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 BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Plaintiff, by Plaintiff's undersigned counsel, will appear before the Dane County Circuit Court, the Honorable Frank Remington presiding, on June 17, 2019, or such other date and time to be determined by the Court, and move for an order for summary judgment.

FACTUAL BACKGROUND

I. INTRODUCTION

Defendant Fetzer has had a personal and public vendetta against Plaintiff Leonard Pozner for years. He has called Plaintiff "one of the world's great liars and frauds," a "hypocrite," a "con-artist", and "one of the world's most dishonorable men."[1] Defendant Fetzer admits to having conducted "hundreds" of interviews and published

[1] Email from J. Fetzer to L. Pozner dated February 7, 2016, attached as Ex. A to the Affidavit of Jacob Zimmerman in Support of Plaintiff's Motion for Summary Judgment (Zimmerman Aff.) and as Zimmerman Aff. Ex. B (Exhibit B to Fetzer Response to RFP No. 2).

"loads" of blogs about Sandy Hook, many of which impugn Plaintiff's integrity. (Zimmerman Aff. Ex. B (Fetzer Response to RFP No. 7).)

For years Mr. Fetzer and his associates directed their false and hurtful claims at Mr. Pozner, his family, and the fellow parents of children who died at Sandy Hook Elementary School. Mr. Pozner eventually sought to put those attacks to rest by releasing definitive proof that his son lived and that his son died, including a certified copy of Noah Pozner's death certificate.

In response, Defendants published written statements accusing Mr. Pozner of circulating a death certificate that was "fake," "fabricated," and a "forgery," all without taking even the most basic steps to evaluate the truth of their wild assertions. Defendants' statements were made in the context of improbable accusations that Mr. Pozner conspired to defraud his community and the world about the lives and deaths of children for his own financial gain. Plaintiff has long since reached the end of his willingness to tolerate Defendants' tortious harassment and abuse. Because the facts related to the defamation claims are not reasonably in dispute, Plaintiff respectfully requests the Court grant his motion for summary judgment.

II. BACKGROUND

A. Noah Pozner (November 20, 2006 – December 12, 2012)

Noah Samuel Pozner was born at 8:34 A.M. on November 20, 2006 at the Danbury Hospital in Danbury, CT. (*See* Zimmerman Aff. ¶4 & Ex. C;[2] *see also id*. Ex D at 27.[3]) The attending physician was Dr. Daniel Goldstein. (*Id*.)

Noah Pozner's mother, Veronique Pozner (now Veronique De La Rosa), delivered twins—one boy and one girl. (*Id*. (reflecting "multiple gestation" and delivery details regarding twin babies).) Until he was named, Noah Pozner was referred to in his medical records as "Baby A" or "Pozner, NBM A". (*Id*.) At birth, Noah Pozner weighed 7 lbs, 2 oz and he was 19 ¾" long. (*See* Zimmerman Aff. Ex D.) His blood type was B+. (*See id*. Ex. D at 10.)

Noah Pozner's medical records reflect the information that even a layperson would reasonably expect to accompany a childbirth, such as charts containing his temperature, pulse, lung sounds, skin color, and hearing test results. (*See id*. Ex. D at 11, 25.) His birth records likewise reflect the basic milestones that indicate he was a healthy baby, including passing urine and stool. (*Id*. Ex D at 32.)

Noah Pozner was discharged from the Danbury Hospital on November 24, 2006. (Zimmerman Aff. Ex. D at 2.) His discharge records include left and right

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[2] Birth and death certificates are defined as "vital records" by Connecticut law. *See* Conn. Gen. Stat. § 7-36(4). Certified birth certificates are prima facie evidence of the facts contained therein. Conn. Gen. Stat § 7-55; *see also In re Michaela Lee R.*, 756 A.2d 214, 225 (Conn. 2000).

[3] The contents of certified medical records are admissible as evidence under Wis. Stat. § 908.03(6m).

footprints. (*Id.* Ex. D at 37.) Medical bills evidencing Noah Pozner's birth were prepared by the hospital, sent to Blue Cross Blue Shield of Connecticut, and reflect Blue Cross's payment to the hospital. (*See id.* Ex. E.)

Noah's Connecticut birth certificate was registered on November 30, 2006. (*See* Zimmerman Aff. Ex. C.) Noah Pozner's live birth was certified by Dr. Daniel Goldstein. (*Id.*) Noah Pozner's mother is Veronique Pozner.[4] (*Id.*) Noah Pozner's father is Leonard Pozner. (Pozner Aff. ¶ 4; Zimmerman Aff. Ex. C.) Noah Pozner is Leonard Pozner's only son. (Pozner Aff. ¶ 4.)

On December 12, 2006, Noah Pozner was issued a social security number by the United States Social Security Administration. (*See* Zimmerman Aff. Ex. G.) He received a social security card. (Pozner Aff. ¶ 20 & Ex. C.)

Noah Pozner's childhood medical records likewise reflect a normal little boy's life. As a three year old, Noah Pozner received stitches at the Danbury Hospital emergency room for a cut on his forehead. (*See* Zimmerman Aff., Ex. D at 39.) Later that same year, Noah was back at the ER with a cough and fever and, following an x-ray, he was diagnosed with croup. (*Id.* 60-67, 75.)

Noah Pozner's records reflect immunizations from 2007 to 2011. (*See* Zimmerman Aff. Ex. H at 7.) He received a flu shot and was treated for head lice in September of 2011. (*Id.* at 15.) His well-child visit, in February of 2012, is the last pediatrician visit reflected in his certified pediatric medical records. (*Id.* at 37-38.)

[4] At the time Noah Pozner was born in 2006, Leonard Pozner and Veronique De La Rosa were married. *See* Pozner Aff. ¶ 21.

Noah Pozner died on December 14, 2012. (*See* Zimmerman Aff. Ex. I (certified copy of Medical Examiner's report).)[5] According to the Report of Investigation section of the official report issued by the State of Connecticut's Chief Medical Examiner, paramedics declared Noah Pozner dead at 12 Dickinson Drive in Sandy Hook, Connecticut at 11:00 AM on December 14, 2012.[6] (*Id.*)

Dr. H. Wayne Carver, II, the Chief Medical Examiner for the State of Connecticut, certified that he performed a post-mortem examination of Noah Pozner. (Zimmerman Aff. Ex. I.) That post-mortem examination was documented in a written report. (*Id.*) The certified report, M.E. Case No. 12-17604, describes the deceased as a preadolescent male, 47" tall and weighing 61 lbs. (*Id.*) The Medical Examiner's Office took a tissue sample of cardiac blood. (*Id.*) DNA analysis of that blood establishes a 99.99% probability that the body on the medical examiner's table was Plaintiff Leonard Pozner's only son, Noah Samuel Pozner. (*See* Affidavit of Dr. Alan Friedman ¶¶ 11-13 & Ex. C; *see also* Pozner Aff. ¶ 4.)

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[5] The Medical Examiner's report is an official record of a public office. *See* Conn. Gen Stat. § 19a-406(a). As a Connecticut state record, the report is entitled to full faith and credit. *See In re Paternity of B.W.S.*, 131 Wis. 2d 301, 308, 388 N.W.2d 615, 619 (1986) ("We also accord the records and judicial proceedings of other states '... such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.'") (internal citations omitted). In Connecticut, the report is admissible per Conn. Gen. Stat. §§ 19a-412, 1-210 ("Any certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by law to so act, shall be competent evidence in any court of this state of the facts contained therein."). Moreover, the report is also self-authenticating under Wis. Stat. § 909.02(1) and the contents thereof are admissible under Wis. Stat. § 908.03(8).

[6] Newtown is a town within Fairfield County, CT. See Conn. Gen. Stat. § 6-1. Sandy Hook is a community within Newtown, CT. (*See* Pozner Aff. ¶ 15.)

According to the Medical Examiner's report, Noah Pozner suffered multiple gunshot wounds, which ultimately caused his death. (Zimmerman Aff. Ex. I.) One went through Noah Pozner's chest, penetrating both lungs and his upper arm, another went through Noah's left hand, and one went through Noah's lower lip and jaw. (*Id.*)

Noah Pozner's death certificate is on a standard Connecticut form, VS-4ME. (*See* Zimmerman Aff. Ex. J*; see also* Affidavit of Samuel Green ("Green Aff.") ¶ 7.) The "ME" indicates that his death was investigated by the medical examiner. (Green Aff. ¶ 7.) Boxes 3, 4, 23-27, and 36-53 of Noah Pozner's death certificate were completed by the medical examiner, who certified that the information was correct. (*Id.* at ¶ 10; Zimmerman Aff. Ex. J.)

Noah Samuel Pozner was pronounced dead at 11:00 AM on December 14, 2012. (*See* Zimmerman Aff. Ex. J.) The certified death certificate references Medical Examiner's case 12-17604, the same case number on Noah Pozner's post-mortem report. (*Id.* Exs. I, J.) The death certificate reaffirms that Noah Pozner's cause of death was "multiple gunshot wounds." (*Id*. at Ex. J.)

After the Medical Examiner's Office completed Noah Pozner's post-mortem examination, Noah's body was released to the Abraham L. Green and Son Funeral Home. (*See* Green Aff. ¶ 4.) Noah Pozner's death certificate, the medical examiner's portions already certified, was also released to the funeral home. *Id*.

Samuel Green, who has worked at Abraham L. Green and Son funeral home for 41 years, personally prepared Noah Pozner's body for burial. (Green Aff. ¶¶ 3, 16.)

Among other things, Mr. Green performed "restorative procedures" on Noah Pozner's face. (*Id.* ¶ 16.) To assist him in that effort he relied on a photo to see what Noah looked like prior to his facial injury. (*Id.* ¶ 16.) Mr. Green testified in his affidavit that the boy in that photo is the body he prepared for burial. (*Id.* ¶ 17.)

Mr. Green personally entered the required information into the death certificate's boxes 1, 2, 5-22, 28-35, 54-58, as well as Noah's social security number. (*Id.* ¶ 12.) Mr. Green signed the death certificate in box 34. (*Id.* ¶ 14.) According to Mr. Green's sworn affidavit, the unredacted information in the death certificate released by Leonard Pozner is unchanged from the information that Mr. Green entered in 2012. (*Id.* ¶ 13.)

Noah Pozner's funeral service was held at Samuel Green's funeral home. (*Id.* ¶ 18.) Mr. Green's memory of the event was vivid—it was the only time in his career that police dogs swept his funeral home for bombs prior to a funeral service, and the door to the chapel was closed, locked, and guarded by state and local police. (*Id.*)

Following Noah Pozner's death, Plaintiff was appointed administrator of Noah Pozner's estate by the Connecticut Probate Court. (*See* Zimmerman Aff. Ex. K (Probate Court Order).) The order includes a judicial finding that Noah Samuel Pozner died on December 14, 2012. (*Id.*)

B. Sandy Hook Hoaxers

Within weeks of the 2012 tragedy at Sandy Hook Elementary School, conspiracy theorists began claiming that the shooting was fake. (*See*, *e.g.*, Zimmerman Aff. Ex. L at 312-13.) The plot of those stories ran the gamut. Defendant Fetzer initially claimed that the Sandy Hook victims were murdered by the Israeli

Mossad. (*See id.* ¶ 15 & Ex. N (December 20, 2012 article by James Fetzer).) Others claimed that the families were "crisis actors" and that no one actually died. (*See* Pozner Affidavit ¶ 8; *see also* Zimmerman Aff. Ex. O (Fetzer Response to RTA No. 26.) Still others, such as Alex Jones, claimed that Sandy Hook was an "inside job." (*See* Pozner Aff. ¶ 7.)

Defendant Fetzer admitted that in 2013, he published an article that claimed the parents of Sandy Hook victims were "crisis actors." (*See* Zimmerman Aff., Ex. O (Fetzer Response to RTA No. 26).) Defendant Fetzer has admitted that before April of 2014 he "probably" stated that no children were killed at Sandy Hook. *Id.* at Request 27. (*Id.* Ex. O (Fetzer Response to RTA No. 27).)

Plaintiff initially stayed quiet, assuming that the conspiracy theorists' focus would shift and he and his family would be left in peace. (Pozner Aff. ¶ 9.) But eventually, following relentless harassment of Plaintiff and disparagement of the memory of Plaintiff's deceased son by Defendant Fetzer and others, Plaintiff felt compelled to defend the memory of his deceased son. (*See* Pozner Aff. ¶¶ 10-11.) Plaintiff released information that demonstrated that his son was in fact, a real boy who, in fact, really died. (*See* Pozner Aff. ¶ 11.)

C. Defendants' Defamatory Publications

In May of 2016, Defendants published the "second edition" of their book, NOBODY DIED AT SANDY HOOK.[7] Among many other outrageous and false statements, the book accused Plaintiff of circulating a fake death certificate:

- "Noah Pozner's death certificate is a fake, which we have proven on a dozen or more grounds." (*See* Zimmerman Aff. Ex. L at 183; *see also id.* at 177 ("Noah Pozner's death certificate is a fake.").)
- "And when Kelley Watt, who had spent more than 100 hours in conversation with Lenny, told him she did not believe a word he said, that she did not believe he had a son or that his son had died, he sent her a death certificate, which turned out to be a fabrication." (*Id.* Ex. L at 232.)
- "As many Sandy Hook researchers are aware, the very document Pozner circulated in 2014, with its inconsistent tones, fonts, and clear digital manipulation, was clearly a forgery." (*Id.* Ex. L at 242.)

Each of these false statements was made in the context of assertions 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.*)

In addition, Defendant Fetzer authored the following statement in an August 2018 blog post:

> "It [N.P.'s death certificate] turned out to be a fabrication, with the bottom half of a real death certificate and the top half of a fake, with no file number and the wrong estimated time of death at 11 AM, when 'officially' the shooting took place between 9:35-9:40 that morning."

[7] *See* Fetzer's Response to Plaintiff's Motion to Strike, Doc. #27 at p. 12; Palacek's Answer, Doc. #28 at p. 2; Wrongs Answer, Doc. #36, at ¶ 17 (each admitting ¶ 17 of Plaintiff's complaint, Doc. #1, which set forth the defamatory statements). The Second Edition was actually a third edition, the "First Edition" was published in October of 2015 and the second "Banned Edition" was published in December of 2015. *See* Zimmerman Aff. Ex. L (copyright page).

(*See* Zimmerman Aff. Ex. P; *see also* Fetzer's Response to Plaintiff's Motion to Strike, Doc. #27 at p. 12 ¶ 11 (affirming Complaint ¶ 18).)[8] That statement was made in the context of an 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.*)

In October of 2018, Defendants were notified that their language was defamatory. (*See* Zimmerman Aff. Ex. Q.) The notice letter informed them that they could obtain a certified copy of the death certificate directly from the State of Connecticut. (*Id.*) The letter requested a full retraction. (*Id.*) No such retraction occurred, despite the fact that Defendant Wrongs Without Wremedies, LLC ordered and received a certified copy of Noah Pozner's death certificate directly from the Newtown Office of Vital Records. (*See* Zimmerman Aff. Exs. R (Wrongs Response to RTA No. 11.) & W (Wrongs Supplemental Response to RTA No. 14).)

LEGAL STANDARD

Summary judgment must be granted when there is no genuine issue of material fact, and only legal issues remain. Wis. Stat. § 802.08(2) (2013-14). The opposing party "must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3). "[T]he 'mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material

[8] Defendant Fetzer admits that he authored the blog post. *See* Fetzer's Response to Plaintiff's Motion to Strike, Doc. #27, at 12.

fact.'" *Baxter v. DNR*, 165 Wis. 2d 298, 477 N.W.2d 648 (Ct. App. 1991) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, (1986)). A "material" fact is such fact that would influence the outcome of the controversy." *Cent. Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶ 19, 272 Wis. 2d 561, 681 N.W.2d 178. A genuine issue must be "such that reasonable jurors could return a verdict for the nonmoving party." *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 522 N.W.2d 261 (Ct. App. 1994), *overruled on other grounds by Marks v. Houston Cas. Co.*, 2016 WI 53, 369 Wis. 2d 547, 881 N.W.2d 309. Without a genuine issue of material fact, the "judgment sought shall be rendered." Wis. Stat. § 802.08(2).

ARGUMENT

A. Defendants Defamed Leonard Pozner

Each of the three Defendants defamed Plaintiff through multiple statements in the 2016 "Second Edition" of their book NOBODY DIED AT SANDY HOOK.[9] Defendant Fetzer also defamed Mr. Pozner through in an August 5, 2018 blog post. Specifically, these three Defendants claimed that: (1) Mr. Pozner released a "fake" death certificate for his son; (2) Mr. Pozner provided a death certificate of his son that turned out to be a "fabrication;" and (3) Mr. Pozner circulated a death certificate of his son that "was clearly a forgery." (*See* Zimmerman Aff., Ex. L, at 183, 232, 242.) In addition, Mr. Fetzer claimed that Mr. Pozner provided a death certificate for his son

[9] The defamatory statement "Noah Pozner's Death Certificate is a fake…." appears on page 183 of both the Banned Edition and the Second Edition of NOBODY DIED AT SANDY HOOK. *See* Zimmerman Aff. Exs. L & M.

that was "a fabrication with the bottom half a real death certificate and the top half a fake." *Id.* at Ex. P.

The elements of defamation under Wisconsin law are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. *Ladd v. Uecker*, 2010 WI App 28, ¶ 8, 323 Wis. 2d 798, 780 N.W.2d 216; *Laughland v. Beckett*, 2015 WI App 70, ¶ 22, 365 Wis. 2d 148, 870 N.W.2d 466.

1. **Defendants Made False Statements of Fact**

Each of the statements alleging that Noah Pozner's death certificate is "fake," "fabricated," or a "forgery" is a false statement of fact. The first element of defamation, "falsity," is met by establishing that the false statement contained facts that are proven to be false. *Mach v. Allison*, 656 N.W.2d 766, 772 (Wis. App. 2002). "Facts" are distinguishable from "opinions" in that an opinion "does not contain a provably false factual connotation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

Defendants accused Plaintiff of circulating a death certificate for his son Noah that is "fake," "fabricated," or a "forgery." Defendants' statements are false because Mr. Pozner released an authentic, duly-issued record of the State of Connecticut and not a fake, forgery, or fabrication.

a. *Mr. Pozner Did Not Fake, Fabricate, or Forge Noah's Death Certificate*

Defendants' statements about Noah Pozner's death certificate are false. The image of Noah Pozner's death certificate released by Plaintiff was a scan from a certified death certificate issued by the Newtown clerk. (Pozner Aff. ¶ 13.) At no point prior to the certified death certificate being issued by the Newtown clerk did Plaintiff possess the document. (*Id*. ¶ 14.) As such, there can be no legitimate allegation that Mr. Pozner "fake[d]," "fabricated," or "forge[d]" Noah's death certificate.

A certified copy of that certified death certificate is attached as Ex. J to the Zimmerman Affidavit. An unredacted copy of the certified death certificate Mr. Pozner released in 2014 is attached as Ex. B to the Pozner Affidavit. All of the material information establishing that Noah Pozner died on December 14, 2012 in Newtown, Connecticut is the same in both documents.[10] (*Id*.)

Moreover, at this point there can be no good faith claim that the top half of Noah's death certificate is fake and the bottom half is real, as Mr. Fetzer claimed on his blog. (*See* Zimmerman Aff. Ex. P.) Multiple certified copies of the document have been obtained directly from both the state and local Vital Records offices in Connecticut and none of them support Defendant's contention that the top half of a fake death certificate was combined with the bottom half of a real death certificate.[11]

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[10] Exhibit J reflects amendments made by the Newtown Vital Records Office in 2013 to reflect Noah Pozner's home address. Zimmerman Aff. Ex. J; *see also* Pozner Aff. ¶ 17. Those amendments are documented on the death certificate per Conn. Gen. Stat. § 19a-41-6.

[11] One certified copy was obtained via the State Vital Records Office by counsel for Plaintiff shortly before this case was filed. Zimmerman Aff. ¶ 11. That document was attached to Plaintiff's Complaint. *See* Doc. #1. Another certified copy was obtained by Wrongs Without Wremedies, LLC from the Newtown Vital Records Office after the Complaint was filed. *See*

Nothing stopped Defendants from obtaining those death certificates before publishing these falsehoods. Even Mr. Fetzer has recently admitted that a "definitive, official death certificate" was issued and he presented no argument that the top half of that document was fake and the bottom real. (*See* Zimmerman Aff. Ex. S.)

Moreover, the testimony of Mr. Green fully and finally disproves any contention that the document is fake, forged, or fabricated, because he stated under oath that he personally filled out his portions of Noah Pozner's death certificate and the medical examiner's portion had already been completed. (Green Aff. ¶¶ 9, 10, 12.) Mr. Green, who personally entered information on the form, testified in his affidavit that the information on the death certificate released by Mr. Pozner is unchanged from what Mr. Green entered on that form in December of 2012. (Green Aff. ¶ 13.)

The evidence also fully refutes Defendants' unsubstantiated speculation that a Connecticut official produced a fake death certificate. (*See* Transcript of March 11, 2019 Hearing, Doc. # 51, at 54:14-17.) Mr. Green testified in his affidavit that the information on the death certificate released by Mr. Pozner in 2014 is the same information Mr. Green entered on the death certificate in 2012. (Green Aff. ¶ 13.) Mr. Green further testified that the medical examiner's portions (the shaded boxes), were complete before he completed the portions on behalf of the funeral home. (*Id.* ¶ 10.) The only information added by the town clerk is the registration information. (*Id.*

Zimmerman Aff. Exs. R (Wrongs Response to RTA No. 11) & W (Wrongs Supplemental Response to RTA No. 14).

¶¶ 9, 12 & Ex. A.) Given Mr. Green's testimony, there is nothing that a rogue clerk could have changed.

Mr. Fetzer's allegation that the top half of Noah Pozner's death certificate is fake and the bottom is real is false. Mr. Green entered information in both the top half and the bottom half of the birth certificate. (*See* Green Aff. ¶ 12 & Ex. A.) Mr. Green confirmed that the information he entered was unchanged. (*Id*. ¶ 13.) There is no genuine issue of material fact in dispute: the document is authentic and therefore Defendants' statements are false.

b. *Defendants Cannot Reasonably Argue That The Death Certificate Was Wrongly Issued*

Noah Pozner's death certificate cannot accurately be characterized as "fake," "fabricated," or a "forgery" because the record was duly issued by the State of Connecticut. Connecticut has authority to issue death certificates. *See* Conn. Gen. Stat. § 7-62b. The document bears an embossed seal. (*See* Pozner Aff. ¶ 13; *see also* Zimmerman Aff. Ex. L at 181 (embossed seal is visible in bottom left of image in Defendants' book).) Defendants cannot challenge the authenticity or admissibility of this death certificate because sealed certified public records are self-authenticating under Wis. Stat. § 909.02 and admissible evidence under hearsay exceptions pursuant to Wis. Stat. § 908.03.

This is Noah Pozner:

(Pozner Aff. ¶ 5.) This photograph was taken in 2012. (*Id.*) Samuel Green, the funeral home director who prepared part of Noah's death certificate and personally oversaw his funeral, has stated under oath that he used this picture to perform restorative work on Noah Pozner's face prior to his burial. (Green Aff. ¶ 16.) Mr. Green has also stated under oath that the deceased body that he personally prepared for burial is the boy pictured above. (Green Aff. ¶ 17.)

The Medical Examiner's blood sample has a 99.99% probability of being from Leonard Pozner's son. (*See* Zimmerman Aff. Ex. I (describing collection of tissue sample); *see also* Friedman Aff. (establishing probability of fatherhood).) Noah Pozner is the only son that Plaintiff, Leonard Pozner, has ever fathered. (Pozner Aff. ¶¶ 2, 4.)

The certified public records likewise establish that Noah Pozner died in Connecticut. The death certificate states that Noah Pozner died at 12 Dickenson Drive in Sandy Hook, a community within the Town of Newtown, Connecticut. (Zimmerman Aff. Ex. J; Pozner Aff. ¶ 15.) The Medical Examiner's report lists the same location of death. (Zimmerman Aff. Ex. I.)

Multiple certified public records indicate that Noah Pozner died on December 14, 2012. The certified death certificate states that he died on December 14, 2012. (Zimmerman Aff. Ex. J.) The certified Medical Examiner's report states that he died on December 14, 2012. (*Id*. Ex. I.) The certified U. S. Social Security Administration data states that Noah Pozner died on December 14, 2012. (*Id*. Ex. G.) Taken as a whole, the evidence undisputedly shows that Noah Pozner died on December 14, 2012 in Newtown, Connecticut. As such, Connecticut had statutory authority to issue a death certificate for Noah Pozner, and exercised its statutory authority in issuing such a certificate. The resulting death certificate is not "fake" "fabricated" or a "forgery" as a matter of law.

2. **Defendants Published the Falsehood to Third Persons**

The second element of defamation requires that a statement about an identifiable person be published to third parties. Within in this element are requirements that: (a) the words must be communicated to a person other than the person defamed, and (b) the communication must identify the person defamed expressly or by reasonable inference. *See Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251, 255 (1966); *Schoenfeld v. Journal Co.*, 204 Wis. 132, 235 N.W. 442, 444 (1931); Restatement (Second) Torts § 577 (1977).

a. *Defendants Published the Defamations to Third Parties*

It is undisputed that Defendants communicated the defamatory falsehoods to third parties. As of April 27, 2019, Defendant Fetzer's defamatory falsehood in his blog post remains accessible on the Internet. (*See* Zimmerman Aff. ¶17 & Ex. P.)

Three of the defamatory falsehoods are printed in the second edition of NOBODY DIED AT SANDY HOOK.[12] (*See* Zimmerman Aff. Ex. L at 181, 232, 242.) Wrongs Without Wremedies has admitted that it sold and shipped copies of the book. (*See* Zimmerman Aff. Ex. W (Wrongs Supplemental Response to RTA No. 14).) The books encompassed by Defendants' admission were not shipped to Plaintiff. (*See* Pozner Aff. ¶ 18; Zimmerman Aff. ¶ 13.)

b. *Defendants Admit that the Communication Identifies Plaintiff*

Each Defendant admitted that the statements in NOBODY DIED AT SANDY HOOK accuse Plaintiff Leonard Pozner of issuing and/or possessing a fake, fabricated, or forged copy of Noah Pozner's death certificate. (*See* Wrongs Answer, Doc. #36 ¶ 17 ("Defendant admits the allegations in paragraph 17"); *see* Fetzer's Response to Motion to Strike, Doc. #27 at p. 12 ("Defendant affirms paragraph 17 [of Plaintiff's Complaint] where Defendant has asserted on more than 100 occasions that the death certificate Plaintiff gave to Kelley Watt is a fake and a fabrication"); *see* Palecek Answer at p. 1 ("Defendant affirms paragraph 17"); *see also* Plaintiff's Complaint, Doc. #1 ¶ 17 (alleging that the defamatory falsehoods were directed at Plaintiff).)

Likewise, Defendant Fetzer admitted that the defamatory statement in his blog post refers to Plaintiff Leonard Pozner. (*See* Fetzer's Response to Motion to Strike, Doc. #27 at p. 12 (affirming ¶ 18 of Plaintiff's Complaint).) Accordingly, there are no genuine issues of material fact for this element.

[12] The defamatory falsehoods in Chapter 11 were also published in Defendants' "Banned Edition." *See* Zimmerman Aff. Ex. M. Defendant Fetzer admitted that the Banned Edition of the book was released as a PDF and is available for public download. *Id.* Ex. C.

3. **The Statements Carry a Defamatory Meaning**

The third element of a claim for defamation is that the statement must be defamatory, meaning that it must "tend[] so to harm reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him [or her]." *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 262, 258 N.W.2d 712 (1977), *citing* Restatement (Second) Torts § 559 (1977).

The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one. *See Meier v. Meurer*, 8 Wis. 2d 24, 98 N.W.2d 411 (1959). The words must not be evaluated in in isolation, but must instead be considered "in the context in which they were used and under the circumstances they were uttered." *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 259 (Wis. 1966).

It is the function of the Court to determine in the first instance whether a communication is capable of a defamatory meaning. *Martin v. Outboard Marine Corp.*, 15 Wis. 3d 452, 462, 113 N.W.2d 135 (1962). If the only possible meaning of the communication is defamatory, and could only be reasonably so understood by a recipient, language is defamatory as a matter of law. *Id.*

This is not a high burden. In *Ranous v. Hughes*, the Wisconsin Supreme Court found language defamatory as a matter of law where the language referenced a teacher's "unpatriotic attitude" and "intemperate and offensive behavior." 30 Wis. 2d

452, 460, 141 N.W.2d 251 (1966). As a matter of black letter law, a statement is also "defamatory if, in its natural and ordinary sense, it imputes to the person charged commission of a criminal act." *Converters Equip.*, 258 N.W.2d at 715. Here, Defendants have accused Plaintiff of committing a serious crime, circulating a forged public record, in the context of allegations that he fabricated the existence and death of his son (and indeed, his own identity) as part of a conspiracy to fake the deaths of young children.

Defendants cannot dispute that their statements that Mr. Pozner presented a "fake," "forge[d]," and "fabricat[ed]" death certificate of his son carry a defamatory meaning. As a preliminary matter, all of these words, when used to describe a person's actions, would harm one's reputation as they all mean or imply deception. MERRIAM-WEBSTER defines "fake" as "not true, real, or genuine," and "one that is not what it purports to be: such as (a) a worthless imitation passed off as genuine…." (*See* Zimmerman Aff. at Ex. F.) MERRIAM-WEBSTER defines "forgery" as "(2) something forged," or "(3) an act of forging especially: the crime of falsely and fraudulently making or altering a document (such as a check)." (*Id.*) "Forged" in turn, is defined as "(2): made falsely especially with intent to deceive." (*Id.*) MERRIAM-WEBSTER defines "fabricate" to include "to make up for the purposes of deception." (*Id.*)

This Court must also consider the context in which these words were used to determine whether they are capable of a defamatory meaning. *Frinzi*, 140 N.W.2d at 262. Here, Defendants used these words in the context of a book claiming Plaintiff is

a crisis actor covering up a fake massacre of children. (Zimmerman Aff. Ex. L, Preface at xxii ("The grieving parents are actors….").)

Apart from the context provided by the book as a whole, the allegations that the death certificate is "fake" are made in Chapter 11 of the book, a chapter that posits that the entire Sandy Hook tragedy is a hoax, that no children actually died, and that Plaintiff is "posing" as the father of Noah Pozner. (Zimmerman Aff. Ex. L at 178-83.) The chapter concludes by describing an interaction between Plaintiff and chapter co-author Kelley Watt in which Plaintiff allegedly attempted to convince Ms. Watt of Noah Pozner's existence and death by providing Noah Pozner's birth certificate, death certificate, and other evidence that Noah actually lived and actually died.[13] (*Id*.) Defendants also accuse Plaintiff of "circulat[ing]" what they characterize is "clearly a forgery" and "an obvious forgery," beneath a reproduced image of Noah Pozner's death certificate. (*Id*. at 242.)

Similarly, the allegations that the death certificate was a "fabrication" appears in the context of an "epilogue" attributed to Mr. Fetzer in which he contends that "no children or adults died..." at Sandy Hook. (Zimmerman Aff. Ex. L at 231.) Mr. Fetzer goes on to accuse Plaintiff of seeking to hide the truth so that Plaintiff would not have to return donations received after Sandy Hook. (*Id*. Ex. L at 233.) A reasonable reader would understand the defamatory information to mean that Mr. Pozner fabricated

[13] Plaintiff disagrees with the description of the Kelley Watt communications, but it nevertheless represents the context in which the defamatory statement was made.

his son's death certificate in an effort to deceive Kelley Watt and the public for his own financial gain.

Mr. Fetzer reiterated this same point as to "fabrication" in a similar context on his blog. In his blog, Mr. Fetzer says Sandy Hook was a "staged shooting" in which "nobody died." (Zimmerman Aff. Ex. P.) The blog states that Noah Pozner is a fiction made up of photos from Michael Vabner. (*Id.*) Mr. Fetzer goes onto repeat the story of the Kelley Watt conversation. *See supra* Section II.C. He says:

> And when Kelley Watt, who had spent more than 100 hours in conversation with Lenny, told him she did not believe a word he said, that she did not believe he had a son or that his son had died, he sent her a death certificate, which turned out to be a fabrication.

(Zimmerman Aff. Ex. L at 232.)

Given the context each of the defamatory statements, a person having an "ordinary mind" could be left with only two reasonable meanings for the allegation that the death certificate is "fake," a "forgery," or a "fabrication." One reasonable understanding of Defendants' defamatory language is that Plaintiff is the person who allegedly photoshopped or otherwise fabricated or forged Noah Pozner's death certificate before he released it, all in an intent to deceive Kelley Watt. That interpretation would mean Leonard Pozner committed a serious crime. *See*, *e.g.*, Conn. Gen. Stat. § 53a-139 ("a person is guilty of forgery in the second degree when, with intent to . . . deceive. . . he falsely makes . . . any written instrument which he knows to be forged, which is or purports to be . . . (2) a public record or. . . (3) a written instrument officially issued or created by a public office….").

The other reasonable interpretation of the defamatory statement in context is that Plaintiff's son's death certificate had been fabricated or forged by someone else, and Plaintiff nevertheless released it in an effort to deceive Kelley Watt. Given Defendants' allegation that Leonard Pozner had no son named Noah Pozner, as the book and blog both assert, it is self-evident that Plaintiff would have had to know that Noah Pozner's death certificate was fake. (*See* Zimmerman Aff. Exs. L & P.)

The result is the same under either interpretation—a reasonable reader of the defamatory statement in the context in which it was made would necessarily be left with the false impression that Leonard Pozner committed a serious crime when he tried to deceive Kelley Watt by releasing a document that Mr. Pozner knew to be fake.

Either of the meanings described above would unquestionably tend to injure Plaintiff's reputation. Under either meaning, he is being accused of a crime in the context of pretending to be a grieving parent for his own financial gain. The cited language is defamatory as a matter of law.

4. **Defendants' Communication is Not Privileged**

The final element of defamation is that the statement is not privileged. A statement is conditionally privileged under the United States Constitution only if the subject of the defamation is a public figure or a limited purpose public figure and the statement was made without actual malice. *See Denny v. Mertz*, 106 Wis. 2d 636, 650-51, 318 N.W.2d 141 (1982).

The Court decides whether someone is a public figure or a limited public figure. *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 676, 543 N.W.2d 522 (Ct. App. 1995), *citing Lewis v. Coursalle Broadcasting of Wis., Inc.*, 127 Wis. 2d 105, 110, 377 N.W.2d

166 (1985). The Court must resolve this issue even where the facts underlying the analysis are in dispute. *Bay View Packing*, 198 Wis. 2d at 676.

There are two types of public figures: all-purpose and limited purpose. *See Denny v. Mertz*, 106 Wis. 2d at 645-46. Defendants have argued that Plaintiff is a limited purpose public figure. (*See* Zimmerman Aff. Exs. T (Wrongs Response to Interrogatory No. 1) & U (Fetzer Response to Interrogatory No. 1); *see also* Palecek Answer, Doc. #28 at p. 6.)

The two-part test for determining whether a plaintiff is a limited purpose public figure was established by *Denny v. Mertz*. 106 Wis. 2d at 649-51. A court must (1) determine if there is a public controversy; and (2) the court must look at the nature of the plaintiff's involvement in the public controversy to see whether the plaintiff has injected himself into the controversy so as to influence the resolution of the issues involved. *Id*. at 650. In *Wiegel v. Capital Times Co.*, the court expanded on *Denny* and provided a three-step analysis to be used when considering the second prong of the *Denny* test: (1) isolating the controversy at issue; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential; and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy. 145 Wis. 2d 71, 426 N.W.2d 43 (Ct. App. 1988). However, the focus is always whether an individual has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

The Constitutional protection afforded to defamation defendants is narrow. It was established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) with respect to public officials. *Id*. at 279-280. In *Gertz*, the U.S. Supreme Court expanded the privilege to "limited purpose public figures." 418 U.S. at 346. There, the Court found that a lawyer in a civil case was not a limited public figure, even though the lawyer had, "long been active in community and professional affairs . . . . He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects." *Id.* at 351.

In a series of subsequent cases, each of which was discussed in *Denny*, the U.S. Supreme Court emphasized the narrow nature of the Constitutional privilege by repeatedly refusing to find that a plaintiff was a limited purpose public figure. *See Denny*, 318 N.W.2d at 145-149.

First, *Time, Inc. v. Firestone*, the U.S. Supreme Court provided guidance on the meaning of a "public controversy." 424 U.S. 448, 454 (1976). The Court rejected Time magazine's argument that "public controversy" meant "all controversies of interest to the public." *Id*. at 454. Next, in *Wolston v. Reader's Digest, Inc.*, the Court rejected the finding that a man who refused to appear before a grand jury to testify about Soviet espionage in the U.S. was a public figure, concluding that "mere newsworthiness" did not justify applying the privilege. 443 U.S. 157, 166-168 (1979), *quoted in Denny*, 318 N.W.2d at n. 14. *Wolston* went further to specifically find that "[a] private individual is not automatically transformed into a public figure just by

becoming involved in or associated with a matter that attracts public attention." *Id*. at 167.

Finally, in *Hutchinson v. Proxmire*, the Court held that a defendant cannot seek to impose the higher burden of actual malice by claiming that a plaintiff is a public figure as a result of a public controversy the defendant created. 443 U.S. 111, 135 (1979), *discussed in Denny*, 318 N.W.2d at 146. In *Hutchinson*, the plaintiff's scientific research was criticized as wasteful by Senator Proxmire. *Id*. at 114. The district court held that the scientist's research was a matter of public interest, that he was a public figure by virtue of having sought federal grants and because local newspapers reported the award of such grants, and because newspapers reported his response to the defamatory comments. *Id*. at 119, 134-135. The Court reversed, holding that Hutchinson was not a public figure despite news coverage and press interviews. *Id*. Importantly, the U.S. Supreme Court found that any public controversy that arose was created by Senator Proxmire, not because the scientist thrust himself into the vortex of a public dispute, stating "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id* at. 135.

a. *There is no public controversy*

Defendants cannot even meet the first step necessary to claim the conditional privilege. To do so, Defendants would have to demonstrate there is a public controversy. But neither Wrongs Without Wremedies nor Defendant Fetzer identified any public controversy in response to Plaintiff's interrogatories requesting that information. (*See* Zimmerman Aff. Exs. T (Wrongs Response to Interrogatory No. 1)

& U (Fetzer Response to Interrogatory No. 1).) As such, they should be barred from now introducing evidence of any such controversy.

b. *Plaintiff Did Not Become a Public Figure By Responding to Defendants' Attacks*

Plaintiff is not transformed into a limited purpose public figure merely because he stood up to hoaxers' bullying and harassment. The law has long recognized the privilege to speak in self-defense or to defend one's reputation. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994) (describing long-held privilege of reply in defamation). In *Foretich*, the United States Court of Appeals for the Fourth Circuit held that a couple accused of committing crimes did not become limited purpose public figures by making reasonable attempts to vindicate their reputations, especially in light of the serious accusations made against them. *Id*. at 1558.

"Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties that he owes to himself and to his family." William Blake Odgers, A Digest of the Law of Libel and Slander *228 (1st Am. ed. Bigelow 1881), *quoted in Foretich*, 37 F.3d at 1559. It is that longstanding right to defend one's honor that frames the *Hutchinson* holding that a defendant cannot claim the benefit of a public figure defense after drawing the plaintiff into commenting on a public controversy created by the defendant. *See* 433 U.S. at 135.

Here, Plaintiff had no public presence until he was forced to defend his character and that of his family, including his murdered son, from outrageous attacks. (*See* Pozner Aff. ¶¶ 10-11.) Plaintiff's public statements, interviews, and opinion pieces all relate to activities Plaintiff undertook *after* he was accused by

Defendants and their associates of being a crisis actor and being complicit in faking the existence and death of his son in an effort to deceive the public and reap financial reward. (Pozner Aff. ¶¶ 7-12; *see* Zimmerman Aff. Ex. U (Fetzer Response to Interrogatory No. 1).)

c. *Defendants Acted With Reckless Disregard for Whether the Statements Were True*

Even if Plaintiff were a limited purpose public figure, these defendants acted with actual malice as a result of their reckless disregard for the truth. Actual malice exists where a statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." *In re Storms v. Action Wisconsin Inc.*, 2008 WI 56, ¶ 38, 309 Wis. 2d 704, 750 N.W.2d 739 (2008) (quoting *Sullivan*, 376 U.S. at 280.)

In *St. Amant v. Thompson*, the U.S. Supreme Court explained how a defamation plaintiff might establish reckless disregard. 390 U.S. 727, 732 (1968). The Court said:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 732; *see also* WIS JI–CIVIL 2511 (adopting *St. Amant* "inherently improbable" test). Each of these indicia of recklessness apply to Defendant Fetzer and his book and blog.

The claim that Plaintiff faked his son's death certificate is a story fabricated by Defendant Fetzer. (*See* Zimmerman Aff. Ex. L at 229 (crediting author James Fetzer).) It is evidence of recklessness because, as *St. Amant* described, it is a "product of his imagination…."

Perhaps the strongest evidence of recklessness is the inherent improbability of Defendants' contentions. *St. Amant* held that protestations of innocence by defamers are unlikely to prevail "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 732. Defendants acted with precisely that degree of recklessness by publishing statements that accuse Plaintiff of committing crimes as part of an effort to deceive the public.

Defendants' statements are inherently improbable. They require one to believe that multiple medical care facilities and their staff fabricated medical records and billing records going back to 2006, when Noah Pozner was born. (*See* Zimmerman Aff. Exs. D, E, & H.) It requires multiple town clerks across multiple states to fabricate scores of vital records for the deceased children and their parents. It requires one to believe that Noah Pozner's birth certificate and death certificate and the Plaintiff's marriage certificate were all fabricated and entered into the offices of vital records in disparate towns in disparate states. (*See*, *e.g.*, Zimmerman Aff. Ex. C.)

Defendants' improbable tale requires funeral home directors, including Mr. Green, whose funeral home has been a mainstay of the community for seven decades, to fake funerals attended by hundreds of mourners. (Green Aff. ¶ 3.) It requires

collusion of first responders, medical examiners, and state, local, and federal investigators. If Defendant Fetzer is to be believed, dozens of parents and hundreds of relatives and friends are stuck playing the role of crisis actors for the rest of their lives. The web of complicit parties would have to number in the thousands, if not higher.

Mr. Fetzer's theory also requires one to accept that the federal government has created a vast set of undetectable forged documents to evidence the existence of Noah Pozner, the other dead children, and all of their families. (*See* Zimmerman Aff. Ex. Z.) But, implausibly, he also asks his readers to accept as evidence of deception the alleged errors or imperfections in those documents. (*See*, *e.g.*, *id.* Ex. L at 182.) It is inexplicable, and to say the least improbable, that the same government agencies Mr. Fetzer alleges are making perfect forged documents would be so sloppy as to issue a defective passport or a photoshopped death certificate.

The degree of improbability grows when one takes into account Defendants' assertion that Plaintiff is actually Reuben Vabner and Noah Pozner is Michael Vabner. The IRS and the courts, each of which are comprised of innumerable staff members, would have to be in on it, because Noah Pozner, complete with a social security number, was listed as a dependent on Plaintiff's tax returns for years before he died. (Pozner Aff. ¶ 19.) The Social Security Administration would apparently be in on it too, given their certified records showing they issued Noah Pozner a social security number in 2006. (Zimmerman Aff. Ex. G; Pozner Aff. Ex. C.)

Under Fetzer's theory, the New York Court that finalized the divorce of Reuben Vabner and Veronique De La Rosa in 2001 (*See Vabner v. Vabner*, Index No. 9147-00, Supreme Court of the State of New York, Westchester County), the village justice in New York that conducted Plaintiff and Ms. De La Rosa's wedding ceremony in 2003, and the Florida court that divorced Plaintiff and Ms. De La Rosa in 2014 are all in on the conspiracy. (Pozner Aff. ¶ 21.) Even the Probate Court in Connecticut would have to be a part of Fetzer's sprawling conspiracy, given its factual finding that Noah Pozner died. (Zimmerman Aff. Ex. K.)

Mr. Fetzer's theory is not even internally consistent. In one place he says the death certificate is fake because portions of the text were "photoshopped into the document," and in another he says that the document suffers from "inconsistent tones, fonts, and clear digital manipulation," and in a third he asserts that the top half of the death certificate is fake and the bottom half is real. (Zimmerman Aff. Ex. L at 183, 242 & Ex. P.) Mr. Fetzer's allegations are so improbable that he himself cannot keep them straight.

Defendant Fetzer's flawed "methodology" necessitates Defendants' improbable positions. In the traditional scientific method, one establishes a hypothesis and then subjects it to falsification attempts. Fetzer's approach is entirely the opposite. He settles on a "fact", *e.g.*, Noah Pozner did not die at Sandy Hook, and then relies on his belief in his "fact" as proof to discredit countervailing evidence. Anything that stands in his way, whether a passport, a certified death certificate, a certified birth

certificate, or a certified medical examiner's report, is conveniently dismissed as a fake regardless of the absence of any evidence supporting his wild assertions.

When faced with proof that falsifies his core position, Fetzer asserts unfounded assumptions, such as his erroneous notion that the death certificate would be filled out by one entity in one sitting using one typewriter, and then relies on his false postulation as if it were the established truth. If Defendants had taken a moment to research Connecticut death certificates, they would have learned that the shaded parts are filled out by the medical examiner and other parts are filled out by the funeral home. Different type sizes on the same death certificate is not evidence of a fake—it establishes only the non-controversial proposition that the medical examiner used a different typewriter on his portion than that used by the funeral home.

The evidence that Defendants acted recklessly by publishing such an improbable accusation is overwhelming. Their story is simply too far-fetched to be realistic in light of the evidence to the contrary. Even Infowars personnel discussed distancing themselves from Defendant Fetzer's Sandy Hook theories, characterizing him as "bat[] crazy." (Zimmerman Aff. Ex. V (expletive omitted).)

The reality is straightforward: Defendants spent years staking their reputation on a Sandy Hook conspiracy theory. When Defendants found themselves faced with an official death certificate, their entire Sandy Hook theory, and with it their professional reputations, were at risk of being tainted. Rather than recognize their error and move on to the next conspiracy target, Defendant Fetzer and his co-defendants acted with reckless disregard and invented a false accusation about

Plaintiff faking his son's death certificate. Mr. Fetzer's various assertions that Noah Pozner's death certificate was photoshopped or that it was fabricated by combining the top half of a fake death certificate with the bottom half of a real death certificate are the epitome of "improbable." Defendants' decision to publish the defamatory statements went far beyond mere negligence, they represent the height of recklessness. As such, their own theory is evidence that Defendants acted with actual malice in publishing the defamatory falsehoods with reckless disregard for the truth.

B. Defendants Engaged in a Civil Conspiracy to Publish the Defamatory Statements

Plaintiff has alleged that Defendants engaged in a concerted effort to publish the defamatory matter through a civil conspiracy. The elements of a civil conspiracy are (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977). "The criteria are the same whether the conspiracy is based upon concerted action to accomplish some unlawful purpose or upon concerted action to accomplish some lawful purpose by unlawful means." *Id*.

1. **Defendants' Formed an Agreement Between Conspirators**

To establish the first element, Plaintiff must show must "show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end." *Augustine v. Anti–Defamation League of B'nai B'rith*, 75 Wis. 2d 207, 249 N.W.2d 547 (1977)). This element is undisputed for two reasons.

First, Defendants each admitted paragraph 7 of Plaintiff's Complaint, which alleges that Defendants Palecek and Wrongs Without Wremedies "coordinated publication of the defamatory falsehoods with Mr. Fetzer…." (*See* Wrongs Without Wremedies Answer, Doc. # 36 ¶ 7 (failing to deny this aspect of Plaintiff's allegation); Palecek Answer, Doc. # 28 at p. 1 (failing to deny this aspect of Plaintiff's allegation; *see generally* Fetzer Answer, Doc. #5 (failing to deny this aspect of Plaintiff's allegation). Allegations that are not denied are deemed admitted. Wis. Stat. § 802.02(4).

Second, Defendant Fetzer admitted that the Defendants entered into a verbal agreement to publish the book containing the defamatory material after the first edition was banned by Amazon in 2015. (*See* Zimmerman Aff., Ex. O (Fetzer Response to RTA No. 31).) Defendant Fetzer admitted that he, Defendant Palecek, and Defendant Wrongs Without Wremedies, LLC formed a new publishing entity, "Moon Rock Books," to enable them to publish "controversial subjects." (*Id*.) The second edition of NOBODY DIED AT SANDY HOOK, which contains the defamatory falsehoods, was published under that imprint. (*See* Zimmerman Aff., Ex. L, Title Page.)

2. **Publishing The Defamatory Material Was A Wrongful Act**

The second element, a wrongful act done pursuant to the concerted action, is established as a result of the act of publishing the defamatory material. The material is defamatory as a matter of law, as detailed above.

3. **Defendants' Defamatory Publication Damaged Plaintiff**

The third and final element is that Plaintiff was damaged as a result of the concerted act of publishing the defamatory material. As a result of Defendant's

publication of defamatory material, Plaintiff suffered mental anguish and personal humiliation. (*See* Pozner Aff. ¶ 22.) The measure of those damages will be determined by a jury.

C. Defendants' Affirmative Defenses Fail as a Matter of Law

Defendants Palecek and Wrongs Without Wremedies each pled several affirmative defenses. None of the Defendants' affirmative defenses survive scrutiny. The Defendants bear the burden of establishing a disputed issue of material fact on those affirmative defenses. *E-Z Roll Off, LLC v. Cty. of Oneida*, 2011 WI 71, ¶ 49, 335 Wis. 2d 720, 800 N.W.2d 421. Defendants' affirmative defenses fail as a matter of law.

1. **Fair Comment Defense Does Not Apply to Facts**

Defendants Palacek and Wrongs Without Wremedies assert that their publications are opinions regarding a matter of public interest and therefore cannot give rise to liability. That defense fails because Defendants' defamatory statements are not opinions.

Although the U.S. Supreme Court has held that opinions regarding matters of public interest cannot generally give rise to liability for defamation, that immunity is narrowly limited to opinions, and then only opinions based on a true statement of underlying fact. *Milkovich*, 497 U.S. at 13, *cited in Terry v. Journal Broad. Corp.*, 2013 WI App 130, ¶¶ 13-14, 351 Wis. 2d 479, 840 N.W.2d 255. The "fair comment" defense does not apply to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a (1977).

Defendants' defamatory statements are not opinions. An opinion is a statement that "does not contain a provably false factual connotation." *Milkovich*, 497 U.S. at 20. None of the statements at issue are opinions because each contains a provably false factual connotation. Even if the statements were opinions, Defendants could not escape liability because the alleged opinions are not based on a true statement of fact. *Milkovich*, 497 U.S. at 13. Each expressly (and falsely) states that Noah Pozner's death certificate is "fake," "fabricated," or "forge[d]."

Defendants' own book touts the "provability" of the underlying fact. Page 183 of NOBODY DIED AT SANDY HOOK states "Noah Pozner's death certificate is a fake, *which we have proven* on a dozen or more different grounds." (Zimmerman Aff. Ex. L at 183 (emphasis added).) Having claimed it is susceptible to proof, Defendants should not be now heard to claim that this underlying fact is anything other than a "provably false connotation."

The authenticity of Noah Pozner's death certificate is a fact that is susceptible of being proven true or false; it is either an authentic death certificate or it is not. Because Plaintiff's defamation claim is not based on Defendants' opinions, but is instead based on provably false statements of fact, Defendants cannot rely on a "fair comment" defense to avoid liability for defamation.

2. **Defendants Dissemination Was Not Innocent**

Under Wisconsin Law, one who publishes defamatory material may escape liability under an "innocent dissemination" defense only where they neither knew nor had reason to know of the existence of the libel. *See Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 297 N.W.2d 500, 507 (1980). In *Maynard*, the plaintiff sued Port

Publications, a contract publisher who owned and operated an offset printing press, for defamation. *Id*. The claim was based on an article printed by Port Publications that was written by Take Over, a newspaper that paid Port Publications to reproduce copies of Take Over's newspaper on Port's printing equipment. *Id*. at 502.

Due to the "hands off" nature of this process, the court found that offset printing press operators have negligible contact with the actual content of materials they are reproducing because it is written, edited, type-set and laid out by others. *Id*. at 507. The Wisconsin Supreme Court therefore held that Port Publications could not be liable because, as a mere contract printer, they had no knowledge of the contents of the printed material and they could not reasonably be expected to know of the defamatory material. *Id*. at 506-507.

Defendants Wrongs Without Wremedies and Palecek cannot make the same claim. There is no evidence that they played a role that insulated them from knowledge of the defamatory material. Indeed, the evidence shows that they knew exactly what this book was about. They formed their own publishing company after their book was banned by Amazon. (*See* Zimmerman Aff., Ex. O (Fetzer Response to RTA No. 31).)

Defendant Palecek is credited with writing the Preface to the book. (*See* Zimmerman Aff. Ex. L, Preface at ix.) There, he asserts "[k]nowing that the evidence shows that nobody died at Sandy Hook, as wild as that sounds. The grieving parents are actors, the school was not a functioning school, only a stage…." (*See* Zimmerman Aff. Ex. L, Preface at xxii.) Not only did he know what the book said, but he knew

that the book's assertions were "wild." That assertion is fundamentally at odds with *Maynard's* lack of knowledge requirement.

Defendant Palecek also admits that he conducted "a good faith examination and research responsibly conducted into the fact and publication regarding the Sandy Hook case" and the allegedly defamatory information in particular. (Palecek Answer, Doc. #28, at p. 4.) Likewise, Wrongs Without Wremedies claims to have published the allegedly defamatory material only after "diligent investigation, observation, good faith examination and research…." (Wrongs Answer, Doc. #36 ¶ 55.) If they each claimed to have conducted research into the defamatory material, they must first have been aware of the defamatory statements. As such, they cannot avail themselves of the innocent dissemination defense under Wisconsin law. By their own admissions these Defendants are far from the innocent printer who had no idea what content was running on its equipment.

3. **Defendants Were Not Prejudiced By Any Alleged Delay in Bringing Suit**

Defendant's Palecek and Wrongs Without Wremedies asserted the affirmative defense of laches. Laches is a form of equitable relief in which a party that unreasonably delays making a claim may lose its right to assert that claim. The three elements of laches are (1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay. *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶ 7, 312 Wis. 2d 463, 752 N.W.2d 889. The reasonableness of the delay, and whether prejudice resulted from the delay, are questions of law based upon factual findings. *State ex rel. Coleman v. McCaughtry*,

2006 WI 49, ¶ 17, 290 Wis. 2d 352, 714 N.W.2d 900, *opinion clarified in* 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424.

Defendants were not prejudiced by any alleged delay in filing this action. In response to an interrogatory request, Defendant Wrongs Without Wremedies stated only "Plaintiff made no complaints for over three years from the filing of this lawsuit. Defendant was led to believe Plaintiff had no objections to the contents of both editions of the book." (Zimmerman Aff. Ex. T (Wrongs Response to Interrogatory No. 3).) While, for the sake of argument, that may evidence of lack of knowledge or acquiescence, it is not evidence of prejudice. Without admissible evidence of prejudice, Defendants cannot meet their burden on this affirmative defense.

4. **Plaintiff's Claims Are Not Barred By the Statute of Limitations**

Defendants Wrongs Without Wremedies and Palecek contend that Plaintiff's action is barred by the statute of limitations. The Wisconsin statute of limitations for libel is three years after the action accrues. *See* Wis. Stat. § 893.57. Plaintiff filed this lawsuit less than three years after the "Expanded 2016 Revised" edition of "NOBODY DIED AT SANDY HOOK" was filed.[14]

Wisconsin has adopted the "single publication rule." *See Ladd v. Uecker*, 780 N.W.2d at 220. Under that rule, defamation does not occur each time a single edition of a publication is sold, but instead attaches only to the initial publication of the defamatory material. *Id*. at 220, *citing* Restatement (Second) Torts § 577(A)(3).

[14] Defendant Fetzer did not plead statute of limitations as a defense, so this argument does not apply to him. His blog post was published in 2018, which is clearly less than three years before this case was filed. Likewise, his defamatory Epilogue was new matter published by all three Defendants for the first time in May of 2016.

However, the Restatement makes clear that the "single publication rule" does not apply different editions of a book: "*Any one edition* of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.").

Plaintiff's Complaint alleged, and Defendants each admitted, the that Defendants published a second edition of the book in 2016:

> Defendants published a second edition of "Nobody Died At Sandy Hook" in 2016. That edition does not purport to be a mere reprinting of the first edition, but is instead described as "Expanded" and "Revised." The copyright page of that book states that it was published in May of 2016 by Moon Rock Books.

(*See* Complaint, Doc. #1 ¶ 16; *see also* Wrongs Without Wremedies Answer, Doc. #36 ¶ 16; *see also* Defendant Palecek's Answer, Doc. #28, at p. 2 (each admitting allegations ¶ 16 of Plaintiff's Complaint).)

The existence of multiple editions of the book is confirmed by the title page:

> First edition: October 2015
> Banned Edition: December 2015
> Second Edition: May 2016

(*See* Zimmerman Aff Ex. L, Title Page.)[15]

The Second Edition included additional defamatory statements that were not part of the earlier editions. As described above, the Epilogue, which includes defamatory language, was clearly new material because it is responsive to an article

[15] The Banned Edition was also published less than 3 years before the Complaint was filed in this case and the defamation published therein is likewise not barred by the statute of limitations.

published in early 2016, well after the 2015 publication date of the first edition. (*See* Zimmerman Aff. Ex L at 229-34.)

As the Restatement (Second) of Torts § 577(A)(3) notes, a second edition of a book is treated as a separate publication for purposes of the single publication rule. Plaintiff filed this action on November 27, 2018. *See* Plaintiff's Complaint, Doc. #1. November of 2018 is less than three years from May of 2016. Thus, Plaintiff filed this case within three years of the publication of both the December 2015 "Banned Edition" and the 2016 Second Edition of Defendants' book and therefore satisfied the statute of limitations as to both of those editions as a matter of law.

CONCLUSION

For the reasons stated above, Plaintiff asks the Court to grant summary judgment that Defendants defamed Leonard Pozner and that Defendants engaged in a civil conspiracy. Plaintiff asks the Court to dismiss Defendants' affirmative defenses with prejudice.

Dated this 30th day of April, 2019.

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