UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRISTOPHER ARMSTRONG,

Plaintiff/Counter-Defendant,

vs. CASE NO. 2011-CV-11921

ANDREW SHIRVELL, Hon. Arthur J. Tarnow

Defendant/Counter-Plaintiff.

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MEMORANDUM OF LAW AS TO PUBLIC/PRIVATE FIGURE STATUS

The determination of whether a particular person is a public or private person is a question of law. *Woodruff v. Ohman*, 29 Fed. Appx. 337 (6th Cir. 2002) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

A. Armstrong Was Not a General Purpose Public Figure

A public figure is a person who has holds "pervasive power" or as to whom there is "clear

evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). Courts may not "lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." *Id.* The "designation has been applied sparingly," only "to those persons whose **names have become household words**." *Bufalino v. Detroit Magazine, Inc.*, 433 Mich. 766, 789-90 (1989) (emphasis added). Chris Armstrong is not such a person. Shirvell has adduced no evidence that Armstrong was a household name, nor anything remotely approaching that status.

B. Armstrong was Not a "Public Official"

A public official (police chief, mayor, judge) is a type of public figure, to whom the actual malice standard applies in a defamation case.

Defendant has been unable to identify for the Court **any** case anywhere holding that a person who neither has a state or locally authorized title, office, rank or position of any kind nor is seeking public office may be considered a "public official."

The Supreme Court has consistently referred to public "officials" as, at least, public employees or candidates for public office. *See, e.g., New York Times v. Sullivan*, 376 U.S., 254, 283 n. 23 (1964) (question "how far down into the lower ranks of **government employees** the 'public official' designation would extend" would be decided later) (emphasis added).

No all-encompassing definition has ever announced since, although the Supreme Court has held, "the 'public official' designation applies at the very least to those **among the hierarchy of government employees** who have, or appear to the public to have, **substantial responsibility for or control over the conduct of governmental affairs**." *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (emphasis added). The Supreme Court has indicated that a "public official" is something *more* than just any public employee. "Where a position in government has such apparent importance that the

public has an independent interest in the qualifications and performance of the person who holds it, **beyond the general public interest in the qualifications and performance of all government employees**, ... the *New York Times* malice standards apply." *Id.* at 86 (emphasis added). The Sixth Circuit has explained, "What determines whether an officer is a public official for First Amendment purposes is the presence or absence of 'substantial responsibilit[y]' and 'control' over governmental processes that affect the lives, liberty and property of citizens." *Woodruff v. Ohman,* 29 Fed. Appx. 337, 348 (6th Cir. 2002).

Based on these facts, there is no doubt that Armstrong is not a public official. It is undisputed Chris Armstrong has never been a government employee. He has never run for any state or local office. He has had no control over any state budget, nor any official duties. Defendant apparently relies on the fact that Plaintiff was elected president of his class at the University of Michigan. However, the student council that Plaintiff presided over had no official policy making role whatsoever. Rather, at best, it could advocate student perspectives to the actual, elected decisionmakers. Awai-Williams De bene esse Dep. 48-49. Armstrong had no authority to direct the resources of the student counsel on his own. The organization ran on a majority rule vote. *Id.* at 16-17. Armstrong had no authority to spend the student fees collected to support the student council. Awai-Williams Dep. p. 73. Nor could he determine the funding status of other student groups. *Id.* at 68. Actions of the council were subject to review and approval by Anika Awai-Williams, the Program Manager and Advisor for the student council. *See id.*

C. Armstrong Was Not a Limited Purpose Public Figure

A limited purpose public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz,* 418 U.S. at 351.

A "controversy" for these purposes must be more than a "cause célèbre," *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976), or "a matter that attracts public attention," *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979). "Rather, it must be shown that persons actually were discussing some specific question and a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Lluberes v. Uncommon Productions, LLC*, 663 F.3d 6, 14 (1st Cir. 2011) (quoting cases, internal punctuation omitted). The defamer cannot purport to be the person actually engaged in and affected by the so-called controversy. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[T]hose charged with defamation cannot, by their own conduct, create their own defense by making claimant a public figure").

If a "controversy" exists, the plaintiff still does not qualified as a limited purpose public figure unless he (a) voluntarily engages in the controversy, (b) has access to channels of effective communication to counteract false statements, and (c) has a **prominent** role in the public controversy. *Clark v. ABC, Inc.*, 684 F.2d 1208, 1218 (6th Cir.1982).

Shirvell has not identified a controversy that the public was discussing at times relevant, let alone adduced proof of the same, nor has he shown that such "controversy" could reasonably impact the public.[1] He also has not shown that Armstrong thrust himself into such a controversy, had access to media outlets on demand to counteract Shirvell's lies, nor that Armstrong attained a prominent role in a specific controversy.

Even if Armstrong were a limited purpose public figure, statements at issue here fell outside the protected "limited range of issues" involving the controversy. There is no privilege for

[1] The only policy Shirvell has remotely discussed involved a proposal to bring gender-neutral housing to the University. But Shirvell cannot show that Armstrong was a prominent figure on that issue. The University staff member who oversees MSA testified that he was not a leader on that issue; it was primarily championed by others. Awai-Williams Dep. 69-70.

comments outside the scope of the public question. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980) ("[T]he alleged defamation must have been germane to the plaintiff's participation in the controversy.... Misstatements wholly unrelated to the controversy ... do not receive the *New York Times* protection."); *Gertz*, 418 U.S. at 352 (as to a limited purpose public figure, the Court must look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."). For example, a former District Court Judge may have been involved in a "public controversy" as defined above with respect to the allegations of misconduct on his part while serving on the Livingston County bench, but the defendant's public accusations of mistreatment of a child were unrelated. The public controversy as to his conduct as a judge "did not deprive [the plaintiff] of private-person status vis-á-vis [the unrelated] accusation." *In re Thompson*, 162 B.R. 748, (Bkrtcy. E.D. Mich. 1993).

Here, Shirvell's false statements had nothing to do with a public controversy in which Armstrong was a prominent leader. Shirvell focused instead on Armstrong's private life, from sex acts and sex partners to whether Nancy Pelosi's office in Washington, D.C. was reconsidering Armstrong's employment over the summer. All such statements fall outside the privilege surrounding limited purpose public figures.

Relief Requested

Plaintiff Chris Armstrong ran for student body president, but that does not remotely elevate him to the status of the Trustees of the University, the employees who controlled state funds, or the mayor of Ann Arbor. He was no more a "public official" or "public figure" than the president of Huron Valley High School or any one of the dozens of other "elected" student council members. Defendant's failure to bring before this Court any precedent for the position he is urging is not accidental. His position is not supportable, and must be rejected.

Respectfully submitted,

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DATED: August 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2012 , I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing and service of said documents to all parties through their counsel of record.

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