

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

LEONARD POZNER,
Plaintiff

vs.

Case No. 18CV3122

JAMES FETZER,
MIKE PALECEK,
WRONGS WITHOUT WREMEDIES, LLC,
Defendants.

MOTION FOR FAILURE TO MAKE DISCOVERY AND TO DETERMINE
SUFFICIENCY OF ADMISSIONS

PLEASE TAKE NOTICE that Plaintiff, by Plaintiff's undersigned counsel, will appear before the Dane County Circuit Court, the Honorable Frank Remington presiding, at a date and time to be determined by the Court, and move to compel production of documents from Defendant Fetzer, to determine the sufficiency of his answers to Plaintiff's requests for admission, and to limit introduction of theories or evidence not disclosed in response to Plaintiff's interrogatory.

I. BACKGROUND

On March 18, 2019, Plaintiff served interrogatories, requests for admission, and document requests on Defendant Fetzer. *See* Zimmerman Aff. at ¶ 2. Defendant Fetzer served responses on April 18, 2019. *Id.* at Exs. A-C.

Plaintiff attempted in good faith to resolve the many shortcomings by identifying those shortcomings by email. *Id.* at ¶ 6, Ex. D. Defendant Fetzer emailed unverified "amendments" on April 28, 2019. *Id.* at ¶ 7, Ex. E. As described below, Defendant Fetzer's responses to Plaintiffs Requests for Admission and

Interrogatories remain deficient, and Defendant Fetzer has refused to produce responsive documents. Plaintiff therefore respectfully moves this Court for an Order compelling production of responsive documents and to prohibit Defendant Fetzer from introducing any evidence not disclosed in response to Plaintiff's interrogatory.

ARGUMENT

A. Defendant Fetzer Failed to Sufficiently Answer Plaintiff's Interrogatories

Defendant Fetzer failed to specify the alleged public controversy that he contends makes Plaintiff a public figure. An incomplete or evasive answer to an interrogatory is treated as a failure to answer. Wis. Stat. § 804.12. Plaintiff's first interrogatory stated:

If you contend that Plaintiff is a limited purpose public figure, describe with particularity the public controversy into which you contend Plaintiff has injected himself, including specific citation to any documents or other evidence that supports the existence of such public controversy and Plaintiff's role in that public controversy.

See Zimmerman Aff. at Ex. A. Rather than provide a responsive answer, Defendant Fetzer repeated his views that Sandy Hook was fake and referred generally to news stories that covered Sandy Hook or that allegedly referred to Plaintiff and other litigation that Defendant Fetzer seems to allege is somehow related to Plaintiff's alleged status as a public figure. *Id.*

Defendant Fetzer's "amended" answer fails to identify the alleged public controversy with any reasonable level of detail. First, that answer is unverified, a shortcoming that Mr. Fetzer has yet to remedy. More importantly, Defendant Fetzer's "amended" response identifying the alleged public controversy consists of six words:

“The Sandy Hook Elementary School event.” Zimmerman Aff. at Ex. E. There is no indication or explanation as to what aspect of “The Sandy Hook Elementary School event” Defendant Fetzer contends is a public controversy. Is it the mainstream media’s alleged bias in covering of the event? Is the alleged public controversy the supposed agenda to erode gun rights, as Defendant Fetzer alleged in his Counterclaim? *See* Doc. # 53 at 7. Or perhaps the “media giants” decision to remove Sandy Hook hoaxer content from web platforms and thereby “subvert the First Amendment”? *Id.* at ¶ 16. Because Defendant Fetzer’s answer lacks detail, Plaintiff cannot reasonably determine the particular public controversy into which Defendant Fetzer alleges Mr. Pozner injected himself, to the extent one exists.

Not only did Defendant fail to reasonably disclose an alleged public controversy into which Plaintiff injected himself, Defendant failed to cite to any evidence that supports Defendants contention that Plaintiff played a role in that controversy. Instead, he directs Plaintiffs to “[s]imply do an Internet search for Lenny Pozner and Sandy Hook.” Zimmerman Aff. at Ex. E.

Wis. Stat. § 804.12(4) enables the Court to prohibit a party that failed to answer an interrogatory from introducing certain matters into evidence. Defendant’s failure to provide an answer to a straightforward interrogatory has prejudiced Plaintiff’s ability to develop facts and arguments in support of Plaintiff’s motion for summary judgment and in opposition to Defendant Fetzer’s motion. Given that prejudice, it is appropriate for the Court to limit Defendant to the Answer as written and refuse to allow Defendant to assert additional details regarding what he alleges

to be a public controversy or to support any such theories with undisclosed evidence of Plaintiff's alleged role in such unidentified controversy.

B. Defendant Fetzer Failed to Properly Respond to Plaintiff's Requests for Admission

Defendant Fetzer failed to answer Plaintiff's Requests for Admission. Wis. Stat. § 804.11(1)(c) authorizes a party to move to determine the sufficiency of an answer to a request for admission. Plaintiff's Request No. 11 states "[a]dmit that a Certificate of Death for Noah Samuel Pozner was duly issued by the State of Connecticut." Defendant Fetzer's initial response said "[a]pparently, but its authenticity remains in doubt." Ex. B at 11. His amended response states that he has "no first-hand knowledge." *Id.* at Ex. D. Neither answer is sufficient.

Lack of first-hand knowledge is not a sufficient reply to a request for admission. Wis. Stat. § 804.11(1)(b) requires a party to either admit, deny, or state that after reasonable inquiry the party can neither admit nor deny. Mr. Fetzer's response never states that he conducted a reasonable inquiry and was nevertheless unable to admit or deny.

Mr. Fetzer's blog demonstrates that he has conducted an inquiry. One day before he responded to Plaintiff's Request, Mr. Fetzer published a blog post admitting that Noah Pozner has a "definitive, official death certificate, certified by the State of Connecticut, with an issue date of March 20, 2019." *See Zimmerman Aff.* at Ex. F (Fetzer Blog Post). Given his admission in that April 17, 2019 blog post, it is not clear how Mr. Fetzer can justify his refusal to admit this request.

C. Defendant Has Refused To Produce Responsive Documents

Defendant Fetzer has refused to produce any documents responsive to Plaintiff's document requests. Plaintiff requested "communications sent or received by you that relate to Noah Pozner's death certificate." Zimmerman Aff., Ex. C, at Request 1. Given that this entire case is about Mr. Fetzer's assertion that Noah Pozner's death certificate is "fake," "fabricated," and a "forgery," Mr. Fetzer's own communications related to that death certificate are surely discoverable under Wis. Stat. § 804.01(2). Such communications relate to the central issue in this case. They may reveals doubts by Defendant Fetzer or the other defendants about the veracity of the defamatory statements. There is no valid basis to withhold production of these communications.

Plaintiff also sought communications with authors, editors, reviewers, or publishers of the Book that refers to Noah Pozner and Leonard Pozner. Zimmerman Aff., Ex. C, at Requests 3-4. Defendant responded by admitting that he has roughly 350 emails that reference Noah or Leonard Pozner. *Id.*, Ex. E, at No. 4. He objects that the emails did not appear in the book, could not have influenced readers, and that the emails are personal. *Id.* at Ex. E. None of those objections are valid reasons to withhold the documents.

Mr. Fetzer's communications regarding Plaintiff and Noah Pozner may lead to the discovery of information that is relevant to any number of issues in this case. Among other things, Mr. Fetzer has alleged that neither Mr. Pozner nor Noah Pozner are real people. Fetzer Complaint, Doc. #5, at ¶ 26, 28. Mr. Fetzer has alleged that Noah Pozner did not die. *Id.* at ¶ 15. Plaintiff should be permitted to evaluate Mr.

Fetzer's communications to evaluate whether his positions on Noah Pozner's death certificate have changed or whether he knew or had reason to know that his defamatory statements were false. That Defendant Fetzer considers the emails "personal" is an invalid reason to withhold production.

CONCLUSION

Defendant has failed to provide meaningful, valid responses to Plaintiff's discovery requests. Plaintiff was prejudiced by Defendant's refusal to provide acceptable responses prior to the dispositive motion deadline. Plaintiff therefore respectfully requests that the Court issue an order limiting Defendant to the responses set forth in his April 18, 2019 discovery responses. Plaintiff also respectfully requests that the Court order Defendant to immediately produce responsive documents. Finally, Plaintiff requests that the Court award expenses for the attorney fees incurred in bringing this motion pursuant to Wis. Stat. 804.12(1)(c).

Dated: May 3, 2019

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