BY THE COURT
4/28/23
Date
Circuit Court Judge

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MARATHON COUNTY
CLERK OF CIRCUIT COURTS

STATE OF WISCONSIN CIRCUIT COURT MARATHON COUNTY
BRANCH 6

CORY TOMCZYK and
GENESIS VENTURES, INC. (d/b/a IROW),
Plaintiffs,
vs. Case No. 21-CV-625

WAUSAU PILOT AND REVIEW CORP.,
DAMAKANT JAYSHI, and
SHEREEN SIEWERT,
Defendants.

DECISION ON SUMMARY JUDGMENT

Cory Tomczyk and his business brought defamation claims against the Wausau Pilot and Review, its editor, and a writer, for publishing an article asserting that Tomczyk used a slur at an August 12, 2021, meeting of the Marathon County Board's Executive Committee in reference to another participant in public comment during debate on a proposed "Community for All" resolution. The defendants are seeking summary judgment dismissing the claims. For the reasons set forth below, the Court concludes that Tomczyk was a public figure and, because the plaintiffs cannot establish that the defendants acted with actual malice, their claims must be dismissed.

BACKGROUND

The summer of 2020 saw nationwide protests following the death of George Floyd in Minneapolis. In many communities, that led to the beginning of a civic dialogue about the importance of diversity and inclusivity. In Marathon County, one manifestation of that civic dialogue was the introduction of a county board resolution that came to be known as "A Community for All." However, the resolution faced significant opposition and sparked extended debate.

On August 12, 2021, the Executive Committee of the Marathon County Board held a meeting that included time for public comment. One of the attendees at that meeting was plaintiff, Cory Tomczyk, a local business owner who spoke in opposition to the resolution. Another attendee was Norah Brown, who was there with her 13-year-old son. The boy spoke in favor of the resolution. At one point, she heard a man behind her refer to her son as a "fag." She turned and looked at him, but did not say anything. She sent a message to a friend, who was also in attendance, Christine Salm. Ms. Brown's text said, in part, "The man behind me just referred to the speaker and then to my son as a f**. I am in tears and livid." When Salm saw the message, she responded, "I'm so sorry. His name is Corey [sic] Tomczyk he owns IROW." Sometime after the meeting, Norah Brown used the Wausau Pilot and Review's web portal to send a message about the incident to the publication.

The Wausau Pilot and Review subsequently published articles that referred to the incident. In a story published on August 21, 2021, the Wausau Pilot and Review asserted that "a local businessman" was heard using a slur, but it did not identify Tomczyk by name. Then, in a story published on August 28, 2021, the Wausau Pilot and Review did identify Tomczyk as the source of the slur: "Tomczyk, earlier this month, was widely overheard calling a 13-year-old boy who spoke in favor of the resolution a 'fag.'" Both articles were written by Damakant Jayshi and approved for publication by the Wausau Pilot and Review's editor, Shereen Siewert.

ANALYSIS

The defendants argued that they are entitled to summary judgment for three reasons: (1) the plaintiffs cannot establish "actual malice" by clear and convincing evidence, (2) the statement at issue was true, and (3) the statement was privileged as a true and fair report of a government proceeding. As a fallback position for their first argument, they also asserted that, even if Tomczyk were not a public figure, the plaintiffs would not be able to establish negligence, either.

Whether the plaintiffs' defamation claims require them to show actual malice or merely negligence depends upon whether Cory Tomczyk qualifies as a public figure. When the plaintiff is a public figure, "he or she must establish that the media defendant acted with actual malice in order to prevail in a defamation action." *Wiegel v. Capital Times Co.*, 145 Wis. 2d 71, 82, 426 N.W.2d 43 (Ct. App. 1988).

The rule requiring actual malice arises from the constitutional protections for freedom of speech and freedom of the press, "'two of our most jealously guarded and basic constitutional rights.'" *Id.* at 78 (quoting *State ex rel. Gall v. Wittig*, 42 Wis. 2d 595, 606, 167 N.W.2d 577 (1969)). These protections are vital to the health of our democracy, a recognition that "public discussion of public issues should be a fundamental principle of American government." *Id.* "Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 301–02 (1941) (Black, J., dissenting) (quoted in *Wiegel*, 145 Wis. 2d at 78).

"Because of the importance of public debate on issues of public significance, the actual malice standard is applied to press comment on the actions and activities of people involved in those issues." *Wiegel*, 145 Wis. 2d at 81. Such people are referred to as public figures — "those persons who, although not government officials, are nonetheless 'intimately involved in the resolution of important public questions.'" *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

Public figures can be grouped into two categories: general purpose or limited purpose. A general purpose public figure is treated as "a public figure for all purposes due to general fame or notoriety." *Id.* at 82. This category applies when the person can be considered a celebrity in at least the local area where the alleged defamation was published. *Id.*; *Lewis v. Coursolle Broadcasting of Wis., Inc.*, 127 Wis. 2d 105, 117, 377 N.W.2d 166 (1985). A limited purpose public figure is "not generally famous or notorious," but is noteworthy "because of his or her involvement in a particular public controversy." *Wiegel*, 145 Wis. 2d at 82. "Limited purpose public figures are required to prove actual malice only when their role in the controversy is 'more than trivial or tangential' and the defamation is 'germane to [their] participation in the controversy.'" *Biskupic v. Cicero*, 2008 WI App 117, ¶17, 313 Wis. 2d 225, 756 N.W.2d 649 (quoting *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 913–14, 447 N.W.2d 105 (Ct. App. 1989)).

The defendants initially argued that Tomczyk is a general purpose public figure, citing his service on the Mosinee School Board from 2006 to 2019, as vice-chair of the Republican Party of Marathon County from 2008 to 2015, as a board member for the Wausau Area Chamber of Commerce from August

2019 to August 2022, as the founder and owner of Industrial Recyclers of Wisconsin (IROW, i.e., co-plaintiff Genesis Ventures), as an organizer and speaker at protest demonstrations against COVID-19 restrictions, and as a member of the board of directors of Get Involved Wisconsin.[1] They subsequently argued that Tomczyk is at least a limited purpose public figure with respect to the debate over the "Community for All" resolution, and that his slur was relevant to that debate.

The Court agrees that Tomczyk was a public figure at least for the limited purpose of the "Community for All" debate. He was a local business owner who spoke out against the resolution at two public meetings on the issue, including the August 12 meeting at which he allegedly uttered the slur. Both his public comments and the alleged use of a slur toward another person making public comment were newsworthy, making his role in the controversy more than trivial or tangential.[2] And, given that the stated purpose of the "Community for All" resolution was to promote inclusivity, his alleged use of the slur would be germane to the resolution and to his participation in the controversy.

As a public figure, Tomczyk must be able to demonstrate that the defendants acted with actual malice in order for the plaintiffs' claims to survive, but he cannot. "Actual malice means either the defendant knew the statement was false, or made the statement with reckless disregard for whether it was true or false." *Biskupic*, 313 Wis. 2d 225, ¶27. Reckless disregard requires the plaintiff to ""show that the defendant[s] in fact entertained serious doubts

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[1] Tomczyk was subsequently elected to the Wisconsin legislature, but at the time of the alleged defamation, he was not a candidate for public office.

[2] The *Wiegel* decision offered examples of people who could involuntarily become limited purpose public figures. One example was "a magazine seller arrested by police" based on the content of literature he was distributing, who would be "'an involuntary public figure with respect to reports or comments about the arrest.'" *Wiegel*, 145 Wis. 2d at 84 (quoting Tribe, *American Constitutional Law* 880 (2d ed. 1988)). Another was "an air traffic controller, who wholly involuntarily and '[b]y sheer bad luck' was thrust into a central role in a controversy surrounding a plane crash" and thereby became "an 'involuntary public figure for the very limited purpose of discussion of the . . . crash." *Id.* at 86 (quoting *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 742–43 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986); alteration in original). Finally, Wiegel himself was an involuntary limited purpose public figure due to his ownership of large areas of farmland that were determined by the Department of Natural Resources to be contributing to erosion, which caused siltation and pollution problems in a nearby lake. *Id.* at 86–87.

as to the publication's truth.'" *Id.* (quoting *Erdmann v. SF Broadcasting of Green Bay, Inc.*, 229 Wis. 2d 156, 169–70, 599 N.W.2d 1 (Ct. App. 1999); alteration in original). But here, the plaintiffs can establish neither knowledge of falsity nor the existence of serious doubts on the part of the defendants.[3]

In their attempt to establish reckless disregard, the plaintiffs relied on the argument that neither Shereen Siewert nor Damakant Jayshi had spoken directly to Norah Brown prior to running the August 28 story identifying Tomczyk as the individual who uttered the slur. They argued that, in doing so, Siewert violated her own rule about having two sources to corroborate a quote. But the summary judgment record also contains proof that Siewert received a message from Norah Brown about the slur, that she followed up by reviewing social media posts, several of which identified Tomczyk, that she reviewed a video recording of the meeting to confirm where people had been seated, and she saw messages exchanged on the night of the meeting by Norah Brown and Christine Salm, which also identified Tomczyk. On this record, it is not possible to find that the defendants had serious doubts about the truth of the publication.

What the plaintiffs' arguments amount to is an indictment of the defendants' journalistic practices. However, "'[a] court's role is to interpret and apply the law, not to enforce standards of journalistic accuracy or ethics.'" *Biskupic*, 313 Wis. 2d 225, ¶37 (quoting *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 552, 563 N.W.2d 472 (1997); alteration added). It is not as though the defendants did absolutely nothing to confirm the accuracy of their reporting. And even if they had done nothing, "[f]ailure to investigate an allegation, standing alone, is not sufficient to show subjective doubts exist." *Id.* at ¶29.

Because the Court agrees that Tomczyk was a public figure and that he cannot establish actual malice, the plaintiffs' defamation claims must be dismissed. Consequently, the Court need not reach the defendants' other arguments.

CONCLUSION

Despite his arguments to the contrary, Cory Tomczyk was a public figure at the time of the alleged defamation at issue in this case, at least insofar as the

[3] The plaintiffs did not argue actual knowledge of falsity. They relied on the reckless disregard prong of the test.

"Community for All" resolution was concerned. In that context, the assertion that Tomczyk used a homophobic slur was germane to his stance on the resolution. As such, he (and his business) are required to establish that the defamatory statement alleged in this case was made with actual malice, but the summary judgment proof falls short of that mark. Accordingly, his claims must be dismissed.

THEREFORE, IT IS HEREBY ORDERED that the defendants' motion for summary judgment is granted. The plaintiffs' claims are dismissed in their entirety. This decision is final for purposes of appeal.[4]

[4] A judgment or order is final for purposes of appeal if it "disposes of the entire matter in litigation as to one or more parties[.]" Wis. Stat. §808.03(1). "[I]n order to 'dispose' of the matter under §808.03(1), a memorandum decision must contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter as to one or more parties." *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶39, 299 Wis. 2d 723, 728 N.W.2d 670. The recommended practice is for the Court to explicitly state when a judgment is final for purposes of appeal. *Id.* at ¶¶44–45; *Tyler v. The RiverBank*, 2007 WI 33, ¶¶25–26, 299 Wis. 2d 751, 728 N.W.2d 686.