

High court rejects lawsuit against state GOP

By KEVIN O'HANLON / Lincoln Journal Star | Posted: Thursday, April 28, 2011 12:30 pm

The Nebraska Supreme Court on Thursday rejected a lawsuit brought by a former legislative candidate who accused the Nebraska Republican Party of distributing false and misleading publications that helped lead to his defeat in 2008.

Rex Moats of Omaha, a Democrat, lost the District 39 seat to Beau McCoy of Omaha, a Republican. Legislative races are officially nonpartisan.

Before the election, the GOP sent out mailings questioning Moats' work with National Warranty Insurance Group, a Lincoln based vehicle-repair insurance company that failed in 2003.

The GOP also said Moats received a \$50,000 trust fund from National Warranty and misled creditors and the public, among other things. One of its mailings was posed as a letter from Moats while vacationing in the Cayman Islands. And one said this: "Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would. How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well."

In his lawsuit, Moats said he never received a trust fund and did not make false or misleading statements and that he made one trip to the Cayman Islands to work on the company's 2003 insolvency filing.

The lawsuit said the Republican mailings were "deliberate and unsubstantiated accusations intended to foment distrust or hatred against Mr. Moats."

Moats sought \$50,400 in lost salary for four years as a state legislator and additional compensation to cover the expense of campaign materials to refute Republican claims, lost earning capacity and emotional distress.

In Thursday's ruling, the court said in an unsigned opinion that the U.S. Supreme Court has pointed out the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on ... public officials."

"We have similarly observed that the 'First Amendment encourages robust political debate,' though we have also noted that its protections are not absolute," the ruling said. "It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public discourse."

"It is within this context that we review the defamatory nature of the statements made by the Republican Party. A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," the ruling said. "Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood. Courts make the determination in the first instance because a jury is 'unlikely' to be neutral with respect to the content of the speech,' posing 'a real danger of becoming an instrument for the suppression of ... 'vehement, caustic, and sometimes unpleasant' expression."

Regarding one of the mailings, the high court said "examining the totality of the circumstances, we note that this statement appeared in a political campaign brochure. It was written to persuade voters to vote against Moats through the use of both rhetoric and hyperbole -- namely that National Warranty was 'shady' and that Moats would choose it over Nebraska consumers."

The general tone of the publication suggested the Republican Party was not making assertions of fact, the court said, and that no reasonable reader would conclude otherwise.

"Given this context, we simply cannot find this statement to be reasonably susceptible of an interpretation which implies a false assertion of fact, but instead conclude that it constitutes an opinion protected by the First Amendment," the court said.

Moats' attorney, **David Domina**, said he was "respectfully disappointed at the Supreme Court's decision to hold that 'misleading statements' do not amount to the same thing as 'false statements.'"

"Does not a student who misleads a teacher, lie to the teacher?" **Domina** asked. "Does not a witness who misleads a State Patrol investigator lie to the investigator? Do not the parents of our state work hard in our homes to teach our children that misleading is lying?"

"And, does not a campaign that misleads voters, lie to them? After all, what is wrong with straight talk?"

"I think voters in Nebraska believe they are entitled to the protection of the law against both false and misleading campaign statements," he said. "It is hard to imagine that voters would think there is any difference. I don't."

State GOP Chairman Mark Fahleson hailed the ruling.

"This was nothing more than an attempt by Nebraska Democrats to force the Nebraska Republican Party to spend resources and time on a frivolous lawsuit rather than enacting the conservative principles for which we stand," he said.

Said **Domina**: "This opinion is no victory for Republican Party. It is a loss for every Nebraskan."

He said he planned to discuss a possible appeal to the U.S. Supreme Court with Moats.

In a partial dissent, Judge Lindsey Miller-Lerman said she agreed with Moats about two of the mailings that implied he lied in an affidavit.

"How did Rex Moats mislead creditors and the public?" one of the mailings said. "Rex Moats claimed in an affidavit that National Warranty was doing financially well."

Wrote Miller-Lerman: "Even though they were made in a political campaign, such accusations, if proved at trial to be false and made with malice, are not constitutionally protected under the First Amendment."

She said the same of the other mailing, which was made to appear as if it were a greeting cards from Moats.

"I reject the suggestion that (it) cannot be actionable because it was printed on an island-themed card and is therefore protected as parody or satire," she said. "I do not accept the argument that the statement that Moats made misleading statements in an affidavit is immunized simply by its appearance on fanciful stationery."