STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,
Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER;
MIKE PALECEK;
WRONGS WITHOUT WREMEDIES, LLC;
Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT FETZER'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendant Fetzer's motion for summary judgment is unsupported by admissible evidence that demonstrates the truth of his defamatory statements. His motion likewise fails to establish the absence of evidence that the defamatory statements were false. Defendant Fetzer's motion provides no admissible evidence that Mr. Pozner is a public figure or that Defendant Fetzer acted without actual malice. As such, the Court should deny Defendant Fetzer's Motion.

II. BACKGROUND

Plaintiff Leonard Pozner released a copy of his deceased son Noah's death certificate. Doc. #103 at ¶ 11. He told his "friend," Kelley Watt, that the document was available on Noah's memorial social media page. *Id.*; *see also* Doc. #100 (Watt Aff. at ¶¶14-15). On August 6, 2014, Defendant Fetzer published an article claiming that Noah Pozner's death certificate was fake. *See* Doc. #121 (Excerpts from Nobody Died at Sandy Hook) at page 60.

Defendant Fetzer's August 2014 article became Chapter 11 of the book NOBODY DIED AT SANDY HOOK. *Id*. That chapter asserts Noah Pozner's death certificate is fake because it is photoshopped, a claim that forms the basis of one of Plaintiff's allegations of defamation. *Id*. at Ex. M; see also Doc. 1 (Complaint) at ¶¶ 17-18. That statement was repeated, along with new, additional defamatory statements, in a second edition of the book in 2016. *Id*. at Ex. L. In August of 2018, Defendant Fetzer published a blog post that included yet another defamatory statement. *See* Doc. #122

at Ex. P.[1] Defendants' statements were each made in the context of a broader assertion that Mr. Pozner was part of an effort to deceive the public into believing his son, among others, had been killed at Sandy Hook Elementary School. *Id*.

III. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is only appropriate if there is "no genuine issue as to any material fact." Wis. Stat. § 802.08(2) (2013-14). The burden is on the moving party to show that there is an "absence of any factual dispute on a material matter." *Delmore v. Am. Family Mut. Ins. Co.*, 118 Wis. 2d 510, 512, 348 N.W.2d 151 (1984). The evidence must be viewed in the light most favorable to the non-moving party, and any doubts "must be resolved in favor of the nonmoving party." *Novell v. Migliaccio*, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. The moving party must "demonstrate[] a right to a judgment with such clarity as to leave no room for controversy." *Konneker v. Romano*, 2010 WI 65, ¶22, 326 Wis. 2d 268, 785 N.W.2d 432 (quoting *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980)).

[1] This blog post essentially repeats a statement found in Appendix D of the Book, on page 384-385, which states "He would eventually send me a copy of 'Noah's death certificate', which turned out to be a fabrication combining an authentic bottom half with a fake top half, which you can find here and in NOBODY DIED AT SANDY HOOK (2015), which *amazon.com* banned less than a month after its publication." (italics in original). *See* Doc. #136 at "Erratum 1" (page 384); Doc. #100 at page 36 (page 384).

IV. ARGUMENT

A. Defendant's Summary Judgment Is Not Supported By Admissible Evidence

Most of the "evidence" offered in support of Defendant's motion is not admissible. Defendant Fetzer's statement of proposed undisputed facts poses multiple problems, as referenced in Plaintiff's Response to Defendant Fetzer's Proposed Undisputed facts. Moreover, the vast majority of the evidence Defendant Fetzer relies on in his motion consists of inadmissible hearsay and unauthenticated documents which lack foundation and cannot be considered by the Court under the Wisconsin Rules of Evidence.

Defendant Fetzer submitted a document styled as a motion, and included his signature on a "Verification" page. On this Verification page, Defendant Fetzer swore and stated under oath that the factual statements made in the motion were true to the best of his "knowledge, information, and belief." A notary's signature and seal follows Defendant Fetzer's signature. Attached to the motion are five documents, Exhibits A-D, which Defendant Fetzer references in his motion. Also attached was the Affidavit of Kelley Watt, which includes three additional documents.

Most of the evidence submitted by Defendant Fetzer is inadmissible for multiple reasons. Defendant Fetzer does not establish that he has personal knowledge of the attested facts either in the body of the brief or in the verification statement. In many instances, the "facts" are actually opinions, conclusions of law or statements of ultimate fact. Nearly all of the evidence is some combination of hearsay,

references to unauthenticated documents, or references to documents that were not submitted with the motion.

Affidavits in support or in opposition to a motion for summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3). In order to be admissible in evidence, a document must be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Wis. Stat. § 909.02(4) & (12). A party submitting an affidavit in support for a motion for summary judgment "need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit," but must "make a prima facie showing that the evidence would be admissible at trial.'" *Bank of Am. NA v. Neis*, 2013 WI App 89, ¶ 22, 349 Wis. 2d 461, 475, 835 N.W.2d 527, 534. "If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial." *Id.* Defendant Fetzer's "affidavit," much of Ms. Watt's affidavit, and most of the documents attached thereto fail to meet basic Wisconsin evidentiary standards.

1. Fetzer's "Affidavit"

By submitting his verification to the body of his brief, Defendant Fetzer has, in effect, attempted to attest to the truth of every statement in his brief. Plaintiff's counsel has attempted to parse out these statements of ultimate fact and/or conclusions of law from factual statements that may be used as evidence and, after doing so, it is clear that Defendant Fetzer's motion is sorely lacking in evidentiary support.

In many instances, the admissibility of Defendant Fetzer's statements are of decreased significance because the factual assertions are not relevant to any claims or defenses in this case. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

In a few instances, the disconnect between Defendant Fetzer's assertion and the admissibility of evidence is important. For example, Defendants have never served a document request seeking production of the scan of his son's death certificate that Mr. Pozner uploaded to his social media page in 2014. Defendant Fetzer instead claims claims that his Exhibit B is a death certificate Kelley Watt found on Mr. Pozner's Google Plus memorial page in 2014 and that she thereafter provided to him.[2] *See* Fetzer's Statement of Undisputed Facts at 5-6. Defendant Fetzer cites the affidavit of Kelley Watt. *Id*. The affidavit of Kelley Watt does not say that she obtained the document attached as Exhibit B from Mr. Pozner. There is no evidence in the record to authenticate the document Defendant Fetzer attached as his Exhibit B as a copy of the electronic file that Mr. Pozner uploaded to his son's memorial page.

Under Wis. Stat. § 910.01, data stored on a computer is considered an "original" only if the output of that data is shown to reflect the data accurately. Given

[2] To the extent this is true, it is troubling that Defendant Fetzer did not produce the communication from Kelley Watt that contained the death certificate attached as Defendant Fetzer's Exhibit B in response to Plaintiff's document request No. 3, which requested communications with authors of the book that refer or relate to Noah Pozner, or No. 4, which requested communications with authors of the book that relate to Leonard Pozner.

the low resolution of Mr. Fetzer's Exhibit B, there is ample reason to find that Mr. Fetzer's Exhibit B is not an "original" under Wisconsin law.

For the same reason, it would be unfair to allow Mr. Fetzer to introduce Exhibit B as a duplicate under Wis. Stat. § 910.03—his Exhibit B appears to be of much lower quality than the original uploaded by Mr. Pozner in 2014. That is important because Mr. Fetzer's defamatory statements allege that the tone and shading on the death certificate itself evidences photoshopping, digital manipulation, or that the certificate is a combination of two separate documents. In this situation it would be unfair to admit a low-resolution copy into evidence in lieu of the original to support an argument that the defamatory statements were true. *See* Wis. Stat. § 910.03. Thus, Defendant Fetzer's assertion has no admissible factual support.

There are precious few factual statements in Defendant Fetzer's brief for which Defendant Fetzer has personal knowledge. An affiant must "have personal knowledge of the facts he is alleging." *Lathan v. Journal Co.*, 30 Wis. 2d 146, 156-157, 140 N.W.2d 417, 422 (1966). The statements that are supported by Defendant Fetzer's personal knowledge may be counted on one hand:

- "I had never even seen Exhibit A, much less addressed its authenticity in any forum." (p. 2)
- "Exhibit B was provided me by a person named Kelley Watt[.]" (p. 2)
- "I have made no statements whatsoever about Exhibit A, other than in the context of this suit[.]" (p. 3)
- ". . . I had never seen it [Exhibit A] until I was sued. I made statements only about Exhibit B[.]" (p. 12)

Plaintiff's counsel cannot find any other factual statement for which Defendant Fetzer would have had personal knowledge.

Defendant Fetzer has not provided the appropriate foundation for the documents he attaches to his motion. Defendant Fetzer merely attaches documents and does not attempt to provide "evidence sufficient to support a finding that the matter in question is what its proponent claims" under Wis. Stat. § 909.02(4) & (12).[3] As described above, these significant evidentiary deficiencies leave Defendant Fetzer's motion unsupported by almost any admissible evidence.

2. Ms. Watt's Affidavit

The facts contained in the Affidavit of Kelley Watt, attached to Defendant Fetzer's motion, do not fare much better. Watt's statements are full of hearsay and lack foundation. Moreover, the documents attached to Watt's affidavit are hearsay within hearsay and lack proper authentication and foundation.

Watt's statements, when read in context, are for the most part not relevant to the narrow scope of Plaintiff's defamation claim. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination

[3] Defendant Fetzer's Exhibits A and C appear to be roughly the same as the documents contained in Exhibits J and I, respectively, to the Corrected Affidavit of Jacob Zimmerman in Support of Plaintiff's Motion for Summary Judgment, (*see* Doc. # 133), except that Plaintiff's Exhibit I, the medical examiner's report, is a certified copy, whereas Defendant Fetzer's is not. Exhibit D appears to be an excerpt from the Connecticut State Police Report documenting its investigation of the Sandy Hook shooting. Assuming all of that to be correct, Plaintiff does not challenge the authenticity of these documents for purposes of this motion, though Plaintiff disputes Defendant's Fetzer's characterization of certain of those documents as described herein and in Plaintiff's Responses to Defendant Fetzer's Proposed Findings of Fact.

of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Many of the statements of which Watt appears to have personal knowledge relate to her alleged six-month friendship with Plaintiff. (Watt Aff. ¶¶ 9-15, 17-18.) None of these statements make it more or less likely that Defendants defamed Plaintiff, that the death certificate was fabricated, forged, or a fake, or that Plaintiff was a public figure. In other words, none of these statements relate to the existence of any fact that is of consequence to the determination of this action.

Several of the statements in Watt's affidavit, along with all of the attached documents, are inadmissible hearsay. An out of court statement offered for the truth of the matter asserted is inadmissible unless a hearsay exception applies. *See* Wis. Stat. § 908.01. Watt sets forth several out of court statements arguing that Sandy Hook never happened ostensibly in support Defendant Fetzer's overarching theory. (Watt Aff. ¶¶ 3-8 & Watt Exhibits 1-2.)

Defendant Fetzer attempted to correct the deficiencies with some of Ms. Watt's statements by providing documents attached to his Errata to Defendant's Motion for Summary Judgment, (Doc. #136), but Defendant Fetzer does not have personal knowledge of these documents—at most Kelley Watt does, as she testified in her Affidavit. There is no evidence to authenticate or provide a foundation for the documents themselves, and this still does not remedy the hearsay issues.

Several of the statements in Watt's affidavit referencing articles and documents lack proper foundation. Watt attaches three documents: (1) "Kelley Watt: Nobody Knows Who Cleaned Up the Blood -- No Blood to Clean Up?"; (2) "Is Noah's

older step-brother, Michael Vabner, Noah 'all grown up'? or is Noah simply Michael as a child?"; and (3) "Are Sandy Hook Skeptics Delusional with 'Twisted Minds'?". In addition to not being admissible for the truth of the out of court statements in these documents, *see* Wis. Stat. § 908.01(3), Watt has not presented any facts that the "evidence sufficient to support a finding that the matter in question is what its proponent claims" under Wis. Stat. § 909.02(4) & (12).

More importantly, Ms. Watt's speculation in those articles represents inadmissible opinion testimony for which she does not appear to be an expert. For example, she opines that a company cleaning up blood must provide chain-of-custody records from scene to disposal, but offers to evidence to show that she has any experience with Connecticut's laws or regulations regarding handling of bio-hazards.

Similarly, Ms. Watt opines in her Exhibit 2 that Noah Pozner is made up from photos of Michael Vabner, but offers no evidence that she is qualified to offer that opinion testimony. Moreover, the process she appears to have used, looking for resemblance between two people, is the same process that Wisconsin rejected more than a century ago, where the Wisconsin Supreme Court held that resemblance was "…too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury." *Hanawalt v. State*, 64 Wis. 84, 24 N.W. 489, 490 (1885).

The statement in paragraph 16 of Watt's affidavit about her expectations for how a grieving parent should act is inadmissible opinion testimony. Under Wis. Stat. § 907.01, lay witness opinion testimony is limited to an opinion that is: (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the

witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. There is no evidence Watt is an expert in behavioral psychology or any other field of expertise that would allow her to present opinions on the way a grieving parent would act.

B. Defendants Defamatory Statements Are Not True

None of Defendant Fetzer's "evidence" or arguments establish the truth of the defamatory statements. Fetzer's entire "truth" defense is predicated on a straw man argument—that the inquiry for truthfulness should focus on whether the death certificate was properly issued or whether the contents of the death certificate meet his expectations—instead of relating to the actual defamatory statements in the context in which Defendant Fetzer published those statements.

While the parties have used the terms "fake," "fabrication," and "forgery" as a convenient shorthand to describe Defendant's defamatory statements, Wisconsin law requires analysis of the truth or falsity of defamatory statements in the context in which they were made. *See Denny v. Mertz*, 106 Wis. 2d 636, 663, 318 N.W.2d 141, 154 (1982); *see also Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259, 262 (1966). It is error to parse out individual words from the defamatory statements and argue that those words, in isolation, are true. *See Anderson v. Hebert*, 2011 WI App 56, ¶ 20, 332 Wis. 2d 432, 444, 798 N.W.2d 275, 281. In *Hebert*, the court of appeals reversed a circuit court's grant of summary judgment because the truth of the statements was evaluated without considering the context in which the statements were made. *Id.*

Thus, the context of the defamatory language must be considered when evaluating the truth or falsity of each of Defendants' defamatory statements.

Defendant Fetzer's book did not say that Noah Pozner's birth certificate was merely imperfect from an administrative perspective, it instead claimed the certificate was "fake" because "the clear sections were photoshopped into the document," and "a fabrication, with the bottom half of a real death certificate and the top half of a fake" and that the death certificate, "with its inconsistent tones, fonts and clear digital manipulation, was clearly a forgery." *See* Doc. # 121 at Ex. M (excerpts from NOBODY DIED AT SANDY HOOK); Doc. # 122 at Ex. P (Fetzer's 2018 Blog Post). None of Defendant Fetzer's "evidence" establishes the truth of any of the alleged photoshopping or digital manipulation, much less that a fake document was combined with a real one, all as described in the context surrounding Defendants' various defamatory statements.

1. The Death Certificate Was Not Photoshopped, Digitally Manipulated, Or The Combination Of A Fake Half Of One Death Certificate And A Real Half Of Another

Testimony from the two people responsible for filling out Noah Pozner's death certificate conclusively establishes that the death certificate could not have been "photoshopped" or "digital[ly] manipulate[ed]" and likewise confirms that Noah Pozner's death certificate could not possibly be the result of combining the fake half of one certificate with the real half of another.

Dr. Carver's deposition establishes that he, as the Chief Medical Examiner who conducted Noah Pozner's post-mortem examination, was responsible for entering information in Noah Pozner's death certificate and also confirms that the information

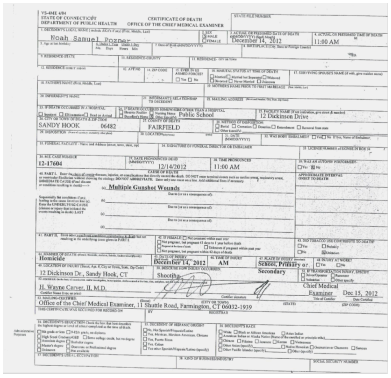
Dr. Carver added has not been modified. *See* Zimmerman Aff Ex. A (Carver Dep.) at 29:13-36:24. The funeral director, Dr. Green, submitted a sworn statement confirming that the information he typed in Noah Pozner's death certificate had not been modified in the copy depicted in Defendant Fetzer's book. Doc. #104 at ¶ 13. Thus, both of the individuals responsible for filling out the death certificate have testified that the information they entered has not been changed—meaning there is no possibility the document was photoshopped or digitally manipulated as Defendant Fetzer contends. In the context in which it was made, Defendants' statement was false.

Moreover, Defendant Fetzer's contention that the death certificate released by Mr. Pozner is the combination of a fake top half of one death certificate and a real bottom half of another is preposterous given that each of those two witnesses entered information in both the top and bottom of the certificate. The medical examiner's office entered information in boxes 3-4 and 23-27, all of which appear on the top half of the death certificate. *See* Zimmerman Aff Ex. A (Carver Dep.) at 36:17-21. Dr. Carver also entered information into boxes 36-53, and signed the death certificate, all of which is on the bottom half of the death certificate. *Id*. Similarly, Mr. Green, the funeral home director, entered information, including his signature, in boxes 5-22, and 28-35 of the death certificate, all of which are on the top half of the document. Doc. # 104 at ¶ 12. He also entered information into boxes 54-58 and typed in Noah Pozner's social security number, which are on the bottom half of the form. *Id*. There is no factual support for Defendant Fetzer's contention that Noah Pozner's death

certificate was fabricated by combining the top half of a fake document with the bottom half of a real one. In the context in which it was made, Defendants' statement was false.

The evidence rebutting Defendant Fetzer's truth defense is not limited to eyewitness testimony. The medical examiner's office made a copy of the incomplete death certificate before releasing the original certificate, along with Noah Pozner's remains, to the funeral home. *See* Zimmerman Aff Ex. A (Carver Dep.) at 40:2-9. Mr. Green's funeral home also made a copy of the incomplete death certificate before it was filed with the Newtown Clerk. *See* Zimmerman Aff Ex. B (Green Dep.) at 11:13-12:15. Those two photocopies of the incomplete death certificate corroborates their testimony and definitively establishes that the information entered by the medical examiner's office and Mr. Green's funeral home is the same as the information on the death certificate released by Leonard Pozner.

Even a cursory comparison of the pre-filing copies from the medical examiner's file and the funeral home's records demonstrates the impossibility of Defendant Fetzer's claim that the top half of a fake document was combined with the bottom half of a real document or that the document was photoshopped or digitally manipulated:



Medical Examiner's Copy[4]

Funeral Home Copy[5]

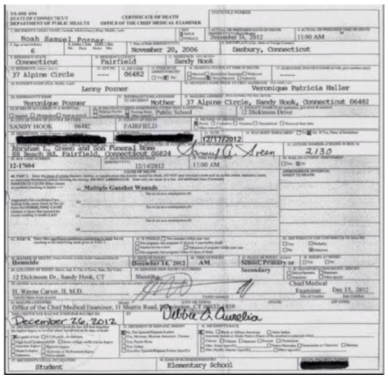


Image from Defendant's Book[6]

Neither Defendant Fetzer's "evidence," nor his arguments, support Defendants' contention that Noah Pozner's death certificate is "a fabrication, with the bottom half of a real death certificate and the top half of a fake," or that the document is fake because it was photoshopped or otherwise digitally manipulated. To the contrary, all of the evidence shows that Mr. Pozner received a certified copy of his son's death certificate from the Newtown Registrar and uploaded an accurate digital scan of that information to his son's memorial page. Defendants' defamatory statements are therefore false as a matter of law.

2. None Of Defendant Fetzer's Alleged Defects Are Evidence That Noah Pozner's Death Certificate Is A Fake, Fabricated, Or A Forgery.

Defendant has no evidence to suggest that Noah Pozner's death certificate is anything other than an authentic, duly-issued record of the State of Connecticut. The arguments in his motion are not directly relevant to the defamatory language in the

[4] *See* Zimmerman Aff. at at Ex. F.

[5] *See* Zimmerman Aff. at Ex. C (Excerpt from Green Dep. Ex. 1).

[6] See Doc. #121 at Ex. L.

context in which the statements were made. Even if they were true, Defendant Fetzer has no evidence that these alleged imperfections are evidence of a forgery, much less photoshopping, digital manipulation, or half of a fake death certificate pasted onto a real one.

Most of Defendant Fetzer's theories relate to what he considers errors in the death certificate. None of his criticisms are grounded in reality, but even if they were, there is no Connecticut law that says a death certificate that has errors is a fabrication or fake or forgery. To the contrary, Connecticut's vital records statutes expressly allow for corrections to vital records. *See* Conn. Gen. Stat. § 7-36(9); § 7-42. A statutory process for correcting errors necessarily implies an acceptance for the existence of imperfections without rendering documents void, much less forgeries. But as a practical matter, the question or errors is a red herring because none of Defendant Fetzer's claimed deficiencies are actually wrong.

The absence of a state file number is not relevant to the defamatory statements. Defendant Fetzer offered no evidence that the absence of a state file number on a vital record released by a town is abnormal, much less indicative of any impropriety such as forgery. Instead, as Dr. Carver explained, the absence of a state file number on the death certificate released by Mr. Pozner merely indicates that Mr. Pozner obtained his son's death certificate from the Newtown Clerk's Office and not the State Vital Records Office. *See* Zimmerman Aff. Ex. A (Carver Dep.) at 75:24-76:14 (explaining that death certificates issued from the state vital records office have state file numbers and those issued from town vital records offices do not).

There is no evidence that Defendant Fetzer's arguments related to the presumed time of death supports Defendant Fetzer's contention that Noah Pozner's death certificate is fake, forged, or fabricated. Indeed, Dr. Carver testified that 11:00 AM is the time Noah Pozner was officially pronounced dead by a competent emergency medical technician. *See* Zimmerman Aff. Ex. A (Carver Dep.) at 65:2-5, 77:8-79-2. The death certificate is not rendered invalid, much less proven to be "photoshopped" or "digitally manipulate[ed]" or the combination of part of a real death certificate and part of a fake one, merely because Defendant Fetzer disagrees with the time of death entered by the State of Connecticut's Chief Medical Examiner in the performance of his statutorily-defined duties.

Similarly, Defendant Fetzer's attempt to show that no paramedics entered the school such that Noah Pozner could be declared dead is (1) not supported by Defendant Fetzer's own evidence; and (2) belied by other portions of the official Connecticut State Police Report. Defendant Fetzer's "evidence" says only that the particular EMT crew being interviewed did not enter the school. It does not say that no EMT's entered the school. Not surprisingly, the official state police report includes police statements from paramedics that *did* enter the school. The official report includes a police interview report with Matthew Cassavechia, Director of Emergency Medical Services for Danbury Hospital.[7] *See* Zimmerman Aff. at Ex. D. According to

[7] The police report itself is a public record of the State of Connecticut and therefore is an exception to the hearsay rule. Wis. Stat. 908.03(8). The State of Connecticut has made the contents publicly available at https://cspsandyhookreport.ct.gov/. Moreover, the statements by Cassavechia, Reed, and Meehan, each of whom are outside of the subpoena power of Wisconsin courts, are not hearsay because those

Mr. Cassavechia, who was trained as a "tactical paramedic operator," he and two other paramedics, John Reed and Bernie Meehan, entered the building and conducted patient assessments. *Id*. Police statements by paramedics Reed and Meehan confirm that process. *Id*. Mr. Cassavechia's statement describes conducting "four separate patient assessments" on each victim to be certain that none of the victims could be resuscitated. *Id*. Defendant Fetzer's assumption that no paramedics entered the building is wrong, and is in no way evidence that Noah Pozner was not pronounced dead, much less evidence of photoshopping or digital manipulation.

Nor does Defendant Fetzer's attempt to manufacture a dispute based on the death certificate's indication that no autopsy was performed indicate any photoshopping or digital manipulation of any kind, much less that the death certificate is the combination of more than one document. As Dr. Carver testified, and as the medical examiner's report confirms, Noah Pozner had an external post-mortem examination, not an autopsy. *See* Zimmerman Aff. Ex. A (Carver Dep.) at 19:3-22:5; 53:12-25. Those are different procedures. *Id*. Dr. Carver testified that it was acceptable to do a post-mortem examination instead of an autopsy because, along with x-ray images, he used a needle and syringe to draw blood from both of Noah's chest cavities, which enabled him to confirm that Noah's chest was full of blood.[8] *Id*.

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statements fall within the exceptions set forth at Wis. Stat. § 908.03(4) and Wis. Stat. § 908.045(2).

[8] It was that blood, drawn from Noah Pozner's chest cavities and then stored on an FTA card in secure conditions at the medical examiner's office, that yielded the sample used by Dr. Baird to find a 99.9998% likelihood that the Medical Examiner's blood sample was that of Plaintiff Leonard Pozner's son. *See* Zimmerman Aff. Ex. A (Carver Dep.) at 49:2-11; 50:2-51:17; *see also* Doc. # 157.

Defendant Fetzer has no admissible evidence to support his contention that the existence of different typefaces is evidence that the death certificate was photoshopped or manipulated or in any other way faked. First, the statements in his brief are unsupported by admissible evidence. To the extent the Court considers Defendant Fetzer's brief itself as evidence, Defendant Fetzer has not provided any information by which the Court to determine that he has the requisite skill, experience, or training to determine that a document has been digitally manipulated or photoshopped or is the combination of a fake document with a real document. *See Mettler ex rel. Burnett v. Nellis*, 2005 WI App 73, ¶ 11, 280 Wis. 2d 753, 759–61, 695 N.W.2d 861, 864–65 (holding that expert affidavit must establish that affiant is arguably an expert).

To the extent Defendant Fetzer relies on statements from Chapter 11 of NOBODY DIED AT SANDY HOOK that were purportedly provided to him by someone named "Bob Sims," those statements are hearsay within hearsay.[9] Moreover, even if the statements were not hearsay, neither the book nor Defendant Fetzer's motion offers any description of Mr. Sims' credentials or methodology such that the Court could evaluate the admissibility of Mr. Sims' typewriting analysis or other opinions. In the end, the "analysis" offered by Defendant Fetzer as evidence is not admissible, and even if it were, it is not evidence that the document was photoshopped. It

[9] Nobody Died At Sandy Hook is hearsay for the proposition that the typeface is evidence that the document was photoshopped. Statements attributed to Mr. Sims are hearsay within hearsay for the truth of any proposition they assert. Neither appears to be admissible under any hearsay exception.

supports only the conclusion that the death certificate was filled out using more than one piece of equipment.

There is no dispute that Noah Pozner's death certificate was completed using more than one piece of equipment. As described above, some information on Noah Pozner's death certificate was entered by the Medical Examiner's Office. Other information was entered by Mr. Green's funeral home. That those two entities used different equipment to enter their respective information is not evidence of a forgery, much less of digital manipulation or photoshopping. Not only does the evidence require denial of Defendant Fetzer's request for judgment in his favor, it demonstrates that his defamatory statement that the document was photoshopped is false as a matter of law.

3. Defendant's Focus On Exhibit A is Misplaced

Plaintiff has never alleged that Defendant Fetzer made defamatory statements regarding the copy of Noah Pozner's death certificate that was attached to Plaintiff's Complaint. Plaintiff's allegations relate to Defendants' book and blog. *See* Doc. #1 at ¶¶ 17-18. Thus, there is no allegation in Plaintiff's Complaint for which Defendant Fetzer's requested summary judgment regarding Exhibit A would be appropriate.

C. <u>Defendant Did Not Establish A Conditional Constitutional Privilege</u>

Defendant Fetzer argues that Plaintiff's case should be dismissed because Plaintiff cannot establish that Defendant Fetzer acted with "actual malice." Defendant's argument puts the cart before the horse. "The term 'actual malice' arises when there has been an abuse of a constitutional conditional privilege…." *Calero v.*

Del Chem. Corp., 68 Wis. 2d 487, 500, 228 N.W.2d 737, 745 (1975). Defendant Fetzer bears the initial burden of proving the existence of a conditional privilege. *Id.* at 499, citing *Otten v. Schutt*, 15 Wis. 2d 497, 504, 113 N.W.2d 152, 156 (1962). Only after a defendant makes a *prima facie* showing that the conditional privilege applies does the burden shift to the plaintiff to establish abuse of that burden. *Id.* Defendant Fetzer failed to provide any evidence that could support a *prima facie* case that the constitutional conditional privilege applies.

Denny v. Mertz established a two-part test for determining whether a plaintiff is a limited purpose public figure, and therefore whether the constitutional conditional privilege exists. 106 Wis. 2d at 649-650. A court must first determine if there is a public controversy. *Id.* That analysis centers on whether the alleged controversy has "an impact outside of those immediately interested" in the dispute. *Id.* at 148 (finding that the controversy "did not have an impact outside of those immediately interested" in the dispute). If there is a public controversy, the Court must isolate the controversy and look at the nature of the plaintiff's involvement in the controversy to see whether the plaintiff has injected himself into the controversy so as to influence the resolution of the issues involved. *Id.* at 147.

Admissible evidence is required to make a *prima facie* showing that a constitutional conditional privilege applies. Even though Plaintiff's status as a public or private figure is a question that must be resolved by the Court, including disputed factual issues, *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 677, 543 N.W.2d 522, 530 (Ct. App. 1995), the Court's determination must be based on admissible evidence.

See, *e.g.*, *Denny*, 106 Wis. at 144. The summary judgment rules do not change merely because the Court is evaluating a constitutional conditional privilege in a defamation case. *See Calder v. Jones*, 465 U.S. 783, 791 (1984), citing *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9 (1979).

In *Denny*, the trial court found that the Plaintiff, Mr. Denny, was a limited purpose public figure through "affidavits, depositions and interrogatories submitted by [the defendants]…which the affidavits submitted by Denny failed to contradict" *Id*. at 144 (reversing trial court's determination that Denny was a public figure). In contrast, Defendant Fetzer offered no admissible evidence that would enable the Court to find the *existence* of a public controversy, much less identify that public controversy with enough particularity that the Court could evaluate Plaintiff's alleged role in any alleged public controversy. That alone is enough to deny Defendant Fetzer's motion for summary judgment on this issue.

1. Plaintiff Made No Public Statements That Could Transform Him into a Public Figure

Even if Defendant Fetzer had identified an alleged public controversy, he did not offer admissible evidence that Mr. Pozner became a public figure before Defendant Fetzer began defaming him. Evidence that a plaintiff is a public figure must pre-date the publication of defamatory material. *See Hutchinson*, 443 U.S. at 134–35. In *Hutchinson*, the U.S. Supreme Court reversed the limited purpose public figure finding by the United States District Court for the Western District of Wisconsin because the lower court's decision rested on plaintiff's actions *after* the defamation began. *Id.* at 134–35.

The article that became chapter 11 of NOBODY DIED AT SANDY HOOK was originally published by Defendant Fetzer in August of 2014. *See* Doc. 121 at Ex. L (excerpts from NOBODY DIED AT SANDY HOOK (2016)). Thus, the very latest that any public statements could be relevant to Mr. Pozner's status as a public figure is August 6, 2014.

The only "evidence" cited in Defendant Fetzer's brief is a statement in Plaintiff's Complaint that Plaintiff undertook "efforts to respond to and debunk false statements and denigration of the memory of his murdered son." Doc. #100 at 14. Defendant Fetzer offered no evidence that any of those efforts by Mr. Pozner relate to any particular alleged public controversy or that they took place prior to Defendant Fetzer's August 6, 2014 article that defamed Mr. Pozner. As the moving party, Defendant is not entitled to an inference that Mr. Pozner's efforts in that regard related to this (unspecified) public controversy. *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 40, 294 Wis. 2d 274, 303, 717 N.W.2d 781, 796 (all reasonable inferences are drawn in the light most favorable to the non-moving party).

2. Mr. Pozner Lacked Access To The Media

There is no evidence in the record that Mr. Pozner had "the regular and continuing access to the media that is one of the accouterments of having become a public figure" in the time leading up to the first known publication of Defendant Fetzer's defamatory material in August of 2014. *Hutchinson*, 443 U.S. at 136; *Denny*, 106 Wis. 2d 636, 650. The arguments made by Defendant Fetzer about Plaintiff's access to the media are unsupported by admissible evidence and, to the extent it is discernable, largely appear to relate to coverage that occurred after Defendant

published the defamatory statements. As the non-moving party, Plaintiff is entitled to reasonable inferences that the publicity described in Defendant's brief does not represent access to the media before Defendant Fetzer defamed Mr. Pozner. *Burbank*, 294 Wis. 2d at 303.

3. Defendant Fetzer Acted With Actual Malice

Plaintiff's Motion for Summary Judgment set forth examples of Defendants' actual malice in publishing the defamatory falsehoods. In addition, under Wisconsin law, Defendant Fetzer's publication was defamatory because his allegations that the death certificate was "photoshopped" or digitally manipulated or a fabrication "combining an authentic bottom half with a fake top half" were not rational interpretations of an ambiguous document. As such, it is appropriate to impute that Defendant Fetzer acted with reckless disregard for the truth or falsity of his statements.

It is clear that a court "cannot infer actual malice sufficient to raise a jury issue from the deliberate choice of a rational interpretation of ambiguous materials." *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 546, 563 N.W.2d 472, 482 (1997), *citing Time, Inc. v. Pape*, 401 U.S. 279, 290–92 (1971). But that restriction applies only where the materials are ambiguous and the interpretation is rational. In *Torgerson*, the Wisconsin Supreme Court reviewed material underlying a defamatory statement and found that it was ambiguous, and therefore refused to impute actual malice. 210 Wis. 2d at 547. Conducting the same kind of analysis, the United States Court of Appeals for the D.C. Circuit in *Nader v. de Toledano* held that it was acceptable to impute actual malice where a reporter published a falsehood that was

not a rational interpretation of an ambiguous source document. 408 A.2d 31, 53 (D.C. 1979).

There is no ambiguity in Noah Pozner's death certificate that would lend credence to Defendant Fetzer's accusations that the document was photoshopped or digitally manipulated. Likewise, there is no ambiguity in Noah Pozner's death certificate that would support Defendant Fetzer's allegation that the document was the result of combining the bottom half of a real death certificate with the top half of a fake one. In the absence of ambiguity, the *Torgerson*/*Pape* bar on imputing actual malice does not apply.

Moreover, none of Defendant Fetzer's defamatory statements are rational interpretations of Noah Pozner's death certificate. There is no evidence the death certificate is photoshopped or digitally manipulated or the combination of a fake documents and a real one, nor did Defendant Fetzer disclose any such evidence at the time he made the statement. Given the extreme improbability of the baseless assertions published by Defendant Fetzer, and the vast number of culpably bad actors his alleged conspiracy would require, it is appropriate to impute that Defendant Fetzer acted with reckless disregard for the truth or falsity of his statements. Alone or in addition to the indicia of recklessness described in Plaintiff's Motion, Plaintiff has raised more than enough evidence to demonstrate a disputed issue of material fact.

Finally, it is appropriate to render summary judgment in Plaintiff's favor on this issue as a result of Defendant Fetzer's refusal to turn over relevant

communications in spite of an order by this court to do so. Defendant Fetzer was ordered by the Court to produce communications relating to Plaintiff and to Noah Pozner's death certificate. Doc. #152. Defendant Fetzer has admitted that he has such hundreds of responsive communications in his possession. Doc. #147 (transcript of May 16, 2019 hearing) at 106:18-107-3. Only after he was order to produce the communications did Defendant Fetzer belatedly claim that some subset of those communications are from his "confidential sources." Doc. #156. But Defendant Fetzer's decision to selectively produce responsive emails, for example the email from Kelley Watt attached to Defendant Fetzer's "errata" (Doc. # 136), demonstrates that at least some of the communications are not from "confidential sources" and also demonstrates that the contents of the withheld documents are *highly* relevant to this case.

Moreover, Defendant Fetzer was ordered to supplement his Interrogatory No. 1. Doc. # 154. That interrogatory sought his description of the particular public controversy into which he contends Mr. Pozner injected himself, and all evidence in support of the existence of that public controversy and Mr. Pozner's role in it. Doc. #115. Defendant Fetzer has failed to abide by the Court's Order. *See* Zimmerman Aff. at ¶ 9.

Wisconsin Stat. § 804.12(2)(a) sets forth remedies for a party's failure to obey a discovery order. Among those remedies is that facts may be taken for the purpose of the action or the court may issue an order refusing to allow the disobedient party to support or oppose designated claims or defenses. *Id*. In this instance, given the

clear relevance of the responsive communications in Defendant Fetzer's possession, it is appropriate for the Court to either take as true Plaintiff's contention of recklessness or to bar Defendant from asserting his public figure defense.

V. CONCLUSION

For the reasons stated above, Plaintiff asks the Court to deny Defendant Fetzer's Motion for Summary Judgment and to find as a matter of law that Plaintiff is not a limited purpose public figure.

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