IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN GREEN BAY DIVISION

ANDREW L. COLBORN, **Plaintiff,** **vs.** **NETFLIX, INC.; CHROME MEDIA LLC, F/K/A SYNTHESIS FILMS, LLC; LAURA RICCIARDI; AND MOIRA DEMOS,** **Defendants.**	**Civil No.: 19-CV-484**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY NETFLIX, INC.

Andrew L. Colborn, a sworn law enforcement officer, brings this lawsuit over a documentary television series that uses the unique experiences of Steven Avery, a DNA exoneree charged with murder, to provide a window into the American criminal justice system. Taking viewers from Avery's 1985 wrongful conviction for rape through his 2005 arrest and prosecution for murder, the series explores whether twenty years of scientific advances and legislative reforms have resulted in a more reliable system. As is obvious from even this brief summary, as well as the nationwide, contemporaneous media coverage of Avery's prosecution and trial, the series—titled *Making a Murderer*—

explores issues of the utmost public interest and concern.[1]

Given the subject matter of *Making a Murderer* and Colborn's status as a public official, to prevail in this defamation case, he must plead and prove that Defendants published the documentary series with "actual malice"—i.e., either knowing it was false or despite a "high degree of awareness" of its "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Even if Colborn were not a public official, he would still be obliged to plead and prove that Defendants negligently disseminated a material falsehood about him. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

With regard to defendant Netflix, Inc., however, Colborn's Amended Complaint comes nowhere close to satisfying federal pleading standards. Instead, he simply lumps Netflix together with co-defendants Chrome Media, LLC—the concededly *independent* production company that created *Making a Murderer*—and its filmmakers, Laura Ricciardi and Moira Demos, and makes vague, conclusory allegations (on "information and belief," no less) about "defendants" collectively.

Setting aside all the other problems with Colborn's lawsuit—most fundamentally, that *Making a Murderer* contains no false statements of fact about him—he has not plausibly alleged that Netflix distributed the documentary series negligently, much less with the requisite actual malice. All of his claims against Netflix should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

[1] *See, e.g.*, Monica Davey, *Freed by DNA, Now Charged in New Crime*, NYTimes.com (Nov. 23, 2005), https://www.nytimes.com/2005/11/23/us/freed-by-dna-now-charged-in-new-crime.html?searchResultPosition=1.

PROCEDURAL HISTORY

Colborn commenced this lawsuit on December 17, 2018—the day before the statute of limitations expired[2]—by filing a Complaint against eight defendants, including Netflix, Chrome, Ricciardi, and Demos, in the Circuit Court for Manitowoc County. *See* Dkt. 1-1. The Complaint alleged defamation, intentional infliction of emotional distress, and negligence claims arising from *Making a Murderer* ("*MaM*").

Colborn filed an Amended Complaint on March 4, 2019. *See* Dkt. 1-2. The Amended Complaint reframed its three causes of action as "Defamation—Actual Malice," "Negligence (In the Alternative)," and "Intentional Infliction of Emotional Distress." *Id.* It also dropped a number of defendants, leaving only Netflix, Chrome, Ricciardi, and Demos (collectively, "Defendants"). *Id*.

The Amended Complaint acknowledges that Chrome is an "*independent* film production company," and it describes Ricciardi and Demos as both Chrome's founders and the filmmakers who actually created *MaM*. *See id.* ¶¶ 4, 8 (emphasis added). It accurately characterizes Netflix's role as having served as the entity that "released" *MaM* for "worldwide distribution." *Id.* ¶ 15. This Memorandum refers specifically to Chrome, Ricciardi, and Demos (but not Netflix) as the "Producer Defendants."

Colborn served an Amended Summons and the Amended Complaint on Netflix on March 5, 2019. *See* Dkt. 20. On April 3, 2019, Defendants removed the case to this Court. *See* Dkt. 1. Shortly thereafter, the parties agreed to an extension of time—until

[2] The statute of limitations for defamation and other tort claims in Wisconsin is three years. Wis. Stat. § 893.57. As the Amended Complaint concedes, Netflix first disseminated the documentary series from which Colborn's claims arise on December 18, 2015. *See* Dkt. 1-2 ¶ 15.

May 10, 2019—for Defendants to answer or otherwise respond to the Amended Complaint and the Court granted that stipulated extension on April 10. *See* Dkt. 26.

Netflix now brings this motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). It seeks dismissal with prejudice because Colborn has not plausibly alleged that Netflix acted with the requisite degree of fault in distributing *MaM* and because a Second Amended Complaint would be futile.

COLBORN'S ALLEGATIONS AGAINST NETFLIX

The gist of Colborn's Amended Complaint is that *MaM*—which chronicles Avery's wrongful conviction in the 1980s for a crime he did not commit, his exoneration and release after eighteen years in prison, his filing of a $36 million civil rights lawsuit against Manitowoc County, its former sheriff and district attorney, and his subsequent conviction (along with his nephew Brendan Dassey) for the 2005 murder of Teresa Halbach—defames Colborn in retelling that story. *See generally* Dkt. 1-2.

As Colborn concedes, Avery's defense at his murder trial was essentially that Colborn and another sheriff's deputy—embarrassed by their role in the botched investigation that led to Avery's wrongful conviction and facing his civil rights action—planted evidence to ensure he was convicted a second time. *See, e.g.*, *id.* ¶ 31. Colborn objects, however, to the series' recounting of that theory. He alleges that, by selectively editing trial testimony and by purportedly taking his statements and actions out of context (including by allegedly omitting from the series information that he believes points toward Avery's guilt), "Defendants" (he typically does not distinguish among them) misled viewers into concluding Avery is innocent and Colborn is crooked. *See generally*

Dkt. 1-2.

More specifically, Colborn, a "sworn law enforcement officer," *id.* ¶ 11, who both participated in the investigation of Halbach's death and testified against Avery at trial, complains about *MaM*'s portrayal of three issues he concedes were addressed at Avery's trial: (1) a telephone call Colborn received while serving as a corrections officer at the Manitowoc County Jail, *id.* ¶¶ 21-27; (2) a communication he made to dispatch regarding the license plate number on Halbach's car after she disappeared, *id.* ¶¶ 28-38; and (3) the discovery of the key to Halbach's car in Avery's home, *id.* ¶¶ 39-43.[3]

Although Colborn sprinkles the phrase "actual malice" throughout his Amended Complaint, neither that pleading nor its predecessor contains a *single* allegation describing Netflix's role (if any) in the series' production—Colborn merely alleges that Netflix "released" *MaM* for "worldwide distribution," while simultaneously acknowledging that Chrome is the "*independent* film production company" that created it. *See id.* ¶¶ 4, 15 (emphasis added). The Amended Complaint does not contain *any* statement of alleged fact regarding Netflix's state of mind with respect to the truth or falsity of *MaM* that could plausibly support Colborn's conclusory claim that Netflix acted with the requisite degree of fault.

Instead, wherever the phrase "actual malice" or some other allegation of knowledge of falsity or negligence does appear in the Amended Complaint, Colborn

[3] In so doing, however, the Amended Complaint conspicuously fails to acknowledge how the series, which it otherwise incorporates by reference, also devoted significant attention to the State's evidence and arguments. And, of course, it reveals that the jury ultimately *rejected* the defense theory and convicted Avery.

either:

(1) *Exclusively* discusses the actions taken and knowledge possessed by the Producer Defendants (not Netflix), *see, e.g.*, *id.* ¶¶ 25, 42, 43, or

(2) Simply refers to "defendants" vaguely and generically and then alleges in conclusory fashion—and sometimes even "on information and belief"—that they acted "jointly," "severally," and/or "in concert," *see id.* ¶¶ 18, 21, 27, 31-36, 38-39, 44-45, 48, 50, 55-56, 60, 64-65.

The Amended Complaint further emphasizes that it requires a comprehensive, "*side by side comparison* of the trial transcript" with scenes from *MaM*'s multiple episodes to appreciate how, in Colborn's view, Ricciardi and Demos "heavily edited" his trial testimony to "manipulate viewers." *See id.* ¶ 32 (emphasis added). To explain this subtle "manipulat[ion]," he is compelled to provide to the Court what purports to be a heavily annotated series of excerpts from the trial transcript. *See* Exhibit B to Dkt. 1-2. Yet nowhere does Colborn plead that Netflix "knew" or even "should have known" the series contained false and defamatory statements because, for example, its representatives attended Avery's murder trial, reviewed trial or deposition transcripts (or even had such transcripts in their possession), watched the many days' worth of raw video footage that the Producer Defendants recorded at trial (to say nothing of footage of the multiple out-of-court depositions and interviews also included in *MaM*), or were otherwise in any way familiar with the minutiae of what transpired at trial or in the lead-up to it such that they would have had any reason to question *MaM*'s accuracy.

By the same token, Colborn implicitly concedes that it was only Ricciardi and Demos—and *not* Netflix—who attended Avery's trial and edited hundreds of hours of raw footage into what became the final series. See, for example, Dkt. 1-2 at:

¶ 25—"Ricciardi and Demos strategically spliced and omitted portions of Plaintiff's trial testimony . . . ."

¶ 26—"For the same purposes, Defendants Ricciardi and Demos included in the second episode of MAM an interview of Steven Glynn . . . ."

¶ 34—Ricciardi and Demos omitted from Plaintiff's call to dispatch his words . . . ."

¶ 35—"Ricciardi and Demos strategically spliced 'reaction' shots of plaintiff appearing nervous . . . ."

¶ 36—"Upon information and belief, Defendants Ricciardi and Demos filmed the entire trial . . . ."

¶ 38—"Having attended the trial in its entirety, defendants Ricciardi and Demos were aware of the routine nature of the hole on the vial's rubber stopper . . . ."

¶ 42—"On information and belief, Defendants Ricciardi and Demos were present during this testimony and viewed certain photographs . . . ."

¶ 43—"Upon information and belief, Defendants Ricciardi and Demos filmed the entire trial and were aware of the full line of questioning . . . ."

¶ 44—"Upon information and belief, defendants Ricciardi and Demos were present for all court proceedings . . . ."

¶ 45—"Upon information and belief, defendants Ricciardi and Demos had access to the police reports and criminal complaints associated with each of these crimes and knew of their contents."

Colborn makes no such allegations against Netflix or any of its employees or representatives. To the contrary, he expressly acknowledges that "the series purports to objectively and accurately recount Avery and Dassey's arrest and conviction for Halbach's murder" and that, in "interviews since the program's release, Defendants Ricciardi and Demos have repeatedly avowed that they were unbiased and objective in their re-telling of events, holding the film out as a non-fiction piece." *Id.* ¶¶ 15-16.[4]

[4] Although not the focus of this motion to dismiss brought by Netflix, it bears emphasis that Colborn's overarching

Finally, in addition to the allegations of the Amended Complaint, the following evidence relevant to this Motion is properly before the Court, either because it is itself contained in *MaM* (and is therefore incorporated in the Amended Complaint) or because the Court may take judicial notice of it:

- The Amended Complaint's assertion that Colborn "has refrained from public comment and has in no other way injected himself into the controversy surrounding the Avery case," *see id.* ¶ 17, is demonstrably false. Approximately thirty-four minutes into Episode 8 of *MaM*, video from Action 2 News shows a statement released by Colborn after the verdict. The statement reads, "I hope and pray that this verdict helps put to rest any suspicions or loss of confidence that this community may have felt towards our department, because I assure everyone that this agency has some of the finest law enforcement officers in the country in its employ."

- Less than a year after Halbach's death, and in the months leading up to Avery's March 2007 trial, Colborn was the Republican candidate in the 2006 election for Manitowoc County Sheriff. Attached as Exhibits 1 and 2 to the declaration of James A. Friedman are copies of a sample ballot showing that Colborn was the Republican nominee for that office, as well as the election tally sheet showing he received more than 12,000 votes. Colborn testified at Avery's trial about his unsuccessful bid for Manitowoc County Sheriff. *See* Jury Trial Tr.-Day 7, attached as Exhibit 4 to the Friedman Declaration, at 149:4-151:23, 156:6-158:4.

- Colborn had previously run for town constable in Kossuth, Wisconsin. Attached as Exhibit 3 to the Friedman Declaration is a copy of his 2003 nomination papers.

- Colborn testified at Avery's murder trial that he was a sergeant in the

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allegation against the Producer Defendants—*i.e.*, that the "purported conspiracy and scheme" to frame Avery described in *MaM* was "the product of [their] imagination" and manipulative editing, Dkt. 1-2 ¶ 50—cannot survive reasonable scrutiny. As the Amended Complaint elsewhere concedes, from his lawyers' opening statement through submission of the case to the jury, the transcript of Avery's criminal trial confirms that the very same theories that Colborn labels false and defamatory constituted "[a] central part of Avery's defense." *Id.* ¶ 31. *See, e.g.*, Jury Trial Tr.-Day 1, attached as Exhibit 5 to the declaration of James Friedman, at 117:11-120:11, 131:9-142:2, 147:20-148:10 (opening statement); Decision and Order on State's Motion to Exclude Blood Vial Evidence (Jan. 30, 2007), attached as Exhibit 6 to the Friedman Declaration (finding theory that Colborn helped frame Avery sufficiently credible to warrant admission of evidence supporting it).

Manitowoc County Sheriff's Department and that he served as both a shift commander and patrol supervisor. In these roles, he had both administrative and "supervisory responsibilities." *See* Jury Trial Tr.-Day 7, attached as Exhibit 4 to the Friedman Declaration, at 65:19-23, 66:4-17, 141:16-142:-12, 143:11-14. Colborn further testified that his responsibilities as a sergeant were wide-ranging, including such things as supervising patrol officers, executing search warrants, responding to domestic violence calls, and collecting evidence in criminal cases. *Id.* at 85:23-25, 142:13-143:2, 15-21.

LEGAL STANDARD

"A motion under Rule 12(b)(6) tests whether the complaint states a claim on which relief may be granted." *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012); *accord Cornielsen v. Infinium Capital Mgmt., LLC*, 916 F.3d 589, 598 (7th Cir. 2019). "To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555); *accord Alamo v. Bliss*, 864 F.3d 541, 549 (7th Cir. 2017).

The *Iqbal-Twombly* standard governs a defamation action about a matter of public concern as it does all civil litigation in the federal courts. *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013). However, in cases such as this one, the federal courts have also recognized that protracted litigation will inevitably inhibit the exercise of First Amendment rights and that such cases should therefore be closely scrutinized and,

where appropriate, dismissed at the earliest possible stage. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (recognizing that defamation suits can impose "grave risk of serious impairment of the indispensable service of a free press in a free society"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that a rule "compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . dampens the vigor and limits the variety of public debate" and "is inconsistent with the First and Fourteenth Amendments").

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court may take judicial notice of public records, *see Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008), including other judicial proceedings, *see Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994). The Court may also consider "documents referenced in the pleading if they are central to the claim," such as the entire contents of *MaM*, which is the subject of this lawsuit, and the transcripts of the judicial proceedings referenced in the Amended Complaint. *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) (citation omitted); *see also Citadel Grp. v. Wash. Reg'l Med. Ctr.*, 692 F.3d 580, 591 (7th Cir. 2012) ("In deciding a motion to dismiss for failure to state a claim we may consider documents attached to or referenced in the pleading if they are central to the claim."); *Beanstalk Grp., Inc. v. AM Gen. Corp.*, 283 F.3d 856, 858 (7th Cir. 2002) (materials attached to the complaint become a part of it for all purposes).

ARGUMENT

The United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. As a result—and as the Seventh Circuit has put it—service as a public official is "not for the thin-skinned, even, or perhaps especially, at the local level." *Manley v. Law*, 889 F.3d 885, 889 (7th Cir. 2018).

To ensure that lawsuits by public officials against their critics do not stifle the public debate essential to democracy, the Supreme Court in *Sullivan* held that public officials suing for libel must prove not only that the statements they challenge are false but also that the defendant made them with "actual malice"—i.e., either with knowledge of their falsity or despite a "high degree of awareness" of their "probable falsity." 376 U.S. at 279-80; *see also Garrison*, 379 U.S. at 74; *Grzelak v. Calumet Publ'g Co.*, 543 F.2d 579, 582 (7th Cir. 1975) (stating that the actual malice standard is designed "to prevent persons from being discouraged in the full and free exercise of their First Amendment rights" (citation omitted)).

The actual malice standard is *subjective*—"reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). It requires a public official plaintiff to "focus on the defendant's conduct and state of mind," *Babb v. Minder*, 806 F.2d 749, 755 (7th Cir. 1986), and to prove, by clear and convincing evidence, that the defendant made false statements with a "high degree of awareness of their probable

falsity," *Garrison*, 379 U.S. at 74. Moreover, it is the defendant's state of mind *at the time of publication* that matters—"actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false." *Pippen*, 734 F.3d at 614.

Colborn, a self-described "sworn law enforcement officer" who investigated Halbach's murder and testified against Avery at trial, is a public official. Because his Amended Complaint does not adequately plead actual malice (or even negligence) and because any attempt to amend it would be futile, all of his claims against Netflix should be dismissed with prejudice.

I. Colborn is a public official.

Whether a defamation plaintiff is a public official is a threshold question of law for the court, *Rosenblatt v. Baer*, 383 U.S. 75, 88 & n.15 (1966), and presents an issue of federal constitutional law, not state law, *Meiners v. Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977).

The Supreme Court has recognized, on multiple occasions, that police and other law enforcement officers are quintessentially "public officials" for these purposes. In *Sullivan* itself, the plaintiff was the official in charge of law enforcement in Montgomery, Alabama. *Sullivan*, 376 U.S. at 256. Four years after *Sullivan*, in *St. Amant v. Thompson,* 390 U.S. at 730 & n.2, the Court held that a deputy sheriff had failed to prove the actual malice necessary for him to prevail in a defamation action. And, three years after that, the Court similarly concluded that a Chicago police detective had failed to demonstrate the requisite actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 284, 292 (1971). In so holding, the Court embraced the Seventh Circuit's prior decision that such a plaintiff is a

public official as a matter of law. *See Pape v. Time, Inc.*, 354 F.2d 558, 560 (7th Cir. 1965); *see also Pape v. Time, Inc.*, 419 F.2d 980, 981 (7th Cir. 1969).

Not surprisingly, courts throughout the country have since followed the Supreme Court's lead and overwhelmingly held that law enforcement officers, from patrol officers to police chiefs, are public officials within the meaning of *Sullivan* and its progeny. The Wisconsin Court of Appeals, for example, has recognized that a police chief is a public official because he is, by definition, "a local government employee charged with protecting the public interest in law enforcement." *Pronger v. O'Dell*, 127 Wis. 2d 292, 295, 379 N.W.2d 330, 331-32 (Ct. App. 1985); *see also Miller v. Minority Bhd. of Fire Prot.*, 158 Wis. 2d 589, 599-601, 463 N.W.2d 690, 694-95 (Ct. App. 1990) (concluding that fire department captain is a public official and favorably citing other courts' holdings that sheriff's deputies, police officers and state troopers also qualify as public officials).

Similarly, federal appellate courts throughout the country have not hesitated to apply the public official designation to those working in law enforcement. *See, e.g.*, *McGunigle v. City of Quincy*, 835 F.3d 192, 206 (1st Cir. 2016) (police officer); *Revell v. Hoffman*, 309 F.3d 1228, 1232-33 (10th Cir. 2002) (former Associate Deputy Director of FBI); *Rattray v. City of Nat'l City*, 36 F.3d 1480, 1486 (9th Cir. 1994) (police officer), *modified and superseded on denial of rehearing on other grounds*, 51 F.3d 793 (9th Cir. 1994); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069-70 (5th Cir. 1987) (chief deputy sheriff and chief of detectives in sheriff's office); *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 780 F.2d 340, 342 (3d Cir. 1985) (per curiam) (police officer); *Meiners*, 563 F.2d at 352 (federal narcotics agent).

More specifically, courts have regularly held that sheriff's deputies—even those with fewer responsibilities than Colborn had as a sergeant, shift commander, and patrol supervisor—are public officials within the meaning of *Sullivan*. *See, e.g.*, *Zerangue*, 814 F.2d at 1069-70; *Karr v. Townsend*, 606 F. Supp. 1121, 1131 (W.D. Ark. 1985) (sheriff's deputy is public official); *Hirman v. Rogers*, 257 N.W.2d 563, 566 (Minn. 1977) (same); *Pardo v. Simons*, 148 S.W.3d 181, 189 (Tex. App. 2004) (same); *Murray v. Lineberry*, 69 S.W.3d 560, 563 (Tenn. Ct. App. 2001) (same).[5]

These holdings make perfect sense given the First Amendment's overarching commitment to promoting "uninhibited, robust, and wide-open" debate about those responsible for performing important governmental functions:

> [T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* [actual] malice standards apply.

Rosenblatt, 383 U.S. at 85-86. Law enforcement officers such as Colborn comfortably meet this standard. They are, as multiple decisions note, members of "quasi-military"

[5] For additional state court precedent, see *Turner v. Devlin*, 848 P.2d 286, 290 & n.8 (Ariz. 1993) (police officer); *Gomes v. Fried*, 136 Cal. App. 3d 924, 933-34 (1982) (police officer); *Moriarty v. Lippe*, 294 A.2d 330-32 (Conn. 1972) (patrol officer); *Jackson v. Filliben*, 281 A.2d 604, 605 (Del. 1971) (police sergeant); *Smith v. Russell*, 456 So. 2d 462, 463-64 (Fla. 1984) (police officer); *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 992 (Kan. 1975) (police officer); *Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981) (all law enforcement personnel, including police detective); *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 288 (Mass. 2000) (police officer); *Malerba v. Newsday, Inc.*, 406 N.Y.S.2d 552, 554 (App. Div. 1978) (patrolman); *Colombo v. Times-Argus Ass'n*, 380 A.2d 80, 83 (Vt. 1977) (police officer); *Starr v. Beckley Newspapers Corp.*, 201 S.E.2d 911, 913 (W. Va. 1974) (police sergeant).

organizations who carry guns and who possess the authority not only to arrest but also, in some circumstances, to take human life. *See, e.g.*, *Pool v. VanRheen*, 297 F.3d 899, 909 (9th Cir. 2002) (referring to sheriff's department as "quasi-military entity"); *Kokkinis v. Ivkovich*, 185 F.3d 840, 846 (7th Cir. 1999) (same, as to police department); *Eiland v. City of Montgomery*, 797 F.2d 953, 960 (11th Cir. 1986) (same); *Easley v. Kirmsee*, 235 F. Supp. 2d 945, 957 (E.D. Wis. 2002) (finding that sheriff's deputies receive training "on all aspects of a law enforcement officer's duties and responsibilities, including the use of force, both deadly and non-deadly [and] the use of firearms"), *aff'd on other grounds*, 382 F.3d 693 (7th Cir. 2004); *Caraballo v. Cty. of Sawyer*, 2013 WI App 1, ¶ 4, 345 Wis. 2d 398, 824 N.W.2d 929 (table) (Wis. Ct. App. 2012) (per curiam) (unpublished) (sheriff's deputies' discretionary duties include shackling prisoners, as well as enforcing compliance with commands by use of physical force and chemical agents); *see also* Wis. Stat. § 59.27 (enumerating duties of Sheriffs and their deputies).

Given Colborn's responsibilities and privileges as a sheriff's deputy, sergeant and shift commander—which were apparently significant enough to qualify him to be the Republican nominee in the 2006 election for Manitowoc County Sheriff[6]—there can be no doubt either that he had "substantial responsibility for or control over the conduct of governmental affairs," or that the public has a compelling interest in scrutinizing his

[6] Although it is not necessary for the Court to reach the issue given Colborn's status as a public *official*, he is also obliged to plead and prove actual malice because he is a "public figure." *See Gertz*, 418 U.S. at 335. Should this case proceed to discovery, all Defendants reserve their right to argue via a motion for summary judgment that Colborn's 2006 campaign for Sheriff, his statements to the press about the Avery verdict, and his role in the investigation and prosecution of Halbach's murder render him a limited purpose public figure.

performance of his official duties. As the Wisconsin Court of Appeals has explained: "[T]here is no more awesome power exercised by government than that of the police. The police have literally the power of life and death over citizens they are to protect . . . ." *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 516, 558 N.W.2d 670, 677 (Ct. App. 1996). As a result, "the public has a particularly strong interest in being informed about its . . . law enforcement officers." *Hutchins v. Clarke*, 661 F.3d 947, 955 (7th Cir. 2011); *see also Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (police officer is public official for defamation purposes because "[m]isuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss").[7]

II. The Amended Complaint does not plausibly allege that Netflix acted with the requisite fault.

Because Colborn is a public official and because he does not and cannot plead any facts that could plausibly establish that Netflix distributed *MaM* with actual malice, his defamation claim against Netflix must be dismissed. In fact, even if he were a private figure required to plead and prove only negligence, the Amended Complaint would still fall short.

[7] For these same reasons, in the context of disputes over open records requests, Wisconsin courts have repeatedly emphasized the need for the public to monitor the conduct of law enforcement officers. *See, e.g.*, *Kroeplin v. Wis. Dep't of Nat. Res.*, 297 Wis. 2d 254, 287, 725 N.W.2d 286, 302 (Wis. Ct. App. 2006) ("The public interest in being informed both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated is particularly compelling . . . ."); *Hempel v. City of Baraboo*, 2003 WI App 254, ¶ 18, 268 Wis. 2d 534, 548, 674 N.W.2d 38, 45 ("Police officers must necessarily expect close public scrutiny."), *aff'd on other grounds*, 284 Wis. 2d 162, 699 N.W.2d 551 (2005).

A. The Amended Complaint does not plausibly plead actual malice.

In the wake of *Iqbal* and *Twombly*, the Seventh Circuit has expressly held libel plaintiffs to the intentionally heavy burden of pleading facts that *plausibly* establish the defendant knew the allegedly defamatory statements were false or probably false. *Pippen*, 734 F.3d at 614 ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) ("*Iqbal* itself directly held that malice and other degrees of intent are subject to the plausibility pleading standard." (citing *Iqbal*, 556 U.S. at 686-87)).

Like the Seventh Circuit, every other federal appellate court presented with the issue has held that, where actual malice is an element of a defamation claim, a complaint lacking plausible factual allegations supporting such a finding must be dismissed. *See Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 24 (1st Cir. 2018); *Michel*, 816 F.3d at 704; *Biro v. Condé Nast*, 807 F.3d 541, 544-45 (2d Cir. 2015); *McDonald v. Wise*, 769 F.3d 1202, 1219-20 (10th Cir. 2014); *Mayfield v. NASCAR*, 674 F.3d 369, 377 (4th Cir. 2012).

To plausibly plead actual malice, as with any other element of a claim, conclusory allegations or legal conclusions masquerading as factual assertions will not do; "[b]are assertions of the state of mind required for the claim . . . must be supported with subsidiary facts." *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 916 (7th Cir. 2013). Thus, if Colborn's lawsuit against Netflix is to move forward, he must plead facts sufficient to give rise to a reasonable inference that *Netflix*, as opposed to Ricciardi, Demos, or any other participant in *MaM*'s creation, was aware of the series' probable falsity vis-à-vis

Colborn when it premiered in December 2015. *See Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 868 (7th Cir. 2018) (under actual malice standard, "knowledge of falsity held by a principal cannot be imputed to its agent. It is the state of mind of the speaker that is relevant").

The Amended Complaint contains no such allegations regarding Netflix, nor could it. At most, Colborn makes broad, undifferentiated accusations against all Defendants, alleging in conclusory fashion that they acted "jointly and severally," Dkt. 1-2 ¶¶ 39, 44, 48, 55, or that Ricciardi and Demos acted "in concert with" the other named Defendants, *id.* ¶¶ 21, 32, 33, 45. Similarly, without offering any averments specific to Netflix, the Amended Complaint flatly declares that all Defendants acted "with actual malice," *id.* ¶¶ 18, 39, 44, 48, 55; "with reckless disregard for the truth," *id.* ¶ 45; or that Defendants "knew or had reason to know that the statements were false," *id.* ¶¶ 50, 60, 64.

These are the very kind of "vague and conclusory" statements reciting the elements of a cause of action that are facially insufficient to advance a claim beyond the pleading stage. *Anderson v. Malone*, No. 17-CV-493-PP, 2018 WL 1462232, at *2 (E.D. Wis. Mar. 23, 2018) (Pepper, J.). Colborn's *only* allegations specific to Netflix are that it "released" the series "for worldwide distribution" and that it continues to make *MaM* available to its subscribers. Dkt. 1-2 ¶ 15. Nothing regarding the required state of mind can plausibly be inferred from these allegations.

Colborn also pleads—again, in conclusory fashion—that, together, all of the Defendants defamed him "to make the film more profitable and more successful in the eyes of their peers." Dkt. 1-2 ¶ 18. But it is black-letter law that an alleged profit motive

is insufficient to show actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Similarly insufficient is the Amended Complaint's accusation that "Defendants included in their broadcasts [sic] only one-sided[,] biased interviews that cast police and prosecutors as villains determined to prosecute and convict Avery for a crime that he did not commit . . . ." Dkt. 1-2 ¶ 49(c). Even if that were accurate (and even a cursory viewing of *MaM* shows that it is not), "actual malice does not mean bad intent, ill-will, or animus." *In re Storms v. Action Wis. Inc.*, 2008 WI 56, ¶ 66, 309 Wis. 2d 704, 733, 750 N.W.2d 739, 753. Further, a speaker "is under 'no legal obligation to present a balanced view' and cannot lose its constitutional protection because the plaintiff believed it failed to do so." *Torgerson v. Journal Sentinel, Inc.*, 200 Wis. 2d 492, 546 N.W.2d 886 (table), 1996 WL 56655, at *8 (Ct. App. Feb. 13, 1996) (unpublished) (quoting *Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 412 (6th Cir. 1991)), *aff'd*, 210 Wis. 2d 524, 563 N.W.2d 472 (1997).[8]

What is missing from the Amended Complaint is any allegation that anyone at Netflix knew or had reason to know that the series conveyed defamatory falsehoods about Colborn. To be sure, Colborn alleges that Ricciardi and Demos attended and filmed the entire Avery murder trial. Nowhere, however, does he allege that anyone at *Netflix* attended even one minute of the Avery or Dassey trials, reviewed one word of the

[8] The Amended Complaint also alleges that all Defendants acted with actual malice because they have refused to "admit[] their distortions and omissions of fact" in the wake of "[t]horough, careful, and objective analysis by some members of the public and a few journalists [that] revealed that the series had badly distorted the facts." Dkt. 1-2 ¶ 55. Here, the Amended Complaint makes a not-so-veiled reference to a book criticizing *MaM* published by Colborn's counsel that mirrors many of the allegations in the Amended Complaint. *See generally* Michael Griesbach, INDEFENSIBLE: THE MISSING TRUTH ABOUT STEVEN AVERY, TERESA HALBACH, AND *MAKING A MURDERER* (Kensington Publ'g Corp. 2016). This detour is, however, irrelevant to the issue of actual malice, which is measured at the time of publication, not afterwards. *Pippen*, 734 F.3d at 614.

transcripts of either or those trials, or examined a single trial exhibit. *See, e.g.*, Dkt. 1-2 ¶ 36 ("Upon information and belief, Defendants Ricciardi and Demos filmed the entire [Avery] trial"); *id.* ¶ 43 (same); *id.* ¶ 45 ("Upon information and belief, defendants Ricciardi and Demos had access to the police reports and criminal complaints associated with each of these crimes and knew of their contents."). Absent plausible allegations about scienter specific to Netflix, the Amended Complaint against it must be dismissed.[9]

B. The Amended Complaint does not plausibly allege negligence.

Even if Colborn were deemed, at this juncture, to be a private figure, his Amended Complaint would still fail to state a claim because he has not plausibly pleaded that Netflix was negligent in its distribution of *MaM*.

"[N]egligence is the failure to use the degree of care that would be exercised by a reasonable person under similar circumstances." *Estate of Schilling by Schilling v. Blount, Inc.*, 152 Wis. 2d 608, 618, 449 N.W.2d 56, 60 (Ct. App. 1989). "The whole theory of negligence presupposes some uniform standard of behavior for the protection of others from harm.'" *Denny v. Mertz*, 106 Wis. 2d 636, 654, 318 N.W.2d 141, 149 (1982) (quoting *Troman v. Wood*, 340 N.E.2d 292, 296-99 (1975)).

[9] With regard to Colborn's repeated refrain of "on information and belief": While "information and belief" pleading is not automatically deficient, "alleging something 'on information and belief' is not a license to engage in rank speculation." *Brazil v. Fashion Angels Enters.*, No. 17-CV-824, 2018 WL 3520841, at *2 (E.D. Wis. June 29, 2018), *report and recommendation adopted,* 2018 WL 3518524 (E.D. Wis. July 20, 2018). The Court may not rely merely on a plaintiff's say-so; there must be some factual support to render the allegation plausible. In other words, "there must be a belief that the claim is likely to have evidentiary support after further investigation," and a complaint must plead sufficient facts to create a plausible inference that will be the case. *Verfuerth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 647 (E.D. Wis. 2014) (internal marks and citation omitted). Here, even if Colborn's allegations "on information and belief" were interpreted as somehow directed at Netflix, they would be insufficient because he "has not taken the opportunity to explain why such a claim might be likely to have evidentiary support at some time." *Id.*

The Amended Complaint's bare allegations with respect to Netflix fail to satisfy even this lower bar. As discussed above, wherever Colborn attempts to allege that Netflix distributed *MaM* with fault—whether actual malice or negligence—he does so in conclusory fashion and only by indiscriminately lumping it together with the Producer Defendants. He does not do what the law requires, which is to allege a "lack of ordinary care either in the doing of an act or in the failure to do something." *Denny*, 318 N.W.2d at 149-50 (quoting *Troman*, 340 N.E.2d at 296-99). In fact, he does not specifically allege that Netflix did *anything*, other than distribute *MaM*. Nothing in the Amended Complaint connects the alleged omissions, distortions, and falsifications in the series to any action or inaction by Netflix, as opposed to the Producer Defendants. Nor does Colborn attempt to allege a "uniform standard of behavior" for distributors of nonfiction documentary series or even begin to explain how Netflix violated such a standard. (Nor could he because, as discussed below, distributors such as Netflix are not expected or required to investigate the accuracy of programs they distribute, absent some "blatant" clue that the content is false in some material respect.)

Courts throughout the country have dismissed libel claims based on similarly thin and unsupported allegations of negligence. For example, in *Jang v. Trustees of St. Johnsbury Academy*, one federal court concluded that, although the plaintiff's libel complaint alleged the defendants acted "maliciously" as well as "willfully, wantonly, and recklessly," she failed to "connect these conclusory allegations with any recitation of facts from which the Court can infer that [defendants] negligently failed to check the accuracy of the Letter's contents." 331 F. Supp. 3d 312, 351 (D. Vt. 2018), *appeal filed*,

No. 18-3342 (2d Cir. Nov. 5, 2018).

Likewise, in *E-Ventures Worldwide, LLC v. Google, Inc.*, another federal court dismissed a defamation claim against Google over its classification of plaintiff's websites as "pure spam." 188 F. Supp. 3d 1265, 1269, 1277-78 (M.D. Fla. 2016). The court rejected the plaintiff's argument that negligence was "implied" because Google had failed to review all of its websites, finding this allegation "insufficient to plead fault for a claim of defamation." *Id.* at 1278; *see also Glocoms Grp., Inc. v. Ctr. for Pub. Integrity*, No. 17-cv-6854, 2018 WL 2689434, at *6 (N.D. Ill. June 5, 2018) (granting motion to dismiss because, "[b]eyond conclusory allegations that CPI published the allegedly defamatory statements 'in full knowledge that they were untrue' and failed 'to fully investigate,' Glocoms fails to plead any supporting facts that raise a reasonable inference of negligence" (citations omitted)); *Hakky v. Wash. Post Co.*, No. 8:09-cv-2406-T-30MAP, 2010 WL 2573902, at *6 (M.D. Fla. June 24, 2010) (granting motion to dismiss and stating that, "[a]lthough Plaintiff does point to specific statements in the Article that are false or misleading, Plaintiff does not state how Defendants made these statements negligently, or facts supporting that they were made with malice").

Nothing in the Amended Complaint permits the Court to infer that Netflix failed to exercise the degree of care expected of a company in the business of distributing nonfiction documentary series. The Amended Complaint's "vague and conclusory" statements reciting the elements of a cause of action are facially insufficient to proceed, *see Malone*, 2018 WL 1462232, at *2, and the claims against Netflix should be dismissed even if Colborn were not a public official.

III. Because amendment would be futile, the Court should dismiss Colborn's claims against Netflix with prejudice.

Although, under Federal Rule of Civil Procedure 15, a plaintiff is often granted leave to amend following an initial dismissal for failure to state a claim, "[l]eave to amend need not be granted . . . if it is clear that any amendment would be futile." *Bogie*, 705 F.3d at 608. A complaint should be dismissed with prejudice where its allegations or the contents of exhibits or other material referenced in and central to it show that the plaintiff cannot state a claim as a matter of law. *Id.* at 608-09; *see also Doermer v. Callen*, 847 F.3d 522, 528 (7th Cir. 2017) (affirming dismissal with prejudice where "the law is clearly on the defendants' side"). Both the law and the well-pleaded allegations of the Amended Complaint demonstrate that the flaws in Colborn's pleading cannot be cured by further amendment.

As noted, the Amended Complaint correctly characterizes the respective roles of the Defendants in this case: Chrome was the "*independent* film production company" that, along with its founders, filmmakers Ricciardi and Demos, created *MaM*, while Netflix thereafter "released [the series] for worldwide distribution." Dkt. 1-2 ¶¶ 4, 15. Colborn does not (and cannot) allege either that Netflix, as opposed to Ricciardi and Demos, created the series or that the filmmakers were Netflix employees.

Faced with analogous scenarios, courts across the country have recognized that those who distribute allegedly defamatory material produced by others are not liable for defamation or other content-related torts unless, prior to publication, they know or have reason to know of the allegedly unlawful content. *See, e.g.*, *Lerman v. Flynt Distrib. Co.*,

745 F.2d 123, 140-41 (2d Cir. 1984) (magazine distributor); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 319-20 (D.D.C. 2011) (online and brick-and-mortar booksellers); *Velle Transcendental Research Ass'n v. Sanders*, 518 F. Supp. 512, 519 (C.D. Cal. 1981) (book publishers).

This standard requires more than just a general awareness of *MaM*'s content, as the Wisconsin Supreme Court recognized in *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 500, 297 N.W.2d 500 (1980). There, the court affirmed dismissal of a defamation claim against a contract printer, holding that it had no duty to review the publications it printed and therefore could not be liable for the contents of an allegedly defamatory newspaper produced by a third party. *Id.* at 567, 297 N.W.2d at 506-07. The court reached this conclusion *even though* the printer had previously refused to print copies of the newspaper because of inappropriate content and was thus generally aware of its contents. *Id.* at 566, 297 N.W.2d at 506; *see also Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992) ("[A] publisher who does not already have 'obvious reasons to doubt' the accuracy of a story is not required to initiate an investigation that might plant such doubt."); *Nader v. de Toledano*, 408 A.2d 31, 57 (D.C. 1979) ("In the absence of an evidentiary showing that a publisher had good reason to suspect its falsity, a statement does not create a duty of inquiry.").

Colborn does not even allege that Netflix reviewed the series or was otherwise familiar with its contents before distributing *MaM*. But even if he did, that would not be enough. Instead, he must plausibly allege, at a minimum, that Netflix *knew that the contents were probably false*. *Maynard*, 98 Wis. 2d at 566, 297 N.W.2d at 506. In the

Seventh Circuit, this means he must allege that "something *blatant* put [Netflix] on notice that [the Producer Defendants were] reckless about the truth." *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1319 (7th Cir. 1988) (concluding that publishers generally have no obligation to fact-check the work of journalists who are freelance contributors or independent contractors (citations omitted) (emphasis added)). Colborn does not make any such allegations, nor could he. As the court explained in *Saenz*, "blatant" notice means "[s]erious factual improbabilities or inconsistencies in the article itself, or resting it solely on an inherently unreliable source such as an anonymous telephone call." *Id.* (citations omitted).

In this case, the well-pleaded allegations of the Amended Complaint *themselves* demonstrate that Netflix had no reason to question *MaM*'s references to Colborn and thus assumed no duty to verify the accuracy of those statements prior to distribution. Absent such a duty, Netflix could not have distributed *MaM* negligently, much less with actual malice. *See Parisi*, 774 F. Supp. 2d at 320-21 (to show that a corporate defendant disseminated allegedly defamatory material with actual malice, "plaintiffs must demonstrate actual malice in a high-level employee in order to attribute actual malice to the corporation"); *accord Lerman*, 745 F.2d at 140; *cf. Sullivan*, 376 U.S. at 286-92 (reversing a libel verdict even though the newspaper defendant did nothing to investigate the accuracy of an advertisement it published that libeled the plaintiff).

Both the Amended Complaint and *MaM* itself demonstrate that Netflix had no reason to suspect that the series conveyed anything false about Colborn. First, far from a "product of Defendants' imagination," *see* Dkt. 1-2 ¶¶ 50, 64, the allegation that Colborn

and another Manitowoc County law enforcement official planted evidence to ensure Avery's conviction for the Halbach slaying was at the heart of Avery's murder trial, which Ricciardi and Demos attended and recorded. Colborn concedes this. *See* Dkt. 1-2 ¶¶ 31, 36. Further, as the Amended Complaint repeatedly acknowledges and as *MaM* recounts in detail, Avery was "wrongfully convicted" in Manitowoc County in 1985 before being exonerated by DNA evidence eighteen years later. *Id.* ¶¶ 14, 23, 24. Thus, any suggestion in *MaM* that Colborn planted evidence or that Avery was wrongly convicted was not inherently improbable such that Netflix was confronted with "blatant" evidence that the series contained false statements of fact. Whether or not Manitowoc County officials framed Avery a second time, it is not inherently improbable to assert that they might have done so (as Avery's counsel concededly did on his behalf). This is especially true given that *MaM* is comprised largely of footage of trial testimony, other evidence including interrogations and depositions, and interviews with participants in the case.

In addition, Colborn has not pleaded that there was anything in Ricciardi's and Demos's background that should have put Netflix on notice that they were unreliable. It is not "actual malice" to publish material from a source whose credibility is not suspect. *See Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1090-91 (7th Cir. 1990) (newspaper reporter did not summarize television news report with actual malice where there was no indication television journalist "was a notoriously unreliable reporter"); *Saenz*, 841 F.2d at 1319-20 (magazine had no duty to fact-check freelancer's article "absent strong indicators of falsity or unreliability" (citations omitted)); *Simonson v.*

United Press Int'l, Inc., 500 F. Supp. 1261, 1268-69 (E.D. Wis. 1980) (no actual malice where wire service reporters relied on newspaper report), *aff'd*, 654 F.2d 478 (7th Cir. 1981); *Biskupic v. Cicero*, 2008 WI App 117, ¶¶ 33, 313 Wis. 2d 225, 247, 756 N.W.2d 649, 659 (no actual malice in reporter's reliance on a single source where reporter "did not have any reason to question [the source's] motives or the veracity of her information"). The principle that publishers are entitled to rely on authors and other content creators they have no reason to doubt is merely an application of the black-letter law that "failure to verify information, without more, is not evidence of actual malice." *Id.*, 313 Wis. 2d at 247, 756 N.W.2d at 659; *see also Pippen*, 734 F.3d at 614 ("[F]ailure to investigate is precisely what the Supreme Court has said is insufficient to establish reckless disregard for the truth.").

The allegations of the Amended Complaint and the content of *MaM* establish that Netflix had no reason to double-check the accuracy of Ricciardi's and Demos's work, and consequently could not have disseminated the series with fault—much less actual malice—as a matter of law. Because another attempt to amend Colborn's claim against Netflix would be futile, it should be dismissed with prejudice.

IV. Colborn's intentional infliction of emotional distress claim should also be dismissed.

Colborn's remaining claim for intentional infliction of emotional distress ("IIED") is based entirely on the premise that Netflix published false and defamatory statements about him. As a result, that claim must be dismissed along with his defamation claim.

Defamation plaintiffs cannot end-run the requirements of libel law by calling their

claims something else. As the Supreme Court held in *Hustler Magazine v. Falwell*, "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" 485 U.S. 46, 56 (1988).

In fact, if the Court dismisses Colborn's libel claims, his IIED claim fails whether or not he is deemed a public official for purposes of this motion. As the Fourth Circuit explained in a decision affirmed by the Supreme Court: "[R]egardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech." *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011); *see also Snyder*, 562 U.S. 443, 451 ("The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (when the First Amendment protects speech for libel purposes it similarly protects against a product disparagement claim); *Hill*, 385 U.S. at 387-88 (same, for invasion of privacy); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192-93 & nn.2-3 (9th Cir. 1989) (same, for intentional infliction of emotional distress and false light).

Colborn's IIED claim also fails because he does not plead any facts that would plausibly establish the elements of the tort. A claim for intentional infliction of emotional distress in Wisconsin requires the plaintiff to plead and prove "(1) that the defendant's conduct was intentioned to cause emotional distress; (2) that the defendant's conduct was

extreme and outrageous; (3) that the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct." *Rabideau v. City of Racine*, 2001 WI 57, ¶ 33, 243 Wis. 2d 486, 501, 627 N.W.2d 795, 802-03. Colborn does not plead any fact plausibly suggesting that Netflix distributed *MaM* with the express intent of causing Colborn emotional distress. Nor does he plead any fact that would plausibly support a contention either that Netflix's conduct in distributing *MaM* was "extreme and outrageous" or that it proximately caused emotional distress so disabling that, as Wisconsin's pattern jury instructions put it, he "was unable to function in other relationships because of the emotional distress caused by the conduct." *Pierce v. Physicians Ins. Co. of Wis.*, 2005 WI 14, ¶ 43, 278 Wis. 2d 82, 104, 692 N.W.2d 558, 568-69 (Prosser, J., concurring) (citing Wis JI-Civil 2725).

CONCLUSION

The First Amendment requires Colborn, a sworn law enforcement officer, to plead and prove that Netflix distributed *Making a Murderer* with actual malice. His Amended Complaint comes nowhere close to satisfying federal pleading standards—indeed, it does not even plausibly plead negligence. Because amendment would be futile and because Colborn's intentional infliction of emotional distress claim is based entirely on the premise that Netflix defamed him, his lawsuit against Netflix should be dismissed with prejudice.

Dated: May 9, 2019

Respectfully submitted,

s/ James A. Friedman

James A. Friedman, SBN 1020756
Godfrey & Kahn, S.C.
One East Main Street
Suite 500
Madison, WI 53703-3300
T: (608) 284-2617
F. (608) 257-0609
jfriedman@gklaw.com

Lee Levine
Matthew E. Kelley
Ballard Spahr LLP
1909 K Street, NW, Suite 1200
Washington, D.C. 20006-1157
T: (202) 508-1110
F: (202) 661-2299
levinel@ballardspahr.com
kelleym@ballardspahr.com

Leita Walker
Ballard Spahr LLP
2000 IDS Center, 80 South 8th Street
Minneapolis, MN 55402-2119
T: (612) 371-6222
F: (612) 371-3207
walkerl@ballardspahr.com

Counsel for Netflix, Inc.; Chrome Media LLC; Laura Ricciardi; and Moira Demos

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Terry L. ANDERSON, Plaintiff,
v.
Warden MALONE, John Doe, Bruce E., CO Weise, CO Pekenow, Sgt Robinson, and Captain Brick, Defendants.

Case No. 17–cv–493–pp
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Signed 03/23/2018

Attorneys and Law Firms

Terry L. Anderson, Milwaukee, WI, pro se.

Wisconsin Dept of Justice, for Defendant.

DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO PROCEED WITHOUT PREPAYMENT OF THE FILING FEE (DKT. NO. 2), SCREENING PLAINTIFF'S COMPLAINT, ALLOWING PLAINTIFF TO FILE AMENDED COMPLAINT, DENYING WITHOUT PREJUDICE PLAINTIFF'S REQUEST FOR APPOINTMENT OF COUNSEL (DKT. NO. 1 AT P. 4) AND DENYING PLAINTIFF'S MOTION TO HAVE HIS SOCIAL WORKER SEND HIS PROPERTY TO HIM (DKT. NO. 7)

PAMELA PEPPER, United States District Judge

***1** On April 5, 2017, the plaintiff filed a complaint under § 1983, alleging that the defendants were violating his constitutional rights. Dkt. No. 1. He also filed a motion for leave to proceed without prepayment of the filing fee. Dkt. No. 2. On April 19, 2017, the plaintiff filed a motion asking the court to order his social worker to mail his legal documents to him. Dkt. No. 7. This decision resolves the plaintiff's motions and screens his complaint.

I. Motion for Leave to Proceed without Prepayment of the Filing Fee

The Prison Litigation Reform Act (PLRA) applies to this case because the plaintiff was incarcerated when he filed his complaint. 28 U.S.C. § 1915. The PLRA allows a court to give an incarcerated plaintiff the ability to proceed with his lawsuit without prepaying the case filing fee, as long as he meets certain conditions. One of those conditions is that the plaintiff must pay an initial partial filing fee. 28 U.S.C. § 1915(b).

On April 18, 2017, the court decided that the plaintiff lacked sufficient funds to pay an initial partial filing fee, so it waived that requirement. Dkt. No. 6. The court will grant the plaintiff's motion to proceed without prepayment of the filing fee, and will require him to pay the entire $350 filing fee over time as explained at the end of this decision.

II. Screening the Plaintiff's Complaint

The law requires the court to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint if the plaintiff raises claims that are legally "frivolous, malicious, or fail[ ] to state a claim upon which relief may be granted," or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: 1) he was deprived of a right secured by the Constitution or laws of the United States; and 2) the defendant was acting under color of state law. Buchanan–Moore v. Cty of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Vill. of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)); see also Gomez v. Toledo, 446 U.S. 635, 640 (1980). The court gives a *pro se* plaintiff's allegations, "however inartfully pleaded," a liberal construction. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

A. The Plaintiff's Allegations

The plaintiff alleges that "every time [he does] legal work or get[s] on a religious diet prison staff retaliate against [him] with psychological warfare mindgames headgames chaos confusion." Dkt. No. 1 at 2. The plaintiff states that he is under attack from the warden, guards, unit managers and even nurses. Id. at 3. He states that they are attacking him with mindgames, spiritual warfare and evil spirits. Id. He alleges that these attacks occur, not just when he does legal work or gets on a religious diet, but when he practices religion and politics and "African American studies." Id. at 2.

***2** The plaintiff also alleges that when he is "short something on [his] special diet," he has observed officers going into the control center and coming back with items that only he gets; in other words, he alleges that officers are holding his food in the control center and not giving him anything to replace it. Id. at 3. He also alleges that his life is in danger, that his food is tampered with and that someone is spitting in it. Id.

B. The Court's Analysis

To state a cognizable claim under the federal notice pleading system, the plaintiff must provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts, and his statement need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint that offers mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555).

In considering whether a complaint states a claim, courts should follow the principles set forth in Twombly by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 556 U.S. at 679. Legal conclusions must be supported by factual allegations. Id.

The plaintiff's allegations are too vague and conclusory to state a claim for which a court can grant relief. The plaintiff says that he is being attacked by prison staff, and he mentions the warden, the security director, sergeants, security guards, unit managers and nurses. He does not name any of these individuals. In the caption of his complaint, he names "MSDF Warden—Malone," as well as two kitchen managers, "Bruce E C.O. Weise–Pekenow–Lt. Al Sgt. Robinson, Sgt. Captain Brick et al," but he does not describe the specific actions that each of these people took toward him, or how each of them allegedly violated his rights. He says that prison staff members are attacking him with "mind games," "psychological warfare," "head games" and "spiritual warfare," but he does not describe the mind games, or the warfare. He does specifically state that someone is tampering with his food, spitting in his food, and taking his "special diet" food without replacing it. But he doesn't tell the court *who* is doing these things. He does not say what special diet he believes he should be on. He does say that he practices Islam and Egyptian Paganism (which he describes as a "combo of all religions"), but he does not explain whether he has asked for a special Muslim diet (or a special diet for Egyptian pagans), or say whether anyone denied him that request and who that person was.

In order for the court to decide whether a particular prison staff member has violated an inmate's constitutional rights, the court must know the "who, what, when, where and why" about the alleged constitutional violations. It needs to know the name of the staff member, what specific actions that staff member took, when the staff member took those actions, where the staff member took the actions and, if the plaintiff knows, why the staff member took the actions. The court needs to know this information with regard to each person the plaintiff believes violated his rights. If the plaintiff does not know the name of the person who he believes violated his rights, he can give information such as "the sergeant who works in the control center during first shift," or "Lt. Al, the supervisor on third shift."

***3** The plaintiff should be aware that under § 1983, only prison officials who are personally responsible for a constitutional violation can be liable. Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir. 2009). In other words, an individual defendant must have caused or participated in a constitutional violation in order to be liable under § 1983. Hildebrandt v. Ill. Dept. of Natural Resources, 347 F.3d 1014, 1039 (7th Cir. 2003). For a supervisor to be liable, the supervisor "must [have] know[n] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye [to it]." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995)). The plaintiff should identify only those people who had a direct role in violating his rights.

The court will give the plaintiff the opportunity to file an amended complaint to correct the problems the court has identified. If the plaintiff wants to proceed, he must file the amended complaint in time for the court to receive it by the end of the day on **April 20, 2018**. If the plaintiff does not file an amended complaint by the end of the day on April 20, 2018, the court will dismiss his case based on his failure to diligently prosecute it. See Civil L.R. 41(c). If the plaintiff no longer wants to pursue the case, he does not need to take any further action.

If the plaintiff *does* want to pursue the case, the court is sending the plaintiff a blank complaint form to use in filing the amended complaint. The amended complaint takes the place of the prior complaint, and must be complete in itself; the plaintiff cannot simply say, "Look at my first complaint for further information." See Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1056–57 (7th Cir. 1998). When a plaintiff files an amended complaint, the previous complaint "is in effect withdrawn as to all matters not restated in the amended pleading[.]" Id. at 1057 (citation omitted). The plaintiff should write the word "Amended" in front of the word "Complaint" on the form, and put his case number—17–cv–493—in the space provided. When writing his amended complaint, the plaintiff should provide the court with enough facts to answers to the following questions: 1) Who violated his constitutional rights? 2) How did each person violate his rights? 3) Where did each person violate his rights? and 4) When did each person violate his rights? The plaintiff's complaint does not need to be long, or contain legal language or citations to statutes or cases, but it does need to provide the court and each defendant with notice of what each defendant allegedly did to violate the plaintiff's rights.

If the plaintiff files an amended complaint, the court will screen it under 28 U.S.C. § 1915A.

III. Request for Appointment of Counsel

In his complaint, the plaintiff told the court that he was not competent to represent himself, and asked the court to appoint counsel to assist him. Dkt. No. 1 at 4. He indicates that he has post-traumatic stress disorder, a heart problem, anxiety and trouble breathing. He says that he is not very stable, and that while sometimes he feels okay, other times he does not. Id.

In a civil case, the court has discretion to decide whether to recruit a lawyer for someone who cannot afford one. Navejar v. Iyiola, 718 F.3d 692, 696 (7th Cir. 2013); 28 U.S.C § 1915(e)(1); Ray v. Wexford Health Sources, Inc., 706 F.3d 864, 866–67 (7th Cir. 2013). First, however, the person has to make a reasonable effort to hire private counsel on his own. Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007). After the plaintiff makes that reasonable attempt to hire counsel, the court then must decide "whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it." Navejar, 718 F.3d at 696 (citing Pruitt, 503 F.3d at 655). To decide that, the court looks, not only at the plaintiff's ability to try his case, but also at his ability to perform other "tasks that normally attend litigation," such as "evidence gathering" and "preparing and responding to motions." Id.

***4** The plaintiff does not state that he tried to find an attorney on his own. That means that he has not satisfied that initial requirement of making a reasonable effort to find an attorney. The plaintiff should contact at least three attorneys (he can do it by writing letters to those attorneys) and ask them if they will represent him. If those three attorneys decline to represent the plaintiff, or don't respond in a reasonable time (about a month), then the plaintiff can satisfy the first requirement by letting the court know the names of the lawyers and how (or if) they responded.

At this point, however, even if the plaintiff had satisfied the requirement that he try to find a lawyer on his own, the court would not grant his motion. The court needs more information from the plaintiff to determine whether he is able to state a claim. The court has many, many cases filed by inmates who are representing themselves. Most of them don't have any money to hire a lawyer. Most of them don't have any legal training. Many of them suffer from mental, emotional or physical problems. Most of them ask the court to appoint lawyers to represent them. The court does not have funds to pay lawyers to represent inmate plaintiffs; it relies on volunteer lawyers. There are not enough volunteer lawyers to represent every inmate plaintiff who asks for one. Because there aren't enough volunteer lawyers, the court will appoint a lawyer only in those cases where the plaintiff has stated a claim against an identified defendant, and only when it is satisfied that the plaintiff does not have the ability to litigate that claim himself.

The court will deny the plaintiff's request to appoint counsel without prejudice. That means that if the plaintiff files an amended complaint that the court concludes does state a claim or claims against specific defendants, the plaintiff may renew his request for a lawyer once the court allows him to proceed on that claim (or those claims).

IV. Motion for Legal Materials

The plaintiff filed a motion asking the court to order his social worker to send him his legal materials. Dkt. No. 7. The social worker is not a party in this case, so the court does not have authority to order her to do anything. In addition, the court will not interfere with institution policies about how much or what kind of personal property a prisoner may keep in his cell.

If the plaintiff files an amended complaint and the court finds that that amended complaint states a claim, the plaintiff may use a process called "discovery" to ask the defendants written questions (called interrogatories) or to request documents that he thinks will help him support his claim. See Federal Rules of Civil Procedure 33, 34. The court cautions the plaintiff, however, that he cannot ask the defendants for discovery until after (a) he files an amended complaint, (b) the court reviews it and allows him to proceed on a claim, (c) the defendants file an answer in response to the plaintiff's amended complaint, and (d) the court enters a scheduling order. Right now, the only thing the plaintiff should focus on is preparing an amended complaint and sending it to the court before the **April 20, 2018** deadline.

V. Conclusion

The court **GRANTS** the plaintiff's motion for leave to proceed without prepayment of the filing fee. Dkt. No. 2.

The court **DENIES WITHOUT PREJUDICE** the plaintiff's request that the court appoint counsel to represent him. Dkt. No. 1 at 4.

The court **DENIES** the plaintiff's motion to have his social worker send his property to him. Dkt. No. 7.

The court **ORDERS** that, if the plaintiff wants to proceed with this lawsuit, he must file an amended complaint in time for the court to receive it by the end of the day on **April 20, 2018**. If the plaintiff does not file an amended complaint by the deadline, the court will dismiss this case based on the plaintiff's failure to diligently pursue it. If the plaintiff no longer wants to pursue this lawsuit, he does not need to take any further action.

***5** The court **ORDERS** the agency having custody of the prisoner to collect from his institution trust account the $350 filing fee by collecting monthly payments from the plaintiff's prison trust account in an amount equal to 20% of the preceding month's income credited to the prisoner's trust account and forwarding payments to the Clerk of Court each time the amount in the account exceeds $10 in accordance with 28 U.S.C. § 1915(b)(2). The agency must clearly identify the payments by the case name and number. If the plaintiff is transferred to another institution—county, state or federal—the transferring institution shall forward a copy of this order, along with plaintiff's remaining account balance, to the receiving institution.

The court **ORDERS** the plaintiff to submit all correspondence and legal material to:

United States District Court
Eastern District of Wisconsin
362 United States Courthouse
517 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

PLEASE DO NOT MAIL ANYTHING DIRECTLY TO THE JUDGE'S CHAMBERS. It will only delay the processing of the case.

The court advises the plaintiff that if he does not file documents or take other court-ordered actions by the deadlines the court sets, the court might dismiss his case for failure to prosecute. The parties must notify the Clerk of Court of any change of address. Failure to do so could result in orders or other information not being timely delivered, which could affect the legal rights of the parties.

The court will mail a copy of this order to the officer in charge of the Milwaukee Secure Detention Facility.

2018 WL 1462232

All Citations

Slip Copy, 2018 WL 1462232

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Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

Barbara BRAZIL, Plaintiff,
v.
FASHION ANGELS ENTERPRISES, Defendant.

Case No. 17-CV-824
|
Signed 06/29/2018

Attorneys and Law Firms

Ryan E. Kastelic, Kastelic Law Office, Milwaukee, WI, for Plaintiff.

David J. Hanus, Elizabeth A. Odian, Hinshaw & Culbertson LLP, Milwaukee, WI, for Defendant.

REPORT AND RECOMMENDATION

WILLIAM E. DUFFIN, U.S. Magistrate Judge

Facts

***1** According to the complaint, which the court accepts as true at this stage, Barbara Brazil is an African American woman who was employed by QPS, a staffing agency, and worked at Fashion Angels Enterprises, a warehouse distribution center in Milwaukee, for a little over two months. (ECF No. 1, ¶¶ 1-3, 9.) "On multiple occasions Carmen [who is not otherwise identified or described in the complaint] remarked to Ms. Brazil that the company needed to get her black ass out of there. Ms. Brazil subsequently complained to the Defendant, no action was taken." (ECF No. 1, ¶ 7.) "In October of 2014 the [sic] Ms. Brazil was informed that she was being let go due to insufficient work." (ECF No. 1, ¶ 8.) "On or around October 2 of 2014 the Defendant informed Ms. Brazil's employment agency that she was being let [sic] as a result of an alleged confrontation between Ms. Brazil and Carmen." (ECF No. 1, ¶ 9.)

Brazil alleges "[o]n information and belief black employees were held to a harsher standard than Caucasian or Hispanic employees" and "she was replaced with an employee who happened to be of Hispanic descent." (ECF No. 1, ¶¶ 10-11.)

Fashion Angels moved to dismiss Brazil's complaint pursuant to Fed. R. Civ. P. 12(b)(6). (ECF No. 10.) It argues the complaint does not plausibly suggest that Fashion Angels terminated Brazil because of her race. There is no hint that the person who made the decision to terminate her was motivated by impermissible animus. (ECF No. 11 at 4.) The only specific allegation of racial animus is that with respect to Carmen, but she is not alleged to have any sort of supervisory role over Brazil. (ECF No. 11 at 4.)

Fashion Angels further argues that Brazil's assertion "[o]n information and belief" that African American employees were held to a harsher standard should not be accepted as true because it is not a fact within Brazil's knowledge. (ECF No. 11 at 5 (citing *Verfuerth v. Orion Energy Systems, Inc.*, 65 F.Supp.3d 640 (E.D. Wis. 2014)).)

Brazil responds that she is not required to set forth the elements of a prima facie case in her complaint, and her complaint is otherwise sufficient. (ECF No. 12.)

In reply, Fashion Angels contends "The factual allegations set forth in Brazil's Complaint could never support a violation of 42 U.S.C. 2000e-2 even if Brazil proved each fact. That is because nothing in the Complaint suggests racial animus on the part of Fashion Angels." (ECF No. 13 at 1.)

Motion to Dismiss Standard

"To survive a motion to dismiss under Rule 12(b)(6), a complaint must provide enough factual information to 'state a claim to relief that is plausible on its face' and 'raise a right to relief above the speculative level.' " *Thulin v. Shopko Stores Operating Co.*, 771 F.3d 994, 997 (7th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Accepting as true all well-pleaded facts, the court determines whether they give rise to an entitlement of relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Analysis

"[A] plaintiff alleging employment discrimination under Title VII may allege these claims quite generally." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). "A complaint need not 'allege all, or any, of the facts logically entailed by the claim,' and it certainly need not include evidence." *Id.* (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). Thus, the plaintiff's complaint need not set forth the elements of a prima facie case. *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)).

***2** Even after *Twombly* and *Iqbal*, it does not take much to state a claim for employment discrimination under Title VII. *See Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (quoting *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) ("[I]n order to prevent dismissal under Rule 12(b)(6), a complaint alleging sex discrimination need only aver that the employer instituted a (specified) adverse employment action against the plaintiff on the basis of her sex.")); *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 827 (7th Cir. 2014); *see also EEOC v. Concentra Health Servs.*, 496 F.3d 773, 781 (7th Cir. 2007) (applying *Twombly*) ("[A] plaintiff alleging employment discrimination on the basis of race, sex or some other factor governed by 42 U.S.C. § 2000e-2 may allege the defendant's intent quite generally: 'I was turned down for a job because of my race is all a complaint has to say.") (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998); citing *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 714 (7th Cir. 2006) (holding that a religious discrimination plaintiff need only say that the employer "h[eld] the worker's religion against him")). "In these types of cases, the complaint merely needs to give the defendant sufficient notice to enable him to begin to investigate and prepare a defense." *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (quoting *Tamayo*, 526 F.3d at 1085); *see also Samovsky v. Nordstrom, Inc.*, 619 F. App'x 547, 548 (7th Cir. 2015). "Employers are familiar with discrimination claims and know how to investigate them, so little information is required to put the employer on notice of these claims." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 827 (7th Cir. 2014).

Brazil's two-page complaint can be fairly described as "bare bones" in the extreme in that it provides minimal factual detail. But that is all that is required. *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 779 (7th Cir. 2007) ("Rule 8(a)(2)'s 'short and plain statement of the claim' must contain a minimal level of factual detail, although that level is indeed very minimal."). The essential details are there. Brazil alleges she is African American. She alleges that, shortly after she began working at Fashion Angels, she was promoted to a position of "informal lead worker" that consisted of assisting other workers and instructing them how to perform certain duties. (ECF No. 1, ¶ 4.) She alleges that on multiple occasions a co-worker repeatedly told her "the company needed to get her black ass out of there." (ECF No. 1, ¶ 7 (in the complaint this statement is not in quotation marks but the court presumes that "black ass" is what Carmen actually said and not just counsel's characterization of what she said).) She alleges she complained about these comments to Fashion Angels but no action was taken. (*Id.*) She alleges Caucasian and Hispanic employees were treated better. (ECF No. 1, ¶ 10.) And despite the fact that she was told she was being let go because there was insufficient work (ECF No. 1, ¶ 8), she was replaced by an Hispanic employee (ECF No. 1, ¶ 11). These facts provide the defendant with sufficient notice to begin to investigate and defend against her claim.

It is true that Brazil's complaint does not contain certain details that courts have come to expect in employment discrimination complaints: who did Brazil tell of Carmen's comments; when did she tell this person; what is the basis for the allegation that black employees were "held to a harsher standard than Caucasian or Hispanic employees"; what does she mean by "a harsher standard"? But these are questions that may be answered in discovery and, in light of controlling precedent of the Court of Appeals for the Seventh Circuit, need not be explained in a complaint.

As for Fashion Angels' criticism that Brazil's allegations are asserted "upon information and belief," allegations based upon "information and belief" have long been accepted in federal court for pleadings. *See Odogba v. Wis. DOJ*, 22 F.Supp.3d 895, 901 (E.D. Wis. 2014); *Chisholm v. Foothill Capital Corp.*, 940 F.Supp. 1273, 1280 (N.D. Ill. 1996) (citing *Hall v. Carlson*, No. 85 C 06544, 1985 WL 2412, at *1, 1985 U.S. Dist. LEXIS 23810 at *2 (N.D. Ill. Aug. 28, 1985)); *see also Carroll v. Morrison Hotel Corp.*, 149 F.2d 404, 406 (7th Cir. 1945). Having said that, alleging something on "information and belief" is not a license to engage in rank speculation. *See Verfuerth v. Orion Energy Sys.*, 65 F.Supp.3d 640, 647 (E.D. Wis. 2014). Rule 11 of the Federal Rules of Civil Procedure,

and its requirement that allegations be preceded by "an inquiry reasonable under the circumstances," tempers the use of unfettered speculation. *See* Fed. R. Civ. P. 11(b); *Chisholm v. Foothill Capital Corp.*, 940 F.Supp. 1273, 1281 (N.D. Ill. 1996). Thus, the court need not accept as true an allegation in a complaint merely because it states that it is based "on information and belief." There must be some reason for believing "that the claim is 'likely to have evidentiary support' after further investigation ...." *Verfuerth v. Orion Energy Sys.*, 65 F.Supp.3d 640, 647 (E.D. Wis. 2014) (citing *Twombly*, 550 U.S. at 551, 557, 127 S.Ct. 1955); *In re Darvocet, Darvon, and Propoxyphene Products Liability Litigation*, 756 F.3d 917, 931 (6th Cir. 2014) ("The mere fact that someone believes something to be true does not create a plausible inference that it is true.").

***3** However, the allegations in Brazil's complaint that are "on information and belief" are not necessarily beyond her knowledge. For example, an employee would be likely to have some information as to how her coworkers are treated, either through her own observation or the workplace grapevine. And given how often it is included in employment discrimination complaints, a terminated employee may well know the race of the person who replaced her.

IT IS THEREFORE RECOMMENDED that Fashion Angels Enterprises' motion to dismiss (ECF No. 10) be **denied**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b)(2) whereby written objections to any recommendation herein or part thereof may be filed within fourteen days of service of this recommendation. Failure to file a timely objection with the district court shall result in a waiver of your right to appeal.

All Citations

Slip Copy, 2018 WL 3520841

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345 Wis.2d 398
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

Joseph A. CARABALLO, Plaintiff–Appellant,
v.
COUNTY OF SAWYER, Sawyer County Sheriff's Department and James Meier, Sheriff of Sawyer County, Defendants–Respondents.

No. 2012AP364.
|
Nov. 6, 2012.

Appeal from a judgment of the circuit court for Sawyer County: John P. Anderson, Judge. *Affirmed.*

Before HOOVER, P.J., PETERSON and MANGERSON, JJ.

Opinion

¶ 1 PER CURIAM.

***1** Joseph Caraballo appeals a summary judgment dismissing his personal injury action against Sawyer County, its sheriff's department and the sheriff (collectively, "the County"). Caraballo argues that because the use of force against him was "plainly excessive," the court erred by dismissing his suit on the basis of governmental immunity. We reject Caraballo's arguments and affirm the judgment.

BACKGROUND

¶ 2 This case arises from Caraballo's November 2006 arrest on charges related to operating while under the influence. A sheriff's deputy stopped Caraballo's vehicle after observing erratic driving. Caraballo told the deputy he had been at a bar, and because the deputy detected the odor of intoxicants, he asked Caraballo to perform field sobriety tests. After failing two tests, Caraballo was placed under arrest and transported to the Sawyer County jail.

¶ 3 Caraballo was brought to a booking room and his left hand was cuffed to a restraint on the wall. Throughout his time in the booking room, Caraballo was verbally combative and argumentative. A deputy gave Caraballo a second-offense OWI citation and read him the "informing the accused" notice. Caraballo initially declined to submit to a breath test, then offered to take the test immediately. When told that he would have to wait five minutes, Caraballo again refused to take the test. The deputy consequently informed Caraballo he would be transported to the hospital for a blood draw, and Caraballo replied that they would not be able to draw his blood.

¶ 4 In order to transport him, Caraballo needed to be restrained in shackles. After Caraballo's handcuff was removed from the wall, however, he physically resisted attempts to shackle him. Caraballo was forced to the floor face down and ordered to place his hands behind his back. Caraballo refused and continued to physically resist. He was subsequently knelt upon by at least one deputy; knee strikes were administered to Caraballo's kidney region by two deputies and "wrist bends" were used in an effort to secure compliance. When Caraballo continued to resist, a deputy advised him that he would be pepper sprayed if he did not comply. Caraballo continued to resist and pepper spray was administered before the deputies were able to restrain him.

¶ 5 Caraballo filed suit against the County alleging the deputies: (1) violated his civil rights by using excessive force to restrain him; and (2) were negligent in restraining him. The circuit court granted the County's motion for summary judgment on the basis of governmental immunity. This appeal follows. [1]

1 In his briefs, Caraballo often identifies himself as "plaintiff" or "plaintiff-appellant." Likewise, the County's brief utilizes the term "plaintiff" when referring to Caraballo. The attorneys are reminded that the rules of appellate procedure require them to identify the parties by their names, not their party designations. WIS. STAT. RULEE 809.19(1)(i). All

references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

DISCUSSION

***2** ¶ 6 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.,* 212 Wis.2d 226, 232, 568 N.W.2d 31 (Ct.App.1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten,* 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). All reasonable inferences from the undisputed facts are construed in the nonmoving party's favor. *Strozinsky v. School Dist. of Brown Deer,* 2000 WI 97, ¶ 32, 237 Wis.2d 19, 614 N.W.2d 443.

¶ 7 Here, the circuit court concluded the County was entitled to judgment as a matter of law on the basis of governmental immunity. The application of the governmental immunity statute and its exceptions to a set of facts presents a question of law that we review independently. *See Heuser v. Community Ins. Corp.,* 2009 WI App 151, ¶ 21, 321 Wis.2d 729, 774 N.W.2d 653. The governmental immunity statute, WIS. STAT. § 893.80(4), provides that governmental subdivisions are not liable for employee acts done in the exercise of their legislative, quasi-legislative, judicial or quasi-judicial functions. In other words, the statute immunizes governmental subdivisions from liability for "any act that involves the exercise of discretion and judgment." *Lodl v. Progressive N. Ins. Co.,* 2002 WI 71, ¶ 21, 253 Wis.2d 323, 646 N.W.2d 314. The defense of discretionary act immunity for public officers and employees assumes negligence and focuses on whether the action or inaction upon which liability is premised is entitled to immunity. *Id.,* ¶ 17.

¶ 8 Governmental immunity is subject to several exceptions that represent "a judicial balance struck between the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress." *Id.,* ¶ 24 (internal quotations omitted). Caraballo asserts that two exceptions apply here: the ministerial duty exception, and the malicious, willful, and intentional action exception. We address each in turn.

I. *Ministerial Duty*

¶ 9 The ministerial duty exception abrogates immunity in circumstances where the law imposes an affirmative obligation to act in a particular way. A ministerial duty is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister v. Board of Regents of Univ. of Wis. Sys.,* 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976).

***3** ¶ 10 The first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty. *Pries v. McMillon,* 2010 WI 63, ¶ 31, 326 Wis.2d 37, 784 N.W.2d 648. Here, Caraballo argues that various Sawyer County Sheriff's Department policy provisions relating to the use of force imposed ministerial duties on the deputies. We are not persuaded.

¶ 11 Caraballo cites the following policy provision regarding enforcement action based on legal justification:

> The requirement that legal justification be present imposes a limitation on the Officer action. In every case, an Officer must act reasonably within the limits of his authority as defined by statute and judicial interpretation, thereby insuring the rights of the individual and the public are protected.

Caraballo also cites a policy provision on the use of force that states, in relevant part:

> In order to ensure safety, security, and maintenance of order in situations in which application of force may be necessary; and in order to ensure provision of the legal rights of citizens; physical force shall only be used when absolutely necessary to gain or regain control of a resistive or assaultive subject(s) during arrest or other legitimate law enforcement functions.
>
> When application of force is required, Officer's legal authority is provided by Wisconsin State Statutes 939.45 (Privilege) and 939.48 (Self-defense and defense of others). Only the minimum amount of force

reasonably necessary to gain or regain control of a subject shall be applied. In general, the following factors ... shall be used to determine whether use of force is "objectively reasonable" in a given situation:

1. The severity of the alleged crime at issue;

2. Whether the suspect poses an imminent threat to the safety of Officers and others; and

3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

"Minimum force" shall be based on the steps in the Force Option Continuum of Wisconsin's Defense and Arrest Tactics system.[2] Non-physical force options (presence and dialogue), which are the lowest levels of force in the Force Option Continuum, shall be used whenever possible and feasible. Physical force options (empty hand control techniques, intermediate weapons, or firearms) shall only be used when non-physical force options have proven ineffective or would clearly be inappropriate in order to gain or regain control.

2 Department policy identifies four levels on the "Force Option Continuum": (1) deputy attempts to gain compliance through the use of presence and dialogue; (2) deputy attempts to gain compliance through the use of empty hand control tactics, such as escort holds, compliance holds, passive countermeasures, active countermeasures and/or pepper spray; (3) deputy attempts to gain compliance through the use of an intermediate weapon, such as a police baton; and (4) deputy uses deadly force.

***4** ....

Application of any level of force must de-escalate when control of a subject has been gained or regained, and/or the subject has ceased resisting. Application of physical restraints, such as handcuffs, following gaining control of a subject shall not be considered use of force. Instead, such application of physical restraints shall be considered stabilization of the subject to prevent further resistance and/or injury to the subject or others. Proper follow-through procedures shall be initiated following any incident involving use of force.

¶ 12 Caraballo similarly cites what he describes as a "sheriff's department/jail division" policy providing that the Sawyer County Jail will accomplish custodial correctional functions with minimal reliance on the use of force and "[e]mployees may use reasonable force as required in the performance of their duties, but unnecessary or excessive force shall not be used." Reasonable force is then defined by the jail division policy as:

> The force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain control of a resistive or combative inmate, defend themselves or others from physical or sexual assault, prevent inmates from escaping, or prevent destruction of property.

¶ 13 Caraballo does not claim the deputies lacked the authority to restrain him but, rather, that they used excessive force in violation of the ministerial duties imposed by the above-referenced policy provisions. The cited policy provisions, however, merely provide general guidelines on the use of force, while affording deputies discretion within the stated guidelines. These provisions do not mandate action (or inaction) on the part of the deputies "with such certainty that nothing remains for judgment or discretion." *Lister,* 72 Wis.2d at 301, 240 N.W.2d 610. These provisions, therefore, did not impose a ministerial duty on the deputies to use less force than what they deemed necessary to restrain Caraballo.

¶ 14 Regarding the use of chemical agents, Caraballo cites a department policy that relates to the use of tear gas.[3] As the County points out, however, the specific policy on pepper spray provides: "Actual use of [pepper spray] will depend on the threat assessment factors, officer-suspect factors, or special circumstances. A practical guideline is that pepper spray may be used in reaction to aggressive resistance or its threat." Here, pepper spray was used in response to Caraballo's continued physical resistance despite repeated requests for compliance. The policy provision gives deputies the discretion to use pepper spray and, therefore, did not impose a ministerial duty to refrain from using the spray in this case.

3 The provision cited by Caraballo indicates:

> To minimize injury to suspects, Officers, and others, or to avoid property damage, the use of chemical agents such as tear gas may be necessary in circumstances where a serious danger to life and property exists and other methods of control or apprehension would be ineffective or more dangerous. The commanding Officer at the situation has the responsibility for determining the need for the use of chemical agents and authority to direct its deployment. In no event, however, can chemical agents be used for crowd or riot control unless authorized by a commanding Officer or higher.

***5** ¶ 15 Citing another department policy requiring the deputies to file a "Use of Force Continuum Report," Caraballo contends the deputies' failure to file a report is "further evidence of inappropriate conduct and disregard of the policies of the department." Caraballo, however, fails to establish how he is harmed by the failure to file a report, especially when there is video of the incident and the respective parties' actions during the incident are undisputed. Ultimately, none of the cited policies imposed a ministerial duty abrogating the County's immunity from suit.

II. *Malicious, Willful and Intentional*

¶ 16 Although Caraballo asserts this additional exception to governmental immunity, the County properly notes that his argument is undeveloped. Emphasizing that the deputies already had overwhelming evidence of his intoxication, Caraballo simply intimates that the use of force to obtain an unnecessary blood draw was "intentional." This court declines to consider arguments that are unexplained, undeveloped or unsupported by citation to authority. *M.C.I., Inc. v. Elbin,* 146 Wis.2d 239, 244–45, 430 N.W.2d 366 (Ct.App.1988). Moreover, the exception does not apply to mere intentional conduct of a public officer or employee without more. *Bicknese v. Sutula,* 2003 WI 31, ¶ 19, 260 Wis.2d 713, 660 N.W.2d 289. "The three terms should be read in conjunction as 'malicious, willful, *and* intentional.' " *Id.* (emphasis added).

¶ 17 Although Caraballo attempts to develop his argument in the reply brief, developing an argument for the first time in a reply brief impermissibly deprives the respondent of an opportunity to respond. Thus, we need not address Caraballo's reply argument. *See Swartwout v. Bilsie,* 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (Ct.App.1981). In any event, the undisputed facts and the video confirm there is no room for a jury to reasonably infer that the deputies' actions were malicious, willful and intentional. Caraballo has therefore failed to establish that this alternative exception to governmental immunity applies.

Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULEE 809.23(1)(b)5.

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United States District Court,
N.D. Illinois, Eastern Division.

The GLOCOMS GROUP, INC., Plaintiff,
v.
CENTER FOR PUBLIC INTEGRITY, Defendant.

Case No. 17-cv-6854
|
Signed 06/05/2018

Attorneys and Law Firms

Andrew S. May, Chuhak & Tecson, P.C., Chicago, IL, for Plaintiff.

Constance Morrow Pendleton, Lisa Beth Zycherman, Laura Rose Handman, Davis Wright Tremaine LLP, Washington, DC, Jessica Tovrov, Goodman Tovrov Hardy & Johnson LLC, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

John Robert Blakey, United States District Judge

***1** Plaintiff Glocoms Group sued Defendant Center for Public Integrity (CPI) after CPI published an article about Glocoms' consulting work for the U.S. government and foreign governments. Glocoms alleges that the article contained false statements that damaged its reputation. CPI moved to dismiss all claims. For the reasons explained below, this Court grants that motion.

I. The Complaint's Allegations

Since 2000, Glocoms has done consulting work for both U.S. and foreign government agencies. [33] ¶ 1. Maurence Anguh is Glocoms' sole shareholder. *Id.* ¶ 6. CPI publishes news to the general public through its website. *Id.* ¶ 3.

In September 2016, CPI published an article about Glocoms entitled: "A Trail of Contracting Fiascos: How a Company Using a Rented Mailbox in Chicago Got Millions of Dollars from International Agencies and the U.S. Government, Despite Official Allegations of Lying and Repeated Sanctions." [33-2] at 15–18. The article's authors included one graduate student and three undergraduate students. [33] ¶ 11. The article stated, among other things, that the World Bank debarred Glocoms in 2010 from working on Bank-funded projects, but that Glocoms still received millions of dollars in contracts from U.S. agencies after the debarment. [33-2] at 15–18.

Glocoms contends that the article contains numerous false statements that hurt its "good reputation for honesty and truthfulness" in its industry. *See* [33] ¶ 8 (identifying ten allegedly false statements: 8(a)–(j)). Glocoms also contends that CPI acted recklessly or negligently in publishing the allegedly false statements. *Id.* ¶ 9. Glocoms demanded a written retraction from CPI in October 2016, but CPI refused to issue a retraction. *Id.* ¶ 16. Glocoms sued CPI in September 2017. [1].

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must provide a "short and plain statement of the claim" showing that the pleader merits relief, Fed. R. Civ. P. 8(a)(2), so the defendant has "fair notice" of the claim "and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint must also contain "sufficient factual matter" to state a facially plausible claim to relief—one that "allows the court to draw the reasonable inference" that the defendant committed the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). This plausibility standard "asks for more than a sheer possibility" that a defendant acted unlawfully. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

In evaluating a complaint, this Court accepts all well-pled allegations as true and draws all reasonable inferences in the plaintiff's favor. *Iqbal*, 556 U.S. at 678. This Court does not, however, accept a complaint's legal conclusions as true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Rule 12(b)(6) limits this Court to considering the complaint, documents attached to the complaint, documents central to the complaint (to which the complaint refers), and information properly subject to judicial notice. *Williamson*, 714 F.3d at 436.

III. Analysis

***2** CPI seeks to dismiss Glocoms' claims on three alternative grounds: (1) the Illinois Citizen Participation Act (ICPA), 735 ILCS 110/1 *et seq.*, bars Plaintiff's suit; (2) the fair report privilege protects CPI; and (3) Glocoms fails to plead that CPI acted with actual malice or even negligence. [36] at 4. This Court addresses each argument in turn.

A. ICPA

The ICPA bars "strategic lawsuits against public participation," or SLAPPs. *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012). By definition, SLAPPs have no merit because the plaintiff does "not intend to win but rather to chill a defendant's speech or protest activity" through "delay, expense, and distraction." *Id.* CPI argues that this suit qualifies as a prohibited SLAPP. [36] at 4.

Illinois courts employ a three-step analysis for identifying SLAPPs subject to dismissal under the Act: (1) the defendant acted in furtherance of its "right to petition, speak, associate, or otherwise participate in government to obtain favorable government action"; (2) the plaintiff's claims are "*solely* based on, related to, or in response to" the defendant's acts in furtherance of its constitutional rights; and (3) the plaintiff cannot produce clear and convincing evidence that the defendant did not genuinely and solely aim to procure "favorable government action." *Chi. Reg'l Council of Carpenters v. Jursich*, 986 N.E.2d 197, 201 (Ill. App. Ct. 2013) (emphasis added) (citing *Sandholm*, 962 N.E.2d at 433–34). The moving party bears the burden of proof under the first two prongs of the test; the burden shifts to the non-moving party for the third prong. *Garrido v. Arena*, 993 N.E.2d 488, 496 (Ill. App. Ct. 2013).

CPI meets its burden to show that it published the article in furtherance of its right to petition "or otherwise participate in government to obtain favorable government action." *See Jursich*, 986 N.E.2d at 201. A review of the article, [33-2] at 15–18, makes clear that CPI published the article to draw attention to what it viewed as the federal government's failure to establish adequate safeguards for hiring contractors, and to further "the public's interest in responsible governmental contracting procedures," [44] at 3.

CPI fails, however, to meet its burden "to demonstrate affirmatively" that Glocoms filed this lawsuit *solely* as a response to CPI exercising its right to participate in government (in other words, to demonstrate that Glocoms' claims have no merit). *See Jursich*, 986 N.E.2d at 201. Indeed, CPI fails to comprehend that it has this burden, [44] at 2, and disregards Glocoms' citation to *Sandholm*, in which the Illinois Supreme Court unambiguously interpreted the phrase "based on, relates to, or is in response to" from the ICPA "to mean *solely* based on, relating, or in response to" the moving party's acts in furtherance of its rights of petition, speech, association, or government participation, 962 N.E.2d at 430.

As *Sandholm* explained, the "paradigm" meritless SLAPP involves "developers, unhappy with public protest over a proposed development," who sue "leading critics in order to silence criticism" of the project. *Id.* at 427. Illinois courts assess multiple factors to identify a meritless lawsuit, including the suit's timing and whether the suit seeks "extremely high damages, unsupported by the facts." *See Jursich*, 986 N.E.2d at 202 (discussing "a classic SLAPP scenario" in which a plaintiff sued a broadcaster before the final part of a four-part program aired and sought $28 million in damages "not justified by the nature of the plaintiff's alleged injuries"). Moreover, "meritless" has a specific meaning under the ICPA, as described above; a claim does not qualify as meritless simply because it might be dismissed for failure to state a claim. *See Garrido*, 993 N.E.2d at 496; *Hammons v. Soc'y of Cosmetic Prof'ls*, 967 N.E.2d 405, 410 (Ill. App. Ct. 2012).

***3** Here, Glocoms did not sue CPI until one year after CPI published the article, and Glocoms seeks damages "in an amount within the jurisdiction of this court and to be proven at trial." [33] at 15. CPI cites the article's statement that Anguh—Glocoms' sole shareholder—threatened legal action in December 2014 if CPI reporters continued contacting him, [44] at 3, but otherwise fails to provide "affirmative evidence" to establish that Glocoms filed this suit solely in response to CPI's protected activities, rather than as a result of its belief (whether justified or not) that the article defamed Glocoms, *see Jursich*, 986 N.E.2d at 203. Thus, this Court denies CPI's motion to dismiss Glocoms' suit under the ICPA.

B. Fair Report Privilege

CPI next argues that the fair report privilege protects the article's statements that depend upon World Bank reports and records of judicial proceedings from Anguh's divorce in Cook County Circuit Court. [36] at 5–10. Illinois' fair

report privilege protects reports of official proceedings when the reports are "complete and accurate or a fair abridgement of the official proceeding." *Solaia Tech. v. Specialty Publ'g Co.*, 852 N.E.2d 825, 843 (Ill. 2006). A fair abridgement means one that conveys "a substantially correct account" of the proceeding to readers. *Tepper v. Copley Press, Inc.*, 721 N.E.2d 669, 675 (Ill. App. Ct. 1999) (quoting Restatement (Second) of Torts § 611, cmt. *f* (1977)). The defendant's subjective intent in publishing the allegedly defamatory statement does not affect whether the privilege applies. *Huon v. Denton*, 841 F.3d 733, 740 (7th Cir. 2016).

Plaintiff argues that the privilege does not apply to most of the article because it protects only reports based upon the acts of U.S. governmental entities, not foreign governments or institutions like the World Bank. [43] at 9–10. Until 1988, no American court had directly addressed whether the privilege applies to reports based upon foreign governmental proceedings. *See Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). In *Lee*, the Fourth Circuit held that the privilege does not extend to reports of foreign governments' activities because, among other reasons, foreign governments "are not necessarily familiar, open, reliable, or accountable." *Id.* at 879.

Some district courts have reached the opposite result. CPI points to *Friedman v. Israel Labour Party*, 957 F. Supp. 701, 714 (E.D. Pa. 1997), in which the court held that the fair report privilege protected a newspaper that republished an Israeli press release, and *Sharon v. Time, Inc.*, 599 F. Supp. 538, 542–43 (S.D.N.Y. 1984), in which the court implied in dicta that a magazine article based upon an Israeli commission's report was "the fair report of a judicial proceeding."

Such cases, however, remain unconvincing, especially where one case addressed the issue only briefly in dicta. Consequently, this Court follows the Fourth Circuit's reasoning in *Lee* and holds that the fair report privilege does not encompass reports of World Bank proceedings. [1]

1 The Fourth Circuit's approach also accords with the Restatement, which explicitly limits the privilege's scope to "reports of the proceedings or actions of the government of the United States, or of any State or of any of its subdivisions." *See OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 42 (D.D.C. 2005) (internal quotation marks omitted) (following *Lee* and holding that the privilege did not protect a CPI article based upon a Russian law enforcement agency's report).

Nevertheless, the privilege does protect the article's statements based upon Cook County Circuit Court records from Anguh's divorce proceedings. *See Solaia*, 852 N.E.2d at 844. Glocoms does not argue otherwise in its response. *See* [43] at 9–10. Glocoms' complaint takes issue with the article's statement that the address listed on Glocoms' website "is for a mailbox at a UPS store beneath a street-level Chicago Starbucks." [33] at 3. But that statement accurately reflects Anguh's testimony about Glocoms' address, [36-1] at 81, and thus falls within the fair report privilege, *see Solaia*, 852 N.E.2d at 844. Besides, Glocoms admitted in its complaint that it "maintains a PO Box mailing address" in Chicago's Gold Coast neighborhood. [33] at 3. Thus, this Court dismisses with prejudice Glocoms' claims based upon statement 8(a).

C. The Merits of Glocoms' Claims

***4** Finally, CPI argues that Glocoms' defamation claim and related tort claims fail because Glocoms qualifies as a limited purpose public figure, but fails to plead that CPI acted with actual malice or even negligence. [36] at 8, 10–14. Glocoms argues that it is a private figure. [43] at 10–13. CPI also argues that some of the allegedly defamatory statements are not defamatory as a matter of law. [36] at 8.

To state a defamation claim under Illinois law, a plaintiff must allege that: (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of that statement to a third party; and (3) publication damaged the plaintiff. *Green v. Rogers*, 917 N.E.2d 450, 459 (Ill. 2009). Certain categories of statements qualify as defamatory per se, meaning they cause harm so "obvious and apparent" that a plaintiff need not plead damages. *See id.* (citing *Owen v. Carr*, 497 N.E.2d 1145, 1147 (Ill. 1986)). Those categories include, among others: (1) words imputing that a person cannot perform "or lacks integrity in performing his or her employment duties"; and (2) words imputing that "a person lacks ability," or that otherwise prejudice the person in his or her work. *Id.*

1. Non-Defamatory Statements

Two of the ten statements that Glocoms' complaint labels defamatory are not about Glocoms; they address the federal government's standards for when contracting officers must consult certain databases or update the databases with information about a contractor's performance. *See* [33] at 6–7. Because CPI did not make these statements about Glocoms, the statements could not have defamed Glocoms as a matter of law. *See Huon*, 841 F.3d at 744 ("Some comments are not defamatory because they do not directly concern Huon himself, but instead relate to acquittal and guilt more generally."); *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 701 (Ill. App. Ct. 2002).

Glocoms also challenges the article's opening line as defamatory: "In 2006, the Mongolian Finance Ministry hired a small Chicago-based consulting firm called Glocoms to strengthen its budget planning." [33] at 3. But in Glocoms' own words, that statement is true: "Glocoms was not hired by the Mongolian Finance Ministry. Glocoms was selected through a rigorous competitive international Quality Cost Based Selection." *Id.* By any common-sense reading, the latter sentence is simply a more complicated way of saying "hired." [2] The law does not require CPI to include every detail of the hiring process in its reporting. *See Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001) (Illinois law does not require a reporter "to include all facts" that "put the subject in the best light."). Thus, this Court dismisses with prejudice Glocoms' claims based upon statements 8(b), (i), and (j).

2 This Court, for example, selects its law clerks through a rigorous, competitive, quality-based process, but it also "hires" them.

2. Whether Glocoms Is a Limited Purpose Public Figure

In *Gertz v. Robert Welch, Inc.*, the Supreme Court introduced the classification of limited purpose public figures—those who inject themselves "into a particular public controversy" and therefore become public figures "for a limited range of issues." 418 U.S. 323, 351 (1974). Although determining whether Glocoms is a limited purpose public figure remains a question of federal constitutional law, the Supreme Court has not yet provided significant guidance around the precise contours of exactly who constitutes a public figure. *See Harris v. Quadracci*, 48 F.3d 247, 250 n.5 (7th Cir. 1995). Thus, because states may provide a more developed definition of "public figure," this Court may appropriately look to Illinois case law in this diversity action. *See id.* (explaining the Seventh Circuit's reliance on Wisconsin case law defining public figures).

***5** To determine whether a plaintiff is a limited purpose public figure, Illinois courts follow the three-part test that the D.C. Circuit articulated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). *See Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1176 (Ill. App. Ct. 2014). First, a public controversy must exist, involving active public debate about an issue, "the outcome of which impacts the general public or some portion of it in an appreciable way." *Id.* (citing *Waldbaum*, 627 F.2d at 1296). A matter of "general public interest or concern" does not suffice. *Id.* Second, the plaintiff must have "undertaken some voluntary act seeking to influence the resolution of the issues involved" in the public controversy. *Id.* at 1177 (citing *Waldbaum*, 627 F.2d at 1297). Finally, the alleged defamation must relate to the plaintiff's participation in the public controversy. *Id.* (citing *Waldbaum*, 627 F.2d at 1298).

Based upon the limited record before this Court, Glocoms does not qualify as a limited purpose public figure. Even assuming a public controversy exists surrounding the federal government's contracting practices, nothing indicates that Glocoms met the second prong of the test by voluntarily acting "to influence the resolution of the issues involved" in that controversy. *See id.* at 1177. Limited purpose public figures "thrust themselves to the forefront of particular public controversies." *Gertz*, 418 U.S. at 345. Participating in a public controversy in a "trivial or tangential" way does not suffice; a plaintiff must have purposely tried to influence the outcome of a controversy or "expected, because of his position in the controversy, to have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297.

CPI argues that Glocoms became a limited purpose public figure by seeking "international and U.S. government contracts, thus assuming the risk of public scrutiny." [44] at 7 (citing *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 295 (4th Cir. 2008); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 255 (D.D.C. 2016)). But the government contractor in *Rhodes* became a public figure not merely

by seeking and accepting government contracts, but by contracting to provide civilian interrogators at "the notorious U.S.-run Abu Ghraib prison in Iraq." *Rhodes*, 536 F.3d at 284–95 (detailing the contractor's "prominent role" in the controversy itself about the military abusing detainees at Abu Ghraib). The plaintiff in *Montgomery* became a limited purpose public figure where: (1) he sold controversial technology to the government that he claimed could anticipate terrorist attacks; (2) he made multiple high-profile allegations—including in an interview on NBC News—that a former Congressman accepted bribes to secure defense contracts for a certain company; and (3) the media reported extensively on the plaintiff's technology before the allegedly defamatory book came out. 197 F. Supp. 3d 219, 226, 257–58. And another case that CPI cites expressly contradicts its argument that Glocoms became a public figure simply because it sought government contracts. *See McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985) (Merely "working on government contracts, like merely receiving research grants, should not transform a person into a limited purpose public figure.").

In contrast to the examples above, CPI has not shown that Glocoms contracted to do controversial work for the government, became directly implicated in a highly publicized controversy, or received any publicity aside from the CPI article at issue here. *Cf. id.* (plaintiff faced "significant public notoriety and scrutiny well before the allegedly defamatory broadcast"); *Silvester v. Am. Broad. Cos., Inc.*, 839 F.2d 1491, 1495 (11th Cir. 1988) (plaintiff had "longstanding access to the media" and publications such as the *New York Times* and *Wall Street Journal* covered the relevant controversy before the allegedly defamatory broadcast). Overall, the record at this stage of the case contains little evidence about Glocoms' activities. If the case proceeds to summary judgment or trial, more factual development might show that Glocoms qualifies as a limited purpose public figure. Presently, however, this Court cannot find that Glocoms is a limited purpose public figure.

3. Whether Glocoms Pleads Negligence

***6** As a private figure, Glocoms need only plead negligence rather than actual malice for its defamation claims to proceed. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011, 1020 (Ill. 2008). CPI argues that Glocoms fails to allege that CPI acted negligently in publishing the article. [36] at 12. Glocoms argues in its response that it is a private figure, but does not argue that it adequately pleads negligence. *See generally* [43].

Negligence means a "lack of ordinary care" either in doing something or in failing to do something. *See Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975). In the publishing context, negligence takes the form of publishing something without having "reasonable grounds" to believe its truth. *Id.*; *see also Edwards v. Paddock Publ'ns, Inc.*, 763 N.E.2d 328, 335 (Ill. App. Ct. 2001) (reversing a directed verdict for a newspaper when evidence indicated that the paper incorrectly published a yearbook photograph of the plaintiff identifying him as a suspect in a criminal investigation without verifying that the photograph represented the true suspect).

Beyond conclusory allegations that CPI published the allegedly defamatory statements "in full knowledge that they were untrue" and failed "to fully investigate," [33] at 3, Glocoms fails to plead any supporting facts that raise a reasonable inference of negligence. Glocoms alleges that CPI erred by allowing a graduate student and several undergraduate students to write the article, *id.* at 8, but Glocoms provides no authority for the proposition that using college and graduate students as reporters falls below the ordinary standard of care in publishing.

Besides, Glocoms concedes the truth of much of CPI's reporting. Glocoms admits that the World Bank debarred it and that CPI relied upon the World Bank's sources for its article. *See* [43] at 3. Fundamentally, Glocoms' real quarrel appears to be with the World Bank and the process that the World Bank used to debar Glocoms. *See id.* ("The World Bank audit was a sham" and the article "blindly accepted the World Bank's version of events."). Glocoms fails to allege a factual basis for its position that CPI lacked "reasonable grounds" to believe the truth of the article's statements when it relied upon World Bank documents to produce those statements. *See Troman*, 340 N.E.2d at 299.

Glocoms' defamation claim fails because of its failure to plead that CPI acted negligently, so Glocoms' related claims for negligence and false light also fail because they concern the same allegedly defamatory statements. *See Huon*, 841 F.3d at 745 (citing *Madison v. Frazier*,

539 F.3d 646, 659 (7th Cir. 2008) (When an unsuccessful defamation per se claim forms "the basis of a plaintiff's false-light claim, his false-light invasion of privacy claim fails as well.")). Thus, this Court dismisses the remaining portion of Plaintiff's complaint without prejudice.

IV. Conclusion

As set forth above, this Court grants CPI's motion to dismiss [36]. Glocoms may replead the portions of the complaint dismissed without prejudice. Any amended complaint shall be filed on or before July 6, 2018. This Court strikes the June 26, 2018 motion hearing and sets the case for a status hearing on July 10, 2018 at 9:45 a.m. in Courtroom 1203. All other dates and deadlines stand.

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United States District Court, M.D. Florida,
Tampa Division.

Said HAKKY, M.D., Plaintiff,
v.
The WASHINGTON POST COMPANY
and the Washington Post, Defendants.

No. 8:09–cv–2406–T–30MAP.
|
June 24, 2010.

Attorneys and Law Firms

Joseph D. Magri, Ward A. Meythaler, Merkle & Magri and Meythaler, PA, Tampa, FL, for Plaintiff.

Guy P. McConnell, Michael Byrley Colgan, Michael S. Hooker, Glenn, Rasmussen, Fogarty & Hooker, PA, Tampa, FL, Hannah M. Stott-Bumsted, Kevin T. Baine, Kevin Hardy, Williams & Connolly, LLP, Washington, DC, for Defendants.

ORDER

JAMES S. MOODY, JR., District Judge.

***1** THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss and Incorporated Memorandum of Law (Dkt, 22), Plaintiff's Response to Defendants' Motion to Dismiss (Dkt.28), Defendants' Reply Memorandum (Dkt.34), and Plaintiff's Sur–Reply Memorandum (Dkt.41). On June 21, 2010, the Court heard oral argument on Defendants' Motion to Dismiss. After consideration of the parties' filings and oral argument on these issues, the Court concludes that Defendants' Motion to Dismiss should be granted in part and denied in part.

BACKGROUND

This case arises from a September 2008 news article published in The Washington Post that contained alleged false and defamatory statements about Plaintiff Said Hakky[1], M.D. ("Hakky"). Specifically, Hakky alleges that Defendants The Washington Post Company (the "Post Company") and The Washington Post published and generally made available for sale and gave publicity to an article entitled "Iraqi Red Crescent Paralyzed by Allegations" (the "Article"). Hakky contends that the Article stated false and damaging statements, including that Hakky was chosen to serve in Iraq because of contributions to the Republican Party, that Hakky was corrupt, that the Iraqi Red Crescent was riddled with corruption, that Hakky fled Iraq after he learned that an arrest warrant had been issued for him, that the State Department would support Hakky's extradition from the United States on criminal charges in Iraq, and that one of Hakky's associates used Red Crescent ambulances to transport weapons to al-Queda in Iraq.

1 It appears that Hakky is also spelled Hakki.

Hakky claims that these defamatory statements as well as other statements and omissions were false and extremely damaging to Hakky's reputation and career, particularly in Florida, where he and his extended family live and his career is centered. Hakky's complaint against Defendants asserts claims of defamation and false light invasion of privacy based on the Article's defamatory statements.

This case is now at issue on Defendants' motion to dismiss. First, Defendants argue that Defendants are not subject to personal jurisdiction in Florida, because both Defendants are based in Washington, D.C., and conduct virtually all of their business there. Defendants also contend that the Post Company is principally a holding company, with no direct business operations in Florida, and that it did not publish or distribute The Washington Post, and had nothing to do with the publication of the article in question. Lastly, on this issue, Defendants argue that the Article had no connection to Florida; it reported a public controversy in Iraq and Hakky was living in the Middle East at the time the article was reported and published.

Second, Defendants argue dismissal is warranted because the complaint fails to state a claim upon which relief can be granted. Specifically, Defendants state that Plaintiff's claims do not meet the heightened standard of *Ashcroft v. Iqbal.*, —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which requires more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.*

***2** Third, Defendants argue dismissal against the Post Company is warranted because the complaint does not contain any allegations that would support any theory of liability against the Post Company for the actions of its subsidiary, The Washington Post.

As set forth in more detail herein, the Court concludes that Plaintiff has established personal jurisdiction over The Washington Post under the Florida Long–Arm Statute and the *Calder* "effects test." Given the contrary evidence provided by the parties as to the extent of the Post Company's influence over The Washington Post, the Court concludes that additional discovery is necessary to determine whether Plaintiff has personal jurisdiction over the Post Company.

On the issue of whether Plaintiff's claims state a claim upon which relief can be granted, the Court concludes that Plaintiff's allegations, although sufficient for jurisdictional purposes against The Washington Post, do not contain adequate facts under *Iqbal* to demonstrate that Defendants acted negligently or with actual malice.

Similarly, Plaintiff's claims against the Post Company do not contain adequate facts to state a theory of the Post Company's liability for the acts of its subsidiary. Accordingly, Plaintiff's claims must be dismissed without prejudice to Plaintiff to amend.

DISCUSSION

I. Motion to Dismiss—Personal Jurisdiction

A. Standard of Review

A federal court sitting in diversity may properly exercise personal jurisdiction over a defendant only if the plaintiff meets the requirements of the state long-arm statute and the Due Process Clause of the Fourteenth Amendment. *Posner v. Essex Ins. Co., Ltd. .,* 178 F.3d 1209, 1214 (11th Cir.1999); *Venetian Salami Co. v. Parthenais,* 554 So.2d 499, 502 (Fla.1989). Thus, Plaintiff must show Defendants' activities and contacts in Florida satisfy Florida's long-arm statute to obtain personal jurisdiction. If the Court concludes that personal jurisdiction exists under Florida's long-arm statute, it must next consider whether Defendants' contacts with the state of Florida are sufficient to satisfy the Due Process Clause of the Fourteenth Amendment. *Venetian Salami Co.,* 554 So.2d at 501 (mere proof of any one of the several circumstances enumerated in Fla. Stat. § 48.193 does not automatically satisfy the federal constitutional requirement of minimum contacts). The due process inquiry requires the Court to determine whether Defendants have minimum contacts with the forum state and whether the exercise of jurisdiction would "offend traditional notions of fair play and substantial justice." *Internet Solutions Corp. v. Marshall,* 557 F.3d 1293, 1295–96 (11th Cir.2009).

B. Florida's Long–Arm Statute

Florida's long-arm statute, Fla. Stat. § 48.193(1)(b), provides that a defendant, "whether or not a citizen or resident of this state," is subject to the jurisdiction of Florida courts if he "commit[s] a tortious act within this state." Florida courts construing this provision have noted that the alleged tortfeasor's physical presence in Florida is not required. *Wendt v. Horowitz,* 822 So.2d 1252, 1260 (Fla.2002). Rather, jurisdiction may be found in certain instances where an out-of-state defendant commits a tort that produces an injury in Florida. *Id.*

***3** The Eleventh Circuit has held that "[i]n our technologically sophisticated world permitting interstate business transactions by mail, wire, and satellite signals, physical presence by the nonresident defendant is not necessary for personal jurisdiction in the forum state." *Cable/Home Communication Corp. v. Network Productions, Inc.,* 902 F.2d 829, 857 (11th Cir.1990) (*citing Burger King,* 471 U.S. at 476). *See generally Brennan v. Roman Catholic Diocese of Syracuse New York,* 2009 WL 941765 (11th Cir. April 9, 2009)[2] (vacating district court's dismissal for lack of personal jurisdiction where plaintiff suffered injury in Florida arising from defendant's alleged intentional misconduct in New York and its fraudulent representations directed to him in Florida); *Horizon Aggressive Growth, L.P. v. Rothstein–Kass, P.A.,* 421 F.3d 1162, 1168 (11th Cir.2005) (reversing district court's dismissal for lack of personal jurisdiction under Florida's long-arm statute where complaint alleged defendant's communications from California to plaintiff in Florida intended to deceive and defraud plaintiff); *Acquardo v. Bergeron,* 851 So.2d 665, 671 (Fla.2003) (finding jurisdiction under Fla. Stat. § 48.193(1)(b) where an out-of-state defendant allegedly defamed a Florida resident during a single phone call made into Florida).

2 Unpublished opinions are not binding precedent in the court; however they may be cited as persuasive authority. *See* 11th Cir. R. 36–2.

There does not appear to be any dispute that Plaintiff has met this first jurisdictional requirement. Plaintiff's complaint states that the circulation in Florida of both paper and electronic versions of the Article, which contained defamatory statements, constituted the commission of a tortious act within Florida. Defendants seem to quibble with this requirement only to the extent that they argue that the allegations of the complaint fail to state a cause of action. Although this argument will be discussed in more detail, the Court concludes that for purposes of satisfying Florida's long-arm Statute, the complaint is sufficient to state a claim against The Washington Post.

C. Due Process Analysis

1. Minimum Contacts

Having concluded the tortious act provision of Florida's long-arm statute is satisfied, the Court must analyze the long-arm jurisdiction under the due process requirements of the federal constitution. "A forum may exercise specific jurisdiction over a nonresident defendant if the defendant has purposefully directed his activities to forum residents and the resulting litigation derives from alleged injuries that arise out of or relate to those activities." *Cable/Home Communication Corp., supra,* at 857 (*quoting Burger King, supra,* at 474) (internal quotations omitted). Determining minimum contacts requires the Court to ascertain whether Defendants "purposefully availed" themselves of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla,* 357 U.S. at 253. Even one significant single act or meeting in the forum state may be sufficient to establish personal jurisdiction. *Burger King Corp.,* 471 U.S. at 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Williams Electric Co., Inc. v. Honeywell, Inc.,* 854 F.2d 389, 392–93 (11th Cir.1988); *Sea–Lift, Inc. v. Reinadora Costarricense de Petroleo, S.A.,* 792 F.2d 989, 993 (11th Cir.1986).

***4** As already stated above, in our technologically sophisticated era, physical presence by the nonresident defendant is unnecessary for personal jurisdiction in the forum state. *Cable/Home Communication Corp., supra,* at 857 (*citing Burger King,* 471 U.S. at 476). Resolution of the minimum contacts issue depends whether the case "arises out of" or "relates to" the defendant's contacts with Florida. *Helicopteros,* 466 U.S. at 414 n. 8. Intentional torts may support the exercise of personal jurisdiction over a nonresident defendant who has but one single act supporting jurisdiction so long as it creates a "substantial connection" with the forum. *Licciardello v. Lovelady,* 544 F.3d 1280, 1288 n. 8 (11th Cir.2008) (holding that "[w]here the internet is used as a vehicle for the deliberate, intentional misappropriation of a specific individual's trademarked name or likeness and that use is aimed at the victim's state of residence, the victim may hale the infringer into that state to obtain redress for the injury. The victim need not travel to the state where the website was created or the infringer resides to obtain relief out-of-state" (*citing Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)).

In *Calder,* a California plaintiff sued a Florida newspaper and two of its employees in California state court arising from the publication of an allegedly libelous article about the Plaintiff. The Court stated that "in judging minimum contacts, a court properly focuses on the relationship among the defendant, the forum and the litigation" and found that "[a]n individual in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Calder,* at 788–90. Following *Calder,* the Eleventh Circuit in *Licciardello* noted that many courts apply the *Calder* "effects test" when a plaintiff's claim involves an intentional tort. *Licciardello,* 544 F.3d at 1286 (citations omitted). In fact, even more recently, the Eleventh Circuit applied the *Calder* "effects test" to conclude a district court erred in finding a lack of sufficient minimum contacts with Florida. The Eleventh Circuit stated:

> [S]o long as the purposeful conduct creates a "substantial connection" with the forum, even a single act can support jurisdiction over the non-resident defendant who has no other contacts with the forum. *Burger King Corp.,* 471 U.S. at 475. Intentional torts are such acts and may support the exercise of personal jurisdiction over the nonresident

> defendant who has no other contacts with the forum. *Licciardello,* 544 F.3d at 1285. In *Licciardello,* we held that the commission of an intentional tort by a nonresident expressly aimed at a resident, the effects of which were suffered by the resident in the forum, satisfied the "effects" test established in *Calder v. Jones,* 465 U.S. 783, 789–90, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). 544 F.3d at 1288. The "effects" test provides that due process is satisfied when the plaintiff brings suit in the forum where the "effects" or "brunt of the harm" caused by the defendant's intentional tortious activity was suffered. *Licciardello,* 544 F.3d at 1285–87. Therefore, personal jurisdiction is proper over a defendant who commits an intentional and allegedly tortious act expressly aimed at the plaintiff in the forum state. *Id.* at 1288.

***5** Brennan, at *4 (*citing Licciardello, supra,* 544 F.3d 1280); *New Lenox Ind. v. Fenton,* 510 F.Supp.2d 893, 904 (M.D.Fla.2007) (recognizing that "a number of courts" have held that "where a defendant's tortious conduct is intentionally and purposefully directed at a resident of the forum, the minimum contacts requirement is met, and the defendant should anticipate being haled into court in that forum").

In this case, it is undisputed that the Article stated that Hakky settled in Florida, where he became a U.S. citizen, developed a urology practice, taught at the University of South Florida, and became known for his patented work on prosthetic penile implants. Defendants argue, however, that Plaintiff cannot demonstrate that the alleged defamatory statements were aimed at the forum state. Defendants point to the fact that the focal point of the Article was charges of corruption and mismanagement in the operation of the Iraqi Red Crescent, not actions in Florida, and that the Article was aimed at Iraq, not Florida, or Washington, DC, which is The Washington Post's circulation area, and where decisions are made about the U.S. government's role in Iraq. Defendants also point to the fact that Hakky was not living in Florida at the time the Article was published and that The Washington Post did not interview any sources in Florida or do any reporting in Florida for the Article. Moreover, at the time the Article was reported and published, Defendants contend that The Washington Post understood Hakky to be living in the Middle East, not in Florida. Defendants also point to the fact that when Hakky was interviewed, he was in Lebanon.

Hakky's affidavit states that Amit Paley ("Paley"), who conducted interviews with Hakky for the Article, knew that Hakky and his wife and children lived and had lived in the Tampa Bay area for years, that Hakky's children attended school in the Tampa Bay area, that Hakky was a staff urologist at Bay Pines in the Tampa Bay area, that Hakky had an Assistant Professor position at the University of South Florida ("USF"), that Hakky did not intend to permanently stay in Iraq and would return to his positions at Bay Pines and USF, that during the period of Paley's interviews with Hakky, Hakky had been ordered back to Bay Pines, and that Hakky had filed legal action in Florida against Bay Pines. Defendants do not dispute these facts.

Upon consideration of all of these facts, the Court concludes that The Washington Post "purposefully availed" itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The record reflects that Hakky stated to Paley the extent of his ties to Florida and it is evident that The Washington Post knew that the "brunt of the harm" to Hakky's reputation would be suffered in Florida, where he and his family lived and where he intended to return to his positions at Bay Pines and USF. Hakky did not need to be living in Florida during the time of his interviews for the Article or during the time that the Article was published in order to suffer this harm. This is so, despite the fact that The Washington Post may have no other contacts with the forum.

2. Fair Play and Substantial Justice

***6** Even where a defendant has purposefully established minimum contacts with the forum state, the court must also evaluate jurisdiction in light of several other factors to determine whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *International Shoe Co.,* 326 U.S. at 320. When assessing fairness, courts look to various

factors: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the interstate judicial system's interest for the most efficient resolution of controversies. *Brennan,* at *4 (*citing World–Wide Volkswagen,* 444 U.S. at 292).

The Court concludes that Florida has a very strong interest in affording its residents a forum to obtain relief from intentional misconduct of nonresidents causing injury in Florida and that the Constitution is not offended by Florida's assertion of its jurisdiction over such nonresident tortfeasers. Thus, holding The Washington Post amenable to personal jurisdiction in Florida does not contravene basic notions of fair play and substantial justice. Accordingly, Defendants' Motion to Dismiss The Washington Post for lack of personal jurisdiction will be denied.

As to the Post Company, the Court concludes that the record is unclear as to whether there is personal jurisdiction in Florida over it. Plaintiff points to evidence suggesting that The Washington Post is still a division of the Post Company, that the Post Company played a role in publishing the Article, and that The Washington Post newspaper is an operating division of the Post Company. Defendants point to evidence suggesting that, pursuant to a corporate restructuring in 2003, the Post Company no longer exercises control over The Washington Post. Defendants argue that Plaintiff cannot prove that The Washington Post manifests no separate corporate interests of its own and functions solely to achieve the purposes of the Post Company.

In light of these factual inconsistencies, the Court will permit Plaintiff to obtain discovery concerning facts that could establish personal jurisdiction over Defendant the Post Company. This jurisdictional discovery shall occur simultaneously with the upcoming merits discovery. After the discovery period has expired, and at the time that summary judgment motions are due to be filed, the Post Company may file a renewed motion to dismiss based on a lack of personal jurisdiction. Importantly, the Post Company's participation in this case to the point of a renewed motion to dismiss or for summary judgment as to jurisdiction shall not be deemed a waiver of its position on jurisdiction.

II. Motion to Dismiss—Failure to State a Claim

Defendants argue that Plaintiff's complaint should be dismissed because Plaintiff's claims do not meet the heightened standard of *Ashcroft v. Iqbal.* —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which requires more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* The Court agrees that, under *Iqbal,* Plaintiff failed to allege sufficient facts demonstrating negligence or actual malice on the part of Defendants. Although Plaintiff does point to specific statements in the Article that are false or misleading, Plaintiff does not state how Defendants made these statements negligently, or facts supporting that they were made with malice. Thus, Plaintiff's claims must be dismissed without prejudice, with leave to amend within twenty (20) days from the date of this Order.

***7** Defendants also argue that dismissal is necessary against the Post Company because the complaint does not contain any allegations that would support any theory of liability against the Post Company for the actions of its subsidiary, The Washington Post. The Court agrees. Indeed, the complaint points to absolutely no facts suggesting an agency theory of liability. Thus, Plaintiff's claims against the Post Company must be dismissed without prejudice, with leave to amend within twenty (20) days from the date of this Order.

It is therefore ORDERED AND ADJUDGED that:

1. Defendants' Motion to Dismiss and Incorporated Memorandum of Law (Dkt, 22) is hereby GRANTED IN PART AND DENIED IN PART.

2. The Court concludes that there is personal jurisdiction over Defendant The Washington Post.

3. As set forth herein, after the discovery period has expired, and at the time that summary judgment motions are due to be filed, the Post Company may file a renewed motion to dismiss or motion for summary judgment based on a lack of personal jurisdiction. This is assuming that Plaintiff successfully states a claim against the Post Company.

4. As set forth herein, Plaintiff's claims are dismissed without prejudice. Plaintiff has twenty (20) days from the date of this Order to file an amended complaint.

5. Plaintiff's Contingent Motion or Request to File Amended Complaint if Necessary (Dkt.37) is hereby DENIED AS MOOT.

DONE and **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2010 WL 2573902

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200 Wis.2d 492
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

John W. TORGERSON, Plaintiff-Respondent,
v.
JOURNAL SENTINEL, INC., Defendant-Appellant.
John W. TORGERSON, Plaintiff-Appellant,
v.
JOURNAL SENTINEL, INC.,
Defendant-Respondent.

Nos. 95-1098 & 95-1857.
|
Feb. 13, 1996.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge.

Before CANE, P.J., and LaROCQUE and MYSE, JJ.

Opinion

LaROCQUE, J.

***1** The Journal Sentinel, Inc., publisher of THE MILWAUKEE JOURNAL (THE JOURNAL) appeals the denial of its summary judgment motion in the libel action initiated by John W. Torgerson, formerly Wisconsin's deputy commissioner of insurance. [1] Torgerson, who concurrently held his public office while he was half owner and an officer of a title insurance company, contends that THE JOURNAL defamatorily and falsely reported that he had violated conflict of interest restraints set forth in two letters from the state Ethics Board, and similarly implied that his initiation of a change in title insurance regulation was for the purpose of advancing his private business at the expense of the public interest and was therefore unethical. We have consolidated Torgerson's separate appeal of a summary judgment dismissing his second libel action based upon the republication of similar articles in other newspapers, including THE EAU CLAIRE LEADER-TELEGRAM.

1 We granted leave to appeal pursuant to § 808.03(2), STATS., by order dated May 11, 1995.

We conclude that Torgerson failed to provide sufficient evidence of actual malice to go to trial. Actual malice is a constitutional requirement for a successful libel action involving a public official. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). [2] Actual malice must be shown with "convincing clarity" at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 244, 106 S.Ct. 2505, ---, 91 L.Ed.2d 202, 91 L.Ed.2d 202 (1986). "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Bose Corp. v. Consumers Union,* 466 U.S. 485, 511, 104 S.Ct. 1949, ---, 80 L.Ed.2d 502, 80 L.Ed.2d 502 (1984). We reverse the denial of the newspaper's summary judgment motion. Because the same defect bars the republication lawsuit, the circuit court's judgment of dismissal of that action based on other grounds is affirmed. [3]

2 The First Amendment to the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech, or of the press...."

The First Amendment is made applicable to the states by virtue of the Fourteenth Amendment. *New York Times Co. v. Sullivan,* 376 U.S. 254, 263 n. 4, 84 S.Ct. 710, ---, 11 L.Ed.2d 686, 11 L.Ed.2d 686 (1964). There is "state action" even though the matter involves a civil lawsuit between private parties; state courts apply a state rule of common law to impose the invalid restrictions on the constitutional freedoms of speech and press, and therefore the state is exercising its power to deny a federal constitutional right. *Id.* at 265, 84 S.Ct. 710.

3 The circuit court dismissed the second action for failure to comply with the provisions of § 895.05(2), STATS., which compels a demand for retraction before suing for a published libel. Although Torgerson served separate demands for retraction as to both the original and the republication, the court ruled that Torgerson was required to notify

> the defendant in his initial demand that he might sue on the republication *before* he brought suit on the initial publication. Because we resolve both lawsuits on other grounds, we do not address the question of notice.

The alleged libel as initially published on October 14 and 15, 1993, read:

> Torgerson cut rule despite ethics warning
>
> *Agency no longer keeps track of lowest rates for title insurance*
>
> ....
>
> During his recent tenure as a top state insurance regulator, John W. Torgerson was co-owner of a title insurance company, leading to two warnings by the state Ethics Board to avoid a conflict of interest by staying out of title insurance regulation.
>
> But a Milwaukee Journal investigation of state insurance records shows that Torgerson, while deputy commissioner of insurance, helped wipe out a rule that required title insurance companies to disclose publicly in commission files their lowest, discounted rates.
>
> ....
>
> Torgerson told The Journal earlier this year, after it disclosed his dual role as insurance regulator and insurance company co-owner, that he had stayed out of title insurance matters.

A substantially identical story was later republished in other newspapers in Wisconsin and Minnesota. After THE JOURNAL refused to comply with Torgerson's demand for retraction made under § 895.05, STATS., he brought suit.

***2** Torgerson claims the article is defamatory and false.[4] He relies in part upon the undisputed fact that he initiated the inquiries that caused the Ethics Board to write the advisory letters, a fact not reported in the article, which characterized the letters as "warnings."[5] Torgerson further contends that the article falsely reports that the Ethics Board letters stated that he was told he should be "staying out of title insurance regulation." Rather, he says, the letters merely set forth limited specific circumstances in which he could not be involved in title insurance regulation without an impermissible conflict of interest. Torgerson also contends that the story falsely implies that he participated in getting the rule change for the purpose of advancing his private business, acted contrary to the public interest, and thereby behaved unethically. Torgerson suggests that the defamatory and false inference of his improper motivation is strengthened by the false statement that he had earlier told THE JOURNAL that he had "stayed out of title insurance matters." He points to the actual words of his earlier statement to the paper when he said that "the ethics guidelines were easy to follow ... There is an appearance of conflict which must be avoided ... That appearance is extremely easy to avoid." He asserts proof of actual malice from facts and circumstances detailed later in this opinion.

4 Defamation has been defined as " 'that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.' PROSSER [Law of Torts (hornbook series, 3d ed.),] p. 756." *Polzin v. Helmbrecht,* 54 Wis.2d 578, 583, 196 N.W.2d 685, 688 (1972). For a newspaper article to be libelous, it need only tend to degrade or disgrace the plaintiff generally, or to subject him to public distrust, ridicule or contempt in the community. *Id.*

Torgerson must prove that the statements in the article were false because truth is a complete defense in a defamation action. *See Lathan v. Journal Co.,* 30 Wis.2d 146, 158, 153, 140 N.W.2d 417, 423 (1966). The elements of a common law defamation claim are set forth in *Van Straten v. Milwaukee Journal Newspaper-Publisher,* 151 Wis.2d 905, 912, 447 N.W.2d 105, 108 (Ct.App.1989), *cert. denied,* 496 U.S. 929, 110 S.Ct. 2626, 110 L.Ed.2d 646 (1990).

5 To allow the letters to be read in context, we have included them in their entirety in the appendix.

THE JOURNAL contends that the trial court construed the statements at issue out of context and that the story as a whole is neither capable of a defamatory meaning nor false. It points to the conflicting interpretations different parties placed upon the meaning of the Ethics Board letters, including comments from Torgerson himself. THE JOURNAL also argues that the alleged implication of Torgerson's subjective motivation and ethics is protected by the fair comment privilege because it is merely a matter of opinion, neither capable of being proven expressly false nor including a provable false factual connotation.[6]

6 Under the common law principal of "fair comment," legal immunity is afforded for the honest expression of opinion on matters of public interest when based upon a true or privileged statement of fact not made solely for the purpose of causing harm. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 13-14, 110 S.Ct. 2695, ---, 111 L.Ed.2d 1, 111 L.Ed.2d 1 (1990). Moreover, insofar as such statements involve a public official, as long as the "opinion" does not contain a provable false factual connotation, it is given constitutional protection. *Id.* at 14-21, 110 S.Ct. 2695.

THE JOURNAL also maintains that Torgerson failed to meet his burden to establish a prima facie case of actual malice under the rational interpretation analysis of the evidence employed by the United States Supreme Court in *Time, Inc. v. Pape,* 401 U.S. 279, 290, 91 S.Ct. 633, ---, 28 L.Ed.2d 45, 28 L.Ed.2d 45 (1971). This is so, it argues, because Rowan's article provided a reasonable translation of the meaning of highly ambiguous government documents and statements. Because we embrace this application of *Pape* to this case, and because we conclude that the evidence of actual malice is insufficient as a matter of law, we need not address the other issues.

Our review of a decision to grant or deny summary judgment applies the same methodology as the circuit court and we decide the matter de novo. *Crowbridge v. Village of Egg Harbor,* 179 Wis.2d 565, 568, 508 N.W.2d 15, 21 (Ct.App.1993). When the materials introduced for and against summary judgment present only a question of law, that question should be decided by summary judgment. *Southard v. Occidental Life Ins. Co.,* 31 Wis.2d 351, 354-55, 142 N.W.2d 844, 845 (1966). Summary judgment may be particularly appropriate in defamation actions to mitigate the potential chilling effect on free speech and the press that might result from lengthy and expensive litigation. *Bayview Packing Co. v. Taff,* No. 95-0901 slip op. at 12 (Wis. Ct.App. Dec. 12, 1995, ordered published Jan. 30, 1996).

***3** The underlying basis of Torgerson's claim is not unlike the circumstances in *Pape. Pape* holds that where the alleged libel of a public official is founded upon a claimed misinterpretation of authoritative government sources that are highly ambiguous, and where the reviewing court concludes from all of the evidence that the newspaper's account of the information is one reasonable translation of the source material, even though it may not be the "true" meaning intended by the source, the claim fails for lack of actual malice. *See id.* at 284-92.

The requirement of actual malice as an element in libel actions by a public official was imposed in *New York Times.* The parties agree that Torgerson was a public official so as to invoke the actual malice rule. *New York Times* held that the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with " 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The reviewing court must independently "examine ... the statements in issue *and the circumstances under which they were made* to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Id.* at 285 (quoting *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, ---, 90 L.Ed. 1295, 90 L.Ed. 1295 (1946)) (emphasis added). The evidence of actual malice is subject to the clear and convincing evidentiary standard. *See Pape,* 401 U.S. at 285-86, 91 S.Ct. 633. This heightened evidentiary requirement must be considered by the court in ruling on a motion for summary judgment. *Anderson,* 477 U.S. at 244, 106 S.Ct. 2505.

The rational interpretation approach used in *Pape* arose from a libel action based upon a story published in TIME magazine. The story described a publication released by the United States Commission on Civil Rights in 1961, entitled *Justice,* devoted in part to the problem of police brutality and related private violence in the United States. *Id.* at 280, 106 S.Ct. 2505. *Justice* contained references to accusations that had been made in a civil rights complaint of a shocking incident of police violence against a black family in Chicago. *Id.* at 281, 106 S.Ct. 2505. Pape, a police detective named in the civil rights suit, brought his libel action against TIME because its article quoted at length from the civil rights complaint without ever indicating that the charges were those of the complainant rather than the independent findings of the commission, and without using the word "alleged" in relation to the accusations. *Id.* at 281-82[7], 106 S.Ct. 2505. The TIME researcher conceded at trial that she was aware of her omission of the word "alleged" in the story, but said she believed the article to have been true as written in light of the full context of the *Justice* report. *Id.* at 283, 106 S.Ct. 2505.

7 The TIME article began:

> The new paperback book has 307 pages and the simple title *Justice.* It is the last of five volumes in the second report of the U.S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North-and it stands as a grave indictment since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.
>
> ....
>
> Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a. m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights...."

Time, Inc. v. Pape, 401 U.S. 279, 281-82, 91 S.Ct. 633, ---, 28 L.Ed.2d 45, 28 L.Ed.2d 45 (1971).

Pape reinstated the trial court's directed verdict in favor of the magazine. *Id.* at 283, 106 S.Ct. 2505. It did so on the basis of its legal conclusion that there was an insufficient showing of actual malice.

***4** *Pape* ratified earlier standards:

> In *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ... the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of * * * probable falsity." ... *These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.* There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 291-92, 106 S.Ct. 2505 (emphasis added).

Thus, *Pape* concluded that there was absence of malice while acknowledging that the TIME magazine article reported "as a charge by the Commission what was, in its literal terms, a description by the Commission of the allegations in a complaint filed by a plaintiff in a civil rights action." *Id.* at 284-85, 106 S.Ct. 2505.

Pape emphasizes the fact that a libel lawsuit over a publication that purports to report what others say about public affairs differs in a number of respects from the conventional libel case. *Id.* at 284-85, 106 S.Ct. 2505. First, the publication underlying the plaintiff's claim was not the defendant's independent report of the police brutality episode, but TIME's report of what the government agency had said about it. *Id.* at 285, 106 S.Ct. 2505. Further, the alleged damage to reputation was not that arising from mere publication, but that resulting from attribution of the accusations to an authoritative official source. *Id.* Finally, the defendant admitted an awareness at the time of publication that the wording of the government report had been significantly altered, but insisted that its real meaning had not been changed. *Id.*

Pape grants the press considerable leeway in making conscious and deliberate choices of "truthful" interpretation, noting:

> Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the "truth" of such an indirect newspaper report presents rather complicated problems.
>
> A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact-such as that a policeman has arrested a certain man on a criminal charge-there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.

Id. at 285-86, 106 S.Ct. 2505.

Similarly, Torgerson's comment that "There is an appearance of conflict which must be avoided ... That appearance is extremely easy to avoid," is reasonably capable of meaning that "he stayed out of title insurance matters." The test is not whether the article is an erroneous interpretation of the documents and the statements made. The question is whether all of the circumstances of the case sufficiently demonstrate a belief by the publisher that it was not true. *Pape* reaffirmed its concern expressed earlier in *New York Times:*

> ***5** A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of libel judgments virtually unlimited in amount-leads to ... "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

Id. at 290, 106 S.Ct. 2505.

Like the reporter for TIME in *Pape,* the reporter for THE JOURNAL, James Rowan, stated in his affidavit that he had no personal animus toward Torgerson and, based upon his review of public records and interviews with the individuals involved, believed when he wrote the story and still believed the facts and statements were true. Torgerson has not provided sufficient facts and inferences to overcome this assertion.

The rationale underlying *Pape* resonates in the present lawsuit. *Pape* characterized the government document, *Justice,* that the TIMES interpreted as "extravagantly ambiguous." *Id.* at 287, 106 S.Ct. 2505. It was impossible to know whether the Civil Rights Commission was seeking to encourage belief or skepticism regarding the incidents described in its report. *Id.* at 286-89, 106 S.Ct. 2505.

The Ethics Board letters and other comments about them in this case are also abundantly ambiguous on the key question. It can be conceded that the letters do not state in so many words that Torgerson must "stay[ ] out of title insurance regulation," and Torgerson did not expressly advise THE JOURNAL that he had "stayed out." However, the letters, read in their entirety and considered along with the comments about them from the writer of the initial letter, may reasonably be interpreted to suggest that is what was meant. The initial letter immediately advises Torgerson that his half ownership and active service as an officer of a title insurance company "raises issues under the Ethics Code." The letter quotes the state Code of Ethics for Public Officials and Employees that limits private employment and business pursuits that "*in no way interfere[ ]* with the full and faithful discharge of his or her duties to the state." (Emphasis added.) An Ethics Board opinion is cited for the proposition that "[a] public officer owes *an undivided duty* to the public whom he serves and should avoid placing himself in a position in which *a conflict of interest might arise.*" (Emphasis added.) Language from another opinion ambiguously advises: "the official's personal interest in the performance of that business may conflict impermissibly with the official's regulatory responsibilities." Perhaps the ambiguity was unavoidable because, at the time the letters were written, they were meant only as a general statement of ethical rules and not directed at a specific activity that Torgerson contemplated. [8]

8 "It appears to me that in Ethics, as in all other philosophical studies, the difficulties and disagreements, of which history is full, are mainly due to a very simple cause: namely to the attempt to answer questions, without first discovering precisely *what* question it is which you desire to answer." JOHN B. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 915 (14th ed.1968) (quoting GEORGE EDWARD MOORE, PRINCIPIA ETHICA, preface (1903)).

***6** Other language in the letters is similarly capable of supporting THE JOURNAL's interpretation. The second letter notes a public officer "owes an *undivided loyalty to the public* ...." (Emphasis added.) The writer advises Torgerson that the legislature has clearly expressed its sensitivity to this issue with respect to the Office of Commissioner of Insurance. "It has indicated an intent that the head of the agency avoid *even the possibility of a conflict of interest* by prohibiting the Insurance Commissioner from engaging in any occupation, business or activity that is in any way inconsistent with the performance of the Commissioner's duties. § 15.06(3)(b), *Wisconsin Statutes.*" The writer concludes: "Thus, in determining when and how to avoid situations of potential conflict I advise erring on the side of caution."

Significantly, THE JOURNAL also had the statement from the first letter's author, Jonathan Becker, the board's legal counsel. Becker was "disappointed to learn that Torgerson had been involved in changing the rules governing title insurance regulation." Becker added: "Quite honestly, I'm just very surprised, given what he said publicly and privately to us that he was uninvolved." These comments strongly support THE JOURNAL's interpretation of the letters.

As proof of absence of malice, THE JOURNAL also points to the fact that the article read in its entirety contains both sides of the debate. It pointed out that Torgerson saw nothing wrong with his conduct, said that it hurt no one, said that the rule change was pro-consumer and that he read the letters to mean that he should stay out of regulatory matters "from which he could personally benefit." The story then attributed to Torgerson the observation: "That meant that he did not totally disassociate himself from some general title insurance issues."

Apart from the question of the ambiguity of the letters and the comments about them, Torgerson points to other evidence in this record to support his contention that the question of actual malice bars summary judgment. He suggests summary judgment is inappropriate because the issue of actual malice goes to the publisher's state of mind, *New York Times,* 376 U.S. at 279-80, 84 S.Ct. 710, because all justifiable factual inferences are to be drawn in his favor, *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505, and because a publisher's testimony that he or she acted in good faith in publishing defamatory statements does not "automatically insure a favorable verdict...." *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, ---, 20 L.Ed.2d 262, 20 L.Ed.2d 262 (1968).

Specifically, Torgerson points to the fact that THE JOURNAL reporter, Rowan, destroyed his interview notes after he was aware that Torgerson had demanded a retraction. He points to the fact that Rowan characterized the letters as "warnings" when he knew they were only written in response to a request from Torgerson for advice. He points to facts that were not included in the article, including a note in the file from Norman Writz, the examiner in the Office of Insurance Commissioner quoted in the article in a light unfavorable to Torgerson. The note stated that the rule change was "okay" and that [n]obody [would] be harmed." Torgerson relies upon the statement that the rule change was accomplished two months before Torgerson resigned to return to Eau Claire where he was an officer and part owner of the private title insurance company. The article fails to mention that a review of the rule-making file demonstrated that the timing of the rule change was simply a result of the natural course of the rule-making process.

***7** We first address the issue of the destruction of the reporter's notes. Torgerson relies upon *Chang v. Michiana Telecasting Corp.,* 900 F.2d 1085, 1090 (7th Cir.1990), which noted that the seventh circuit had previously held that a reporter's destruction of his notes permits an inference of malice, citing *Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1134-36 (7th Cir.1987). Torgerson suggests that *Chang* essentially applied the "well-established principle that evidence is presumed to be harmful to the position of the party who destroys it."

We think that neither *Chang* nor *Jacobson* support a determination of actual malice based upon Rowan's destruction of his interview notes. *Chang* refused to draw an inference of malice from circumstances more suspicious than those presented here. The television reporter's notes in that case had "vanished," although the pages in the note pad before and after the relevant story were found; the reporter denied knowing how that happened. *Id.* at 1090. The *Chang* court refused to infer that the notes had been purposely destroyed, noting that the previously anonymous source of the allegedly libelous story had surfaced and confirmed the information that the reporter had noted and then published. *Id.* Thus, the court, observing that the missing notes were only significant as contemporaneous records of the anonymous telephone conversation, concluded that any inference that the missing notes could supply clear and convincing evidence of malice was absent. *Id. Chang* concluded that the mere possibility that the reporter had made notes of her thoughts of disbelief in the truth of her story was "so remote that it does not defeat a motion for summary judgment." *Id.*

In our case, the reporter acknowledged that he had destroyed the interview notes intentionally. He explained, however, that he had destroyed his interview notes because THE JOURNAL required him to move his work space in January 1994, whereby he lost more than half his work space, leaving him one file cabinet and a desk. He indicated that he discarded many files and parts of

files, including his interview notebooks and legal pads with interview notes to thin out his files. He indicated that although he was aware of the retraction demand, he had heard nothing further for months and believed Torgerson did not intend to follow through on his threat to sue.

There is no claim that the quotes from the interviews were inaccurately reported in the article. To the contrary, Torgerson's contention is that the Ethics Board letters were misinterpreted, that Torgerson's earlier quote in THE JOURNAL was later misquoted and that the article draws improper inferences from the records and statements made by the parties involved. The remote possibility that the reporter would have written in his interview notes that he entertained serious doubts about the truth of his article is far too speculative.

***8** *Jacobson* is also easily distinguished. In that case, the court of appeals essentially determined that the "innocent" explanation of a researcher for a libelous television broadcast who intentionally destroyed critical research documents was not believable as a matter of law. First, the researcher who had worked "constantly" on stories involving legal matters claimed that he was unaware the plaintiff had a right to appeal the initial dismissal, a claim the court found "implausible." *Id.* at 1135. Second, the selective "housecleaning" of only part of the documents was unexplained. *Id.* Third, the researcher had no explanation why he had cleaned off his former boss's desk without permission at a location in a different part of the newsroom where the researcher no longer worked. *Id.* Finally, the researcher violated a CBS retention policy requiring that the law department be contacted prior to destruction. *Id.* The interview notes here were not critical to the libel issue, the reporter did not limit destruction to the story in question and he gave a rational explanation for his actions.

We have similar misgivings concerning the other grounds recited to show clear and convincing evidence of actual malice. The use of the word "warning" to describe the Ethics Board letters is not significant:

> [T]he First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words. Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights.

Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir.1986) (citation omitted). Accepting the semantical argument "would place the First Amendment at the mercy of linguistic subtleties and fourth-ranked dictionary definitions." *Id.* at 1302. [9]

9 The JOURNAL points to dictionary definitions of "warn" as "to give notice [or] advice ... of danger, impending evil, possible harm, or anything else unfavorable...." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabr.1966).

Similarly, the plaintiff's contentions regarding the absence of certain favorable facts in the story are insufficient to establish actual malice. The newspaper is under "no legal obligation to present a balanced view" and cannot lose its constitutional protection because the plaintiff believes it failed to do so. *Perk v. Reader's Digest Ass'n,* 931 F.2d 408, 412 (6th Cir.1991).

Said another way:

> [The reporter's] journalism skills are not on trial in this case. The central issue is not whether the [article] measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendant[ ] published the column with actual malice-actually knowing it to be false or having serious doubts as to its truth.

Woods v. Evansville Press Co., 791 F.2d 480, 489 (7th Cir.1986).

In conclusion, Torgerson failed to offer clear and convincing evidence in opposition to summary judgment sufficient to meet the plaintiff's burden of showing by clear and convincing evidence that the JOURNAL knew the

challenged statements were false or had serious doubts about their truth. Because the circuit court dismissed the republication lawsuit on other grounds, we affirm the judgment of dismissal.

***9** *By the Court.*-Judgment affirmed in part and reversed in part. Costs to Journal Sentinel, Inc.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

COURT OF APPEALS

OF WISCONSIN

ROOM 231, STATE CAPITOL EAST

POST OFFICE BOX 1688

MADISON, WISCONSIN 53701-1688

TELEPHONE: (608) 266-1880

FAX: (608) 267-0640

Marilyn L. Graves, Clerk

Court of Appeals

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