No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES H. FETZER

Petitioner

v.

LEONARD POZNER

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WISCONSIN FOURTH COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDICES

Volume 1:

Appendix A

Appendix A

COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2020AP121
2020AP1570

Cir. Ct. No. 2018CV3122

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

LEONARD POZNER,

PLAINTIFF-RESPONDENT,

V.

JAMES FETZER,

DEFENDANT-APPELLANT.

IN RE THE FINDING OF CONTEMPT IN POZNER V. FETZER:

LEONARD POZNER,

PLAINTIFF-RESPONDENT,

V.

JAMES FETZER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and orders of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

¶1 FITZPATRICK, P.J. Leonard Pozner brought this defamation lawsuit against James Fetzer because of statements published by Fetzer concerning a copy of a death certificate for Pozner's son, N.,[1] which Pozner posted on the internet. In the statements, Fetzer alleged that the death certificate released by Pozner is a "fake," "forgery," and a "fabrication." The Dane County Circuit Court granted partial summary judgment to Pozner and determined that Fetzer's statements are defamatory. The issue of Pozner's damages was tried to a jury, which returned a verdict awarding $450,000.

¶2 In appeal number 2020AP121, Fetzer appeals the partial summary judgment decision of the circuit court that his statements are defamatory and the circuit court's rulings on Fetzer's motions for a new trial. In a separate appeal, number 2020AP1570, Fetzer appeals the post-trial order of the circuit court granting Pozner's request for a monetary remedial contempt sanction against Fetzer based on Fetzer's second intentional violation of a protective order entered by the circuit court.[2] For the following reasons, we affirm each of the circuit court's rulings.

[1] Because N. was a minor and the victim of a crime, we use an initial in place of the victim's name.

[2] For the purpose of deciding these appeals, we consolidated appeal numbers 2020AP121 and 2020AP1570 in an order dated February 10, 2021. To facilitate consolidation, the appeal of the contempt order in appeal number 2020AP1570 was converted from a one-judge opinion to a panel opinion in an order dated February 10, 2021. *See* WIS. STAT. § 752.31(2)(h) and (3) (2019-20).

BACKGROUND

¶3 The following material facts are taken from the summary judgment submissions and trial testimony, as discussed in more detail in the Discussion section of this opinion. There is no reasonable dispute regarding the following facts.

¶4 On December 14, 2012, a mass shooting occurred at Sandy Hook Elementary School in Newtown, Connecticut.[3] Tragically, twenty-six people were killed, including six staff members and twenty children who were aged six and seven. *See, e.g.*, ***Jones v. Heslin***, No. 03-19-00811-CV, 2020 WL 1452025, at *1, *4 (Tex. Ct. App. Mar. 25, 2020) (stating "Neil Heslin's son … was killed in the Sandy Hook Elementary School Shooting in December 2012" and rejecting the substantial truth doctrine as a basis to dismiss Heslin's defamation claim related to statements disputing Heslin's assertion that he held his deceased son in his arms); ***Soto v. Bushmaster Firearms Int'l, LLC***, 202 A.3d 262, 272 (Conn. 2019) ("On December 14, 2012, twenty year old Adam Lanza forced his way into Sandy Hook Elementary School in Newtown and, during the course of 264 seconds, fatally shot twenty first grade children and six staff members, and wounded two other staff members."). Pozner's six-year-old son, N., was one of the children killed during the Sandy Hook shooting.

¶5 Fetzer, a Wisconsin resident, takes the position that the Sandy Hook shooting was an "elaborate hoax" which, according to Fetzer, was staged by government authorities with the "agenda to deprive U.S. citizens of their rights pursuant to the Second Amendment of the U.S. Constitution." Fetzer takes the

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All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[3] We refer to the mass shooting that occurred at Sandy Hook Elementary School as the "Sandy Hook shooting."

position that no one was killed during the Sandy Hook shooting and that part of the "elaborate hoax" included the fabrication of a "fiction[al]" person "called [N.]" Before and during this litigation, Fetzer has asserted that Pozner is a "fraud," "liar," "hypocrite," and "con-artist," and he has accused Pozner of concealing his true identity. Fetzer has also accused Pozner of "engaging in a massive cover-up" with regard to the Sandy Hook shooting. Fetzer is an editor of the book NOBODY DIED AT SANDY HOOK: IT WAS A FEMA DRILL TO PROMOTE GUN CONTROL (2d ed. 2016), and is the co-author of chapter 11 of that book, which is titled "Are Sandy Hook skeptics delusional with 'twisted minds'?"

¶6 In November 2018, Pozner brought this defamation action against Fetzer.[4] In his complaint, Pozner alleged that, following N.'s murder, "conspiracy theorists began to claim that [N.] was not killed in the tragedy, that [Pozner] was not N.'s father, and that [Pozner] was complicit in a grand conspiracy to fake the massacre." To debunk those claims and to prove that N. was killed during the Sandy

[4] In the circuit court, a number of additional claims were brought that are not before this court on appeal. In addition to his claim against Fetzer, Pozner brought suit against Wrongs Without Wremedies, LLC, the publisher of NOBODY DIED AT SANDY HOOK: IT WAS A FEMA DRILL TO PROMOTE GUN CONTROL (2d ed. 2016), and Mike Palecek, a co-editor of NOBODY DIED AT SANDY HOOK (1st ed. 2015). After settlements were reached, Pozner's claims against Wrongs Without Wremedies and Palecek were dismissed by the circuit court upon joint motions by Pozner and those defendants. Pozner's claims against Wrongs Without Wremedies and Palecek are not at issue in this appeal.

In addition to his defamation claim, Pozner also alleged a conspiracy claim against Fetzer. Pozner has abandoned that claim and it is not at issue in this appeal.

Fetzer brought counterclaims against Pozner alleging abuse of process, fraud and theft by deception, and fraud upon the court. Pozner filed a motion requesting the dismissal of Fetzer's counterclaims. The circuit court granted Pozner's motion. Fetzer's counterclaims are not before us on appeal.

Pozner cross-appealed, but later voluntarily dismissed his cross-appeal in number 2020AP121.

Hook shooting, Pozner posted a copy of N.'s death certificate on the internet.[5] Pozner alleged that, in NOBODY DIED AT SANDY HOOK (2016), Fetzer made the following defamatory statements concerning Pozner and the copy of N.'s death certificate released by Pozner:

- "[N.]'s death certificate is a fake, which we have proven on a dozen or more grounds." NOBODY DIED AT SANDY HOOK 183 (2016).

- "As many Sandy Hook researchers are aware, the very document [(N.'s death certificate)] Pozner circulated in 2014, with its inconsistent tones, fonts, and clear digital manipulation, was clearly a forgery." ***Id.*** at 242.

- "[Pozner] sent [Kelly Watt][6] a death certificate, which turned out to be a fabrication." ***Id.*** at 232.

Beyond that, Pozner alleged that Fetzer falsely stated the following in an August 5, 2018 post on a blog concerning the death certificate released by Pozner: "[N.'s death certificate] turned out to be a fabrication, with the bottom half of a real death certificate and the top half of a fake, with no file number and the wrong estimated time of death at 11 AM, when 'officially' the shooting took place between 9:35-

[5] Pozner alleges in an affidavit filed in this action that he posted a copy of N.'s death certificate "to show that [N.] was a real boy who actually lived and actually died."

[6] Fetzer stated in NOBODY DIED AT SANDY HOOK (2016) that Kelly Watt "spent more than 100 hours in conversation with [Pozner]" and that, when she informed Pozner that she "d[id] not believe [Pozner] had a son or that his son had died, [Pozner] sent her a death certificate [for N.]." ***Id.*** at 232.

9:40." Fetzer does not dispute that he published each of the alleged defamatory statements.[7]

¶7 Pozner filed a motion for partial summary judgment requesting a determination from the circuit court that Fetzer defamed Pozner by publishing the alleged defamatory statements. Fetzer opposed Pozner's motion for summary judgment, and Fetzer filed a motion for summary judgment requesting a determination from the circuit court that the alleged defamatory statements are not false. Pozner and Fetzer each filed materials supporting their motions, and the circuit court heard lengthy arguments about the motions. The circuit court granted partial summary judgment in favor of Pozner, and denied Fetzer's motion for summary judgment, based on the circuit court's determination that there are no genuine issues of material fact, and Fetzer's statements are defamatory.

¶8 Prior to trial, the circuit court found Fetzer in contempt of court for intentionally disclosing Pozner's video deposition taken in this action to a person not allowed to have the deposition in violation of the protective order[8] previously entered by the circuit court. As part of the remedy for that contumacious act, Pozner was allowed to introduce evidence of Fetzer's contempt of court during the trial.

¶9 The issue of Pozner's damages caused by Fetzer's defamatory statements was tried to a jury. The jury was tasked with answering one special verdict question:

[7] Throughout this opinion we refer to the four statements identified by Pozner in his complaint as defamatory as either the "alleged defamatory statements" or "the defamatory statements" based on the then-current procedural status of the case.

[8] We generally refer to this order as "the protective order."

> Question 1: What sum of money, if any, will fairly and reasonably compensate Mr. Pozner because of Mr. Fetzer's defamatory statements?

The jury's answer was $450,000.

¶10 Fetzer filed post-verdict motions requesting that the circuit court's order of partial summary judgment be vacated, and that he be granted a new trial. We will discuss those motions later in this opinion. The circuit court denied Fetzer's post-verdict motions. Based on Pozner's post-trial motion, the circuit court entered an order permanently enjoining Fetzer from repeating the alleged defamatory statements.

¶11 Also post-trial, Pozner filed a second motion requesting a finding of contempt of court because Fetzer violated the protective order a second time by again providing Pozner's deposition in this case to a person not allowed to have the deposition under the terms of that order. The circuit court found that Fetzer had for a second time intentionally violated the court's protective order and, for reasons stated by the circuit court that are discussed later in this opinion, the circuit court granted a remedial contempt monetary sanction of $650,000 against Fetzer.

¶12 Fetzer appeals. Additional material facts are set forth in our discussion.

DISCUSSION

¶13 Fetzer argues that the circuit court erred in: granting partial summary judgment in favor of Pozner and determining that Fetzer's statements are defamatory; denying Fetzer's motions for a new trial; and granting the remedial contempt monetary sanction based on Fetzer's second intentional violation of the

protective order. We begin by addressing Fetzer's arguments concerning the circuit court's grant of partial summary judgment.

I. Partial Summary Judgment in Favor of Pozner.

¶14 Fetzer makes three separate arguments on appeal challenging the circuit court's grant of partial summary judgment in favor of Pozner on the defamation issue: (1) the circuit court committed "structural error" by preventing Fetzer from presenting a particular defense theory at the summary judgment stage; (2) there were material facts in dispute regarding the falsity of the defamatory statements; and (3) because Fetzer now alleges that he is a member of the "media," the circuit court was required to determine whether Fetzer was negligent in making the defamatory statements. Before we address each of those arguments, we next explain summary judgment procedure, our standard of review, and governing principles regarding defamation.

A. Summary Judgment Procedure, Standard of Review, and Governing Principles.

¶15 Summary judgment is proper, and the moving party is entitled to judgment as a matter of law, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2); *see* ***Bank of N.Y. Mellon v. Klomsten***, 2018 WI App 25, ¶31, 381 Wis. 2d 218, 911 N.W.2d 364. This court views the summary judgment materials "in the light most favorable to the party opposing summary judgment." ***United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.***, 2013 WI 72, ¶12, 349 Wis. 2d 587, 836 N.W.2d 807. We review

de novo a summary judgment determination of the circuit court. ***Bank of N.Y. Mellon***, 381 Wis. 2d 218, ¶31.

¶16 The elements that must be established to prove a claim of defamation differ depending on whether the defendant is considered to be a member of the "news media," and whether the plaintiff is considered a public or non-public figure. *See* ***Denny v. Mertz***, 106 Wis. 2d 636, 643-46, 651-52, 318 N.W.2d 141 (1982); *see also* ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 534-35, 563 N.W.2d 472 (1997). As applicable to this case, the starting point is that a plaintiff (such as Pozner) alleging a claim for defamation must prove three elements: (1) a false statement was made by Fetzer concerning Pozner; (2) the statement was communicated in writing to a person other than Pozner; and (3) the communication tends to harm Pozner's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *See* ***Laughland v. Beckett***, 2015 WI App 70, ¶22, 365 Wis. 2d 148, 870 N.W.2d 466; ***Schaul v. Kordell***, 2009 WI App 135, ¶10, 321 Wis. 2d 105, 773 N.W.2d 454. Of these three elements, only the falsity of the defamatory statements was in dispute at the summary judgment stage.

¶17 In addition to the three elements set forth above, if the communicated statement is made by a "news media" defendant, a fourth element must be shown to establish a defamation claim. In that case, the plaintiff must prove the additional element of negligence on the part of the defendant. *See* ***Denny***, 106 Wis. 2d at 652-

54.[9] As will be discussed below, Fetzer argues on appeal that Pozner was required to establish the additional element of negligence because Fetzer now asserts that he is a "media defendant."

¶18 We next consider each of Fetzer's arguments regarding the circuit court's grant of partial summary judgment.

B. The Circuit Court Did Not Prevent Fetzer From Presenting His Defense Theory.

¶19 To repeat, the defamatory statements asserted that the copy of the death certificate for N. that was released by Pozner is a "fake," "forgery," and "fabrication." Fetzer contends on appeal that the defamatory statements are not false. *See* ***Laughland***, 365 Wis. 2d 148, ¶23 ("'Substantial truth' is a defense to a defamation action."); ***Ladd v. Uecker***, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216 (stating "[t]ruth is a complete defense" to a common law action for defamation). Fetzer contends that, "if the entire Sandy Hook narrative is false, then death certificates associated with that event," including the copy of the death certificate that Pozner released, "also must necessarily be false." Fetzer argues that the circuit court foreclosed him from an attempt to prove that there is a genuine issue of material fact about whether the Sandy Hook shooting occurred, and that the ruling by the circuit court was a "structural error" which requires reversal of the

[9] If the communicated statement is about a public figure, as opposed to a non-public figure, the plaintiff must also prove actual malice on the part of the defendant. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 535-36, 563 N.W.2d 472 (1997) (citing ***Masson v. New Yorker Mag., Inc.***, 501 U.S. 496, 510 (1991)). For purposes of this appeal, there is no dispute that Pozner is a non-public figure and that Pozner was therefore not required to prove actual malice on Fetzer's part in order to prevail. Fetzer initially argued in the circuit court that Pozner is a "limited public figure." However Fetzer later abandoned that assertion and agreed that Pozner is a private, non-public figure.

circuit court's summary judgment ruling. Our review of this issue is de novo. ***State v. C.L.K.***, 2019 WI 14, ¶12, 385 Wis. 2d 418, 922 N.W.2d 807.

¶20 Fetzer's argument rests on two factual premises, both of which are necessary to his argument: that the circuit court barred Fetzer from asserting as a factual matter in summary judgment that the Sandy Hook shooting did not occur; and that, after that purported ruling of the circuit court, Fetzer made no such factual assertion and "respectfully accepted the court's defense-limiting directive." For the following reasons, both premises fail.

¶21 In support of his argument, Fetzer points only to a single comment made by the circuit court, about a "path" to a "rabbit hole" made during a hearing about discovery disputes in this action.[10] From that one comment, Fetzer contends that the circuit court broadly barred him from proffering evidence that the Sandy Hook shooting did not occur. Because it is important to our analysis, we next consider the context of the circuit court's comment.

¶22 The comment by the circuit court relied on by Fetzer occurred during a March 2019 hearing at which the court addressed Pozner's motion requesting that the court direct that Pozner need not respond to certain discovery requests from Fetzer because the information and documents requested by Fetzer were not likely to lead to discoverable information and were not proportional pursuant to WIS. STAT. § 804.01(2)(a) and (am).

¶23 The comment by the circuit court on which Fetzer relies was made by the circuit court during a specific discussion about whether Pozner should be

[10] In his briefing in this court, Fetzer twice misquotes the circuit court's comment and once gives an incorrect cite to the record for the quote.

relieved from responding to a discovery request from Fetzer that Pozner "[p]roduce all court records of any lawsuits ... Pozner has brought against Sandy Hook skeptics." Immediately before the "rabbit hole" comment, the circuit court stated:

> THE COURT: ... [T]he reason I'm going through this somewhat lengthy exchange on the Motion [and] ... on the request for production of documents is ... [so that Fetzer] would get a sense of what I think is the appropriate course of discovery.

¶24 We now consider some examples of why the circuit court made that broader statement about the proper scope of discovery.

¶25 Fetzer asked Pozner to produce N.'s original kindergarten report card. The circuit court ruled that N.'s "original report card from kindergarten is far beyond the relevance of this case in terms of the truth or falsity ... of the death certificate." Fetzer also asked Pozner to produce Pozner's own birth certificate. The circuit court ruled that "Pozner's existence is not an issue in this case and is not likely to lead to the discovery of any relevant information," and the circuit court denied Fetzer's request for production of the birth certificate of N.'s mother and the marriage license for N.'s parents for similar reasons.[11]

¶26 However, pertinent to our discussion of this issue, the court denied Pozner's motion concerning Fetzer's request for information about N.'s funeral expenses. The circuit court determined that "if the defense theory is that this is a fraudulent death certificate because no human [N.] existed, then in theory, possibly,

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[11] As another example, Fetzer asked Pozner in discovery to:

> Admit that Exhibit N, "Fabricated Passport of [N.], includes a passport number with '666' as its middle digits, the occurrence of which by chance is so remote it appears to be telegraphing that the alleged [Sandy Hook Elementary School] shooting was a hoax that had Satanic elements."

if there were no expenses related to a funeral or burial, that might be consistent with [Fetzer's] theory," and for similar reasons the circuit court ordered production of a copy of N.'s birth certificate.

¶27 At the same hearing, the circuit court took up Fetzer's request for discovery from Pozner based on Fetzer's contention that N. appeared alive in Pakistan about two years after the Sandy Hook shooting. Germane to the issue now before us, the circuit court made the following statements, which establish that the court did not foreclose Fetzer from presenting facts about whether the Sandy Hook shooting occurred:

> THE COURT: Mr. Fetzer.... Discovery is not your only avenue to gather the facts that you think support your defense of the case.... [P]resumably, since you're asking for it, you have a copy of some photograph, and the burden is on you or your co-defendants to try to admit that document. You can't sort of upend the rules of evidence by saying that I know that this document that appeared in a Pakistani newspaper somewhere or some newspaper regarding a massacre in Pakistan I'm going to try to get from Mr. Pozner.
>
> ... I envision there's going to be a lot of things you'll try to do to defend yourself and that's fine.... I'm not making rulings here on the rules of evidence. I'm trying to do [what] I'm required to do on a request for a protective order to balance [based on] the issues in the Complaint as I understand it today and to put the context of the discovery in its reasonable position based on the facts of the case.

Later at the same hearing, the following exchange occurred:

> MR. FETZER: -- the Defendant is going to argue ... the death certificate is a fabrication, that [N.] is a fiction that was made out of photographs of another child when he was younger, and explain the context within which this took place just in order for the Court -- for the jury to understand, for it to make it intelligible what's going on here.
>
> THE COURT: Well, Mr. Fetzer, I'm not ruling on motions in limine. I'm not telling you what the trial is about.

> I'm ruling on the Motion for Protective Order as I understand it today[,] having carefully considered the precise words you chose in your request for production of documents.

¶28 Fetzer characterizes the circuit court's "rabbit hole" comment as the circuit court's limitation on the factual defenses Fetzer could assert in this action against the allegations in Pozner's defamation cause of action. However, looking at the March 2019 hearing transcript in its entirety, it is manifest from the circuit court's statements and rulings at that hearing that the circuit court did not bar Fetzer from asserting any particular factual defense. Instead, the circuit court only limited the breadth of information and documents Fetzer could obtain from Pozner during pre-trial discovery under Wisconsin's discovery rules. *See generally* WIS. STAT. ch. 804.

¶29 Fetzer's other premise also fails. Contrary to what Fetzer argues on appeal, he did not stop arguing his factual theory of defense. As one example, at the hearing of June 4, 2019, Fetzer argued as follows:

> Nobody died at Sandy Hook, Your Honor. This was a FEMA drill that was presented ... as a mass shooting to promote gun control.
>
> One of my contributors, the 13 contributors to the book, NOBODY DIED AT SANDY HOOK, including 6 current and retired PhD professors, we establish the school had been closed by 2008; that there were no students there; that it was done to promote gun control. (Italicization omitted and small capitalization added.)

Indeed, at the summary judgment hearing, Fetzer continued to make that factual argument as shown by this example, which is illustrative of several:

> All of these oddities are more readily explicable on the hypothesis that [N.] is a fiction made up out of photographs of his purported older step-brother .... When we consider that we may be dealing with an illusion rather than reality, where the Sandy Hook event was a FEMA mass casualty exercise involving children to promote gun control

> that was then presented to the public as mass murder, the pieces made sense.

As a result, there is no basis to support the premise that Fetzer stopped asserting this factual defense before or at the summary judgment hearing.[12]

¶30 Thus, although the circuit court limited the breadth of Fetzer's pre-trial discovery, the court did not, as Fetzer argues, restrict or prohibit any defense Fetzer sought to assert. Accordingly, we reject Fetzer's argument that the circuit court erroneously foreclosed him from pursuing a theory of defense in summary judgment.[13]

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[12] In an attempt to bolster his argument that the circuit court barred Fetzer, before summary judgment was granted, from arguing that the Sandy Hook shooting did not occur, Fetzer contends in briefing in this court that the circuit court "cautioned counsel" at trial not to raise that factual defense. The citation to the record from Fetzer for that assertion shows nothing of the sort. The only relevant statement from the circuit court in that portion of the record is a comment made to counsel outside the presence of the jury: "This is not a trial to defend the academic excellence of the book, NOBODY DIED AT SANDY HOOK." (Italicization omitted and small capitalization added.) At most, the court's one sentence recognized that the question of whether the statements were defamatory was not an issue for the jury. Nothing about that statement, in context or in isolation, leads to the conclusion that the circuit court barred Fetzer before partial summary judgment was granted from raising this theory of defense.

[13] Because our decision that Fetzer fails to establish that the circuit court precluded him from pursuing a theory of defense in summary judgment is dispositive, we do not address his argument that any such an error is "structural" and as such cannot be subjected to a harmless error analysis. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised). In any event, there is a strong presumption that errors are not structural. ***State v. C.L.K.***, 2019 WI 14, ¶¶14-15, 385 Wis. 2d 418, 922 N.W.2d 807.

C. There Are No Material Facts In Dispute as to the Falsity of the Defamatory Statements.

¶31 Fetzer contends that there are disputed material facts as to the falsity of the defamatory statements that prevent a grant of partial summary judgment in Pozner's favor.[14]

¶32 The party moving for summary judgment, here, Pozner, bears the burden of establishing a prima facie case for summary judgment through affidavits and other submissions. *See* ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). If Pozner does so, the burden shifts to the opposing party, here, Fetzer, to point to evidence showing that material facts are in dispute. ***Id.***[15] The party against whom summary judgment has been brought cannot rest upon the pleadings, but must set forth specific facts that are admissible in evidence showing that there is a genuine issue for trial. WIS. STAT. § 802.08(3); ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999).

1. Pozner's Prima Facie Case for Summary Judgment.

¶33 We now discuss whether Pozner established a prima facie case for summary judgment regarding the falsity of the defamatory statements.

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[14] Fetzer also contends that the circuit court did not carefully address his arguments as to the falsity of the defamatory statements or rule on the authenticity of the death certificate. The record flatly refutes this contention. In any event, because our review is de novo, we do not further consider this contention.

[15] The first step in summary judgment procedure is to determine whether the complaint states a valid cause of action and whether the answer of the defendant properly joins issue. ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). The parties do not discuss this first step, and we agree that both parties have satisfied this first step.

¶34 Pozner submitted to the circuit court an affidavit in which he averred that the following is true:

- Pozner fathered a child named N., who was born, along with a twin sister, in 2006, and N. "is now deceased."

- Pozner posted a certified copy of N.'s death certificate on the internet through a social network page dedicated to N.'s memory. The death certificate Pozner posted "was one of several certified copies that had been issued to [him] by the Newtown records clerk in 2013." After receiving a copy of N.'s certified death certificate, Pozner was never in possession of an incomplete or uncertified copy of N.'s death certificate and he "did not enter any information into any of the boxes on [N.'s] death certificate." Attached as exhibits to Pozner's affidavit are "[t]rue and correct scans of [the death certificates] [he] obtained from the Newtown clerk" which "include embossed seals … [that] are not well reflected in [the] scans."[16]

¶35 Pozner also submitted to the circuit court the affidavit of Abraham Green, who averred that the following is true.

- Green is a licensed funeral director in Connecticut.

- "[Green's] funeral home prepared [N.'s] body for burial and held [N.'s] funeral service," Green "was personally involved in that process," and he "personally performed the preparation of [N.'s] body

[16] Fetzer does not dispute that, at the hearing on the summary judgment motions, counsel for Pozner handed to the circuit court the originals of the certified death certificates Pozner obtained from the town, and the circuit court noted on the record the presence of the embossed seals on the documents.

for his funeral." N.'s remains were "obtained ... from the medical examiner" and "[Green's] funeral home obtained the death certificate form, at that point only partially completed, from the Office of the Chief Medical Examiner."

- "Connecticut uses two death certificate forms .... One form ... is for anticipated deaths .... The other, form 'VS-4ME' is for deaths investigated by the Medical Examiner." N.'s death "was investigated by the Medical Examiner." "The process of filling out a VS-4ME death certificate involves multiple entities entering information at different times" and "[a]t the time of [N.'s] death and funeral, [Green's] funeral home typically used a typewriter to fill out death certificates."

- Green attached a copy of N.'s death certificate to his affidavit. Green's "funeral home entered information in boxes 1, 2 and 5-22, 28-35, and boxes 54-58 as well as the social security number on [N.'s] death certificate." That information in the copy of the N.'s death certificate attached to Green's affidavit "is unchanged from the information [he] typed in those boxes in December of 2012, with the exception of redactions in boxes 29, 30 [(which concern the cemetery and city where N. is buried)] and the decedent's social security number."

¶36 Pozner's attorney, Jacob Zimmerman, submitted an affidavit to which he attached the following exhibits.

- A certified copy of N.'s birth certificate. This document states that N. was born on November 20, 2006 at Danbury Hospital in the State of

Connecticut to Pozner and Veronique Pozner. The document was issued on April 23, 2019, and was signed by the Registrar beneath the following attestation language: "I hereby certify that this is a true certificate of live birth issued from the official records on file." (Capitalization omitted.) The document shows faint marks left from an embosser and a seal.

- Copies of certified medical records from Danbury Hospital pertaining to N. Those medical records concern medical billings and records from the date of N.'s birth through at least February 2012.

- A "true and correct copy of a certified copy of the report filed by the Office of the Chief Medical Examiner of the State of Connecticut." The document is comprised of a written description of the post-mortem examination of N.'s body conducted by the Chief Medical Examiner on December 15, 2012, and a "REPORT OF INVESTIGATION" form. The written description of N.'s post-mortem examination: describes N.; identifies and describes three separate gunshot wounds; and lists N.'s cause of death as "MULITPLE GUNSHOT WOUNDS." We now set forth information in separate sections of that form.

    - The "DECEASED" section of the document states in pertinent part that N., age 6, died at 12 Dickinson Drive, Sandy Hook, CT (which is the address of the school).

    - The "CIRCUMSTANCES OF DEATH" section states:

        > On 12/14/12 at 1115 hours Sgt. James Thomas of Connecticut Central District Major

> Crimes informed me that there were at least twenty fatalities at the Sandy Hook Elementary School as a result of a shooting. The extent of the shooting was not known until Dr. Carver assessed the scene and it was reported that there were two child victims at Danbury Hospital and twenty-five at the scene. Once at the scene we generated case numbers for each victim, tagged each victim with a case number, and once positive identifications were made the victims information was appropriately added. All victims were pronounced at the scene on 12/14/12 at 1100 hours by EMS.

- The "EXTERNAL EXAMINATION" section of the document states that N. was "Examined At" "Sandy Hook Elementary School" on "12/14/12," and further states:

> The body is that of a white male approx. 6 years. Decedent is supine on the floor in classroom eight.
>
> Head hair is dark brown[.] He is clad in a red and black hooded sweat shirt with Batman on the front, black sneakers with red and gray, white socks and underwear. There are two EKG tabs on the upper chest and two on the lower torso.
>
> There are injuries noted to the right lower mouth and chin area.

- The "CERTIFICATION" section states beneath "Date" "12/15/12." Beneath "Name of Investigator," "Louis[] Rinaldi" is stated and beneath his name is the following typed notation: "****Typographical Errors Corrected on 12/5/13" Beneath "Signed" is a signature that appears to be that of Louis Rinaldi.

- A "true and correct copy of a certified copy of [N.'s] death certificate, issued by the State of Connecticut Department of Vital Records in November of 2018."

- A "true and correct copy of a probate court order [regarding N.] issued on December 10, 2014 by the State of Connecticut Probate Court."

¶37 On appeal, Fetzer does not challenge the circuit court's determination that Pozner's submissions established a prima facie case for summary judgment on the issue of falsity of the defamatory statements. In other words, Fetzer does not dispute that Pozner made a prima face case that the copy of N.'s death certificate that Pozner released is not a fake, forgery, and fabrication. Rather, Fetzer challenges on appeal the circuit court's determination that Fetzer did not point to admissible evidence to show that there is a genuine issue of material fact concerning whether the death certificate Pozner released is a fake, forgery, or fabrication. *See* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966) ("To defeat [a] motion [for summary judgment], the statute requires the opposing party by affidavit or other proof to show facts which the court shall deem sufficient to entitle him [or her] to a trial.").

2. Fetzer Did Not Rebut Pozner's Prima Facie Case For Partial Summary Judgment.

¶38 For context, we first note what Fetzer does not argue on appeal. Fetzer's reasoning stated in the book and his blog regarding why he believed N.'s death certificate released by Pozner is a fake, forgery, and fabrication were the following allegations: part of N.'s death certificate was created by a photoshop computer program, N.'s death certificate has a missing file number and has inconsistent tones, fonts, and textures. Fetzer abandoned those reasons at the summary judgment hearing in the circuit court when he stated:

> In this case, my premises may have been mistaken or wrong -- the absent file number, the differences in tone and texture, the variations in font sizes and spacing, which led me to

> believe that this document had been created by combining the bottom half of a real death certificate with the top half of a fake -- given what I have learned in the meanwhile, do not appear to have been right.

Fetzer then explicitly stated to the circuit court that those reasons given in the book and his blog were "wrong."

¶39 Further, Fetzer does not dispute in any meaningful way on appeal that N.'s death certificate released by Pozner (which Fetzer claims is a fake, forgery, and fabrication) is identical to N.'s death certificate from, and certified by, the Newtown, Connecticut Registrar (which Fetzer agrees is authentic) with the very few exceptions we now consider.[17] The death certificate released by Pozner redacted the name of the cemetery and the city where N. is buried as well as N.'s social security number (all for purposes of privacy), and the portions of N.'s death certificate regarding N.'s residence and his parents' mailing address were later corrected by the registrar as is stated on the certificate. Put another way, Fetzer does not assert that any difference or combination of differences between N.'s death certificate released by Pozner and N.'s certified death certificate from the registrar

[17] In this appeal, in a vague manner, Fetzer asserts that there are purported discrepancies between the copy of the death certificate released by Pozner and the copies of N.'s death certificate that were submitted to the circuit court by affidavit, in that there are "differing notations; and – written state file numbers; empty information boxes on the different versions" of the certificates in the record. However, Fetzer makes no discernable argument about why such purported discrepancies (assuming those exist) might lead to the conclusion that N.'s death certificate released by Pozner was fabricated, and we reject those contentions for that reason. ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (declining to address undeveloped arguments). Moreover, Fetzer does not provide this court with citations to the record to support several of his factual allegations on this issue. We could reject portions of Fetzer's argument on that basis alone. *See* WIS. STAT. RULE 809.19(1)(e); *see* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (declining to address arguments not supported by citations to the record).

causes there to be a genuine issue of material fact that the death certificate released by Pozner is fake.

¶40 Fetzer's only argument remaining on appeal is this narrow assertion: Pozner released a copy of N.'s death certificate that lacks a "narrative certification," and that is sufficient to raise a genuine issue of material fact about whether the released death certificate is a fake, forgery, and fabrication.[18]

¶41 Fetzer begins his argument with the assertion that "Connecticut law ... prohibits even a parent from having such an uncertified death certificate" and he

[18] That this is Fetzer's argument is confirmed in his reply filed in this court:

> Pozner misunderstands the "difference that matters" as to the multiple versions of the death certificate. Fetzer contends that the death certificate circulated by Pozner lacked a narrative certification by the Town Registrar. The death certificate discussed in the book "Nobody Died at Sandy Hook" lacks the Registrar's certification, which is the version published in the Book, as obtained from Pozner. The version of the death certificate attached to Pozner's Complaint, however, includes a narrative certification by the Registrar on the left margin of the document. The absence of the narrative certification by the Registrar is the "difference" relevant to summary judgment.

(Internal record citations omitted.)

cites generally to CONN. GEN. STAT. § 7-51a (2012)[19] without quotation, or any analysis, of the statute. We take no positon on the applicability of that statute in these circumstances. Regardless, Fetzer does not dispute that, as mentioned earlier and confirmed by the circuit court at the summary judgment hearing, the death certificate released by Pozner and placed in the record in this case has a raised seal from the town, which is evidence that the document was certified. Instead, as mentioned, Fetzer goes a different route and focuses exclusively on the fact that all certified copies of N.'s death certificate have an attestation (what Fetzer calls a "narrative certification") along the edge of the certificate stating: "I certify that this is a true copy of the certificate received for record. Attest: Debbie A. Aurelia, Registrar." (Capitalization omitted.) From that, Fetzer argues that, because the attestation is not shown on N.'s death certificate "discussed in the book 'Nobody Died at Sandy Hook,'" there is a reasonable inference that N.'s death certificate released by Pozner is a fake.

¶42 "[I]f more than one reasonable inference can be drawn from the undisputed facts, summary judgment is not appropriate." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶47, 305 Wis. 2d 538, 742 N.W.2d 294. But, while

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[19] That statute states in pertinent part:

> (a) Any person eighteen years of age or older may purchase certified copies of marriage and death records, and certified copies of records of births or fetal deaths which are at least one hundred years old, in the custody of any registrar of vital statistics. The department may issue uncertified copies of death certificates for deaths occurring less than one hundred years ago, and uncertified copies of birth, marriage, death and fetal death certificates for births, marriages, deaths and fetal deaths that occurred at least one hundred years ago, to researchers approved by the department pursuant to section 19a-25, and to state and federal agencies approved by the department.

CONN. GEN. STAT. § 7-51a (2012).

we may draw inferences in favor of the non-moving party, we are not required to draw unreasonable inferences in Fetzer's favor. ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979); *see* ***Helland***, 229 Wis. 2d at 756 ("A party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge.").

¶43 As already discussed, there are no material differences between N.'s death certificate released by Pozner and what Fetzer agrees is a certified copy of N.'s death certificate. That alone is sufficient to establish that N.'s death certificate released by Pozner is not a "fake," "forgery," or "fabrication" by any applicable definition of each word. In addition, the only reasonable inference from the undisputed facts is that, at some point when Pozner released the death certificate online, or later when a copy of N.'s death certificate was placed in the book Fetzer co-edited, the attestation from the registrar was cropped off N.'s death certificate. It is in a location where this would be easy to do. That does not reasonably lead to the conclusion that the death certificate released by Pozner was a fake, forgery, or fabrication.

¶44 As a result, Fetzer does not raise a genuine issue of material fact regarding the falsity of the defamatory statements made by him.

¶45 Accordingly, we conclude that Fetzer has failed to overcome Pozner's prima facie showing, and partial summary judgment was properly granted in favor of Pozner on the issue of whether the defamatory statements were false.

D. The Circuit Court Was Not Required to Determine Whether Fetzer Was Negligent.

¶46 Fetzer argues that, in order for Pozner to prevail on his defamation claim, Pozner was required to establish that Fetzer was negligent in publishing the defamatory statements because Fetzer published the statements as a member of the "media." Fetzer contends that the circuit court erred in granting partial summary judgment in favor of Pozner because the court failed to consider whether Fetzer was negligent.

¶47 We now briefly summarize the legal context of Fetzer's argument. In ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323 (1974), the United States Supreme Court addressed the standard for defamation actions brought by private individuals against a "publisher or broadcaster."[3] The Supreme Court held that states are free to set their own standards for defamation actions brought by private individuals against a "publisher or broadcaster" so long as liability without fault is not imposed. ***Id.***, 418 U.S at 342-43, 347; ***Denny***, 106 Wis. 2d at 651, 654. The Supreme Court explained that this approach "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." ***Gertz***, 418 U.S. at 347-48. In ***Denny***, the Wisconsin Supreme Court adopted a negligence standard for defamation claims brought by a private individual against the "news media (publication or broadcasting)." *See* ***Denny***, 106 Wis. 2d at 651, 656-57. That is to say, under ***Denny*** a private individual who claims that he or she has been defamed by the "news media" must "prove that [the] media defendant was negligent in broadcasting or publishing a defamatory statement." ***Id.*** at 654.

¶48 Fetzer's argument that the circuit court erred in not requiring Pozner, under ***Gertz/Denny***, to prove that he was negligent in publishing the defamatory statements fails for at least the following reasons, either of which is sufficient to reject Fetzer's argument.

¶49 The first reason is forfeiture. Fetzer agrees that he did not raise this issue before the circuit court on summary judgment, and it was first raised by Fetzer in his post-verdict motions.[20] As we have explained, "[o]nly the summary judgment submissions are relevant to the question whether the court properly [decided] summary judgment." ***H & R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶27 n.9, 307 Wis. 2d 390, 745 N.W.2d 421. The circuit court was not obligated to allow Fetzer to effectively sit back and allow a case to proceed based upon a certain standard and then, after that issue is determined against him, argue for the first time after summary judgment and trial that the standard applied was wrong. *See* ***Paape v. Northern Assurance Co. of Am.***, 142 Wis. 2d 45, 53, 416 N.W.2d 665 (1987) ("Because the purpose of alerting the [circuit] court to any error is corrective in nature, i.e. to avoid a costly and time-consuming appeal, and is as salutary for summary judgment purposes as for motions after verdict, we conclude that the failure to present this error to the [circuit] court for its appraisal and correction constitutes waiver."); ***Pabst Brewing Co. v. City of Milwaukee***, 125 Wis. 2d 437, 459-60, 373 N.W.2d 680 (Ct. App. 1985) ("As it appears that the payment under protest question was not considered a genuine issue until after the City lost the case, we deem the issue waived."); *see also* ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727 (stating that the forfeiture rule prevents

[20] In his brief-in-chief, Fetzer concedes that the negligence question "was not briefed, raised or intimated at the prior summary judgment hearing."

"sandbagging" errors, or failing to object to an error for strategic reasons and later claim that the error is grounds for reversal).

¶50 Fetzer did not raise the question of negligence or his alleged membership in the "media" as a factual dispute as he was required to do in summary judgment. As a result, Fetzer forfeited the argument that he was a member of the media, and that a showing of negligence was required before he could be held liable for his defamatory statements.[21]

¶51 The second reason involves the burden of showing news media status of a defendant. An unstated premise in Fetzer's argument is that in any defamation claim there is, in effect, a default position that the defendant is considered a member of the "news media," and the plaintiff has the burden to show that the defendant is not a member of the news media or show that the defendant was negligent. However, under Wisconsin law, it is not the plaintiff but the defendant who bears the burden of raising and establishing a conditional privilege (such as the news media defense raised by Fetzer) that may grant immunity from liability for defamation based on a public policy which recognizes the social utility of encouraging the free flow of information. *See* ***Calero v. Del Chem. Corp.***, 68 Wis. 2d 487, 498-99, 228 N.W.2d 737 (1975); *see also* ***Talens v. Bernhard***, 669 F. Supp. 251, 256 (E.D. Wis. 1987). Fetzer does not directly dispute that precept of Wisconsin law, but in support of his argument cites only ***Snead v. Redland Aggregates Ltd.***, 998 F.2d 1325, 1329 n.5 (5th Cir. 1993). That one short footnote from a federal court opinion construing federal law does not answer the question of

[21] While not dispositive to our analysis, we observe that, when Fetzer raised this issue in a post-verdict motion, the circuit court determined that it would have rejected on summary judgment Fetzer's contention that he is a "media defendant" and, even if Fetzer is a member of the media, the circuit court would have concluded that there is no genuine issue of material fact that Fetzer was negligent in making the defamatory statements.

who has the burden on this issue under Wisconsin law and, moreover, gives no authority for the position stated in the footnote.

¶52 For those reasons, we reject Fetzer's argument that the circuit court erred in not determining whether he was negligent in making the defamatory statements.[22]

¶53 In sum, we affirm the circuit court's grant of partial summary judgment on the question of whether the statements made by Fetzer were defamatory.

II. Fetzer's Motion For a New Trial Based on an Evidentiary Ruling.

¶54 Fetzer argued in post-verdict motions that he is entitled to a new trial on the issue of damages because the circuit court erred in admitting what Fetzer refers to as "prejudicial" "character evidence" concerning Fetzer's intentional violation of the protective order of the circuit court.[23] The circuit court denied Fetzer's motion, and we reject Fetzer's argument for the following reasons.

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[22] To the extent Fetzer may be arguing in this court that it was the duty of the circuit court to identify and address this issue, Fetzer is wrong. It was not the circuit court's burden or duty to construct an argument for Fetzer. *See* ***Service Emps. Int'l Union, Loc. 1 v. Vos***, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35 (stating that courts do not develop or construct arguments for parties).

[23] The section of Fetzer's brief-in-chief concerning Fetzer's argument on this issue contains factual assertions but no citations to the record as required by WIS. STAT. RULE 809.19(1)(e). Indeed, at one point in his briefing of this issue, Fetzer gives what purports to be a quote from Pozner's counsel's closing argument, but Fetzer gives no citation to the record for the quote. We need not search the record for citations to support Fetzer's assertions, and we could reject Fetzer's argument on this basis alone. *See* ***id.***; *see* ***Grothe***, 239 Wis. 2d 406, ¶6 (declining to address arguments not supported by citations to the record).

A. Standard of Review.

¶55 We review a circuit court decision to admit or exclude evidence for an erroneous exercise of discretion. ***State v. Jackson***, 2014 WI 4, ¶43, 352 Wis. 2d 249, 841 N.W.2d 791. This court independently reviews the record to determine whether the record provides a basis for the circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶56 We next set forth additional pertinent facts regarding this issue. These additional facts also inform our analysis of Fetzer's second intentional violation of the same order of the circuit court that we discuss later in this opinion.

B. Additional Pertinent Facts.

¶57 In April 2019 Pozner filed a motion in the circuit court requesting an order "establishing a process by which parties may designate documents or things confidential." As grounds for the motion, Pozner alleged that: Fetzer "has a history of exposing [Pozner's] confidential information and that of [N.]"; Fetzer had in this case improperly filed an unredacted image of N.'s United States passport via the circuit court's e-filing system;[24] Fetzer refused Pozner's request that Fetzer take steps to have the protected information redacted; and Fetzer posted Pozner's social security number on a blog shortly after Pozner initiated this lawsuit. Pozner also expressed concern that his image from his video deposition in this case would be released and used to harass him.

¶58 The circuit court granted Pozner's motion. The court's protective order provided that the parties could designate information as "confidential" by

[24] Passport numbers are one of five categories of "[p]rotected information" not to be disclosed in the public record under WIS. STAT. § 801.19(1)(a). *See* § 801.19(1)(a)5.

"placing or affixing on the document or material ... the word[] 'CONFIDENTIAL'" in specifically delineated circumstances. The order further provided:

> Information, documents, or other material designated as CONFIDENTIAL under this Order must not be used or disclosed by the parties or counsel ... for any purposes whatsoever other than preparing for and conducting the litigation in which the information, documents, or other material were disclosed (including appeals).

¶59 In September 2019, Pozner sought a finding of remedial contempt of court[25] against Fetzer for intentionally violating the protective order by providing a copy of the video deposition of Pozner delineated "confidential" by Pozner to an individual who was not allowed to receive the video under the terms of the protective order. An evidentiary hearing was held on Pozner's motion.

¶60 At the hearing, Fetzer's counsel admitted that Fetzer had violated the protective order by forwarding a copy of the videotape of Pozner's discovery deposition to individuals not authorized to see it. Fetzer testified to the following at the hearing:

- Fetzer admitted that he gave a copy of Pozner's video deposition to Alison Maynard, and Fetzer gave Maynard permission to provide that videotape to Wolfgang Halbig.

- Fetzer acknowledged at the evidentiary hearing that, during a Skype exchange with Dave Gahary, an associate member of Wrongs Without Wremedies, Gahary asked if Fetzer had provided the videotape deposition to Halbig. Fetzer admitted that he had, and Fetzer stated

[25] WISCONSIN STAT. § 785.03(1)(a) describes the procedure a circuit court uses in a nonsummary remedial contempt proceeding, and those procedures will be discussed later in this opinion.

during their exchange: "What are they going to do? Sue me for a million dollars? Oh, I forgot, they're already doing that."

- Like Fetzer, Halbig professes the belief that the Sandy Hook shooting is an elaborate hoax, and Halbig professes doubts that Pozner is actually Leonard Pozner.

¶61 Pozner had previously sued Halbig for invasion of privacy for allegedly publishing private information about Pozner. In its written decision denying Fetzer's post-verdict motions, the circuit court described the significance of Fetzer allowing Halbig to receive the video of Pozner's discovery deposition:

> In the lawsuit against Halbig, Pozner dismissed his case rather than sit for a video tape deposition. Fearing for himself and his family, ... Pozner gave up on his legal claim [against Halbig], rather than to allow his image to be captured and disseminated. Dr. Fetzer did what Halbig could not do. Dr. Fetzer obtained Pozner's image and he disseminated it. This single act created, in Pozner's opinion, an unwarranted and serious risk to his and his family's personal safety.... Pozner, a man who for his own safety moved from place to place now had his picture in the hands of the people he believed would do him harm.... According to Dr. Fetzer, Halbig took Leonard Pozner's image and disseminated it to other parents and apparently to the FBI, presumably in Halbig's similar pursuit [of] their claim that Leonard Pozner is a fraud. According to Pozner, if these people actually believed he was a crisis actor and a fraud and not the same person holding his murdered child, what else are they capable of doing to him[?]

(Internal citation omitted.)

¶62 The circuit court made the following findings at the evidentiary hearing: Fetzer intentionally violated the court's protective order, and Fetzer's contempt of court was "ongoing" in that the video tape deposition of Pozner continued to be distributed to third parties. The circuit court ordered Fetzer to

reimburse Pozner for costs related to the contempt action, sentenced Fetzer to five days in jail (which was stayed pending payment of the imposed sanction), and required Fetzer to "retrieve" the videotape unlawfully distributed or make "sufficient assurances to the best of [his] ability that [the videotape in possession of the individuals] ha[s] [been] destroyed." Additionally, and material to this issue, the circuit court stated that it would allow evidence of this intentional violation of the court's order to be considered by the jury on the issue of punitive damages.

¶63 Prior to trial, Pozner withdrew his claim for punitive damages, leaving only his claim for compensatory damages. Also prior to trial, Fetzer's counsel objected to any reference before the jury to Fetzer's violation of the protective order on the grounds that such evidence is not relevant to the issue of Pozner's compensatory damages and is prejudicial. The circuit court overruled Fetzer's objection. Fetzer's counsel acknowledged that Fetzer had been unable to retrieve all images taken from the video of Pozner's deposition that had been disseminated as a result of Fetzer's violation. So, the court agreed with Pozner that the evidence of Fetzer's violation of the protective order was relevant because Pozner's harm from that violation was "ongoing" and that the dissemination of Pozner's video deposition provided an additional source of "conspiracy" "material" for those who believe that Pozner fabricated N.'s murder. The circuit court cautioned counsel, however, against using the word "contempt" when referring to Fetzer's conduct.

¶64 At trial, Fetzer's violation of the confidentiality order was referred to three times. During opening statements, Pozner's counsel stated: "Fetzer is … going to agree and admit that he's violated this Court's order on confidentiality in e-mailing out videos taken in this case."

¶65 Next, Fetzer was cross-examined by Pozner's attorney as follows.

> [Counsel:] And you're a party to this litigation, so in that role you agreed to a confidentiality order, didn't you? "Yes" or "no"?
>
> [Fetzer:] Several.
>
> [Counsel:] And that means that you agreed that some of the things you learn in this case are confidential, correct?
>
> [Fetzer:] Yes.
>
> [Counsel:] And you agreed that if you thought something labelled confidential was not actually confidential, you'd ask the Court about that, didn't you?
>
> [Fetzer:] I believe that's correct. Yes.
>
> [Counsel:] And you violated that confidentiality order, didn't you?
>
> [Fetzer:] I did.
>
> [Counsel:] You attended Mr. Pozner's deposition?
>
> [Fetzer:] Yes.
>
> [Counsel:] And it was marked confidential, wasn't it?
>
> [Fetzer:] Yes.
>
> [Counsel:] And in violation of this Court's order, you shared that video with others, didn't you? "Yes" or "no"?
>
> [Fetzer:] Yes. Yes.
>
> [Counsel:] And allowing other Sandy Hook hoaxers to spread Mr. Pozner's image, correct? "Yes" or "no"?
>
> [Fetzer:] Yes.

¶66 Later, during closing arguments, Pozner's trial counsel referred to Fetzer's violation of the confidentiality order as follows:

> He testified to you today he promised to follow the protective order of this Court, the laws of this country. He violated it. He told you right from the stand. Yep. He took

> that deposition clip. He knew it was confidential, and what did he do? He spread that around too in violation of this Court's order.

C. Analysis.

¶67 Fetzer argues that the circuit court erred in permitting Pozner to elicit testimony and to argue to the jury concerning Fetzer's intentional violation of the protective order. More particularly, Fetzer contends that evidence and argument concerning Fetzer's violation of that order was inadmissible evidence of his "character,"[26] and introduction of such evidence was "prejudicial" to Fetzer. Pozner responds that Fetzer is not entitled to a new trial because admission of that evidence was proper and, in any event, introduction of the evidence and argument from counsel did not affect Fetzer's "substantial rights." We reject Fetzer's argument because, even if we would conclude that the circuit court erroneously admitted this evidence (and we do not so conclude),[27] any purported error was harmless in these circumstances.

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[26] Although Fetzer does not cite to WIS. STAT. § 904.04(1) in briefing in this court, that rule of evidence states: "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion...." We also note that § 904.04(2)(a) states in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[27] In its written decision on Fetzer's post-verdict motions, the circuit court further explained its reasoning for allowing the admission of this evidence on the issue of compensatory damages:

¶68 "We may not reverse or order a new trial on the ground of improper admission of evidence unless the error has affected substantial rights of the party seeking relief on appeal." ***Heggy v. Grutzner***, 156 Wis. 2d 186, 196, 456 N.W.2d 845 (Ct. App. 1990); *see* WIS. STAT. § 901.03(1) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."). "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698 (quoting ***State v. Dyess***, 124 Wis. 2d 525, 543, 547, 370 N.W.2d 222 (1985)) (applying the harmless error test to civil cases). To determine whether a reasonable possibility exists that the error contributed to the result, we examine the evidence brought out at trial. "[W]e have previously held that in determining the necessity for a new trial due to the admission of prejudicial evidence, the effect of the inadmissible evidence should be weighed against the totality of the sufficient credible evidence supporting the verdict." ***Sumnicht v. Toyota Motor Sales,***

> Additionally, the court advised the parties that Dr. Fetzer's intentional violation of the court's order and its resulting harm to plaintiff could be presented to the jury, not as a punitive sanction, but because Mr. Pozner convinced this court that the entire episode was a current manifestation of the underlying action taken by the defendant relating to Dr. Fetzer's prior defamatory statements.... This court relied on the fact that Dr. Fetzer's contemptuous act was relevant to the ongoing emotional harm Pozner claimed he was suffering.
>
> ....
>
> ... Pozner was looking [to] submit evidence of the ongoing harm he faced from Dr. Fetzer's continuing actions, which included sharing and using confidential materials in this case to repeat the claim that Pozner was not a real person. As such, evidence of the contempt order was not character—let alone inadmissible character—evidence.

U.S.A., Inc., 121 Wis. 2d 338, 377, 360 N.W.2d 2 (1984). Our review of this question is de novo. *See* ***Weborg v. Jenny***, 2012 WI 67 ¶43, 341 Wis. 2d 668, 816 N.W.2d 191.

¶69 Pozner sought damages because Fetzer's defamatory statements caused Pozner reputational and emotional harm.[28] Pertinent to our review, Pozner testified to the following.

- Following N.'s murder, Pozner was diagnosed with post-traumatic stress disorder (PTSD). Pozner and his family "started a life elsewhere" and, in the year following N.'s murder, Pozner "start[ed] to feel better."

- In mid-2014, Pozner became aware that Fetzer was writing about Pozner and N. and read the defamatory statements. Those statements made Pozner feel "like [he] needed to defend [N.] … to be his voice," Fetzer's statements caused Pozner "duress" and have left him "concerned … for [his] safety, [his] family's safety."

[28] For context, we note the material portions of the instruction given to the jury by the circuit court in this case:

> A person wronged by a defamatory statement is entitled to recover money damages. The measure of recovery is such sum as will compensate the person for the damages suffered as a result of the statements.
>
> In arriving at your answer, you should consider whether Mr. Pozner has suffered any humiliation, mental anguish, physical injury, and damage to his reputation in the community where his reputation is known. You should presume that Mr. Pozner had a good reputation at the time the statements were published. However, in determining damages, you should consider all evidence that has been offered bearing on his reputation in the community.

- After publishing N.'s death certificate on N.'s memorial page, Pozner "was accused of being a fake and a fraud" and now, when he thinks of N., "instead of thinking about [N.] and remembering memories that I have with him, I am constantly reminded of all this hate directed at [N.] and me."

- Fetzer's statements "cause[] people to believe ... that [Pozner] lied about [his] son's death, that [his] son didn't die" and that as a result of Fetzer's statements, Pozner is "very cautious" when he interacts with people and "very careful about what [he] reveal[s] and what others may reveal about [him]" because "people could accuse [him] of being ... this villain that Mr. Fetzer portrayed [him] to be."

- A woman named Lucy Richards accused Pozner of faking N.'s death or hiding N., and made death threats against him for which she was sentenced to prison. The FBI informed Pozner that Richards' "source of information was Mr. Fetzer," and a part of Richards' sentence and release conditions is a prohibition against reading Fetzer's website or any of his material.

¶70 Pozner also presented the deposition testimony of Dr. Roy Lubit, a board certified psychiatrist who has published regarding the issue of trauma, including PTSD in adults. Lubit testified as follows regarding Pozner:

> [Pozner] is very uncomfortable going out because he has been threatened.... He is very concerned about people recognizing him ... because people come up and approach him and say things, and argue with him, and tell him he's a terrible person, that he is part of this hoax. That there was no shooting there ... that ... he's part of this conspiracy to take away their guns, and he made this up.

> ... [Pozner has] withdrawn from people, he tries not to go out much more than he needs to ....
>
> ....
>
> And [Pozner] said that ... 14 months, very roughly, 15 months after [the Sandy Hook shooting] happened he was doing better, he was on the mend [although] people never fully get over these things....
>
> ....
>
> But then he started going downhill ... when there were attacks on him, verbally, that he's making up a hoax, ... there never was a son, his son wasn't killed ... and people started harassing him in various ways....

¶71 Lubit opined that Pozner continued to suffer from PTSD as a direct result of being "publicly accused of having falsely claimed he lost a child." Lubit further testified that "if people just left him alone, he would not now be suffering from PTSD. So as a result of what they did, his trauma symptoms not only ceased to heal, but got worse."

¶72 We reject Fetzer's characterization of the above-mentioned evidence as "weak[]" as compared to the evidence regarding Fetzer's intentional violation of the protective order. The testimony outlined above establishes that Pozner began to heal from the trauma of his son's death, but that the defamatory statements made by Fetzer have resulted in a regression in Pozner's healing process and have caused him continuing emotional harm. When the above-cited evidence is weighed against the very brief testimony that Fetzer violated the court's confidentiality order and counsel's truncated argument to that effect, we are confident that there is no reasonable possibility that references to Fetzer's violation of the protective order contributed to the jury's verdict and affected the substantial rights of Fetzer. *See* ***Martindale***, 246 Wis. 2d 67, ¶32.

III. Fetzer's Motion For a New Trial Based on "Incitement" of Third Parties.

¶73 Fetzer argued in his post-verdict motions that he is entitled to a new trial on the issue of damages for a second reason. Fetzer's briefing on this issue jumbles together various concepts. As best we can tell, Fetzer's argument is that the jury's answer to the special verdict question improperly caused him to be liable to Pozner for damages that Pozner sustained from what Fetzer refers to as "incitement"[29] of third parties who read Fetzer's defamatory statements.

¶74 As previously noted, Pozner testified at trial that Fetzer's defamatory statements "cause[] people to believe … that I lied about my son's death," Pozner is "very cautious" interacting with people because "it constantly happens" that people make accusations about him "being this villain that Mr. Fetzer portrayed me to be." As noted, a woman made death threats against Pozner because she thought that he was "faking [his] son's death or hiding [his] son," and that woman told the FBI that her "source of information was Mr. Fetzer."

¶75 Fetzer's motion was denied by the circuit court, and we reject Fetzer's argument for the following reasons.[30]

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[29] The term "incitement" is defined as "the act of encouraging someone to do or feel something unpleasant or violent." Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/incitement (last visited Mar. 12, 2021).

[30] Fetzer makes a number of factual assertions in the argument sections of his briefs in this court about incitement of third parties but, with the exception of a single citation to Pozner's attorney's closing argument, he fails to cite to any portion of the record to support his position. In his reply brief, Fetzer in an obscure manner refers to facts purportedly cited in his brief-in-chief. However, we are left to wonder what evidence in the record Fetzer might be relying on. We could reject Fetzer's argument regarding purported incitement of third parties for this reason but, instead, we consider the arguments of the parties. *See* WIS. STAT. RULE 809.19(1)(e); *see* ***Grothe***, 239 Wis. 2d 406, ¶6 (declining to address arguments not supported by citations to the record).

A. The Evidence Concerned Pozner's Reputation.

¶76 Pozner contends that the evidence Fetzer now complains of post-trial comes within the damages allowable for defamatory statements. *See* ***Denny***, 106 Wis. 2d at 643 (defining defamatory statements as a statement "that 'tends so to harm the reputation of another so as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her]'" (quoting ***Westby v. Madison Newspapers, Inc.***, 81 Wis. 2d 1, 6, 259 N.W.2d 691 (1997))).[31] Pozner argues that harm to reputation necessarily encompasses at least some evidence of what others think and say about a defamed plaintiff. Other than referring to it as "semantics," Fetzer does not engage with Pozner's argument.

¶77 Fetzer's argument assumes that negative interactions of persons with Pozner must concern only "incitement" of third parties. We reject that assumption because the evidence Fetzer now complains of was relevant to the issue of whether the defamatory statements affected how others view Pozner. Pozner presented evidence of how his reputation was affected by Fetzer's statements; in other words, how people viewed him when those persons were made aware of Fetzer's defamatory statements. We agree with Pozner that, as a matter of expedience, the actions and statements of others are relevant to the perception of Pozner in the community and whether his reputation was lowered. That reputation evidence

[31] To repeat, pertinent portions of the instruction read to the jury by the circuit court were:

> In arriving at your answer, you should consider whether Mr. Pozner has suffered any humiliation, mental anguish, physical injury, and damage to his reputation in the community where his reputation is known.... However, in determining damages, you should consider all evidence that has been offered bearing on his reputation in the community.

helped establish how the public views Pozner in light of Fetzer's defamatory statements, and it was properly part of the damages consideration for the jury.

B. Forfeiture.

¶78 Fetzer argues that evidence at trial violated Wisconsin public policy because, in allowing recovery for purported incitement of third parties by Fetzer, there is "no sensible or just stopping point; [it] would place too unreasonable a burden on the speaker; would be wholly out of proportion to the culpability of the speaker; and would be too remote from the speaker's own actions."[32]

¶79 Fetzer also makes a separate argument that allowing the jury to hear and rely on "incitement" evidence violates his First Amendment rights unless the test in ***Brandenburg v. Ohio***, 395 U.S. 444 (1969), is satisfied:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447.

[32] The Wisconsin Supreme Court has considered six public policy grounds upon which Wisconsin courts may deny liability in tort cases, including: (1) the injury is too remote from the wrongful act; (2) the recovery is wholly out of proportion to the culpability of the tortfeasor; (3) the harm caused is highly extraordinary given the wrongful act; (4) recovery would place too unreasonable a burden on the tortfeasor; (5) recovery would be too likely to open the way to fraudulent claims; and (6) recovery would enter into a field that has no sensible or just stopping point. ***Hornback v. Archdiocese of Milwaukee***, 2008 WI 98, ¶49, 313 Wis. 2d 294, 752 N.W.2d 862.

¶80 Pozner contends that Fetzer forfeited these arguments.[33] In support of that position, Pozner asserts that his complaint does not state a separate cause of action for incitement of others. Fetzer concedes that no such cause of action was pled by Pozner when he states in briefing in this court: "Incitement, moreover, is unrelated to reputational injury, which is [Pozner's] only ostensible basis of recovery." Pozner asserts that, if we assume that the evidence Fetzer now complains of concerned incitement of third parties rather than Pozner's reputation, it necessarily follows that evidence and argument concerning incitement of third parties was not properly a part of Pozner's claim for defamation damages, and Fetzer was required to object to the jury's consideration of that question. As we now discuss, Fetzer made no such objection or argument at or before trial and, therefore, Fetzer's arguments were forfeited and further we decline to address those.

[33] Before considering Pozner's contention that Fetzer forfeited these arguments, we pause to consider whether Fetzer ties his contentions that Wisconsin public policy and his First Amendment rights were violated to the facts of this case. His briefing in this court shows that Fetzer gives only the following conclusory statements with no analysis in support of those positions: "Pozner essentially would impose strict liability whenever a third person reads something and then commits acts of lawlessness," "[c]asual [sic] liability for the uninvited actions of the readers of speech is a dangerous precedent," and "[s]peech, and its public policy implications is not an abstract aspiration. The limits on liability for alleged incitement are fundamental to an informed and intellectually vibrant society." Those generalized, conclusory assertions do not substitute for analysis germane to this issue and the facts of this case. Without a developed argument, we need not consider Fetzer's assertions. ***Associates Fin. Servs.***, 258 Wis. 2d 915, ¶4 n.3 (declining to address undeveloped arguments). However, for the sake of completeness, we consider other arguments of the parties.

In addition, in his post-verdict motions in the circuit court and in his brief-in-chief in this court, Fetzer argued that there was insufficient evidence to support any claim for incitement of third parties in this action. Fetzer abandons an insufficiency of the evidence argument in his reply brief in this court, in which he states: "The issue raised is not one of ... sufficiency of the evidence, but rather constitutional mandate and public policy."

¶81 The Wisconsin Supreme Court in ***State v. Mercado***, 2021 WI 2, 395 Wis. 2d 296, 953 N.W.2d 337, has described the proper application of the forfeiture rule:

> Forfeiture occurs when a party fails to raise an objection. We have espoused important reasons why courts should abide by the forfeiture rule. Those rules include, for example, allowing circuit courts to correct errors in the first instance, providing circuit courts and parties with fair notice of an error and an opportunity to object, and preventing "attorneys from 'sandbagging' errors" by not raising them during trial and alleging reversible error upon review.

Id., ¶35 (footnote omitted) (internal citation omitted) (quoting ***Huebner***, 235 Wis. 2d 486, ¶12).

¶82 Pozner contends, and Fetzer does not dispute, that Fetzer never raised an objection at or before trial to the admission of evidence regarding statements made to Pozner by persons other than Fetzer that were caused by Fetzer's defamatory statements. Material to that point, our supreme court has stated:

> In the context of admitting or denying admission of evidence, forfeiture is contemplated by statute. WISCONSIN STAT. § 901.03(1) provides that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected and ... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record ...." Two things are required before an appellate court may reverse evidentiary errors: (1) the violation of a party's substantial right and (2) an objection or motion to strike.

Id., ¶36 (footnote omitted).[34] As a result, Fetzer has forfeited any objection on appeal to the jury's consideration of this evidence. *See* ***id.***, ¶38 ("Upon a review of the record, we cannot identify a single instance during the trial in which Mercado

[34] Fetzer does not contend that any exceptions to the statutory mandate discussed by the supreme court in ***State v. Mercado***, 2021 WI 2, ¶37, 395 Wis. 2d 296, 953 N.W.2d 337, are applicable.

objected to [particular evidence]; he therefore forfeited his objection in regard to its admissibility."). Further, we see no good reason to overlook forfeiture in these circumstances.

¶83 Next, Pozner contends that Fetzer forfeited any argument on appeal regarding the jury instructions. That contention is germane because Fetzer argues on appeal that the circuit court should have instructed the jury that it could not impose damages against Fetzer for statements of others allegedly incited by the defamatory statements unless the jury found that the standards enunciated in ***Brandenburg***, 395 U.S. at 447, were satisfied by the evidence. Fetzer argues in this court that this issue must be met "head on." That statement from Fetzer is ironic because Pozner contends, and Fetzer does not dispute, that Fetzer did not request a jury instruction regarding the standard discussed in ***Brandenburg***. By failing to do so, Fetzer has forfeited the argument. *See* WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); *see* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶39, 340 Wis. 2d 307, 814 N.W.2d 419 (stating that failure to object at the jury instruction conference constitutes forfeiture of an objection to a jury instruction).

¶84 Finally regarding forfeiture, the relief requested by Fetzer for these alleged errors is a new trial on all damages issues. Fetzer asks for a new trial on all damages issues because, according to him, the evidence about the purportedly "incited" statements of third parties "cannot be parsed out as contributing to the jury's verdict." But, for the reasons we next discuss, Fetzer has forfeited that request for a new trial because of his failures to make the necessary objections and requests at trial.

¶85 The circuit court concluded in its post-verdict decision, and we agree, that "Pozner's claim for compensatory damages did not rest entirely" on statements made by others. That is to say, Pozner did not base his damages claim solely on statements of others caused by Fetzer's defamatory statements. Instead, Pozner's claim for compensatory damages was premised mostly on the basis that the defamatory statements themselves caused Pozner direct harm. As one example previously noted, Pozner presented evidence in the form of expert testimony from Dr. Lubit that Fetzer's defamatory statements in themselves have prevented Pozner from healing from the PTSD Pozner suffered following N.'s murder. Pozner also testified that he changed his behavior in a negative manner as a result of the defamatory statements.

¶86 As stated, Fetzer does not argue that this evidence of damages which had nothing to do with the purported "incitement" of others evidence was not sufficient to support a damages award. But, because of strategic decisions or failures to act on Fetzer's part at or before trial, there is no remedy at this point other than a new trial on all damages issues to parse out the evidence Fetzer now claims post-trial that the jury should not have considered. Because of Fetzer's strategic decisions or failures to act, the circuit court was not given the opportunity to frame the jury instructions or questions in the special verdict to ensure that there was a proper record to decide post-trial questions of public policy or constitutionality which Fetzer should have raised prior to or at trial. As a result, we cannot know how much weight, if any, was given to this evidence in deliberations by the jury or how much of the damages verdict, if any, concerned the evidence to which Fetzer now objects. Fetzer cannot, by his failure to act at or before trial, cause the record to be unclear, and then rely on that lack of clarity to obtain a new trial on all damages issues.

¶87 In sum, we reject Fetzer's request for a new trial on damages based on his public policy and constitutionality arguments.

IV. APPEAL IN 20AP1570.

A. Fetzer's Second Contempt of Court.

¶88 Fetzer argues that the circuit court's alternative purge condition for the second contempt finding, an order for payment of $650,000 reflecting a portion of Pozner's attorney fees incurred in this action, is in error. We reject Fetzer's argument for the following reasons. We begin by considering additional pertinent facts.

1. Additional Pertinent Facts.

¶89 About two weeks after the circuit court first found Fetzer in contempt of court for distribution of Pozner's deposition, Fetzer provided a copy of Pozner's deposition again to Maynard. Months after that, Pozner discovered that Maynard published a blog post that included a link to a copy of Pozner's videotaped deposition and deposition transcript. Based on that information, Pozner again asked the circuit court to hold Fetzer in contempt of court.

¶90 At the second contempt hearing, Fetzer's counsel admitted that Fetzer provided Maynard with a copy of Pozner's deposition for a second time. Put another way, Fetzer violated the protective order a second time after he was told by the court at the first contempt hearing that Maynard was not authorized to receive materials protected by that order.

¶91 The circuit court found, for a second time, that Fetzer was in contempt of court.[35] Of importance, the circuit court also found that Fetzer's contempt was continuing in that all copies of the deposition that had been unlawfully disseminated were not recovered. In fact, Fetzer conceded the continuing contempt finding of the circuit court:

> [THE COURT:] Having so held him in contempt, now for the second time, do you agree, [counsel for Fetzer], that the contempt is continuing? Now, I understand that factually, you suggested that Ms. Maynard is -- I think the words that you used at one point in the courtroom, stuff the genie back in the bottle, perhaps.
>
> But do you also agree that the deposition transcript has been disseminated more widely and will never be assuredly removed from the possession of those that are not authorized?
>
> [FETZER'S COUNSEL]: I don't disagree with that, Your Honor.
>
> THE COURT: All right.
>
> So having found that the contempt is continuing, the purpose of the hearing is to fashion a remedy to address continuing contempt.

¶92 Further, Fetzer does not challenge on appeal the circuit court's finding that his contempt was continuing and does not in reply dispute Pozner's assertion in his brief-in-chief that Fetzer's second contempt of court is ongoing. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (stating propositions asserted by a respondent and not disputed by the appellant's reply are taken as admitted). Accordingly, we conclude that there is no dispute that Fetzer's second contempt of the circuit court's order was continuing. Fetzer further does not

[35] A circuit court's finding of contempt is reviewed under an erroneous exercise of discretion standard. *See* ***Frisch v. Henrichs***, 2007 WI 102, ¶29 n.13, 304 Wis. 2d 1, 736 N.W.2d 85. Here, Fetzer does not dispute that the contempt finding was appropriate.

question that Pozner incurred in this litigation at least $650,000 of attorney fees or that the fees were reasonably incurred.

2. The Order Was For Remedial Contempt.

¶93 The parties disagree on whether the circuit court imposed remedial or punitive contempt. Determining whether the contempt sanction was punitive or remedial is a question of law that this court reviews de novo. *See, e.g.*, ***Diane K.J. v. James L.J.***, 196 Wis. 2d 964, 968, 539 N.W.2d 703 (Ct. App. 1995).

¶94 As applied to these circumstances, "'[c]ontempt of court' means intentional ... [d]isobedience, resistance or obstruction of the authority, process or order of a court." WIS. STAT. § 785.01(1)(b). "Contempt may be punished either by a punitive sanction or a remedial sanction." ***Frisch v. Henrichs***, 2007 WI 102, ¶33, 304 Wis. 2d 1, 736 N.W.2d 85; *see also* WIS. STAT. §§ 785.02 and 785.04(1) and (2). The ***Frisch*** court stated:

> A punitive sanction is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." WIS. STAT. § 785.01(2). "A court issuing a punitive sanction is not specifically concerned with the private interests of a litigant." ***Diane K.J. v. James L.J.***, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). A punitive sanction requires that a district attorney, attorney general, or special prosecutor formally prosecute the matter by filing a complaint and following the procedures set out in the criminal code. WIS. STAT. § 785.03(1)(b).

Frisch, 304 Wis. 2d 1, ¶34. "[B]ecause the sanction is directed only at past conduct, its imposition cannot directly aid a litigant harmed by the contempt." ***Christensen v. Sullivan***, 2009 WI 87, ¶52, 320 Wis. 2d 76, 768 N.W.2d 798 (quoted source omitted).

¶95 In contrast, a remedial sanction is one that is "imposed for the *purpose of terminating a continuing contempt of court*." WIS. STAT. § 785.01(3) (emphasis added). "[T]his means that remedial sanctions may be imposed *only* when action or inaction constituting contempt of court is ongoing and needs to be terminated." ***Christensen***, 320 Wis. 2d 76, ¶54.

¶96 The circuit court concluded that it was imposing a remedial contempt sanction. We agree. The contempt request was not prosecuted as required under WIS. STAT. § 785.03(1)(b), and there is no dispute that Fetzer's contempt was continuing.

3. Sanction Related to Fetzer's Contempt.

¶97 The parties next dispute whether the second contempt order remedies were reasonably related to Fetzer's contempt. The issue of whether a circuit court has authority under WIS. STAT. ch. 785 to employ remedial contempt requires interpretation and application of a statute, and that is a question of law this court reviews de novo. ***Frisch***, 304 Wis. 2d 1, ¶29.

¶98 "A person aggrieved by another person's contempt may file a motion for imposition of a remedial sanction for the contempt, and the court may impose an authorized sanction." ***Id.***, ¶35.[36] The circuit court found that there may be future

[36] The following remedial sanctions may be imposed by the circuit court for the purpose of terminating a continuing contempt of court:

> (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

contemptuous acts by Fetzer based on his past behavior and other actions (as we described above in ¶60). Future compliance with a court order is an acceptable purpose for a remedial sanction. *See* ***Benn v. Benn***, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999).

¶99 As our supreme court explained in ***Frisch***:

> At one time, the statutes required that civil contempt situations be purgeable. *See* [WIS. STAT. §] 295.02(4) [1974-75]. *The current statutes do not contain such a requirement* other than the provision that a person may be imprisoned for civil contempt "only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period." [WIS. STAT. §] 785.04(1)(b).

Frisch, 304 Wis. 2d 1, ¶58 (quoting ***Larsen v. Larsen***, 165 Wis. 2d 679, 685 n.1, 478 N.W.2d 18 (1992)). Instead, WIS. STAT. ch. 785 "has been consistently interpreted to allow the circuit court to establish an alternative purge condition to purge a party's contempt." ***Id.***, ¶60. "An alternative 'purge condition' may be [a] sanction authorized under WIS. STAT. § 785.04(1)(a) or (e).'" ***Id.*** "The contempt statute allows the purge condition and the sanction to be the same." ***Id.***, ¶63. An

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> (b) Imprisonment if the contempt of court is of a type included in [WIS. STAT. §] 785.01(1)(b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.
>
> (c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.
>
> (d) An order designed to ensure compliance with a prior order of the court.
>
> (e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

WIS. STAT. § 785.04(1).

ongoing contempt can be terminated by complying with the alternative purge condition. ***Id.***, ¶60.

¶100 The circuit court determined that the sanctions set forth in WIS. STAT. § 785.04(1)(a)-(d) would be ineffectual to terminate Fetzer's continuing contempt, and that the sole proper remedy lay within § 785.04(1)(e). In imposing an alternative purge condition against Fetzer under that statutory provision, the court stated:

> [Pozner] has met [his] burden and established a nexus between the requests for reimbursement of the fees and the contempt that the Court has found to be current, ongoing, and not likely to be terminated any time soon.
>
> So therefore, I'm going to grant the plaintiff's motion and issue an award, issue a judgment for actual attorneys' fees incurred on two alternative theories. One is simply as it relates to the contempt and the connection between the fees expended since commencement of this action, but also just taking the total amount as being an ... appropriate sanction ... independent of that nexus, to be an appropriate consequence for ... Dr. Fetzer's repeated contemptuous behavior.

¶101 Fetzer argues that the alternative purge condition set by the circuit court of $650,000, which reflects a partial payment toward Pozner's attorney fees incurred in this action, is improper. But, the circuit court was left, at Fetzer's specific request, with only monetary alternative purge conditions because Fetzer asked not to be jailed in light of what Fetzer referred to as his "health conditions."

¶102 The circuit court properly focused on the harassment of Pozner in this action by Fetzer in his continuing contempts in violation of the court's protective order. We see no reason to question the circuit court's finding that Pozner was worse off at the end of the proceedings in the circuit court than he would have been if he had never brought suit, at least in terms of his image and information being

disseminated on the internet to Pozner's detriment. As Pozner asserts, Fetzer, despite a court order designed to protect Pozner's image and confidential information, took the affirmative steps of gathering non-public information and disseminating it on the internet to persons who have professed beliefs similar to his regarding the Sandy Hook shooting. And, as Pozner asserts, Fetzer used these legal proceedings to obtain information and Pozner's image, which Fetzer could not obtain otherwise, to harass and "publicly smear" Pozner. It was reasonable for the circuit court to award a substantial share of the attorney fees incurred by Fetzer in this action because of the multiple and intentional violations of the protective order, the harm to Pozner, the continuing nature of the contempt, and the likelihood of future contemptuous actions by Fetzer. That the circuit court may have employed a different alternative purge condition does not lead to the conclusion that the circuit court did not have the authority to employ this condition or that the circuit court's order is improper.

4. Evidentiary Hearing.

¶103 Lastly, Fetzer argues that the circuit court erred because it did not give Fetzer an evidentiary hearing regarding his ability to pay the $650,000 alternative purge condition. It is correct, as Fetzer argues, that "the contemnor should be able to fulfill the proposed purge." *See* ***Frisch***, 304 Wis. 2d 1, ¶64.

¶104 The circuit court recognized that this could be an issue and suggested that an evidentiary hearing may be needed. At the next hearing at which the circuit court ruled on this issue, the court specifically asked Fetzer's counsel whether he requested an evidentiary hearing on any issue concerning the second contempt. Fetzer's counsel answered: "Your Honor … my preference would be to proceed as scheduled … with oral arguments rather than an evidentiary hearing." Under those

circumstances, Fetzer waived the right to have an evidentiary hearing on this particular issue, and cannot be heard to complain of the circuit court's failure to hold such an evidentiary hearing when he declined the opportunity.[37]

¶105 In sum, the circuit court did not err in granting the alternative purge condition for Fetzer's second contempt of court.

B. Alleged Bias of the Circuit Court.

¶106 Finally, Fetzer argues that the circuit court acted with bias against him. We reject this argument for the following reasons.

¶107 When analyzing a claim of judicial bias, we "presume that the judge was fair, impartial, and capable of ignoring any biasing influences." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The burden is on the party asserting judicial bias here, Fetzer, to show bias by a preponderance of the evidence. ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. The Wisconsin Supreme Court has stated that "it is the exceptional case with 'extreme facts' which rises to the level of a 'serious risk of actual bias.'" ***Miller v. Carroll***, 2020 WI 56, ¶24, 392 Wis. 2d 49, 944 N.W.2d 542 (quoted sources omitted). Fetzer asserts that there is evidence of the circuit court's "objective bias." Objective bias in this context means that a reasonable person could question the court's impartiality based on the court's statements. *See* ***id.***, ¶40. A circuit court's partiality is a matter of law reviewed independently by this court. ***State v. Goodson***, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385.

[37] Fetzer also argues that Pozner recognized that Fetzer may have difficulty paying a large judgment in this case. However, Fetzer does not make any cognizable argument that Pozner waived or forfeited his right to a contempt remedy by making a general observation about what Fetzer may, or may not, have available to him in terms of money and assets at this time or going forward.

¶108 As an initial matter, we reject some of Fetzer's claims of the circuit court's bias. Those allegations concern purported acts of the circuit court regarding issues discussed in appeal number 2020AP121, as opposed to appeal number 2020AP1570, the second contempt of court decision appeal just discussed. We did not consolidate these appeals for briefing purposes, and the parties filed separate briefs in each appeal. Claims of bias regarding the circuit's decisions discussed in the earlier appeal were required to be raised within the briefing in that separate appeal, and Fetzer did not do so. Therefore, those claims of bias were forfeited by Fetzer for failing to raise those issues at the proper time, and we decline to overlook that forfeiture.

¶109 In regard to issues concerning the second contempt of court decision of the circuit court, Fetzer raises only the allegation that the circuit court "sua sponte proposed to award Pozner attorney fees" as a contempt sanction.[38] We do not find any basis for Fetzer's bias argument. As pointed out by Pozner, he had requested attorney fees in his complaint. Moreover, Fetzer does not dispute that, by the time at which attorney fees were discussed, he had not proposed a viable alternative purge condition. As a result, it is not evidence of objective bias of the circuit court to comment that payment of some of Pozner's attorney fees incurred in this action might be an appropriate sanction for Fetzer's continuing and intentional violation of the court's order under these circumstances.

[38] Fetzer also contends on appeal that there was evidence of objective bias of the circuit court because the court "refused to consider Fetzer's ability to satisfy" the monetary sanction. We have already decided that the circuit court did not err in that regard. Further, we see no evidence of bias there.

¶110 For those reasons, there is no basis to conclude that there was objective bias on the part of the circuit court regarding the second contempt of court decision.

¶111 One other matter must be addressed. We are dismayed regarding assertions about the circuit court in the briefs filed in these appeals by Fetzer's counsel. Fetzer's counsel appears to believe that he has a license to make unprofessional comments about the circuit court that are not in any way supported by the record.

¶112 The following are illustrative examples in briefing in this court: "The court articulated a rambling theory of liability"; "Finally, the court attempted to cover its tracks by ruling that Fetzer, in fact, was negligent as a matter of law"; "Due process in such circumstances required notice and an opportunity for Fetzer to be meaningfully heard, especially when the court becomes advocate"; "The circuit court's foray into the negligence issue, as a solo adventurer, also fares poorly as a substantive matter"; "The circuit court improperly acted as judge advocate for" Pozner; "The circuit court's palpable disdain for Fetzer as a conspiracy researcher is not a basis for judicial abnegation of the right to equal and fair treatment under the law"; The circuit court imposed "rogue remedies"; and "The circuit court, nonetheless, led Pozner's counsel, as if by the halter, to conclude that Pozner was now worse off as a result of the deposition disclosure than before he initiated his limited action for defamation." We should not have to observe that baseless attacks on the competence or integrity of a circuit court judge is not a substitute for effective advocacy.

¶113 We expect, and ethical rules require, that counsel who appear before us are zealous advocates for their clients, and of course this includes pointed,

supported argument challenging all potential errors made by a court. What this court neither expects nor wants are gratuitous, disrespectful comments from counsel that are not in any way supported by the record and therefore not worthy of an attorney who practices before this court. We admonish Fetzer's counsel not to continue this practice. We also note, however, that we are confident that the result of this appeal would be the same even if counsel had advocated in a more professional manner.

CONCLUSION

¶114 For the foregoing reasons, the judgment and orders of the circuit court are affirmed.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES H. FETZER

Petitioner

v.

LEONARD POZNER

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WISCONSIN FOURTH COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDICES

Volume 2:

Appendices B - G

INDEX TO APPENDICES

VOLUME 2:

Appendix B

FILED
06-18-2019
CIRCUIT COURT
DANE COUNTY, WI
2018CV003122

DATE SIGNED: June 18, 2019

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,
Plaintiff

vs.

Case No. 18CV3122

JAMES FETZER,
MIKE PALECEK,
WRONGS WITHOUT WREMEDIES, LLC,
Defendants.

Order Granting Plaintiff's Motion For Summary Judgment

This Court having considered the following:

On April 30, 2019, Plaintiff filed a Motion for Summary Judgment and supporting materials (Docs. 101-106, 117-122), that Defendant Fetzer and Defendant Palecek defamed Plaintiff by publishing the following statements in the 2016 edition of NOBODY DIED AT SANDY HOOK:

- "Noah Pozner's death certificate is a fake, which we have proven on a dozen or more grounds."
- "[Mr. Pozner] sent her a death certificate, which turned out to be a fabrication."
- "As many Sandy Hook researchers are aware, the very document Pozner circulated in 2014, with its inconsistent tones, fonts, and clear digital manipulation, was clearly a forgery."

Plaintiff's Motion additionally sought Summary Judgment that Defendant Fetzer defamed Plaintiff by publishing the following statement from a 2018 blog post:

- "It [N.P.'s death certificate] turned out to be a fabrication, with the bottom half of a real death certificate and the top half of a fake, with no file number and the wrong estimated time of death at 11 AM, when 'officially' the shooting took place between 9:35-9:40 that morning."

Defendant Fetzer filed a Response and supporting materials (Docs. 176-184, 190-191, 193, 195-198) which Mr. Palecek sought to join (Docs. 210-212). Plaintiff filed a Reply (Doc. 206) on June 12, 2019.

Defendant Fetzer filed a Motion for Summary Judgment and supporting materials (Docs. 100, 136-137). Plaintiff filed a Response and supporting materials (Docs. 169-172) and Defendant Fetzer filed a Reply on June 12 (Doc. 207). The parties filed associated motions to strike certain evidence and responses thereto (Docs. 185-186 (Defendant Fetzer's motions), 202-205 (Plaintiff's motions)). The Court thereafter heard oral argument on June 17, 2019.

NOW IT IS HEREBY ORDERED that for the reasons stated on the record at the June 17, 2019 hearing:

Defendant Palecek's Verified Motion for Extension to File Response is denied;

Defendant Palecek's Response to Plaintiff's MSJ and Cross-Motion for Summary Judgment is denied;

Defendant Fetzer's Motion to Strike Green Affidavit is denied;

Defendant Fetzer's Motion to Strike Friedman and Sinelnikov Affidavits is denied;

Defendant Fetzer's Motion for Summary Judgment is denied; and

Plaintiff's Motion for Summary Judgment is granted. The amount of Mr. Pozner's damages remains at issue for trial.

Ordered on this 18th day of June, 2019.

Appendix C

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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MADISON, WI 53701-1688

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February 16, 2022

To:

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Circuit Court Judge
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Carlo Esqueda
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You are hereby notified that the Court has entered the following order:

Nos. 2020AP121 & 2020AP1570 Leonard Pozner v. James Fetzer L.C. #2018CV3122

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, James Fetzer, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Sheila T. Reiff
Clerk of Supreme Court

Appendix D

FILED
12-12-2019
CIRCUIT COURT
DANE COUNTY, WI
2018CV003122

BY THE COURT:

DATE SIGNED: December 12, 2019

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

LEONARD POZNER,

Plaintiff,

v.

JAMES FETZER, *et al.*,

Case No. 18CV3122

Defendants.

DECISION AND ORDER ON POST-VERDICT MOTIONS

Plaintiff Leonard Pozner is the parent of Noah Pozner, a student killed in the mass shooting at Sandy Hook Elementary School. Mr. Leonard Pozner filed suit for defamation, after defendant Dr. James Fetzer published several statements denying the existence of his son. In June 2019, the court entered partial summary judgment in favor of Mr. Pozner, after concluding that Dr. Fetzer's statements met all the elements of defamation under Wisconsin law. Dkts. 230 and Dkt. 231. The issue of damages was submitted to a jury, and on October 15, the jury returned a verdict in favor of Mr. Pozner. Dkt. 300. Dr. Fetzer now moves to vacate the court's entry of partial summary judgment. He also moves for a new trial, based on the argument that inadmissible evidence was submitted to the jury. Dkt. 331.

The court will deny both motions. As discussed below, Dr. Fetzer's primary argument against the court's entry of partial summary judgment is that he qualifies as a "media defendant."

But not only did Dr. Fetzer fail to raise media-defendant issue until now, he has also failed to articulate how he qualifies as one in his post-verdict materials. The omissions are enough for the court to reject the argument. But even if the court were to consider the argument, the court would conclude that Dr. Fetzer acted with negligence when making (or publishing) his statements. The undisputed facts show that Noah Pozner's death certificate was (and is) authentic, and no reasonable factfinder can conclude that Dr. Fetzer acted with ordinary care when he published the statements claiming that the death certificate was a fake.

As for whether there should be a new trial, the evidence that Dr. Fetzer now claims was prejudicial was in fact relevant to Mr. Pozner's claim for compensatory damages. Because the evidence was relevant, the evidence was admissible.

As a final matter, Mr. Pozner has also filed post-verdict motions. He seeks a permanent injunction preventing Dr. Fetzer from repeating the defamatory statements at issue in this case. Dkt. 329. Mr. Pozner has also filed an application for reasonable attorney fees. Dkt. 327. As further discussed below, the court will grant the request for a permanent injunction. Defamatory statements are not protected by the First Amendment, and a narrow enough injunction can be crafted to balance the competing interests in this case. As for whether Mr. Pozner is entitled to reasonable attorney fees, Wisconsin follows the American Rule. The rule generally holds that in the absence of a statute or contract, attorney fees cannot be awarded. An exception to this rule exists when dealing with actions in equity—such as a foreclosure—where the court has considerable more leeway in "do[ing] justice between the parities." But this case is an action in law, not equity, so the court must deny Pozner's application for attorney fees.

ANALYSIS

A. Motion to vacate partial summary judgment

Almost six months after granting the motion, Dr. Fetzer, through his counsel, now challenges the court's entry of partial summary judgment in favor of Mr. Pozner. As an initial matter, the court notes that all of the issues now raised could have been raised earlier, between the time of the court's entry of partial summary judgment and when the case was tried to a jury verdict. But Dr. Fetzer failed to raise those arguments. Understandably, Dr. Fetzer is now represented by counsel. But that fact alone does not immunize Dr, Fetzer from the decisions he made when acting as his own attorney. A persuasive case has been made that it is too late for Dr. Fetzer to now attack the court's June decision on cross-motions for summary judgment.

To be sure, defense counsel argues in his brief that he raised this issue at the final pretrial conference. That may be so, but it misses the mark relating to waiver (or more accurately forfeiture). Raising an issue for the first time at the final pretrial conference is not raising it in defense to plaintiff's motion for summary judgment, and it is not the court's obligation to raise and dispose of issues never briefed nor argued.[1]

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[1] It is worth delving into the particular details of the decisions that Dr. Fetzer made pro se at the time the cross motions for summary judgement were filed. Dr. Fetzer never argued that there was any disputes of material fact or that summary judgment could not be decided. On the contrary, Dr. Fetzer argued that the facts were clear, so the court should grant summary judgment in his favor. At one point in time, Dr. Fetzer even brazenly stated that he welcomed Mr. Pozner's lawsuit because it would provide a public forum for proving that Sandy Hook was all a hoax concocted by President Obama.

During oral argument on the cross-motions for summary judgment, despite being asked multiple times to identify which, if any, facts were in dispute Dr. Fetzer failed to identify a single one. *See* Dkt. 231, at 132-158, 161. Even in his interlocutory appeal taken immediately after the court ruled, although he claimed he created a genuine issue of material fact, his whole interlocutory appeal was based on his complaint that this court relied on the undisputed facts to come to what he claimed was the erroneous legal conclusion that Dr. Fetzer had defamed Mr. Pozner. Unfortunately, the court's attempt to expose factual disputes according to its order governing summary-judgement methodology fell flat in large part to Dr. Fetzer's misunderstanding of the

Dr. Fetzer's challenge to the court's entry of partial summary judgment focuses on *Denny v. Mertz,* 106 Wis. 2d 636, 318 N.W.2d 141 (1982). In *Denny*, the Wisconsin Supreme Court held that "a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement." *Id.* at 654. According to Fetzer, the court erred in not applying the negligence standard when concluding that Fezter's statements met all the elements of defamation under Wisconsin law.

There are two problems with Dr. Fetzer's argument. First, he does not articulate—let alone define—whether he qualifies as a "media defendant." As noted above, he did not raise the media-defendant argument his in summary-judgment materials, Dkt. 100 and Dkt. 176, and his post-verdict motion starts with the assumption that he already qualifies as one. Federal courts that have considered the media-defendant issue have deemed the media/nonmedia distinction irrelevant—focusing instead on whether the speech at issue was matter of public concern. *See Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) ("[E]very other circuit to consider the issue has held that the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers. . . . But this does not completely resolve the *Gertz* dispute[] [because] [plaintiffs] also argue that they were not required to prove [defendant's] negligence because *Gertz* involved a matter of public concern[.]"); *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009) ("[W]e believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions."); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) ("[A] distinction drawn according to whether the defendant is a member of the media or not is untenable. . . [I]n a suit by a private plaintiff involving a matter of public concern, we

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legal process.

hold that allegedly defamatory statements must be probably false[.]"). Dr. Fetzer does not articulate how the federal courts' eschewing of the media/nonmedia distinction affects Wisconsin defamation law. Nor has Dr. Fetzer addressed why the court should view his defamatory statements as one that involves a matter of public concern, should the court adopt the federal circuit courts' analyses, *see Jones v. Dane Cty.*, 195 Wis. 2d 892, 921 n.10, 537 N.W.2d 74 (Ct. App. 1995) ("[Wisconsin courts] are bound only by the United States Supreme Court on questions of federal law.").

Dr. Fetzer's omissions are enough for the Court to reject the media-defendant argument. But even if the court were to consider the argument, it is hard to see how the outcome of the summary-judgment hearing would have been different. During the June 2019 hearing, the court heard oral arguments on whether Mr. Pozner was entitled to Dr. Fetzer's research materials. *See* Dkt. 231, at 20. Mr. Pozner had argued that those materials were relevant in determining whether Dr. Fetzer acted with actual malice. Dkt. 231, at 21:18-20 (Pozner's counsel stating, "[T]he discovery requests that Dr. Fezer doesn't want to produce discovery to[] actually goes to the malice element."). But Dr. Fetzer refused to turn over those research materials, going as far as to concede that Mr. Pozner was a private figure in order to make the actual-malice element irrelevant. *Id.* at 71:24-25, 72:1-4 (Fetzer stating, "Frankly, Your Honor, the other issues are so much more fundamental, I'm not even concerned about that... I'm willing that [Pozner's discovery request] be resolved on the basis of [Pozner] being a private person."). Having benefited from that deal, Dr. Fetzer cannot renege on that deal now.

But Dr. Fetzer's concession was much more than him conceding that Mr. Pozner was a private individual. By refusing to produce the requested research materials, Dr. Fetzer was also effectively conceding that he too should be treated as a private individual. Having made that

calculated choice then, and thus depriving the plaintiff of evidence relating to both malice and negligence, he cannot now return to this court, after trial, and seek to set aside the court's entry of partial summary judgment.[2]

In fact, had Dr. Fetzer raised the media-defendant argument in his written response to Pozner's motion for summary judgment, the court would have treated the issue as conceded as well. As stated above, *Denny* held that private person need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. 106 Wis. 2d at 654. Negligence is generally defined as "the lack of ordinary care either in the doing of an act or in the failure to do something." *Id.* (citation and internal quotation marks omitted). In order to prove that Dr. Fetzer acted with (or failed to act) with ordinary care when making his statements, Mr. Pozner would have needed Dr. Fetzer's research materials. But as noted above, Dr. Fetzer conceded away a major element of Mr. Pozner's defamation claim in order to not turn over those materials. Having benefited from the trade off, Dr. Fetzer cannot renege on that deal now.[3]

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[2] This highlights an additional problem with Dr. Fetzer's present motion. Had he raised the media-defendant argument then, this court would have come to the conclusion that the undisputed material facts were still sufficient to find Dr. Fetzer defamed Leonard Pozner. That conclusion would have been based on two considerations. The first was that Dr. Fetzer made a tactical decision to withhold documents in exchange for agreeing that for purposes of the court's inquiry both parties should be treated as private individuals. The second consideration was that this court would have concluded that indeed, the undisputed facts showed that Dr. Fetzer was negligent. Stated another way, Leonard Pozner was entitled to judgment as a matter of law because the underlying facts were undisputed.

[3] To repeat, Dr. Fetzer never raised the negligence issue at the time this court considered the parties' cross motions for summary judgment. In his June 9, 2019 brief responding to Pozner's motion for summary judgment, nowhere does he claim that he enjoyed the benefits of being a media defendant. He never argued at he was not "negligent". Instead, he iterated and reiterated his version of the truth in a vain hope that this Court would similarly conclude that "Nobody Died at Sandy Hook." And he duplicated that argument in his final reply brief in support of his motion for summary judgment. Dr. Fetzer's entire case was based on his belief that he could prove the truth of all the things he said about Leonard and Noah Pozner.

When the issue did finally come up, during the June 20th oral arguments on the parties' cross-motions for summary judgment, addressing Dr. Fetzer's motion, the court stated:

> So Mr. Zimmerman, Dr. Dr. Fetzer wants me to reconsider an earlier ruling I made regarding a motion to compel because now he would like to assert a privilege given to journalists. Now, we all know, because we were all on the phone, he didn't assert that defense at the time the Court considered your motion to compel. My recollection of the underlying motion was fairly simple, is the Plaintiff requested, Look, in order for me to prove that the elements of defamation, I need to know all the information you had which formed the basis of your assertion that . . . the death certificate was fabricated by someone.

Dkt. 231, at 20-21.

After Dr. Fetzer again tried to characterize himself as a journalist, the court went on to note:

> There's no question, Dr. Fetzer, that I -- I agree with you that the law has moved toward a greater protection in recognizing some of the traditional protections we've given the classic written newspaper journalist, television journalism, to journalists of -- of a different kind. So but -- but this is a discovery question now. Dr. Dr. Fetzer, why didn't you raise this issue when I -- we were together on the motion to compel? MR. DR. FETZER: I suppose it hadn't crossed my mind, Your Honor, but it's such an enveloping aspect of this case. The -- the Plaintiff is seeking to identify new targets for his harassment, for his lawsuits. THE COURT: Okay. MR. DR. FETZER: He has a history of doing this. THE COURT: Hang on. So Dr. Fetzer, there's a concept in the law that when you don't raise something when it was time to raise it, you waive it, so we don't keep coming back and having additional hearings. You agree that this should have been raised at the time I considered the motion to compel. You've called it a Motion to Reconsider, and under 806.07, there's specific things I look at to determine whether a court should reconsider. Are you familiar with the statutory provisions set forth in Wisconsin statutes 806.07? MR. DR. FETZER: Only -- only in a general fashion, Your Honor.

Dkt. 231, at 24-25.

Although the discussion during that hearing toggled back and forth between how to characterize the Mr. Pozner and Dr. Fetzer, the goal of Dr. Fetzer was always to keep his files secret. And if Dr. Fetzer had to concede that both he and Mr. Pozner were private individuals, he was prepared to do so. At the end of that hearing the court addressed Dr. Fetzer directly and stated:

But even if the court were to conclude that Fetzer qualifies as a media defendant, the court would still conclude that Fetzer acted with negligence when making (or publishing) his statements. Not only were the four statements presented to the jury all untrue, the underlying undisputed facts also establish that. Dr. Fetzer was negligent when he first wrote them. Let me be clear, based on all of the evidence presented to this Court, the undisputed facts clearly establish that Mr. Pozner's son's death certificate is not a fake. Mr. Pozner did not send out a death certificate which turned out to be a fabrication. The document Mr. Pozner circulated in 2014, with its tones and fonts was not a forgery. And finally, Mr. Pozner's son's death certificate did not turn out to be a fabrication, even when comparing the bottom half with the top half. Despite all the evidence now produced in this court Dr. Fetzer remains undaunted in his misguided and cruel belief that Leonard Pozner continues to participate in this alleged charade that people actually died at Sandy Hook.

In Wisconsin a person is negligent when he fails to exercise "ordinary care." "Ordinary care" is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something, or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury to a person. (WI JI 1005).

> There are four elements to defamation. I'm going to start from the bottom and work up, just so we're on the same page. Do you agree, Dr. Fetzer, Mr. Palecek, that there's no genuine issue as to the fourth element that the communication is unprivileged, given the Court's now ruling based on your concession of the absence of the journalistic privilege? MR. DR. FETZER: Well, it was published in the book and I've asserted it on many occasions, Your Honor. So to that extent, and granting now that the Plaintiff for the sake of this trial is being regarded as a private person, they were unprivileged.

Dkt. 231, at 105.

No reasonable person would come to the conclusion that someone fabricated or falsified Mr. Pozner's son's death certificate. No reasonable person would believe that President Obama hired crisis actors to stage a pretend school shooting at Sandy Hook Elementary School in order to advance the former President's supposed agenda on gun control. No reasonable person could consider what Leonard Pozner tried to tell Dr. Fetzer and his fellow "researchers" immediately after the shooting and come to the conclusion that Noah Pozner never lived, and thus never died. It is impossible to imagine that anyone in today's digital world could believe, much less conceive, that three or four hundred "actors" could or would keep this "secret" safe and not be lured to sell this fantastic story to the highest bidder. Yet, even today, even now, Dr. Fetzer would have everybody believe that "Nobody died at Sandy Hook." Based on the facts submitted to this court in the parties' cross-motions for summary judgment this court, for a second time, finds that Leonard Pozner has proven all the elements of his claim for defamation, including that Dr. Fetzer did not exercise "ordinary care" in writing the things he did about Noah Pozner's death certificate or saying the awful and untrue things he wrote about his grieving father, Leonard.

B. Motion for a new trial

Dr. Fetzer next challenges the court's admission of evidence relating to him being found in contempt. As an initial matter, the court notes the procedural history. Dr. Fetzer was found to be in contempt because he violated a stipulated court order by sharing the confidential deposition video with people not authorized to see it. *See* Dkt. 283 (Contempt Order).[4] The seriousness of

[4] Dr. Fetzer improperly obtained his copy of the video not from the court reporter, but from another party. He then sent it to a number of people, who in turn, with Dr. Fetzer's permission, sent it on to Wolgang Halbig. Mr. Pozner had a prior history with Halbig, including prior litigation. The merits of that litigation is not important, but the events were. In the lawsuit against Halbig, Pozner dismissed his case rather than sit for a video tape deposition. Fearing for himself

the matter cannot be overstated. Mr. Pozner's counsel outlined to the court during the hearing on September 13, 2019, the impact to both Leonard Pozner and his family. As a purge condition, Dr. Fetzer was ordered (using a turn of phrase first made by Dr. Fetzer's counsel) to "put the genie back in the bottle" and retrieve all of the unauthorized copies of the deposition he sent out. He came close. But one recipient refused to return what he was not allowed to possess and it was clear that the video would be used against Mr. Pozner by that person acting in concert with the defendant himself. Incredibly, according to information received by this court, other "Sandy Hook deniers" upon receipt of the images, claimed that the man depicted in the deposition video was not the same man but rather "an actor" who played the part of Mr. Pozner right after the "alleged" shooting. Mr. Pozner's reaction was both incredulity and despair. More importantly, Dr. Fetzer himself articulated his new theory that the man in the deposition was not Mr. Pozner. During the hearing on September 13 2019, Dr. Fetzer described his work with Wolfgang Halbig and their joint conclusion that not only did Mr. Pozner falsify his non-existent son's fake death certificate, but that there must be more than one person involved, because, according to Dr. Fetzer and Halbig, the man in the video deposition is not the same man in the picture purporting to be Leonard Pozner. *See* Dkt. 285, at 49-52.

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and his family, thisxCourt was told that Pozner gave up on his legal claim, rather than to allow his image to be captured and disseminated. Dr. Fetzer did what Halbig could not do. Dr. Fetzer obtained Pozner's image and he disseminated it. This single act created, in Pozner's opinion, an unwarranted and serious risk to his and his family's personal safety. In short, Pozner's worst fears were realized by Dr. Fetzer's contemptuous act. Pozner, a man who for his own safety moved from place to place now had his picture in the hands of the people he believed would do him harm. That fear was made more legitimate in the eyes of this court because both Dr. Fetzer and Halbig continued to assert their claim that the man who sat for the deposition in this court "is not in fact, Leonard Pozner." Dkt. 285, at 44. According to Dr. Fetzer, Halbig took Leonard Pozner's image and disseminated it to other parents and apparently to the FBI, presumably in Halbig's similar pursuit their claim that Leonard Pozner is a fraud. *Id.* at 44-45. According to Pozner, if these people actually believed he was a crisis actor and a fraud and not the same person holding his murdered child, what else are they capable of doing to him.

The court, presented with Dr. Fetzer's failure to purge his contempt, did not do what it said it might. It is understandable that Dr. Fetzer does not now argue that this Court should have instead put him in jail or fine him up to $2,000 per day. Recall that Dr. Dr. Fetzer admitted he violated the court's order and he conceded that he failed to successfully purge his contempt. Rather than impose more serious and onerous consequences, the court merely indicated that what was done was done and it could not be fixed and repaired and leniently only imposed a modest payment of attorneys fees. That decision ended the matter of contempt but it did not make it irrelevant to Mr. Pozner's underlying legal claims.

Additionally, the court advised the parties that Dr. Fetzer's intentional violation of the court's order and its resulting harm to plaintiff could be presented to the jury, not as a punitive sanction, but because Mr. Pozner convinced this court that the entire episode was a current manifestation of the underlying action taken by the defendant relating to Dr. Fetzer's prior defamatory statements. Dr. Fetzer disseminated the image to Halbig because Dr. Fetzer thought Halbig would make a great surprise witness in this court. *See* Dkt. 285, at 52. Dr. Fetzer admitted his complicity with Halbig and their joint opinion that Pozner falsified the death certificate, never had a son, that nobody died at Sandy Hook, and both of these men were willing to do anything to prove their misguided beliefs, including violating this court's orders. Therefore, Dr. Fetzer made the event relevant to his own theory of the case and more importantly, and perhaps unwittingly, he himself contributed to and exacerbated plaintiff's damages. The court allowed the jury to hear the evidence because it was relevant to Pozner's claim he was suffering post traumatic stress from what Dr. Fetzer said and continue to say about him and his murdered child. This court relied on the fact that Dr. Fetzer's contemptuous act was relevant to the ongoing emotional harm Pozner claimed he was suffering. Dkt. 339, at 22.

In short, allowing evidence of the effect of Dr. Fetzer's admitted contempt did not turn the remedial sanction into a punitive one. Leonard Pozner's claim for compensatory damages was based on his claim that he suffered an ongoing emotional harm from Dr. Fetzer's continuing behavior. Part of Pozner's emotional damage stemmed from Dr. Fetzer's (impermissibly) sharing Pozner's deposition and claiming that Pozner was not the same man in the deposition as the person who appeared in the media holding Noah Pozner. That conduct, the court noted, was part and parcel to the "continuing conduct" that Pozner was being subjected to. The court's contempt order was relevant to Pozner's claim for compensatory damages.

The conclusion that Dr. Fetzer's acts were relevant to Pozner's claim for compensatory damages defeats Dr. Fetzer's present argument that evidence of the contempt order was inadmissible character evidence. Under the rules of evidence, evidence of a person's character or trait is generally not admissible for the purpose of proving that person "acted in conformity therewith on a particular occasion." Wis. Stat. § 904.04(1). But in this case, Mr. Pozner, through counsel, was not looking to submit evidence of contempt order to show that Dr. Fetzer would have acted in some particular way. The contempt order, for example, was not introduced as evidence to demonstrate that Dr. Fetzer had a habit of violating court orders. Nor was it introduced to show that he would likely violate a future court order. Rather, Pozner was looking submit evidence of the ongoing harm he faced from Dr. Fetzer's continuing actions, which included sharing and using confidential materials in this case to repeat the claim that Pozner was not a real person. As such, evidence of the contempt order was not character—let alone inadmissible character—evidence.

C. Sufficiency of the evidence

Dr. Fetzer also argues that there is insufficient evidence to support the jury's verdict. A motion that tests the sufficiency of the evidence cannot be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Wis. Stat. § 805.14(1). Here, Dr. Fetzer contends that insufficient evidence exists to support the jury award because, according to Dr. Fetzer, "no evidence linked threats and harassment to Professor Dr. Fetzer's published statements." Dkt. 331, at 7.

There are serval problems with Dr. Fetzer's argument. First, the court notes that Mr. Pozner's claim for compensatory damages did not rest entirely on threats and harassment. Mr. Pozner's claim for damages was also that the defamatory statements *themselves* harmed him. As Dr. Lubit testified that these defamatory statements harmed Mr. Pozner because they impeded Mr. Pozner's ability to recover from the death of his child. Dkt. 305, at 43. Additionally, Pozner testified that he felt his reputation had been harmed as a result of Dr. Fetzer's defamatory statements. *See* Dkt. 338, at 40:4-11. ("How do you think Dr. Fetzer's statements about your son's death certificate injured your reputation? . . . Well, it -- he -- it causes people to believe that -- that I lied about my son's death, that my son didn't die, and that I'm somehow doing that for some -- some other reason."). Finally, Leonard Pozner testified that he had changed the way he reacted to other people as a result of the defamatory statements. *Id.* at 40:13-14.

But beyond the harm that the defamatory statements caused themselves, there is also evidence, submitted without objection, that links the threats Pozner received to Dr. Fetzer. At trial, Pozner testified that a woman named Lucy Richards left voice messages on his answering machine, threatening to kill him because she believed he had faked his son's death certificate.

Dkt. 338, at 40:25 and *id.* at 41: 1-4. Pozner testified that FBI agents had informed him that the source for Ms. Richards' belief came from Dr. Fetzer's blog. *See id.* at 41:23-25. In fact, Richards was arrested, and part of her sentence, according to Pozner's testimony, was that she was not to read Dr. Fetzer's website or any of his material. *Id.* 41:12-13. A reasonable inference from this testimony is that Dr. Fetzer's published statements was at least a substantial factor in causing Ms. Richards to make threats against Pozner's life.[5] It is reasonable to assume that the jury could have made the same inference. *See Morden v. Cont'l AG*, 2000 WI 51, ¶ 39, 235 Wis. 2d 325, 611 N.W.2d 659 ("courts search the record for credible evidence that sustains the jury's verdict[.]").

Even had there not been sufficient evidence to establish a link between Fezter's published statements and the threats Pozner received, sufficient evidence still exists to support the jury's award. Pozner's claim of damages was premised on him suffering from post-traumatic stress disorder, or PTSD. Mr. Pozner's PTSD, according to Dr. Lubit, was partly brought on by Dr. Fetzer's statements, not just the death threats that came after. As Dr. Lubit testified, Dr. Fetzer's "campaign to [] [] invalidate [Pozner], [] to say that [Pozner] [] [] is an enemy of good people," led "the destroying of [Pozner's] son's memory." Dkt. 305, at 43:2-13. "Denying that this person existed," Dr. Lubit testified, is "almost like taking way [Pozner's] son a second time." *Id.* 43:19-21. In short, even had the death threats not been admitted as evidence, sufficient evidence exists establishing that Dr. Fetzer's published statements caused Mr. Pozner harm. That's enough to sustain the jury's verdict. *See Morden*, 2000 WI 51, ¶ 39.

[5] Pozner's testimony on Lucy Richard's source material and her subsequent conviction could be considered hearsay. *See* Wis. Stat. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") But the defendant never objected, so any hearsay objection now has been forfeited (or waived). *See* Wis. Stat. § 901.03(1)(a). More importantly, the audiotape was admitted into evidence without objection.

In the alternative, Dr. Fetzer argues public policy warrants a new trial. The public-policy argument is essentially a rehashing of his sufficiency-of-the-evidence argument. *See* Dkt. 331, at 8 ("Dr. Fetzer's brief stating that there should be a new trial because "[i]ncitement by speech [in this case] is not *causally* established.") (emphasis added). But as explained above, there *is* a causal link between Dr. Fetzer's published statements and the death threats Pozner received. So even if the court were to consider Dr. Fetzer's public-policy argument, the court would reject it. In this court's opinion forcing Leonard Pozner to endure yet another jury trial would be an affront to "public policy."

D. Pozner's post-verdict motions

1. Permanent injunction

Leonard Pozner seeks an injunction prohibiting Dr. Dr. Fetzer from repeating the defamatory statements at issue in this case. To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right and will violate a right of and will injure the plaintiff. *Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371, 375, 44 N.W. 303 (1890). The plaintiff must establish that the injury is irreparable, i.e., not adequately compensable in damages. *Ferguson v. City of Kenosha*, 5 Wis. 2d 556, 561, 93 N.W.2d 460 (1958). Injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

In this case, the jury awarded Pozner $450,000 in compensatory damages. Dkt. 300. But there is a serious question as to whether Dr. Fetzer can (or is even willing) to pay that judgment. Throughout the litigation Dr. Fetzer has refused to accept the conclusion that the statements at

issue in this case were defamatory, *see e.g.*, Dkt. 338, at 74:5-8. (Dr. Fetzer's answering a question on direct with, "That the Court determined to be defamatory, correct. And with all respect to the Court, I believe this was a mistake and that indeed the statements were-non-defamatory because they are true."), and he has yet to accept the fact that those statements caused Pozner harm. This leads to the strong likelihood that Dr. Fetzer will repeat his statements, which would leave Pozner without an adequate remedy in law—because Pozner would have to return to court to sue Dr. Fetzer for the same statements which has already been determined as defamatory. *See McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) ("The problem with [the traditional rule against injunctions on future speech] is that it would make an impecunious defamer undeterrable. He would continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment."). The court concludes that Pozner has made a prima facie case for injunctive relief.

Leonard Pozner's prima facie case for injunctive relief requires the court to weigh the "competing interests." At the outset, the court notes that many (including Dr. Fetzer) may view the statements Dr. Fetzer made in this case as being protected by the First Amendment. They are wrong. Long ago, the United States Supreme Court established that defamation, like obscenity or calls to violence, is outside of the scope of the First Amendment's guarantee of "*the* freedom of speech." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992) (noting that speech like obscenity, defamation, fighting words, threats of violence, or advocacy of imminent lawless action are unprotected or less protected by the First Amendment because they are "of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568,

572 (1942)). The statements in this case are outside the scope of First Amendment protection because they are "of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality." The critical question, then, is not whether Dr. Fetzer's First Amendment rights are being infringed by a prohibition against him from repeating the defamatory statements at issue in this case, but rather whether a remedy can be crafted to prevent Mr. Pozner from being harmed by those statements.

Nevertheless, the court must bear in mind that an order permanently enjoining future speech is still considered a prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."). Injunctions baring speech are therefore presumptively unconstitutional. *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."), which has led the federal Seventh Circuit Court of Appeals to note that injunctions on future speech can be "no broader than necessary to provide relief to the plaintiff while minimalizing the restriction of expression." *McCarthy*, 810 F.3d at 462 (citation and internal quotation marks omitted). The pivotal question in this case, then, is whether an injunction can be crafted in such a way as to provide Pozner with relief "while minimalizing the restriction o[n] [Dr. Fetzer's] expression."

Such an injunction can be crafted here. For starters, Dr. Fetzer, through his counsel, seems to concede that Dr. Fetzer *can be* enjoined from stating (or publishing) that *Pozner* faked his son's death certificate. *See* Dkt. 340, at 1 (Dr. Fetzer's brief opposing a permanent injunction stating, "[Plaintiff counsel's] seemingly benign formulation [of an injunction] misses the mark [] by excluding any requirement that Plaintiff be accused of faking or forging [N.P.]'s death."). The

only issue is whether Dr. Fetzer can be prohibited from stating that N.P's death certificate is a fake.

Dr. Fetzer can be enjoined from stating that Noah Pozner's death certificate is fake. Four statements in this case were found to be defamatory. *See* Dkt. 308. Those four statement read in full are:

- Mr. Pozner's son's death certificate is fake, which we have proven on a dozen or more grounds. (Internal quotation marks omitted).
- [Mr. Pozner] sent . . . a death certificate, which turned out to be a fabrication. (Alterations in the original).
- As many Sandy Hook researches are aware, the very document Pozner circulated in 2014, with its inconsistent tones, fonts and clear digital manipulation, was clearly a forgery.
- Mr. Pozner's son's death certificate turned out to be a fabrication, with the bottom half of a real death certificate and the top half of a fake, with no file number and the wrong estimated time of death at 11:00am, when officially the shooting took place between 9:35-9:40 that morning. (Internal quotation marks omitted).

Id. The court can therefore order that these statements not be repeated. *See McCarthy*, 810 F.3d at 464 (Sykes, J., concurring) ("An emerging modern trend, however, acknowledges the general rule but allows for the possibility of narrowly tailored permanent injunctive relief as a remedy for defamation as long as the injunction prohibits only the repetition of the *specific statements* found at trial to be false and defamatory.") (emphasis added). As shown by the reproduction of the statements above, the four statements include the statement that Noah Pozner.'s death certificate was a fake—not just that Pozner faked his son's death certificate. *See, e.g.,* Dkt. 308,

at 1 ("Mr. Pozner's son's death certificate is fake, which we have proven on a dozen or more grounds.) (internal quotation marks omitted).

Counsel for Mr. Pozner is directed to draft an injunction consistent with the court's decision above.

2. Attorney fees

The last remaining issue is Mr. Pozner's application for attorney fees. Pozner contends that he is entitled to attorney fees because Dr. Fetzer, according to Pozner, acted in bad faith when litigating this case.

The court is skeptical that it can award attorney fees. Wisconsin generally follows the American Rule, under which the parties are expected to pay their own way unless otherwise provided by statute or contract. *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 571, 547 N.W.2d 592 (1996). No statute or contract provides for the recovery of attorney fees in this case, so the court must deny Pozner's application for attorney fees.

Mr. Pozner argues that the Wisconsin's Supreme Court's decision in *Nationstar Mortg. LLC v. Stafsholt*, 2018 WI 21, 380 Wis. 2d 284, 908 N.W.2d 784, recognized an exception to the American Rule. In *Nationstar*, the supreme court held that a circuit court can award attorney fees "as part of an equitable remedy" when a party has acted with bad faith. *Nationstar Mortg. LLC v. Stafsholt*, 2018 WI 21, ¶ 3. The power is "not unlimited," and "such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* ¶ 37.

And the facts in *Nationstar* were exceptional. *Nationstar* involved a foreclosure proceeding in which the mortgage servicer was found to have acted in bad faith. The mortgage servicer in that case, Bank of America, had placed a homeowner's insurance policy on the borrower after the borrower had already purchased a homeowner's policy on his own. *Id.* ¶ 7.

When the borrower attempted to have the charge for the Bank of America placed insurance policy removed, a customer-service representative from the bank told the lender him "to skip a mortgage payment and become delinquent" sending him into default. *Id.* ¶¶ 7, 36. The circuit court concluded that Bank of America and its successors and interest were "estopped from foreclosing on the property because [Bank of America] created the dispute and induced the default." *Id.* ¶ 11 (internal quotation marks omitted). The circuit court reinstated the mortgage, *id.* ¶¶ 12-13, and deducted the borrower's attorney fees from the principal balance of the loan based on a theory of equitable estoppel, *id.* ¶ 15. The Wisconsin Supreme Court agreed with the circuit court, because "the primary purpose of equitable actions is to do justice between the parities." *Id.* ¶ 28.

Mr. Pozner has not articulated how this defamation case is a cause of action grounded in equity. Rather, defamation is an action grounded in law. Although a defamation claim admittedly implicates equitable concepts—such as the ability of the court to issue equitable *remedies*, like an injunction—Pozner has not articulated how the court's ability to issue an equitable remedy also creates an exception to the American Rule. In fact, such an exception to the American Rule would have the odd result of swallowing the rule. In virtually all civil actions grounded in law, the court has the ability to issue equitable remedies. If it so follows that the court can also award attorney fees based on that power, the American Rule would cease to exist. The Wisconsin Supreme Court could not have meant to upend the American Rule when it concluded that a circuit court could award attorney fees in a foreclosure action. *See Milwaukee Teacher's Educ. Ass'n v. Milwaukee Bd. of Sch. Directors*, 147 Wis. 2d 791, 797, 433 N.W.2d 669 (Ct. App. 1988) ("departures from the American rule are narrowly drawn exceptions"). Absent explicit caselaw to the contrary, the court concludes that attorney fees cannot be awarded in (causes of)

action grounded in law, absent a statute or contract. If there was such legal precedent or clear authority, the court would unquestioningly award attorney fees in this case.

ORDER

IT IS ORDERED that:

1. Defendant Dr. Fetzer's post-verdict motions, Dkt. 331, are denied.
2. Plaintiff Mr. Pozner's application for attorney fees, Dkt. 327, is denied
3. Plaintiff Mr. Pozner's motion for a permanent injunction, Dkt. 329, is granted.
    a. Plaintiff's legal counsel is directed to draft an injunction consistent with the court's decision above.

This is a final order for the purposes of appeal. Wis. Stat. § 808.03(1).

Appendix E

Summary Judgment in Wisconsin:
https://docs.legis.wisconsin.gov/statutes/statutes/802/08

802.08 Summary judgment.

(1) AVAILABILITY. A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim, counterclaim, cross claim, or 3rd-party claim which is asserted by or against the party. Amendment of pleadings is allowed as in cases where objection or defense is made by motion to dismiss.

(2) MOTION. Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(3) SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(4) WHEN AFFIDAVITS UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(5) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees.

(6) JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

(7) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 Wis. 2d 585, 630 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 2d ix; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 256; Sup. Ct. Order, 168 Wis. 2d xxi (1992); 1993 a. 490; 1997 a. 254; 2005 a. 253; 2007 a. 97.

Judicial Council Committee's Note, 1977: Sub. (1) is revised to allow a party at any time within 8 months after the summons and complaint are filed or the time established in a scheduling order under s. 802.10 to move for a summary judgment. The 8-month time period has been created as the old procedure requiring a party to move for summary judgment not later than the time provided under s. 802.10 can no longer apply in most cases as the use of such a scheduling order is now completely discretionary with the trial judge. The 8-month time period is subject to enlargement under s. 801.15 (2) (a). [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (7) [created] allows oral arguments permitted on motions for summary judgment to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1992: The prior sub. (2), allowing service of affidavits opposing summary judgment up to the date of hearing, afforded such minimal notice to the court and moving party that a plethora of local court rules resulted. Community Newspapers, Inc. v. West Allis, 158 Wis. 2d 28, 461 N.W.2d 785 (Ct. App. 1990). Requiring such affidavits to be served at least 5 days before the hearing is intended to preclude such local rules and promote uniformity of practice. Courts may require earlier filing by scheduling orders, however. [Re Order effective July 1, 1992]

When the plaintiff had signed a release, and when another illness subsequently developed, whether the plaintiff consciously intended to disregard the possibility that a known condition could become aggravated was a question of fact not to be determined on summary judgment. Krezinski v. Hay, 77 Wis. 2d 569, 253 N.W.2d 522 (1977).

Summary judgment procedure is not authorized in proceedings for judicial review under ch. 227. Wisconsin Environmental Decade v. Public Service Commission, 79 Wis. 2d 161, 255 N.W.2d 917 (1977).

When an insurance policy unambiguously excluded coverage relating to warranties, a factual question whether implied warranties were made was immaterial and the trial court abused its discretion in denying the insurer's summary judgment motion. Jones v. Sears Roebuck & Co., 80 Wis. 2d 321, 259 N.W.2d 70 (1977).

Use of the mandatory language in sub. (2) that "judgment shall be rendered" means that trial courts do not have wide latitude in deciding summary judgment motions and that appeals of decisions to grant or deny summary judgment be given exacting scrutiny. Wright v. Hasley, 86 Wis. 2d 572, 273 N.W.2d 319 (1979).

When a stipulation to the facts of a case did not satisfy the formal requirements of s. 807.05, summary judgment was improper. Wilharms v. Wilharms, 93 Wis. 2d 671, 287 N.W.2d 779 (1980).

The existence of a new or difficult issue of law does not make summary judgment inappropriate. Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 297 N.W.2d 500 (1980).

A conviction for injury by conduct regardless of life did not establish that the injury was intentional or expected and did not entitle the insurer to summary judgment on a policy exclusion issue. Poston v. U.S. Fidelity & Guarantee Co., 107 Wis. 2d 215, 320 N.W.2d 9 (Ct. App. 1982).

Summary judgment can be based upon a party's failure to respond to a request for admissions, even if the admissions would be dispositive of the entire case. Bank of Two Rivers v. Zimmer, 112 Wis. 2d 624, 334 N.W.2d 230 (1983).
An appellate court reviews the trial court's decision by applying the same standards and methods as did the trial court. Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987).
When the only issue before the court requires expert testimony for resolution, the trial court on summary judgment may determine whether the party has made a prima facie showing that it can, in fact, produce favorable testimony. Dean Medical Center v. Frye, 149 Wis. 2d 727, 439 N.W.2d 633 (Ct. App. 1989).
CHIPS proceedings are controlled by the Code of Civil Procedure unless ch. 48 requires a different procedure, and summary judgment is available. Interest of F.Q., 162 Wis. 2d 607, 470 N.W.2d 1 (Ct. App. 1991).
Summary judgment does not apply to cases brought under the criminal code. State v. Hyndman, 170 Wis. 2d 198, 488 N.W.2d 111 (Ct. App. 1992).
Involuntary commitment may not be ordered on summary judgment. Matter of Mental Condition of Shirley J.C., 172 Wis. 2d 371, 493 N.W.2d 382 (Ct. App. 1992).
In a trial to the court, the court may not base its decision on affidavits submitted in support of a summary judgment. Proof offered in support of summary judgment is for determining if an issue of fact exists. When one does, summary judgment proof gives way to trial proof. Berna-Mork v. Jones, 173 Wis. 2d 733, 496 N.W.2d 637 (Ct. App. 1992).
A party's affidavit that contradicted that same party's earlier deposition raised an issue of fact, making summary judgment inappropriate. Wolski v. Wilson, 174 Wis. 2d 533, 497 N.W.2d 794 (Ct. App. 1993).
A 4-step methodology for determining and reviewing a summary judgment motion is stated. The use of trial material to sustain a grant or denial of summary judgment is inconsistent with this methodology. Universal Die & Stampings v. Justus, 174 Wis. 2d 556, 497 N.W.2d 797 (Ct. App. 1993).
When expert testimony is required to establish a party's claim, evidentiary material from an expert is necessary in response to a summary judgment motion. Holsen v. Heritage Mut. Ins. Co., 182 Wis. 2d 457, 513 N.W.2d 690 (Ct. App. 1994).
The court of appeals has authority to grant a summary judgment on appeal of a motion that was denied by the trial court. Interest of Courtney E., 184 Wis. 2d 592, 516 N.W.2d 422 (1994).
Trial courts have the authority to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are considered. Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96-2782.
If a litigant who is not the subject of a motion for summary judgment has reason to dispute facts supporting the motion, the litigant has a duty to appear and object to the motion. If summary judgment is granted, the facts underlying the judgment are binding on all parties to the suit as a matter of issue preclusion. Precision Erecting v. M&I Marshall & Ilsley Bank, 224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App. 1998), 97-3029.
The federal "sham affidavit rule" is adopted. An affidavit that directly contradicts prior deposition testimony generally does not create a genuine issue of fact for trial unless the

contradiction is adequately explained. Yahnke v. Carson, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102, 99-0056.

Generally review of a summary judgment is *de novo*, but when a summary judgment is based on an equitable right, legal issues are reviewed *de novo* while equitable relief, which is discretionary with the trial court, will be overturned only if there is an absence of the exercise of discretion. Pietrowski v. Dufrane, 2001 WI App 175, 247 Wis. 2d 232, 634 N.W.2d 109, 00-2143.

Summary judgment procedure is inconsistent with, and unworkable in, ch. 345 forfeiture proceedings. State v. Schneck, 2002 WI App 239, 257 Wis. 2d 704, 652 N.W.2d 434, 02-0513.

Summary judgment is inapplicable in ch. 343 hearings. State v. Baratka, 2002 WI App 288, 258 Wis. 2d 342, 654 N.W.2d 875, 02-0770.

In the absence of an answer to a cross claim and in the absence of any other responsive pleadings, a court may deem facts alleged in the cross claim and submissions filed in connection with a summary judgment motion admitted for purposes of summary judgment. Daughtry v. MPC Systems, Inc., 2004 WI App 70, 272 Wis. 2d 260, 679 N.W.2d 808, 02-2424.

At summary judgment, an affidavit setting forth an expert's opinion is evidence of a factual dispute as long as the opinion is expressed on a matter that is appropriate for expert opinion and the affiant is arguably an expert. Mettler v. Nellis, 2005 WI App 73, 280 Wis. 2d 753, 695 N.W.2d 861, 04-1216.

The plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction, even if the plaintiff does not demonstrate that an evidentiary hearing is necessary. The burden of going forward with the evidence, as well as the burden of persuasion, on the issue of jurisdiction is on the plaintiff. However, there is no rule that the plaintiff's burden to prove prima facie the facts supporting jurisdiction must be met by affidavit or in any manner prior to the evidentiary hearing. Kavanaugh Restaurant Supply, Inc. v. M.C.M. Stainless Fabricating, Inc., 2006 WI App 236, 297 Wis. 2d 532, 724 N.W.2d 893, 06-0043.

Sub. (2) was amended in 1992 to preclude local rules and to provide a statewide remedy and uniformity of practice. A conflicting local rule was precluded by the uniform rule contained in sub. (2), and the circuit court improperly applied the law when it relied exclusively upon the local rule in refusing to consider a party's submissions. David Christensen Trucking & Excavating, Inc. v. Mehdian, 2006 WI App 254, 297 Wis. 2d 765, 726 N.W.2d 689, 05-2546.

When a trial court enters a scheduling order, it may, in its discretion, deviate from the requirements of sub. (2) for cause shown and upon just terms. There was no exercise of discretion when a standard attachment to a scheduling order recited local court rules at odds with the 5-day rule of sub. (2). With regard to scheduling orders, trial courts that deviate from the statutory time requirements for responding to a motion for summary judgment should explain on the record why that deviation is necessary and appropriate. Hunter v. AES Consultants, Ltd., 2007 WI App 42, 300 Wis. 2d 213, 730 N.W.2d 184, 06-0872.

The circuit court erred when it *sua sponte* granted summary judgment when it failed to give the notice required by sub. (2). Larry v. Harris, 2008 WI 81, 311 Wis. 2d 326, 752 N.W.2d 279, 05-2935.

Scheduling orders may trump sub. (2). By contrast, local court rules may not trump the deadlines in sub. (2). A scheduling order that attempts to apply a void rule in conflict with sub. (2) by attaching it to the order is invalid. In the absence of some specific dispute, there is no need for the court to explain scheduling decisions on the record. Hefty v. Strickhouser, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820, 06-1094.
Findings of fact are determinations by a court from the evidence of a case concerning the facts asserted by one party and denied by another. Summary judgment is only granted when there is no genuine issue as to any material fact, where facts are not being asserted by one party and denied by the other. Therefore, formal findings of fact are not part of the summary judgment calculus. Camacho v. Trimble Irrevocable Trust, 2008 WI App 112, 313 Wis. 2d 272, 756 N.W.2d 596, 07-1472.
Section 802.06 (2) (b) serves as an exception to the summary judgment procedure laid out in s. 802.08. Section 802.06 (2) (b) allows the circuit court to convert a defendant's motion to dismiss for failure to state a claim into a summary judgment motion when the defendant has not filed an answer even though s. 802.08 requires that the pleadings be complete before a court can review a summary judgment motion. Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc., 2008 WI App 180, 315 Wis. 2d 143, 763 N.W.2d 167, 07-2857.
At the summary judgment stage, a court must determine whether the alleged facts comprise one or more causes of action. The substantive law governing a cause of action tells the court what types of facts a plaintiff must allege. If the facts satisfy all of the constitutive elements of the claim, then the complaint has stated a good cause of action and the court's summary judgment analysis may proceed. The cause of action is important, therefore, because it is the standard against which the court measures the sufficiency of the complaint's factual allegations. Tikalsky v. Friedman, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, 17-0170.
101: Refresher: Wisconsin's Summary Judgment Methodology. Loudenslager. Wis. Law. Apr. 2020.

When we go to 2008 WI App 112 we find:

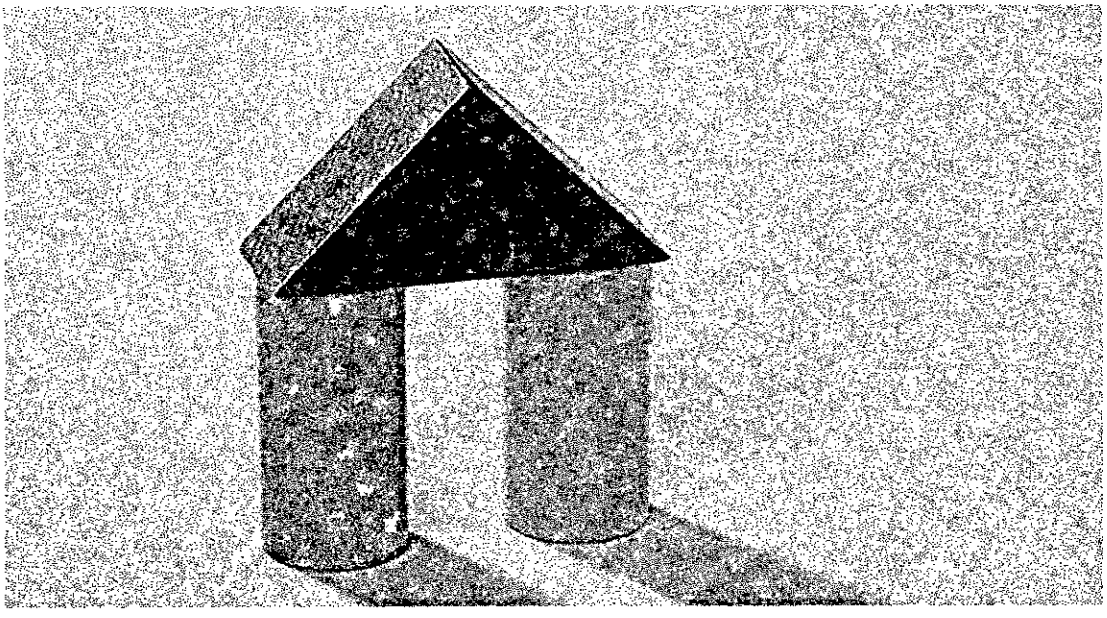
¶ 3 We review a motion for summary judgment de novo, using the same methodology as the trial court. *Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield,* 180 Wis.2d 254, 278, 509 N.W.2d 323 (Ct. App.1993). That methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk,* 2001 WI 25, ¶¶ 20-24, 241 598*598 Wis.2d 804, 623 N.W.2d 751. Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06).[1] The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Baxter v. DNR,* 165 Wis.2d 298, 312, 477 N.W.2d 648 (Ct.App.1991) (*quoting Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 312, 477 N.W.2d 648 (citation omitted).

Appendix F

101: Refresher: Wisconsin´s Summary Judgment Methodology

Aaron Jeramie Loudenslager

Although a motion for summary judgment is one of the most common dispositive motions filed in civil cases, lawyers and judges sometimes overlook two of the fundamental principles that underlie Wisconsin's summary judgment methodology. Get your refresher here.



In Plato's *Phaedo*, Socrates postulates how learning and knowledge result from people's act of recollecting. According to Socrates, there is no learning and knowledge if we are unable to remember what we already know. The same can be said regarding Wisconsin's summary judgment methodology.

A motion for summary judgment is one of the most common dispositive motions filed in civil cases, and Wisconsin's summary judgment methodology is well established. Nonetheless, this article focuses on two of the fundamental principles underlying Wisconsin's summary judgment methodology. At times, lawyers and judges overlook these principles. Remembering these fundamental principles will assist each in fulfilling their respective duties in cases involving summary judgment methodology.

Summary Judgment Methodology: The Basics

In civil cases, a party may file a motion for summary judgment.[1] The procedure governing motions for summary judgment is set forth in Wis. Stat. chapter 802. Within certain statutory time frames, or within the time set by a circuit court in a scheduling order, any party to the case may "move for summary judgment on any claim, counterclaim, cross claim, or 3rd-party claim which is asserted by or against

the party."[2]

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The summary judgment statute states that the court "shall" grant judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] Additionally, under the statute, "a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."[4]

Wisconsin courts have established a basic methodology to decide motions for summary judgment. First, a court must review "the complaint to determine whether, on its face, it states a claim for relief."[5] "Under the second step of this methodology, '[i]f a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist.'"[6] "If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's ... affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment...."[7]

Finally, if the moving party establishes a prima facie case for summary judgment, the court then must "review the opposing party's affidavits [or other proof] to determine whether there are any material facts in dispute, or inferences from undisputed material facts, that would entitle the opposing party to a trial."[8]

Principle 1: Summary Judgment Not Available Unless "Complaint" and "Answer" Join Issues of Material Fact

The first principle this article focuses on is well established: Summary judgment is not available unless the "complaint" and "answer"[9] join issues of material fact. However, many cases involving review of motions for summary judgment do not recite this fundamental principle and, in fact, only provide a highly abbreviated version of Wisconsin's summary judgment methodology. As a few Wisconsin cases from the past two decades illustrate, this fundamental principle can be outcome determinative in a given case, a result that is particularly likely if the case is a forfeiture action.

For example, in *State v. Schneck*, the Wisconsin Court of Appeals addressed whether summary judgment is available "in a traffic forfeiture prosecution under Wis. Stat. ch. 345."[10] Reviewing Wisconsin's summary judgment procedure, the court noted that the summary judgment statute "contemplates a summons and complaint" filed by the plaintiff and, likewise, the filing of an answer or other responsive pleading asserting "every defense in law or fact" by the defendant.[11]

"Armed with these pleadings, particularly the defendant's answer, the trial court can then perform the threshold steps of summary judgment methodology – determine whether the plaintiff's complaint states a claim and, if so, whether the defendant's answer has joined material issues of fact...."[12]

In contrast, under Wis. Stat. chapter 345, a traffic forfeiture prosecution may be initiated by the issuance of a uniform traffic citation and the defendant may enter one of three pleas: guilty, no contest, or not guilty.[13] As a result, "a trial court cannot perform even the rudimentary initial steps of summary judgment methodology because the responses contemplated by [Wis. Stat. ch. 345] are not the equivalent of an answer in a conventional civil action."[14] Thus, the court concluded that Wisconsin's "[s]ummary judgment procedure is inconsistent with, and unworkable in, a Wis. Stat. ch. 345 forfeiture proceeding."[15]

> Cross-motions for summary judgment should be treated as agreement for the court to decide the case upon the legal issues presented only when the court independently determines there is no genuine issue of material fact with regard to each party's separate motion.

Almost 10 years later, in *State v. Ryan*, the Wisconsin Supreme Court addressed whether summary judgment is available "in forfeiture actions for violations of Wis. Stat. ch. 30."[16] The court noted that such a forfeiture action can be initiated by either the issuance of a citation or the filing of a complaint and summons.[17] However, the court also observed that a defendant can only plead guilty, no contest, or not guilty.[18] Because this type of forfeiture action can be initiated by the issuance of a citation (as opposed to only the filing of a summons and complaint), and the defendant must enter a plea (rather than filing an answer or other responsive pleading asserting every defense in law or fact), the court held that summary judgment is unavailable.[19]

More recently, in *Olson v. City of Stoughton*, the Dane County Circuit Court addressed "whether the summary judgment procedure in Wis. Stat. § 802.08 is available in an appeal from a municipal court judgment when either of the parties to such an appeal requests [under Wis. Stat. § 800.14(4)] a new trial to be conducted in the circuit court."[20] The court noted that forfeiture actions in municipal court can be initiated by the filing of either a citation or a complaint and that, whether through an in-person appearance or written response, the defendant must ultimately enter one of three pleas.[21]

Relying on the reasoning in *Schneck* and *Ryan*, the circuit court determined that Wisconsin's summary judgment procedure is unavailable in an appeal from a municipal court judgment because it "is incompatible with Wisconsin's municipal court procedure – including a subsequent appeal and request for a new trial to be conducted in the circuit court under Wis. Stat. § 800.14(4)."[22]

Principle 2: Court Must Construe Factual Inferences in Favor of Nonmoving Party

The second principle of Wisconsin's summary judgment methodology is also well established: When reviewing a motion for summary judgment, the court must construe all factual inferences in favor of the nonmoving party.[23] However,

Wisconsin courts have not always applied this fundamental principle consistently in certain cases: that is, when both parties move for summary judgment – at times referred to as "reciprocal," "bilateral," or "cross-motions" for summary judgment.[24]

In *Wiegand v. Gissal*, the Wisconsin Supreme Court held that when "both sides moved for summary judgment" and "it would appear that there were no factual issues in dispute," "the practical effect of the bilateral summary judgment motions was the equivalent of a stipulation as to the facts."[25] Then in *Powalka v. State Mutual Life Assurance Co.*, the court held that "the reciprocal motions for summary judgment by the defendant and by the plaintiff constituted a waiver of any right to jury trial that might have theretofore existed" because the factfinder could reasonably only make one inference or conclusion based on the undisputed historical facts.[26]

Since *Powalka* was decided, two primary lines of cases in Wisconsin have emerged in the context of cross-motions for summary judgment. One line of cases misconstrues those two cases' respective holdings – reflexively treating all cross-motions for summary judgment as a stipulation to all factual issues by the parties and as an agreement for the court to decide the case upon the legal issues presented by the parties.[27]

Relatedly, some post-*Powalka* cases construe the two cases and their progeny as establishing a *general* rule that cross-motions for summary judgment constitute a stipulation to all factual issues by the parties and as an agreement for the court to decide the case on the legal issues presented.[28] This "general" rule appears to hinge on the supposition that when both parties move for summary judgment, neither party usually is arguing that factual disputes bar the other's motion for summary judgment.[29]

But even assuming this supposition was empirically supported, the so-called general rule is unhelpful in individual cases – as "the existence of a genuine issue of material fact is a question of law for the court, not for the parties" and "both parties might erroneously conclude that no factual dispute exists when in reality one does."[30]

In contrast, a different line of Wisconsin cases correctly recognizes the import of those two cases' respective holdings – cross-motions for summary judgment should be treated as a stipulation to all factual issues by the parties, and as an agreement for the court to decide the case upon the legal issues presented, only when the court independently determines there is no genuine issue of material fact with regard to each party's separate motion for summary judgment.[31]

However, until the state supreme court provides more definitive guidance on this issue, lawyers and judges should follow the latter line of cases when addressing cross-motions for summary judgment in Wisconsin. First, this approach comports with the plain meaning of Wisconsin's summary judgment statute.[32] Second, this approach is more faithful to the respective holdings in *Wiegand* and *Powalka*.[33] Third, this approach is consistent with the one taken by most federal courts when deciding cross-motions for summary judgment.[34] Finally, this approach is consistent with the one advocated for by the relevant academic literature, including federal and state practice manuals.[35]

Conclusion

Although a motion for summary judgment is one of the most common dispositive motions filed in civil cases, lawyers and judges sometimes overlook two of the fundamental principles that underlie Wisconsin's summary judgment methodology. Remembering these principles will assist each in fulfilling their respective duties in cases involving summary judgment methodology.

Endnotes

[1] *See* Wis. Stat. §§ 801.01(2), 802.08.

[2] Wis. Stat. § 802.08(1).

[3] Wis. Stat. § 802.08(2).

[4] *Id.*

[5] *Hoida Inc. v. M & I Midstate Bank*, 2006 WI 69, ¶ 16, 291 Wis. 2d 283, 717 N.W.2d 17 (citation omitted).

[6] *Tikalsky v. Friedman*, 2019 WI 56, ¶ 12, 386 Wis. 2d 757, 928 N.W.2d 502 (quoting *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987)).

[7] *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

[8] *Hoida*, 2006 WI 69, ¶ 16, 291 Wis. 2d 283 (citation omitted).

[9] A party need not necessarily file an "answer" joining issues of material fact, as long as that party files a "responsive pleading" that does so. *See, e.g.*, *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988).

[10] *State v. Schneck*, 2002 WI App 239, ¶ 1, 257 Wis. 2d 704, 652 N.W.2d 434.

[11] *Id.* ¶ 9.

[12] *Id.* (citation omitted).

[13] *Id.* ¶ 10.

[14] *Id.*

[15] *Id.* ¶ 16.

[16] *State v. Ryan*, 2012 WI 16, ¶ 4, 338 Wis. 2d 695, 809 N.W.2d 37.

[17] *See id.* ¶¶ 45, 55.

[18] *See id.* ¶¶ 58, 66 & n.18

App. 1992), *rev'd on other grounds*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994); *Larsen v. Munz Corp.*, 166 Wis. 2d 751, 756, n.4, 480 N.W.2d 800 (Ct. App.), *rev'd on other grounds*, 167 Wis. 2d 583, 482 N.W.2d 332 (1992) (per curiam); *Stone v. Seeber*, 155 Wis. 2d 275, 278, 455 N.W.2d 627 (Ct. App. 1990).

[32] *See* Wis. Stat. § 802.08(2), (6).

[33] *See supra* notes 25-26 & 31 and accompanying text.

[34] *See, e.g., Matusevich v. Middlesex Mut. Assurance Co.*, 782 F.3d 56, 59 (1st Cir. 2015); *In re United Air Lines,Inc.*, 453 F.3d 463, 468 (7th Cir. 2006); *Shaw Constructors v. ICF Kaiser Engineers Inc.*, 395 F.3d 533, 539 (5th Cir. 2004); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003); *Wojcik v. City of Romulus*, 257 F.3d 600, 608 (6th Cir. 2001); *Terwilliger v. Terwilliger*, 206 F.3d 240, 244 (2d Cir. 2000); *Lincoln Benefit Life Co. v. Bowman*, 221 F. Supp. 3d 617, 632 (E.D. Pa. 2016); *Estate of Bleck v. City of Alamosa*, 105 F. Supp. 3d 1222, 1225-26 & n.2 (D. Colo. 2015).

[35] *See, e.g.*, 73 Am. Jur. 2d *Summary Judgment* § 45 (2012 & Supp. 2019); 49 C.J.S. *Judgments* § 318 (2009 & Supp. 2019); 27A *Fed. Proc. L., Ed.* § 62:599 (2017); Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* app. C (State Bar of Wis. 8th ed. 2020) (citing *Millen*, 201 Wis. 2d at 689-90 (Brown, J., concurring)); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (4th. ed. 2016 & Supp. 2019).

Appendix G

http://www.texas-opinions.com/law-summary-judgment-standards.html

law-summary-judgment-standard | no-evidence motion for summary judgment |
summary judgment evidence - affidavits in support |

To prevail on a traditional summary-judgment motion, a movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "A movant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim." See IHS Cedars Treatment Ctr. of DeSoto, Texas, Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004)(citing Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002)).

SUMMARY JUDGMENT STANDARD & STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON APPEAL

The standard for reviewing a traditional summary judgment is well established. See Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548 (Tex. 1985); McAfee, Inc. v. Agilysys, Inc., 316 S.W.3d 820, 825 (Tex. App.-Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. Nixon, 690 S.W.2d at 548-49; In re Estate of Berry, 280 S.W.3d 478, 480 (Tex. App.-Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. City of Keller v. Wilson, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. Dickey v. Club Corp. of Am., 12 S.W.3d 172, 175 (Tex. App.-Dallas 2000, pet. denied).

Summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).
A matter-of-law summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a (c). The motion must state the specific grounds relied upon for summary judgment. Id.
The standard of review for a traditional summary judgment is well established: (1) the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant's favor. See, e.g., Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

In a traditional motion for summary judgment, the movant has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Nixon v. Mr. Prop. Mgmt. Co., 690 S. W.2d 546, 548 (Tex. 1985). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the non-movant's favor. Id. at 548–49. If there is no genuine issue of material fact, summary judgment should issue as a matter of law. Haase v. Glazner, 62 S. W.3d 795, 797 (Tex. 2001). A defendant who conclusively negates at least one of the essential elements of a plaintiff's cause of action is entitled to a summary judgment on that claim. IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004). Once a defendant establishes its right to summary judgment, the burden then shifts to the plaintiff to come forward with competent controverting summary judgment evidence raising a genuine issue of material fact. Centeq Realty, Inc. v. Siegler, 899 S. W.2d 195, 197 (Tex. 1995).

To prevail on a traditional summary judgment motion, the movant has the burden of proving that it is entitled to judgment as a matter of law and that there are no genuine issues of material fact. Tex. R. Civ. P. 166a(c); Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995). Res judicata is an affirmative defense. Tex. R. Civ. P. 94; W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C., 237 S.W.3d 745, 755 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A defendant is entitled to summary judgment based upon an affirmative defense when the defendant proves all elements of the affirmative defense. Henry v. Masson, No. 01-07-00522-CV, 2010 WL 5395640, at *16 (Tex. App.—Houston [1st Dist.] Dec. 31, 2010, no pet.) (citing Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000)).

To prevail on a traditional summary judgment motion, a movant must prove that there is no genuine issue regarding any material fact and that it is entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a (c); Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381 (Tex. 2004). A party moving for summary judgment on one of its own claims must conclusively prove all essential elements of the claim. See Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 (Tex. 1999). A defendant may also prevail by traditional summary judgment if it conclusively negates at least one essential element of a plaintiff's claim or

conclusively proves an affirmative defense. See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004). A movant seeking traditional summary judgment on an affirmative defense has the initial burden of establishing its entitlement to judgment as a matter of law by conclusively establishing each element of its affirmative defense. See Chau v. Riddle, 254 S.W.3d 453, 455 (Tex. 2008) (per curiam); see also TEX. R. CIV. P. 166a(b)–(c). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. See City of Keller v. Wilson, 168 S.W.3d 802, 816 (Tex. 2005).
If the movant meets its burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. See Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. See Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

We review a grant of summary judgment de novo. Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 192 (Tex. 2007). Ferguson v. Building Materials Corp. of America, No. 08-0589 (Tex. Jul. 3, 2009)(per curiam) (judicial estoppel based on bankruptcy proceeding held inapplicable)

Standard of Review (Tex.App., pet. denied)

08-0275
PANQUITA CARTER v. UNIVERSITY TEXAS SYSTEMS; from Dallas County; 5th district (05-07-00592-CV, ___ SW3d ___, 02-25-08, pet. denied Oct. 2008)(workers comp, compensable injury, carpal tunnel syndrome, frivolous appeal sanctions denied)
The standard for review of a traditional summary judgment is well-settled. We review a summary judgment de novo to determine whether a party has established its right to summary judgment as a matter of law. See Dallas Cent. Appraisal Dist. v. Cunningham, 161 S.W.3d 293, 295 (Tex. App.-Dallas 2005, no pet.). A party moving for a traditional summary judgment must show no material fact issue exists and it is entitled to judgment as a matter of law. Tex. R. Civ. P.166a(c); Cunningham, 161 S.W.3d at 295. When reviewing a summary judgment, we must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. City of Keller v. Wilson, 168 S.W.3d 802, 824-25 (Tex. 2005).