

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 Wrongs Without Wremedies, LLC, to determine the sufficiency of Defendant's answers to Plaintiff's requests for admission, and to limit introduction of theories or evidence not disclosed in response to Plaintiff's interrogatory.

BACKGROUND

On March 18, 2019, Plaintiff served interrogatories, requests for admission, and document requests on Defendant Wrongs Without Wremedies, LLC. *See Zimmerman Aff.* at ¶ 2. Defendant Wrongs Without Wremedies served responses on April 18, 2019. *Id.* at Exs. A-C.

Plaintiff attempted in good faith to resolve the many shortcomings by informal conferences with Counsel for Wrongs Without Wremedies, and it appeared that the

parties had resolved some of those issues, but ultimately Defendant's answers to Plaintiffs Requests for Admission and Interrogatories remain deficient. Moreover, Defendant has yet to turn over responsive documents that it admits are in its possession, custody and control.

ARGUMENT

A. Defendant Wrongs Without Wremedies Failed to Sufficiently Answer Plaintiff's Interrogatories

Plaintiff served five interrogatories. Defendant did not provide a complete, meaningful response to any of them. Plaintiff hereby moves for relief under Wis. Stat. § 804.12 on four of those interrogatories.

1. Defendant Failed to Identify any Public Controversy or Plaintiff's Role in any Alleged Public Controversy

Defendant Wrongs Without Wremedies failed to specify the alleged public controversy that it 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 asked:

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, Wrongs Without Wremedies copied and paraphrased portions of Defendant Palecek's Answer (Doc. #28) and added its opinions on the state of the law of actual malice. *Id.*

Not only did Defendant fail to disclose any 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. An “evasive or incomplete interrogatory answer is treated as a failure to answer.” Wis. Stat. § 804.12(1)(b). Defendant’s failure to provide a complete answer to a straightforward interrogatory has prejudiced Plaintiff’s ability to develop facts and arguments in support of Plaintiff’s motion for summary judgment. Given that prejudice, it is appropriate for the Court to limit Defendant to the Answer as written and refuse to allow Defendant to assert undisclosed theories of public controversy or to support such theories with any undisclosed evidence of Plaintiff’s role in such alleged controversy. *See* Wis. Stat. § 804.12(2)(a)(2), (4) (authorizing court to prohibit introduction of designated matters into evidence for failure to serve interrogatory answer).

2. Defendant Failed To Identify Any Prejudice In Response To Plaintiff’s Interrogatory

Defendant’s answer to Plaintiff’s Interrogatory No. 3 is equally deficient. Defendant pled the affirmative defense of laches. *See* *Wrongs Without Wremedies Answer*, Doc. #36, at ¶ 60. One element of laches is prejudice to the defendant. *Zizzo v. Lakeside Steel & Mfg. Co.*, 752 N.W.2d 889 (Wis. App. 2008). Plaintiff’s interrogatory asked Defendant to identify any prejudice allegedly suffered as a result of the alleged delay in bringing this claim. *See* *Zimmerman Aff.* at Ex. A. Defendant failed to identify any prejudice.

Presumably before asserting the affirmative defense in its Answer, Defendant had evidence of its own prejudice or at least some theory to support that element of its own laches defense. Given Defendant’s failure to provide that evidence in response

to Plaintiff's interrogatory, it is appropriate for the Court to limit Defendant to the Answer as written and refuse to allow Defendant to assert undisclosed theories of prejudice or to support such theories with any undisclosed evidence of prejudice.

3. Defendant Failed to Answer Plaintiff's Fourth Interrogatory

Defendant provided no response to Plaintiff's interrogatory number 4. That interrogatory asked:

If you contend that Plaintiff had knowledge that Noah Pozner's death certificate was counterfeit, describe with particularity all evidence in support of such contention.

Zimmerman Aff. at Ex. D. Defendant Wrongs Without Wremedies provided no response. *See* Zimmerman Aff. at Ex. A. Again, Defendant should be held to its failure to respond to Plaintiff's discovery and should not be allowed to introduce any evidence that Mr. Pozner had knowledge the Noah Pozner's death certificate was counterfeit.

4. Defendant Failed to Describe Any Reasons Why The Alleged Defamation Did Not Injure Plaintiff

Defendant also failed to respond to Plaintiff's interrogatory number 5, which sought evidence in support of Defendant's contention that Plaintiff's reputation was not damaged by the defamatory statements. Defendant alleged an affirmative defense that Plaintiff was not damaged by Defendant's defamatory statements. *See* Wrongs Answer, Doc. #36, at ¶ 56. Defendant's response, which was mis-numbered as "4", objected on the grounds that it is Plaintiff's burden to prove his damages and that discovery is ongoing. Zimmerman Aff. at Ex. A.

Defendant's refusal to answer is improper. Given the affirmative defense, it is appropriate for Defendant to disclose the reasons why Defendant contends its defamation did not damage Plaintiff.

Again, Plaintiff requests only that Defendant not be allowed to raise new evidence or theories now, after Plaintiff has relied on Defendant's responses and filed his motion for summary judgment. In particular, Defendant should be prohibited from arguing that Plaintiff was not damaged by Defendant's defamation and should be prohibited from providing evidence that the defamatory statements are not of the type that tend to damage Plaintiff's reputation.

B. Defendant Wrongs Without Wremedies Failed to Properly Respond to Plaintiff's Requests for Admission

Wrongs Without Wremedies failed to answer many of Plaintiff's Requests for Admission. Instead, Wrongs Without Wremedies stated that it had "no first-hand knowledge" of most of the requests. Zimmerman Aff. at Ex. B. That response is insufficient. 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.

During the meet and confer process, counsel stated that Defendant would amend its responses to state that Defendant had performed a reasonable inquiry and still could not admit or deny. *See* Zimmerman Aff. at ¶8. As of the filing of this Motion, Defendant has yet to provide such updated responses. *See* Zimmerman Aff. at ¶8.

Proper responses are important, if only to evidence Defendant's failure to conduct a reasonable pre-filing investigation to support the affirmative defenses asserted in Defendant's complaint. For example, if Defendant is going to supplement

its responses to claim that after a reasonable investigation it does not know whether Noah Pozner died on December 14, 2012 (Ex. B, Plaintiff's Request No. 3) or whether a death certificate was duly issued by the State of Connecticut (*id.* at Request No. 8), it begs the question of whether Defendant performed a reasonable pre-filing investigation before asserting the affirmative defense of truth. *See* Wrongs Answer, Doc. #36, at ¶ 51.

C. Defendant Has Not Produced Responsive Documents

Defendant admits that it is in possession of responsive documents, and has expressed its intent to produce those documents, but those documents have not been produced. *See* Zimmerman Aff. at ¶ 5, Ex. C.

Plaintiff's Request No. 5 sought "all communication sent or received by You that relates to Noah Pozner's death certificate." *Id.* Defendant objected on the grounds that the request is "overburdensome, overbroad, vague, ambiguous and irrelevant." Aff. at Ex. C. Defendant also objected that it "[r]equires excessive time to prepare." Defendant further objected that its emails are not the focus of the Complaint, and are not publicized, but private. *Id.*

Given the Plaintiff's defamation allegations are based on Defendant's statement that Noah Pozner's death certificate is "fake," "fabricated," or a "forgery," it is difficult to comprehend how this request could be objectionable. Indeed, based on the meet-and-confer process it seemed Defendant would agree to produce the emails, but not a single email has been produced to date. Aff. at ¶ 5.

Instead, Defendant has apparently retracted its previously-stated preference to produce emails in the .pdf format and has instead requested to "forward" the emails

to the email account of Plaintiff's counsel. Zimmerman Aff. at ¶ 10, Ex. E. That is an unreasonable method of document production because it inherently changes the email. The emails would not reflect the manner in which they were kept in the ordinary course of business, but would instead reflect Plaintiff's counsel's name and email address in the "To" field on every email so produced. Counsel for Defendant has offered no rationale for this method of production and has not identified any problem with producing .pdf files or .tiff images, or any other method of production that preserves the documents as they were maintained by Defendant in the ordinary course of business.

Plaintiff's Request No. 6 sought drafts of the book that reference Noah Pozner's death certificate being fake, forged, counterfeit, or otherwise not authentic. Aff. at Ex. C. Defendant read the word "draft" out of the request and pointed Plaintiff to the final, published versions of the book. That is insufficient. Drafts are discoverable because they may illustrate material changes in Defendants' positions leading up to the publication of the defamatory matter. Moreover, drafts may indicate that Defendant played a role in the publication of the book that is undercuts its "innocent dissemination" affirmative defense. *See* Wrongs Answer, Doc. #36, at ¶ 55. To the extent Defendant has in its possession, custody, or control drafts of the book, those should be produced.

Plaintiff's Request No. 7 sought communications with any author or editor or reviewer of any portion of the book that refers to Noah Pozner. Aff. at Ex. C. Rather

than producing any documents, Defendant directed Plaintiff to refer to Plaintiff's own email communications with a person named Kelley Watt. Aff. at Ex. C.

That is an invalid response. Plaintiff has a right to know what information Defendant had access to in connection with the defamatory statements. Plaintiff has the right to evaluate Defendant's state of mind related to the publication of the defamatory material. The emails may contain information that undercuts Defendant's "truth" defense. They may contain information that undercuts Defendant's innocent dissemination defense. They may also contain information bearing on Defendants' public figure defense.

Plaintiff's request No. 8 sought communication related to portions of the book that refer to Leonard Pozner. Aff. at Ex. C. Defendant objected on multiple grounds, including that the request is "overburdensome" and "overbroad." *Id.* Defendant noted that it has located 1,219 emails that mention the name "Pozner." *Id.* Despite locating those responsive emails, Defendant's responses refuse to produce the documents unless Defendant is compensated. *Id.*

Defendant has not raised any valid reason why the emails should be withheld. Nor has Defendant identified anything special about this document production that would justify compensating Defendant for producing emails that relate to Plaintiff or his son in a case where the Defendants deny the very existence and/or identity of Plaintiff and his deceased son.

Plaintiff's request No. 9 sought documents showing the number of copies of the Second Edition of *Nobody Died At Sandy Hook* that were printed. Defendant refused

on two grounds: that the information is “Confidential proprietary information” and “Defendant reserves the right to bifurcate damages.” *Id.*

As to the first objection, at the April 26, 2019, hearing, the Court granted Plaintiff’s request for a confidentiality order. *See* Minutes of Telephone Motion Hearing, Doc. #99. To the extent Defendant wishes to avoid public disclosure of its proprietary information, Defendant may designate it “confidential,” but refusing to produce the documents altogether based on claims of confidentiality is improper.

As to the second, Defendant has not moved to bifurcate damages, nor, of course, does the Defendant control whether the trial is bifurcated. Plaintiff would oppose any such motion. Moreover, there is no indication that damages *discovery* would be bifurcated even if this Court ordered that *trial* on damages will be bifurcated. Defendant has no valid basis to withhold the requested information.

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 requests that the Court limit Defendant to the responses set forth in its April 18, 2019 discovery responses. Plaintiff also respectfully requests that the Court order Defendant to immediately produce responsive documents in an appropriate format that preserves the contents of the documents. Finally, Plaintiff requests that the Court award expenses, including attorney fees, for the cost of this motion pursuant to Wis. Stat. 804.12(1)(c).

Dated: May 3, 2019

MESHBESHER & SPENCE LTD.

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