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George L. Christenson
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BY THE COURT:

DATE SIGNED: May 16, 2022

Electronically signed by Honorable Pedro A. Colon
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 18

TRI-CORP HOUSING, INC.,

Plaintiff,

Case No. 07-CV-13965

v.

ROBERT BAUMAN, ALDERMAN,

Defendant,

DECISION AND ORDER GRANTING MOTION TO CHANGE VERDICT ANSWERS

This case was initiated on November 19, 2007, as a foreclosure action filed by the Wisconsin Housing and Economic Development Authority against Tri-Corp Housing, Inc. (Tri-Corp). On February 17, 2022 – almost fifteen years later - a jury awarded Tri-Corp $1,400,000 in compensatory damages for its counterclaim for defamation, based on several statements made by City of Milwaukee Alderman Robert Bauman (Bauman) during the course of his opposition to Tri-Corp's operations. Shortly thereafter, Bauman filed a motion for judgment notwithstanding the verdict and motion to change answers. For the reasons stated below, the court finds that the evidentiary record is entirely devoid of evidence to demonstrate that Bauman acted with actual malice by clear and convincing evidence. The court find that Tri-Corp is a "limited purpose public figure," and actual malice is a condition precedent for recovery in

defamation cases involving public figures. Accordingly, Tri-Corp is not entitled to any compensatory damages as a matter of law.

INTRODUCTION

This case was initially assigned to Judge Michael Dwyer. Since then, the case has been reassigned – due to judicial rotation, a substitution and a recusal – to seven different branches, including a vacant branch with a reserve judges presiding.[1] The most recent reassignment did not occur until early 2020, when the courts were significantly disrupted by the COVID-19 pandemic. As a result, the court was faced with the daunting task of making eleventh-hour decisions with respect to the formulation of the jury verdict and jury instructions, without having the ability to fully decipher the logic and rationale of the predecessor judges' decision-making process.

Fortunately, many of the facts are undisputed. Tri-Corp is a non-profit agency whose mission, among others, is to provide housing to individuals with mental disabilities who are not in need of confinement and are capable of living in the community. In the early 1990s, Tri-Corp acquired a 92-unit facility housing facility, known as "West Samaria," located at 2713 West Richardson Place, in Milwaukee. The "American Red Cross" and Milwaukee County Mental Health Division occupied the fourth floor of the facility with their own occupancy permit from the City and independently rented 32 units from Tri-Corp. In 1997, Bauman purchased a home approximately two blocks from West Samaria.

In 2003, the Wisconsin Housing and Economic Development Authority (WHEDA) gave Tri-Corp a multi-family mortgage for approximately $1.6 million, which was secured by the

[1] The case was also appealed to the Wisconsin Court of Appeals. In addition, it was removed to the federal district court, which declined to exercise supplemental jurisdiction over Tri-Corp's state law claims. The federal case ultimately proceeded to the Seventh Circuit Court of Appeals.

West Samaria facility and another building in West Allis, known as "New Samaria." Both facilities were operated by Tri-Corp to providing housing and meals for cognitively disabled persons.

In the spring of 2004, Bauman was elected Alderman of the Aldermanic District in which West Samaria is located.

Since 2005, Bauman was an opponent of the West Samaria Facility and publicly opposed Tri-Corp's special use permit to operate West Samaria. In the process of doing so, he made several statements, which, according to Tri-Corp, were defamatory in nature. There were initially seven statements at issue, but Judge Witkowiak prevented three of the seven statements from going to the jury because they were made during administrative hearings before the Board of Zoning Appeals (BOZA), and they were therefore subject to an "absolute privilege."

On March 2, 2007, the City of Milwaukee Department of Neighborhood Services (DNS) issued a 30-day notice to vacate. The jury heard evidence that on the same date, Bauman emailed his constituents informing them that DNS determined that West Samaria violated its plan of operation after it became public that Joseph Droese, a resident of West Samaria, was found dead in his room after four days from the last day he was seen alive on January16, 2022. Droese's death led to subsequent public discussion regarding the manner and circumstances that caused his death. After Droese's death became public, Bauman requested and confirmed that DNS would issue an order revoking Tri-Corp's special use permit. In addition, in a news release dated March 23, 2007, Bauman stated that "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there." Finally, at an October 19, 2007, meeting with county officials, a city employee, WHEDA representative, and a representative from a prospective buyer, Bauman stated that West Samaria

"was a combination of three things – bad design, bad location, and a bad operator."[2] At issue is whether there is sufficient evidence in the record that would allow Tri-Corp to recover compensatory damages for these statements through the requirements of the law of defamation.

DISCUSSION

The first inquiry in evaluating a defamation claim is whether the communication is capable of a defamatory meaning, that is, whether the words complained of are reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and probable one. *Laughland v. Beckett*, 2015 WI App 70, ¶ 21, 365 Wis. 2d 148, 870 N.W.2d 466. The determination is one of law for the circuit court. *Id*.

The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. *Id*., ¶ 22. If the court determines that the statements at issue are defamatory, it must also consider the defenses alleged. *Id.*

"Substantial truth" is a complete defense, and opinions may be valid defenses under certain circumstances. *Id*. The doctrine of substantial truth provides that "slight inaccuracies of expression" do not make the alleged defamation false. *Id*. An expression of opinion generally

[2] The jury also heard evidence that on March 1, 2007, Bauman told the Department of Neighborhood Services (DNS) to revoke Tri-Corp's special use permit because "a resident died and was not discovered for 4 days." According to Bauman, this suggested that the facility was not operating in compliance with its operation or operating in a manner that was consistent with the health, safety and welfare of the public. As part of their verdict, the jury determined that Bauman did not make this statement with actual malice, thereby precluding recovery for this allegedly defamatory statement.

cannot be the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result ... "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion.

In this case, all of the statements at issue are substantially true, and Bauman's statement regarding West Samaria's "bad design, bad location, and a bad operator" is pure opinion. It is unclear why any of these statements were even issued to the jury.[3]

In addition to the common law defenses, the First Amendment to the United States Constitution provides its own limitations to recovery. The First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I. The landmark case of *New York Times Co. v. Sullivan* recognized that enforcement of state tort law through civil litigation may "impose invalid restrictions on ... constitutional freedoms of speech and press" and thus constitute state action denying due process of law in violation of the Fourteenth Amendment. 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

When speech involves private matters, the state's interest in compensating its citizens for injuries arising from tortious speech will generally outweigh any First Amendment concerns. However, the balance changes significantly when speech involves a matter of public concern.

[3] When a new judge is appointed, he or she has all the powers and authority of his or her predecessor. *Starke v. Village of Pewaukee,* 85 Wis.2d 272, 282, 270 N.W.2d 219 (1978). "[A] successor judge may in the exercise of due care modify or reverse decisions, judgments or rulings of his [or her] predecessor if this does not require a weighing of the testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications." *Id.* at 283, 270 N.W.2d 219.

"[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Hustler Magazine v. Fallwell,* 485 U.S. 46, 53, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). This is because "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50, 108 S.Ct. 876; *accord Dun & Bradstreet,* 472 U.S. at 758–59, 105 S.Ct. 2939 ("[S]peech on matters of public concern ... is at the heart of the First Amendment's protection.") (internal quotation marks omitted).

In fact, the recognition that this right under the First Amendment applied to Bauman's statements led the Seventh Circuit Court of Appeals to conclude that Tri-Corp could not prevail on its federal discrimination claim against Bauman. As the court stated:

> Speech is a large part of any elected official's job, in addition to being the means by which the official *gets* elected (or re-elected). Teddy Roosevelt called the presidency a "bully pulpit," and all public officials urge their constituents and other public bodies to act in particular ways. They have every right to do so, as long as they refrain from making the kind of threats that the Supreme Court treats as subject to control under the approach of *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Tri-Corp Hous. Inc. v. Bauman, 826 F.3d 446, 449 (7th Cir. 2016).

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that the First Amendment's guarantee of freedom of speech limits a state court's "power to award damages for libel in actions brought by public officials against critics of their official misconduct." *Id*. at 283. The court held that in such cases the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made 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 court considered the case "against the background of 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." *Id*. at 270.

In *Rosenbloom v. Metromania, Inc*., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality of the court extended the actual-malice standard to protect speakers who discuss "matters of public or general concern," even when the plaintiff is a private figure. However, three years later, observing that there had been a "general problem of reconciling the law of defamation with the First Amendment," the Supreme Court reconsidered its decision in *Rosenbloom. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). In doing so, the court changed its position and decided that a negligence standard would be imposed for defamation suits brought by private individuals in federal court, but left it up to the states to define for themselves the appropriate standard of liability in state court actions for defamatory statements made about a private individual. *Id*. at 347.

In *Denny v. Mertz*, 106 Wis. 2d 636 (1982), the Wisconsin Supreme Court accepted the *Gertz*' court's invitation and imposed a simple negligence standard for cases involving private-figure plaintiffs. *Id*. at 654. However, in *Wiegel v. Capital Times Co*., 145 Wis. 2d 71 (1988), the court clarified that the simple negligence standard does not apply "limited purpose public figures," which remain subject to the actual-malice standard. *Id*. at 79.

A limited purpose public figure is one who "assumes that status by involvement in a particular public issue or controversy and thereby becomes a public figure for a limited range of issues." *Id*. at 82. The question of whether a person is a limited public purpose public figure "is an issue left solely to the court to decide *as a matter of law*, not an issue of fact to be decided by the jury." *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 676, 543 N.W.2d 522, 530–34 (Ct. App. 1995).

In *Wiegel v. Cap. Times Co*., 145 Wis. 2d 71, 83–84, 426 N.W.2d 43 (Ct. App. 1988), the court established several criteria to determine whether a defamation plaintiff may be considered a public figure:

> First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in *Gertz*, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he [or she] has voluntarily injected himself [or herself] into the controversy so as to influence the resolution of the issues involved. Factors relevant to this test are whether the plaintiff's status gives him [or her] access to the media so as to rebut the defamation and whether plaintiffs should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

Id. (citation omitted).

In this case, the first factor is satisfied because the community at large has a great societal interest in safe, clean, publicly-funded housing for mentally ill individuals that require assistance from the community. Even Jim Hill, who was directly responsible for providing and administering housing for the mentally ill in Milwaukee County, testified that that he understood that the conditions were so poor that any attention would be beneficial – including that of reporter Meg Kissinger, who wrote a series of articles criticizing Hill and Milwaukee County's incompetence as it related to housing for the mentally ill – would be beneficial.[4] Furthermore, in the series of articles many opinions were shared regarding West Samaria, Milwaukee County, County Executive Scott Walker, county supervisors, BOZA members, and of course, Bauman and Tri-Corp's executive director, Michael Brever.

Bauman questioned whether the West Samaria's operations were based on a safe policy decision, given the difficulty in providing housing to a population of overwhelmingly indigent,

[4] On March 1, 2, 3, 6, 11, 23, and 29, 2007, Kissinger wrote a series of articles under the headline, "Abandoning Our Mentally Ill."

mentally ill individuals who are not severely ill enough to be legally required and compelled to endure difficult mental health treatment choices. As Hill, the Director of Housing for Milwaukee County from 2007 until 2009 and Director of Metal Health in Milwaukee County from 2003 until 2007, testified:

> I spent the most difficult years of my public service career managing this agency [that oversaw mental health housing, including West Samaria]. [T]he agency was starved for revenue to make services available in the community to persons with mental illness, in part because the institutions that were being run or being operated by the agency were gobbling up most of the resources. It was very difficult to get in front of this. Housing choices were very slim. There extremely few decent choices. And those choices, whatever choices there were, were offered to individual who needed housing, but they were under no obligation to take those choices. Of course, the may well have ended up homeless if they had declined the choice, but the choices were few and the quality of care in those choices were few and the quality of the care in those choices was not very good. The system needed – urgently needed improvement . . .”

Trial Testimony of Jim Hill, Pg. 15, lns. 19-25 , and Pg. 16, lns, 1-9. Hill’s testimony is consistent with other evidence in the record, which establishes that housing for the mentally ill in Milwaukee County was in a dire state with regards to housing options for those who were diagnosed with severe mental illness during the period that Bauman made the statements at issue in this trial.

In addition, the issues associated with West Samaria were debated publicly on numerous occasions, and the outcome had foreseeable and substantial ramifications for a large segment of the community. Joseph Droese, a resident of West Samaria, was last seen alive on January 16, 2007. It wasn’t until January 20, 2017 - after Droese’s mother made several calls requesting that Droese be located, and ultimately insisting that someone check his room – that Droese was found dead by West Samaria’s on-duty receptionist. The incident was not made public until March 1, 2007. This incident became the catalyst event for the community’s public debate regarding appropriate housing options for the mentally ill in Milwaukee County and whether the actions of

the County, the County's mental health workers, West Samaria staff and other factors could have prevented Droese's death. Throughout this discussion, the press on several occasions covered the debate and reported statements made by Tri-Corp, Bauman, and many others. There is no question that the issues associated with West Samaria were debated publicly and had foreseeable and substantial ramifications for the neighborhood and beyond. There was a "public controversy" within the meaning of *Weigel*.

With respect to the second factor, it has been stated that a defamation plaintiff need not consciously or voluntarily thrust itself into the dispute in order to be considered a limited purpose public figure. *Wiegel*, 145 Wis. 2d at 85. Instead, a plaintiff may be a limited purpose public figure if his or her activities "almost inevitably put him [or her] into the vortex of a public controversy." *Id*. By making statements throughout the controversy which mitigated West Samaria's responsibility in the events that led to Droese's death, Brever and others made public comments which in turn transformed Tri-Corp from a private organization to a limited purpose public figure. Brever testified that Tri-Corp was not responsible for Droese's care. His statements were made to press and compounded in court during his testimony. During the trial, Tri-Corp, through Brever and Hills' testimony, established that Jill Rodrigues, Droese's mental health case worker, failed to provide the six required visits to West Samaria as part of her job.

In a March 1, 2007, Milwaukee Journal Sentinel article, Meg Kissinger wrote: "Michael Brever, executive director of Tri-Corp Housing Inc., which runs West Samaria said Wednesday that residents normally are accounted for when they come to the dining room for dinner. But because Droese had moved in only recently, his absence was not noted. . . . [However] [a] staff worker told investigators that they were understaffed and attendance was not always take as promised." Exh. 217.

On March 3, 2007, the City of Milwaukee building inspectors issued an order to vacate West Samaria because the inspectors determined that Tri-Corp violated conditions of its special permit by not properly monitoring residents. Again, in an effort to protect the actions of West Samaria staff, Brever pointed the proverbial finger of blame on the county. He explained that "wish[ed] that things turned out differently" and that he and others fully believed that Droese was being monitored by his caseworkers. Exh. 519. In the course of doing so, Tri-Corp voluntarily thrusted itself to the forefront of the controversy in order to achieve a special prominence in the debate and corresponding resolution in its favor.

Brever's persistence paid off to some degree. On March 23, 2007, BOZA stayed the order to close West Samaria, and Tri-Corp was allowed to continue to house mentally ill residents under additional conditions regarding reporting and monitoring of residents. Tri-Corp's participation in the matter was far from trivial, and as is noted above, its attorney and executive director on several occasions provided timely statements to the press in response to the alleged infirmities of its operation. The second factor is easily satisfied.

Since the court has determined that Tri-Corp is a limited purpose public figure, the dispositive question is whether there is any evidence in the record to demonstrate that Bauman acted with actual malice. *See Bay View Packing Co. v. Taff,* 198 Wis. 2d 653 at 677. Framed in terms of the applicable burden of proof at this stage of the proceedings, the court must determine whether the facts developed at trial are sufficient to prove actual malice by clear and convincing evidence. After listening to the testimony of all the witnesses and weighing the facts as required, there is no clear and convincing evidence that Bowman acted of actual malice.

In *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Supreme Court of the United States clarified the meaning of "reckless disregard" of a statement's

probable falsity. The test is not whether a reasonably prudent person would have published or would have investigated before publishing; rather, the evidence must show that the defendant in fact entertained serious doubts as to the truth of the statement but published in spite of his doubts. *Id.* at 731, 88 S.Ct. at 1325. The *St. Amant* court listed several examples of circumstances that might give rise to recklessness: (1) a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call; (2) the allegations are so inherently improbable that only a reckless man would have put them in circulation; or (3) there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.* To be sure, the defendant in a defamation action cannot automatically prevail merely by testifying or stating in an affidavit that he published with a belief that the statements were true. *Id*. at 732, 88 S. Ct. at 1326.

In this case, the applicable questions on the verdict provided as follows:

> Question 8: Did Robert Bauman [say that "West Samaria has repeatedly demonstrated that they are unwilling or unable to provide quality care to the mentally disabled residents who lived there] with reckless disregard of its truth or falsity?
> Question 9: In making (publishing) the statement, did . . . Robert Bauman abuse his First Amendment privilege?
> Question 13: Did Robert Bauman [say that West Samaria had a bad design, bad location and bad operator] with reckless disregard of its truth or falsity?
> Question 14: In making or publishing the statement, did . . . Robert Bauman abuse his First Amendment privilege?

Based on an independent review of the record, and drawing all reasonable inferences in Tri-Corp's favor, the court concludes that the evidence presented at trial is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. It is clear that Bauman's allegations were neither fabricated nor "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326. Tri-Corp's and Bauman's view on the whether West Samaria was

providing competent housing for the mentally ill were greatly divergent, but both parties spoke as they saw the situation as it related to Droese's death and as it related more broadly for the mentally ill segment of the community. While there may have been reasons to doubt the veracity of Bauman's statements, there was no evidence that Bauman formed his opinion based on anonymous or unverified complaints. To the contrary, Bauman's statements were consistent with and corroborated by numerous statements made by the press, elected officials, city staff, BOZA members, and members of the community.

Bauman attended numerous meetings and administrative hearings, where he heard criticisms that were entirely consistent with his own. Mayor Tom Barrett sought to have the DNS conduct an investigation to determine whether West Samaria was meeting the conditions of its plan of operation required by its permit. Jim Hill, the County Director of Housing, expressed reservations about the services by West Samaria. Viewing these circumstances as a whole and the evidence adduced at trial, the court finds that no rational fact finder could find actual malice by clear and convincing evidence.

Accordingly, the jury's answers to Questions 8 and 13 must be changed from "yes" to "no." Since there is no reasonable inference that Bowman knowingly or recklessly lied, Questions 9 and 14 are rendered moot. Bowman's motion after the verdict must therefore be granted, and Bowman's alternative arguments need not be decided.

CONCLUSION

For the above reasons, Alderman Robert Bauman's motion is **GRANTED**.

SO ORDERED.

THIS DECISION IS FINAL FOR PURPOSES OF APPEAL.