

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Leonard Pozner,

Plaintiff-Respondent,

v.

Appeal No. 2020AP1570

James Fetzer,

Defendant-Appellant.

Appeal From the Circuit Court of Dane County
Case No. 2018CV3122
Honorable Frank D. Remington, Presiding

BRIEF OF DEFENDANT-APPELLANT

Richard L. Bolton
State Bar No. 1012552
Boardman & Clark LLP
1 S. Pinckney St., Ste. 410
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES**Error! Bookmark not defined.**

I. INTRODUCTION..... 1

II. STATEMENT OF ISSUES PRESENTED 2

 A. DID THE CIRCUIT COURT ERR BY IMPOSING A \$650,000
 ALTERNATIVE PURGE CONDITION WITHOUT CONSIDERING THE
 APPELLANT’S ABILITY TO PAY SUCH A PENALTY 2

 B. DOES CONTEMPT THAT IS DISTINCT FROM THE MERITS OF AN
 UNDERLYING ACTION JUSTIFY A FEE-SHIFTING AWARD FOR THE
 UNDERLYING ACTION AS AN ALTERNATIVE PURGE CONDITION 3

 C. DID THE CIRCUIT COURT DENY THE APPELLANT DUE PROCESS AS
 A RESULT OF THE COURT’S BIAS AND PARTIALITY 3

 D. DID THE CIRCUIT COURT IMPROPERLY IMPOSE A PUNITIVE
 SANCTION FOR CONTEMPT IN A REMEDIAL PROCEEDING 3

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION 3

IV. STATEMENT OF THE CASE 4

 A. NATURE OF THE CASE 4

 B. PROCEDURAL STATUS LEADING UP TO APPEAL AND DISPOSITION
 IN THE CIRCUIT COURT 4

 1. BACKGROUND OF THE UNDERLYING ACTION 4

 2. THE POST-VERDICT CONTEMPT 9

 C. STATEMENT OF FACTS RELEVANT TO THE INSTANT APPEAL 13

V. STANDARD OF REVIEW 17

VI. ARGUMENT 18

 A. THE CIRCUIT COURT ERRED BY IMPOSING A PUNITIVE SANCTION
 IN A CIVIL CONTEMPT PROCEEDING 18

 B. THE CIRCUIT COURT’S JUDGMENT IS NOT AN APPROPRIATE
 ALTERNATIVE PURGE CONDITION 20

 C. THE CIRCUIT COURT IMPROPERLY ACTED WITH THE OBJECTIVE
 APPEARANCE OF BIAS 25

VII. CONCLUSION 27

FORM AND LENGTH CERTIFICATION 28

CERTIFICATE OF COMPLIANCE WITH WIS. STATS. § 809.19(12)(F) 29

I. INTRODUCTION.

The circuit court improperly acted as judge advocate for the Respondent, Leonard Pozner, thereby failing to conduct itself as an impartial decisionmaker when awarding Pozner \$650,000 in attorney fees as an alternative purge condition for contempt. The court disregarded the inability of the Appellant, Professor James Fetzer, to pay \$650,000, and the fees awarded were unrelated to the contempt. The court, however, had long since wanted to award Pozner attorney fees for the underlying action, eventually finding an unprecedented excuse to do so, even while the underlying action is still on appeal. The circuit court erred in its ways.

This, then, is the appeal of the circuit court's judgment awarding Pozner \$650,000 as attorneys' fees for the underlying action, albeit as a sanction for a contempt that occurred after final judgment was entered in the underlying action. Pozner prevailed in the underlying action on his narrowly-focused defamation claim against Fetzer, wherein the court entered judgment on the jury's \$450,000 verdict. The court grudgingly denied Pozner's request at that time for attorney fees to be added to the jury's verdict, after the court itself suggested the request.

Subsequent to the entry of final judgment, Pozner claimed that Fetzer improperly disclosed his deposition taken in the underlying action, contrary to its designation as confidential. As a result, of that post-judgment offense, the circuit court awarded Pozner all of his attorney fees for the prior defamation action, purportedly as an alternative purge condition.

The circuit court erred by effectively entering a fee-shifting judgment against Fetzer on the underlying defamation action. The court acted with such partiality that the neutral consideration to which Fetzer was entitled was compromised. The court's initiative to award fees was not only biased but fails as an alternative purge condition for contempt by disregarding Fetzer's ability to pay, and because the fees of the underlying defamation action commenced by Pozner were not caused by the later disclosure of his deposition.

The circuit court's palpable disdain for Fetzer as a conspiracy theorist is not a basis for judicial abnegation of the right to equal and fair treatment under the law. Here, Fetzer has questioned the mainstream Sandy Hook narrative, which is a controversial and unpopular position. Any resulting bias against such theorists, however, is not a proper basis to impose rogue remedies as in this case where the court imposed an unprecedented alternative purge condition, including with no consideration of Fetzer's ability to pay \$650,000.

II. STATEMENT OF ISSUES PRESENTED.

A. DID THE CIRCUIT COURT ERR BY IMPOSING A \$650,000 ALTERNATIVE PURGE CONDITION WITHOUT CONSIDERING THE APPELLANT'S ABILITY TO PAY SUCH A PENALTY?

Circuit Court Answer: The circuit court refused to consider Fetzer's ability to pay a \$650,000 alternative purge condition. The court deemed ability to pay merely a post-judgment collection issue.

B. DOES CONTEMPT THAT IS DISTINCT FROM THE MERITS OF AN UNDERLYING ACTION JUSTIFY A FEE-SHIFTING AWARD FOR THE UNDERLYING ACTION AS AN ALTERNATIVE PURGE CONDITION?

Circuit Court Answer: The circuit court considered that the fees of the prior underlying action constituted a loss caused by the contempt, even though the contempt occurred after entry of final judgment in the underlying action.

C. DID THE CIRCUIT COURT DENY THE APPELLANT DUE PROCESS AS A RESULT OF THE COURT'S BIAS AND PARTIALITY?

Circuit Court Answer: The circuit court consistently urged Pozner to seek attorney fees for the underlying action, which the court expressed a desire to award. No claim or argument was made by Pozner, nor finding made by the court, that Fetzer acted frivolously in defending the underlying action commenced by the Respondent.

D. DID THE CIRCUIT COURT IMPROPERLY IMPOSE A PUNITIVE SANCTION FOR CONTEMPT IN A REMEDIAL PROCEEDING?

Circuit Court Answer: The circuit court purported to enter a \$650,000 judgment for contempt as a remedial sanction, but the substance, effect, and intent of the court's judgment belie such purpose.

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Oral argument will be useful to the Court's consideration of the unprecedented alternative purge condition ordered by the circuit court.

Publication of the Court's decision will provide useful guidance regarding the limits of alternative purge conditions as a civil remedy.

IV. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

Fetzer appeals a \$650,000 judgment entered against him as an alternative purge condition for disclosing Pozner's confidential deposition. The contempt occurred after entry of final judgment in the underlying defamation action commenced by Pozner. The \$650,000 judgment represented Pozner's attorney fees in the defamation action.

Fetzer contends on appeal that awarding fees for the defamation action, which the circuit court previously denied, constitutes an inappropriate alternative purge condition. The underlying defamation action was not precipitated by the contempt, and the court did not consider Fetzer's ability to pay \$650,000 as a purge condition.

B. PROCEDURAL STATUS LEADING UP TO APPEAL AND DISPOSITION IN THE CIRCUIT COURT.

1. Background of the Underlying Action.

Pozner filed suit against Fetzer alleging that Fetzer defamed Pozner by alleging that Pozner circulated a false death certificate for his son, Noah Pozner. Three of the alleged defamations occurred in the book *Nobody Died at Sandy Hook; It was a FEMA Drill to Promote Gun Control* (2015). A fourth defamation allegedly occurred in a blog published by Fetzer.

Fetzer is a former Marine Corps officer and retired university professor with many honors and awards for his research and teaching. (R. 159 at 14.) He has dedicated himself since retirement in 2006, after a 35 year academic career, to the investigation and research of complex and controversial events, such as Sandy Hook, the Boston bombing, Charlottesville, Parkland, the Orlando “Pulse Club shooting, among others. Fetzer brings together multiple noted experts to investigate and analyze such events to determine what really happened, in the belief that Americans are entitled to the fullest understanding of their history, free of manipulation by propaganda and disinformation, and without political motivation. This is the approach he took in the published work regarding Sandy Hook, which the 12 other collaborators conclude was staged to promote the Obama administration’s gun control agenda. (R.159.)

Pozner’s Complaint purported to be restricted only to statements by Fetzer about the death certificate. Pozner thereby sought to avoid challenging the research of Fetzer and others questioning the Sandy Hook narrative. The circuit court agreed to this limited focus, advising Fetzer that whether Sandy Hook occurred as reported was beyond the scope of this action. “It’s a rabbit hole we won’t go down.” (R.303 at 149.)

Pozner then moved for partial summary judgment on liability. The parties fully briefed the motion, as well as Pozner’s cross motion for summary judgment. Pozner sought only partial summary judgment on the issue of liability. The motions were fully briefed and came before the

circuit court for oral argument on June 17, 2019. Fetzer appeared *pro se*, unable to find willing representation.

The circuit court proceeded to address Pozner's motion for partial summary judgment on the issue of liability. The argument and questioning focused primarily on whether Fetzer's published statements were false, a necessary element of defamation. The court concluded that the published statements were false and that Pozner was entitled to summary judgment as a matter of law on the issue of liability. (*Id.* at 163.)

After determining that summary judgment on liability was warranted, the circuit court set a date solely to try the issue of any damages caused by Fetzer's statements.

In the interim, between summary judgment and trial, Pozner brought a motion to hold Fetzer in contempt for having disclosed to third parties the video deposition of Pozner. (R.213.) The entire deposition video was marked as confidential, but Pozner argued that the disclosure of his video image was his concern, rather than disclosure of any substantive information. (R.225.) Pozner complained that he previously had been subject to harassment, and so he sought to conceal his physical appearance. Pozner did not claim any specific harassment or threats as a result of the video disclosure. (R. 225.) His image also was already in the public domain from multiple other sources.

Fetzer's motivation for limited sharing of Pozner's video deposition was to establish that the person who appeared at the deposition

was not, in fact, Leonard Pozner. (R. 231.) Fetzter argued that Pozner's real concern was based on the fact that the person who appeared at the deposition is markedly dissimilar from known prior images of Pozner. (R. .) The deponent appears to be 20 years younger than the real Pozner and at least 100 pounds lighter, as the record indicates. (R. 231 at 19-21.) Fetzter sought to establish these facts through an intended rebuttal witness, which Fetzter believed to be appropriate, but which the court refused to permit.

The circuit court found Fetzter in contempt for disclosing the video deposition. In fashioning a remedy, the court advised Pozner that he could introduce evidence of the contempt during the trial on defamation damages. (R.310 at 91.) Fetzter, who was newly represented, objected on the basis that such evidence was irrelevant to defamation damages and prejudicial.

The circuit court justified admission of the contempt evidence as being relevant to punitive damages sought by Pozner. (*Id.* at 91-97.) The court stated that evidence of contempt was relevant to show the jury the type of person that is Fetzter. (*Id.* at 97.)

Pozner, however, withdrew his claim for punitive damages prior to trial. The circuit court then changed horses, arguing that such evidence was relevant to damages. The court articulated an unspecified cause of action, but one quite unlike the defamation trial before the jury. (R.311 at 25-27.)

Trial proceeded ostensibly on Pozner's claim for damages caused by defamation. Pozner, however, also presented evidence and argument of Fetzer's contempt, as prompted by the circuit court. (R. 313 at 85-86.) He further presented evidence and argument that third persons had threatened him, whereupon the jury returned a verdict of \$450,000. (R.259.)

The circuit court then prompted and encouraged Pozner to request that attorneys' fees be awarded for his entire case. R. 263.) The court asked Fetzer to "please indicate whether you oppose plaintiffs' request for attorneys' fees allowable as an equitable remedy, see *Nationstar*, 2018 WI 21." (*Id.*) Pozner had not previously raised the issue of attorneys' fees as an equitable remedy, nor cited to *Nationstar*, but the court actually directed Pozner's counsel to authority that the court believed provided a basis for fee-shifting. (*Id.*)

Fetzer, for his part, made post-verdict motions, which the circuit court denied. (R. 282.) The court also considered Pozner's post-verdict motion for attorneys' fees, based on the court's earlier prompt. After considering briefing on the matter, the court grudgingly concluded that attorneys' fees were not warranted in an action at law. (R. 361 at 45.) The court noted, however, that "but for the fact that I don't have legal authority, I would grant attorneys' fees." (*Id.*) Significantly, Pozner did not premise his request for attorneys' fees on any claim that Fetzer had acted frivolously such that fees would be warranted as a sanction.

The court entered judgment against Fetzer on the verdict amount of \$450,000. (App. at 24.) The court also entered a permanent injunction prohibiting Fetzer from prospectively publishing defamatory statements about the disputed death certificate of Noah Pozner. (*Id.* at 26-27.)

After entry of final judgment, Fetzer timely appealed the defamation judgment. (R. 301.) That appeal has been fully briefed and is pending before the Court of Appeals.

2. The Post-Verdict Contempt.

Pozner subsequently filed another motion for contempt, after entry of judgment, alleging that Fetzer again disclosed his confidential deposition. (App. at 107-115.) Fetzer acknowledged that he provided the deposition transcript, without the visual image of Pozner, to Alison Maynard for input regarding his appeal. (App. at 122.) Thus, to assure against future disclosures, Fetzer's counsel required Fetzer to destroy any copies of the deposition, electronic or otherwise, so that only counsel remain in possession. (App. at 120.)

The circuit court subsequently concluded that Fetzer had committed a separate and distinct contempt by his disclosure of Pozner's deposition transcript to Ms. Maynard. (App. at 17.) The court deemed the disclosure to constitute a contempt separate and distinct from the prior incident. (*Id.*) The court also considered the contempt to be continuing because Fetzer could not necessarily undo

the disclosure. (App. at 22.) Finally, the court offered an opportunity for Pozner to present evidence of any injury resulting from the disclosure. (App. at 25.)

Pozner, however, was not interested in a further hearing on injury as Fetzer did not have means to even satisfy the \$450,000 judgment previously entered by the circuit court on the defamation claim. (App. at 26-27.) Pozner, instead, sought a jail term for Fetzer. In the event, Pozner declined the opportunity to present evidence of injury. (App. at 73.)

The circuit court, nonetheless, ordered Fetzer to provide to Pozner's counsel all documents relating to any disclosure of Pozner's deposition to any third party. (App. at 31.) The court also ordered Fetzer to provide a sworn expert report confirming his destruction of any electronic version of the deposition. (App. at 36.) Fetzer, thereafter, complied with the court's orders, as Pozner acknowledged. (App. at 87.)

Fetzer sought to address the circuit court on his own behalf during the hearing on contempt. (App. at 37-38.) The court expressly took offense to Pozner's comments, which were not intended to be offensive. (App. at 39.) The court then suddenly proposed to award Pozner all attorney fees associated with the underlying defamation suit by Pozner. (App. at 44-45.)

The court reiterated that it had always wanted to award attorneys' fees, but was constrained by the American rule regarding such fees. (App. at 44.) The court now proposed, however, to award attorneys' fees as an alternative purge condition for the deposition disclosure that occurred after the prior defamation trial. (App. at 45.) The court requested the parties to brief the propriety of such an alternative purge condition, which the court already was of a mind to impose. (*Id.*)

The circuit court held oral argument after briefing of the fees issue. (App. at 49-106.) The court acknowledged that Pozner declined to present evidence as to any effect of the contempt. (App. at 73.) The 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. (App. at 64.) The court concluded, without evidence, that Pozner was now in a worse situation than if he had never commenced a lawsuit, and therefore the court purported to justify an award attorneys' fees for the entire underlying defamation action. (App. at 78-79.)

The circuit court noted in conclusion that the sanction imposed on Fetzer was intended "to make sure that Dr. Fetzer understands and knows that there are consequences to his

contemptuous behavior.” (App. at 81.) The court explained its decision as prompted by concerns “that there very well may likely be continuing incidents of contemptuous behavior in violation of this Court’s Order. (App. at 82.) The court further lectured that “there needs to be consequences to actions.” (*Id.*) Finally, the court concluded that an award of all attorneys’ fees incurred to prosecute the defamation action should be awarded as an alternative remedy under Wis. Stat. § 785.04(1)(e). (App. at 82.) The court, nonetheless, found as a matter of fact that Fetzer only disclosed the Pozner deposition for the purpose of seeking advice and counsel as permitted under the law. (App. at 44.)

Based on its ruling, the circuit court entered judgment against Fetzer for \$650,000. (App. at 1-2.) The court, in doing so, refused to consider Fetzer’s ability to pay. (App. at 96-101.) Although Pozner’s counsel had declined a hearing on damages because of Fetzer’s limited means, the court considered ability to pay as merely a post-judgment issue of collection. (App. at 99.) On the issue of ability to pay, the court concluded that “I’m not going to schedule any more hearings.” (App. at 101.)

Fetzer, accordingly, has now appealed the circuit court’s entry of judgment for \$650,000. (App. at 351.) This is that appeal.

C. STATEMENT OF FACTS RELEVANT TO THE INSTANT APPEAL.

Pozner filed a post-judgment motion for contempt on January 9, 2020. (App. at 107-113.) Pozner alleged that Fetzer improperly disclosed his confidential deposition. Pozner also claimed that Fetzer had previously testified falsely that he did not have a copy of the written deposition transcript. (App. at 108.) Pozner requested that Fetzer be incarcerated as a means to compel a third party, Alison Maynard, to destroy any and all copies of Pozner's deposition in her possession obtained from Fetzer. (App. at 111.)

Fetzer responded to Pozner's motion by denying perjury allegations, but implementing remedial measures to prevent future disclosure of Pozner's deposition. (App. at 116-118.) This was the ultimate objective of Pozner's motion, as Pozner acknowledged Fetzer's limited financial resources. (App. at 111.)

Fetzer's counsel affirmed his prior representation to the court that Alison Maynard previously had deleted the Pozner deposition from her computer, which counsel believed to be true based upon information available to him. (App. at 119.) Counsel later became aware from Pozner's contempt motion that Ms. Maynard subsequently publicly posted links to Pozner's video deposition. (*Id.*) Ms. Maynard thereafter advised Attorney Bolton that she intended her prior statement to be true and accurate, but she later found that the video deposition was stored as part of the backup of her computer data. (*Id.*)

Counsel also vouched for Fetzer's prior testimony on September 13, 2019, to the effect that he did not then have a written transcript of Pozner's deposition. (App. at 119-20.) In fact, Professor Fetzer later obtained the written transcript, after September 13, 2019, when counsel requested the transcript. (*Id.*)

In any event, to avoid future disclosures of Pozner's deposition, counsel requested that Fetzter himself delete and destroy any format of Pozner's deposition in his possession or control so that counsel would be the sole repository for the deposition. (App. at 120.) Fetzter agreed that counsel should be the sole repository for Pozner's deposition, in electronic or written format. (*Id.*) Fetzter's counsel also, on behalf of Fetzter, requested that Ms. Maynard delete/destroy Pozner's deposition within her control, in any format. She has advised counsel of her compliance with his request. (*Id.*) Counsel then obtained an affidavit from Ms. Maynard, affirming her compliance with his request. (App. at 124-25.)

Fetzter became aware of Pozner's complaint that Ms. Maynard had posted links to his video deposition and the transcript of his deposition in late December of 2019. (App. at 121.) When Fetzter so learned, he immediately requested Ms. Maynard to take down from the internet both the video and transcript of Pozner's deposition. (*Id.*)

Fetzter also addressed the insinuation by Pozner that he previously lied to the court regarding Pozner's video deposition and the transcript of his deposition. (App. at 121-22.) Fetzter denied insinuations that his prior testimony was not true. (*Id.*) Pozner had noted Fetzter's testimony that he did not possess the written transcript at the time of a prior hearing on September 13, 2019. (App. at 122.) In fact, Fetzter did not possess the written transcript of Pozner's deposition, just as he testified. (*Id.*) He only possessed Mr. Pozner's video deposition as of the September 13, 2019 hearing date. (*Id.*) Attorney Bolton, however, subsequently requested a copy of the written transcript of Pozner's deposition, which Fetzter did not have. (*Id.*) Fetzter then obtained a copy of the transcript

after the September 13, 2019 hearing, and provided it to Attorney Bolton. (*Id.*) Fetzer's testimony at the September 13, 2019 hearing, therefore, was correct. (*Id.*)

Pozner's counsel, however, also implied that Fetzer provided false information to the Court to the effect that Ms. Maynard had deleted her video copies of Pozner's deposition. (*Id.*) Ms. Maynard, in fact, did represent to Fetzer and Attorney Bolton that she had deleted Pozner's video deposition, as Fetzer requested her to do. (*Id.*) Neither Fetzer nor his counsel intentionally misrepresented any information to the Court regarding their understanding that Ms. Maynard no longer had Pozner's video deposition. (*Id.*)

Fetzer did, however, provide a copy of Pozner's written transcript to Ms. Maynard on or about October 27, 2019, for the purpose of providing consultation regarding his appeal of the defamation judgment. He did not then provide Ms. Maynard the video deposition that included Pozner's visual image. (*Id.*)

Fetzer requested Ms. Maynard to immediately take down any posting of Pozner's video deposition and written transcript upon learning of their being posted. (App. at 123.) Fetzer also subsequently requested Ms. Maynard, through Attorney Bolton, to delete all vestiges of Pozner's video deposition and transcript. (*Id.*) Ms. Maynard agreed to do so, and she agreed to provide Fetzer's counsel a written affirmation of compliance with his request. (*Id.*)

In addition, Fetzer personally deleted both Pozner's video deposition and transcript, so that he no longer has access to Pozner's deposition in his own right. (*Id.*) Fetzer agreed with Attorney Bolton's request that Fetzer make such deletions of access to Pozner's deposition, with Attorney Bolton thereafter remaining the sole repository of the deposition on his behalf. (*Id.*)

Ms. Maynard acknowledged that Fetzer, by Attorney Bolton, requested that she delete from her possession and control all electronic and written copies of the deposition of Leonard Pozner, in any and all formats, said deposition taken in Case No. 18-CV-3122, pending in the Circuit Court for Dane County, Wisconsin. (App. at 124.) Although Maynard did not see any basis for the confidential classification of Pozner's deposition in its entirety, she agreed to Attorney Bolton's request. (*Id.*) Maynard accordingly deleted from her computer, and all other electronic locations to which she has access, Pozner's video deposition and the transcript of his deposition, including any and all electronic backup and/or storage locations. (*Id.*) As a result, Maynard does not have any continuing access to Pozner's deposition in any electronic format, or hard copy format. Maynard further affirmed that she is not aware of any continuing public access to Pozner's deposition through any link or internet location over which she has control.

Fetzer later supplemented his affidavit stating that he had deleted all text and video versions of the deposition of Leonard Pozner, which he believed to be true. (App. at 129.) Fetzer sought professional input from Jack Mullen, the webmaster for his blog, who is a cybersecurity engineer, to verify that all copies of the Pozner deposition had been deleted from Fetzer's desktop and from his laptop computers which are Fetzer's only computers. (*Id.*) Fetzer asked Mullen to assist him in searching both his desktop and laptop computers for any video and transcript versions of Pozner's deposition. (*Id.*) Using an application called AnyDesk.com, Mullen and Fetzer searched his desktop computer, an iMac, on March 13, 2020, which search was video recorded at that time. (*Id.*)

Fetzer and Mullen found one remaining pdf file of the deposition transcript on Fetzer's desktop, but no copies of the video deposition, which Fetzer promptly deleted from his computer. (App. at 130.) Realizing that they had not searched Fetzer's email or his laptop, Mullen and Fetzer did a subsequent search of Fetzer's laptop and email on March 15, 2020. (*Id.*) When they searched Fetzer's laptop and email for copies, they found two additional copies of the deposition transcript, which they then deleted. (*Id.*) Based on the searches conducted by Mullen, all video and/or text versions of Pozner's deposition have been deleted from all of Fetzer's computers and email. (*Id.*)

Mullen confirmed by sworn statement that he assisted Fetzer in deleting any electronic versions of Pozner's deposition. (App at 133-35.) Two electronic files containing the Pozner deposition were located, which were permanently removed from Fetzer's hard drive. (App. at 134.) This search and delete process included Fetzer's backup hard drives, both network and local. (App. at 135.)

V. STANDARD OF REVIEW.

Formulating a contempt remedy is generally committed to the circuit court's discretion. A misapplication or erroneous view of the law, however, constitutes an abuse of discretion. *State v. Anderson*, 163 Wis.2d 342, 346, 471 N.W.2d 279 (1991), citing *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968). "A trial court's misapplication of the law is an erroneous exercise of discretion on which we [Court of Appeals] must reverse the trial court's ruling." *State v. Smith*, 203 Wis.2d 288, 295, 753 N.W.2d 824 (Ct. App. 1996); *State v. Tarantino*, 157 Wis.2d 199, 207-08, 458 N.W.2d 582 (Ct. App. 1990).

Fetzer also claims that the circuit court misused its discretion when it issued a punitive sanction in a remedial contempt proceeding. This involves a question of law which the Court of Appeals reviews *de novo*. *Diane K.J. v. James L.J.*, 196 Wis.2d 964, 968, 539 N.W.2d 703 (Ct. App. 1995), citing *State ex rel. Larsen v. Larsen*, 165 Wis.2d 679, 682-83, 478 N.W.2d 18 (1992).

VI. ARGUMENT.

A. THE CIRCUIT COURT ERRED BY IMPOSING A PUNITIVE SANCTION IN A CIVIL CONTEMPT PROCEEDING.

The circuit court's contempt sanction is void because the court did not comply with the procedure for enforcing punitive contempt set out in the Criminal Code, as required by Wis. Stat. § 785.03(1)(b). *In re Paternity of Cy C.J.*, 196 Wis.2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). Because the court's contempt order is punitive, it must be reversed as Fetzer was not sanctioned in accordance with the procedures outlined in § 785.03(1)(b). *State ex rel. N.A. U.G.S.*, 156 Wis.2d. 388, 342, 456 N.W.2d 867 (Ct. App. 1990). Here, the court expressly acknowledged the punitive nature of the sanction imposed on Fetzer, which was intended "to make sure that Dr. Fetzer understands and knows that there are consequences to his contemptuous behavior." (App. at 81.)

Pozner, for his part, did not request fees as compensatory damages pursuant to Wis. Stat. § 785.04(1)(a). That statutory section recognizes the propriety of "payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as a result of a contempt of court."

Pozner's decision to not claim fees under Wis. Stat. § 785.04(1)(a) was well founded. Under subsection (a), the court has "the power to assess damages in contempt situations limited to indemnification for actual damages." *Getka v. Lader*, 71 Wis. 2nd 237, 248, 238 N.W. 2d. 87 (1976). "The indemnification for actual loss which a complainant is entitled to is that amount which could be recovered in a separate action." *Novo Industrial Corp. v. Nissen*, 30 Wis. 2d. 123, 130, 140 N.W. 2d. 280 (1966); *Mohr v. City of Milwaukee*, 106 Wis. 2d. 80, 93, 350 N.W. 2d 504 (1982). In fact, Pozner elected to not present any evidence of injury, including any evidence that anything from the written deposition transcript at issue was actually damaging. (App. at 26-27.)

The circuit court's belief that Pozner is worse off as a result of Fetzer's disclosure of Pozner's deposition is itself misplaced. The contempt at issue, after the defamation trial, did not include the video image of Pozner, which Pozner previously claimed was most damaging. (R. 225.) The disclosure at issue involved only Fetzer providing a copy of Pozner's written transcript on or about October 27, 2019, for the purpose of obtaining consultation regarding his appeal. (App. at 122.) This is an important distinction because Pozner complained primarily about the video disclosure of his image, rather than injury from the written transcript.

Only attorneys' fees that a person incurs "while prosecuting a contempt action" are available, in any event. *Rand v. Rand*, 327 Wis. 2d. 778, 786, 787 N.W. 2d. 445 (Ct. App. 2010); See also *Town of Seymour vs. City of Eau Claire*,

112 Wis. 2d. 313, 320, 332 N.W. 2d. 821 (Ct. App. 1983). Attorneys' fees in the underlying defamation action do not constitute fees incurred to prosecute Pozner's contempt motion. Fees associated with the underlying action were incurred independent of any contempt.

Pozner's defamation action obviously preceded the contempt at issue, and the subsequent trial on damages resulted from the defamation determination, rather than contempt. In fact, Pozner acknowledges that the defamation action was separately tried, resulting in an award of compensatory damages. Fees incurred in prosecuting the defamation claim were incurred separate and distinct from Fetzer's failure to comply with the order giving rise to Pozner's contempt. Nor were such fees requested by Pozner as an incentive to cease a continuing contempt. On the contrary, Pozner acknowledged that Fetzer does not have the means to pay a \$650,000 penalty. (App. at 26-27 and 111.) In short, attorney fees incurred in prosecuting the defamation claim do not constitute compensatory damages awardable under Sec. 785.04(1)(a), as Pozner acknowledges.

The circuit court's imposition of a \$650,000 award of attorney fees for Pozner's defamation action was not intended to end a continuing contempt, nor to compensate Pozner for any injury caused by the contempt. The extraordinary award was intended to be punitive and as such the judgment is void.

B. THE CIRCUIT COURT'S JUDGMENT IS NOT AN APPROPRIATE ALTERNATIVE PURGE CONDITION.

The circuit court's reliance on Wis. Stat. § 705.04(1)(e) as authority misapprehends that section of the contempt statutes. Subsection (e) permits a court to impose a remedial sanction for the purpose of terminating a continuing contempt of court, i.e., "a sanction other than the sanction specified in paragraphs (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court."

The circuit court misconstrued subsection (e) as allowing a court to award any sanction without regard to whether the sanction is calculated to terminate a continuing contempt. Pozner, for his part, does not claim that an award of attorney fees from the underlying defamation action was intended to terminate a continuing contempt, as Pozner recognized that such an award cannot be paid by Fetzer. As such, an award of attorneys' fees from the underlying defamation action would be strictly a sanction for alleged past conduct, i.e., for punitive purposes.

Punitive sanctions may not be imposed in remedial contempt proceedings. *Christensen v. Sullivan*, 320 Wis. 2d. 76, 99, 768 N.W. 2d 798 (2009). Punitive sanctions are imposed to punish a past contempt of court rather than to compel prospective compliance. *Id.* By contrast, all of the sanctions listed under Wis. Stat. § 785.04(1) carry the label of "remedial sanction," meaning they are sanctions imposed for the purpose of terminating a continuing contempt of court. *Id.* at 118.

The requested contempt sanction here lacks the indispensable feature of being remedial. Pozner makes no claim that such fees should be awarded in order to terminate a continuing contempt. The award of such fees, in effect, accomplishes what the court could not do in the underlying defamation action, i.e., award attorney fees, despite the circuit court's stated desire to do so. That decision by the court is now pending before the Court of Appeals, and as to that decision, the circuit court lacked competency to presently reconsider, by hook or by crook. See Hengel v. Hengel, 120 Wis. 2d. 522, 527, 355 N.W. 2d. 846 (Ct. App. 1984). (*Hengel* has been partly superseded by various statutes, i.e., Wis. Stat. § 808.075, in certain circumstances, none of which apply here. See Schmidt v. Smith, 162 Wis. 2d. 363, 369 – 71, 469 N.W. 2d. 855 (Ct. App. 1991).)

Although a court may impose remedial sanctions for contempt, sanctions generally must be purgeable through compliance with the original court order which was violated. The court also has the authority to establish alternate conditions, which if met, will purge the contempt. For example, if payment of money is a condition required to purge, a court may impose a payment that is sufficient to compensate for the loss suffered by another due to failure to comply with the court's order. "However, purge conditions must be feasible and must be reasonably related to the cause or nature of the contempt." *Benn v. Benn*, 230 Wis. 2d. 301, 311, 602 N.W. 2d. 65 (Ct. App. 1999). *State ex rel V.G.H. v. C.A.B.*, 163 Wis. 2d. 833, 845, 472 N.W. 2d. 839 (Ct. App. 1991).

In the present circumstances, a sanction to force compliance with a prior order of the court is not entirely possible, as the court has noted; it would be like trying to remedy the interference with an important visitation that cannot be rescheduled. The court may turn to subparagraph (e) of Wis. Stat. § 785.04 in order to provide relief to the party injured by such a contempt, but that is not a catch-all without limitations, contrary to the circuit court's assumption.

Chapter 785 allows the court to establish an alternate purge condition, but that is qualified authority. *Frisch v. Henrichs*, 304 Wis. 2d. 1, 31, 736 N.W. 2d. 85 (2007). When a court decides to provide a purge condition outside of compliance with the original court order, several requirements must be met. "The purge condition should serve remedial aims; the contemnor should be able to fulfill the proposed purge; and the condition should be reasonably related to the cause or nature of the contempt." *Id.* at 32, quoting *Larson v. Larson*, 165 Wis. 2d. 679, 685, 478 N.W. 2d. 18 (1992). (In *Frisch*, the trial court imposed a \$100,000 purge condition for failure to timely provide income tax returns, but the purge condition approximated Plaintiff's loss, and the contemnor was found to be capable of fulfilling the proposed purge.)

In this case, the award of attorneys' fees from the underlying defamation action does not satisfy the requirements for an alternate purge condition. In the first place, such an award is not calculated to serve a remedial aim, as discussed above. In addition, Fetzner undisputedly would not be able to fulfill the proposed

alternate condition. Finally, Pozner's attorney fees are separate and distinct from the contempt, and not caused by the later contempt.

The circuit court also refused to consider Fetzer's ability to pay \$650,000 as an alternate purge condition. Both the court and Pozner acknowledged that Fetzer does not have the means to satisfy even the underlying \$450,000 judgment on the defamation claim. The court erred, as a matter of law, therefore, by refusing to consider Fetzer's ability to pay as a predicate, rather than as a post-judgment collection issue.

The fact that contempt occurred during the pendency of the defamation action, moreover, does not make the underlying fees coextensive with the fees incurred to prosecute the contempt. That the contempt occurred in an underlying action is inherent in every contempt case, made true by the fact that a contempt constitutes a violation of a court order issued in an underlying action. That, however, does not make prosecution of the underlying action coextensive with the motion for contempt. As in the instant case, fees related to the defamation action do not overlap the fees incurred to prosecute the contempt motion.

The circuit court's judgment for \$650,000 is ultimately predicated on the belief that Fetzer is nefarious. The court may hold that belief, but animus is not a proper basis for imposing a punitive sanction in a remedial contempt proceeding. The court's sanction is not appropriate as an alternate purge condition precisely because it does not further remedial aims. Furthermore, Fetzer undisputedly does not have the means to satisfy the supposed purge condition. Finally, the contempt

is not coterminous with Pozner's defamation claim, predicated as it is on false statements, rather than the violation of a discovery protective order.

Fetzer acknowledges that he disagrees with Pozner's claim that certain statements were false and defamatory, but that is a separate issue from the contempt issue, and should not be twice punished as such. Fetzer, moreover, has taken undisputed steps to remove from his possession any video or written transcript of Pozner's deposition. Fetzer also has never publicly broadcast Pozner's deposition, either in video or written transcript format. Similarly, he has requested Allison Maynard to destroy any version of Pozner's deposition, which she has now sworn to have done.

Pozner, needless to say, is not satisfied, but that does not justify sanctions by the court that are without basis or precedent. A court's contempt powers are premised on upholding respect for the court's authority. The circuit court's decision, ironically, imposes a punitive vindication that is contrary to the court's authority.

C. THE CIRCUIT COURT IMPROPERLY ACTED WITH THE OBJECTIVE APPEARANCE OF BIAS.

The right to an impartial judge is fundamental to the notion of due process. *In re Paternity of B.J.M.*, 2020 WI 56, ¶15, 392 Wis.2d 49, 944 N.W.2d 542 (2020). A circuit court's partiality is a matter of law reviewed independently by the Court of Appeals. *State v. Goodson*, 2009 WI App. 107, ¶7, 320 Wis.2d 166, 771 N.W.2d 385. If a party rebuts the presumption that a judge has acted fairly,

impartially, and without bias, the error is structural and requires reversal. *In re Paternity of B.J.M.*, 2020 WI 56 at ¶16.

Objective bias arises in two situations. The first is where there is the appearance of bias. *State v. Goodson*, 2009 WI App. 107 at ¶9. The appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements. (*Id.*) The second form of objective bias occurs where the facts demonstrate the judge treated a party unfairly. The Court, moreover, considers the totality of the circumstances when considering a claim of judicial bias. *In re Paternity of B.J.M.*, 2020 WI 56 at ¶25.

The circuit court's unprecedented decision in the present case is the product of at least objective bias. Considering the ubiquitous pattern of the court's actions, the presumption of impartiality is patently overcome. First, court previously allowed evidence of an unrelated contempt to be offered during the trial of damages for defamation. After the jury's verdict in the underlying action, the court then prompted Pozner's counsel to seek attorneys' fees for the entire defamation suit, directing counsel to potential authority. The court subsequently, but grudgingly, denied such fees on the basis of the American rule. The court stated, however, that it would otherwise award fees and thought the law should be changed. Subsequently, in this post-judgment contempt proceeding, the court *sua sponte* proposed to award Pozner attorney fees for the underlying defamation suit as an alternative purge condition. This remedy was not proposed by Pozner and no case has been found anywhere in the country where such a remedy has been

imposed. The court further refused to consider Fetzer's ability to satisfy such a purge condition, which the court deemed necessary to teach Fetzer a lesson, i.e., for punitive purposes.

The circuit court consistently advocated extreme measures not urged by Pozner, at least until prompted by the court. At least four lawyers represented Pozner, all from prominent law firms, so the court's advocacy was unnecessary except to satisfy the court's apparent biases.

The totality of the circumstances and the extraordinary facts of this case, viewed objectively by a reasonable person, rebut any presumption of impartiality and fairness by the circuit court. The court, instead, denied Fetzer the fundamental right of due process. The error is structural in its dubious effect, requiring reversal of the court's \$650,000 penalty as a matter of law.

VII. CONCLUSION.

The circuit erred by ordering Fetzer to pay \$650,000 as an alternate purge condition. The court's order is void, thereby requiring the Court of Appeals to reverse and remand for further consideration.

Dated this 14th day of December, 2020.

BOARDMAN & CLARK LLP

/s/ Richard L. Bolton

Richard L. Bolton, SBN: 1012552
rbolton@boardmanclark.com
1 S. Pinckney St., Ste. 410
Madison, WI 53701-0927
(608) 257-9521
Attorneys for Defendant-Appellant