STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs. Case No. 18-CV-3122

JAMES FETZER, et al.,

Defendant.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTIONS AFTER VERDICT

I. IMPOSING LIABILITY FOR DEFAMATION WITHOUT FAULT CONSTITUTES MANIFEST ERROR OF LAW.

The Court has authority to reconsider its summary judgment decision, including to correct a manifest error of law. A manifest error of law is not demonstrated by disappointment or umbrage, of course, but does include failure to recognize or apply controlling precedent. *Koepsell's Old Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis. 2d 397, 416-17, 665 N.W.2d 853 (Ct. App. 2004). Here, the Court did not consider or apply the Plaintiff's burden to prove liability with fault, i.e., negligence. *Denny v. Mertz*, 106 Wis. 2d 636, 653, 318 N.W.2d 141 (1982).

The obligation to prove negligence is an essential element of the Plaintiff's case. By contrast, an affirmative defense does not implicate proof of the elements of a plaintiff's claim. *See State v. Watkins*, 2002 WI 101, ¶ 40, 255 Wis. 2d 265, 647 N.W.2d 244. An affirmative defense does not negate any facts of the claim that a plaintiff must prove in order to prevail. *Id*. In the present case, negligence is an element of the Plaintiff's claim under the reasoning of *Denny*, rather than an affirmative defense.

The Defendant undeniably did not abandon his claim to be a journalist or member of the media. Plaintiff's counsel emphatically acknowledged this very fact at the Final Pretrial Conference:

> I don't think that he [Fetzer] dropped the argument or his position that he's a journalist. I mean, he's published any number of books. He has a blog. He, I think, would say if he were here today that he believes that it is his duty as a journalist to let everybody know about all these things that he believes he has investigated and uncovered. And so the 2511 [instruction] is we think the appropriate jury instruction here because while Mr. Pozner is a private figure, the Defendant, Mr. Fetzer, has repeatedly and over and over again taken the position that he is a media figure.

(Dkt. 284 at 24-25).

Plaintiff's own pleadings establish Professor Fetzer's media or journalist status. In his Complaint, Plaintiff alleges that Professor Fetzer is an editor of the book, "Nobody Died at Sandy Hook." (Dkt. 1 at ¶ 3.) Plaintiff also alleges that Professor Fetzer is a co-author of Chapter 11 in the referenced book. *Id*. Mr. Pozner also alleges that "Fetzer has claimed for years that the Sandy Hook shooting was a government conspiracy. Defendant Fetzer and Palecek released the original edition of 'Nobody Died at Sandy Hook' in October 2015." (*Id*. at ¶ 12.) Pozner further alleges that Defendants published a second edition of the book in 2016. (*Id. at* ¶ 16.) Finally, Mr. Pozner alleges that Professor Fetzer has made false claims against Plaintiff on one or more blog posts. (*Id*. at ¶ 18.) In addition to his Complaint, Plaintiff submitted evidence and argument supporting Professor Fetzer's media or journalist credentials. (*See* Dkt. 102 at 17-18 and 20-21; Dkt. 172 at 3.) Thus, Plaintiff's argument that Professor Fetzer failed to prove he is a journalist is belied by Plaintiff's own admissions and pleadings.

Plaintiff disingenuously implies that only someone working as a newspaper reporter or such, like Jimmy Olson, constitutes a journalist or media professional. Media defendants are not just those who "impartially disseminate information," or "issue unsolicited, disinterested and

neutral commentary as to matters of public interest." *Ortega Trujillo v. Banco Centro Del Ecuador*, 17 F. Supp. 2d 1334, 1338 (S.D. Fla. 1998). The term also applies to those "who editorialize as to matters of public interest without being commissioned to do so by their clients." *Id*. *See also, Tobinic v. Novella*, 2015 WL 1191 267 at *8 (S.D. Fla. 2015). The United States Supreme Court decision in *Gertz v. Welsh, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), itself refers broadly and frequently to publishers and broadcasters of allegedly defamatory material. More recently, in *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014), the Court of Appeals also rejected any distinction between institutional press and non-traditional sources, such as bloggers:

> Every other circuit to consider the issue has held that the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers. *See, e.g., Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*. ___ U.S. ___ 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) ("any effort to justify a media/non-media distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media'."); *Flamm v. American Association of University Women*, 201 F. 3d 144, 149 (2d Cir. 2000) (holding that "a distinction drawn according to whether the defendant is a member of the media or not is untenable"); *In Re IBP Confidential Business Documents Litigation*, 797 F.2d 632, 642, (8th Cir. 1986); *Garcia v. Board of Education*, 777 F. 2d 1403, 1410 (10th Cir. 1985); *Avins v. White*, 627 F. 2d 637, 649 (3d Cir. 1980); *Davis v. Schuchat*, 510 F. 2d 731, 734 n.3 (D.C. Cir. 1975).
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> We agree with our sister circuits. The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable. "With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Citizens United*, 558 U.S. at 352, 130 S. Ct. 876.

The present case undeniably involves a media defendant. In addition, Professor Fetzer's statements involve matters of public concern. Writings like those by Professor Fetzer do not involve a matter only of private concern. His statements were not made solely for his own

individual benefit. Professor Fetzer's statements address a matter of public concern, thereby further requiring as an element of the Plaintiff's claim that he prove Professor Fetzer acted negligently. That is missing from the Court's ruling in this case.

Summary judgment, therefore, was granted as a result of a manifest error of law. Summary judgment is only appropriate if a party is entitled to judgment in his favor as a matter of law. Here, the Plaintiff was not entitled to summary judgment on the issue of liability without proof of fault, i.e., negligence. The Plaintiff, in fact, did not even move for summary judgment on the issue of negligence. As a result, Professor Fetzer respectfully requests the Court to vacate its order granting partial summary judgment to the Plaintiff.

II. EVIDENCE OF CONTEMPT WAS PREJUDICIALLY ADMITTED.

The Plaintiff unpersuasively argues that the admission of evidence and argument regarding contempt was appropriately remedial. No explanation is offered as to how such evidence remedies the Court's prior finding of contempt. Nor does the Plaintiff explain how such evidence is relevant to the issue of defamation damages, the only issue before the jury. There is no such explanation. In fact, the evidence was admitted for the sole purpose of letting the jury "know the type of person" that is supposedly Professor Fetzer. That purpose, however, has nothing to do with the Plaintiff's claimed damages, and it is made all the more egregious by the fact that Plaintiff abandoned any claim for punitive damages before trial.

The contempt evidence was allowed for the purpose of inviting the jury to decide this case on the basis of highly prejudicial and inflammatory evidence. That is the very reason the evidence was admitted. It is also precisely why the admissibility of character evidence is so scrupulously guarded against by law and by logic. The prejudice here is apparent and reflected in the jury's verdict.

The Plaintiff's suggestion that Professor Fetzer waived any objection to such evidence and argument is misplaced. The Defendant did object to such evidence, both at the Final Pretrial and again before trial, but the Court ruled otherwise. The Plaintiff himself raised the issue on the first morning of trial to obtain an advance ruling *in limine*. In these circumstances, Professor Fetzer cannot seriously be said to have waived an objection raised and ruled upon by the Court.

III. PLAINTIFF'S INCITEMENT THEORY OF THE CASE IS NOT SUPPORTED BY APPLICABLE PRINCIPLES OF LAW OR FACT.

The Plaintiff vainly attempts to disavow his own theory of the case. The Plaintiff claims that he never tied his damage claim to actions of third parties purportedly incited by Professor Fetzer's writings. He did so. As his first witness, Plaintiff called Dr. Roy Lubit, who testified that Plaintiff suffered a second post-traumatic stress injury as a result of threats and harassment by third persons, who theoretically were inspired by Professor Fetzer. Dr. Lubit repeatedly emphasized threats and harassment by third persons as the basis for his PTSD diagnosis. Plaintiff's counsel then continued to emphasize throughout the trial, and in argument, that Dr. Lubit was the only expert speaking to the Plaintiff's alleged damages.

Lest any doubt remain as to his theory of the case, the Plaintiff followed Dr. Lubit with dramatic audio recordings of criminal threats by a woman named Lucy Richards. The Plaintiff also offered into evidence written transcriptions of these calls in order memorialize and imprint the memory. While never linked to Professor Fetzer, the Plaintiff based his damage claim on the intervening actions of such third persons. Incitement was the linchpin of Plaintiff's claims.

So be it, then the Plaintiff alternatively claims without force or effect that Professor Fetzer waived any objection to evidence of incitement. The Plaintiff's waiver argument misapprehends Professor Fetzer's concern. The issue is not one of admissibility, but whether the Plaintiff proved incitement, and if so, whether such attenuated liability violates public policy,

including that laid down by the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). The issue raised is not admissibility, but rather public policy, which is an issue appropriately addressed post-verdict. *Alverado v. Search*, 2003 WI 55, ¶ 18, 262 Wis. 2d 74, 662 N.W.2d 350. Now at that point, the trial court and appellate courts are provided with the fullest understanding of the circumstances and context necessary to thoughtfully consider the policy implications at issue in this case.

Public policy, undergirded by the First Amendment, weighs against a liberal policy of incitement liability. Casual liability for the uninvited actions of the readers of speech is a dangerous precedent. The Plaintiff dismissively rejects the debate as lofty, but not worthy of substantive response. Addressing head on the issue of liability for incitement by speech, however, is not haughty or pretentious, and the First Amendment is not merely hortatory or precatory. Free speech is not an abstract aspiration. On the contrary, the limits on liability for alleged incitement are fundamental to an informed and intellectually vibrant society.

By any standard, the Plaintiff's proof of indictment is insufficient. There is no evidence that Professor Fetzer intended to incite or cause lawless action. There is no evidence that Professor Fetzer's writings provoked imminent lawless action. There is no evidence that Professor Fetzer's research was likely to incite or produce lawless action. There is no evidence of foreseeability. There is not even any evidence that persons who committed lawless acts actually read Professor Fetzer's writings. Nor is there evidence that any person who committed lawless acts were impelled or motivated by Professor Fetzer's writings.

Imposing incitement liability based on the record in this case would be no different than holding besmirchers of Professor Fetzer liable for third-party threats. That Professor Fetzer has been reviled for his views is not a revelation. That Professor Fetzer is ridiculed for his writings

is not news. That third-party threats are made upon Professor Fetzer is not unheard. Nonetheless, more would be required to impose liability for such threats upon writers who supposedly set in motion lawless third persons. The disconnect between speech and incitement would be apparent – as in the present case.

Lacking sufficient evidence for vicarious incitement liability, the jury's verdict cannot stand. Such liability is the centerpiece of the Plaintiff's damage claim, made clear by Dr. Lubit. Otherwise, the Plaintiff's award could not at all be justified, particularly in the absence of any claim for punitive damages. Without incitement liability, the jury's verdict is patently excessive.

The Plaintiff presented no evidence of medical treatment. The Plaintiff presented no evidence of medical expense. The Plaintiff presented no evidence of wage loss. The Plaintiff presented no evidence that Professor Fetzer's words caused disabling effect. Without the claimed trauma of third-party intervenors, the verdict award is obscenely excessive. Remittitur, therefore, is also warranted in order to properly limit damages, measured without the influence of vicarious liability for the actions of third persons.

Dated: November 27, 2019

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