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**Kenosha County**  
**2020CV000445**

STATE OF WISCONSIN    CIRCUIT COURT    KENOSHA COUNTY

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JOSEPH CLARK,

Plaintiff,

-v-

Case No.: 2020-CV-445

ERIN DECKER,

Defendant.

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**PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff, JOSEPH D. CLARK (hereinafter “Clark”), and Defendant, ERIN DECKER (hereinafter “Decker”), were politically aligned friends who worked on local campaigns from 2010 through March 16, 2016. On that March 2016 date, Clark had the audacity to defy Decker and support a local political candidate whom Decker did not support. Decker made clear that she was more than disappointed in Clark, by emailing him, “to say I’m disappointed would be an understatement”. From that email exchange through today, Decker has never spoken with Clark.

Unfortunately, ending their friendship and silence wasn’t all that Decker did to express her deep disappointment in Clark. Needing retribution, Decker went on to prepare and have filed nearly a dozen complaints with the Wisconsin Ethics Commission, the IRS and the Wisconsin DFI all implicating Clark in allegedly improper conduct. Notably, not one of the complaints was ever substantiated. Unfortunately, filing unfounded complaints still wasn’t enough for Decker. As the ultimate ‘payback’ for defying her, Decker, standing behind the veil of the Republican Party of

Kenosha County (hereinafter “RPKC”), compiled documents and published a Facebook Post on April 28, 2020 (hereinafter the “Post”), defaming Clark. That Post included two local active politicians whom she attached monikers to (“King Kreuser” and “Big-man Beth”), but the Post also included Clark. Clark had long been a private citizen, long time local Certified Public Accountant (“CPA”) and regular community volunteer. Decker elected to not only label Clark as “Crooked Clark” but she also tried to support that label with statements of fact that were patently false. Those statements of fact and the supporting documentation she obtained, are far from fact. They are outright lies that were intended to do one thing: make Clark pay for defying her. For the reasons stated below, this Court should deny Decker’s motion for summary judgment in its entirety.

#### STATEMENT OF FACTS

##### **Joe Clark**

Clark is and has been a CPA in Kenosha, Wisconsin since 1995. (Clark Aff. ¶2). In his business Clark needs a reputation of honesty, trustworthiness and ethics. (Clark Aff. ¶3). Clark was previously a Kenosha County Board Member but has held no political office since 2012. (Clark Aff. ¶4). Clark has volunteered and served on numerous non-profit boards since 1991 without compensation or personal benefits. (Clark Aff. ¶5).

##### **Kenosha Cares Coalition**

Clark was one of the original members of the Kenosha Cares Coalition (hereinafter “KCC”) from its inception in 2014. (Clark Aff. ¶6). KCC was organized by several persons to advocate for Kenosha Unified School District (“KUSD”) candidates of a conservative mindset. (Clark Aff. ¶7). Decker supported KCC’s efforts in the 2014 KUSD election. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 93 lines 13-19). Clark served on the KCC Board as its secretary up and until March 2020.

(Clark Aff. ¶8). Clark was also KCC's registered agent until it was change on DFI's website on March 21, 2020. *Id.* Clark had also previously been designated as the Principal Officer on IRS filings up until that was changed to Kim Breunig starting with the 2019 IRS filing. (Clark Aff. ¶9). KCC was almost entirely inactive from conclusion of the 2014 Spring election through the date Clark resigned from the KCC Board. (Clark Aff. ¶10). Clark had no active role with KCC from 2015 through the even date hereof. (Clark Aff. ¶11).

### **Kenosha Community Health Center**

Since 2017, Clark has served on the Board of the Kenosha Community Health Center (hereinafter "KCHC"), a non-profit in Kenosha County. (Clark Aff. ¶12). KCHC generally provides health care, dental care, mental health care and pharmacy support for low-income clients who are unable to access such services otherwise. (Clark Aff. ¶13). Clark receives no compensation or any other financial benefit from serving on the Board of the KCHC, as the same is entirely volunteer. (Clark Aff. ¶14).

### **Clark and Decker**

Decker met Clark in 2006 during a business transaction. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 9 line 24, p. 10 line 11). Decker and Clark worked together every spring election cycle from 2010 through 2016. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 17 lines 18-24). Decker and Clark were friends from 2010 through March 2016. (Clark Aff. ¶15) (Terry Aff. ¶3, Exh. A, Decker Dep. p. 20 line 14-p.21 line 2). Decker and Clark were regularly aligned on community issues up until March 2016. (Clark Aff. ¶16).

### **Drastic Change in Relationship**

Decker's friendly relationship with Clark changed drastically in 2016. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 21 lines 7-9). The end of the friendship occurred when Clark supported a

candidate who was running against the one supported by Decker. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 21 line 10-24). The change in the relationship is demonstrated by an email from Clark to Decker explaining why he was supporting a different candidate. (Terry Aff. ¶3, Exh. A, Decker Dep., Exh. 1). Decker expressed her anger with Clark and, specifically, that he didn't "have the balls to tell me you are supporting another candidate." (Terry Aff. ¶3, Exh. A, Decker Dep. p. 21 lines 10-24, Exh. 1). Decker made clear her feelings when she expressed to Clark, "to say I am disappointed would be an understatement." (Terry Aff. ¶3, Exh. A, Decker Dep. p. 24 lines 14-18). From that email through today, Decker still remains disappointed in Clark. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 24, lines 19-20). In fact, Decker has not spoken with Clark since that March 16, 2016, email. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 24, lines 21-25). Decker has described her anger with Clark when she saw him supporting another candidate as a "punch to the gut." (Terry Aff. ¶3, Exh. A, Decker Dep. p. 24 line 24-p. 25 line 11).

### **IRS Complaint Relating to Clark**

On February 8, 2021, Decker filed a Complaint against KCC, implicating Clark, with the Internal Revenue Service IRS"). (Terry Aff. ¶3, Exh. A, Decker Dep. p. 27 lines -17). Notably, Decker had been working on the IRS Complaint well before this litigation ensued. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 27 line 23-p. 28 line 5). The IRS Complaint against KCC lists Joseph D. Clark as the first of the individuals involved. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 29 lines 11-15). As a CPA, a substantiated Complaint with the IRS could result in a reprimand of Clark under his licensure. (Clark Aff. ¶¶31, 33). In filing the Complaint with the IRS, Decker sought to remain anonymous. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 30 line 25-p. 31 line 5). Decker wanted to remain anonymous as she feared retribution. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 31 lines 6-8).

### **Ethics Complaints Relating to Clark**

Beginning in and around late 2020, Decker began compiling Complaints with the Wisconsin Ethics Commission (“WEC”) for persons, other than herself, to sign and file. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 39 line 23-p. 40 line 3). Decker prepared eight (8) complaints to the WEC for Michael Skalitzky (“Skalitzky”) to sign and file. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 38 lines 3-13; p. 43 line 12-p. 44 line 14). One of the original WEC Complaints compiled was against Kenosha County Supervisor Monica Yuhas (“Yuhas”), the candidate Clark supported in 2016, (hereinafter the “Yuhas Complaint”) (Terry Aff. ¶3, Exh. A, Decker Dep. p. 39 lines 13-15). All eight (8) of the complaints alleged violations between KCC and the candidates. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 38 lines 3-13; p. 43 line 12-p. 44 line 14). All of the Complaints were against candidates that Clark was supporting in the 2020 Spring Election. (Clark Aff. ¶25). Decker had worked on compiling documents and information for the complaints for months. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 39 line 29-p. 40 line 3; p. 43 line 12-p. 44 line 14). Decker gathered all the information for the complaints. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 39 lines 6-12; p. 43 line 12-p. 44 line 14). Decker typed up the complaints for Skalitzky to sign. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 38 lines 10-13).

Decker worked to obtain records to see if Clark was helping the candidates in further support of her Complaint. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 40 lines 14-10; p. 43 line 12-p. 44 line 14). Decker submitted an Open Records Request to the State of Wisconsin to see if Clark had purchased voter lists all to be used in support of the complaints. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 40 lines 14-20; p. 43 line 12-p. 44 line 14). Decker had Skalitzky file all five (5) of the referenced Complaints. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 43 line 12-p. 44 line 5). Each of the Complaints Decker had Skalitzky sign against KCC started in April 2020. (Terry Aff. ¶3, Exh.

A, Decker Dep. p. 45 line 17-p. 46 line 4). Specifically, each of the Complaints alleged “this coordination was facilitated by Joseph D. Clark by Clark purchasing voter lists and being on the Board of KCC” amounting to coordination. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 51 line 3-p. 52 line 6). The Complaints specifically assert that Clark charged candidates for scoring of voter lists; however, Decker did not know that the same had occurred. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 52 line 17-p. 53 line 1). Within the Yuhas Complaint prepared by Decker, Decker alleged that “Clark accepted money from Yuhas in cash to avoid reporting”. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 58 line 17-p. 59 line 13). Decker’s allegation as to Clark accepting cash from Yuhas to avoid reporting was **solely based** on observation she alleges to have made in 2012. (emphasis added) (Terry Aff. ¶3, Exh. A, Decker Dep. p. 60 lines 8-13).

### **Complaint to Wisconsin DFI**

In addition to the numerous WEC Complaints, Decker also prepared and had her husband, Michael Decker, file a Complaint against KCC (implicating Clark) with the Wisconsin Department of Financial Institutions (“WDFI”) (hereinafter the “DFI Complaint”). (Terry Aff. ¶3, Exh. A, Decker Dep., Exh. 6). Decker prepared the entire DFI Complaint and had her husband sign it. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 67 lines 21-25).

### **Coordinated District Attorney Complaint**

On February 24, 2020, Andrew Ellinger (hereinafter “Ellinger”) filed a complaint with the Kenosha County District Attorney’s Office (the “DA Complaint”) alleging that Clark’s signature on Yuhas’ nomination papers was a forgery. (Terry Aff. ¶5, Exh. C, Ellinger Dep. p. 8 line 24-p. 10 line 6). Ellinger has known Decker for several years as the two both served on the RPKC board. (Terry Aff. ¶5, Exh. C, Ellinger Dep. p. 6 lines 21-24). Ellinger was assisted by Katie Verzal (hereinafter “Verzal”) in preparing the DA Complaint. *Id.* Verzal and Decker are known to work

in coordination on political matters. (Clark Aff. ¶29). Decker had discussed the issue of Clark's signature on the Yuhas nomination papers with Verzal. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 103 line 20-p. 104 line 8). Decker testified that she took no part in the preparing or filing of the DA Complaint. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 33 lines 14-19). The WEC Complaints Decker prepared for Skalitzky to file included a 2018 campaign mailer from Yuhas, depicting Ellinger's address. *Id.*

### **Facebook Post**

On April 28, 2020, Decker posted on the Republican Party of Kenosha County ("RPKC"), a Facebook post ("Post") making statements about Clark. (Clark Aff. ¶34)(Terry Aff. ¶3, Exh. A, Decker Dep. p. 70 line 20-p. 71 line 3, Exh. 7). The Post was solely made by Decker but did not identify her by name anywhere within the Post. *Id.* At the time of the Post, the RPKC had over 3,300 followers. *Id.* Decker spent substantial time working on obtaining documents that were subsequently part of the Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 71 line 19-p. 72 line 3). The Post states that Kreuser (then Kenosha County Executive James Kreuser) was "using tax dollars to help his buddy Joe Clark". (Clark Aff. ¶34). Decker testified that she believed the use of tax dollars was supported by someone from Kenosha County Government writing the Press Release pertaining to Kenosha Community Health Center's ("KCHC") COVID testing site. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 76 line 20-p. 77 line 7). Decker was well aware that Clark served on the KCHC Board at the time of the Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 lines 11-14). When asked how a free COVID screening clinic offered by KCHC would help Clark, Decker replied, "because he sits on the Board". (Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 lines 11-14). At the time of the Post, Decker knew nothing of any financial arrangement between Clark and KCHC. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 lines 18-21). Decker had **no knowledge** that

Clark was paid or compensated in any way by KCHC when she made the Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 line 18-p. 78 line 6). The post was seen by at least two people who know Clark. (Rossi Aff. ¶4)(Clark Aff. ¶36). Both of those persons expressed concerns about what was being said about Clark. (Rossi Aff. ¶6)(Clark Aff. ¶37).

### **Demand for Retraction**

Decker received a letter from Clark's attorneys the day after the Post demanding a retraction. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 100 lines 10-20). Decker, to this day, has not removed the Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 100 lines 21-23).

## ARGUMENT

### **I. THE POST IS DEFAMATORY.**

#### **A. Decker's Statements Regarding the KCHC are Defamatory to Clark.**

Decker claims that Clark cannot assert a claim for defamation as to the Post's statements regarding KCHC. (Dkt. 202, p. 8). This argument is fruitless. The third element of defamation requires that the statement "tends to harm one's reputation so as to lower him ... in the estimation of the community or to deter third persons from associating or dealing with him." *Mach v. Allison*, 2003 WI App 11, ¶ 12, 259 Wis.2d 686 (Ct.App.2002). Decker is correct in stating that "the statement must tend to harm the reputation of the person whom it is about." (Dkt. 202, p. 9, citing *Terry v. Journal Broadcast Corp.*, 2013 WI App 130, ¶14, 351 Wis. 2d 479). However, "[o]ne may be libeled by implication and innuendo quite as easily as by direct affirmation." *Frinzi v. Hanson*, 30 Wis. 2d 271, 277 (1966).

Decker claims that the statement about the funding of KCHC is completely unrelated to Clark and could not harm his reputation. (Dkt. 202, p. 9). If a statement about KCHC's alleged misuse of funding were made on its own, the same could be true, but the entirety of the Post does



not only include statements on KCHC but directly relates Clark to the entity. The Post uses Clark's position to defame him. Specifically, Decker says "Crooked Clark is the president of Kenosha Community Health Center" (Clark Aff. ¶34, Exh. B) and then makes statements of fact about taxpayer money funding KCHC's COVID testing and "King Kreuser ... using tax dollars to help out his buddy, Joe Clark." (*Id.*). There is little need for innuendo or implication where the Post points readers directly to the connection between Clark, KCHC, and alleged misspending of tax dollars. These direct, matter of fact statements alone, or together with any inference, do and are most certainly intended to harm Clark's reputation. Moreover, the Post need not say 'Clark orchestrated KCHC's misconduct' in order for statements about KCHC to be defamatory to Clark. *See Frinzi, supra*. Because the Post directly links Clark to the alleged improper spending by KCHC, statements about KCHC's alleged misconduct would most certainly tend to deter current clients, potential clients, and the public at large from dealing with Clark and would tend to cause them to distrust and question him. As such, allegations about and involving Clark and his position or involvement with KCHC absolutely tend to harm his reputation as to satisfy the third element of defamation. *See Mach, supra*. Thus, Clark's claim relating to these statements regarding KCHC are defamatory to him given the context of the entire Post. Decker's argument here fails.

B. Decker's Statements are not Substantially True and are Defamatory.

Decker asserts that Clark cannot claim defamation because the statements in the Post are substantially true, which would be a defense to this action. (Dkt, 202, p. 9 (citing *Williams v. Journal Co.*, 211 Wis. 362, 370, 247 N.W. 435 (1933))). At the very least, there is a substantial material issue of fact if the statements are substantially true, and more realistically, the undisputed facts show the statements are patently false. Decker first claims that the statement that Clark is "behind" KCC is substantially true. (Dkt. 202, p. 9). If the post were to only say that 'Clark is

behind KCC' and nothing else, this could possibly be true. However, this statement is within the broader context of the entire Post. Combining the allegations that KCC is a "dark money group", taxpayer dollars are being used for political favors, and candidates are being "bought and paid for", the word "behind" does not merely mean "in support of". (Dkt. 202 pp. 9-10). In the context of the Post, "behind" suggests a much more sinister meaning and insinuates that Clark was pulling the strings of an organization engaging in illegal, immoral, or wrongful activities. The context of the Post shows that the use of "behind" was not a harmless assertion that Clark was involved in KCC, but rather that Clark was the orchestrator of immoral or criminal behavior. Since there is **zero evidence** of Clark ordering KCC to conduct any such illegal activities, this statement in the context of the Post is not only not substantially true but is a lie. The language used together with all reasonable inferences confirms that the verbiage "behind" is defamatory. Even if, *arguendo*, there were some truth to the statement that Clark is "behind" KCC, it is for a jury to decide if a particular word could have a defamatory meaning. *See Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 462 (1962). As the term "behind" could have a defamatory meaning, it is not an undisputed fact, and therefore a question for the jury and not worthy of summary judgment.

Decker next claims that the assertion in the Post that KCHC was using taxpayer dollars to fund the COVID testing site is also substantially true and therefore not defamatory. (Dkt. 202, p. 10). Decker reasserts a previous argument that statements about KCHC are not defamatory to Clark. (*Id.*). However, as previously established, the Post directly connects Clark and KCHC, making any assertion about KCHC implicate and therefore defame Clark. *See Frinzi v. Hanson*. Decker then argues why the statements about KCHC are substantially true. (Dkt. 202, p. 10). These arguments are laughable and do not support the granting of summary judgment. Decker claims that because KCHC was working in conjunction with Gateway Technical College ("Gateway")

and Kenosha County Division of Health, KCHC was using and taking advantage of taxpayer funds. (Dkt. 202, p. 11.). Despite Decker's argument, the use of a public facility and the acceptance of help from a municipal organization is a far cry from tax dollars being **spent** on the testing site (as the Post explicitly says). This statement about tax dollars, as the arguments depict, is a fact in dispute and can only be decided by the trier of fact. The facts Decker relied on are that Kenosha County authorized the Media Release and that Gateway allowed the use of their parking lot. (Clark Aff. ¶34, Exh. B). Those are the **only** "facts" that someone who spends hours, days, and months researching political opponents came up with.

Decker further contends that the Post does not insinuate that Kenosha County taxpayer funds went directly to KCHC, and that no reasonable reader would think so. (*Id.*). However, the Post does not say that KCHC merely benefitted from tax dollars, it outright says that tax dollars were "**used**" and "**spent**" to make KCHC's COVID testing site possible. (Clark Aff. ¶34, Exh. B). It further says that in the context of the then Kenosha County Executive (Kreuser) and Kenosha County Sheriff (Beth) being directly linked to Clark. The clear and direct inference is that Kenosha County taxpayer funds were being used to support this endeavor and that Clark had a financial gain via those tax dollars. Looking at the plain text of the Post, most any reader would conclude a direct flow of Kenosha County tax dollars from citizens to KCHC. Decker's argument that a reasonable reader would assume an indirect flow of funds is entirely inconsistent with all sense of logic and the actual factual statements in the Post. As such, the statement that KCHC used tax dollars in not substantially true and therefore is defamatory. Because the statements in the Post are certainly open to different interpretations, truth being a very remote one, summary judgment cannot be granted on this materially disputed fact.

C. The Term "Crooked" is Hardly Hyperbole and is Defamatory in the Context of the Post.

Decker next claims that the term “Crooked” is merely rhetorical hyperbole and solely her opinion. (Dkt. 202, p. 11). Calling a local CPA “Crooked” and providing false statements and documents to support it is nowhere near “hyperbole.” Thus, this argument fails on all accounts. Decker first argues that “Crooked” is unactionable because the statement is merely conjecture and that the speaker (Decker) is not “claiming to be in possession of objectively verifiable facts.” (*Id.* (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). However, Decker did not state that Clark is “Crooked” as a one-off comment about him. She made the statement that Clark is “Crooked” in combination with assertions and false documentary evidence about Clark being involved with a “dark money” organization, buying and paying for political candidates, and being the recipient of misappropriated tax dollars. (Clark Aff. ¶34, Exh. B). These claims are Decker’s attempt to back up calling Clark “Crooked” with what she puts forth as “objectively verifiable facts.” *Haynes*, 8 F.3d at 1227. In fact, Decker attempts to verify these assertions in the Post itself by attaching screenshots of the KCHC Board members, the (former) registered agent of KCC, expenditures of KCC, and the media release for the testing site. (Clark Aff. ¶34, Exh. B). This is not a situation where Decker is merely calling Clark “Crooked” simply to state her personal opinion of him. Rather, Decker stated Clark was “Crooked” and actively asserted she was in possession of documentary facts that prove that Clark was “Crooked.” Thus, the Post was not just a statement of opinion, but an actionable assertion of what Decker purported to be verifiable proof of misconduct. Furthermore, the Post not only fails to identify Decker as an individual expressing her opinion by qualifying such statements with “I think” or “in my opinion”, but the Post does not even identify Decker as the author. Rather, consistent with her repeated use of proxies to file her complaints, Decker hid behind the organization and made a statement of dishonesty about a local CPA and then supported that statement with false or reckless facts.

Decker next discusses the context in which the court should view the Post. Decker claims that this post was “low-level . . . campaign tactics or rhetoric.” (Dkt. 202, p. 12, quoting *Adelson v. Harris*, 973 F. Supp. 2d 467, 489 (S.D.N.Y. 2013)). However, this Post and the testing site project were not part of any campaign. Nor was this Post made as part of a “public debate” or “heated labor dispute”. (Dkt. 202, p. 12, quoting *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 428 (Cal. 1976)). Furthermore, this setting was not one in which “the audience may anticipate efforts by the parties to persuade others to their positions” as Decker made no call to action in the Post, nor did Clark instigate or call for any such discussion or action in regard to KCHC’s testing project. (*Id.*). This was not a back-and-forth debate about COVID policies, nor did KCHC or any other party make the media release about politics at all. The Post was Decker’s attempt to take a public health initiative headed by KCHC and turn it into an opportunity to harm the reputation of Clark. This Post was not a “campaign tactic” but a personal call-out and vendetta against Clark.

Decker also asserts the because the Post took place on social media that readers will be skeptical of its contents. (Dkt. 202, p. 12). If Decker made this post on her personal Facebook page, readers may be skeptical of it. However, Decker chose to make this Post from the official Facebook page of the Republican Party of Kenosha County. (Clark Aff. ¶34, Exh. B). Given that this was an organization page and that Decker offered up screenshot exhibits of the allegations in the Post, readers would be more likely to hold it as true. In the context of the Post, it is clear that this was not just an individual’s political opinions in the ordinary course of a campaign, but rather Decker’s assertion that these allegations are fact behind the face of a local political organization to give the statements more weight. Additionally, even if this Post were actually part of a political campaign, the fact that Clark was not a candidate in any political campaign dooms Decker’s argument here.

Decker next asserts that the term “Crooked” does not imply that Clark was engaging in illegal activity because Meriam-Webster Dictionary lists the definition of “crooked” as “dishonest” and not illegal. (Dkt. 202, p. 10). However, Wisconsin Supreme Court has frequently held that:

One accused of defamation cannot insist upon a literal reading or his understanding of the language. His intention might go to the question of malice but he is responsible for the understanding his language reasonably conveys to its recipients **under the circumstances** whether that exact meaning was intended or not. One may not dissect the alleged defamatory statement into nondefamatory parts and thus lose the **vital over-all meaning**.

*Frinzi v. Hanson*, 30 Wis. 2d 271, 277 (1966) (citing *Schoenfeld v. Journal Co.*, 204 Wis. 132, (1931)) (emphasis added). Add to that, the fact (an obvious matter for a jury to determine) that multiple dictionaries include “illegal” and “criminal” in the definition of “crooked.”<sup>1</sup> Additionally, thesauruses include “criminal”, “illegal”, “unlawful”, and “fraudulent” as synonyms for “crooked”<sup>2</sup>. Even further, people who knew Clark have told him that they found the use of “Crooked” to be a concerning descriptor for a CPA. (Johnson Aff. ¶¶6-8), (Rossi Aff. ¶6), (Clark Aff. ¶¶36-37). Clearly, it is well established in the English language and common understanding that the term “crooked” encompasses and conveys that someone is engaged in illegal and immoral behavior.

Not only does Decker’s dictionary definition argument fail, but the cases that Decker cites are merely persuasive in value and are so distinguishable on the facts to be of no use in the case at hand. The first case Decker cites, *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 618 (D.S.C. 2019), held that a series of Facebook posts calling McGlothlin a “crooked owner” was not actionable

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<sup>1</sup> Cambridge Dictionary Online, *Crooked*, <https://dictionary.cambridge.org/us/dictionary/english/crooked> (last visited August 11, 2022). Collins Dictionary Online, *Crooked*, <https://www.collinsdictionary.com/dictionary/english/crooked> (last visited August 11, 2022). Lexico Dictionary Online, *Crooked*, <https://www.lexico.com/en/definition/crooked> (last visited August 11, 2022).

<sup>2</sup> Collins Thesaurus Online, *Crooked*, <https://www.collinsdictionary.com/dictionary/english-thesaurus/crooked> (last visited August 11, 2022).

because the term was rhetorical hyperbole. Unlike the post in *McGlothlin*, though, the term “crooked” is not used in its own statement in the Post. Decker called Clark “Crooked Clark” in the same sentence as allegations of Clark buying and paying for candidates. (Clark Aff. ¶34, Exh. B). In addition, Decker calls Clark “Crooked Clark” in reference to his (former) position with KCC and then immediately follows up with allegations of KCC being a “dark money organization.” (*Id.*). Unlike the use of “crooked” in *McGlothlin*, the use of “Crooked” in Decker’s Post was not a side comment untied to any other allegation. Decker did not simply say, without facts or support, ‘Joe Clark is crooked’, which could make that stand alone statement rhetoric hyperbole. Decker used “Crooked Clark” as a proper noun to refer to Clark in the same sentence as false factual allegations regarding buying and paying for political candidates. (*Id.*).

Furthermore, the court in *McGlothlin* held that the remaining allegations in the posts were actionable even though they regarded highly reported scandals, which made the allegations substantially true. *McGlothlin v. Hennelly*, 370 F. Supp. 3d at 618. Decker’s allegations of tax dollar misappropriation, buying of candidates, and allegations of “dark money” organizations are not highly publicized scandals with evidence like those in *McGlothlin*. The allegations here are certainly actionable as they are not in reference to any published matter, let alone a *widely* published scandal. Since the use of “Crooked” was not a stand-alone tag, but rather surrounded by purported facts and none of this case involves highly publicized scandals, Decker’s use of *McGlothlin* is misplaced and unpersuasive.

The next case Decker cites, *Westmont Residential LLC v. Buttars*, 340 P.3d 183, 188-189 (Utah Ct. App. 2014), is even less compelling. In *Westmont*, the defendants posted a review on Yahoo saying Westmont “are crooks and will take full advantage of you. Run from them!” *Westmont Residential LLC v. Buttars*, 340 P.3d 183, 188 (Utah Ct. App. 2014). The court held that

this was not actionable because the defendants made a **general statement** about Westmont being “crooks” and made no attempt to explain why or allege any facts supporting the claim. *Id.* This is a far cry from the facts at issue here. As briefed *supra* Decker did not post a mere statement that Clark is “crooked” but made false allegations of misusing tax dollars, being a part of a “dark money group” and buying and paying for political candidates. (Clark Aff. ¶34, Exh. B). Decker’s use of “Crooked” in the Post is much more in depth and not just general name calling as it was in *Westmont*. The *Westmont* case provides no support to Decker’s motion.

Decker’s next citation is also discussed in *Westmont*. As Decker cited, the court in *Hodgins v. Times Herald Co.*, 425 N.W.2d 522, 527 (Mich. Ct. App. 1988) held that terms like “blackmailer”, “traitor” or “crook” are not actionable if they could be taken out of context to accuse someone of criminal activity. Similarly, other cases cited in *Westmont* say that mere “juvenile name-calling” is not defamatory because no reader could reasonably interpret the name-calling **to be an assertion of fact**. See *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, 249 (2008) (emphasis added), see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Again, this is not the case in Decker’s Post. Decker did not **only** engage in name-calling but supported that defined term with detailed and explicit facts and documentary evidence.

Decker next claims that she was merely expressing her opinion using colorful terms and tries to justify this by citing her use of rhetorical hyperbole in saying “King Kreuser” and “Big-Man Beth”. (Dkt. 202, p. 13). This position by Decker is fraught with irony. First, she, yet again, hid behind someone or some entity in asserting such “opinion.” Second, the other two persons Decker attached names to are actual political figures. Further, the connotation of the names “King” and “Big-Man” substantially differ from the connotation of “Crooked”. “Crooked”, especially



when attached to a long-time local CPA, insinuates wrongful and illegal activity versus the insinuation of having an ego. Despite Decker's insistence that the Post is "undeniably her opinion on a political matter" (*Id.*), the facts and Decker's own cited cases show that the use of "Crooked" in combination with the Post's allegations do purport to be factual assertions and not mere opinion. Because the statements in the Post relate to and are about Clark, are not substantially true, and are not merely opinions but Decker's assertion that they are fact, the Post is absolutely actionable as defamatory.

**II. CLARK WAS NOT AN ALL-PURPOSE OR LIMITED PURPOSE PUBLIC FIGURE AT THE TIME OF THE POST, AND EVEN IF HE WAS A PUBLIC FIGURE, CLARK CAN ESTABLISH THAT DECKER'S STATEMENTS WERE MADE WITH ACTUAL MALICE.**

A. Clark Was Not a Public Figure at the Time of the Post.

Decker alleges that Clark is a public figure in the Kenosha Community, which would mean Clark has to prove actual malice to bring a defamation claim. (Dkt. 202, p. 14). While the record here would certainly allow a jury to find actual malice, the same is not necessary because Clark was not a public figure at the time of the Post. Decker is correct in asserting that there are two types of public figures: all-purpose or limited purpose. (*Id.*). Decker is incorrect, though, in asserting that Clark is an all-purpose public figure. (Dkt. 202, p. 15). In fact, Clark is neither an all-purpose nor a limited purpose public figure. To determine if a plaintiff is a limited purpose public figure, courts use the two-prong *Denny v. Mertz* test:

- (1) there must be a public controversy; and
- (2) the court must look at the nature of the plaintiff's involvement in the public controversy to see whether the plaintiff has injected himself or herself into the controversy so as to influence the resolution of the issues involved.

*Denny v. Mertz*, 106 Wis. 2d 636, 649-50 (1982). Decker's argument fails immediately on the first prong of the test because there was no public controversy regarding the contents of the Post. There

are no news articles or public debates regarding KCHC's efforts to offer a testing site prior to or at the time of the Post. Furthermore, there was no public controversy or debate involving Clark **at all** at the time of the Post. Not a single news article mentions any campaign financing issues, the misuse of tax dollars, or the like in regard to Clark, KCHC, or KCC at the time of the Post. As there was no public controversy for Clark to involve or inject himself in at the time of the Post, Clark cannot be a limited purpose public figure.

While Decker next argues that Clark is an all-purpose public figure, her arguments are not only misplaced on the facts, but fail as a matter of law. An all-purpose public figure "has 'general fame or notoriety' in the location the defamation takes place." *Biskupic v. Cicero*, 2008 WI App 117, ¶ 16, 313 Wis. 2d 225, 238 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52, 94 S.Ct. 2997 (1974)). "[C]ourts look at a number of factors, including evidence of the person's name recognition, press coverage of the person, whether the person has shunned or encouraged media attention, and whether the person has access to the media such that he or she would likely be able to respond to false information." *Id.* (citing *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295 (D.C.Cir.1980)). These factors apply at the time the defamation took place. *See id.* at ¶ 19, 313 Wis. 2d at 240.

In *Biskupic v. Cicero*, 2008 WI App 117, ¶ 16, 313 Wis. 2d 225, 238, Biskupic was a local district attorney until 2003 and involved in a controversy about accepting payments from criminal defendants to an anti-crime foundation in exchange for not prosecuting the 'donors'. The defendants published an article in 2004 about criminal charges against another man, but the paper mistakenly named Biskupic. *Biskupic* at 235. Biskupic brought a defamation action, but the court found that he was an all-purpose public figure and therefore required to prove actual malice. *Id.* at 240. The court held that Biskupic was an all-purpose public figure at the time of the publication

of the article because he had only been out of the district attorney's office for a year, had recently run for Wisconsin Attorney General, his controversy was before an ethics committee less than a year prior, and more than 100 news articles had been recently published about him and the controversy. *Id.* Despite not currently being in office, the amount of publicity within the last year about Biskupic rendered him an all-purpose public figure at the time of the publication of the article in question. *Id.*

The facts of this case are immediately distinguishable from *Biskupic*. At the time of the post in April 2020, Clark had been out of office for over 8 years. (Clark Aff. ¶4). This is significantly longer than Biskupic, who had only been out of public office for a year. Additionally, over 100 articles had been published about Biskupic's controversy, whereas only one article had been published involving Clark within the prior **two years** of the Post, and this article was authored **by** Clark as a voice of the people on a completely unrelated topic to the Post. (Dkt. 202, p. 15). One news article in the past two years is hardly community-wide notoriety to the level of that required to be an all-purpose public figure.

Decker cites to several articles from many years prior to the Post and two articles from after the Post. (Dkt. 202, p. 16). These articles are irrelevant not only because they were published well before or after the Post, but because they have nothing to do with the content and allegations contained in the Post. (*Id.*). Decker further claims, without any legal support, that Clark's personal involvement with candidates after he left office makes him an all-purpose public figure. (Dkt. 202, p. 15). However, being known to a handful of local candidates and some of their supporters did not make Clark rise to a household name in the broader Kenosha Community. Looking at the *Biskupic* factors relied on by Decker, it is clear that at the time of the Post, Clark did not have the level of name recognition by the general public of Kenosha, the level of press coverage or media

attention necessary, nor abundant access to the media to constitute being so notorious or famous in the community to be an all-purpose public figure. As Clark was neither a limited purpose nor all-purpose public figure at the time of the Post, he need not prove actual malice.

B. There is Ample Evidence for a Jury to Find that Decker Made the Defamatory Statements with Actual Malice.

The litany of conduct by Decker after Clark failed to toe the line in 2016 is evidence of actual malice. At the summary judgment stage, the Court must decide “whether the evidence in the record could support a reasonable jury finding ... that the plaintiff had shown actual malice by clear and convincing evidence.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986). Clark would have to show that Decker knew the statements in the Post were false or that she made them with reckless disregard for the truth. *In re Storms v. Action Wisconsin, Inc.*, 2008 WI 56, ¶¶ 38, 39, 309 Wis. 2d 704 (citing *New York Times, Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). Proof of reckless disregard can be shown when the statement is “made with a high degree of awareness of probable falsity.” *Id.* at ¶39. Moreover, actual malice can be proven with the combination of evidence of reckless disregard or knowledge of falsity, motivation for the allegations, and the research conducted or not conducted by the defendant. *See Anderson v. Hebert*, 2011 WI App 56, ¶ 22, 332 Wis. 2d 432, 445. A movant cannot prevail on summary judgment “simply by proclaiming a belief in the truth of its publication.” *Torgerson v. J./Sentinel, Inc.*, 210 Wis. 2d 524, 542, 563 N.W.2d 472, 480 (1997) (citing *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326 (1968)).

In *Anderson v. Hebert*, 2011 WI App 56, ¶¶ 2, 5, 332 Wis. 2d 432, 436, the defendant made defamatory statements to the press about Anderson after he had resigned from his job with Barron County. As a public figure, Anderson had to prove actual malice to defeat the motion for summary judgment. *Id.* at ¶21. Two employees of the County made allegations that lead to Anderson’s

resignation, and these employees admittedly made these allegations to get taken off of the night shift. *Id.* at ¶23. Furthermore, there was an audit proving the allegations false between Anderson's resignation and the defamatory statement. *Id.* at ¶24. The defendant also did not ask any supervisors or other employees about the truth of the allegations. *Id.* at ¶25. The court thus held that a reasonable jury could find actual malice because there were ulterior motives behind the allegations, there was evidence available to the defendant showing that the allegations were false, and the defendant did not adequately investigate the truth of the allegations before making them. *Id.* at ¶26. As such, the court found that Anderson had sufficiently shown facts that could support actual malice to defeat summary judgment based on the combination of the evidence and circumstantial factors. *Id.* The very same multiple factors are ever present here based on positive evidence, Decker's pattern of conduct, and all reasonable inferences from the same.

Clark can similarly show actual malice based on evidence obtained by Decker in researching the Post, Decker's motivation in making the Post, and Decker's careless disregard for researching information to support her allegations. Like in *Anderson*, where the defendant was made aware of the falsity of the allegations by an audit, Decker would have known that Clark was no longer a part of KCC or had reason to doubt that Clark was still a part of KCC when she searched KCC on the Wisconsin Department of Financial Institutions (DFI) website before she made the Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 89 lines 11-15). The DFI listing for KCC clearly shows that the registered agent was changed on March 21, 2020, and Clark was no longer listed on the page at all. (Clark Aff. ¶8). Additionally, the IRS website for Non-Profit entities shows the Principal Officer changing from Clark to Kim Breunig as of the 2019 tax filing. (Clark Aff. ¶9). For someone who spends months researching her opponents, Decker would have seen this and realized or at the very least had serious doubt as to Clark still being a part of KCC if he

was no longer the registered agent nor Principal Officer. Knowing or having serious reason to doubt Clark's involvement in KCC and then still making defamatory allegations against Clark and KCC is clear evidence of actual malice. At the very least, this is a disputed material fact that is left for the jury to determine.

Despite Decker's continual insistence that "Crooked" has no association with "illegal", as explained *supra*, "Crooked" is clearly associated with and connotes illegal and criminal behavior. Clark can show that Decker used this term with actual malice because she continually testified that there was nothing illegal, unlawful, or wrong about Clark's conduct. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 54 lines 3-19; p. 59 lines 14-20; p. 60 lines 22-24). Decker knew that there was nothing wrong with obtaining voter lists, endorsing candidates, or spending money on campaigns, yet still called Clark "Crooked" for engaging in those behaviors. (*Id.*). Decker clearly had knowledge that Clark was not engaging in illegal or dishonest behavior but continued to make the Post alleging that he was engaging in such illegal behavior. Decker, as a non-stop researcher, did not do her due diligence and deliberately disregarded what she knew to be the truth regarding the factual statement she made in the Post. This is the very definition of actual malice.

Decker then claims that she would not have filed complaints against Clark and those he was associated with if she doubted the truth behind them or knew the allegations were false. (Dkt. 202, p. 17). This argument is fruitless because Decker knew that Clark was not involved in KCC when she wrote the complaints, admitted that there was nothing wrong with coordinating with candidates, and admitted to basing these complaints on her "information and belief" in the allegations without any facts to support them. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 51 lines 14-22; p. 60 lines 22-24; p. 78 lines 2-6; p. 85 lines 2-6). As previously stated, Decker cannot claim there is no actual malice solely because she believes in her allegations. *See Torgerson v.*

*J./Sentinel, Inc.*, 210 Wis. 2d at 542. Decker did not have any evidence other than her own “belief” that the allegations contained in the Post and these complaints ever occurred at the hands of Clark.

**As to Clark being ‘behind’ KCC:**

Question: Other than the work that was done with the DFI by somebody that you testified to, did you talk to anyone about Joe Clark’s current involvement, as of April 28, 2020, in KCC?

Answer: No.

(Terry Aff. ¶3, Exh. A, Decker Dep. p. 91 lines 8-15).

Question: So, prior to April 28, 2020, you didn’t have any information about who sat on the Board for KCC?

Answer: I knew that Joe Clark did, no one else.

Question: How did you know he did but on one else?

Answer: Because back in 2014.... I helped Joe design...lit pieces.

Question: And that was back in 2014?

Answer: Correct.

(Terry Aff. ¶3, Exh. A, Decker Dep. p. 92 lines 10-24).

The fact that every one of her complaints were summarily dismissed by each and every agency further shows that the allegations were meritless and solely an act of Decker’s own disdain for Clark. (Clark Aff. ¶¶31, 32). In addition, Decker’s conduct in writing and “researching” these complaints but being too scared to file them herself is evidence of her underlying motive in trying to defame Clark. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 38 line 13-p. 39 line 12; p. 42 lines 16-22; p. 43 lines 22-24).

With regards to Clark being “behind” KCC, Clark can show actual malice. As explained *supra*, the use of “behind” was not an innocent word choice by Decker. Saying Clark is “behind” KCC and then calling KCC a “dark money group” shows that Decker meant to convey that Clark and KCC were engaging in nefarious and illegal behavior. That very statement was made for one purpose, and that was to hurt Clark because he dared defy her in 2016. Given that Decker had admitted there is nothing wrong with Clark or KCC supporting, endorsing, or donating to candidates, Decker made this statement insinuating wrongdoing knowing that there was nothing

wrong with Clark and KCC's behavior. (Terry Aff. ¶3, Exh. A Decker Dep. p. 54 lines 3-19; p. 59 lines 14-20; p. 60 lines 22-24). Moreover, even if Decker were referring to KCC's overspending on campaign literature (which the IRS declined to investigate), Decker would have known or had reason to seriously doubt that Clark was not a part of KCC at this time based on her DFI search before the Post. Thus, Decker made statements about Clark's involvement and association with KCC knowing they were false or recklessly disregarding the veracity of her claims. When Decker does the work to gather documents to support her version, but does not research the actual truth, she is intentional or reckless in her actions.

Finally, Decker attempts to argue that she could not make claims about the misuse of tax dollars or political payback with regard to KCHC with reckless disregard for the truth of the allegations. (Dkt. 202, p. 18). This argument, too, fails to show that there was no actual malice in making these statements. Decker admitted that the only "evidence" she had that Clark was benefitting from the COVID testing site was her own belief that he was. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 lines 18-21; p. 85 lines 2-13). Again, actual malice cannot be disproven solely by Decker's assertion that her allegation is true. *See Torgerson v. J./Sentinel, Inc.*, 210 Wis. 2d at 542. Much like the defendant in *Anderson*, Decker either undertook no due diligence to discern the truth or falsity of her allegations regarding tax dollars or political payback, or she simply found documents that were enough to attach to her Post. (Terry Aff. ¶3, Exh. A, Decker Dep. p. 78 lines 2-6; p. 85 lines 2-6). Decker, by her own admission, spent months investigating possible wrongdoing in support of the complaints she prepared. Yet, Decker did not look into or provide any evidence that the opening of a COVID testing site by a municipality and a health organization was anything more than a public health initiative but rather a scheme to pay Clark back for endorsing a political candidate as she claimed. The defendant in *Anderson*'s failure to investigate



his claims was evidence of actual malice and is one of many smoking guns showing actual malice here.

The combination of Decker knowing or having reason to doubt that Clark was involved with KCC or being “behind” anything nefarious, Decker’s motivation to get back at a former friend who had the nerve to cross her, Decker’s utter disregard for investigating the truth of her claims, and Decker’s only evidence of any wrongdoing being her own insistence and belief, are ample evidence for a jury to find actual malice.

**As to KCHC /Financial Benefit to Clark:**

Question: So, did you know what kind of, if any, financial arrangement Joe Clark had with the Community Health Center in Kenosha County?

Answer: No.

(Terry Aff. ¶3, Exh. A, Decker Dep. p. 77 lines 18-21).

Question: With Joe Clark as the president of the KCHC, as you sit here today, are you aware of any financial benefit he received from that position relative to Kenosha County helping with this testing effort?

Answer: No.

(Terry Aff. ¶3, Exh. A, Decker Dep. p. 85 lines 7-13).

**As to Kenosha County Using Tax Dollars:**

Question: Do you know how much money, I guess, if any, that Kenosha County provided to KCHC to do the COVID testing?

Answer: No, but obviously they gave manpower.

(Terry Aff. ¶3, Exh. A, Decker Dep. p. 85 lines 2-6).

CONCLUSION

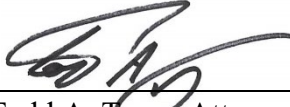
The facts and timeline here show that once someone had the backbone to defy Decker, that someone, Clark, had to be punished. Decker has had it out for Clark since 2016 when he supported a candidate other than her chosen one. From this defaming Post to a series of complaints she researched, typed, and then had her proxies file against Clark and his associates, Decker has shown an utter disregard for the truth at every step of the way. The reason for the disregard for the truth

is simple, it did not fit her needs. It is inconceivable that Decker could not have known that calling Clark, a long-time local CPA and volunteer, “Crooked” without any factual basis would be defamatory towards Clark’s business, reputation, and standing in the community. Astoundingly, given the non-stop researcher that Decker and her lemmings are, they were unable to actually compile any truthful documentary support for her statements. For these reasons, and as further explained above, the Court should deny Decker’s motion for summary judgment and allow a jury to decide the extent of damages Clark should be awarded for Decker’s defamatory Post.

Dated: August 15, 2022

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