STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

CHRISTOPHER SMITH
10650 South Shangrila Ct.
Oak Creek, WI 53154

Plaintiff,

v.

Case No. 2022-CV-000257

KELLY GALLAHER
4622 Knollwood Drive
Mount Pleasant, WI 53405

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

This lawsuit is not about "defamation." Instead, it is an attempt by a local government official to silence opponents of a policy he supported by substituting retaliatory litigation for public debate. This attempt is an assault upon the fundamental principle that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). Even apart from free-speech protections, though, none of the allegedly defamatory statements constitute defamation under Wisconsin law. Because neither the First Amendment nor Wisconsin law allows thin-skinned officials to muzzle their critics with lawsuits, this case should be dismissed with prejudice under WIS. STAT. § 802.06(2)(a)(6).

STANDARD OF REVIEW

"A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint." *Beloit Liquidating Tr. v. Grade*, 2004 WI 39, ¶ 17, 270 Wis. 2d 356, 677 N.W.2d 298 (citing *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987)). Although "[a]ll facts pleaded and reasonable inferences that may be drawn from such facts are accepted as true" for the purpose of testing the complaint's legal sufficiency, "legal inferences and unreasonable inferences need not be accepted as true." *Id.* (citations omitted). While these motions are generally limited to the allegations of the complaint, "incorporation by reference" allows courts to "consider a document attached to a motion to dismiss . . . without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his or her claim, and its authenticity has not been disputed." *Soderlund v. Zibolski*, 2016 WI App 6, ¶ 37, 366 Wis. 2d 579, 874 N.W.2d 561 (citations omitted).

STATEMENT OF FACTS

Kelly Gallaher is a local activist in Mt. Pleasant, Wisconsin, where she is the spokeswoman for "A Better Mt. Pleasant," a community advocacy group founded in 2015 to focus on local village issues. Compl. ¶¶ 2, 6. Mt. Pleasant is governed by a Village Board composed of seven elected trustees that serve two-year terms. *Id.* ¶ 5. *See* Diana Panuncial, *Mount Pleasant to become only municipality in Racine County where board members have a three-year term*, The Racine Journal Times (Feb. 10, 2022),

https://tinyurl.com/yrwzzxru [hereinafter Journal Times Article].[1] On January 24, 2022, the Board voted to extend these terms to three years. *See* Journal Times Article at 1. Plaintiff Chris Smith is employed as the Village Attorney of Mt. Pleasant and publicly supported the term extension in an interview with the Racine Journal Times. *See* Compl. ¶¶ 3, 8–9; Journal Times Article at 1–2. Kelly opposed the term extension and helped organize a petition to trigger a public referendum on the issue. *See* Email from Kelly Gallaher to Adam Rogan of the Racine Journal Times et al. (Mar. 3, 2022, 11:32 AM CST) [hereinafter Journal Times Email].[2] On February 10, the Racine Journal Times published a story about the vote to extend Village Trustee term limits and included a quote attributed to Village Attorney Smith: "This change was first form[al]ly brought to the board in April 2021, though discussion of it began back in 2018." Compl. ¶ 8; Journal Times Article at 2. The Complaint does not claim the article's quotation was inaccurate. Compl. ¶ 9.

Village Attorney Smith's quote in the Journal Times didn't ring true to Kelly. She didn't "recall any discussion about [the term extension] until the January 10, 2022 Committee of the Whole meeting" and she "searched village archives to find other discussions on the length of terms in office for Village Trustees, but [could not] find one."

[1] The Racine Journal Times article by Diana Panuncial is incorporated by reference into the Complaint at ¶ 8 and a copy of the article is attached as Exhibit 1. *See Soderlund*, 2016 WI App ¶ 37.

[2] Kelly's email to Adam Rogan and other journalists is incorporated by reference into the Complaint at ¶ 12 and a copy of the email is attached as Exhibit 2. *See Soderlund*, 2016 WI App ¶ 37.

Journal Times Email at 5. To clear things up, Kelly e-mailed Village Attorney Smith about his quote in the Journal Times on February 22 and asked him to provide her with "the agendas in which the Village Board (or the Committee of [the] Whole) discussed and/or debated extending the length of terms in office for public officials from January 2020 until the present." *Id*. On February 23, Village Attorney Smith responded that during that time frame the term extension was "discussed at the Committee of the Whole on 4/19/21," as well as at meetings on January 10 and 24 of 2022 and attached the agendas for all three meetings. *Id.* at 4. Kelly wrote back the same day that the April 2021 meeting agenda "doesn't really inform residents that longer terms for village officials was being considered—there is no agenda item which specifically refers to term lengths," and expanded her request to ask for "all other agendas in which longer terms for village officials were specifically discussed and/or debated from January 2018 through April of 2021." Journal Times Email at 3–4. All told, she had now requested meeting agendas discussing the term extension from 2018 through the present—the entire period in which Village Attorney Smith told the Journal Times that the change had been discussed. *See* Compl. ¶ 8. After Kelly followed up a week later, Village Attorney Smith admitted in a one-sentence email that: "This subject matter was not discussed at a public meeting within that timeframe, other than the 4/19/21 meeting previously discussed." Journal Times Email at 2.

On March 3, Kelly forwarded her correspondence with Village Attorney Smith to reporters and editors at the Journal Times and asked them to review it. Journal Times

Email at 1. Kelly then referenced Village Attorney Smith's quote alleging that "discussion of [the term extension] began back in 2018" and told the reporters: "This is false. Smith lied to you. His email to me today admits there were no public discussions about term lengths by the Village Board between January 2018 and April 2021." *Id.* Kelly explained further, writing:

> The village board never discussed lengths of terms for village officials until April 19, 2021 - and there is no agenda item which reflects term lengths, and no posted minutes or audio recording to reflect exactly what was discussed. Unless you were in the room on April 19th, the public had no way of knowing.
>
> The first time any agenda reflected any possible change to trustee terms was at the January 10, 2022 COW meeting, nebulously listed as "Discussion on Trustee Terms."

Id. Kelly then made posts to her organization's Facebook and Twitter pages that contained screenshots of Kelly's email to the Journal Times reporters and of Village Attorney Smith's email to Kelly admitting that the term extension "was not discussed at a public meeting" before April 2021. *See* @abetterpleasant, TWITTER (Mar. 3, 2022, 09:52 AM CST), *archived at* https://tinyurl.com/mryn5pd2 [hereinafter Twitter Post].[3] Both posts summarized the included email. In her Facebook post, Kelly wrote in part, "[s]o, the Village Attorney lied to The Journal Times saying term length discussions date back

[3] Kelly deleted her Facebook and Twitter posts in response to Village Attorney Smith's demand that she do so. Compl. ¶¶ 14–15. Kelly did not save records of either post, but the Twitter post is archived on the Internet Archive at https://tinyurl.com/mryn5pd2 (the Facebook post does not appear to have been archived). Kelly's Twitter post is incorporated by reference into the Complaint ¶ 13 and a copy of the archived post is attached as Exhibit 3. *See Soderlund*, 2016 WI App ¶ 37.

to 2018." Compl. ¶ 10. In her Twitter post, Kelly wrote: "Village Attorney Chris Smith told the [Journal Times] that discussions on extending term lengths for village official[s] date back to 2018. He lied. The village never put trustee terms on an agenda until two weeks before the vote." Twitter Post.

Later that day, Village Attorney Smith contacted Kelly and threatened to sue her unless she removed the social media posts and send "corrections." Compl. ¶ 14, 18. Frightened, Kelly complied, but Village Attorney Smith sued anyway. *Id.* ¶¶ 15–19. The Complaint alleges that Kelly's social media posts and email to the Journal Times defamed Village Attorney Smith and caused him to "suffer[] emotional distress." *Id*. ¶ 22. The Complaint also alleges that Kelly has previously "created hundreds of posts on social media . . . pertaining to Village policies, politics, officials, and employees" and that "nearly every one of the posts . . . portrays Mount Pleasant officials or employees negatively." *Id*. ¶¶ 23–24. It does not, however, allege that anything in any of these posts was false, let alone defamatory. *See id*.

The Complaint states only one legal claim: defamation. *See id.* It makes bare, unsupported allegations that Village Attorney Smith's quote in the newspaper was "true and accurate" and that Kelly's posts and email about that quote are false. *Id.* ¶¶ 9, 27. The Complaint does not allege that Kelly acted with actual malice, that she knew her statements were false, or that she made the statements recklessly. *See id.* The Complaint does allege that Kelly "made these defamatory statements intentionally and with express malice, which is a basis for punitive damages in a private defamation action." *Id.* ¶ 32.

But it does not tie this allegation to any suggestion that Kelly knew (or should have known) her statements were false; instead, the only support for this assertion is that (1) Kelly added a few words to the "correction" Village Attorney Smith demanded she issue; (2) Kelly truthfully confirmed in a Facebook comment that she was threatened with a lawsuit; (3) Kelly allegedly refused to send Village Attorney Smith's "correction" text to reporters she emailed; and (4) Kelly allegedly has a "pattern and practice of consistently and publicly portraying Village officials and employees negatively." *Id.*

Because the Complaint fails to state a claim for defamation, Defendant Kelly Gallaher now asks the Court to dismiss it with prejudice.

ARGUMENT

Establishing an action for defamation requires a plaintiff to prove (1) that the defendant made a false statement; (2) that the statement was communicated to a third party; and (3) that the communication was "unprivileged and tends to harm one's reputation" *Rechsteiner v. Hazelden*, 2008 WI 97, ¶ 72 n.11, 313 Wis. 2d 542, 753 N.W.2d 496 (stating the elements of a defamation action). If the plaintiff is a public official, the First Amendment also requires him to "prove[] 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Failure to prove any one of these elements defeats Plaintiff's claim here, yet the Complaint alleges none of them. It does not allege that Kelly knew that her statements were false or acted

recklessly, and it makes only a conclusory allegation that her statements were false factual statements to begin with. The Complaint thus fails to state a claim for defamation.

There are two independent bases on which the Complaint can be dismissed. First, it should be dismissed because Village Attorney Smith, like any other village attorney, is a public official who is required to prove actual malice in a defamation suit, and the complaint fails to allege actual malice. Second, even setting aside the First Amendment, none of Kelly's statements are defamatory as a matter of law.

I. Plaintiff's Claim Fails Because He is a Public Official and Kelly Did Not Act with Actual Malice

The First Amendment requires public officials like Village Attorney Smith to show that Kelly acted with actual malice to recover for defamation even if Kelly's statements were false. *Pronger v. O'Dell*, 127 Wis. 2d 292, 294–95, 379 N.W.2d 330 (Ct. App. 1985) ("Under the constitutional standard set forth in *New York Times v. Sullivan*, a public official must prove actual malice in order to recover damages for a defamatory statement relating to his official conduct." (citation omitted)). The actual malice standard requires courts to evaluate defamation claims that government officials bring against their critics "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* The heightened threshold public officials face under *New York Times v. Sullivan* exists "in

order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Berry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted).

Village Attorney Smith's attempt to silence Kelly's criticism of him through retaliatory litigation conflicts with the First Amendment, with which the Founding Fathers "eschewed silence coerced by law—the argument of force in its worst form." *Sullivan*, 376 U.S. at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (internal quote marks omitted)). To prevail here, Village Attorney Smith must surmount the high bar that the First Amendment and *New York Times v. Sullivan* sets for all public officials to recover for defamation. And, as explained in this section, he cannot do so. First, Village Attorney Smith is the village attorney—he is a public official or, at minimum, a limited-purpose public figure for the purpose of the public policy debate at issue here. Second, the allegations of the Complaint (and the documents referenced therein) make clear Village Attorney Smith could not show actual malice. The Complaint does not allege that Kelly had reason to believe that her statements were false—on the contrary, all of Kelly's factual statements complained of in this lawsuit were based on careful research and Village Attorney Smith's own emails. The Complaint should therefore be dismissed with prejudice.

A. Village Attorney Smith must show actual malice.

Village Attorney Smith can only prevail in this action by showing actual malice. He must show actual malice because he is a public official (the village attorney) suing about statements that concerned his official conduct. Even if he were not, though, he

would still be a public figure who thrust himself into the public debate over village term limits. Either way, the Complaint would be required to meet the actual-malice standard (a bar that, as explained below, it does not even try to clear).

First, Plaintiff is a public official required to show actual malice because (1) he is the Mt. Pleasant Village Attorney, and (2) Kelly's allegedly defamatory statements concerned his official conduct. The term "public official" in defamation law includes "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Pronger*, 127 Wis. 2d at 295 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)) (holding that a chief of police is a public official). There is "no precise boundary for the category of 'public official,'" and while it does not include all public employees, the law "does not require that a public employee be a policy-maker to be a public official." *Miller v. Minority Bhd. of Fire Prot.*, 158 Wis. 2d 589, 599–603, 463 N.W.2d 690 (Ct. App. 1990) (holding that a fire department captain is a public official). As the *Miller* court found, many different non-elected officers have been held to be public officials under *Sullivan*, including schoolteachers, athletic coaches, appointed auditors, a community-center manager, a motor-pool supervisor, and an appointed city clerk. *Id.* at 598–601 (collecting cases) (citations omitted).

A village attorney fits well within this broad definition of public official, as courts nationwide have recognized. *See, e.g.*, *Preston v. City Council of Petersburg*, No. 3:19-cv-00750, 2021 WL 1177586, at *8 (E.D. Va. Mar. 26, 2021) (finding former city attorney to be public official for defamation purposes); *Weingarten v. Block*, 162 Cal. Rptr. 701, 709 (Cal.

Ct. App. 1980) (same for current city attorney); *Finkel v. Sun Tattler Co.*, 348 So. 2d 51, 52 (Fla. Dist. Ct. App. 1977) (same for former city attorney); *Frink v. McEldowney*, 275 N.E.2d 337, 337 (N.Y. 1971) (same for attorney employed by town); *Wanless v. Rothballer*, 503 N.E.2d 316, 322 (Ill. 1986) (same for village attorney). Municipal attorneys have substantial control over the conduct of governmental affairs in their municipality and have greater access than everyday citizens to public fora to "expose through discussion the falsehoods and fallacies of the defamatory statement." *Tunnell v. Edwardsville Intelligencer, Inc.*, 241 N.E.2d 1, 36–37 (Ill. App. Ct. 1968), *rev'd on other grounds*, 252 N.E.2d 538 (Ill. 1969) (finding city attorney to be public official for defamation purposes). *See also Weingarten*, 162 Cal. Rptr. at 709. And the defendant's First Amendment interests are particularly strong when criticizing a municipal attorney's statements because the "public's interest extends to 'anything which might touch an official's fitness for office,'" including "dishonesty." *Weingarten*, 162 Cal. Rptr. at 709 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)). Village Attorney Smith is thus a public official.

Not only is Village Attorney Smith a public official, but the allegedly defamatory statements at issue in this case exclusively relate to his official conduct as the village attorney. Kelly's email and social media posts concerned an interview that Village Attorney Smith gave to the Journal Times where Plaintiff explained and promoted an official action by the village government. *See* Journal Times Email at 1; Journal Times Article at 1–2. Village Attorney Smith felt that it was "very important that everyone understand" how the new term lengths would work and discussed how the change

would work toward the "betterment of the village going forward." Journal Times Article at 1–2. Aside from Village Attorney Smith, the only other person quoted in the article is a village trustee, and both are identified by their official government positions. *See id.* Kelly's statements likewise refer to Village Attorney Smith using his official title. *See* Journal Times Email at 1; Twitter Post. In short, Village Attorney Smith was not a private citizen opining about a private matter; he was the village attorney, commenting about a public debate that surrounded his work as the village attorney.

Second, even if he were not—even if Village Attorney Smith were simply Private Citizen Smith—he would still need to show actual malice as a "public figure[] for a limited purpose because of [his] involvement in [this] particular public controversy." *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 676, 543 N.W.2d 522 (Ct. App. 1995) (cleaned up). A person is a limited-purpose public figure when they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Here, Village Attorney Smith gave an interview to a local newspaper about a local public controversy, and Kelly responded to those comments. That makes him, at minimum, a limited-purpose public figure and, therefore, required to show that Kelly acted with actual malice to state a claim for defamation against her. *See, e.g.*, *Pronger*, 127 Wis 2d at 295.

B. <u>The Complaint does not even attempt to allege actual malice.</u>

The "actual malice" standard is a high bar—a plaintiff claiming actual malice must show the defendant either knew her statements were false or acted "with reckless

disregard of whether" they were true or false. *Sullivan*, 376 U.S. at 279–80. The Complaint here alleges neither. To be sure, it alleges that Kelly did not like her current government and that she had "created hundreds of posts on social media" that "portray[] Mount Pleasant Village officials or employees negatively." Compl. ¶¶ 23–24. But it does not allege that Kelly knew her statements was false, or even that she *should* have known they were false.

Nor could it have. Indeed, the very email that the Complaint claims was defamatory makes clear that Kelly was anything but reckless. Kelly's email to the Journal Times reporters included her correspondence with the village attorney where she asked for records that could substantiate his quote in the Journal Times article. Journal Times Email at 3–5. That same email made clear that she had tried to find these records on her own by "search[ing] the village archives" with no luck. *Id.* at 5. She followed up with Village Attorney Smith a week later. *Id.* at 3. It was only after Village Attorney Smith admitted, without further explanation, that extending trustee term lengths had *not* been "discussed at a public meeting" in 2018 or at any time before April 2021 that Kelly contacted the Journal Times and made her social media posts. *Id.* at 1–2. In other words, Kelly did research, gave Village Attorney Smith ample opportunities to substantiate his quote, and waited until he appeared to confirm that his quote was false to say anything. Far from showing that Kelly knew her statements to be false or that she acted recklessly, the very statements that the Complaint alleges were defamatory show that Kelly had every reason to believe that what she was saying was true.

Simply put, the Complaint does not contain allegations sufficient to meet the "actual malice" standard, and the allegedly defamatory statements themselves make clear that the standard could not possibly be met here. The Complaint should therefore be dismissed with prejudice.

II. Plaintiff's Defamation Claim Must Fail Because Kelly's Statements Were Not Defamatory

The Complaint should also be dismissed for the simple reason that Kelly's statements were not defamatory. The allegedly defamatory statements simply disclose two true statements from Village Attorney Smith—his statement to the newspaper that the proposed term-limit change had been discussed since 2018 and his subsequent email to Kelly admitting that there were no records of any public discussions before 2021—and express the opinion that the apparent contradiction between these statements shows he was lying.

To be defamatory, a statement must be false and not merely an expression of opinion. *See, e.g.*, *Anderson v. Hebert*, 2011 WI App 56, ¶ 14, 322 Wis.2d 432, 798 N.W.2d 275 ("By definition, a defamatory statement must be false."); *Terry v. Journal Broad. Corp.*, 2013 WI App 130 ¶ 23, 351 Wis. 2d 479, 840 N.W.2d 255 (holding that opinions are not actionable defamation unless blended with fact and implying undisclosed defamatory facts). In her email to the Journal Times—a screenshot of which was in her social media posts—Kelly explained what she meant by saying Village Attorney Smith was lying. Journal Times Email at 1. *See* Twitter Post. The Journal Times article had quoted Village Attorney Smith saying that "discussion" of the term length change began in 2018. Kelly,

not unreasonably, interpreted that as an assertion that there had been *public* discussion of the term length changes as early as 2018—and, when she discovered that this assertion was not true, she publicly said that Village Attorney Smith had lied, disclosing the basis for her opinion. In other words, the allegedly defamatory statements make clear that (1) Kelly believed Village Attorney Smith's quote should be interpreted as a claim that there were public discussions of the term limit change as early as 2018; (2) there were no public discussions of the term limit change as early as 2018; and (3) Village Attorney Smith was therefore a liar. Of these three points, only the second is factual—and that one, as far as the Complaint reveals, is perfectly true. The other two are pure statements of opinion based on disclosed facts: Kelly offered her interpretation of a public statement by Village Attorney Smith and her opinion that people who say false things in public are lying. Village Attorney Smith is, of course, entitled to have a different opinion. He may well believe that the best interpretation of his quote was that discussions of the term-limit change had been held *in secret* rather than in public and that it is therefore unfair to say he lied. But these differences of opinion do not give rise to a defamation claim under Wisconsin law.

The only way a statement of opinion like Kelly's can be defamatory in Wisconsin is if it is "blended with an expression of fact and impl[ies] the assertion of undisclosed defamatory facts as a basis of the opinion." *Terry*, 2013 WI App ¶ 23 (quoting *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268 (7th Cir. 1996)) (cleaned up). Statements express non-actionable opinions when a "reasonable viewer or reader . . . would not take the

[statements] to convey anything other than" the non-defamatory facts conveyed in the same communication. *Terry*, 2013 WI App ¶ 23. In *Terry*, the court found that media companies' accusations that a wedding videographer "rob[bed]," "ripped off," and "cheat[ed]" a "victim" as part of a "scam" were not defamatory because reasonable viewers would understand these terms to convey only the factual information about the videographer's history of poor service reported in the same news stories. *Id.* So too here. Kelly said Village Attorney Smith was lying, but she did so by pointing specifically to the quote she claimed was a lie and to Village Attorney Smith's own emails admitting that there had been no public discussions of the term-limit change before 2021. *See* Journal Times Email at 1–2; Twitter Post. Anyone who read Kelly's email or internet posts would understand the basis of Kelly's opinion—that Village Attorney Smith's statement to the newspaper seemed to be contradicted by Village Attorney Smith's email to Kelly. Readers could agree with Kelly's opinion, or they could disagree, perhaps because they believed that Village Attorney Smith's quote did not refer to *public* discussions of the policy change. But no reader could believe Kelly was asserting knowledge of some unstated nefarious facts about Village Attorney Smith, and so there is no plausible basis to allege that any of Kelly's statements were defamatory. The Complaint should therefore be dismissed.

CONCLUSION

Even in close cases involving a public official suing a critic for defamation, "the doubt should be resolved in favor of free criticism and discussion." *Grell v. Hoard*, 239 N.W. 428, 430 (Wis. 1931). This is not a close case. Village Attorney Smith's defamation

claims are foreclosed by the First Amendment and by Wisconsin defamation law. To be sure, Village Attorney Smith is annoyed by Kelly's criticism of his public statements. But the debate about Village Attorney Smith's statements to the newspapers belongs in the newspapers, not the courts. The Complaint should therefore be dismissed with prejudice.

Respectfully submitted this 21st day of April, 2022.

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**Motion for admission pro hac vice to be filed*