death. (*Ex. 577*).

(2) Bauman's email to his constituents that states DNS had determined Tri-Corp violated its plan of operation. (*Ex. 578*).

(3) Bauman's news release regarding Tri-Corp's failure to provide quality care. (*Ex. 537*).

(4) Bauman's statement that West Samaria was a combination of three things – bad design, bad location, and a bad operator – at the October 19, 2007 meeting among Bauman, County Officials, a city employee, WHEDA representatives, and a representative from a prospective buyer. (*Exs. 88, 592*).

The undisputed evidence elicited at trial confirms that in each instance, Alderman Bauman was serving in his public role when making the statement in

question. In the midst of the ongoing BOZA proceedings, Alderman Bauman made statements about Tri-Corp and West Samaria to: 1) DNS; 2) his District 4 constituents; 3) the press (and by extension, his constituents again) about the BOZA proceedings; and 4) other public officials at a meeting specifically about West Samaria. Under *Ranous,* this is all classic advocacy by a political official and the statements are all protected from liability.

A jury does not decide what a public official should advocate for and how. Thus, government action and accountability is not a jury question. *See also,* Wis. Stat. §893.80(4). *See e.g., Legue v. City of Racine,* 2014 WI 92, ¶¶40-42, 357 Wis. 2d 250, 849 N.W.2d 837 (outlining the public policy for municipal immunity). Instead, the focus would be on what was said and whether the statements when made were either true, or knowingly and recklessly false.

There is no evidence to support the claim that any of Alderman Bauman's four statements were knowingly and recklessly false. There is no evidence "Bauman lied." On the contrary, the record shows rationale justification for all of Alderman Bauman's statements. Deaths. Fraud. Permit violations. Money problems. Thus, there is no basis for the jury to conclude that the conditional privileged was lost or abused by any of the alleged statements. There is no evidence to find malice. The Court is the gatekeeper on whether allegations of defamation present a jury question. *Schaefer v. State Bar of WI,* 77 Wis. 2d 120, 122, 252 N.W.2d 343 (1977). Here, they don't

The Court should direct the verdict and dismiss all four defamation claims based on Alderman Bauman's First Amendment privilege to advocate and Tri-Corp's failure to present evidence to conclude the privilege was abused.

ii. Defamation Claims 1 and 2 Also Fail Because the Statements Were True.

Alternatively, Alderman Bauman seeks a directed verdict as to the defamation claims #1 and #2. Both of these alleged defamatory statements involve the assertion that Tri-Corp violated its plan of operation for West Samaria in 2007. This was on the mistaken belief by Mr. Brever that no such finding was made. However, the evidence confirms Mr. Brever was objectively wrong.

Mr. Kraco did perform the inspection of behalf of the Milwaukee Department of Neighborhood Services, determined the violation, and issued the order to revoke and vacate. (*Exs. 581, 620*). Substantial truth is an absolute defense to defamation. *See Denny v. Mertz*, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982); *DiMiceli v. Klieger*, 58 Wis. 2d 359, 363, 206 N.W.2d 184 (1973); Restatement, Second *Torts* § 581A (1965). *See also Terry v. Journal Broadcast Corp.*, 2013 WI App 130, 351 Wis. 2d 479, 840 N.W.2d 255

SUMMARY

First, the Court is compelled to find Alderman Bauman's actions and statements were in his employment capacity, which is as a public official. Second, the Court must dismiss the tortious inference claims based on the public concern doctrine. Alternatively, the Court should dismiss the WHEDA

tortious interference claim based on the undisputed proof that Alderman Bauman did not interfere with the mortgage already in default.

Next, the Court should find that the defamatory statements are subject to a conditional privilege under the First Amendment and the *Ranous* case. Because the statements were part of Alderman Bauman's advocacy over an issue in the public sphere, and there is no evidence that his statements were intentionally and recklessly false, the defamation claims need not be submitted to the jury. Rather, the defamation claims can be dismissed based on the trial evidence. Alternatively, the two statements involving DNS and a violation of the permit of operation should be decided based on the truth of the statements.

A directed verdict is the required outcome under the law.

Dated this 14th day of February, 2022.

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