

Anonymous Campaign Flyer Publishers Slap County Board Candidates With The Truth

By Natalie A. Harris

The Background

McHenry County Illinois is 50 miles northwest of Chicago, but is geographically—and politically—much closer to rural Wisconsin. In the spring of 2018, Orville Brettman and Ersel Schuster were candidates running for seats on the McHenry County Board. In the run up to the March 2018 McHenry County Republican primary, the Illinois Integrity Fund published a series of campaign flyers advocating against the election of Brettman, Schuster and three of their political allies.

Brettman nicknamed this group of non-traditional conservative Republican candidates the “5 McHenry County Musketeers.” The Illinois Integrity Fund is an alias adopted by a political group opposed to the candidacy of the “Musketeers” as well as other candidates espousing similar political views. The flyers targeting Brettman and Schuster included, among other statements, images of several reprinted headlines from newspaper articles including: “[Brettman’s image] planned illegal spying, burglaries”; “Brettman told a grand jury in 1975 that he took part in admittedly illegal activities”; “Orville Brettman tied to right-wing extremist group that bombed Elgin Church” and “Death threat against county official traced to home of McHenry County Board Candidate Ersel Schuster.”

Brettman and Schuster sued the Illinois Integrity Fund and others believed to be involved in the publication of the flyers for defamation and false light. Within a few weeks of each other, all five “Musketeers” filed defamation lawsuits against the Illinois Integrity Fund arising from the content of the similar flyers.

The Backstory – Orville Brettman

The Illinois Integrity Fund reprinted the newspaper headlines on the flyers directly from articles published in the late 1970s. Those articles reported on a 1975 Cook County grand jury



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investigation into allegations of the illegal gathering and dissemination of intelligence data by members of the Chicago Police Department known as the “Red Squad.” Orville Brettman was called to testify before the grand jury because investigative materials indicated he was a “lieutenant” in the Legion of Justice, a violent right-wing paramilitary group believed to be connected to the Red Squad. The articles included quotes from Brettman’s grand jury testimony in which he admitted his involvement in illegal spying and burglaries orchestrated by the Legion of Justice as part of the group’s efforts to oppose the activity of international communism within the confines of the United States.

The Backstory—Ersel Schuster

In March 2017, the McHenry County Blog, a local political forum operated by a supporter of the Musketeers, published a post entitled “Of Weasels, Chickens and County Government.” The post republished an off-color allegory recited by the chairperson of the McHenry County Republican Party at a recent McHenry County Board meeting. The allegory referenced 23 chickens—alluding to the 23 Republican members of the McHenry County Board—and suggested the chickens should have no trouble resolving “their problem with two weasels.” Use of the term “weasel” was a barely veiled anti-Semitic reference to Democratic McHenry County Board Chairman Jack Franks, who is Jewish.

In the comments section of the blog post, one anonymous reader wrote: “I know a fellow who specializes in terminating weasels of all kinds. His prices are very reasonable. \$5000 each. If you need it to look like an accident, \$10,000 each. Let me know on this blog.” Immediately below the comment, the blog operator encouraged other blog readers to raise money to fund the proposed “weasel termination,” noting that “[o]ne can run a campaign for that.”

Board Chairman Franks was alerted to the post and comments. He believed that the group’s proposal to “terminate” the “weasel” was a credible death threat against him, and contacted local police to protect himself and his family. In connection with their investigation, the police traced the “weasel termination” comment to an IP address associated with an account registered to Edward A. Schuster, Ersel Schuster’s husband. The Schusters refused to cooperate with law enforcement, and the prosecutor’s office ultimately decided not to pursue the matter.

The Illinois Citizen Participation Act

In 2007, the Illinois general assembly passed an anti-SLAPP statute known as the Citizen Participation Act (“CPA”). In *Sandholm v. Kuecker*, 2012 IL 111443, the seminal Illinois anti-SLAPP case, the Illinois Supreme Court interpreted the CPA very narrowly. *Sandholm* confirmed that the CPA only applies to lawsuits “solely based on, relating to, or in response to

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any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *Id.* at ¶ 45.

In order to prevail under the CPA, a defendant must first demonstrate that the plaintiff's complaint is based on defendant's protected acts in furtherance of their rights of petition, speech, association or other form of participation in government.

Next, defendant must also demonstrate that plaintiff's complaint is based *solely* on, relating to, or in response to defendant's protected acts. "To satisfy its burden under this prong of the test, a movant must affirmatively demonstrate that the nonmovant's claim is a SLAPP within the meaning of the [CPA], that is, that the claim is *meritless* and was *filed in retaliation* against the movant's protected activities in order to deter the movant from further engaging in those activities. *Ryan v. Fox TV Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 21.

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Interpretation of the CPA in *Sandholm* and its progeny have made anti-SLAPP victories hard to come by in Illinois. *See, Ryan*, 2012 IL App (1st) 120005, ¶ 29 (defendant must come forward with undisputed affirmative evidence of truth or substantial truth in order to demonstrate that plaintiff's lawsuit is meritless for the purposes of dismissal under the CPA).

The Illinois Integrity Fund's Anti-SLAPP Motion Under The CPA

The Illinois Integrity Fund moved to dismiss Brettman and Schuster's lawsuit pursuant to the CPA on the grounds that it was (1) filed in response to the Illinois Integrity Fund's protected political speech (2) meritless and (3) retaliatory. To demonstrate that Brettman's claims were meritless, the Illinois Integrity Fund undertook an investigation to obtain a copy of Brettman's 45 year old grand jury testimony transcript. Based on existing court records, it became clear that a copy of the transcript had been filed in connection with an appeal of post-conviction proceedings involving another Legion of Justice member Thomas Stewart in the late 1970s. The appellate court records from the era no longer existed, and the Cook County prosecutor's office could not track down the original transcript. However, the Illinois Integrity Fund successfully located a copy of Brettman's transcript in the archived papers belonging to the attorney who represented Thomas Stewart in his post-conviction appeal. The Illinois Integrity Fund also obtained an affidavit from the former prosecutor who lead the Cook County grand jury investigation into the Red Squad back in 1975, questioned Brettman during the grand jury proceedings and vividly remembered Brettman's testimony reflected in the transcript copy. The former prosecutor affirmed that Brettman made the following admissions under oath in 1975: (1) Brettman belonged to the Legion of Justice in the late 1960s and early 1970s (2) the Legion of Justice used surveillance and forceable entry to gather information on suspected communist "front" organizations (3) Brettman participated in two break-ins at a socialist organization; (3) Brettman was involved in the planning of a similar break-in of another target organization; (4) Brettman had been with Legion of Justice member Joseph Powers on the night that Powers destroyed a church in Elgin, Illinois using explosives and (5) Brettman was either involved in or planned additional forceable entries and the other activities that the Legion of Justice participated in and for which it took credit in the newspapers up to 1971.

In response, Brettman argued that, as to the grand jury transcript copy filed by the Illinois Integrity Fund, “there have been all sorts of speculation including, stolen, leaked, plagiarized [sic], fraudulent, illegitimate, fabricated, etc., depending on one’s point of view.” Brettman’s lawyer stated that the transcript was a “bogus version of grand jury proceedings” and Brettman himself swore under oath that the transcript was not a true and accurate copy of his testimony. In the wake of the Illinois Integrity Fund’s filing, Brettman told a local newspaper that the transcript was “fabricated” by a “group of unknown socialists.”

As for Schuster’s claim, the Illinois Integrity Fund submitted police records demonstrating that the IP address from which the “weasel termination” comment originated was traced to Ersel and Edward Schuster’s home. In response, Schuster argued that the comment may have been a threat, but certainly was not a death threat.

The Ruling

On August 21, 2019, Judge Kevin Busch—sitting by designation from neighboring Kane County pursuant to the request of the chief judge of McHenry County—granted the Illinois Integrity Fund’s CPA motion as to all claims asserted in Brettman and Schuster’s lawsuit. The court agreed that the Illinois Integrity Fund’s publication of campaign flyers was in furtherance of their First Amendment right to participate in government. While Brettman generally disputed the truth and accuracy of the submitted grand jury transcript, the court noted that Brettman failed to rebut the former prosecutor’s affidavit demonstrating the truth of the flyer statements. The court also noted that Brettman’s denials were “careful” and did not challenge the accuracy of the specific statements referenced in the flyers.

The court ruled that the flyer statements relating to Brettman were true, and therefore his claims were meritless. In addition, the court rejected Schuster’s argument that the “weasel termination” comment was not a death threat. Judge Busch acknowledged that the comment may not have been serious—allowing for the possibility that it was meant as a joke made in very poor taste. Regardless, the court concluded that the only reasonable interpretation of the comment was as a threat—in seriousness or in jest—to Jack Franks’ life.

The court ruled that the flyer statements relating to Shuster were also true, and therefore her claims were meritless as well. Finally, the court emphasized that the coordinated timing of four separate defamation lawsuits by each of the “Musketeers” all arising from similar political flyers published by the Illinois Integrity Fund weighed in favor of finding retaliatory intent. More importantly, the court concluded that the plaintiffs’ prayer for “[e]xemplary damages in an amount to be determined by the trier of fact that will *serve to punish Defendants and deter Defendants from similar conduct in the future*” amounted to an admission of retaliatory intent. The Illinois Integrity Fund was granted leave to file a petition for attorney’s fees and costs pursuant to the CPA’s mandatory fee-shifting provision.

The Illinois Integrity Fund was represented by Natalie A. Harris of Baron Harris Healey, Chicago, IL; Orville Brettman and Ersel Schuster were represented by James F. Bishop, Attorney at Law of Crystal Lake, IL.