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FROM: COURT OF APPEALS, District IV

DATE: November 3, 2008

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RE: 2008AP2703-LV, Radcliffe for Assembly v. Coalition for
America's Families (L.C. # 2008CV204)



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DISTRICT IV

November 3, 2008

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You are hereby notified that the Court has entered the following order:

2008AP2703-LV Radcliffe for Assembly v. Coalition for America's Families
 (L.C. # 2008CV204)

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

The Coalition for America's Families has filed a petition for leave to appeal a temporary restraining order that enjoins the Coalition from distributing a certain political advertisement about Mark Radcliffe, a candidate for the State Assembly. The Coalition further moves for

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temporary relief from this court, lifting the trial court's temporary injunction. *See* WIS. STAT. RULE 809.52 (2005-06).¹

The trial court issued an *ex parte* temporary restraining order on Saturday in response to a lawsuit filed by Radcliffe's campaign organization, Radcliffe for Assembly, and refused to lift it after hearing arguments from both parties on Sunday. The campaign alleged that the Coalition's advertisement "falsely refers to the plaintiff as supporting plans to double taxes, supporting a 15 billion dollar health care plan that creates new taxes, and refers to the Wall Street Journal as reporting that the plaintiff's plan represents a \$510.00 per month increase in taxes for every Wisconsin Worker." The campaign sought injunctive relief based upon both general defamation law and WIS. STAT. § 12.05. The trial court concluded — and we agree — that § 12.05 is inapplicable here, because it provides criminal penalties for violating campaign laws, and does not appear to provide authority for a noncriminal action. *See* WIS. STAT. § 12.60.

With respect to general defamation law, the Coalition contends that the injunction represents a constitutionally impermissible prior restraint on political speech. It notes that there has not yet been any final adjudication as to whether the ad contains a false or defamatory statement, and further, that the Radcliffe for Assembly campaign lacks standing to assert a defamation claim in the first instance.

The trial court issued its injunction after concluding that "there is a reasonable probability given the facts and circumstances that Mr. Radcliffe may prevail in his defamation action," and that he would not have an adequate remedy if he lost the election based upon a false

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

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advertisement. Based on our review of the cases cited in the petitioner's brief and the arguments and authorities presented to the trial court, that does not appear to be an adequate basis for prior restraint in the context of a defamation claim. In short, we are aware of no caselaw which permits prior restraint of speech before an adjudication on the merits of the defamatory nature of the statement at issue.

Therefore,

IT IS ORDERED that the motion for temporary ex parte relief is granted, and the trial court's temporary restraining order — which was issued before any evidentiary hearing on the truth of the matter asserted was held — is hereby stayed. However, the underlying petition for leave to appeal and vacate the restraining order will not be decided until Radcliff for Assembly has had an opportunity to respond and provide this court with any countervailing authorities.

David R. Schanker
Clerk of Court of Appeals