

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 NOTICE OF MOTION AND
MOTION FOR PERMANENT INJUNCTION

PLEASE TAKE NOTICE that Plaintiff, by Plaintiff's undersigned counsel, will appear before the Dane County Circuit Court, the Honorable Frank Remington presiding, on December 9, 2019 at 9:00 AM or a different date and time to be determined by the Court, and seek an order permanently enjoining Defendant Fetzer from defaming Plaintiff Leonard Pozner as more fully described herein.

I. BACKGROUND

Following the murder of his son at Sandy Hook in December of 2012, Plaintiff Leonard Pozner has been the target of conspiracy theorists, including Defendant Fetzer. Generally, Defendant Fetzer has claimed that Plaintiff is part of a conspiracy to cover up a government operation designed to defraud the public and erode constitutional rights. In particular, Defendant Fetzer has published a number of statements accusing Plaintiff of releasing a fake death certificate for Plaintiff's deceased son, Noah Pozner.

Plaintiff initiated this litigation by filing a Complaint in November of 2018. *See* Doc. #1 (Complaint). Plaintiff alleged that four of Defendant Fetzter's statements were defamatory. *Id.* at ¶¶ 17-18. Three of those statements appeared in the book *Nobody Died At Sandy Hook*:

Noah Pozner's death certificate is a fake, which we have proven on a dozen or more grounds.

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.

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.

See Doc. #106 at PPUF No. 99; *see also* Doc. 231 at 117:23-118:6 (overruling objections to Plaintiff's Proposed Findings of Fact). A fourth statement appeared in an August 2018 blog post authored by Defendant Fetzter:

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.

See Doc. #106 at PPUF No. 107; *see also* Doc. 231 at 117:23-118:6 (overruling objections to Plaintiff's Proposed Findings of Fact).

Plaintiff moved for summary judgment that each of the four statements was defamatory. *See* Doc. 101. Defendant Fetzter conceded, and the Court also found, that Plaintiff was not a public figure. Doc. 231 at 74:11-75:2. The Court overruled Defendant's objections to Plaintiff's Proposed Undisputed Findings of Fact except as

to number 9. *Id.* at 117:23-118:6. The Court granted Plaintiff's Motion for Summary Judgment. *See* Doc. 230.

Importantly, Defendant Fetzer has conceded that he no longer believes the bases he relied upon in the book and blog for accusing Mr. Pozner of uploading a fake death certificate. *See* Doc. 231 at 127:20-129:1. Despite that concession, Defendant Fetzer has not taken steps to remove the defamatory content from his website, other websites, or to remove other instances of the same or similar defamatory statements.

II. LEGAL STANDARD

An injunction is a preventive order looking to the future conduct of the parties. To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. *Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371, 375, 44 N.W. 303 (1890). To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, *i.e.*, not adequately compensable in damages. *Ferguson v. Kenosha*, 5 Wis.2d 556, 561, 93 N.W.2d 460 (1958). Finally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979).

III. ARGUMENT

A. Dr. Fetzer Continues to Defame Mr. Pozner

Defendant Fetzer has demonstrated that he intends to continue defaming Mr. Pozner by claiming that Noah Pozner's death certificate is fake. That Defendant Fetzer's current and future conduct will violate Mr. Pozner's rights and will continue

to injure Mr. Pozner is clear beyond a “sufficient probability.” Defendant Fetzer demonstrated from the witness stand during trial that he refuses to accept the Court’s determination that the death certificate is not fake. *See* Transcript dated October 15, 2019 at 69:22-25 (characterizing the statements as “allegedly defamatory”); *see also* 74:5-8 (characterizing the determinations that the statements are defamatory as a mistake). Moreover, Defendant Fetzer’s website includes new blog posts that continue to contend that Noah Pozner’s death certificate is fake. *See, e.g.,* Zimmerman Aff. at Ex. A.

B. Money Damages Will Not Remedy Defendant Fetzer’s Ongoing Defamation

Money damages were traditionally presumed to be a sufficient remedy for defamation.¹ But where, as here, a defendant is unable to pay the damages awarded as compensation for injuries caused by defamation, courts recognize injunctions may be the only remaining remedy:

It is beyond unlikely that [defendants] can pay what the judge has ordered them to pay the plaintiffs. They will be broke, and if defamation can never be enjoined, they will be free to repeat all their defamatory statements with impunity. [Plaintiffs] will have no remedy except to sue for damages and obtain another money judgment that they won’t be able to collect.

McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015). DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 346 (5th ed. 2019) (“Does it make any sense at all to say that a damage judgment is adequate if it can never be collected?”).

¹ *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 861-86, 1039-61 (2d ed. 1988) (not mentioning the possibility of injunctions in the defamation section of the treatise, while discussing damages in great detail).

Without the potential for an injunction, a judgment-proof defendant cannot be deterred from continuing to defame the plaintiff. *See Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 57 Cal.Rptr.3d 320, 156 P.3d 339, 351 (2007). Dr. Fetzer understands this all too well, having already quipped (in response to a warning that he should not violate the confidentiality order) “What are they going to do? Sue me for \$1,000,000. Oh I forgot. They are already doing that.” Doc. 280 at 2. Thus, it is appropriate for the Court to enter an injunction to deter Dr. Fetzer from continuing his injurious course of conduct.

C. Balancing of Interests Favors an Injunction

A court evaluating a request for a permanent injunction must balance the competing interests. The plaintiff bears the burden of demonstrating that, on balance, equity favors issuance of an injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). Here, the issuance on an injunction must balance Mr. Pozner’s right to not continue to be injured by Defendant Fetzer’s false and defamatory claim that Noah Pozner’s death certificate is fake against the highly disfavored nature of prior restraints on speech under the U.S. Constitution. The narrow scope of Plaintiff’s request tips that balance decidedly in favor of issuing a permanent injunction.

1. Injunctions Restraining Defamation Are Permissible

There is no question that the United States Constitution allows prior restraint of speech. The Constitution tolerates restriction of communication of incitement, obscenity, child pornography, fighting words, fraud, threats, or speech that is an integral part of criminal conduct. *See United States v. Alvarez*, 567 U.S. 709, 717

(2012) (plurality opinion) (giving this list of exceptions). Injunctions regularly issue to restrict infringement of copyrights, even when such infringements manifest in the form of otherwise-protected speech. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-560 (1985) (holding that First Amendment does not shield speech that infringes another's copyright). Thus, the disfavored status of prior restraints on speech under the First Amendment to the United States Constitution are far from absolute.

Nor has Wisconsin adopted a blanket rejection of prior restraints on speech. For example, in *Pure Milk*, the Wisconsin Supreme Court reversed a district court injunction restricting dissemination of allegedly inaccurate information that might divert business away from a cooperative. The district court's injunction was not reversed on constitutional grounds even though the scope restricted speech. Instead, the Wisconsin Supreme Court reversed on the grounds that the scope of the injunction was not supported by the evidence, and remanded to the district court to reevaluate the injunction.

Moreover, Wisconsin courts have issued injunctions against libel and/or slander in the context of harassment restraining orders. *See E.g.*, Docket Entry 7, *Petitioner v. Alvarado*, No. 2017CV002741 (Wis. Cir. Ct. Milwaukee Cty. Apr. 14, 2017); Docket Entry 6-8, *Jokinen v. Alldredge*, No. 2015CV000074 (Wis. Cir. Ct. Ashland Cty. Sept. 1, 2015); Docket Entry 8-11, *Petitioner v. Brandon*, No. 2010CV014072 (Wisc. Cir. Ct. Milwaukee Cty. Sept. 8, 2010), vacated Oct. 22, 2010; Docket Entry 7-8, *Stuckey-Osthoff v. Dobbs*, No. 2007CV000202 (Wisc. Cir. Ct.

Richland Cty. Oct. 5, 2007); Docket Entry 1-3, *Bell v. Maday*, No. 2005CV000009 (Wis. Cir. Ct. Ashland Cty. Feb. 8, 2005). These cases undermine the suggestion that Wisconsin prohibits prior restraint on libel or slander.

Other decisions in the Seventh Circuit support the validity of injunctions restricting defamatory speech. Indeed, Judge Posner, in *McCarthy*, noted that “[m]ost courts would agree . . . that defamatory statements can be enjoined . . . provided that the injunction is no ‘broader than necessary to provide relief to plaintiff while minimizing the restriction of expression.’” 810 F.3d at 462, quoting *Balboa Island Village Inn, Inc.*, 156 P.3d at 352. Because the injunction imposed by the district court in *McCarthy* was far broader than the particular defamatory statements presented to the jury, the 7th Circuit vacated the injunction.² *Id.* at 463.

As described below, the injunction proposed by Plaintiff does not suffer the deficiency that led Judge Pozner to vacate the injunction in *McCarthy*. Mr. Pozner seeks a narrowly-tailored injunction restricting Defendant Fetzer from continuing to say that Noah Pozner’s death certificate is fake—nothing more than what has already been found defamatory.

2. Scope of Proposed Injunctive Relief

Plaintiff seeks a permanent injunction that is no broader than the statements found to be defamatory. Each of the four defamatory statements says that Noah Pozner’s death certificate is a “forgery,” “fabrication” or “fake.” *See* Doc. # 230.

² Importantly, *McCarthy*’s remand did not foreclose the possibility of a proper injunction and invited the district court to enter a new injunction. *Id.*

Therefore, Plaintiff seeks a permanent injunction prohibiting Dr. Fetzer from publishing to any third party any statement that Noah Pozner's death certificate is fake, fraudulent, or forged.

Plaintiff is not requesting an injunction broader than the statements that have already been held to be defamatory. Maintaining that narrow scope avoids the potential prior restraint on speech and ambiguity concerns discussed in *McCarthy*, 810 F.3d at 462 (criticizing injunction for not being tied to statements found to be defamatory and for including vague language that ambiguously expanded the scope of the restraint on speech). Dr. Fetzer should not be allowed to continue to harm Mr. Pozner by publishing the same injurious statements that have already determined to be false and defamatory.

3. Procedural Safeguards

Plaintiff proposes that in the event Defendant Fetzer violates the injunction and such contempt may necessitate incarceration, the Court should afford procedural safeguards consistent with a criminal prosecution. Remedial contempt is civil, not criminal, insofar as it is designed to secure compliance with a court order rather than punish the contemnor for his failure to comply. *See State v. King*, 82 Wis. 2d 124, 129-30, 262 N.W.2d 80, 82 (1978) (describing remedial contempt as civil in nature). However, the remedial sanctions include incarceration. Wis. Stat. § 785.04(1)(b).

The Wisconsin Constitution provides procedural protections for criminal prosecution of libel. *See* Article 1, section 3. Because remedial contempt sanctions include the possibility of incarceration, contempt proceedings are sometimes considered criminal or quasi-criminal. *See, e.g., OWEN M. FISS, THE CIVIL*

RIGHTS INJUNCTION 8 (1978) (making point about injunctions generally). Thus, it may be necessary to provide additional procedural safeguards in the event of a contempt process that could result in incarceration.

Here, Plaintiff proposes that if Defendant Fetzer continues to defame Mr. Pozner by claiming that Noah Pozner's death certificate is fake, Defendant Fetzer cannot be subjected to the remedial sanction of incarceration until and unless he is provided an opportunity to demonstrate that changed circumstances mean he has not failed to exercise reasonable care in publishing, without a valid privilege, a false and defamatory statement.³

Some commentators have argued that a defendant should have the opportunity to show a change of circumstances that might render a previously-defamatory statement true. *See, e.g., Eugene Volokh, Anti-Libel Injunctions*, (forthcoming) 167 U. PA. L. REV. ___ at *27 (2019) (available at <http://www2.law.ucla.edu/volokh/libelinj.pdf>). Such additional procedural hurdles are not applicable in this case. Noah Pozner is dead. There are no circumstances that will ever change that fact. Connecticut had statutory authority to issue a death certificate for Noah Pozner because he died in Connecticut. *See* Conn. Gen. Stat. § 7-42. There are no facts that could change that would ever make Noah Pozner's death certificate fake.

³ These additional procedural safeguards apply only to incarceration, not to the other remedial measures authorized by Wis. Stat. § 785.04.

IV. CONCLUSION

Defendant Fetzter will not stop defaming Leonard Pozner. He continues to host and post false statements about Plaintiff and his deceased son. Defendant Fetzter is not deterred by the jury's award because he lacks the means to pay it. The only way to deter Defendant Fetzter from continuing to willfully injure Mr. Pozner is to permanently enjoin him from claiming that Noah Pozner's death certificate is fake. Plaintiff's narrowly tailored injunction represents a reasonable balance between free speech concerns and protection of Mr. Pozner's rights.

Dated: November 4, 2019

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