21-2016

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINANCIAL FIDUCIARIES, LLC, et al.

Plaintiffs-Appellants,

v.

GANNETT CO., INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No.: 3:19-cv-0874
Stephen L. Crocker, *Magistrate Judge*

PLAINTIFFS-APPELLANTS' OPENING BRIEF AND REQUIRED SHORT APPENDIX

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, counsel for Plaintiffs-Appellants state as follows:

1. The full name of every party that the undersigned attorneys represent in this case are: Thomas Batterman and Financial Fiduciaries, LLC.

2. The names of all law firms, partners, and associates that have appeared in the district court or are expected to appear for Plaintiffs-Appellants are: Rathje Woodward LLC, Charles L. Philbrick, and David P. Hollander.

3. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys: Financial Fiduciaries, LLC's sole member is WTC, Inc., a Wisconsin corporation. No publicly held company owns more than 10 percent of either Financial Fiduciaries, LLC or WTC, Inc.

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JURISDICTIONAL STATEMENT

The district court's subject-matter jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332. Specifically, plaintiff Financial Fiduciaries, LLC ("Fiduciaries") is a Wisconsin limited liability corporation whose sole member is a privately held Wisconsin corporation and Fiduciaries has its principal place of business in Wisconsin. (A91, ¶¶ 5-7) Plaintiff Thomas Batterman ("Batterman") is a private citizen who resides in Wisconsin. (*Id.*) Plaintiffs alleged that the defendant Gannett Co., Inc. ("Gannett") is a Delaware corporation with its principal place of business in Virginia. (*Id.*, ¶ 8)

The basis for the court of appeals' subject-matter jurisdiction is the same as for the district court.

The district court entered a final order on February 8, 2021. (A56) Judgment in favor of Gannett and against Fiduciaries and Batterman was entered the same day. (A64) Thereafter, plaintiffs timely filed a Rule 59(e) Motion on March 3, 2021. (Dkt. 71) The district court denied plaintiffs' Rule 59(e) Motion on April 29, 2021. (A65) Plaintiffs filed their notice of appeal on May 27, 2021, within the time provided by Fed.R.App.P. 4. (Dkt. 80) This appeal is from a final order or judgment that disposed of all the parties' claims. (A56, 65)

ISSUES PRESENTED

1) Whether the district court erred in finding as a matter of law that a reasonable reader of the defamatory article would not understand it to mean that plaintiffs had committed criminal acts.

2) Whether the district court erred in taking judicial notice of and basing its rulings on a version of the defamatory article not attached to or set forth within the Complaint.

3) Whether the district court erred in denying plaintiffs' motion to amend its complaint, thereby refusing to consider the original, more-defamatory version of the article (*i.e.,* the version seen by 92% of readers).

4) Whether the district court abused its discretion by rejecting newly discovered evidence that directly contradicted the substance of its previous rulings.

STATEMENT OF THE CASE

Introduction

This is a defamation case involving an on-line article that was published twice: first on August 21, 2018 (the "August Article"); and second on September 19, 2018 (the "September Version"). (A68, A81) A central issue in this appeal is whether one or both versions could reasonably be understood to confer the defamatory meaning that Tom Batterman or Financial Fiduciaries committed crimes.

The district court never considered the August Article. As to the September Version, the district court concluded that it does not "reasonably convey the impression that Batterman committed theft, embezzlement, fraud, or similar criminal misconduct. (A30)

However, two other lawyers, an assistant district attorney and a prosecutor with Wisconsin Department of Justice, read the September Version and reached the antithetical conclusion. In an October 31, 2019 email titled "Tom Batterman," they

had the following exchange:

> Runde: "What do you know about him?"
>
> Runde: [Runde sends hyperlink to the September Version.][1]
>
> Glaman: "Interesting … Sounds criminal to me."
>
> Runde: "That's why I said. I heard abut him last night from a colleague who is prosecuting him for OWI 2nd. I think there's some criminal acts have absolutely happened."
>
> Glaman: "Are you thinking we should start a criminal investigation?"
>
> Runde: "If you're up for it, I would like to."

(A108)

Plaintiffs/Appellants Thomas Batterman and Financial Fiduciaries, LLC contend the district court improperly granted defendant/appellant Gannett Inc.'s Rule 12 motion to dismiss and its Rule 56 motion for summary judgment. Plaintiffs further contend the district court improperly denied their Rule 15 motion for leave to amend following the dismissal of substantially all of their complaint and their Rule 59(e) motion to alter or set aside the judgement in light of newly found evidence (the Wisconsin DOJ email quoted above).

Plaintiffs/Appellants Thomas Batterman and Financial Fiduciaries, LLC pray for this court to reverse each of these district court orders and remand this matter with instructions to the district court to allow plaintiffs to amend their complaint, set

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[1] "https://www.wausaudailyherald.com/story/news/2018/08/21/wausaufinancial-adviser-thomas-battermanaccused-mishanlding-trust/769134002/"

a new scheduling order and award such further relief as the court deems just and proper.

The Creation of the Article

Sam Wisneski took a summer intern position at the Wausau Daily Herald while attending the University of Wisconsin-Milwaukee. (Dkt. 53 at 20) Following receipt of an anonymous tip, Wisneski was assigned to look into a lawsuit pending in the Marathon County Probate Court known as the Geisler Trust litigation. (Dkt. 52 at 32, 73)

Later that summer, Wisneski prepared a draft article and provided it to his supervisor, Robert Mentzer. Gannett employed Mentzer as a "Storytelling Coach" to help reporters like Wisneski write stories in ways that drove more profit. As a Storytelling Coach, it was Mentzer's job to "encourage reports to tell their stories in a way that would be engaging[.]" (Dkt. 54 at 12:25-13-3)

Wisneski's original draft of the article was a straightforward report. Then, Mentzer revised the article so that it would generate more "clicks" and therefore more profit. In reviewing Wisneski's original draft, Mentzer repeatedly criticized Wisneski's draft as "boring", "bloodless", "bureaucratic", and "legalese":

> This lede is boring. The story is fascinating, but "ordered to pay part of the legal fees of four charities following years of litigation concerning mishandling of charitable trust" is super, super boring, nearly impenetrable. Why is that? It's because the lede is totally unmoored from any actual human being or human concern. It's bloodless and bureaucratic, where the real story is about death and betrayal!

(Dkt. 57-13 at 6)

> Above graf is fairly bloodless as well, 'conspired with fiance to distribute

> funds for her personal gain' is fairly legalese and does not give reader any real idea of what actually happened. Wrote her illegal checks? Made a giant bed of cash in a storage facility like in Breaking Bad?

(Dkt. 57-13 at 7)

> bloodless, bloodless. They're accusing him of fraud, basically. Of taking the money he'd been entrusted by this farmer, who saved his whole life and wanted only to help others, and sitting on it like it was his own, moving it around as if he had the right to. "misrepresented the nature of the trust" is such a legalistic way to represent such a thing!

(Dkt. 57-13 at 7; *see also* Dkt. 57-13 at 7 ("this is a really bloodless way" to write))

Wisneski's draft headline was: "Wausau firm founder ordered to pay portion of over $300,000 in legal fees of charities" (Dkt. 57-13 at 2) As published, the headline read "Wisconsin financial adviser accused of violating a dead man's trust, mishandling $3 million." (A68) Wisneski also had reservations about using Batterman's unrelated OWI charge in the story, stating: "I don't want to use this OWI as an unfair way to shift public opinion, but could deserve a sentence at the end." (Dkt. 57-13 at 11) However, the published draft included extensive discussion of the OWI, including a remark from the arresting officer that he "handcuffed Thomas, checked the handcuffs for tightness, and double checked them." (A79)

Mentzer did not review any court records from the Geisler Trust Litigation, any notes about court records, and he did not interview any witnesses for the article. (Dkt. 54 at 34:15-22; 55:7-13) Yet, he concluded: "They're accusing him of fraud, basically." (Dkt. 57-13 at 7) He instructed Wisneski to make the article less "bloodless"—and less "legalese"—and Wisneski followed his editor's instructions.

Publication of The August Article

On August 21, 2018, the Wausau Daily Herald and other Gannett newspapers published an on-line article titled "Wisconsin financial advisor accused of violating a dead man's trust, mishandling $3 million" (hereinafter the "August Article"). (A68) Mentzer's revisions had the desired result. The day after publication, Mentzer emailed Wisneski to tell him that the "Early returns are in." (Dkt. 54 at 69:1-21) Mentzer told Wisneski that the story metrics were "Pretty excellent" because it got "clearly a well above average page view number[.]" (Dkt. 54 at 73:22-74:11) Mentzer considered anything over one thousand views of a story to be good. (Dkt. 54 at 72:12-20) Within two days, the August Article had been viewed over 20,000 times. (Dkt. 41-1, ¶ 91)

Due to Gannett's promotion efforts (*i.e.* through linking to it on the publications' homepages and promoting on social media), the vast majority of readers who would ever read the content did so within a week of August 21, 2018. (Dkt. 43-1, ¶¶ 90-92) Based on Gannett's records, the Wausau Daily Herald version of the publication had been viewed 23,644 times as of June 30, 2020, with 21,744 of those views coming within the first two days of publication, by August 23, 2018. (*Id.*)

The Gist of the August Article

The gravamen of the August Article is that Batterman and Fiduciaries is accused of and committed criminal acts. According to the article, Batterman "is accused of defrauding" the trust beneficiaries. (A71) The article reports of "mishandling" and "conspiring with his fiancée to milk" the Geisler Trust funds

through various entities such as Fiduciaries and Vigil Trust, all of which Batterman controlled. (A68, A71, A75)

The article made numerous references to the allegations in an underlying Geisler Trust lawsuit:

- Headline: "Wisconsin financial advisor accused of violating dead man's trust, mishandling $3 million." (A68)
- Immediately below the headline is a picture of Fiduciaries' office in Wausau, Wisconsin with a banner immediately below Fiduciaries' name and logo that reads: "The charities accused Batterman of much wrongdoing including conspiring with his fiancée for their financial gain." (A68)
- "But the financial advisor Joe Geisler entrusted to administer his trust put that money in jeopardy, according to a lawsuit filed in Marathon County." (A71)
- "The advisor, Tom Batterman, is accused of defrauding the charities, committing numerous breaches of trust and conspiring with his finance to milk the fund for trustee fees." (A71)
- "It was not the first time Batterman had been accused of mishandling clients' money." (A71)
- "According to accusations and judgments made in the court documents, this is what happened: Two weeks after Geisler's death, Batterman and his fiancée, Deborah Richards, began talking about the trust via Richards' work email." (A72)
- "They planned for Batterman to donate American Cancer Society's portion of the trust to different Relay for Life Events that Richards would be planning. The increase in money raised for each event would make Richards eligible for salary increases according to the American Cancer Society petition to the court." (A72)
- "From Geisler's death to November 9, 2015, when Batterman and Vigil were removed as trustees, they collected about $30,000 in fees from the Trust, according to Batterman's affidavit." (A75)
- "This is the second time that Batterman was found guilty of

wrongdoing by the SEC." (A78)

- Gannett inserted two hyperlinks to different articles under the banner "RELATED," one titled "Five ways to fight elder abuse, financial exploitation" and the other titled "Accountant accused of embezzling over $155,000 near Stratford." (A75)

When read as a whole, the gist, the defamatory sting of the August Article is that Batterman and businesses he controlled committed fraud, theft and embezzlement by "conspiring with his fiancé to milk the fund for trustee fees". (A71)

The Gist of the August 21, 2021 Article Was False

Early on in the underlying Geisler Trust lawsuit, circuit court Judge Michael Moran appointed a successor trustee, Terrance Byrne, who, with the help of a certified public accountant, conducted a detailed investigation into the allegations made in the underlying petition. (Dkt. 20, ¶¶ 38-40; Dkt. 20-3) On February 18, 2016, successor trustee Byrne wrote to the beneficiaries and the Wisconsin Department of Justice to report on his findings. He reported:

> A review of the records shows no embezzlement, theft, or false records of any nature.

(Dkt. 20-3) Successor trustee Byrne went on to report his findings that Vigil Trust failed to give timely notice to the beneficiaries, failed to properly liquidate and distribute certain assets by setting up a scholarship trust without implied or express consent of a beneficiary. (*Id.* at 2) Successor trustee Byrne made no findings as to Thomas Batterman. (*Id.*)

Thereafter, the circuit court held a trial as to whether successor trustee Byrne's findings constituted "bad faith" under Wisconsin Statute § 701.0813 (governing the

trustee's duties). Ultimately, Judge Moran concurred with successor trustee Byrne that delay in notifying the beneficiaries was a breach of the trustee's duty of good faith. But Judge Moran's findings were not based on the scandalous accusations in the original petition:

> The court acknowledges that there were concerns voiced concerning potential criminal activity at the outset of the litigation but was not the focus of this case and that were not the issues that were litigated at the trial court.

(Dkt. 6-9 at 11:4-8)

As a whole, the August Article was erroneous and painted a false and unfair picture of Batterman and Financial as thieves who, acting as trustee, defrauded the beneficiaries, causing four separate charities to lose money, all of which was false. It contains many, repeated statements about the scandalous accusations made in the original Geisler Trust lawsuit—which were recharacterized as "mishandling $3 million," "defrauding," "conspiring" and "guilty of wrongdoing"— but had been long before proven to be false. The August Article made no mention of the successor trustee's or the court's findings that no embezzlement, theft, or false records of any nature had actually occurred.

Batterman and Fiduciaries' Response To The August Article

On August 24, 2018, a consultant for Fiduciaries and Batterman spoke with and provided a statement supporting plaintiffs' requests for retraction. (Dkt. 20, ¶ 45) The publisher, Mark Treinen, declined Batterman's request but suggested that Batterman provide a more detailed listing of the errors in the August 18, Article. (*Id.* ¶ 46) Batterman and Fiduciaries demanded on August 30, 2018 and September 5,

2018 that Gannett retract the article as erroneous or issue corrections as required by § 895.05(2). (Dkt. 57-16)

Rather than retracting the August Article and issuing the requested correction, Gannett re-published the article on September 19, 2018 under the guise of updating the article without correcting the false statements of fact or issuing the necessary corrections (hereinafter the "September Version"). (A81)

The September Version contained a material change from the original August Article. Gannett inserted the following:

> Although a judge later found that Batterman had not committed fraud, theft or embezzlement, he ruled that the financial advisor had engaged in multiple acts of "bad faith" and ordered him to be removed from handling the Geisler Trust and to pay part of the charities' legal fees.

(*Compare* A83 *with* A71) (hereinafter the "Insertion") The original article did not contain the Insertion or any explanation about how the accusations of fraud, theft and embezzlement were resolved by the court. (A68-80) When Gannett revised the publication on September 19, 2018, the vast majority of people (*i.e.* over 90%) who would ever view the publication had already done so. (Dkt. 43 at 10, ¶ 27)

Reactions To The Article

Gannett also published or caused these defamatory statements to be published on Facebook and Twitter (the "Social Media Posts"). (Dkt. 20, ¶ 51) Public comments on the article were damaging to Batterman and Fiduciaries. (*Id.*) For example, a comment on the article stated: "Batterman, what a scumbag!" (*Id.*, ¶ 53; Dkt. 20-4) Another comment on one of the Social Media Posts said: "Anyone who leaves their money with this firm & this guy is a fool." (Dkt. 20, ¶ 54; Dkt. 20-5) Several

individuals shared the Social Media Posts on their personal pages, adding their own commentary such as "Disgusting that people can do this to others" and "Be careful who you invest with[.]" (Dkt. 20 ¶ 55; Dkt. 20-6)

Several financial investor trade webpages, taking the August Article as true, republished the false and defamatory statements, citing exclusively the article. (Dkt. 20, ¶ 56) For example, Financial Advisor IQ published an article on August 27, 2018, stating: "Thomas Batterman of Wausau faces accusations of defrauding the charities, conspiring with his fiancée to overcharge the trust fund he was administering, and several breaches of trust, according to the paper." (Dkt. 20, ¶ 57; Dkt. 20-7) Similarly, a Wealth Professionals article states: "The advisor has been accused of overcharging the trust and defrauding charities named as beneficiaries[.]" (Dkt. 20, ¶ 58; Dkt. 20-8)

Attorneys from the Wisconsin Department of Justice and Marathon County District Attorneys' Office reviewed the September Version on October 31, 2019, which left them with the impression that Batterman had committed crimes worthy of investigation: "I think there's some criminal acts have absolutely happened […] Are you thinking we should start a criminal investigation? […] If you're up for it, I would like to." (A108)

Since posting, the September Version has remained available to millions of Internet users, many of whom may have made copies of the false and defamatory statements and/or distributed them by electronic mail or other means and/or re-posted them to other blogs, Internet forums, and message boards. Fiduciaries and

Batterman have no means of removing these false and defamatory statements from the Internet. (Dkt. 20, ¶ 60)

The Procedural Background

The procedural history of this case is intricate, and several procedural details are material.

Fiduciaries and Batterman filed their complaint on October 24, 2019. (A90) It asserted two counts: (1) defamation; and (2) preliminary and permanent injunction. (A104-105) Both concern the August Article. (A90, ¶ 1) It contained detailed allegations as to the defamatory nature of the August Article (A97-103, ¶¶ 49-57), but did not attach a copy of the August Article because Fiduciaries and Batterman could not locate a copy of the original publication. (Dkt. 20, ¶ 3)

In response, Gannett filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. (Dkts. 4, 5) Gannett supported its motion with a declaration from Gannett's attorney, Brian Spahn (Dkt. 6), which attached numerous pleadings from the underlying trust litigation (Dkts. 6-2 through 6-11) and an inaccurate copy of the September Version. (Dkt. 6-1) Fiduciaries and Batterman countered by opposing the motion to dismiss and cross-moving for partial summary judgment as to liability. (Dkts. 17, 18 and 19) Gannett filed a Rule 56(d) motion that asked the district court to postpone Fiduciaries and Batterman's cross-motion for partial summary judgment as to liability "until 120 days after the Court rules on Gannett's pending motion to dismiss." (Dkt. 21 at 1) The district court granted Gannett's Rule 56(d) motion and indicated that it would first rule on Gannett's motion to dismiss, and later rule on

Fiduciaries and Batterman's cross-motion for partial summary judgment. (Dkt. 29)

On June 1, 2020, the district court substantially granted Gannett's motion to dismiss. The district court relied upon the content of the article as published on September 19, 2018, which was attached to Batterman's Affidavit and filed in support of the cross-motion for partial summary judgment. (A4) Central to the district court's ruling was the a portion of the Insertion: "a judge later found that Batterman had not committed fraud, theft or embezzlement[.]" (A27) According to the district court, "this statement expressly negates any implication that Batterman had embezzled or stolen trust funds…" (*Id.*) So the district court dismissed Fiduciaries and Batterman's defamation claims as to the statements about the underlying Geisler Trust lawsuit because the article did not convey defamatory meaning:

> In light of the Article as a whole, I find that the Article does not fairly and reasonably convey the impression that Batterman engaged in theft, fraud, or embezzlement.
>
> * * *
>
> Reading the Article as a whole, its "gist" or "sting" was not that Batterman was a thief, but rather that Batterman was untrustworthy. […] Although the Article may have contained minor inaccuracies or minor embellishments by the report, Gannett's report on the *Geisler Trust* proceeding was not false, nor did it reasonably convey the impression that Batterman committed theft, embezzlement, fraud, or similar criminal misconduct.

(A27, A31, A32) However, the district court found that Gannett's September Version was conceivably defamatory with respect to its suggestion that Batterman had engaged in "elder abuse." (A38) In so ruling, the district court quoted and repeatedly relied upon the Insertion, which Gannett added to the September Version, but did

not appear in the complaint or the August Article. (A13, 27, 42)

The district court indicated its ruling might have been different but for the inclusion of the Insertion:

> Perhaps this assertion would have some traction if Gannett had not made clear that the court had made no adverse findings against Batterman on the most damning accusations of the ACS petition.

(A29) But in fact, the August Article did not contain the Insertion.

On June 5, 2020, four days after the district court's ruling on the motion to dismiss, Batterman succeeded in finding a copy of the original article as published on August 21, 2018, from a friend whose wife saved a copy. (Dkt. 44, ¶ 7) Plaintiffs sought leave, eight months before the close of discovery, to amend the complaint to attach the August Article as originally published. (Dkt. 43, Dkt. 16) The district court denied Batterman's and Fiduciaries' motion for leave to file a first amended complaint. (A44) The district court determined that Rule 16 governed the motion and disapproved of the tactical choices plaintiffs made with regard to filing their complaint without a copy of the August Article and failed to take procedural steps that the district court preferred. (A50)

Gannett moved for summary judgment on November 2, 2020. (Dkt. 55) It was supported by the same record Gannett has submitted in support of its motion to dismiss. Yet, the district court granted Gannett's motion for summary judgment. (A56) In granting Gannett's motion, the district court reconsidered its previous ruling, and concluded that "the hyperlink implying that plaintiffs financially exploited elders was substantially true." (A63)

On March 3, 2021, Fiduciaries and Batterman moved pursuant to Rule 59(e) to alter or amend the judgment based on newly found evidence. (Dkt. 71) The gravamen of the district court's rulings (A1, 56) was that "the Article does not fairly and reasonably convey the impression that Batterman engaged in theft, fraud or embezzlement." (A27) The newly discovered evidence consisted of an October 31, 2019 email string between an Assistant District Attorney and an attorney with the Wisconsin Department of Justice (the "DOJ Email"). The subject of the DOJ Email was "Tom Batterman" and the exchange concerned their review of the article as republished on September 19, 2018:

> Runde: "What do you know about him?"
>
> Runde: [Runde sends hyperlink to the September Version of the Article.][2]
>
> Glaman: "Interesting … Sounds criminal to me."
>
> Runde: "That's why I said. I heard abut him last night from a colleague who is prosecuting him for OWI 2nd. I think there's some criminal acts have absolutely happened."
>
> Glaman: "Are you thinking we should start a criminal investigation?"
>
> Runde: "If you're up for it, I would like to."

(A108) The district court considered the newly discovered evidence, but denied the motion to alter or amend insisting that no reasonable reader would understand the article as suggesting criminal conduct by Batterman and Fiduciaries. (A67) This

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[2] "https://www.wausaudailyherald.com/story/news/2018/08/21/wausaufinancial-adviser-thomas-battermanaccused-mishanlding-trust/769134002/"

appeal followed. (Dkt. 80)

SUMMARY OF THE ARGUMENT

The district court overstepped its bounds, repeatedly.

When granting Gannett's motion to dismiss, the district court committed reversable error in two respects: procedurally and substantively. As to the substantive error, a fair reading of either the August or September versions of the article clearly conveys the defamatory meaning that Batterman and Fiduciaries had committed crimes with regard to the Geisler Trust. The district court's failure to appreciate the clear and repeated accusations of criminal conduct lead also to the erroneous award of summary judgment and the denial of Batterman and Fiduciaries' Rule 59(e) motion to alter or amend the judgment.

Simply put, it was not for the district court to impose its own view as to the fair meaning of the article. Rather, its job was to determine whether an objective reader could reasonably understand the article as meaning that Batterman and Fiduciaries had committed crimes. *Schaefer v. State Bar of Wisconsin*, 77 Wis. 2d 120, 124, 252 N.W.2d 343, 346 (1977). The truth of the article's defamatory meaning of criminality is self evident from the article, regardless of which version is considered. Moreover, direct evidence of the article's defamatory meaning of criminality was objectively demonstrated to the district court in the DOJ Email, in which two attorneys reviewed the September Version and said to one another: "I think there's some criminal acts have absolutely happened […] Are you thinking we should start a criminal investigation? […] If you're up for it, I would like to." (A-90)

Thus, the district court's conclusion that the article was not capable of defamatory meaning of criminality was error and its rulings on Gannett's motions to dismiss and for summary judgment and on plaintiffs' motion to alter or amend those judgments must be reversed.

As to the procedural error, the district court violated many well-established rules. It looked outside the four corners of the complaint to decide Gannett's motion to dismiss without converting the motion to a motion for summary judgment. It took judicial notice of a disputed record. It refused to consider the defamatory publication identified in the complaint. Each of these procedural missteps was highly prejudicial to Batterman and Fiduciaries and inconsistent with the district court's own ruling on Gannett's Rule 56(d) motion.

The district court doubled down on its procedural errors by denying Batterman and Fiduciaries' Rule 15 motion for leave to file an amended complaint and then rewriting plaintiffs' complaint. Having substantially granted Gannett's motion to dismiss, the district court was mandated to allow Batterman and Fiduciaries an opportunity to cure their pleading. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 518 (7th Cir. 2015). The mandate to permit amendment was not headed. Indeed, the circumstances warranting leave to amend were particularly compelling.

In granting the motion to dismiss, the district court relied upon the September Version, which is not referred to in the complaint. Shortly after granting the motion to dismiss and long before the close of discovery, Batterman obtained for the first time

a copy of the original August Article. Forty-five days after the district court granted the motion to dismiss, Batterman and Fiduciaries sought leave to amend their complaint to add the full text of the August Article. The district court refused the amendment finding that Batterman and Fiduciaries did not show "good cause" under Rule 16 and further refused to even consider the content of the August Article.

However, both the scheduling order and the case authorities state that (1) Rule 15, not Rule 16 governed the motion for leave to amend, and (2) Batterman and Fiduciaries were entitled to amend their pleading in the wake of the court granting Gannett's motion to dismiss. In denying the motion for leave to amend, the district court took the further unbounded step of rewriting Batterman's and Fiduciaries' complaint:

> This case will proceed on the original complaint as framed by *both* parties and as narrowed by the court's June 1 order, namely, whether an ordinary reader would understand the on line version of the Article, as updated on September 19, 2018, to imply that plaintiffs committed elder abuse, whether that implication is false, and whether plaintiffs sustained damages as a result.

(A 53-54) (italic in original; underscore added) The September Version is not even mentioned in the complaint. (A90-107) There is no rule or case authority that allows a district court to rewrite a plaintiff's complaint. *See Martin v. Noble County Sheriff's Dept.*. 2021 WL 26310 *5 (N.D. Ind. January 4, 2021)("a district court should not assume the role of advocate for the *pro se* litigant and may not rewrite a petition to include claims that were never presented," *quoting, Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999) (internal quotations omitted). If a district court cannot be the advocate for a *pro se* plaintiff and rewrite the complaint, it certainly cannot be

advocate for the defendant and rewrite the plaintiffs' complaint. But that is exactly what the district court did here.

In sum, the district court broke a bundle of procedural rules designed to focus the court on the issues framed in the complaint. As a consequence, Batterman and Fiduciaries are now appealing from the dismissal of their defamation action where the district court has never once even considered the defamatory publication at issue. Reversal with instructions to all allow plaintiffs to amend their complaint and proceed with discovery is warranted.

ARGUMENT

I. Standard of Review and Choice of Law.

This court reviews appeals from a motion to dismiss *de novo*. *Johnson v. Winstead*, 900 F.3d 428, 434 (7th Cir. 2018). The same is true for an appeal from an award of summary judgment. *Continental Western Ins. Co. v. Country Mut. Ins. Co.*, 3 F.4th 308, 314 (7th Cir. 2021).

With regard to the review of a Rule 12(b)(6) dismissal, the court "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S. Ct. 992, 996, 152 L. Ed. 2d 1 (2002). In addition to accepting as true all factual allegations, the court must draw all reasonable inferences in plaintiffs' favor. *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007). Also, the court may not look outside the four corners of the complaint. Fed.R.Civ.P. 12(b). A ruling that violates Rule 12(b)'s

prohibition against reliance on matters outside of the complaint is "erroneous." *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1430 (7th Cir. 1996).

On summary judgment, the court "views the record in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor." *McAllister v. Innovation Ventures, LLC*, 983 F.3d 963, 967 (7th Cir. 2020). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 717 (7th Cir. 2018) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986)).

The review of an order denying a Rule 15 motion for leave to amend following the award of a motion to dismiss is "rigorous." The district court has discretion to deny a Rule 15 motion for leave to amend based on futility, undue delay, undue prejudice, or bad faith. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 518 (7th Cir. 2015). The liberal amendment standard of Fed. R. Civ. P. 15(a)(2) establishes a "presumption in favor of giving plaintiffs at least one opportunity to amend[.]" *Id.* (*citing Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1024 (7th Cir. 2013)). Thus, when the plaintiff is denied an opportunity to amend once, such a decision "will be reviewed rigorously on appeal." *Id.* at 19.

"[D]enying a plaintiff that opportunity carries a high risk of being deemed an abuse of discretion." *Id.* at 18.

"Rule 59(e) rulings are reviewed for abuse of discretion, but embedded legal questions are reviewed *de novo*." *Avery v. City of Milwaukee*, 847 F.3d 433, 438 (7th Cir. 2017); *accord Carter v. City of Alton*, 922 F.3d 824, 826 (7th Cir. 2019). Here, the district court expressly stated that its denial of plaintiffs' Rule 59(e) motion was made "as a matter of law" and that the newly discovered evidence "does not alter [its] conclusion" at the motion to dismiss and summary judgment stages that the defamation "was not actionable." (A67) Thus, the district court's denial of the Rule 59(e) motion is reviewed *de novo*.

On one issue, the parties and the district court agree. Wisconsin substantive law applies in this diversity action. (A16)

II. The District Court Erred In Finding As A Matter Of Law That A Reasonable Reader Of The Defamatory Article Would Not Understand It To Mean That Plaintiffs Had Committed *Criminal* Acts.

This is not an appeal about whether Batterman and Fiduciaries are honest or dishonest. Nor is this appeal about whether they are good or bad financial planners. This is an appeal about an article that falsely implied that Batterman and Fiduciaries had committed criminal acts in providing financial services to the estate of a client.

It was the district court's, and now this Court's, role to determine whether the language of the August Article was capable of conveying a defamatory meaning. *Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994), *aff'd*, 48 F.3d 247 (7th Cir. 1995). That legal issue determines the district court's rulings on the Rule 12, 56

and 59(e) motions. The procedure for doing so is as follows:

> If the alleged communication is capable of a defamatory meaning, the demurrer must be overruled; and if the language is of such a character that it is capable of a nondefamatory meaning as well as a defamatory meaning, then a jury question is presented whether such communication was understood in fact in a defamatory sense by the persons to whom it was published. *Martin v. Outboard Marine Corp.*, supra (15 Wis.2d 452, 113 N.W.2d 135). If the communication cannot reasonably be considered defamatory or to be so understood, the demurrer must be sustained.

Schaefer v. State Bar of Wisconsin, 77 Wis. 2d 120, 124, 252 N.W.2d 343, 346 (1977).

Throughout the litigation, the district court repeatedly found that no reasonable reader would understand the article to mean that Batterman or Fiduciaries had committed crimes. At the motion to dismiss stage, the district court found:

> Having considered Batterman's arguments: In light of the Article as a whole, I find that the Article does not fairly and reasonably convey the impression that Batterman engaged in theft, fraud, or embezzlement.
>
> * * *
>
> Reading the Article as a whole, its "gist" or "sting" was not that Batterman was a thief, but rather that Batterman was untrustworthy. […] Although the Article may have contained minor inaccuracies or minor embellishments by the report, Gannett's report on the *Geisler Trust* proceeding was not false, nor did it reasonably convey the impression that Batterman committed theft, embezzlement, fraud, or similar criminal misconduct. (Emphasis added)

(A27, 31-32)

> On summary judgment, the district court found:
>
> It is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement with respect to the Giesler Trust, particularly given the Article's plain statement that no such findings have been made. When read as a whole

> Article's "sting" is a substantially true account of what occurred in the Giesler Trust litigation. (Emphasis added)

(A40-41, 58)

On the motion for reconsideration, the district court shifted its focus and found:

> The fact that two prosecutors read the Article and inferred that Batterman may have engaged in criminal misconduct does not alter my conclusion that, in spite of the minor inaccuracies or embellishments by the reporter, the Article was a substantially true account of the Geisler Trust litigation, and therefore was not actionable.

(A67) Each of these decisions is based upon the district court's reading of the September Version. A threshold procedural issue is whether the district court committed reversable error by relying on the September Version when ruling on the motion to dismiss and later refusing to consider the August Article once it because available. Those issues are discussed in detail in Section III, below. But as to the substance of the court's findings, they are clearly erroneous, regardless of which version of the article is considered because both are capable of defamatory meaning that Batterman and Fiduciaries committed fraud, theft or embezzlement with respect to the Geisler Trust.

A. The Article, With Or Without The Insertion, Reasonably Communicates That Plaintiffs Committed Fraud, Theft Or Embezzlement With Respect To The Geisler Trust.

The article is laced with criminal terminology and repeatedly states that Batterman and Fiduciaries are accused of committing fraud, theft and embezzlement with respect to the Geisler Trust. It starts with the headline: "Wisconsin financial advisor accused of violating a dead man's trust, mishandling $3 million." (A68) The headline sets the criminality tone: people are "accused" of committing crimes and

"mishandling" client funds is a crime. The article then states:

- the "financial advisor … put the money in jeopardy." (A71);
- "The advisor, Tom Batterman, is accused of defrauding the charities, committing numerous breaches of trust and conspiring with his fiancé to milk the fund for trustee fees." (A71);
- "According to accusations and judgments made in the court documents, this is what happened." (A72);
- "But the Wisconsin Department of Justice and the American Cancer Society say the couple went beyond what Joe Geisler's trust allowed. (A75);
- "According to the petition, [Batterman] was evasive and 'ultimately (provided) information riddled with inconsistencies and ambiguities.'" (A76);
- "And that's the essence of the charities' case against Batterman: They say he sought to hold on to Geisler's money for as long as he could in order to profit from it through monthly fees." (A75);
- "The petition made numerous allegations of wrongdoing including that Batterman bought a cabin with Richards with money he took without authorization, he cited incorrect stock price numbers and he charged unnecessary trustee fees." (A76);
- "It was not the first time Batterman had been accused of mishandling clients' money." (A71;
- "The federal Securities and exchange Commission did find that Batterman committed wrongdoing for other business practices over a period of three years … This is the second time that Batterman as found guilty of wrongdoing by the SEC." (A78)

The repeated criminal overtones, jargon and statements about what the ACS petition alleged leave the inescapable impression that Batterman and the companies he controls committed fraud, theft and embezzlement with respect to the Geisler Trust. To reinforce that defamatory meaning, the article is punctuated with two

hyperlinks concerning the very criminality that Batterman was supposedly accused of:

> "RELATED: Five ways to fight elder abuse
>
> * * *
>
> RELATED: Accountant accused of embezzling over $155,000 near Stratford"

(A75) The article also contained gratuitous statements about Batterman's receipt of a DUI that reiterated the criminality theme: "I handcuffed Thomas, and checked the cuffs for tightness and double-locked them." (A79)

The Insertion is not effective in dispelling the clear theme that Batterman has committed crimes. To start, Batterman's exoneration is mentioned once, while the scandalous accusations are referred to in the ACS petition eight (8) times. Moreover, the September Version contains a timeline titled "The journey of Joe Geisler's trust." (A86) The timeline makes no mention of the successor trustee's finding that "A review of the records shows no embezzlement, theft, or false records of any nature." (Dkt. 20-3)

The article expands on the criminality theme by including an entire section titled "Run-ins with the law," which begins with the statement: "Neither Batterman nor Richards has been charged with any criminal wrongdoing in the Geisler case." (A77) When read in context, the statement is not exonerating, but implies that charges of criminal wrongdoing have not been made ***yet***.

The Run-ins with the law section then goes on to state that the SEC "did find Batterman committed wrong doing," and "were found to have violated multiple SEC

rules," and "Batterman was found guilty of wrongdoing." (A78) These statements, with words such as "wrong doing," "violated" and "guilty," again reinforce the criminality theme and the impression that Batterman committed crimes in the past and he has done so again with respect to the Geisler Trust.

Following the SEC smear, the article reports how Batterman's "legal troubles are compounded," this time accentuated with a mug shot of Batterman and a report about an April 10, 2018 arrest for OWI. The article concludes with innuendo derived from statements by Jerry Geisler that Batterman was not "doing the right thing" and was not "making good financial decisions" for Joe Geisler. (A79, 88)

In sum, when the article is read as a whole, defamatory meaning that Batterman and Fiduciaries committed fraud, theft or embezzlement is clear. As demonstrated by the DOJ Email, that defamatory meaning is clear, even with the Insertion. Therefore, the district court's rulings on the Rule 12, 56 and 59(e) motions must be reversed.

B. The Article's Defamatory Meaning – That Plaintiffs Committed Fraud, Theft Or Embezzlement – Is Neither True Or Privileged.

Had the district court properly recognized that the article was capable of defamatory meaning, then the questions to be addressed are whether the defamatory statements are either true or privileged. *Terry v. Journal Board Corp.*, 2013 WI App 130, ¶ 14, 351 WI.2d 479, 840 N.W.2d 255.

The truth or falsity of the defamatory meaning that Batterman and Fiduciaries committed fraud, theft or embezzlement in the administration of the Geisler trust is quickly resolved. Early on the underlying Geisler Trust litigation, Vigil Trust was

removed as trustee and Terrence Byrne was appointed successor trustee with an initial assignment of investigating the criminal accusations alleged in the ACS petition. Successor Trustee Byrne did so and his report is categorical:

> A review of the records shows no embezzlement, theft, or false records of any nature.

(Dkt. 20-3) Likewise, when the state court appointed the successor trusted, it ordered: "Nothing in this Order shall be deemed to be a finding that the Court, factually or at law, that Vigil Trust … and/or Thomas Batterman, has engaged in any wrongful or otherwise dishonest conduct, or breached any fiduciary duty." (Dkt. 20-2 at 9) Thus, the defamatory meaning that Batterman and Fiduciaries committed fraud, theft or embezzlement while administering the Geisler trust is false.

Gannett claimed in its motion to dismiss that regardless of the truth, all of the September Version was privileged. (Dkt. 5, at 21, 22) Not so.

The Wisconsin Statute § 895.05(1) was enacted in 1897 and has been the subject of just a handful of Wisconsin Supreme Court discussions. Most notable is the case of *Ilsley v. Sentinel Co.*, which holds that the privilege does not apply to "mere pleadings and other preliminary papers which simply have been filed in the clerk's office." *Ilsley v. Sentinel Co.*, 133 Wis. 20, 113 N.W. 425, 426-427 (1907). Rather, the privilege applies to reports concerning the actions of the court. This is because the privilege is not intended to shed light on the actions and statements of private individuals, but to facilitate scrutiny of the judicial officers themselves. *Id.* at 426 ("The whole foundation for that privilege is the interest of the public to know the conduct of judicial officers and legislators, to the end that misconduct or incapacity

may be promptly discovered and remedied."); *id.* ("There is, however, no right in the public to know that A charges B with unworthy or criminal conduct, even in court, as a fact by itself; that is mere gossip or scandal.").

When the article is reviewed in light of Wis. Stat. § 895.05(1) and *Ilsley*, the article does not qualify for privilege.

First, *Ilsley* makes clear that the proceedings are limited to what the judicial officer says or does. *Id.* ("The public at most needs to know what its court does, and, since this cannot be intelligibly reported without stating the charges and issues upon which the court's action is based, the latter may be reported also, although as an incidental result the fact of defamatory charges against some individual becomes public to his injury."). "When this reason is understood, it obviously fails wholly to justify publication of defamatory contents of mere pleadings and other preliminary papers which have simply been filed in the clerk's office." *Id.* at 426-427.

Here, the gist of the article is plainly about the allegations made against Batterman and Fiduciaries in the ACS petition, and not about a judicial officer. Indeed, the Article refers to Judge Moran (by time or title) six times, while referring to "Batterman" fifty-five times.

Second, by its very terms, the statute does not apply to headlines. The headline is not privileged, as "no reporter is protected against libelous matter 'contained in any headline or headings to any such report[…]'" *Ilsley,* 133 N.W. at 428.[3]

[3] *Ilsley* was quoting the predecessor to Wis. Stat. § 895.05(2), but the relevant language—namely that the provision does not apply to a matter "contained in any headline or headings to any such report" has remained unchanged since *Ilsley. Compare Ilsley,* 133 N.W. at 428 *with* Wis. Stat. § 895.05(2).

Third, like the headline, the many statements concerning ACS's scandalous accusations in its petition are not privileged. Because the privilege pertains to the conduct of judicial officers, rather than allegations about private individuals, *Ilsley* expressed concern over application of the privilege to preliminary documents filed with the court.

> In absence of dominating public interest, surely the individual ought not to be subjected to such assaults upon his character and reputation as may result from general publication of charges which may thus be made. ***The author of a pleading is broadly privileged in asserting his claims against his opponent, and may, and often does, make the most damaging charges with little or no foundation.*** He may make them with no expectation of proving them, may, with no purpose of ever proceeding further with his action[.]

Ilsley, 113 N.W. at 427 (emphasis added). That is precisely what occurred in the Geisler Trust litigation: the basis for Vigil Trist's removal as trustee was dramatically different from the allegations made in the ACS petition. ACS's scandalous allegations of criminal conduct were quickly discredited by trustee Byrne and in Judge Moran's own words:

> This court acknowledges that there were concerns voiced concerning potential criminal activity at the onset of the litigation but that was not the focus of this case and that was not the issues that were litigated at the court trial.

(Dkt. 6-9 at 11:4-8; *see also* Dkt. 5 at 7) Thus, under *Ilsley*, the privilege does not apply to the article's reporting on the contents of the ACS petition because the court never considered those accusations.

Fourth, the repeated references in the article that Batterman and companies he controlled were removed as trustee are also not privileged. Batterman was never

trustee and the Court never removed Batterman as trustee. (Dkt. 20-2; Dkt. 20 ¶ 41) Therefore, statements like "when Batterman and Vigil Trust were removed as trustees" are neither fair nor true.

Finally, read as a whole, the article plainly is not a fair and accurate reporting:

> A report that is accurate may not be edited and deleted in a way that renders its contents misleading. [I]t is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it. … The reporter is not privileged … to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

Robert D. Sack, *Sack on Defamation* 7:3.5 [B][6] (collecting cases; internal quotations omitted; ellipses added by the author); *see also see also Schiavone Const. Co. v. Time, Inc.*, 735 F.2d 94, 98 (3d Cir. 1984) (Noting the publication was "accurate insofar as it goes; yet it is incomplete" because, after mentioning the plaintiff appeared in FBI reports, failed to mention that "none of the references [to the plaintiff] suggested any criminality or organized crime associations."); *Doe v. Doe*, 941 F.2d 280, 290 (5th Cir.), *on reh'g in part,* 949 F.2d 736 (5th Cir. 1991) ("[T]he newspaper made but partial use of the records […] any use of […] public records must accurately and fairly represent what is contained in the ***entirety*** of the said public records.") (quotations omitted; emphasis by the Fifth Circuit).

The many statements that Batterman and his companies such as Fiduciaries were the trustee are not privileged, nor are the statements and innuendo concerning embezzlement and elder abuse. Essentially, all of the defamatory content of the article, be it the August Article or the September Version, is not privileged.

C. The DOJ Email Topples All Of The District Court's Rulings As To Defamatory Meaning.

It is not often that a Rule 59(e) motion for reconsideration is based on newly discovered evidence that is directly on point, but such was the case here. Batterman and Fiduciaries had timely issued a FOIA request to Wisconsin Department of Justice. (Dkt. 73, ¶ 3) On February 2, 2021, the Wisconsin Department of Justice produced responsive records. (Dkt. 73, ¶ 9)[4]

Within that production was an email string that took place on October 31, 2019 between an assistant District Attorney and an attorney with the Wisconsin Department of Justice (hereinafter the "DOJ Email"). The subject of the DOJ Email is "Tom Batterman" and the exchange concerns their review of the "Article" as republished on September 19, 2018. Their exchange was a follows:

> Runde: "What do you know about him?"
>
> Runde: [Runde sends hyperlink to the Article.][5]
>
> Glaman: "Interesting … Sounds criminal to me."
>
> Runde: "That's why I said. I heard abut him last night from a colleague who is prosecuting him for OWI 2nd. I think there's some criminal acts have absolutely happened."
>
> Glaman: "Are you thinking we should start a criminal investigation?"
>
> Runde: "If you're up for it, I would like to."

[4] The Dkt. 73, ¶ 9 contains a typographical error. The WIDOJ production took place on February 2, 2021, not February 2, 2020, which is clear from the content of the rest of the affidavit.

[5] "https://www.wausaudailyherald.com/story/news/2018/08/21/wausaufinancial-adviser-thomas-battermanaccused-mishanlding-trust/769134002/"

(Dkt. 73-4) The content of this email string directly contracts the district court's repeated conclusions that the article as republished on September 19, 2018 was not capable of defamatory meaning that Batterman committed criminal acts.

The DOJ Email captures these readers' actual understanding of the September Version, which contained the Insertion. The district court's prediction of what an "ordinary reader" would understand is contradicted by what actual readers did understand. According to the district court, the Insertion makes clear that no crime had been committed; but Glaman read the September Version containing the Insertion and concluded "Sounds criminal to me"; and Runde concluded: "I think there's some criminal acts have absolutely happened." (Dkt. 73-4) If Glaman and Runde were left with the distinct impression that plaintiffs had committed criminal acts warranting an investigation based on the September Version, how much more did the original August Article convey defamatory meaning of criminal actions?

Rather than "not plausible," a fair reading the article, even the version containing the Insertion, is that Batterman and Financial Fiduciaries were not only accused of committing "fraud, theft or embezzlement," but that they did in fact commit one or more of those crimes. At the very minimum, the defamatory nature of the article presents an issue of fact for a jury to decide, not the district court. Thus, the district court's rulings on Gannett's Rule 12 and 56 motions and plaintiffs' Rule 59(e) motion must be reversed.

D. The Law Relied Upon By The District Court Is In Applicable.

Batterman and Fiduciaries' Rule 59(e) motion forced the district court to confront evidence that the September Version did, in fact, convey defamatory meaning that plaintiffs had committed crimes. Rather than concede the obvious, the district court relied upon a series of cases that had no bearing on the issue presented by the Rule 59(e) motion. The district court looked to *Simonson*, *Barnett,* and *Read* for the proposition that:

> The fact that two prosecutors read the Article and inferred that Batterman may have engaged in criminal misconduct does not alter my conclusion that, in spite of the minor inaccuracies or embellishments by the reporter, the Article was a substantially true account of the *Geisler Trust* litigation, and therefore was not actionable.

(A67 (citing *Simonson v. United Press Int'l, Inc.*, 654 F.2d 478 (7th Cir. 1981), *Barnett v. Denver Pub. Co.*, 36 P.3d 145 (Colo. App. 2001) and *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 356, 819 P.2d 939 (1991))

However, each of these cases involved an actual criminal proceeding that was reported on, and the publisher merely blundered in reporting on the extent of the criminality.

In *Simonson,* the plaintiff, a recalled judge, sued the United Press International and the Associated Press for defamation, alleging that he was defamed by a publication stating he suspended the sentence of a male juvenile who had "raped" a girl at school, when the boy was actually charged with second degree sexual assault. This Court held that: "The dispatches were in no manner made false by substituting the word in common usage for an exact legalism." *Simonson*, 654 F.2d at 482.

In *Barnett*, the plaintiff alleged that that the publisher "mistakenly suggested he was convicted of felony stalking" when in fact he was convicted of misdemeanor "harassment." *Barnett*, 36 P.3d at 148. The Colorado Court of Appeals affirmed the dismissal of his claims, citing, *inter alia*, *Simonson* for the proposition that "technical errors in legal terminology and reports involving violation of the law are of no legal consequence." *Id.* However, the plaintiff was indeed charged with a crime, and pled guilty to that crime. *Id.*

The court noted that stalking was also a misdemeanor when the plaintiff was charged, and "[a]lthough there is a distinction between harassment, which is a misdemeanor, and stalking, which is now a felony, both terms describe similar repeated, unsolicited behavior." *Id.*

In *Read*, the publication mis-identified the plaintiff's conviction, the court held: "[a]n incorrect identification of a person's crime in a published report is not, by itself, a triable issue of fact for a jury[.]" *Read*, 169 Ariz. at 356). The Court reasoned that there is "no evidence that the inaccurate statements caused him any more damage than that which resulted from his actual conviction and sentence." *Read*, 169 Ariz. at 356).

And indeed, Wisconsin law draws the same distinction between: (1) an actionable statement indicating the plaintiff committed a crime when they did not; and (2) a non-actionable statement that blunders as to the precise degree of criminality. *Vachet v. Cent. Newspapers, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987) (citing *Watson v. Herald-Despatch,* 221 Ill.App. 557, 560 (1921) for the proposition

that "the gist of the libel would be the allegedly false statement that a crime had been charged; other misstatements concerning the details of the arrest were immaterial and formed no basis for libel action[.]"); *see also Watson*, 221 Ill. App. at 559–60 ("The gist of the libel, if there be one, would be the false statement that appellant was indicted for the crime mentioned and was compelled to give bail […] There was no libel in the misstatements of the amount of bail appellant gave[.]").

This distinction is particularly salient here, as Gannett's did merely make good-faith "technical errors in legal terminology[.]" *Barnett*, 36 P.3d at 148. Instead, Wisneski drafted a largely straightforward report. Then, his editor (who never reviewed Geisler Trust Litigation records) directed him to revise it, finding the draft to be too "boring," too "bloodless," too "bureaucratic," and too full of "legalese." (Dkt. 57-13 at 6) The article repeatedly states that Fiduciaries and Batterman were accused of "defrauding," "milking," "embezzling," all of which had long since been refuted and abandoned. Thus, it is actionable defamation.

E. Even If The Court Properly Denied The Motion To Amend, It Was Still Required To Consider The Original Publication.

On summary judgment, the district court refused to consider the August Article, based exclusively on its denial of plaintiffs' motion for leave to amend (A58, n. 2) However—even with the district court denying the amendment—the August Article ***is*** the defamatory statement of which plaintiffs complain. (A90-107, ¶¶ 1, 46, 63) Thus, the district court should have considered the August Article on summary judgment, as Batterman and Fiduciaries requested. (Dkt. 60 at 31-34)

Under Wisconsin law, "the particular words complained of shall be set forth in the complaint." *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007) (quoting Wis. Stat. § 802.03(6)). As long as the complaint is specific and identifies the "particular words" complained of, the "plaintiff need not plead verbatim the defamatory remarks made about him[.]" *Schindler v. Marshfield Clinic,* No. 05-C-705 C, 2007 WL 60924, at *11 (W.D. Wis. Jan. 4, 2007) (emphasis in the original). Where a plaintiff "describe[es] in his complaint the content of the statements allegedly made by defendants, [he] has met the requirements of both § 802.03(6) and Rule 8." *Id.* (citing Wis. Stat. § 802.03(6) and Fed.R.Civ.P. 8).

Marshfield Clinic is instructive on this point. There, a neurosurgeon alleged that the clinic defamed him in, *inter alia*, a report submitted to a national database that reports on physicians' performance. *Schindler*, 2007 WL 60924, at *11. On summary judgment, the clinic argued that the court could not consider the report because "plaintiff did not plead this claim in his complaint." *Id.* at *14. The court noted that the complaint identified the report in one paragraph and alleged that it was harmful to the doctor's reputation. *Id.* It concluded:

> Although plaintiff could have drafted his complaint more carefully, his failure to do so is not fatal. Plaintiff's allegations regarding the June 2004 report were adequate to put defendants on notice that he was pursuing this claim against them; that defendants ignored his claim is no reason for this court to do the same.

Id.

Here too, the face of the Complaint clearly alleges that Gannett defamed plaintiffs through its August Article. The original publication date is referred to in

the Complaint three times. (A90-107, ¶ 1, 46, 63) In contrast, the revised publication date (September 19, 2018) is not referred to anywhere in the Complaint. (A90-107) Thus, the Complaint is adequately pled as to the August Article (and, indeed, only as to that version). The district court therefore erred in refusing to consider the August Article on summary judgment.

III. The District Court Erred In Taking Judicial Notice Of The Version Of The Article On Gannett's Webpage On The Rule 12(b)(6) Motion To Dismiss.

To take judicial notice, the fact must be one that is "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Civ. P 201(b); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7th Cir. 1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite."). The district court should not have taken judicial notice of Gannett's publication, especially given that there were numerous versions. *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) (Drawing a distinction between a district court taking judicial notice of a party's "own assertions" on its own website and "potentially unfamiliar information posted on third-party websites."); *Hill v. Cap. One Bank (USA), N.A.*, No. 14-CV-6236, 2015 WL 468878, at *6 (N.D. Ill. Feb. 3, 2015) ("because the internet contains a wide variety of information with varying levels of reliability, the Court is not required or inclined to take judicial notice of Plaintiffs exhibits based only upon the evidence before it.") (Judge St. Eve); *Id.* (referring to the "evolving nature of websites") (internal quotation omitted).

The district court's June 1, 2020 ruling on the motion to dismiss reads as though there was only one version of the article before the district court. Not so.

There were at least three at the time of the ruling and possibly four.

The first version consisted of the allegations in the complaint, which cited the August Article extensively. (A90-107) Batterman and Fiduciaries did not attach a copy of the August Article to the complaint because they did not have and could not locate a copy of the August Article when they filed the complaint. (Dkt. 40, ¶ 2)

The second version was offered by Gannett in support of its motion to dismiss. (Dkt. 6-1) Gannett offered an inaccurate copy of the September Version, authenticated by its lawyer, Brian Spahn. (Dkt. 6, ¶ 2) Fiduciaries and Batterman objected that the version offered by attorney Shahn was inadmissible. (Dkt. 18 at 10) The district court sustained the objection.[6] (A2-3)

When the district court sustained plaintiffs' objection to Gannett's inaccurate version of the article, it should have resolved the motion to dismiss based on the contents of the article as alleged in the complaint. *Fredrick v. Simmons Airlines, Inc.*, 144 F. 3d 500, 504 (7th Cir. 1998) ("Affidavits are not properly considered in deciding upon a motion under Rule 12(b)(6) unless the district court converts the motion into one for summary judgment under Rule 56."). However, it did not. Instead, the district court took "judicial notice of and consider[ed] the online version of the Article, a copy of which Batterman has provided to the Court." (A4)

The third and fourth versions are Dkt. 20-1 and potentially an "online version of the Article" that the district court may have obtained on its own. The order is unclear on this point. (A3-4) Either way, the district court committed reversible error

[6] "This is a fair objection." (A4)

by taking judicial notice improperly and by violating the prohibition of looking outside the complaint to resolve a Rule 12 motion.

A. By Taking Judicial Notice of the September 19 Version, The District Court Re-Wrote Batterman's and Fiduciaries' Complaint.

A district court may look outside the four corners of a complaint when ruling of a Rule 12 motion to dismiss only when the foreign matter is central to the plaintiff's complaint and is "concededly authentic." *Santana v. Cook Cty Bd. Of Review,* 679 F.3d 614, 619 (7th Cir. 2012). In light of this standard, the district court ruled: "Batterman concedes that the Article is central to the complaint and that the court may consider it." (A3) This point is false in many respects.

First, while the August Article is obviously central to the complaint, and was cited extensively in the complaint, (A90-107), the September Version is a stranger to the complaint. It is not mentioned at all. (A90-107) Indeed, if plaintiffs were to allege a defamation claim based on the September Version, it would necessarily be a separate cause of action. Robert D. Sack, *Sack on Defamation*, § 2:5.1 (5th ed. 2019) ("Every distinct publication of a libel or slander gives rise to a separate cause of action. Republication of a hardcover book in paperback form, for example, ordinarily is deemed to be a separate, potentially actionable publication."). Therefore, it was improper to take judicial notice of foreign matter that was not central to plaintiffs' complaint.

Second, Batterman and Fiduciaries did not "concede[] …that the court may consider" the September Version to resolve Gannett's motion to dismiss. Nowhere, in their opposition to the motion to dismiss did plaintiffs "concede," suggest or

indicate that it would be appropriate for the district court to rely upon anything outside the four corners of the complaint. (See Dkt. 18 at 8-12) To the contrary, Fiduciaries and Batterman specifically argued that it was improper for the district court to look beyond the complaint to resolve Gannett's Rule 12(b)(6) motion, and particularly improper to rely on the exhibits to an affidavit from opposing counsel, Brian Spahn, who was incompetent to testify. (Dkt. 18 at 9-10)

Third, the district court's ruling is internally inconsistent. It defined the term "Article" as the August Article. (A1) But the version the district court relied upon was the September Version. (A4) Thus, without notice or opportunity to cure, the district court based its ruling on Gannett's motion to dismiss on the wrong version of the Article.

Fourth, the Batterman Affidavit was offered in support of plaintiffs' cross-motion for summary judgment as to liability. It was not offered with respect to Gannett's motion to dismiss. Plaintiffs did not reference the Batterman's Affidavit or the exhibits attached to it in their response to the motion to dismiss. (Dkt. 18 at 1-12) By looking outside the complaint to resolve Gannett's motion to dismiss, the district court improperly relied upon a record that was not "concededly authentic" and effectively rewrote plaintiffs' complaint.

Fifth, and finally, by considering an exhibit to Batterman's Affidavit, the district court contradicted its own ruling (Dkt. 29) on Gannett's Rule 56(d) motion (Dkt. 21) Gannett moved to dismiss. (Dkt. 4, 5) Gannett supported its motion to dismiss with 400 pages of records attached to the affidavit of it attorney, Brian Spahn,

and argued that the district court could resolve the case—on a motion to dismiss—by comparing the Spahn Affidavit exhibits to the September Revision. (Dkt. 6-1 through 6-11) Plaintiffs' objected, arguing that "Gannett has brought what is essentially a motion for summary judgment under the guise of a Rule 12(b)(6) motion to dismiss." (Dkt. 18 at 8) However, plaintiffs also brought a cross-motion for summary judgment, arguing that: a "comparison of public records to the defamatory Article does resolve the questions of truth and privilege, but in Plaintiffs favor, not Gannett's." (Dkt. 25 at 1)

Gannett countered with a Rule 56(d) motion and asked the district court to rule on the Rule 12(b)(6) and the Rule 56 motion separately. (Dkt. 21) The district court granted Gannett's Rule 56(d) motion "because different standards and presumptions apply to the different types of motions." (Dkt. 29 at 3) Thus, it was improper for the district court to consider any part of plaintiffs' Rule 56 motion, including Batterman's Affidavit and the September Version attached to it, when ruling on Gannett's motion to dismiss. But it did so anyway.

B. The District Court's Violation of Rule 12(b)(6) Standard Was Material.

As previously noted, "the consideration of outside matter without converting the motion may result in reversible error." *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997). The exception to this rule is "narrow" and consists of taking judicial notice of matter of public record." *General Elec. Capital Corp.*, 128 F.3d at 1080. The content of the August Article was not a matter of public record. It was, indeed, a disputed fact. Gannett attempted to

supplant the August Article identified in the complaint with a different version that was (1) missing material content and (2) contained material content not found in the August Article. (Dkt. 6-1) Gannett offered this different version of the Article as part of its Rule 12(b)(6) motion. Plaintiffs objected. The district court sustained the objection. (A4)

The difference between the September Version, which the district court based its ruling upon, and the version as alleged in the complaint is material. Gannett's Motion to Dismiss quotes the Insertion in full three separate times (Dkt. 5 at 2-3, 18, 22) and the district court cited it numerous times, and quoted it twice. (A13, 27) The district court concluded:

> An ordinary reader would understand from these statements and from the Article as a whole that, to the extent Batterman may have been ***accused*** by ACS of fraud or theft, those accusations were dropped or refuted by the court. In other words, the Article correctly reported Batterman's vindication on these points.
>
> * * *
>
> [I]t is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement with respect to the Geisler Trust, particularly given the Article's plain statement that no such finding had been made.

(*Id.* at 27, 42 (emphasis by the court))

The August Article also used present tense, falsely making it appear as though the allegations of criminal conduct were still pending. For example, the August Article states that Batterman "***is*** accused of defrauding the charities" while the September Version (on which the court relied) says that Batterman "***was*** accused of defrauding the charities[.]" (*Compare* A71 with A83 (emphasis added))

Far from "correctly report[ing] Batterman's vindication," the August Article gave the clear impression that Batterman was accused of criminal conduct; that those allegations remain pending; and that they would, inevitably, be proven correct.

IV. The District Court Erred In Denying Plaintiffs' Motion For Leave To Amend.

As explained above, the district court effectively and erroneously re-wrote Batterman and Fiduciaries' complaint by using the September Version when ruling on Gannett's motion to dismiss. After the ruling, Batterman succeeded in finding a copy of the August Article and immediately sought leave to amend the complaint to include a copy of the August Article. (Dkt. 42, 43) Clearly a grave misjustice had occurred. The district court's order granting in substantial part Gannett's motion to dismiss turned on the Insertion. Amending the complaint to present the full article that was truly at issue would cure the injustice. But the district court denied plaintiffs' motion to amend and its reasoning was erroneous.

A. Rule 15, not Rule 16 Governed.

In ruling on Batterman and Fiduciaries' motion for leave to amend, the district court found that plaintiffs "must meet the heighted 'good cause' standard of Rule 16(b)(4) before the court considers the requirements of Rule 15." (A49) That finding is erroneous for two reasons.

First, while the district court's scheduling order set a deadline to amend pleadings, it specifically ordered that motions to amend after that date would be governed by Rule 15. (A49) Thus, Rule 16 did not apply even if the amendment qualified as a post-scheduling order deadline amendment, which it did not.

Second, the district court based its decision that Rule 16 applied on decisions that did not involve the granting of a motion to dismiss. (A49, *citing, CMFG Life Ins. Co. v. RBS Sec., Inc.*, 799 F.3d 729, 749 (7th Cir. 2015); and *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). Both of these cases concerned post-scheduling order deadlines amendments to add new claims. They did not involve cases where a motion to dismiss had been filed and granted.

On December 24, 2019, which was twenty-one days after the filing of Gannett's motion to dismiss, Batterman and Fiduciaries no longer had a right to amend their complaint as a matter of course. *See* Fed.R.Civ.P. 15(a)(1) (right to amend expires 21 days after service of defendant's motion to dismiss under Rule 12(b)).

A plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend the complaint before the entire action is dismissed. *Luevano v. Wal–Mart Stores, Inc.*, 722 F.3d 1014, 1024 (7th Cir. 2013); *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010); *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir.2008); *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 687 & n. 3 (7th Cir. 2004). When Rule 15(a)(2) governs court approval to amend a pleading, "[t]he court should freely give leave [to amend] when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (reversing denial of leave to amend by citing to Rule 15(a)(2)'s mandate to freely give leave to amend and stating "this mandate is to be heeded").

Here, the district court granted in substantial part Gannet' Rule 12(b)(6)

motion on June 1, 2020. (A1) On June 5, 2020 Batterman succeeded in locating a copy of the original article as published on August 21, 2018. (Dkt. 44, ¶ 7) On July 15, 2020, Batterman and Fiduciaries sough leave to amend their complaint to add the August Article. (Dkt. 43) That motion came a full eight months before the close of discovery, (Dkt. 16 at 3), and just forty-five days after the district court ruled on the motion to dismiss. Baring a finding of undue delay, undue prejudice or futility, Batterman and Fiduciaries should be given at least one opportunity to try to amend their complaint. *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir.2008); *Runnion ex rel. Runnion*, 786 F.3d at 519. Nevertheless, the district court denied plaintiffs' Rule 15(a)(2) motion for leave to amend because it did not approve of plaintiffs' litigation strategies. (A50)

B. The Proposed Amendment Was Timely And Viable.

The district court's denial of Batterman and Fiduciaries' motion for leave to amend must be reviewed "rigorously." *Runnion ex rel. Runnion, 786 F.3d at 519.* "Giving leave to amend freely is 'especially advisable when such permission is sought after the dismissal of the first complaint. Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss." *Runnion ex rel. Runnion*, 786 F.3d at 519-20; *quoting, Barry Aviation Inc. v. Land O'Lakes Municipal Airport Com'n*, 377 F.3d 682, 687 (7th Cir. 2004) (emphasis by the court in *Runnion ex rel. Runnion*).

Here, the district court shirked the mandate. Allowing the amendment would

have solved the issues created by the court looking outside of the complaint when ruling on the Rule 12(b)(6) motion to dismiss. It would have forced the district court to confront the actual defamatory article at issue in the case. It would also have forced the court to address the version of the article which more than 90% of the online readers actually read.

The principal behind Rule 15(a)(2) is "the federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities." *Runnion ex rel. Runnion*, 786 F.3d at 520 (internal quotations omitted); *Moore v. Hunt*, 2015 WL 4202024 *2 (E.D. Wis. 2015). The substantive issue before the district court from the beginning was a defamation claim based on the August Article. Rather than addressing the substance of the case, the district court grasped technicalities and even went so far as to expressly rewrite plaintiffs' complaint as part of its denial of the motion for leave to amend. (A53-54) Specifically, the district court ruled:

> This case will proceed on the original complaint as framed by both parties and as narrowed by the court's June 1 order, namely, whether an ordinary reader would understand the on line version of the Article, as updated on September 19, 2018, to imply that plaintiffs committed elder abuse, whether that implication is false, and whether plaintiffs sustained damages as a result.

(*Id.*) However, plaintiffs' complaint makes no reference to the September Revision. (A90-107) No rule or legal authority allows the district court to rewrite a plaintiff's complaint. *See Martin v. Nobel County Sheriff's Office*, 2021WL26310 *5 (N.D.Ind. January 4, 2021). If a "district court should not assume the role of advocate for the pro se litigant and may not rewrite a petition to include claims that were never presented," *Id.* (*quoting, Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999)),

then a district court certainly cannot be the advocate for the defendant and rewrite a complaint to materially change the defamatory statements that are at issue. *McAllister*, 983 F.3d at 967 (complaint must be construed in the light most favorable to the plaintiff).

Thus, the district court's denial of Batterman and Fiduciaries motion for leave to amend was clearly erroneous, highly prejudicial to plaintiffs and must be reversed.

C. Even Under Rule 16, Plaintiffs' Amendment Should Have Been Granted.

Even if the Court applies Rule 16—and the Court should not do so—plaintiffs' Motion should have been granted. Under Rule 16, the Court "primarily considers the diligence of the party seeking amendment." *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (internal quotations omitted).

Plaintiffs presented uncontroverted evidence that Batterman searched diligently for the August Article over the course of many months. (Dkt. 44) Batterman: (a) asked numerous friends, acquaintances, clients and vendors if they had copies, (b) searched online achieves; (c) searched personal computer and hard files; and (d) searched newspaper achieves at the local library. (Dkt. 44, ¶ 6) Plaintiffs had every incentive to be diligent, because Batterman (though he could not recall the details) remembered the August Article being more harmful than the September Version. (Dkt. 44, ¶ 17)

The district court correctly "accept[ed] plaintiffs' assertions" and acknowledged that they had "every incentive to find a copy" of the August Article. (A50) The district court still denied the motion, finding that Batterman should have made different

strategic decisions in litigating the motion to dismiss. (A50) However, those decisions have no bearing on whether plaintiffs exercised "diligence [in] seeking amendment." *Trustmark Ins.*, 424 F.3d at 553. Because it is undisputed that plaintiffs did exercise diligence, the district court's denial of the amendment was erroneous.

V. The Court Should Remand The Case For Entirely New Proceedings.

The district court kneecapped Batterman and Fiduciaries' case from the outset, by granting "Gannett's motion and dismissing the complaint in all respects but one." (A1) As a result, nothing in this litigation proceeded as it should have. For example, Gannett objected to over 23 of plaintiffs' discovery requests "as overly broad, unduly burdensome, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence in light of the Court's June 1, 2020 Order granting Gannett's motion to dismiss as to every alleged defamatory statement in the Article with the exception of the hyperlink referencing elder abuse anti financial exploitation." (Dkt. 45-5 at 6; *see also* Dkt. 45-5 *generally*) Plaintiffs were deprived of an opportunity to obtain information that they needed on summary judgment such as the original publication, which Gannett still has not produced. (Dkt. 46 at 2; *see also* Dkt. 40-5 at 15 (objecting to production of all versions of the article based on the district court's motion to dismiss ruling))

Accordingly, the Court should reverse and remand this matter for further proceedings, with instructions that the case proceed anew.

CONCLUSION

For the reasons set forth above, appellants Thomas Batterman and Financial Fiduciaries, LLC pray for an order from this Court reversing the district court's rulings contained in Dockets 32, 49, 65 and 78, and remanding the matter for further proceedings.

Dated: October 29, 2021

Respectfully submitted,

/s/ Charles L. Philbrick

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Certificate of Compliance With Federal Rule Of Appellate Procedure 32(a)(7)(B)(i)

I, Charles L. Philbrick, hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), that the foregoing Brief of Plaintiffs-Appellants complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Circuit Rule 32(c) because it contains fewer than 14,000 words, excluding those portions of the brief listed in Federal Rule of Appellate Procedure 32(f) that do not count toward the word limitation. In preparing this certificate, I relied on the word count tool of the word-processing system used to prepare the brief, Microsoft Word.

Dated: October 29, 2021

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Certificate of Service

I, Charles L. Philbrick, hereby certify that I filed Plaintiffs-Appellants Financial Fiduciaries, LLC And Thomas Batterman's Opening Brief and Appendix on October 29, 2021, which effected service on all counsel of record.

Dated: October 29, 2021

Respectfully submitted,

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Required Appendix, Attached To Opening Brief

Separate Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FINANCIAL FIDUCIARIES, LLC,
a Wisconsin limited liability company, and
THOMAS BATTERMAN,

Plaintiffs,

v.

GANNETT CO., INC.,

Defendant.

OPINION AND ORDER

19-cv-874-slc

In this civil action brought under the court's diversity jurisdiction, plaintiffs Financial Fiduciaries, LLC, and Thomas Batterman (referred to herein collectively as Batterman except as noted) allege that defendant Gannett Co., Inc. (Gannett) defamed them in an article (the Article) published in the *Wausau Daily Herald* on August 21, 2018 under the headline "Wisconsin financial adviser accused of violating a dead man's trust, mishandling $3 million." Dkt. 1. Before the court is Gannett's motion to dismiss the complaint in its entirety under Fed. R. Civ. P. 12(b)(6), on the ground that neither the Article's headline nor any of the 20 statements that plaintiffs have identified in the complaint are false or capable of a defamatory meaning. Dkt. 4. In the alternative, Gannett argues that the entire article is privileged as a true and fair report of judicial and other government proceedings.

As discussed below, I am granting Gannett's motion and dismissing the complaint in all respects but one. What survives is Batterman's claim that the Article falsely implied that he had committed elder abuse by financially exploiting elders. I agree with Batterman that an average person reading the Article as a whole could reasonably conclude that it was accusing Batterman of elder abuse. Moreover, unlike Batterman's other allegations, the suggestion that Batterman committed elder abuse is not refuted by the records of the public proceedings that are central to the complaint.

I. OVERVIEW

The Article focuses on a probate matter in the Circuit Court for Marathon County, Wisconsin that had been initiated nearly three years earlier by the American Cancer Society (ACS). ACS claimed that Batterman, in his capacity as trustee for the Geisler Trust, had violated his statutory duties by mismanaging trust funds (the "*Geisler Trust* litigation"). The Article also reports on two administrative orders filed by the Securities and Exchange Commission in 1997 and 2018 in which the SEC fined Batterman and his related companies for violating certain rules governing financial advisers. Batterman contends that the Article as a whole was defamatory because it reported on allegations in the *Geisler Trust* litigation that were either "discredited" or "abandoned" by the time the Article was published. This created the false impression that Batterman had engaged in fraud or embezzled funds, when in fact both the successor trustee and the court in the *Geisler Trust* litigation had explicitly found no fraud, theft or embezzlement. Batterman further contends that the Article was defamatory because: (1) its tactical use of hyperlinks falsely implied that Batterman had committed embezzlement and elder abuse; (2) it inaccurately identified Batterman or an entity controlled by him as the trustee overseeing the administration of the Geisler Trust; and (3) the SEC did not find Batterman "guilty" of any wrongdoing, as reported in the Article.

II. PRELIMINARY PROCEDURAL MATTERS

Before setting out the allegations of the complaint, it is necessary to resolve the parties' dispute about the evidentiary record. When deciding a motion to dismiss under Rule 12(b)(6), a court usually cannot consider materials outside the plaintiff's complaint unless the court treats

the motion as one for summary judgment. *See* Fed. R. Civ. P. 12(d); *Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018); *Santana v. Cook County Bd. of Review*, 679 F.3d 614, 619 (7th Cir. 2012). However, the court may, without treating the motion as one for summary judgment, consider materials outside the complaint when they are mentioned in the complaint, concededly authentic, and central to the plaintiff's claim. *See, e.g., Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009). This incorporation-by-reference doctrine prevents a plaintiff from "evad[ing] dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that prove[s] his claim has no merit." *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (quoting *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002)).

Relying on this doctrine, Gannett has submitted the following exhibits in support of its motion: (1) a copy of the Article; (2) copies of several records from the Marathon County proceedings concerning the *Geisler Trust*, including a printout of the court's docket entries as recorded in the Consolidated Court Automation Programs (CCAP) Case Management system[1]; and (3) a copy of the 1997 SEC order referenced in the Article.[2] Spahn Aff., dkt. 6, exhs. 1-11.

Batterman concedes that the Article is central to the complaint and that the court may consider it. However, he argues that the copy submitted by Gannett is missing certain hyperlinks -- presumably which appear solely in the online version of the Article — that

[1] These records of the Marathon County proceedings are available on the Wisconsin Circuit Court Access Program, a website that provides public access to the records of the Wisconsin circuit courts for counties using the Consolidated Court Automation Programs (CCAP) Case Management system. The CCAP record reflects summaries of the proceedings entered by court staff, but not the underlying documents such as pleadings or court orders. *See* wcca.wicourts.gov.

[2] Gannett did not submit a copy of the 2018 SEC Order. However, both orders are publicly available online. *In the Matter of Vigil Asset Mgmt. Grp., Inc. & Thomas Batterman*, Respondents., Release No. 1621, 64 S.E.C. Docket 294, 1997 WL 120698 (Mar. 17, 1997); *In the Matter of Fin. Fiduciaries, LLC & Thomas Batterman, Respondents*, Release No. 4863, 118 S.E.C. Docket 4501, 2018 WL 1151582 (Mar. 5, 2018).

contribute to the Article's overall defamatory nature. This is a fair objection. Accordingly, the court will take judicial notice of and consider the online version of the Article, a copy of which Batterman has provided to the court. Batterman Aff., dkt. 20, Exh. 1.

Batterman also objects to the inclusion of the publicly-available records from the *Geisler Trust* litigation. That objection is unfounded. These records are undisputably central to his claim: Batterman devotes over 30 paragraphs of the complaint to alleged facts that led to the *Geisler Trust* litigation. Complaint, dkt. 1, ¶¶ 12-46. The complaint includes a table with a column identifying 20 statements in the Article alleged to be false and defamatory. (Dkt. 1, ¶ 56.) In the second column, titled "Why It is False," Batterman counters many of these statements by referring to "the court record" or findings by the Marathon County Circuit Court. (*Id*.) And finally, in the next paragraph, the complaint alleges that:

> The entire court record pertaining to Case No. 15-PR-32, filed September 11, 2015 in Marathon County, Wisconsin, including the affidavit of Thomas Batterman dated October 15, 2015, the reports of successor Trustee Terrence J. Byrne, the September 18, 2017 transcript of the probate court's ruling, the transcripts of the hearings and trial on the beneficiaries' petitions, and the SEC consent decrees were available to Gannett before the article was published.
>
> Dkt. 1, ¶ 57.

So, contrary to Batterman's suggestion, the Marathon Circuit Court proceedings are the main focus of the complaint, not merely "background." Accordingly, absent any claim that the documents submitted by Gannett are not accurate copies of actual pleadings, orders and transcripts from the *Geisler Trust* litigation, it is proper for this court to consider them without converting the motion to a motion for summary judgment. *Parungao v. Cmty. Health Sys., Inc*, 858 F.3d 452, 457 (7th Cir. 2017) (courts may take judicial notice of court filings and other

matters of public record when the accuracy of those documents reasonably cannot be questioned).

Even so, says Batterman, the court should not consider the "CCAP" summary of the *Geisler Trust* proceedings because some of the docket summaries do not accurately reflect the court's orders. In particular, Batterman objects to Gannett's reliance on an entry dated October 23, 2015, stating that, after a hearing on the motion for removal of the trustee, the court granted the motion and removed "Vigil Trust/Thomas Batterman as trustee and appoints new trustee as Terrance Byrne." Dkt. 6, exh. 7, at 37. Batterman insists that entry is inaccurate, noting that the court's follow-up written order, issued on November 10, 2015, states only that Vigil, not Batterman, was removed as trustee. Order, Nov. 10, 2015, attached to Batterman Aff., dkt. 20-2. (This is important to Batterman because he contends that, insofar as the Article named Batterman or suggested that he was trustee for the Geisler Trust, it was false. I address this contention in more detail, below.) Rather than strike the CCAP summary, the court will consider that document *and* the entirety of the court's November 10, 2015 order in ruling on the motion to dismiss. *See* Fed. R. Evid. 106.

Finally, Batterman has not objected to consideration of the SEC Orders, which were discussed at some length in the Article and are the proper subject of judicial notice. In the complaint, plaintiffs have alleged that some of the Article's statements with respect to the SEC Order were false. Complaint, dkt. 1, at ¶¶ 56d., 56q., 56r. Accordingly, these orders are central to the complaint and may be considered.

Against this backdrop, I will review the allegations of the complaint, along with the Article, the record from the *Geisler Trust* litigation, and the SEC Orders:

FACTS

I. The Parties

Plaintiff Financial Fiduciaries, LLC ("Fiduciaries") is and was at all times relevant to this lawsuit a Wisconsin limited liability company located in Wausau, Wisconsin, a city in Marathon County with a population of approximately 40,000. Fiduciaries is a registered financial advisor. Plaintiff Thomas Batterman (a resident and citizen of Wisconsin) manages Fiduciaries. Fiduciaries is a wholly owned subsidiary of WTC, Inc., which is a privately-owned Wisconsin corporation in which Batterman owns an interest.

Defendant Gannett Co., Inc. is a Delaware corporation headquartered in McLean, Virginia. It publishes a number of newspapers in Wisconsin, including the *Wausau Daily Herald*.

II. Background

In 1988, Joseph Geisler established the Geisler Trust and designated himself as the primary trustee, with Vigil Asset Management Group as the successor trustee. Complaint, ¶¶ 15-17. Batterman was the owner of Vigil Asset Management Group. *Id.*, ¶ 17. In 2000, Vigil Asset Management Group's operations were assumed by Vigil Trust. *Id.* In 2011, in the course of amending the Geisler Trust in other respects, Geisler amended his trust to provide that Vigil Trust would be the successor trustee. *Id.*

The Geisler Trust provided that, in the event his wife did not survive him, upon Geisler's death, the assets remaining in the Trust, together with any assets received into the Trust, should be distributed equally to four identified charities: the Superior Diocese of the Catholic Church; Bruce High School in northwestern Wisconsin; the Alzheimer's Association; and the American

Cancer Society ("ACS"). *Id.*, ¶ 22. After outliving his wife, Geisler died on December 27, 2014. *Id.*, ¶ 26. The assets in the Geisler Trust at the time of his death amounted to $3 million.

III. The Petition to Remove Vigil Trust/Batterman as Trustee of the Geisler Trust

On September 9, 2015, ACS brought a verified petition in the Circuit Court for Marathon County seeking, among other things, to remove Vigil Trust as successor trustee of the Geisler Trust. ACS Petition, dkt. 6-2. ACS alleged that, as successor trustee, Vigil Trust, through its owner and president, Batterman, "grossly breached fiduciary duties owed to the Trust and its charitable beneficiaries." *Id.* at 1. ACS alleged that Vigil Trust/Batterman had inappropriately used trust assets for Batterman's own benefit, had concocted a scheme for distributing ACS's funds over a 10-year period rather than in a lump sum in order to increase fees to the trustee, and had provided evasive responses to ACS's inquiries regarding the trust funds. *Id.* at 1-2. ACS brought five claims: (1) breach of duty to administer trust in good faith; (2) breach of duty of loyalty; (3) breach of duty of prudent administration; (4) breach of duty to inform and report; and (5) removal of trustee. *Id.* at 18-23. Soon thereafter, the School District of Bruce, the Roman Catholic Diocese of Superior, and the Alzheimer's Association each filed its own petition. *See* CCAP Summary, dkt. 6-7, at 39. On or about October 15, 2015, Batterman filed a 16-page affidavit and 146 pages of supporting documentation disputing the allegations of the petition. Aff. Of Thomas Batterman, dkt. 6-10.

Judge Michael Moran presided over the case. Following a hearing on October 23, 2015, the court granted the beneficiaries' motion to remove Vigil Trust as trustee of the Geisler Trust and it appointed Terrence Byrne as new trustee. The court formalized its findings and issued

amended findings of fact and conclusions of law in a written order entered November 11, 2015. Among other things, the court found that, "[a]s of the date of the hearing, Vigil Trust had not made distributions to the four named charitable beneficiaries of their monies under the Geisler Trust other than $80,000 to ACS." Dkt. 20-2, at 4. The court further found that, "on or about June 19, 2015, Vigil Trust established the Joseph Geisler Scholarship Trust and transferred monies related to Bruce Schools . . . into that separate Trust. Vigil Trust through Batterman notified Bruce Schools of a scholarship fund at some point thereafter." *Id*. The court directed new trustee Byrne to administer the Geisler Trust and "to seek redress of any breach of trust determined by Byrne to have been committed by Vigil Trust or any entities or individuals affiliated therewith or involved in any way in the administration of the Geisler Trust . . . including all officers, employees, agents, and representatives thereof." *Id*. at 5.

On or about February 18, 2016, Byrne advised the beneficiaries and the court that "[a] review of the records shows no theft, embezzlement, or false records of any nature." Complaint, ¶ 42.

The parties continued to litigate the case for more than two years. On or about February 6, 2017, beneficiary Bruce School District served an amended petition naming Batterman, Financial Fiduciaries, and WTC. Complaint, ¶ 44; Docket Entry, 02-06-2017, dkt. 6-7, p. 30. On April 24, 2017, the court entered an order dismissing Financial Fiduciaries and WTC, but it kept Batterman in the case. Docket Entry, 04-24-2017, dkt. 6-7, p. 25.

The court held a bench trial on April 27, 2017 and May 23, 2017. After post-trial briefing, the court issued its findings in an oral ruling on September 18, 2017. The court found that Vigil, through Batterman, had abused its discretion in administering the trust, had breached

its duty to inform and report, and had breached its duty of loyalty. Tr. Of Oral Ruling, Sept. 18, 2017, dkt. 6-8. Specifically, the court found that Vigil had failed to notify the beneficiaries within a reasonable time frame, had failed to provide complete and timely information, and had made unilateral decisions about how the gift was to be distributed to the beneficiaries that arguably favored Vigil. Summarizing its conclusions, the court stated:

> So much of this litigation could have been avoided had Vigil followed the plain language of the trust document or even attempted to communicate with the school district or other beneficiaries. There is nothing in this record to suggest that Bruce School would have been unable to distribute the scholarship funds in the manner they felt reasonable. While it is possible they may even have had Vigil as the trustee, that decision was not Vigil's to make unilaterally, and by the actions Vigil took by unilaterally creating a separate scholarship trust, refusing to provide any information to the school district and by setting themselves up as a trustee, thus deriving income from the administration of the scholarship trust, Vigil, and Mr. Batterman, acting for Vigil, created a sense of mistrust, not only with Bruce School District but each [of] the beneficiaries to Mr. Geisler's generous gift . . .
>
> The trustee in this case breached his trust and abused his discretions for the reasons I stated and it doesn't – it's not escaping this Court that the beneficiaries would have this mistrust and would, based upon it, want to clarify and get more information and do due diligence to find out exactly what was going on here . . . [u]ltimately it is unfortunate the legacy of Mr. Geisler's gift will be this litigation.
>
> *Id*. at 17-18.

In response to questions posed by Batterman's counsel at the end of the hearing, the court stated: "I am not finding that there is any fraud. I am not finding those other issues. I found [a breach of duty] based on my decision on basically the three different areas that I found here." *Id*. at 29.

On July 11, 2018, the court held another hearing for the purpose of issuing an oral ruling on the parties' cross-motions for attorney fees and non-attorney fee damages. Tr. of Oral Ruling, dkt. 6-9, at 7. Summarizing its September 18, 2017 ruling, the court recounted that it had found that "Vigil and Batterman's conduct constituted a breach of trust pursuant to 701.0813 of the Wisconsin Statutes," that "so much of this litigation could have been avoided had Vigil followed the plain language of the trust or if it had been attempted to communicate with the school district or other beneficiaries," and that "the actions of Vigil and Batterman created a sense of mistrust with the beneficiaries[.]" *Id*. at 4.

The court then denied Vigil's motion for the Trust to pay its attorneys fees, finding that although the successor trustee found no theft, fraud or embezzlement, Vigil had breached the trust and therefore could not recover its fees. *Id*. at 10-11. The court further found that the beneficiaries could recover their fees from Batterman, finding that his actions on behalf of Vigil with respect to the Geisler Trust were "what amounted to something of bad faith, fraud or deliberate dishonesty." *Id*. at 16. The court further ruled that the Trust could recover damages incurred related to the breach of trust. *Id*. at 20.

When deciding who was liable for the attorney fees and damages, the court held that:

> Mr. Batterman is the trust protector in this case. He owed independent duties to the beneficiaries, and, again, there was little argument on the issue of which entity or whether Midwest Trust Company, through Vigil and Thomas Batterman, is personally liable. The court is going to order each party shall be jointly and severally liable for the damages and attorney fees once final numbers are provided. So that means Midwest Trust Company, and Vigil and Mr. Batterman, shall be jointly and severally liable for the damages once we get those numbers together.
>
> *Id*. at 26.

IV. SEC Proceedings

Plaintiffs admit that Batterman was the subject of SEC orders in 1997 and 2018. Complaint, ¶ 56.q. In the 1997 order, the SEC found that Vigil, aided and abetted by Batterman, had willfully violated several rules governing financial advisers by: maintaining client funds in an omnibus account over which it retained control of how funds were distributed; taking physical possession of client funds and securities; failing to calculate its quarterly advisory fees in its clients' monthly statements; failing to ask its custodial broker-dealer to send its clients a quarterly statement identifying all disbursements from their accounts; and making "misrepresentations and omissions of material facts to clients regarding the brokerage commission rates charged to clients." *See In the Matter of Vigil Asset Mgmt. Grp., Inc. & Thomas Batterman*, Respondents., Release No. 1621, 64 S.E.C. Docket 294, 1997 WL 120698, *1-*3 (Mar. 17, 1997). The SEC specifically found that these acts "were fraudulent, deceptive or manipulative." *Id*. at *2. Vigil and Batterman were ordered to cease and desist the rule violations and to pay civil penalties of $15,000 and $10,000, respectively. *Id*. at *4.

In 2018, the SEC found that Batterman, as principal of Financial Fiduciaries, had caused Financial Fiduciaries to "willfully violate[] Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon a client or prospective client." *In the Matter of Fin. Fiduciaries, LLC & Thomas Batterman, Respondents*, Release No. 4863, 118 S.E.C. Docket 4501, 2018 WL 1151582, *5 (Mar. 5, 2018). The SEC found that Financial Fiduciaries and Batterman had breached their financial duties and violated the "custody rule" from 2012-2014 by having a "dual employee" who worked for both WTC (Financial Fiduciaries' primary shareholder), and

for IITC, a Colorado trust company that did business in Wisconsin under the trade name "Vigil Trust & Financial Advocacy." *Id*. at *2-*4. As a result of this arrangement, the employee allowed Financial Fiduciaries to have direct access to clients' trust assets for whom IITC was the trustee. *Id*. In addition to this "dual employee" arrangement, the SEC found that IITC and WTC–who shared the same office space–had financial arrangements concerning the payment of the employee's salary, rent, and office support, that gave rise to a conflict of interest. *Id*. Batterman and Financial Fiduciaries were ordered to cease and desist their violations of the Advisers Act and to pay a fine of $20,000 and $40,000, respectively. *Id*. at *5.

In both proceedings, Batterman and Vigil Trust/Financial Fiduciaries made offers of settlement in which they agreed to the SEC's orders without admitting or denying its findings.

V. The Article

On August 21, 2018, the *Wausau Daily Herald* published an article reporting on the *Geisler Trust* litigation, under the headline "*Wisconsin financial advisor accused of violating a dead man's trust, mishandling $3 million*". Batterman Aff., dkt. 20, exh. 1. The story's lede states: "Joe Geisler spent his life farming and taking care of his father. He was, in the words of one of his nephews, 'frugal with a capital F.'" The story goes on to explain how, after years of hard work, Geisler had died with $3 million in a trust that he wanted distributed to charities that were important to him. This portion of the Article is accompanied by a photograph of Geisler in advanced age.

The Article pivots to Batterman:

> But the financial adviser Joe Geisler entrusted to administer his trust put that money in jeopardy, according to a lawsuit filed in

> Marathon County. The adviser, Thomas Batterman of Wausau, was accused of defrauding the charities, committing numerous breaches of trust and conspiring with his fiancée to milk the fund for trustee fees.
>
> Although a judge later found that Batterman had not committed fraud, theft or embezzlement, he ruled that the financial adviser had engaged in multiple acts of "bad faith" and ordered him to be removed from handling the Geisler trust and to pay part of the charities' legal fees.
>
> It was not the first time Batterman had been accused of mishandling clients' money. He has been fined thousands of dollars twice by the Securities and Exchange Commission, according to federal records.

The Article explains that Geisler had met Batterman through Geisler's brother, that both men had hired Batterman to "manage their funds," and that Joe Geisler had asked Batterman to set up a trust for him. According to the Article, under the terms of the trust, "it would be Batterman's job to honor Geisler's wishes, completing the donations to the four charities. That's where things went awry."

Under the subheading "What Has Been Alleged," the Article discusses ACS's petition, stating: "According to accusations and judgments in the court documents, this is what happened:". The Article then summarizes or quotes directly from the ACS petition—with attribution—and also reports the responses provided by Batterman and his fiancée to some of ACS's allegations. This portion of the Article concludes with a close-up photograph of Batterman's office, with the names "Financial Fiduciaries" and "Vigil" clearly visible. Immediately below the photo, in font larger than the photo's caption, appear the following two statements, with accompanying hyperlinks:

> **RELATED:** Five ways to fight elder abuse, financial exploitation

> **RELATED:** Accountant accused of embezzling over $155,000 near Stratford

Under a new subheading titled "Word spreads about a trust," the Article reports about how ACS learned of Geisler's trust, that it filed a petition, and that the petition "began a three-year battle, first for the removal of Vigil as trustee, then for the legal fees accumulated by the charities through the litigation." The Article then summarizes the Marathon Circuit court's rulings, stating that in November 2015, it "ordered Vigil and Batterman to be removed" and appointed Byrne as successor trustee, and in May had ordered Batterman and associated companies to pay the charities' legal fees.

Under a subheading titled "Run-ins with the law," the Article states:

> Neither Batterman nor [his fiancée] has been charged with any criminal wrongdoing in the Geisler case. Moran said in court transcripts that the case solely concerned the beneficiaries of the trust, their request that Batterman be removed and the responsibility for legal fees.
>
> But the judge made it clear that he didn't think everything went the way it should have.
>
> "This court found that so much of this litigation could have been avoided had Vigil followed the plain language of the trust, or if it had been attempted to communicate with the school district or other beneficiaries," Moran said.
>
> The federal Securities and Exchange Commission did find that Batterman committed wrongdoing for other business practices over a period of three years.

The Article proceeds to paraphrase and quote portions of the SEC's March 5, 2018, report, adding that "[t]his is the second time that Batterman was found guilty of wrongdoing by the SEC. In 1996, he was fined $10,000."

The Article provides a response from Batterman to the SEC's findings. As for the allegations as to Geisler's trust, the Article reports that Batterman had not consented to an interview after several requests to do so.[3]

Towards the end of the Article, the reporter provides the following summary of his interview with Geisler's nephews:

> "You just expect that everyone is doing the right thing," Gary Geisler said during a recent interview at Biggby Coffee in Wausau, less than 10 blocks from Batterman's office. Jerry, 58, traveled from his home in Bruce, and Gary, 63, from Ripon to speak to a reporter about the case.
>
> They said that Joe Geisler didn't have anyone to make sure he was making good financial decisions.
>
> "One thing you need to remember is that our dad and Joe were nice guys," Jerry Geisler said.
>
> "You think about his intentions for that money that he saved up: He wanted it to go to good causes, and instead someone else was taking advantage of that," Gary said.
>
> Batterman handled funds for their father, John Geisler, for years, but when the brothers were concerned about the returns their father was getting, they got a second opinion. When that financial adviser was concerned about Batterman's investment strategy, the brothers fired Batterman. They said the returns have increased drastically since then.
>
> "I would tell anybody that has older parents, older relatives getting financial advice, that they should be checking in on it and getting second opinions just like I did," Gary Geisler said.

[3]The Article also reports that Batterman's "legal troubles were compounded" by an April 10, 2018 OWI arrest and provides additional information. However irrelevant this information might be to the main thrust of the Article, Batterman has not challenged its truth.

On August 30, 2018, Batterman requested the *Wausau Herald* to retract certain statements in the Article. Gannett determined that no retraction was warranted. However, Gannett updated the online version of the Article to clarify the court's ruling on allegations against Batterman. Gannett also added a graphic which depicted a timeline of Batterman's activities with the Geisler Trust.

ANALYSIS

The parties agree that Wisconsin substantive law applies to this case. Under that law, a defamation claim has three elements: (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 is defamatory, that is, it 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. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 534 (1997).

> In a defamation action brought by a private figure against a media defendant, the plaintiff has the burden of proving that the speech at issue is false; this requirement is imposed in order to avoid the chilling effect that would be "antithetical to the First Amendment's protection of true speech on matters of public concern."
>
> *Mach v. Allison*, 2003 WI App 11, ¶ 13, 259 Wis. 2d 686, 656 N.W.2d 766, (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)).

Moreover, to defeat a defamation action, the article or statement in question need not "be true in every particular." *Lathan v. Journal Co.,* 30 Wis. 2d 146, 158, 140 N.W.2d 417, 423 (1966). "All that is required is that the statement be substantially true." *Id*. "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous

charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal citations and quotations omitted). "Put another way, the 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.'" *Id*. (quoting R. Sack, Libel, Slander, and Related Problems 138 (1980)).

In arguing for dismissal, Gannett contends that Batterman does not have a plausible defamation claim because all of the statements of which he complains are true, and some are incapable of a defamatory meaning. In addition, Gannet argues that most of the statements are covered by Wisconsin's judicial proceedings privilege, Wis. Stat. § 895.05(1), which provides that newspapers are absolutely privileged when they publish true and fair reports of judicial, police, and other government proceedings. In support of its dismissal motion, Gannett addresses each of the statements identified in Batterman's complaint, relying largely on the *Geisler Trust* public court record and the SEC orders to show that all of the challenged statements in the Article are substantially true, not capable of a defamatory meaning, or are privileged.

In response, Batterman first argues that the mere fact that he has *alleged* that the statements are false is enough to stave off dismissal at the 12(b)(6) stage. Br. in Opp., dkt. 18, at 11-12. Batterman misunderstands his burden. To survive a motion to dismiss, a complaint cannot simply provide the defendant with fair notice of the claim and its basis; it must also "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing the sufficiency of a complaint under the plausibility standard announced in *Twombly* and *Iqbal*, the court accepts the well-pleaded facts in the

complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth. *Iqbal*, 556 U.S. at 678-79.

Importantly, "[w]hen an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss." *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013). In *Bogie*, for example, the court found that the trial court had not erred by relying on a backstage video that the plaintiff had attached to her breach-of-privacy complaint as a basis for dismissing the complaint under Rule 12(b)(6). *Id*. at 608-09. Noting that the video "shows in real time the content and context of the alleged wrongs," *id.* at 608, the appellate court found that the district court had properly "viewed the recording and weighed its content against the complaint's allegations" to determine whether plaintiff had been recorded in a place that a reasonable person would consider private. *Id*. at 608-09.

Courts have applied the incorporation-by-reference doctrine to evaluate "the content and context of the alleged wrongs" in defamation cases as well. *See, e.g., Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (under incorporation-by-reference doctrine, district court reviewed tapes of broadcasts and transcripts of interviews on which broadcasts were based in deciding defendant's motion to dismiss defamation claim); *Knafel v. Chi. Sun-Times, Inc.*, 413 F.3d 637, 640 (7th Cir. 2005) (considering newspaper column attached to complaint pleading defamation claim); *Harp v. Glock*, No. 18-C-1039, 2019 WL 1859258, at *1–*2 (E.D. Wis. Apr. 25, 2019) (granting, in part, defendant's motion to dismiss defamation case after reviewing crime series episode and finding that not all statements were capable of defamatory meaning). *See also Puhr v. Press Pub. Co.*, 249 Wis. 456, 461–62, 25 N.W.2d 62, 65 (1946)

("[I]t is the duty of the court to determine from the publication itself whether it bears the interpretation given to it by the plaintiff in his complaint."); *Woods v. Sentinel-News Co.*, 216 Wis. 627, 258 N.W. 166, 167 (1935) ("While liberal rules of pleading are followed in construing a complaint, the pleader's statement that particular words [are defamatory because they] impute a criminal charge cannot in themselves enlarge the reasonable and natural meaning of the words used.").

Accordingly, this court will not deny Gannett's motion simply because Batterman has *alleged* that certain statements in the Article are false and defamatory. Rather, it is proper to examine Batterman's allegations against the Article and the records from the *Geisler Trust* litigation and the SEC – which are central to the complaint—to determine whether Batterman states a plausible claim for defamation.

BATTERMAN'S ALLEGATIONS

Batterman asserts that, "[a]s a whole, the Article is erroneous and paints a false and unfair picture of Mr. Batterman as a thief who, acting as trustee, stole money from a trust, causing four separate charities to lose money, all of which is false." Complaint, dkt. 1, ¶49. He further alleges that the Article falsely identifies Batterman as the trustee of the Geisler Trust, when the actual trustee was Vigil Trust. *Id*. at ¶50. In addition, Batterman alleges that the Article plainly implies that "Batterman is a bad financial advisor who takes advantage of elders and cannot be trusted with other people's money." *Id*. at ¶52, noting that the online version of the Article contains links to so-called "Related" stories about elder abuse and embezzlement. *Id*. at ¶ 54.

A review of the complaint reveals that Batterman is not actually contending that the headline and all 20 statements from the Article are false.[4] Some of the statements, he says, are libelous not on their face but because of what they imply. As amplified in his brief in opposition to the dismissal motion, Batterman alleges that in its totality, the Article was defamatory in these respects:

> (1) It falsely implied that Batterman was a thief who "defrauded" the beneficiaries and "embezzled" trust funds;
>
> (2) It falsely stated that Batterman or an entity controlled by him was the trustee overseeing administration of the Geisler Trust;
>
> (3) It falsely stated that Batterman was "found guilty of wrongdoing by the SEC;" and
>
> (4) It falsely implied that Batterman was guilty of "elder abuse."

Br. in Opp., dkt. 18, at 14-23.

Thus, of the four allegedly libelous "statements," Batterman alleges that two were implicit and two were explicit. I address the implicit statements first.

I. Defamation by Implication

Wisconsin courts have recognized that "[t]he 'statement' that is the subject of a defamation action need not be a direct affirmation, but may also be an implication." *Mach*,

[4] Insofar as this bears on Batterman's claims of actual falsity, I note that Batterman has offered no response to Gannett's argument regarding six of the statements. Accordingly, Batterman has waived his claims on these statements. *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1078 (7th Cir. 2016) ("[B]y failing to respond in any way to any of the arguments advanced by Defendants regarding counts 9, 14, 15, and 16, Plaintiffs have waived their claims."); *G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court. That is true whether it is an affirmative argument in support of a motion to dismiss or an argument establishing that dismissal is inappropriate.") (citations omitted).

2003 WI App 11, ¶ 12 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990)). *See also Frinzi*, 30 Wis. 2d at 277, 140 N.W.2d at 262 ("One may be libeled by implication and innuendo quite as easily as by direct affirmation."). The court decides, as a matter of law, whether an alleged defamatory implication is fairly and reasonably conveyed by the words and pictures of the publication. *Id*. at ¶ 32 (citing *Puhr v. Press Publ'g Co.*, 249 Wis. 456, 460, 25 N.W.2d 62 (1946)). If the court decides that it is not, then the defendant is entitled to judgment in its favor. *Id*. If the court decides that the alleged defamatory implication is fairly and reasonably conveyed but that there is also a nondefamatory implication, then it is up to the jury to decide which the publication implies. *Id*. (citing *Liberty Mut. Fire Ins. v. O'Keefe & O'Flaherty, Ltd.*, 205 Wis.2d 524, 527, 556 N.W.2d 133 (Ct. App.1996)). "[T]he 'gist of the matter' is the 'natural and reasonable import' of the words and images on the [reader.]" *Id*. (quoting *Woods*, 216 Wis. At 629). The court must consider the publication as a whole, "not in detached fragments." *Woods*, 216 Wis. at 630.

Cases that fall squarely within the realm of "implied defamation" are those in which the plaintiff alleges that a specific statement, though not necessarily defamatory on its face, could be reasonably understood to convey a defamatory meaning and is therefore actionable. For example, in *Filber v. Dautermann*, 28 Wis. 134 (1871), the plaintiff alleged that the defendant had slandered him by saying to the plaintiff in the presence and hearing of others: "You have cheated and robbed orphan children out of fourteen hundred dollars." *Id*. at 135. According to the complaint, a person named John Freling had assigned to the plaintiff a mortgage for $750, in 1863, in exchange for plaintiff's agreement to support and maintain Freling during his natural life. Freling died in 1866, leaving several orphan children. *Id*. at 135-36. The plaintiff alleged

that the defendant's "You have cheated and robbed . . ." statement implied that, "by taking an assignment of such mortgage from John Freling as the consideration for his agreement to support said Freling during his natural life (Freling having since died leaving orphan children), the plaintiff committed the crime of *larceny*." *Id*. at 136 (emphasis in original).

Finding that "whether the words spoken impute a charge that the plaintiff had been guilty of a criminal offense, and that such words are therefore actionable" was a question of law for the court, *id*., the Wisconsin Supreme Court found that the plaintiff had no cause of action for slander. Evaluated in context, held the court, "the word '*robbed*' was here used to indicate, not a taking by force and violence, but rather a taking by fraud and wrong, the charge being that the plaintiff *cheated and robbed* orphans "*out of*" a certain sum of money. *Id*. at 137 (emphasis in original).

In *Luthey v. Kronschnabl*, 239 Wis. 375, 1 N.W.2d 799, 801 (1942), the plaintiff brought a libel action based on a portion of an editorial that read: "Now if Mr. Luthey had attended a Christmas Eve service in any one of the Crandon churches we are sure he would have gotten a lot of good out of it and felt a whole lot better than he did." *Id*. at 380. The plaintiff claimed that the statement implied that he was a man "of such general lack of integrity and Christian virtue as to require the influence of church service upon him." *Id*. The court rejected plaintiff's claim as a matter of law, finding that "the usual, ordinary and natural meaning of the words" used in the editorial could not reasonably support the implication advanced by plaintiff. *Id*.

In *Woods*, 216 Wis. 627, the plaintiff alleged that the newspaper had falsely implied that he had been charged with a criminal offense when it published a story under the headline "Cops Free 'Robber'", which reported that the plaintiff's wife had called the police saying that her

husband was a bank robber and was wanted in Indiana. Noting that the article had to be read as a whole and "not in detached fragments," 216 Wis. 2d at 630, the court rejected plaintiff's claim, noting that the article had also reported that upon receipt of plaintiff's wife's message, the police had investigated the matter and found that the wife had made a false accusation because of trouble with her husband. *Id*. The article further reported that police did not detain the husband but instead arrested the wife on a charge of disorderly conduct. *Id*. In light of this, the court concluded, unsurprisingly, that "all suggestion that respondent was charged with the commission of any offense is positively excluded." *Id*.

In addition to the classic case where a plaintiff claims that a defamatory meaning can be implied from the express words stated by the defendant, courts have recognized that a person can be defamed not by what is stated, but by what is implied when a defendant

> (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.

Dan B. Dobbs, Prosser & Keeton on the Law of Torts § 116, at 117 (Supp. 1988). *See also Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) ("a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way."), cited in Plt.'s Br., dkt. 18, at 20.

The Wisconsin Court of Appeals' decision in *Mach*, 2003 WI App 11, is such a case. In *Mach*, a dog trainer named Frank Allison, sued a television station, its owner and a reporter, claiming that a story that the station ran about him and Chance – a dog placed with him for

training that died a few days after returning home – conveyed the false impression that Allison employed beating or violence as a means of training Chance. Allison alleged that he did two types of dog training: (1) protection work, in which dogs are trained to bite only on command of the dog's master; and (2) obedience training, which is designed to be gentle and to help a dog gain trust in people. *Id*. at ¶ 13. The broadcast included two video sequences showing Allison with dogs other than Chance in which he was wearing protective gear and inciting the dogs to leap at him or bite him; in one, he had a stick in his hand. Accompanying these sequences were statements by the reporter, Chance's owner, and Allison that related specifically to Chance. *Id*. at ¶ 35. The court of appeals agreed with Mach that a reasonable viewer could conclude from these video sequences and the words spoken during them that Allison used with Chance the methods depicted in the video sequences with the other two dogs, particularly where there were no statements or images indicating that Allison had not used these methods on Chance. *Id*. at ¶ 36.

Finally, in *Terry v. Journal Broadcast Corp.*, 2013 WI App 130, 351 Wis. 2d 479, 840 N.W.2d 255, the plaintiff alleged that a TV news station's broadcast of an investigative report about her wedding video business falsely implied through statements, scary music, and video edits that she was a "freakish and dangerous" person. The broadcast focused on two couples' struggles to obtain their wedding videos from Terry for months after their wedding after paying her $1,000 up front. *Id*. at ¶¶ 2-3. As part of its investigation, a reporter, John Mercure, conducted an in-home interview of Terry, which ended when she made a throat-cutting gesture, told Mercure the interview was over and that he should leave. Terry's son, who was present during the interview, forcibly attempted to remove Mercure and Terry put her hand in front of

the camera lens. All of this was captured on video and broadcast unedited. *Id*. at ¶¶ 3-5. In addition, the broadcast and promotional advertisement included the following statements: "It was their perfect day (pause) until she came along"; "The I-Team's Mercure tracked down the videographer, and that's when he got attacked literally. [T]hat's scary."; and "A Videographer ripped off bride and groom and roughed us up." *Id*. at ¶ 9.

In spite of what plainly was a sensational broadcast seemingly produced to cast Terry in a bad light, the court of appeals found that Terry could not maintain a cause of action for defamation:

> With regard to the statements and images concerning the "brawl" Terry describes, we conclude that Terry fails to show how they are defamatory. In essence, Terry is challenging the way in which she was portrayed in so far as the music and video edits are concerned, but she does not have a cause of action for the words that were used to portray her. None of the videos or web stories Terry challenges use the term "freakish and dangerous person." See Wis. Stat. § 802.03(6) (2011–12) (requiring parties alleging libel or slander to state "the particular words complained of" in the complaint). The video shows an incident—Terry's son attempting to forcibly remove Mercure from Terry's home—and Mercure's and Terry's reactions to the incident. Corresponding statements were used to describe the incident. As stated, "truth is an absolute defense" in defamation actions. *Denny v. Mertz*, 106 Wis.2d 636, 643, 318 N.W.2d 141 (1982). Terry cannot maintain a defamation action for how she *feels* she was portrayed. None of the specific spoken or written words present causes of action in defamation.
>
> *Id*. at ¶¶ 25-26 (emphasis in original).

Against this jurisprudential backdrop, I now turn to Batterman's specific allegations:

B. Implication that "Batterman Stole From or Defrauded the Charities"

1. Defamatory Meaning/Falsity

As noted above, Batterman alleges that, as a whole, the Article "paints a false and unfair picture of plaintiffs as thieves who, acting as trustee, defrauded the beneficiaries, causing four separate charities to lose money, all of which is false." Br. in Opp., dkt. 18, at 17. Batterman cites the following statements as contributing to this overall impression:

- Headline: "Wisconsin financial advisor accused of violating a dead man's trust, mishandling $3 million"
- But the financial advisor Joe Geisler entrusted to administer his trust put that money in jeopardy, according to a lawsuit filed in Marathon County.
- The advisor, Tom Batterman, is accused of defrauding the charities, committing numerous breaches of trust and conspiring with his fiancée to milk the fund for trustee fees.
- It was not the first time Batterman had been accused of mishandling clients' money.
- According to accusations and judgments made in the court documents, this is what happened: Two weeks after Geisler's death, Batterman and his fiancée, Deborah Richards, began talking about the trust via Richards' work email. They planned for Batterman to donate American Cancer Society's portion of the trust to different Relay for Life Events that Richards would be planning. The increase in money raised for each event would make Richards eligible for salary increases according to the American Cancer Society petition to the court.
- From Geisler's death to November 9, 2015, when Batterman and Vigil were removed as trustees, they collected about $30,000 in fees from the Trust, according to Batterman's affidavit.
- This is the second time that Batterman was found guilty of wrongdoing by the SEC.

In addition to the statements, Batterman notes that the web version of the Article contains a hyperlink–fronted by the word "RELATED:"—to an article titled "Accountant accused of embezzling over $155,000 near Stratford." Although Batterman makes no claim that the linked article is about him or his companies, he argues that the hyperlink contributes to the Article's overall "embezzlement theme."

Having considered Batterman's arguments in light of the Article as a whole, I find that the Article does not fairly and reasonably convey the impression that Batterman engaged in theft, fraud, or embezzlement. First, insofar as the Article referred to fraud, it made clear that such conduct was only what Batterman had been "accused of" by ACS. Second, and more importantly, the Article specifically states that "*a judge later found that Batterman had not committed fraud, theft or embezzlement[.]*" As in *Woods*, *supra*, this statement expressly negates any implication that Batterman had embezzled or stolen trust funds, whether created by the reporting on ACS's allegations, the hyperlink, or otherwise.

In addition to this explicit statement, the Article also noted that neither Batterman nor his fiancée had been charged with any criminal wrongdoing in the Geisler case, and that Judge Moran had said the case solely concerned the beneficiaries of the trust, their request that Batterman be removed and the responsibility for legal fees. An ordinary reader would understand from these statements and from the Article as a whole that, to the extent Batterman may have been *accused* by ACS of fraud or theft, those accusations were dropped or refuted by the court. In other words, the Article correctly reported Batterman's vindication on these points.

Batterman argues that because the court found no fraud or theft, *a fortiori,* the Article's statements that Batterman was accused of "mishandling" funds, "wrongdoing," and putting $3

million "in jeopardy" were false. Again, however, Gannett explained when making these statements that the Article was reporting on ACS's allegations. ACS alleged that "[m]ultiple red flags relating to Vigil Trust's administration of the Geisler Trust . . . give ACS serious concern that Vigil Trust has inappropriately used trust assets for Batterman's and his corporate entities' own benefit and to the detriment of the remainder charitable beneficiaries," dkt. 6-2, ¶ 20. ACS further alleged that "[c]ontrary to the terms of the Trust, Vigil through Batterman has treated the Geisler Trust as though it were a discretionary trust to distribute funds as Batterman wishes and in a manner to benefit Batterman." *Id*. at ¶ 21. ACS then outlined specific conduct by Batterman that had raised the "red flags," including arrangements that he and his fiancée had made for distribution of the funds to ACS. *Id*. at ¶¶ 21-44. In light of these allegations, the Article's statements that Batterman was accused of "mishandling" or putting "in jeopardy" Geisler's trust funds were substantially true. *Prahl v. Brosamle*, 98 Wis. 2d 130, 141, 295 N.W.2d 768, 776 (Ct. App. 1980) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."), abrogated on other grounds by *Wilson v. Layne*, 526 U.S. 603 (1999)).

Moreover, and contrary to Batterman's contention, the court did *not* reject *all* of ACS's allegations concerning Vigil Trust/Batterman's administration of the Geisler Trust. As reported in the Article, the court found that Vigil, through Batterman, *had* breached its duties as a trustee when it failed to notify the beneficiaries within a reasonable time frame, failed to provide complete and timely information, and made unilateral decisions that arguably favored Vigil about how the gift was to be distributed to the beneficiaries. Further, the court found that those breaches "amounted to something of bad faith, fraud or deliberate dishonesty." As Gannett

accurately reported, although Judge Moran found that Batterman had not committed fraud, theft or embezzlement, "he ruled that the financial adviser had engaged in multiple acts of 'bad faith' and ordered him to be removed from handling the Geisler trust and to pay part of the charities' legal fees."

In light of these rulings, Batterman cannot plausibly show that the Article was false insofar as it implied that Vigil/Batterman had "mishandled" or "committed wrongdoing" with respect to the trust funds. As in *Filber*, when these terms are considered in the context in which they were used, they plainly were not meant to indicate fraud, but rather that Batterman had failed to properly execute his duties with respect to the trust funds.

Batterman seems to be most upset about the fact that Gannett first reported on ACS's allegations after the court had ruled on them. Batterman asserts that "reporting that the allegations had been made after they had been discredited and abandoned is an utterly false report." Br. in Opp., dkt. 18, at 17. Perhaps this assertion would have some traction if Gannett's article had reported the ACS's allegations as facts rather than allegations, or if Gannett had not made clear that the court had made no adverse findings against Batterman on the most damning accusations of the ACS petition. But the Article didn't do these things. Rather, the Article laid out what ACS had alleged, it explained that the court ultimately found no fraud, theft, or embezzlement, and then it reported on what the court did find, namely, that Batterman had breached his duties; Vigil Trust/Batterman was removed as trustee or trust protector; and Batterman was ordered to pay the charities' attorneys' fees.

Reading the Article as a whole, its "gist" or "sting" was not that Batterman was a thief, but rather that Batterman was untrustworthy. In light of the record of the *Geisler Trust*

litigation, this sting was justified. Although the Article may have contained minor inaccuracies or minor embellishments by the reporter, Gannett's reporting on the *Geisler Trust* proceedings was not false, nor did it reasonably convey the impression that Batterman committed theft, embezzlement, fraud, or similar criminal misconduct.

2. The Judicial Proceedings Privilege

Having found that Gannett's statements with respect to the allegations and findings made in the *Geisler Trust* litigation cannot support a defamation action because they are substantially true, I also find that Gannett's statements are absolutely privileged as a true and fair report of a judicial or other government proceeding.

In Wisconsin, this privilege is codified under Wis. Stat. § 895.05(1), which states:

> The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding.

This is the policy underlying the privilege:

> The whole foundation for that privilege is the interest of the public to know that the conduct of judicial officers and legislators, to the end that misconduct or incapacity may be promptly discovered and remedied. This end has been deemed so vital to public welfare and to the maintenance of good government as to demand subordination of the interest of individuals adverse to the publicity of defamatory statements against them which must otherwise control.
>
> *Ilsley v. Sentinel Company*, 133 Wis. 20, 24-25, 113 N.W. 425 (1907).

Batterman agrees that the privilege applies to Gannett's reporting about what Judge Moran actually did or said in the *Geisler Trust* litigation. As Batterman correctly points out, however, the Wisconsin Supreme Court held in *Ilsley* that the privilege does not extend to "publication of defamatory contents of mere pleadings and other preliminary papers which have simply been filed in the clerk's office." *Id.*, 133 Wis. 20, 113 N.W. at 426–27. According to the *Ilsley* court, such pleadings have no public concern "until they are actually brought to the attention of some judicial officer, and some action on his part is demanded based thereon." *Id.* *See also Finnegan v. Eagle Printing Co.*, 173 Wis. 5, 179 N.W. 788, 790 (1920) ("The rule is well established in this state that the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial attention invited is not privileged."). Thus, says Batterman, Gannett's reporting on the allegations of the ACS petition does not enjoy the protection of the judicial proceedings privilege.

Gannett responds that *Ilsley*'s exception for pleadings is no longer good law, noting that media outlets routinely report on newly filed lawsuits. Although this assertion seems correct on an intuitive level, Gannett does not cite to, and this court has not found, any case overturning *Ilsley*. Moreover, the statutory language of Wis. Stat. § 895.50(1) hasn't changed since *Ilsley* was decided more than 100 years ago. In any event, it is unnecessary to decide whether *Ilsley*'s exception for pleadings still applies. Even under *Ilsley*, the privilege would apply to Gannett's reporting on the ACS's petition because it was "actually brought to the attention" of the court.

Few courts have considered what constitutes a "true and fair report" under Wis. Stat. § 895.05(1), but it is generally understood that an article or broadcast reporting on an official action or proceeding need not quote those proceedings verbatim or describe them completely,

so long as the report is "accurate and complete or a 'fair abridgement' of the proceeding." Robert D. Sack, *Sack on Defamation* § 7:3.5[B][2] (5th ed. 2019). As the Wisconsin Court of Appeals has stated:

> Under the § 895.05(1), Stats., privilege, it is not necessary for the media to report verbatim what occurred at the judicial proceeding. Instead, it is acceptable to condense or paraphrase the events as long as the summary accurately and fairly reflects what transpired. Writers and reporters, by necessity, sometimes alter what people say.

Maguire v. Journal Sentinel, Inc., 198 Wis. 2d 389, 542 N.W.2d 239 (Ct. App. 1995) (unpublished disposition) (citation omitted). *See also Ilsley*, 133 Wis. at 20 ("[A] report of a proceeding, to be privileged, need not be by way of quotations, but may be condensed and expressed in the words of the reporter[.]"). Moreover, so long as the publisher fairly and accurately reports on what was said by others during judicial or other governmental proceedings, it does not matter whether what the person said was true or not. *Bell v. Associated Press*, 584 F. Supp. 128, 130 (D.D.C. 1984)("The point of the privilege is that it covers the reporting of both true and false factual matters."). However, "[l]ibelous remarks or comments added or interpolated" in a newspaper report, as well as libelous headlines, are not privileged. Wis. Stat. § 895.05(1).

I already have found that Gannett's statements with respect to the *Geisler Trust* proceedings were substantially true. That same finding leads to the conclusion that the statements are absolutely privileged under Wis. Stat. § 895.05(1). For reasons already explained, the Article accurately and fairly described the allegations of the ACS petition, the proceedings before the Marathon County circuit court, and the court's ultimate findings about Batterman's conduct. Accordingly, Batterman has no actionable defamation claim with respect

to Gannett's reporting on the *Geisler Trust* litigation, including its statements with respect to the allegations in the ACS petition.

B. Implication that "Batterman Committed Elder Abuse"

Batterman alleges that the Article implies that "Tom Batterman is a bad financial advisor who takes advantage of elders and cannot be trusted with other people's money." Complaint, dkt. 1, ¶ 52. According to the complaint, the statement that gives rise to this implication is the hyperlink in the web version of the Article that states:

> RELATED: Five ways to fight elder abuse, financial exploitation (with hyperlink)

Complaint, ¶ 56 l. Batterman alleges that "[t]his link in the middle of the on-line article unfairly and irresponsibly suggests that Mr. Batterman and Financial Fiduciaries were involved in "elder abuse.'" *Id*.

Gannett dismisses this claim out of hand, arguing that this it not actionable insofar as it contains nothing defamatory about Batterman or his companies. Batterman disagrees, arguing that the hyperlink must be considered in the context of the entire Article. More specifically, he argues that the Article contains an "elder abuse theme," which the average reader would understand from the following:

- the headline accusing Batterman of "violating a dead man's trust;"
- A picture of Joe Geisler taken during his later years that appeared below the headline;
- Statements indicating that Geisler was a hardworking man who entrusted Batterman to administer his trust;

- The reporting on Batterman's "mishandling" of the Geisler Trust; and finally,

- Quotations from Geisler's nephews stating that "Joe Geisler didn't have anyone to make sure he was making good financial decisions" and that Batterman was "taking advantage" of Geisler's good intentions.

Dkt. 18, at 21-22.

In the midst of these statements and the reporting on the *Geisler Trust* litigation, Batterman argues, the hyperlink declaring a story about elder abuse to be "Related" to the Batterman Article creates the false impression that Batterman himself was engaged in "elder abuse" and "financial exploitation."[5]

To clarify, Batterman does not claim that the hyperlinked article about "Five ways to fight elder abuse" is false or in any way defamatory towards him. With the exception of his claim that the Article implied that he committed fraud, which I have already rejected, Batterman also does not claim that any of the underlying statements in the Article that allegedly contribute to the "elder abuse" implication are false. For example, he does not challenge any of the statements related to Joe Geisler or his frugality, nor does he contend that the Article misquoted Geisler's nephews or used their statements out of context to create a false impression. What is defamatory, says Batterman, is Gannett's declaration that the hyperlinked article about elder abuse was "related" to the Article about Batterman's handling of the Geisler Trust. By drawing

[5] At the dismissal stage, for the purposes of this particular claim, I am generously accepting Batterman's allegation that this implication is false, even though he has not specifically alleged in the complaint that he does *not* exploit elders for financial gain. Further, the public records do not conclusively refute this allegation. Judge Moran did not find that Batterman exploited Geisler, he found that Batterman breached his duties as trustee for Geisler's Trust. At this juncture, these types of misconduct are different enough to preclude me from finding from the exhibits to the complaint that the "elder abuse" implication is true.

a connection between the articles, he argues, Gannett deliberately implied that Batterman had engaged in elder abuse.

Neither party has cited and the court has not found a Wisconsin case considering whether a plaintiff can state a cause of action for defamation-by-implication based on a collection of expressed facts that are true. The closest case is *Terry*, but there the plaintiff pointed to video edits and music that allegedly implied the falsehood, taking her case outside the realm of "statements." Here, the plaintiff points to an actual statement by the publisher — its endorsement of a different article as "Related" — as giving rise to the defamatory implication.

The Seventh Circuit has expressed concern about the tensions between the First Amendment and defamation-by-implication claims based on true statements:

> [R]equiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.

Woods v. Evansville Press Co., 791 F.2d 480, 487–88 (7th Cir. 1986). *See also* Sack on Defamation, § 2:4.5 ("If unrestrained . . . the theory of libel by implication would allow a jury to draw whatever inferences it wished from statements of fact."). The *Woods* court found, however, that these concerns were adequately addressed in that case by Indiana's fault requirement, which required that "the private individual who brings a libel action involving an event of general or public interest [must] prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false." *Woods*, 791 F.2d at 483 (quoting *Aafco Heating & Air Conditioning Co. V. Northwest Publications, Inc.*, 162 Ind. App.

671, 321 N.E. 2d 580, 586 (1974)). Because that standard required a showing that defendant was motivated by ill-will or invidious intent, held the Seventh Circuit, it was not enough for the plaintiff to show that the column at issue reasonably could be read to contain a defamatory inference:

> Simply because a statement reasonably can be read to contain a defamatory inference does not mean, as is the case here, that this inference is the only reasonable one that can be drawn from the article. Nor does it mean that the publisher of the statement either intended the statement to contain such a defamatory implication or even knew that readers could reasonably interpret the statement to contain the defamatory implication.
>
> In the present case, there is no evidence that the defendants, through Mr. McManus, shared the plaintiff's interpretation of the June 22 column or intended that the column be read to contain the defamatory innuendoes the plaintiff attributes to it.
>
> *Woods*, 791 F.2d at 487.

The Court of Appeals for the District of Columbia has likewise found that "something more" is required of a plaintiff who brings a defamation-by-implication claim based on materially true facts. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), the court held:

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.

Id. At 520. *See also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092–93 (4th Cir. 1993) (in libel-by-implication case where expressed facts are true, "the language must not only be

reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.") (citing *White*, 909 F.2d at 520).

Based on these authorities, and in the absence of any Wisconsin law or argument from Gannett to the contrary, I conclude that Batterman can proceed on his claim that Gannett defamed him by implying that he committed elder abuse. As an initial matter, I note that in the cases cited above, the plaintiffs had to show actual malice, either because they were public figures (*White, Chapin*), or because state law required it (*Woods*). Although the parties in this case have not addressed this issue, it appears that Batterman is a private individual. In Wisconsin, private figures who bring defamation actions against the news media need only show negligence, *Denny v. Mertz*, 106 Wis. 2d 636, 657, 318 N.W.2d 141, 151 (1982), which suggests that Batterman need make a less rigorous showing than in the cases above.

In any case, I am satisfied that Batterman's complaint plausibly states a claim for defamation by implication even under the more demanding standard required in actual malice cases. Construing the facts in the light most favorable to Batterman, the Article as a whole is capable of conveying the defamatory inference that Batterman financially exploits elders. The Article's reporting on the *Geisler Trust* and SEC proceedings depicted Batterman as an unscrupulous financial adviser who mishandles his clients' money, and the quotations from Geisler's nephews alluded to elder abuse when they indicated that Batterman, their uncle's former financial adviser, "took advantage" of the elder Joe Geisler.

Perhaps if Gannett had stopped there and allowed its readers to draw their own conclusions from these statements, dismissal would be appropriate. But Gannett did something more: it told its readers in capitalized, bold letters that another article about "elder abuse" was

"related" to the story about Batterman. By doing so, Gannett did not merely present a set of facts that permitted readers to infer that Batterman exploited elderly clients; instead, it drew the inference for them. Gannett's decision to deem an article about elder abuse "related" to the Batterman article "supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference," *White*, 909 F.2d at 520. This suffices to state a claim for defamation by implication. Moreover, to the extent Gannett implied that Batterman committed elder abuse, that statement is not privileged under Wis. Stat. § 895.05(1), insofar as it is not a "true and fair" report of a judicial or other governmental proceeding.

Accordingly, given the parties' respective burdens at the Rule 12(b)(6) stage, I am denying Gannett's motion to dismiss this claim.

II. Explicit Statements

A. "Batterman Was the Trustee"

Batterman contends that in 10 different statements, the Article "falsely identifies Batterman or an entity controlled by Batterman as the trustee overseeing the administration of the Geisler Trust." Br. in Opp., dkt. 18, at 17-18. According to Batterman, "Vigil Trust," the named trustee, was a registered trade name that he alleges was owned by Midwest Trust Company and in which Batterman had no ownership or financial interest. Throughout the complaint, Batterman repeatedly attempts to distance himself from Vigil Trust, arguing that he was not the successor trustee and that he was acting only at the direction or with the approval of Vigil Trust. *See, e.g.*, Complaint, ¶¶ 56.b, 56.e, 56.I, 56k. Batterman alleges that "the two persons responsible for the administration of trusts for which Vigil Trust is trustee are Herbert

McPherson and Janice Smith." Complaint, ¶¶ 19, 56b. Therefore, he contends, the Article falsely represented that Vigil was a company owned and controlled by Batterman and falsely represented that "Batterman" was the trustee for the *Geisler Trust*.

Batterman's claim is defeated by the public records from the *Geisler Trust* litigation, which corroborate the Article's statements identifying Batterman as the trustee. First, as for Gannett's reporting on what was *alleged* in the ACS petition, it was accurate: the petition alleged that Batterman, on behalf of Vigil, operated as the trustee, administered the funds, and was responsible for carrying out its terms. Second, documents that Batterman *himself* provided to the court in the *Geisler Trust* proceeding demonstrate that he bore responsibility for deciding how to administer the trust funds. As his own submissions establish, he had multiple communications with ACS about the trust, he held himself out as the trustee, and in one email, he referred to Vigil Trust as his company. Dkt. 6-10, exh. 13.

Batterman points out that the court's November 11, 2015 order appointing successor trustee stated only that it was removing "Vigil Trust" and not "Batterman" as trustee, but that is irrelevant. It is plain from the court's orders that it found that Vigil Trust, nominally the trustee, had acted *through Batterman*. The court found that Batterman was responsible for failing to timely notify the beneficiaries, for setting up a scholarship fund without the prior consent of the Bruce School District, and for breaching his fiduciary duty to the trust. Finally, after refusing to dismiss Batterman from the case, the court found that "Mr. Batterman is the trust protector in this case," and it held him jointly and severally liable with Vigil and Midwest Trust Company for damages and attorney's fees. Tr., July 11, 2018, dkt. 6-9, at 26.

Clearly, the court agreed with the beneficiaries that, whatever the technical relationship between Batterman and Vigil, Batterman was acting on Vigil's behalf and carrying out the responsibilities of the trustee. That Batterman disputes the court's findings is factually and legally irrelevant. The court found what it found, and Gannett was entitled to report on it. Because the Article presented a substantially accurate account of the court's findings regarding Batterman's role with the trust, the statements were not false. Moreover, they were privileged under Wis. Stat. § 895.05(1).

B. "Batterman was 'Found Guilty' by the SEC"

As noted in the facts, Batterman concedes that he and his related companies were the subject of SEC proceedings in 1997 and 2018. Because the SEC's administrative orders were an "other public official proceeding authorized by law," the newspaper's reporting on those proceedings was privileged under Wis. Stat. § 895.05(1) so long as the report was "true and fair." Batterman claims that the Article's statements about the SEC proceedings were not true and fair because he and his related companies were not "found guilty of wrongdoing" by the SEC, as reported in the Article. According to Batterman, the term "found guilty" is false because it implies criminal proceedings, not civil administrative findings, and because Batterman consented to the SEC's findings without admitting or denying the alleged conduct.

While the use of the term "found guilty" may be technically inaccurate in the context of the SEC orders, this inaccuracy is not substantial enough to render the Article's reporting on the SEC proceedings untruthful or unfair. "[W]hen determining whether an article constitutes a fair and true report, the language used therein should not be dissected and analyzed with a

lexicographer's precision. The article need only be a substantially accurate rendering of the allegations of the complaint." *Procter & Gamble Co. v. Quality King Distributors, Inc.*, 974 F. Supp. 190, 196 (E.D.N.Y. 1997) (internal quotation marks and citations omitted.) Within the legal system, being "found guilty" implies the commission of a crime; however, non-lawyers commonly use the term simply to denote responsibility or blameworthiness. *See, e.g.,* https://www.merriam-webster.com/dictionary/guilty (defining "guilty" as "justly chargeable with or responsible for a usually grave breach of conduct *or* a crime," emphasis added).

Construed in this commonplace manner, the statement that Batterman was "found guilty of wrongdoing" by the SEC is substantially accurate: the SEC found that Batterman had mishandled client funds and had engaged in deceptive behavior in violation of rules that governed Financial Advisers, then the SEC ordered Batterman (and Vigil and Financial Fiduciaries, respectively) to cease the behavior and it imposed substantial fines on them. That Batterman may have stipulated to the findings does not change these facts or significantly diminish the import of the SEC's findings against him. In sum, because Batterman cannot make a plausible showing that any of the statements related to the SEC proceedings were not substantially true and fair, these statements are privileged and not actionable.

CONCLUSION

Even construed in the light most favorable to Batterman, Batterman doesn't have any plausible claim that the headline or any of the individual, allegedly defamatory statements in the Article are false. As the Article accurately reported, the Marathon County Circuit Court did find that he was responsible for carrying out and protecting the Geisler Trust, and the SEC did find

that he had engaged in wrongdoing with respect to his handling of client assets. With respect to his defamation-by-implication claims, it is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement with respect to the Geisler Trust, particularly given the Article's plain statement that no such finding had been made. When read as a whole, the Article's "sting" is a substantially true account of what occurred in the *Geisler Trust* litigation.

However, the average reader *could* conclude that Batterman had financially exploited elders, especially when Gannett suggested as much by directing the reader's attention to a "RELATED" article about elder abuse. Because Batterman has sufficiently alleged that the Article's implicit accusation that Batterman had engaged in elder abuse is both false and defamatory, Gannett is not entitled to dismissal of this claim. Whether the Article's explicit and implicit statements in this regard are reasonably capable of conveying a non-defamatory meaning is an open question that Gannett may address in response to Batterman's pending motion for partial summary judgment on liability, dkt. 17. Because this ruling may affect Gannett's approach to that motion, and because the deadline is rapidly approaching, I will extend it by three weeks, to June 26, 2020.

ORDER

IT IS ORDERED that:

1. The motion of defendant Gannett Co. Inc., to dismiss plaintiffs' complaint for failure to state a claim, dkt. 4, is GRANTED IN PART and DENIED IN PART, consistent with this order.

2. Gannett's deadline for responding to plaintiffs' early motion for summary judgment on liability, dkt. 17, shall be extended to June 26, 2020. Plaintiffs' reply is due on July 10, 2020.

Entered this 1st day of June, 2020.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FINANCIAL FIDUCIARIES, LLC,
a Wisconsin limited liability company, and
THOMAS BATTERMAN,

Plaintiffs,

v.

GANNETT CO., INC.,

Defendant.

OPINION AND ORDER

19-cv-874-slc

In this civil suit brought under the court's diversity jurisdiction, financial advisor Thomas Batterman and his company, Financial Fiduciaries, LLC, contend that defendant Gannett Co., Inc. defamed them in an unfavorable news article that initially was published on August 21, 2018 in the Wausau Daily Herald and then was updated on September 19, 2018. Before the court are two motions: (1) plaintiffs' motion to amend their complaint, dkt. 43; and (2) plaintiffs' motion for summary judgment on the claims asserted in their initial complaint, dkt. 17.[1] As explained below, I am denying both motions.

BACKGROUND

Plaintiffs filed the complaint on October 24, 2019, alleging that defendant had defamed them in an article "initially published on August 21, 2018 in the Wausau Daily Herald" (the "Article"). Dkt. 1. The Article reported on a petition that had been filed in the Circuit Court for Marathon County, in which petitioners sought Batterman's removal as trustee over a charitable trust established by one of his clients, Joseph Giesler. The complaint alleges that the

[1] Also pending is a motion by defendant to file a sur-reply to the summary judgment motion, dkt. 41, which I will grant.

Article was false and defamatory in several respects. In particular, plaintiffs allege that the Article did not accurately reflect the circuit court proceedings, making it seem as if they had committed embezzlement and fraud when in fact the court had not made any such findings. Although plaintiffs identified the headline and 20 statements within the body of the Article that were allegedly false and defamatory, they did not attach the August 21, 2018 version or any other version of the Article to the complaint, nor did they allege facts relating to plaintiffs' efforts to locate that or any other version of the Article. The complaint noted that, following plaintiffs' August 30 and September 1, 2018 retraction demands, defendant updated and republished the Article, but the complaint alleged that the updated Article remained defamatory. *Id*. at ¶ 58, 59.

On December 3, 2019, defendant moved to dismiss under Fed. R. Civ. P. 12(b)(6). In support of the motion, defendant submitted a copy of the September 19, 2018 version of the Article and records from the Marathon County trust proceeding. Dkts. 4, 6. Among other things, defendant argued that plaintiffs could not show that the Article falsely implied that they had engaged in fraud or embezzled funds given the following sentence:

> Although a judge later found that Batterman had not committed fraud, theft or embezzlement, he ruled that the financial adviser had engaged in multiple acts of 'bad faith' and ordered him to be removed from handling the Geisler Trust to pay part of the charities' legal fees.

Br. in Supp., dkt. 5, at 22.

In their responsive submissions, plaintiffs objected that the September 19, 2018 version of the Article that defendant had submitted did not include certain defamatory hyperlinks that appeared in the online version of the Article. Batterman submitted an affidavit to which he

attached a "true and correct copy of the Article as published on September 19, 2018," which included the hyperlinks. Batterman Aff., dkt. 20, at ¶ 2, exh. 1.

Although Batterman asserted that he had not been able to locate a copy of the Article as originally published, *id*. at ¶ 3, plaintiffs did not object to the court considering the September 19, 2018 version of the Article for purposes of defendant's motion to dismiss. In fact, plaintiffs filed their *own* motion for partial summary judgment based on the record before the court, asserting that there were no genuine issues of material fact that the Article as a whole and numerous statements within it were false, published to third parties, defamatory, and not privileged.[2] Dkt. 18.

On June 1, 2020, this court issued an order dismissing the bulk of the complaint. Examining plaintiffs' allegations against the September 19, 2018 version of the Article as submitted by Batterman and the public records submitted by defendant, I found that

> it is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement with respect to the Geisler Trust, particularly given the Article's plain statement that no such finding had been made. When read as a whole, the Article's "sting" is a substantially true account of what occurred in the *Geisler Trust* litigation.

Ord. on Mot. to Dismiss, dkt. 32, at 40-41. This court further found that the Article had not been false when it indicated that Batterman had been responsible for carrying out and protecting the Geisler Trust, or when it reported that the SEC found that Batterman had engaged in wrongdoing with respect to his handling of client assets. *Id*.

[2] On February 24, 2020, I granted defendant's motion under Fed. R. Civ. P. 56(d) to continue its deadline to respond to plaintiffs' motion for summary judgment until after the court ruled on defendant's dismissal motion. Dkt. 29.

However, this court found that plaintiffs *could* proceed on their claim that defendant had defamed them by implying that they had financially exploited elders, noting that defendant had, by way of a hyperlink, "suggested as much by directing the reader's attention to a 'RELATED' article about elder abuse." *Id*. at 41. However, ruled the court, "[w]hether the Article's explicit and implicit statements [about elder abuse] are reasonably capable of conveying a non-defamatory meaning is an open question that Gannett may address in response to Batterman's pending motion for partial summary judgment on liability[.]" *Id*.

On June 15, 2020, defendant filed its answer, and on June 26, 2020, it filed its opposition to plaintiffs' still-pending motion for summary judgment. Dkts. 33-37. On July 10, 2020, the date their reply was due, plaintiffs filed 57 new pages of material, including a new declaration by Thomas Batterman, attached to which were copies of the Article as originally published on August 21, 2018. Dkt. 40. Notably, this copy of the Article does *not* contain the "disclaimer" language stating that the judge in the *Giesler Trust* litigation had found that Batterman had not committed fraud, theft or embezzlement.

In his affidavit, Batterman avers that, in spite of his diligent efforts to do so, he had been unable to locate an original copy of the Article until June 6, 2020. *Id*. at ¶ 2. According to Batterman, he was out of the country when it was published and saw the article on line, but he did not save a copy before Gannett revised it. *Id*. at ¶ 4. Batterman avers that in late 2019 and early 2020, he scoured his computer, home, office, and newspaper archives in an attempt to track down a copy of the original Article. *Id*. at ¶ 6. He also spoke with various friends, acquaintances, and former clients who had mentioned seeing the Article to see if any of them had saved a copy of the original. *Id*. He first learned that a friend, Howard Fisher, might have

a copy after he spoke with Fisher on June 5, 2020. After their conversation, Fisher checked his email and found a copy of an email he had sent to his wife back when the Article first appeared, and this email included a copy of the original Article. *Id*. at 7-9.

Batterman further avers that on June 24, 2020, a former client provided him with a copy of the original Article that had been published in print on August 24, 2018 in the *Waupaca Wisconsin State Farmer*. *Id*. at 10. (On July 8, 2020, in response to plaintiffs' concerns about some of defendant's discovery responses and production, defendant acknowledged that the original version of the Article had been published in print in the *Waupaca Wisconsin State Farmer*, but denied that it had appeared in print in any other publications.) Finally, says Batterman, after defendant pointed out that plaintiffs would necessarily have had a copy of the original version of the Article because they demanded that defendant retract or correct it, on July 13, 2020, Batterman contacted the Denver law firm that had represented him in connection with the retraction demand and learned that it had a copy of the original Article in its file. *Id*. at 13. According to Batterman, it had not occurred to him before July 13 that his own lawyers in Denver might have a copy of the Article as originally published because he never sent them a copy, only links to where it appeared online. *Id*. at 16.

Having now located a copy of the original version of the Article, plaintiffs seek permission to amend their complaint and a ruling that their summary judgment motion is moot. Dkts. 42-43. Plaintiffs' proposed amended complaint attaches the original version of the Article, both as it appeared online on August 21, 2018, and in print in the *Wisconsin Farmer* on August 24, 2018, and it includes a number of new statements concerning the alleged inadequacy of defendant's revisions. As for the statements in the Article alleged to be defamatory, plaintiffs mostly repeat the allegations from their original complaint. Acknowledging that "[t]he complaint, Gannett's

Rule 12(b)(6) motion and Plaintiffs' motion for partial summary judgment only considered the September 19, 2018 version of the article,"dkt. 42, at 2, plaintiffs say their recent discovery of the original Article effectively moots their summary judgment motion and is reason to allow them to amend their complaint. In other words, plaintiffs want a do-over, using the August 21, 2018 version of the Article in addition to or instead of the September 19 version.

OPINION

I. Motion to Amend

Generally, a motion for leave to amend a pleading is evaluated under Fed. R. Civ. P. 15(a)(2), which provides that courts should "freely give leave when justice so requires," unless there is "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015) (citing *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008)). In this case, plaintiffs sought leave to amend their complaint on July 15, 2020, a little over three months after the April 6, 2020, deadline set forth in this court's scheduling order for amendments to the pleadings without leave of court. Pretrial Conf. Ord., dkt. 16, at 1. A party seeking to amend a pleading after the expiration of the trial court's scheduling order deadline must meet the heightened "good-cause" standard of Rule 16(b)(4) before the court considers the requirements of Rule 15. *CMFG Life Ins. Co. v. RBS Sec., Inc.*, 799 F.3d 729, 749 (7th Cir. 2015); *see also Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). In making this determination, the court's "primary consideration . . . is the diligence of the party seeking amendment." *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011).

I accept plaintiffs' assertions that both before and after filing the complaint they attempted to locate a copy of the Article as it originally was published on August 21, 2018. As they point out, they had every incentive to find a copy of the original Article and had no reason to "hide" it.

Even so, plaintiffs' conduct in pursuing this lawsuit precludes me from finding that they acted with sufficient diligence to warrant amending the scheduling order. If, as plaintiffs insist, they were aware that defendant had published an earlier, more harmful version of the Article than the one that it submitted in support of the dismissal motion, then common sense, logic, efficiency and self-preservation all screamed out to plaintiffs that the time to raise this issue was *during the dismissal proceedings*. Even without a copy of the original Article in hand, plaintiffs logically and easily could have–should have–

> (1) Moved to dismiss their suit without prejudice after defendant filed the motion to dismiss, then taken the time necessary to locate the Article;
>
> (2) Objected to the materials submitted by defendant in connection with its motion to dismiss on the ground that defendant was not using the original Article; or
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> (3) Asked the court to stay a ruling on the motion to dismiss until plaintiffs had a chance to locate a copy of the original version, either by serving discovery on Gannett or from outside sources.

Rather than exercise any of these commonplace and clearly available options, plaintiffs chose to litigate this case as if the September 19, 2018 version of the Article was at issue, submitting their *own* copy of the September 19 Article in response to the dismissal motion.

Even worse for them now, plaintiffs doubled-down, moving for summary judgment on the ground that no reasonable fact finder could conclude that the September 19 Article was not

false and defamatory. In other words, as a tactical matter, plaintiffs chose to go on offense despite the fact that defendant supported dismissal in part by emphasizing the "disclaimer" language that did *not* appear in the original version of the Article. So far as it appears, it was only after the court relied on this same language in dismissing the bulk of their complaint that plaintiffs renewed their search for the original Article.

That was too late. Under these circumstances, I find that good cause does not exist for amending the schedule so that plaintiffs now may amend their complaint. "Seeking to amend one's complaint when it appears that the current one is a sure loser is not unusual; nor is the denial of leave to file that amended complaint." *Hindo v. Univ. of Health Scis./The Chicago Med. Sch.*, 65 F.3d 608, 615 (7th Cir. 1995). As Batterman acknowledges, he has known since before this case was filed that the original August 21, 2018 Article was "more harmful" than the revised article. Batterman Aff., dkt. 44, ¶ 17. Even so, he chose not only to file this lawsuit, but to defend the motion to dismiss without it, never mentioning until mid-July that his efforts to locate the August 21, 2018 Article were ongoing. Meanwhile, this court read the parties' lengthy submissions, did its own legal research, then wrote a 43-page order, while defendant prepared its response to plaintiffs' motion for summary judgment. All of this work was premised on the September 19, 2018 version of the Article, which was fine with plaintiffs at the time. Now that they've lost, they're not fine with it anymore.

Indeed, although plaintiffs frame their motion as a request for leave to amend, what they really want is reconsideration of this court's June 1 order. Having chosen to go forward without objection and having lost, plaintiffs are asking for a mulligan in order to avoid the impact of the court's unfavorable ruling. A motion for reconsideration cannot be employed as a vehicle to

introduce new evidence that could have been adduced during the pendency of a dispositive motion. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (citations omitted). "To support a motion for reconsideration based on newly discovered evidence, the moving party must 'show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of the motion].'" *Id*. at 1270 (quoting *Engelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963)).

The Seventh Circuit's decision in *Caisse Nationale* is instructive here. There, plaintiff sued defendant, alleging anticipatory breach of an option contract. Over plaintiff's objection, defendant was permitted to move immediately for summary judgment without answering the complaint. Defendant assured the district court that the "only" issue before the court was "an extremely simple one": "[W]hether or not [Credit] exercised the option in a timely fashion." Hence, it said, "no discovery [would be] necessary." After deposing one of defendant's employees, plaintiff filed a cross-motion for summary judgment on all counts. The court granted plaintiff's motion and denied defendant's. *Id.*, 90 F.3d at 1268.

Armed with new counsel, defendant sought reconsideration, arguing that evidence material to the cross-motions for summary judgment had not been before the court. *Id*. Among other things, defendant contended that the option documents sent by plaintiff to defendant had mistakenly omitted an addendum. *Id*. Affirming the district court's denial of the motion for reconsideration, the court of appeals wrote:

> [W]e are not convinced that CBI could not "with reasonable diligence have discovered and produced" the allegedly missing addendum during the pendency of the motion for summary judgment. With its legal theory dependent upon collateral sources,

> it was incumbent upon CBI to ensure that the district court was reviewing the proper documents. That it failed to do so is not so much evidence that CBI was caught by surprise, which CBI implies on appeal, as that it was content to do battle with the documents then before the court. In an unusual and risky maneuver, CBI declined to answer Credit's complaint and instead insisted on proceeding directly to summary judgment, alleging the case was "all based on facts presented by the plaintiff" and thus that "no discovery [would be] necessary." When that tactic failed, CBI retained new counsel who quickly discovered the alleged omission, confirming that "reasonable diligence" would have revealed it during the summary judgment phase.
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> *Id*. at 1270 (internal citations omitted).

The court could be writing about this lawsuit. As in *Caisse Nationale*, plaintiffs' theory of prosecution was "dependent upon collateral sources." Plaintiffs criticize defendant for submitting the updated version of the Article instead of the original, but "it was incumbent upon *[plaintiffs]* to ensure that the district court was reviewing the proper documents." *Id*. (emphasis added.) As noted above, when plaintiffs saw how defendant was drawing the battle lines, they should have called for a cease-fire until they had exhausted their search for the proper Article. Such a search easily could have included a demand that defendant search its files, or a simple email request to plaintiffs' original attorneys in this lawsuit. But plaintiffs not only failed to call attention to what they now view as misdirection, they actively consented "to do battle with the documents then before the court" by filing their own motion for summary judgment. After that approach failed abysmally, plaintiffs suddenly were able to find a copy of the original Article, thereby "confirming that 'reasonable diligence' would have revealed it" during the proceedings on the motion to dismiss. *Caisse Nationale*. 90 F.3d at 1270.

In sum, plaintiffs have not exercised the diligence necessary to permit them to amend their complaint or to persuade this court to reconsider its dismissal order. This case will proceed

on the original complaint as framed by *both* parties and as narrowed by the court's June 1 order, namely, whether an ordinary reader would understand the on line version of the Article, as updated on September 19, 2018, to imply that plaintiffs committed elder abuse, whether that implication is false, and whether plaintiffs sustained damages as a result.

II. Plaintiffs' Motion for Summary Judgment

Plaintiffs' motion for summary judgment requires little discussion. As they concede in their July 14, 2020 reply, this court effectively denied the motion when it dismissed most of their complaint on June 1.[3] Reply Br., dkt. 42, at 2. As for the one remaining claim concerning the implication that plaintiffs committed elder abuse, plaintiffs note that they did not explicitly seek summary judgment on that ground. Accordingly, the court will deny the motion.

Invoking Rule 56(f)(1), defendant argues that this court should grant summary judgment in *its* favor on the remaining elder abuse implication. Rule 56(f)(1) states that "[a]fter giving notice and a reasonable time to respond, the court may . . . grant summary judgment for a nonmovant." Fed. R. Civ. P. 56(f)(1). This Rule "simply formalized what had been long-recognized as a court's ability to sua sponte, after providing notice to the parties and a reasonable time to respond, grant summary judgment . . . . It did not create a substitute for a cross-motion to summary judgment." *Nat'l Exch. Bank & Tr. v. Petro-Chem. Sys., Inc.*, 2013 WL 1858621, at *1 (E.D. Wis. May 1, 2013). In other words, Rule 56(f)(1) can be invoked by the

[3] In light of this concession, it is troubling that plaintiffs did not withdraw the motion after the court issued the motion to dismiss, which would have spared defendant its June 26, 2020 response, dkts. 35-37.

court, not the parties, and it requires that the court provide the parties with an opportunity to respond.

I decline to invoke Rule 56(f)(1) at this time. Discovery has not yet closed and defendant has indicated that it plans to file its own motion for summary judgment in accordance with the court's scheduling order. Defendant can reassert its arguments in favor of dismissal of the remaining claim at that time.

ORDER

IT IS ORDERED that:

1. Defendant's motion to file a sur-reply, dkt. 41, is GRANTED;

2. Plaintiffs' motion to amend the complaint, dkt. 43, is DENIED; and

3. Plaintiffs' motion for summary judgment, dkt. 17, is DENIED.

Entered this 8th day of September, 2020.

BY THE COURT:

/s/

_____
STEPHEN L. CROCKER
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FINANCIAL FIDUCIARIES, LLC,
a Wisconsin limited liability company, and
THOMAS BATTERMAN,

Plaintiffs,

v.

GANNETT CO., INC.,

Defendant.

OPINION AND ORDER

19-cv-874-slc

Thomas Batterman and his company, Financial Fiduciaries, LLC, are suing defendant Gannett Co., Inc. for defamation on the basis of an unfavorable news article that initially was published on August 21, 2018 in the *Wausau Daily Herald*, then was updated on September 19, 2018. In an opinion and order issued June 1, 2020, this court dismissed the bulk of plaintiffs' complaint. Dkt. 32. Gannett now seeks summary judgment on the one claim that survived: that the Article published by defendant defamed plaintiffs by implying that they financially exploit elders. Dkt. 55. As explained below, I am granting that motion on the ground that this implication is substantially true.

FACTS

The Article underlying this suit was first published by defendant on August 21, 2018, in the *Wausau Daily Herald* under the headline "*Wisconsin financial advisor accused of violating a dead man's trust, mishandling $3 million*".[1] The Article reported on a probate matter in the Circuit

[1] The Article was written by Sam Wisneski, a journalism student from UW-Milwaukee who interned at the *Herald* that summer. Wisneski's work was reviewed by Mark Treinen, Gannett's News Director for publications in Central/East Wisconsin, and Robert Mentzer, a storytelling coach for Gannett.

Court for Marathon County, Wisconsin that had been initiated nearly three years earlier by the American Cancer Society (ACS). ACS claimed that Batterman, in his capacity as trustee for the Geisler Trust, had violated his statutory duties by mismanaging trust funds (the "*Geisler Trust* litigation"). The Article also reported on two administrative orders filed by the Securities and Exchange Commission in 1997 and 2018 in which the SEC fined Batterman and his related companies for violating certain rules governing financial advisers. (I discussed both the *Geisler Trust* litigation and the Article in the court's June 1, 2020 order, dkt. 32, and I incorporate that discussion herein by reference.)

On August 30, 2018, Batterman, by counsel, sent Gannett a demand for retraction or correction, identifying the headline and 19 other statements or features of the Article as either false or misleading. Gannett determined that no retraction was warranted, but on September 19, 2018, it published an updated online version of the Article that clarified the Marathon County Circuit Court's ruling on the allegations against Batterman. A copy of the updated Article remains online.

Batterman contends that the Article as a whole was defamatory because it reported on allegations in the *Geisler Trust* litigation that were either "discredited" or "abandoned" by the time the Article was published. This created the false impression that Batterman had engaged in fraud or embezzled funds, when in fact both the successor trustee and the court in the *Geisler Trust* litigation had explicitly found no fraud, theft or embezzlement. Batterman further contends that the Article was defamatory because: (1) its tactical use of hyperlinks embedded within the Article falsely implied that Batterman had committed embezzlement and elder abuse; (2) it inaccurately identified Batterman or an entity controlled by him as the trustee overseeing

the administration of the Geisler Trust; and (3) the SEC did not find Batterman "guilty" of any wrongdoing, as reported in the Article.

On June 1, 2020, this court issued an order dismissing the bulk of the complaint. Examining plaintiffs' allegations against the September 19, 2018 version of the Article[2] as submitted by Batterman and the public records submitted by defendant, I found that:

> It is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement with respect to the Geisler Trust, particularly given the Article's plain statement that no such finding had been made. When read as a whole, the Article's "sting" is a substantially true account of what occurred in the *Geisler Trust* litigation.
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> Ord. on Mot. to Dismiss, dkt. 32, at 40-41.

I further found that:

> Contrary to Batterman's contention, the court did *not* reject *all* of ACS's allegations concerning Vigil Trust/Batterman's administration of the Geisler Trust. As reported in the Article, the court found that Vigil, through Batterman, *had* breached its duties as a trustee when it failed to notify the beneficiaries within a reasonable time frame, failed to provide complete and timely information, and made unilateral decisions that arguably favored Vigil about how the gift was to be distributed to the beneficiaries. Further, the court found that those breaches "amounted to something of bad faith, fraud or deliberate dishonesty." As Gannett accurately reported, although Judge Moran found that Batterman had not committed fraud, theft or embezzlement, "he ruled that the financial adviser had engaged in multiple acts of 'bad faith' and ordered him to be removed from handling the Geisler trust and to pay part of the charities' legal fees."

[2] About a month later, Batterman sought reconsideration (in the form of a motion to amend the complaint) on the ground that he had recently located a copy of the original Article as published on August 21, 2018. I denied that motion on September 8, 2020. Dkt. 49. In his opposition to the instant summary judgment motion, Batterman asks the court to reconsider that order and allow him to proceed on the August 21, 2018 version of the Article. That request is denied. Batterman's new arguments do not convince me that I erred in denying his request the first time.

> In light of these rulings, Batterman cannot plausibly show that the Article was false insofar as it implied that Vigil/Batterman had "mishandled" or "committed wrongdoing" with respect to the trust funds . . . when these terms are considered in the context in which they were used, they plainly were not meant to indicate fraud, but rather that Batterman had failed to properly execute his duties with respect to the trust funds.
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> *Id*. at 29-30.

This court further found that the Article had not been false when it indicated that Batterman had been responsible for carrying out and protecting the Geisler Trust, or when it reported that the SEC found that Batterman had engaged in wrongdoing with respect to his handling of client assets. *Id*.

However, I reached a different conclusion with respect to Batterman's claim that Gannett defamed him by falsely implying, by virtue of a captioned hyperlink stating: "**RELATED**: Five ways to fight elder abuse, financial exploitation," that he had committed "elder abuse" by financially exploiting elders. Gannett had paid little attention to this allegation in its briefing, arguing only that the hyperlink caption and related article were not defamatory because they were not statements about Batterman or his companies. After surveying the law and commentary concerning defamation-by-implication, I allowed the claim to survive dismissal, stating:

> Batterman's complaint plausibly states a claim for defamation by implication even under the more demanding standard required in actual malice cases. Construing the facts in the light most favorable to Batterman, the Article as a whole is capable of conveying the defamatory inference that Batterman financially exploits elders. The Article's reporting on the *Geisler Trust* and SEC proceedings depicted Batterman as an unscrupulous financial adviser who mishandles his clients' money, and the quotations from Geisler's nephews alluded to elder abuse when they indicated

> that Batterman, their uncle's former financial adviser, "took advantage" of the elder Joe Geisler.
>
> Perhaps if Gannett had stopped there and allowed its readers to draw their own conclusions from these statements, dismissal would be appropriate. But Gannett did something more: it told its readers in capitalized, bold letters that another article about "elder abuse" was "related" to the story about Batterman. By doing so, Gannett did not merely present a set of facts that permitted readers to infer that Batterman exploited elderly clients; instead, it drew the inference for them. Gannett's decision to deem an article about elder abuse "related" to the Batterman article "supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference," *White [v. v. Fraternal Order of Police,* 909 F.2d 512 (D.C. Cir. 1990)*]*, 909 F.2d at 520. This suffices to state a claim for defamation by implication. Moreover, to the extent Gannett implied that Batterman committed elder abuse, that statement is not privileged under Wis. Stat. § 895.05(1), insofar as it is not a "true and fair" report of a judicial or other governmental proceeding.
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> *Id*. at 36-38.

Finally, in a footnote, I explained that

> At the dismissal stage, for the purposes of this particular claim, I am generously accepting Batterman's allegation that this implication is false, even though he has not specifically alleged in the complaint that he does *not* exploit elders for financial gain. Further, the public records do not conclusively refute this allegation. Judge Moran did not find that Batterman exploited Geisler, he found that Batterman breached his duties as trustee for Geisler's Trust. At this juncture, these types of misconduct are different enough to preclude me from finding from the exhibits to the complaint that the "elder abuse" implication is true.
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> *Id*. at 34, n.5.

OPINION

Defendant now moves for summary judgment, asserting that plaintiffs' remaining claim must be dismissed because, insofar as the Article implies that plaintiffs engaged in a form of elder abuse by financially exploiting elders, this implication is substantially true. *See Lathan v. Journal Co.,* 30 Wis. 2d 146, 158, 140 N.W.2d 417, 423 (1966) (to defeat a defamation action, article or statement in question need not "be true in every particular" but must only be "substantially true"). Although not framed in these terms, defendant essentially asks this court to reconsider footnote 5, quoted above, wherein this court said that the records and court rulings from the *Geisler Trust* proceedings did not establish the truth of the elder abuse implication because the case involved Batterman's abuse of Geisler's trust, not Geisler himself.

Pointing out that slight inaccuracies of expression are immaterial so long as the "gist" or "sting" of the implication is correct, defendant argues that "issues of elder abuse and financial exploitation were an indispensable and unavoidable part of the [*Geisler Trust*] case": Joe Geisler was elderly when he died, and Batterman, the person entrusted to dispense his fortune in accordance with his wishes, abused that trust. *A fortiori*, argues defendant, this court's conclusion that the Article fairly and accurately reported on the *Geisler Trust* litigation dispenses simultaneously with the alleged falsity of the elder abuse implication. Br. in Supp., dkt. 56, at 15-16.

Plaintiffs respond that this court should deny the motion because it is just a rehash of its 12(b)(6) argument. As plaintiffs correctly note, defendant relies mostly on the same record from the *Giesler Trust* proceeding that it submitted in support of its 12(b)(6) motion and upon

which this court relied in dismissing most of plaintiffs' complaint.[3] Although plaintiffs acknowledge that the court applies different standards at dismissal than on summary judgment, they argue that the court already considered the question of the truth of the elder abuse implication in light of the *Geisler Trust* documents and determined that those documents did *not* establish that plaintiffs engaged in elder abuse in the form of financial exploitation. Moreover, argue plaintiffs, that conclusion was correct: the words "elder" or "exploit" do not appear anywhere in any of the records or transcripts from the *Geisler Trust* litigation. In fact, they note that even Mentzer, who helped Wisneski write the story, did not think the Article was about elder abuse; in his view, the Article was about "financial management following a person's death," whereas "elder abuse is abuse of a person who is living." Br. in Opp., dkt. 60, at 9 (quoting Mentzer Dep. Tr., dkt. 54 at 48:18-49:4).

Having considered the parties' competing arguments, I am granting summary judgment to Gannett. With the benefit of additional briefing on the question of falsity in light of the *Giesler Trust* documents and the rulings from the Marathon County Circuit Court, I agree with Gannett: these documents establish as a matter of law that plaintiffs cannot meet their burden of proving that the implication they were involved in "elder abuse, financial exploitation" is false. That plaintiffs engaged in financial exploitation is irrefutable. As Judge Moran found, Batterman abused his discretion and breached his duties as trustee of Joe Geisler's trust by, among other things, setting up a scholarship fund not authorized by the trust language itself; that he did these

[3] Defendant bolsters its argument with publications from the American Bar Association and the Wisconsin Department of Health and Human Services and with quotations from Geisler's nephews that appeared in the Article, all of which plaintiffs say is inadmissible. Admissible or not, I have not considered this evidence because it is not material to the question before the court.

things in bad faith; and that his actions resulted in damages to the trust, including excess fees earned by Batterman as a result of his unilateral creation of the scholarship fund.

As Gannett now argues, the fact that plaintiffs exploited Geisler's money as opposed to Geisler himself is not a sufficiently material distinction to render false the implication that plaintiffs engaged in "elder abuse, financial exploitation." Notably, in reaching the opposite conclusion at the 12(b)(6) stage, I not only gave the benefit of every doubt to plaintiffs, I also failed to recognize that "[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal citations and quotations omitted). The gist of the Article's accurate reporting on the *Geisler Trust* litigation is that Batterman had abused the trust that the elder Joe Geisler had placed in him to see that his wishes were carried out after his death. Thus, the hyperlink implying that plaintiffs financially exploited elders was substantially true. Therefore, because plaintiffs cannot meet their burden of showing that the allegedly defamatory implication raised by the hyperlink caption is false, their defamation claim must be dismissed.

ORDER

IT IS ORDERED that defendant Gannett Co, Inc.'s motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 8th day of February, 2021.

BY THE COURT:

/s/

_____
STEPHEN L. CROCKER
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FINANCIAL FIDUCIARIES, LLC, a Wisconsin limited liability company, and THOMAS BATTERMAN,

Case No. 19-cv-874-slc

Plaintiffs,

v.

GANNETT CO., INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Gannett Co., Inc., against Financial Fiduciaries, LLC, a Wisconsin limited liability company and Thomas Batterman dismissing this case.

s/ J. Smith, Deputy Clerk
Peter Oppeneer, Clerk of Court

2/08/2021
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FINANCIAL FIDUCIARIES, LLC,
a Wisconsin limited liability company, and
THOMAS BATTERMAN,

Plaintiffs,

v.

GANNETT CO., INC.,

Defendant.

ORDER

19-cv-874-slc

Plaintiffs Financial Fiduciaries, LLC, and Thomas Batterman have moved under Fed. R. Civ. P. 59(e) for reconsideration of this court's orders entered June 1, 2020 and February 8, 2021, which together dismissed their defamation claims against defendant Gannett Co., Inc., for alleged falsehoods that it published on September 19, 2018 in an article in the Wausau Daily Herald. *See* dkts. 32, 65. I discussed the facts underlying plaintiffs' claims at length in prior orders and will not repeat them here. As a basis for their 59(e) motion, plaintiffs assert that they have newly-discovered evidence that shows that I erred in finding that:

> (1) Reading the Article as a whole, its "gist" or "sting" was not that Batterman was a thief, but rather that Batterman was untrustworthy. . . . Although the Article may have contained minor inaccuracies or minor embellishments by the reporter, Gannett's reporting on the *Geisler Trust* proceedings was not false, *nor did it reasonably convey the impression that Batterman committed theft, embezzlement, fraud, or similar criminal misconduct.* (Emphasis added); and
>
> (2) *It is not plausible that an ordinary reader would understand from the Article that Batterman had committed fraud, theft or embezzlement* with respect to the Geisler Trust, particularly given the Article's plain statement that no such findings have been made. When read as a whole, the Article's "sting" is a substantially true account of what occurred in the Giesler Trust litigation. (Emphasis added).
>
> June 1, 2020, Op. and Ord., dkt. 32, at 29-30, 40-41.

Plaintiffs' new evidence consists of email correspondence dated October 31, 2019 between a Wausau Assistant District Attorney and a lawyer in the Wisconsin Department of Justice. Plaintiffs obtained this evidence on February 2, 2021, pursuant to a Public Records/ FOIA request that they initiated on July 8, 2020. The subject line of the email is "Tom Batterman" and includes a review of the Article as published on September 19, 2018. The exchange is as follows:

> Runde: What do you know about him?
>
> Runde: [sends hyperlink to the Article.]
>
> Glaman: Interesting . . . Sounds criminal to me.
>
> Runde: That's what I said. I heard about him last night from a colleague who is prosecuting him for OWI 2nd. I think there's some criminal acts have absolutely happened.
>
> Glaman: Are you thinking we should start a criminal investigation?
>
> Runde: If you're up for it, I would like to.

Plaintiffs say this newly-discovered email exchange is objective evidence that shows that I was simply wrong to conclude that an ordinary reader of the Article would not understand from it that plaintiffs had engaged in fraud, embezzlement or other similar misconduct, and thus the gist of the Article–which accurately and fairly described the allegations and court rulings in the *Geisler Trust* litigation–was substantially true . *See Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (to prevail on motion for reconsideration under Rule 59, the movant must present either newly discovered evidence or establish a manifest error of law or fact). I disagree.

First, there is ample room to question whether the opinions of two prosecutors–whose jobs require them to ferret out and prove up criminal conduct–can be viewed as ordinary readers. Their world view is going to be shaped by the types of people and types of conduct they encounter on a daily basis.

More to the point, as a matter of law, even if some readers understood the published statements as defamatory, the statements are not actionable where the plain and ordinary meaning of the articles is substantially true. *Bustos v. A & E Television Networks*, 646 F.3d 762, 763 (10th Cir. 2011) ("[T]o concede that a statement is defamatory is just to say it hurts. It says nothing about the truth of the matter."). The fact that two prosecutors read the Article and inferred that Batterman may have engaged in criminal misconduct does not alter my conclusion that, in spite of the minor inaccuracies or embellishments by the reporter, the Article was a substantially true account of the *Geisler Trust* litigation, and therefore was not actionable. *See Simonson v. United Press International, Inc.*, 654 F.2d 478 (7th Cir.1981) (article reporting person charged with rape, when actually charged with second degree sexual assault, not defamatory, because statement was not made false by substituting a word in common usage for an exact legalism); *Barnett v. Denver Pub. Co.*, 36 P.3d 145, 148 (Colo. App. 2001)(newspaper's use of the term "stalking" rather than harassment to describe plaintiff's conviction was substantially true and therefore his defamation claim was properly dismissed); *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 819 P.2d 939 (1991) (newspaper article describing a defendant's conviction for "firing a gun," when he was actually convicted of "exhibiting the gun," was not defamatory, because the inaccurate statement did not cause him any more damage than that which resulted from his actual conviction and sentence).

Accordingly, plaintiffs' motion for reconsideration is DENIED.

Entered this 29th day of April, 2021.

BY THE COURT:

/s/

_____
STEPHEN L. CROCKER
Magistrate Judge