STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**

KHARY PENEBAKER,
MARY ARNOLD, and
BONNIE JOSEPH,

Plaintiffs,

v.

Case No: 2022-CV-1178

ANDREW HITT, ROBERT F. SPINDELL, JR.,
BILL FEEHAN, KELLY RUH,
CAROL BRUNNER, EDWARD SCOTT GRABINS,
KATHY KIERNAN, DARRYL CARLSON,
PAM TRAVIS, MARY BUESTRIN,
JAMES R. TROUPIS, and
KENNETH CHESEBRO,

Defendants,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenors.

NOTICE OF ENTRY OF FINAL ORDER

Please take notice that pursuant to Wis. Stat. §§ 806.06(5) and 808.04(1), the attached final order dismissing the claims of Bonnie Joseph was duly filed and entered in the above-captioned action on September 5, 2023, by the Honorable Frank D. Remington. A copy of the order is attached hereto and incorporated by reference.

Dated at Waukesha, Wisconsin this 5th day of September, 2023.

CRAMER MULTHAUF LLP
Attorneys for Defendant, James R. Troupis

BY: *Electronically signed by Matthew M. Fernholz*
Matthew M. Fernholz, SBN: 1065765
Domonic A. Burke, SBN: 1104690

CRAMER MULTHAUF LLP
1601 East Racine Avenue • Suite 200
P.O. Box 558
Waukesha, WI 53187-0558
(262) 542-4278
mmf@cmlawgroup.com
dab@cmlawgroup.com

GRAVES GARRETT LLC
Attorneys for Defendant, James R. Troupis

Edward D. Greim, *Pro hac vice*
Cody S. Hagan, *Pro hac vice*

GRAVES GARRETT LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
T: (816) 256-3181
EDGreim@gravesgarrett.com
CHagan@gravesgarrett.com

FILED
09-05-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV001178

BY THE COURT:

DATE SIGNED: September 5, 2023

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

KHARY PENEBAKER, et al.,

Plaintiffs,

v. Case No. 22CV1178

ANDREW HITT, et al.,

Defendants.

DECISION AND ORDER
GRANTING IN PART JAMES TROUPIS' MOTION FOR RECONSIDERATION

INTRODUCTION

This is an action seeking damages for an alleged conspiracy to usurp the office of presidential elector. On August 10, 2023, I issued a written order granting, in part, defendant James Troupis' motion to dismiss the complaint. Decision and Order (Aug. 10, 2023), dkt. 226 ("the Dismissal Order"). Troupis now seeks reconsideration of the Dismissal Order for two reasons: first, he says the Dismissal Order erroneously referred to plaintiff Bonnie Joseph as an elector, and second, he says the Dismissal Order erroneously concluded Troupis did not dispute an alleged reputational harm.

I grant Troupis' motion for reconsideration, in part. The Amended Complaint does not allege Bonnie Joseph was a presidential elector, so it was a manifest error for the Dismissal Order to identify her as one. Because Joseph does not allege any injury similar to the elector-plaintiffs, or any other individual injury, her claims must be dismissed. However, Troupis fails to demonstrate any other error in the Dismissal Order, so the remaining part of his motion is denied.

I. LEGAL STANDARD

The Wisconsin Supreme Court explains the standard for reconsideration as follows:

> [A] circuit court possesses inherent discretion to entertain motions to reconsider "nonfinal" pre-trial rulings. To succeed, a reconsideration movant must either present newly discovered evidence or establish a manifest error of law or fact.
>
> Newly discovered evidence is not new evidence that could have been [submitted earlier]. Similarly, a "manifest error" must be more than disappointment or umbrage with the ruling; it requires a heightened showing of wholesale disregard, misapplication, or failure to recognize controlling precedent. Simply stated, a motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials that could have been submitted earlier after the court has decided a motion ….

Bauer v. Wisconsin Energy Corp., 2022 WI 11, ¶¶13-14, 400 Wis. 2d 592, 970 N.W.2d 243 (citations, some quotation marks, and original alterations omitted).

II. DISCUSSION

Troupis says the Dismissal Order contains two manifest errors that warrant reconsideration. First, he argues the Dismissal Order erroneously labelled plaintiff Bonnie Joseph as an elector, and as a result, the Dismissal Order erroneously denied Troupis' motion to dismiss Joseph's claims. Second, Troupis argues the Dismissal Order erroneously ignored or misconstrued his argument for reputational harm. I address these two alleged manifest errors, in turn.

A. The Dismissal Order erroneously labelled Bonnie Joseph an elector.

1. Joseph does not allege she was an elector.

The Dismissal Order described plaintiff Bonnie Joseph as one of Wisconsin's presidential electors. Dismissal Order, dkt. 226:1. However, the complaint actually alleges Joseph is a taxpayer and voter, but not one of Wisconsin's presidential electors. Amend. Compl., ¶3. Troupis seeks reconsideration of this factual error. I agree it was error to label Joseph as an elector when the complaint alleges otherwise. Accordingly, I grant Troupis' motion for reconsideration as to Joseph's identity.

2. Because Joseph was not an elector, the Dismissal Order erroneously declined to address Joseph's standing.

Troupis next argues, if Joseph was not an elector, it was a manifest error of law to deny Troupis' motion to dismiss her claims. Troupis first points to the part of the Dismissal Order that rejected the plaintiffs' taxpayer damages theory. Dismissal Order, dkt. 226:23 ("Penebaker fails to allege any taxpayer damages as a result of the alleged conspiracy."). Troupis then points to the part of the Dismissal Order that found reputational damages, but only for "Penebaker," an abbreviation the Dismissal Order intended to represent the elector-plaintiffs Khary Penebaker and Mary Arnold. *Id.* at 25. In this way, the Dismissal Order did not address how Joseph had alleged any injury. Troupis now asks me to "determine whether [Joseph] has standing as a voter and explain what that standing might entitle Joseph to seek." Troupis Reconsideration Mot., dkt. 230:5.

The Dismissal Order declined "to address [voter standing] … unless necessary." Dismissal Order, dkt. 226:21-22. Having now clarified that Joseph was not an elector, I agree with Troupis that the Dismissal Order provides no sufficient explanation of Joseph's standing. Accordingly, I next address whether Joseph has standing to seek civil remedies for an alleged conspiracy to deprive her of the right to vote or for other generalized "harms to democracy."

3. Nobody, including Joseph, has generalized standing as a voter.

In 2021, a Wisconsin voter named Richard Teigen filed a lawsuit against the Wisconsin Elections Commission. Complaint, *Teigen v. WEC,* No. 2021CV958, 2021 WL 11431572 (Waukesha Cnty. Cir. Ct., June 28, 2021). According to Teigen's complaint, WEC told municipal clerks to accept absentee ballots delivered by the voter's family members, despite seemingly clear statutory text that required the voter deliver the ballot himself or herself. *Id.* ¶8. Teigen said this caused harm because it "diminishe[d] the value of the Plaintiffs' votes[,]" and also because "Plaintiffs, as voters, are entitled to have the elections in which they participate administered properly under the law." *Id.* ¶¶53-54.

Three justices on the Wisconsin Supreme Court said Teigen (and all other voters) had standing because they "have suffered an injury in fact to their right to vote." *Teigen v. WEC,* 2022 WI 64, ¶21, 403 Wis. 2d 607, 976 N.W.2d 519 (R.G. Bradley, J., first op.). A majority of justices disagreed. One justice said that Teigen had standing under a different statute that the one Teigen cited (which no one has argued applies here), but not because of any right to vote. *Id.* ¶167 (Hagedorn, J., op). Three other justices said that the right to vote gave neither Teigen nor any other voter standing; in their words:

> Taken to its logical conclusion, the majority/lead opinion indicates that any registered voter would seemingly have standing to challenge any election law. The impact of such a broad conception of voter standing is breathtaking and especially acute at a time of increasing, unfounded challenges to election results and election administrators.

Id. ¶214 (A.W. Bradley, J., op.) (emphasis added, note omitted). In this way, a majority of the Wisconsin Supreme Court held all voters do not have standing as voters.[1]

[1] Troupis repeatedly cites to an unrelated decision of this Court also interpreting *Teigen. See* Decision and Order, *Jane Doe v. MMSD,* No. 22-cv-454 (Dane Cnty. Cir. Ct. Nov. 23, 2022). As some of Troupis' and Joseph's attorneys already know, that decision determined part of Justice Hagedorn's solo concurrence was precedential according to

Turning to this case, Joseph says she has standing because she, the other plaintiffs, and presumably every other adult citizen in Wisconsin, "suffered harm in their capacity as voters." Joseph MTD Resp. Br., dkt. 207:14. Accepting this allegation as true, this harm does not give Joseph standing because "[c]ourts are not the proper forum to air generalized grievances …." *Teigen*, 2022 WI 64, ¶213 (A.W. Bradley, J., op.); *Gill v. Whitford,* 585 U.S. __, 138 S. Ct. 1916, 1929 (2018) (same). As both the Wisconsin and United States Supreme Courts have explained, plaintiffs claiming voter standing must "allege facts showing disadvantage to themselves as individuals":

> We have long recognized that a person's right to vote is individual and personal in nature. Thus, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage. … And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact.

Gill, 138 S. Ct. at 1929-30 (internal citations, quotation marks, and alterations omitted); *see Teigen,* 2022 WI 64, ¶167 (Hagedorn, J., op.) and ¶213 (A.W. Bradley, J., op.).

Joseph does not allege this kind of individual harm. On the contrary, she argues that "Defendants tried to nullify the ballots cast by the entire Wisconsin electorate." Joseph MTD Resp. Br., dkt. 207:14 (emphasis added). If there is some other reason why Joseph has standing, she does not tell us in her complaint.

Wisconsin's framework for interpreting fragmented appellate opinions. *Id.* at 18-20 (citing *State v. Deadwiller,* 2013 WI 75, ¶30, 350 Wis. 2d 138, 834 N.W.2d 362 (itself citing *Marks v. United States,* 430 U.S. 188, 193 (1977)). The Wisconsin Supreme Court sensibly applies these rules to its own decisions. *Deadwiller,* 2013 WI 75, ¶53 (Abrahamson, J., concurring) ("This court has followed *Marks* … in applying plurality decisions of this court.") (collecting cases)).

Further examination of *Marks* is not useful here because, although they did not join together in a single writing, it is apparent that a four-justice majority in *Teigen* rejected Joseph's theory of voter standing. Put another way, this case does not require searching for the narrowest concurrence among the *Teigen* opinions because four justices *agreed on the same rationale:* our constitutional right to vote does not automatically give Wisconsin voters standing to sue in Wisconsin courts.

In sum, "standing is not dispensed in gross." *Gill,* 138 S. Ct. at 1934 (quoted source omitted). Unlike the other plaintiffs, Joseph fails to allege facts which show any individual harm, so unlike the other plaintiffs, she has no standing.

4. Joseph does not have standing to abate a public nuisance as the State's relator.

Joseph offers one final alternative basis for her standing. Absent argument or citation to any authority, her attorney says she must have "standing as a relator on the public nuisance claim made on behalf of the state …." Scott Thompson Letter to the Court (Aug. 31, 2023), dkt. 231.

It is true that a legislature "can enact a qui tam statute[2] to enable a private party to invoke the standing of the government …." *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.,* 985 F.2d 1148, 1153-54 (2nd Cir. 1993) (footnote added); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 (1992) (qui tam statutes give a "cash bounty for the victorious plaintiff")*; e.g., U.S. ex rel. Marcus v. Hess,* 317 U.S. 537, 541-42 (1943). However, Joseph does not explain why Wisconsin's public nuisance statute is the sort of legislative pronouncement that confers standing to a relator who suffered no harm of her own. In any event, courts "will not abandon our neutrality to develop arguments." *Indus. Risk Insurers v. American Eng'g Testing, Inc.,* 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. I decline to search, on my own, for some reason why Wisconsin might have a qui tam public nuisance cause of action, or any other reason why Joseph might have standing to seek to abate a public nuisance.

---

[2] *Qui tam pro domino rege quam pro se ipso in hac parte sequitur* translates as "who as well for the king as for himself sues in this matter."

The abbreviated "qui tam" refers to: "(18c) An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Black's Law Dictionary* (11th ed. 2019).

B. Troupis did not, and still does not, dispute that the complaint alleges a reputational harm, so it was not a manifest error to say so.

Troupis next argues that the Dismissal Order erred because it stated "Troupis does not dispute that the complaint alleges a reputational harm." Dismissal Order, dkt. 226:24. To show this was error, Troupis first directs me to a part of his brief that begin this way: "Wisconsin courts distinguish between cognizable and non-cognizable reputational harm." Troupis MTD Br., dkt. 191:20. Troupis' original brief then proceeded to contrast why some reputational harms are cognizable under Wisconsin law, for example, harm to a person's character, but why other reputational harms are not cognizable under Wisconsin law, for example, the kind of harm Troupis thinks the complaint alleges *Id.* at 20-21. In other words, Troupis' reconsideration motion relies on a section of his brief that never disputed the allegation of a reputational harm—it disputed only how to characterize that reputational harm and whether, based on Troupis' characterization, Wisconsin law could provide a remedy. Troupis' reply does not refine this argument any further, except to accuse the plaintiffs of having conceded the point. Troupis MTD Reply Br., dkt. 212:6 n. 8.

None of this demonstrates a manifest error because I do not—and a court cannot on a motion to dismiss—characterize the factual allegations about reputational harm so freely. As the Dismissal Order explained, a circuit court must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. The Dismissal Order rationally explained why one reasonable inference from the complaint was that the defendants harmed the elector-plaintiffs' reputations. To explain why this was so, I began with *Singer v. Singer,* 245 Wis. 191, 193, 14 N.W. 43 (1944), which recognized a false accusation of wife's infidelity as a reputational

harm. Dismissal Order, dkt. 226:24. I then compared that harm to the Amended Complaint, which alleges a false accusation of electoral fraud. *Id.* at 25. Based on this comparison between the two false allegations—Singer's infidelity and Penebaker's fraud—it was reasonable to infer from the complaint that "the conspiracy caused damage to Penebaker's reputation." *Id.*

Maybe so concise an explanation will not satisfy Troupis. But I think a short explanation is the best response to a very long argument that begins with a very wrong premise. Here, Troupis went awry from the start by selectively interpreting well-pleaded factual allegations, plus the reasonable inferences therefrom, when examining the complaint. A court cannot do this. *Data Key,* 2014 WI 86, ¶19. In any event, the argument was ultimately unconvincing: after selectively interpreting the complaint, Troupis created a standard of reputational harm only for a "core character trait," Troupis MTD Br., dkt. 191:21, that no Wisconsin appellate court has ever put to ink (never mind that Troupis does not tell us which traits are "core" and which traits are not). He concluded by applying that standard to his own characterization of the complaint to say "status as an elector is not a core character trait and, therefore, cannot support a claim for reputational harm." *Id.* (footnote omitted).

To be sure, the complaint is no model of clarity. *See* Decision and Order (July 17, 2023), dkt. 218 (striking large parts of the complaint). But nobody has ever claimed a harm to their "status as an elector." I do not even know what means. Here, to summarize, is what the complaint alleges:

- The defendants conspired to impersonate Wisconsin's presidential electors.
- The conspiracy told the public (and the United States Senate) that ten defendant-conspirators were Wisconsin's "duly elected and qualified Electors." Amend. Compl. Ex. G., dkt. 107:99-100.
- This was false.
- Wisconsin can "duly elect and qualify" exactly ten electors. U.S. Const. art. II, § 1.

- You either are a duly elected and qualified presidential elector or you are not.

Put together, this means that a conspiracy that declares ten of its conspirators the "duly elected and qualified Electors," *necessarily declares* that any other person claiming to be an elector is either (a) lying or (b) so incompetent as to be genuinely mistaken, yet also supremely confident, in their qualification to perform a relatively narrow governmental function. That the alleged falsehood may have caused harm through negative implication does not soften the blow. *United States v. Felix-Jerez,* 667 F.2d 1297, 1303 (9th Cir. 1982) (noting the obvious prejudice from "the well known cliché question of 'When did you stop beating your wife?'").

Troupis' burden on a motion for reconsideration was to show that the Dismissal Order manifestly erred in its conclusion that the complaint pleaded facts, which if true, could show a reputational harm. He does not satisfy that burden. I therefore deny this part of his motion for reconsideration.

ORDER

For the reasons stated,

IT IS ORDERED that Troupis' motion for reconsideration is granted in part. The Court dismisses plaintiff Bonnie Joseph's claims for lack of standing. The motion is otherwise denied.

This is a final order for purpose of appeal.