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**DISTRICT II**

November 8, 2023

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2022AP1924

Michael M. Bell v. Albert Gonzales (L.C. #2020CV953)

Before Neubauer, Grogan and Lazar, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Michael M. Bell appeals the circuit court's grant of summary judgment dismissing Bell's defamation claims against Albert Gonzales. Bell argues the circuit court erred by concluding the disputed statements were either substantially true or a non-defamatory opinion statement. Upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2004, Gonzales, while on duty as a City of Kenosha police officer, shot and killed Bell's son outside Bell's residence. The City of Kenosha concluded the shooting was justified. Bell, his ex-wife, their daughter, and his son's estate brought a federal civil action in 2005. Depositions were taken during that case and ultimately the case settled.

In 2020, Gonzales published a book titled, "A Fateful Two Minutes," which described the shooting and the subsequent events, including the federal lawsuit. In the book, Gonzales used replacement names similar to the real names of some of the people involved.

In the present case, Bell argues there are four instances in the book where Gonzales defamed him. The first instance was Gonzales' depiction of Bell's deposition testimony when Bell was questioned regarding an incident where Bell came to Gonzales' residence after the shooting and left items on Gonzales' front porch. The book provided:

"What did you put on his porch?" Kevin pushed.

"I put a sign that my son made; a picture of my son taped to the sign and a note."

"Why?" Kevin asked.

"I wanted officer Gonzales to pay, I wanted his family to know the pain he caused us!"

Bell alleged that the line, "I wanted officer Gonzales to pay, I wanted his family to know the pain he caused us" was defamatory because it was not the exact testimony from Bell's deposition.

The actual deposition transcript provided:

That table ornament was something that my son created, and I saved it for his wedding day. It was going to be a gag gift. And on the first anniversary of his death, I was in deep pain and I wanted Officer Gonzales to understand the tremendous pain that he caused my family.

The second instance that Bell alleged Gonzales defamed him was Gonzales' recount of a conversation between he and Bell that occurred in a parking lot. The book provided:

“I did come to your house. I wanted your family to feel what you did!” Smith shot back. “I wanted to show you what you took from me.”

“Mr. Smith, if I would've come to your house any time, I would've been arrested and fired. I just want you to know that even though you came to my house and made it personal, I forgive you,” I countered.

Bell alleged that the line, “I wanted your family to feel what you did” was defamatory because it was not the exact statement from a recording of the conversation. The recording provided:

“That morning I was in pain. I wanted to show you what you took from me.”

The third instance occurred when Gonzales described an interaction that took place between a police supervisor and Bell during a public meeting. The book provided:

The room became tense when he began. He started out by attacking Mr. Smith as, basically, being an absentee parent, if he would've been a better father, this would not have happened.

“That's out of line!” Smith barked out.

“Well it's true,” David retorted.

“Again, that's out of line!” Smith snapped back. It seemed those comments hit home.

Bell took issue with Gonzales' statement, “It seemed those comments hit home,” because it suggested that Bell's son would be alive if Bell was a better father.

The fourth instance occurred when Gonzales described Bell's ex-wife's deposition testimony. The book provided: “When it came to questions about his relationship with his father, she would only grit her teeth and say, ‘Ask him!’ motioning with her head back toward her ex-husband. Mr. Smith never broke his gaze, but rather, just sat stoically.” Bell alleged the

statement was defamatory because it was not the exact verbiage from the deposition testimony.

The actual deposition transcript stated:

Q. That's what I wanted to ask you about. So you disagree with that statement, that Michael had a dark side?

A. Yes, I do.

Q. Do you know, and tell me if you don't, do you know what his dad was referring to when he wrote this message as Michael's dark side?

A. Why don't you ask him? He's right here.

Gonzales moved for summary judgment on the defamation allegations. "Defamation is a false statement that tends to harm a person's reputation." *Biskupic v. Cicero*, 2008 WI App 117,

¶13, 313 Wis. 2d 225, 756 N.W.2d 649. The elements of defamation are:

(1) a false statement; (2) communicated by speech, conduct, or in writing to a person other than the person defamed; and (3) the communication is unprivileged and tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

*Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997). "When the person defamed is a public figure, that person must prove that the false statement was made with actual malice." *Biskupic*, 313 Wis. 2d 225, ¶13. In this case, Bell concedes he is a "public figure" for purposes of a defamation analysis. Accordingly, he must establish, by clear and convincing evidence, that the "defendant knew the statement was false, 'in fact entertained serious doubts as to the truth' of the publication, ... or had a high degree of awareness of probable falsity." See *Torgerson*, 210 Wis. 2d at 542.

In support of his motion for summary judgment, Gonzales argued that the statements were substantially true. See *Torgerson*, 210 Wis. 2d at 534-35 ("If the challenged statements as

a whole are ... substantially true, a libel action will fail.”). He averred, in part, that the book was written based on his memory and his recollection of events, that he did not have or rely on deposition transcripts, audio recordings, or other media when writing the book, and that he wrote in the book words that he remembered the individuals stating and that the spirit of the conversation was captured in the book.

Bell responded that Gonzales’ use of quotation marks was critical, materially changed the meaning of what was actually said in a negative way, and demonstrated the statements were both false and made with actual malice.

The circuit court first determined that Gonzales’ statement in the book that the police supervisor’s comments “seem[ed] to have hit home” was not a false statement of fact but Gonzales’ opinion. As for the three remaining statements—the two from depositions and the one that occurred in the parking lot, the court found these statements were substantially true and substantially similar to what was actually said. The circuit court granted summary judgment in favor of Gonzales.

On appeal, Bell argues the circuit court erred by granting summary judgment in favor of Gonzales. He contends Gonzales materially changed the meaning of the quoted statements and Gonzales’ description from the public meeting was an actionable statement of a fact. Bell also argues that the record demonstrates by clear and convincing evidence that Gonzales made the statements with actual malice. He argues that although Gonzales testified he believed the quotations to be accurate, there were obvious reasons for Gonzales to doubt the accuracy of his quotations—specifically, Gonzales was present at the depositions and in the parking lot and had

access to the deposition transcripts and a recording of the parking lot encounter. Bell also argues that Gonzales had feelings of ill-will toward him when he made those statements.

“Actual malice means either the defendant knew the statement was false, or made the statement with reckless disregard for whether it was true or false.” *Biskupic*, 313 Wis. 2d 225, ¶27. A statement is not considered false unless it “would have a different effect on the mind of the reader from that which the pleaded truth would have produced” or “the alteration results in a material change in the meaning conveyed by the statement.” *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991). “To show reckless disregard, [Bell] ‘must show that [Gonzales] in fact entertained serious doubts as to the publication’s truth.’” *Biskupic*, 313 Wis. 2d 225, ¶27 (citation omitted). “Actual malice must be proven by clear and convincing evidence.” *Id.*

We conclude the portions of Gonzales’ book identified by Bell do not meet the standard required to show actual malice. First, the statements identified in the book have not been altered in such a way that results in a material change to the meaning conveyed by the statement. Regarding the first disputed statement, Bell testified at his deposition that he went to Gonzales’ residence and left items on Gonzales’ front porch because “I was in deep pain and I wanted Officer Gonzales to understand the tremendous pain that he caused my family.” In the book, the character Smith states he left items on Gonzales’ front porch because “I wanted officer Gonzales to pay, I wanted his family to know the pain he caused us!” The “to pay” portion of the book statement is ambiguous and, as the entire statement indicates, could mean that Bell wanted Gonzales’ family to experience the pain that Bell’s family experienced because of the death of Bell’s son. These remarks bear the same substantial meaning as the deposition transcript.

As for the second statement, during the recorded interaction in the parking lot, Bell told Gonzales that he went to Gonzales' residence because "That morning I was in pain. I wanted to show you what you took from me." In the book, the character Smith states he went to Gonzales' residence because "I wanted your family to feel what you did!" Again, these remarks bear the same substantial meaning as the actual statements—Bell went to Gonzales' residence and left the items on the front porch because he wanted the officer's family to experience the pain resulting from the death of his son.

Regarding the exchange between character Smith and a police supervisor at a public meeting, Bell does not challenge the book's depiction regarding what the supervisor said to Smith. Rather, Bell challenges Gonzales' assertion that the supervisor's comments "seemed [to have] hit home." This, however, is nothing more than Gonzales' impression or an opinion. We disagree with Gonzales that this statement implies an assertion of fact.

Finally, during Bell's ex-wife's deposition testimony, she told the attorney "Why don't you ask him [Bell]? He's right here." In the book, the character "would only grit her teeth and say, 'Ask him!' motioning with her head back toward her ex-husband." The book's statements are very similar and bear the same substantial meaning as the deposition transcript testimony.

Moreover, Bell cannot show that when writing the book Gonzales knew the statements were false or entertained serious doubts as to the book's truth. See *Biskupic*, 313 Wis. 2d 225, ¶27. "This does not mean that a defendant may escape liability simply by denying doubts about a story." *Id.*, ¶29. "In certain instances, a jury may infer doubts about a story from circumstantial evidence." *Id.*

Bell attempts to prove Gonzales' actual malice by emphasizing that Gonzales could have obtained the deposition transcripts and the video before publication to ensure accuracy. However, the "[m]ere failure to investigate adequately does not constitute actual malice." *Torgerson*, 210 Wis. 2d at 542. Bell also argues that Gonzales had feelings of ill-will toward him when he made those statements. However, as Bell concedes it "is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff). There must be sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made." *See* WIS JI—CIVIL § 2511 (2023).

Most significantly, and as explained above, the statements in Gonzales' book are substantially similar to the actual material and the meaning is unchanged. We conclude the record does not demonstrate, by clear and convincing evidence, that Gonzales made the statements with actual malice. *See Biskupic*, 313 Wis. 2d 225, ¶27.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*