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STATE OF MINNESOTA  
IN COURT OF APPEALS

A04-1034

Thomas J. Bieter,

Appellant,

vs.

James H. Fetzer, et al.,

Respondents,

Assassination Research, Inc., et al.,

Respondents.

Filed January 18, 2005

Affirmed

Gordon W. Shumaker, Judge

St. Louis County District Court

File No. CX-03-603274

Thomas J. Bieter, 18 North Second Avenue East, Apt. A, Duluth, MN  
55802-2126 (pro se appellant)

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Inc.)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

GORDON W. SHUMAKER, Judge

In this defamation action, the district court granted summary judgment in favor of respondents, ruling that appellant was a limited purpose public figure, that no statement was made with malice, that there existed no genuine issues of material fact for trial, and that respondents were entitled to judgment as a matter of law. Appellant contends that the court applied the wrong standard in ruling on respondents' motion and erred in its legal conclusions. We affirm.

FACTS

On October 25, 2002, about a week before the national senatorial election, United States Senator Paul Wellstone was killed when a Beechcraft airplane in which he was riding crashed in northern Minnesota. His wife, daughter, three staff members, pilot, and co-pilot were also killed.

There was no immediately apparent cause of the crash. The media reported speculation as to various possible causes, including the weather, mechanical malfunction, and pilot error. Because the senator was immersed in a vigorous election contest for his senate seat at the time of his death, rumors of possible sabotage arose. Various "conspiracy theorists" around the nation gave life to those rumors through articles on the internet and in the alternative press. As the FBI and the NTSB investigated for months, without determining a definitive cause of the crash, conspiracy theories abounded.

One of the conspiracy theorists was respondent James Fetzer, a University of Minnesota-Duluth philosophy professor. He published articles in a Duluth alternative newspaper called the Weekly Reader in which he speculated that high-level Republican government officials, particularly Dick Cheney, Donald Rumsfeld, and Karl Rove, might have been involved in the sabotage of Wellstone's airplane.

Appellant Thomas Bieter, a former prosecutor and a Republican, started an internet chat group called "FETZERclaimsDEBUNK" to provide discussion, and refutation, of Fetzer's assassination claim. Fetzer and Bieter frequently exchanged messages through Bieter's chatline.

Because of Fetzter's articles and his statements on the chatline, Bieter brought an action for damages for defamation and various other alleged Wrongdoings against (1) Fetzter individually and doing business as Assassination Research, Inc.; (2) the owner and the editor of the Weekly Reader; (3) the Weekly Reader's internet webmaster; (4) the University of Minnesota; (5) the university's chancellor; (6) an anthropology professor employed by the university; and (7) the university regents.

Bieter's principal claim is that Fetzter, and others, published statements that defamed him individually and as a member of the Republican party. Among the allegedly defamatory statements Fetzter made were that Bieter's lawsuit was "corrupt"; that it is doubtful that a competent attorney would bring such a suit; that Bieter had been accused of sexual harassment; that Bieter had "been deprived of the right to practice law"; that Bieter is an incompetent lawyer; and that Bieter "cheats."

The respondents' principal affirmative defense was that Bieter placed himself into a public controversy and became a "limited purpose public figure," and that no statement about him was made with actual malice.

The respondents moved to dismiss Bieter's action for failure to state a claim. Bieter moved to amend his complaint to add allegations regarding Assassination Research, Inc. After a hearing on the motions, the district court treated the respondents' motions as being for summary judgment and granted them, ruling that Bieter failed to show the existence of a genuine issue of material fact and failed to show that the respondents were not entitled to judgment as a matter of law. The court also denied Bieter's motion to amend his complaint. Bieter appealed.

## D E C I S I O N

### Applicable Standard

Bieter first argues that the district court erred in applying the summary judgment standard under Minn. R. Civ. P. 56 rather than the standard for the failure to state a claim under Minn. R. Civ. P. 12.02(e).

The respondents' motions were based on Minn. R. Civ. P. 12.02, which provides that, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment . . . ." Bieter incorporated by reference in his complaint articles from the Weekly Reader and messages from the chatline. These were not items outside Bieter's pleading, and thus the district court was not required to treat the motion as one for Summary judgment. In re Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d 494, 497 (Minn. 1995). But Bieter attached to his memorandum opposing the rule 12 dismissal motion documents that were outside his pleading. These included an article from the Minnesota Star Tribune and a copy of the university regents' policy on employee indemnification. After the hearing on the motions, he also submitted a letter requesting the court to consider an attorney general's opinion. These attachments and this submission were not excluded by the court. Therefore, the court properly treated the motions as summary judgment motions.

On appeal from summary judgment, this court asks whether any genuine issues of material fact exist and whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

#### Defamation Claims

Bieter alleges that Fetzer and others defamed him. All of his other claims are premised on the validity and viability of the defamation claim. The other causes of action cannot succeed unless the defamation action succeeds.

To prove actionable defamation, the claimant must establish that the defendant communicated a false statement about the claimant[1] to a third person and that statement harmed the claimant's reputation and esteem in the community. Weinberger v. Maplewood Review, 668 N.W.2d 667, 673 (Minn. 2003) (citing Britton v. Koep, 470 N.W.2d 518, 520 (Minn. 1991)).

If the claimant is a public figure, he may not recover damages for defamation unless he proves by clear and convincing evidence that the defendant made the defamatory statement with "actual malice." Britton, 470 N.W.2d 520 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 725 (1964)). Although a claimant might not be a public figure in general, he may become so in a limited sense by his public conduct respecting a particular public issue. Thus, a "limited purpose public figure" is someone who has "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." Hunter v. Hartman, 545 N.W.2d 699,

704 (Minn. App. 1996), review denied (Minn. June 19, 1996) (citing *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009 (1974)).

The district court ruled as a matter of law that Bieter was a limited purpose public figure respecting the issue of the Wellstone sabotage theory. The public or private status of an individual for the purpose of applying defamation law is a question of law that we review de novo. *Hunter*, 545 N.W.2d at 704.

To determine whether an individual is a limited purpose public figure, courts consider whether (1) a public controversy existed, (2) the individual had a purposeful or prominent role in the controversy, and (3) the allegedly defamatory statements related to the public controversy. *Id.* We observe first that the facts pertaining to these three criteria are not genuinely in dispute.

Fetzer did not raise his conspiracy theory privately but did so in a public newspaper and on an internet source readily available to the public. Moreover, Fetzer was not the only conspiracy theorist to claim or to intimate that Republicans were involved in causing Wellstone's death. Bieter presented a June 3, 2003, Minneapolis Star Tribune article that identified other conspiracy theorists who held the same opinion as Fetzer. And that article noted that, in addition to Bieter, Congressman Jim Oberstar and his press aide publicly disputed the conspiracy theory. Finally, when Fetzer's articles appeared in the Weekly Reader and on the internet, Bieter launched his own public internet chatroom to dispute Fetzer's theory. The name itself, "FETZERclaimsDEBUNK," reveals the fact of public controversy on the conspiracy issue.

A public controversy is a dispute that "has received public attention because its ramifications will be felt by persons who are not direct participants." *Chafoulias v. Peterson*, 668 N.W.2d 642, 651 (Minn. 2003) (quoting *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980)). Surely, the alleged assassination of a public official by members of a rival political party is a matter of grave concern for the entire nation and thus clearly qualifies as a public controversy.

It is also clear and beyond reasonable dispute that Bieter voluntarily thrust himself into a central and prominent role in the controversy. He formed the chatroom that invited a discussion and refutation of Fetzer's claim. He participated fully in that chatroom and presented his status as a former prosecutor and someone knowledgeable about evidence as authority for the rebuttal of the Fetzer theory.

Bieter contends that Fetzer's allegedly defamatory statements were about him personally and did not relate to the public controversy, as the third criterion requires. But an individual's "talents, education, experience, and motives" may be relevant to a determination of whether statements relating to him also relate to the public controversy. *Hunter*, 545 N.W.2d at 704-05. In his internet discussion forum, Bieter repeatedly presented himself as a "former criminal prosecutor" and as someone who has specialized talents in evaluating evidence. In his effort to "debunk" Fetzer's theory, he vaunted his credentials and thereby placed his credibility at issue in the controversy. The allegedly defamatory statements were related and in response to Bieter's own references to his background and experience.

There is no factual disagreement about what Fetzer said, what Bieter said, the issue to which they were referring, the public nature of that issue, the divergence of opinion on that issue, and the use of public forums to express viewpoints on that issue. The district court did not err in concluding that the undisputed material facts demonstrate that Bieter was a limited purpose public figure.

A limited purpose public figure has no actionable claim for damages for even defamatory statements unless those statements were made with actual malice. *Chafoulias*, 668 N.W.2d at 648. Whether the record supports a finding of actual malice by clear and convincing evidence is a question of law that is reviewed de novo. *Id.* at 655. Applying the summary judgment standard, we examine the record to determine whether Bieter has shown a genuine issue of disputed material fact that would establish by clear and convincing evidence that Fetzer and others acted with actual malice in their statements about Bieter. The district court held that Bieter failed to meet his burden.

"Actual malice is a term of art; it means that the defendant acted with knowledge that the publication was false or with reckless disregard of whether it was false or not." *Id.* at 654 (quotations omitted).

"Reckless disregard" is a subjective test that requires a showing that Fetzer believed that his statements about Bieter were probably false. *Id.* at 654-55 (citations omitted).

Bieter argues that Fetzer's internet aspersions about his competence as a lawyer were made with actual malice because, through a ten-year friendship and a prior attorney-client relationship, Fetzer knew Bieter to be competent. But this evidence is not part of the record before the district court. See *Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996) (material assertions of fact in a brief must be

supported by citations to the record), aff'd, 568 N.W.2d 705 (Minn. 1997). Even if these facts were part of the record, they do not tend to show actual malice. Competence in a profession is not an absolute that, once acquired, exists permanently. A lawyer can be thoroughly competent in his or her field of expertise and not competent outside that field. There is nothing in the record to suggest that Bieter had acquired any legal expertise in investigating or evaluating the causes of airplane crashes. To the extent that Fetzer questioned Bieter's competence on the issue of the cause of the Wellstone crash, there are no facts from which actual malice can reasonably be inferred.

Bieter also cites Fetzer's statements about Bieter's status as a lawyer in support of his argument that Fetzer acted with actual malice. Respecting that status, Fetzer referred to it as an "involuntary disability" and to Bieter as "having been deprived of the right to practice law." Fetzer also said that Bieter concealed his status from the chatroom participants. These statements were not baseless for it appears from official information that Bieter was faced with the prospect of significant discipline when he agreed to a compromise that entailed the surrender of his license to practice law. And although Bieter was a "retired" lawyer, as he represented to the chatroom participants, the record supports an inference that his retirement was not voluntary but was an alternative to suspension or perhaps disbarment. Bieter does not dispute the record of the matters that led to his retirement but rather contends that Fetzer maliciously exposed those matters to the public. Because Fetzer's comments on this issue had a clear basis in truth and fact, there was no genuine issue of material fact as to actual malice.

Fetzer also revealed that Bieter had been charged with sexual harassment. Bieter does not dispute this fact but notes that the charge had been dismissed. Fetzer referred only to a "charge" of sexual harassment. That was true and cannot form the basis for an inference of actual malice.

In short, Bieter has failed to show any fact that would clearly and convincingly support an inference of actual malice. Therefore, the district court did not err as a matter of law in determining that Bieter failed to carry his burden on this issue.

All of the remaining claims and allegations against Fetzer and the other respondents are dependent in one way or another on the core defamation action against Fetzer. Because that action fails, so do all the other claims. Furthermore, Bieter's proposed amended complaint would similarly be dependent on the Fetzer defamation claim, and the

district court's denial of Bieter's motion to amend his complaint was not error.

Affirmed.

[1] Bieter's claim that the defamatory statements that defamed Republicans also defamed him because he is a Republican. To be actionable, a defamatory statement must reasonably identify the claimant as its subject. It is not sufficient that it refers to a group in which the claimant is a member. *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. App. 1991).