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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In re the finding of Contempt in Pozner v. Fetzer:

LEONARD POZNER,

Plaintiff-Respondent,

v.

JAMES FETZER,

Defendant-Appellant.

APPEAL NO. 2020AP001570
Dane County Case No. 18CV3122
Hon. Frank D. Remington, presiding

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STATEMENT OF ISSUES

1. Is a sanction under Wis. Stat. § 785.04(1)(e) "punitive" if the purpose of the sanction is to attempt to compel future compliance with court orders?

The Circuit Court found that its sanction was intended to compel Dr. Fetzer's future compliance with court orders. As such, the sanction was remedial and not punitive.

2. Is the Circuit Court required to rely on mere attorney argument regarding the contemnor's ability to pay when setting an alternative purge condition?

The Circuit Court found that Dr. Fetzer had not offered any evidence of his alleged inability to pay, and provided a procedure for Dr. Fetzer to do so at a later time.

3. Is evidence of an allegedly prejudicial act or series of acts required to establish objective bias?

Bias was never raised by Dr. Fetzer at the Circuit Court, nor did Dr. Fetzer ask the judge to recuse, and therefore no evidence ever was presented to or considered by the Circuit Court.

STATEMENT ON ORAL ARGUMENT

Mr. Pozner does not request oral argument because the briefs will fully develop and address the issues presented by Dr. Fetzer's appeal.

STATEMENT ON PUBLICATION

Mr. Pozner requests that the Court publish its decision because this case presents issues likely to be of continuing public interest and benefit to reviewing courts, which rely on appellate decisions for precedent and guidance.

STATEMENT OF CASE

A. The Defamatory Statements

Plaintiff-Respondent Leonard Pozner sued Defendant-Appellant Dr. Fetzer for defamation.[1] R.1. Mr. Pozner's son was murdered at Sandy Hook Elementary School. Dr. Fetzer published a book entitled, "Nobody Died at Sandy Hook: It Was a FEMA Drill to Promote Gun Control," which argued, among other things, that

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[1] The Complaint originally named Mike Palecek and Wrongs Without Wremedies, LLC as Dr. Fetzer's co-defendants. (R.1.) Mr. Palecek and Wrongs Without Wremedies ultimately reached settlements, dismissing them from the action. (R.130; R. 233.)

Mr. Pozner and the other families whose children were murdered at Sandy Hook Elementary School were crisis actors.

In support of its premise, that no one died at Sandy Hook, the book spent an entire chapter arguing that the copy of N.P.'s death certificate that Mr. Pozner distributed was fake. Defendant Fetzer repeated that allegation in various blogs and online publications.

Mr. Pozner initiated a defamation action based on such statements in the book, and one in a 2018 blog, which claimed that Mr. Pozner circulated a fake death certificate for his son, N.P. *Id.* Mr. Pozner alleged that four statements were defamatory:

- "[N.P]'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 researches are aware, the very document [Mr.] Pozner circulated in 2014, with its inconsistent tones, fonts, and clear digital manipulation, was clearly a forgery."
- "[N.P's death certificate] turned out to be a fabrication, with the bottom half of a real death certificate and the top half 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."

(R.1 at ¶¶ 17-18; *see also* R.252.)

In answering the complaint, Dr. Fetzer alleged that Mr. Pozner was an imposter, a baseless contention he continued to assert throughout the litigation. (R.2 at ¶¶1, 28; *see also* R. 20, Fetzer Response to Motion to Strike Answer at 4.) Dr. Fetzer insisted, "'Leonard Pozner' is a fake name to conceal [Plaintiff's] true identity." (R. 20 at 4.) Dr. Fetzer was not making a new point. Before and during this litigation, he accused Mr. Pozner of being a "liar," "fraud," hypocrite," "con-artist," and a criminal. (*See* R. 29 at 2.) Dr. Fetzer has long expressed an interest in "exposing" Mr. Pozner for his role in what Dr. Fetzer contends is an elaborate hoax. (*Id*.)

B. Discovery

Dr. Fetzer carried these accusations into discovery in this case. At the beginning of the case, Dr. Fetzer served extremely broad discovery requests. Most were entirely unrelated to the underlying cause of action. For example, Dr. Fetzer asked Mr. Pozer to:

> Admit that Exhibit N, "Fabricated Passport of 'Noah Samuel Pozner'" 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.

(R. 32 at 5.)

In response, Mr. Pozner sought a protective order. (*See* R. 29.) Apart from the facially outrageous requests like the one above, Mr. Pozner was

concerned that Dr. Fetzer sought highly personal information not related to the narrow question of whether N. P.'s death certificate was fake. (*See id.*)

The Circuit Court warned Dr. Fetzer that he could not turn this case into "a complete fishing expedition" and excluded requests on irrelevant and highly personal topics ranging from Mr. Pozner's ex-wife's religious conversion, to medical records relating to the *in-vitro* fertilization treatments the couple undertook. (R. 352 at 20:17; *see, e.g.*, *id.* at 32:17-19; 36:11-37:5, 39:21-44:1, 44:16-45:15, 50:14-51:7.)

Despite his repeated arguments that Mr. Pozner is an imposter, Dr. Fetzer declined to seek information that would conclusively determine Mr. Pozner's identity as the father of the slain child. At the April 16, 2019 hearing, Dr. Fetzer announced that he wanted to verify Mr. Pozner's identity by obtaining an additional DNA sample at Mr. Pozner's deposition. (*See* R. 353 at 28:2-6.) Plaintiff's counsel informed counsel for Wrongs Without Wremedies, the party that noticed Mr. Pozner's deposition, that Mr. Pozner was willing to give a DNA sample at his deposition. (*See* R. 214 at 2, ¶ 12.) Neither Dr. Fetzer nor the other defendants collected Mr. Pozner's DNA at his deposition.

C. Stipulation to Confidentiality Order

Throughout this case, Dr. Fetzer tried to get and publish non-public information, much of which had nothing to do with the four defamatory statements. He used the processes of civil litigation in this case to gather

information to further promote his conspiracy theories about Mr. Pozner and his family. The breadth of his requests were nearly boundless. For example, he asked the Circuit Court to order DNA tests of Mr. Pozner's ex-wife's prior husband and Mr. Pozner's step-son, none of whom were parties or even in Wisconsin. (R. 75, Fetzer Motion for Expansion of DNA Testing.)

In addition, and central to this appeal, Dr. Fetzer insisted on videotaping the deposition of Mr. Pozner. He demanded video even though there was no legitimate basis for a video deposition in this case.

Mr. Fetzer blogged about nearly every argument and detail of the case. Shortly after Mr. Pozner filed his Complaint, Dr. Fetzer published a blog post including Mr. Pozner's social security number. As a result, at the initial hearing in the case, Mr. Pozner raised concerns that Dr. Fetzer would obtain access to Mr. Pozner's confidential information and not keep it confidential. (R. 352 at 20:5-20).

Dr. Fetzer repeatedly took the position that the Wisconsin rules and laws do not apply because he did not believe Mr. Pozner and N.P. were real people. After filing an unredacted copy of N.P.'s passport, in violation of Wis. Stat. § 801.19(1)(a), Dr. Fetzer refused to redact the statutorily protected information on the grounds that he believed the passport was fake. (R. 77 at 3.) The defendants continued to argue that the protections of that rule should not apply to documents or people the defendants do not believe exist. (*See* R. 354 at 15:10-16:19.)

Noting that Dr. Fetzer was using this case as a tool to gather information to disseminate to his fellow hoaxers, Mr. Pozner moved for another protective order.

(*See* R. 115.) Mr. Pozner informed the defendants that he would oppose a videotaped deposition, citing the risk that the defendants would release that video to harass Mr. Pozner:

> Second, I remain concerned about Defendants' motivations for videotaping Mr. Pozner's deposition. **The tacit threat of releasing Mr. Pozner's deposition, and especially the video of his deposition, is inappropriate.** Until and unless portions of Mr. Pozner's deposition are filed with the court, Wisconsin law does not provide the public a right of access to the videotaped deposition. Many aspects of this case related to information that is deemed confidential under Wisconsin's laws, among other, including medical treatment, vital records, and other protected or sensitive information.

(R. 118 at 2 (emphasis added).)

At a hearing on April 26, 2019, the Plaintiff argued for a confidentiality order. (R. 354 at 37:25-47:22.) Dr. Fetzer was at that hearing and ultimately agreed to the issuance of that order and to be bound by its terms. (*Id.* at 43:7-17.) The Circuit Court made it very clear that confidential information was not to be leaked:

> There may be a temptation to use the information that's discovered in this case to perpetuate the online or media debate that's going on and will continue to go on, but if I find out that any party – any party has breached this confidentiality agreement … the consequences will be swift.

(*Id.* at 46:10-16.) The Circuit Court went on to ensure that Dr. Fetzer was aware of the consequences of a violation of the protective order:

> [The Court:] Do you understand that, Mr. Fetzer?
>
> Mr. Fetzer: I do, Your Honor.

(*Id*. at 47:14-15.)

As a result, Mr. Pozner agreed to a videotaped deposition. (*See* R. 214 at ¶ 6.) The resulting deposition transcript and video files were conspicuously

marked “confidential” pursuant to the Circuit Court’s confidentiality order. (*See* R. 217-218.)

D. Dr. Fetzer’s Fundraising

Not only did Dr. Fetzer seek to use this litigation to "research" his conspiracy theories, he used his unsupported allegations related to this litigation and information discovered in the litigation, to raise money for himself. (*See*, *e.g.*, R. 271 (posting Defendant Fetzer’s answer and seeking donations).) After the jury awarded Mr. Pozner $450,000 in actual damages, Dr. Fetzer established a “Legal Defense Fund.” (*Id.*; *see also*, R. 272 at 6 (James Fetzer, Ph.D. Legal Defense Fund). In promoting that fund, Dr. Fetzer assured his readers that “None of the money raised will be used to offset the absurd $450,000 verdict….”).)

E. Dr. Fetzer’s First Contempt

Shortly after his videotaped deposition, Mr. Pozner learned that Dr. Fetzer given the video to others in violation of the parties’ stipulated confidentiality order. In particular, Mr. Pozner learned that Dr. Fetzer had shared this video deposition with other individuals, collectively known as “hoaxers,” who believe that the Sandy Hook Massacre was a hoax.

One such individual was Ms. Alison Maynard. Ms. Maynard is a former lawyer. She was found on multiple occasions to be engaged in the unauthorized

practice of law for work performed on behalf of Dr. Fetzer in this litigation. (Resp. App. 001-002; R. 364 at 41:25-42:15.)

Although Dr. Fetzer told this Court that Ms. Maynard assisted him in preparation of his petition for interlocutory appeal. *See* 2019AP001249 at Petition for Leave to Appeal. He later told Colorado's disciplinary prosecutor that his representation to this court was not accurate. (*See* R. 321.) Dr. Fetzer's refusal to tell the truth to this Court and in his own affidavits undermines the veracity of all of the factual assertions made by him in this and the co-pending merits appeal, 2020AP000121.

Mr. Pozner moved to hold Dr. Fetzer in contempt and sought sanctions against Dr. Fetzer for disseminating the deposition video, which violated the protective order. R.213. After briefing and an evidentiary hearing, the Circuit Court held "that Defendant Fetzer intentionally violated the Court's Confidentiality Order," and ordered sanctions for the ongoing contempt. (R. 234.) Dr. Fetzer was sentenced to jail for five days, stayed on the condition he pay attorneys' fees for Plaintiff bringing the motion and make efforts to retrieve and cause recipients to delete the confidential material. (R. 359 at 90:25-91:22.)

On October 14, 2019, the Circuit Court found (over Mr. Pozner's objections) that Dr. Fetzer met the purge conditions and was not required to report to jail. (*See* R. 360 at 11:18-20.) Dr. Fetzer's counsel represented at that hearing that Ms. Maynard advised that she had complied with Dr. Fetzer's request that she delete the video files. (*Id*. at 10:4-23.)

F. Dr. Fetzer's Second Contempt

Less than two weeks after avoiding jail for his first contemptuous distribution of Mr. Pozner's confidential deposition video, Dr. Fetzer provided a copy of Mr. Pozner's confidential deposition transcript to Ms. Maynard. (*See* R. 306 at ¶ 14 (admitting that he provided Ms. Maynard a copy of the confidential transcript "on or about October 27, 2019").) Months later, Mr. Pozner discovered that Ms. Maynard had published a blog post that included a link to a copy of Mr. Pozner's videotaped deposition and deposition transcript. (R. 297 at ¶¶ 2-6.) Mr. Pozner again asked the Circuit Court to hold Dr. Fetzer in contempt. (R. 295.)

During the second contempt proceeding, Dr. Fetzer's counsel admitted that Dr. Fetzer provided Ms. Maynard with a copy of Mr. Pozner's confidential deposition transcript. (R. 364 at 11:5-22.) Dr. Fetzer had violated the confidentiality order after being told, during the first contempt hearing and determination, that Ms. Maynard was not authorized to receive confidential materials. (R. 359 at 86:13-15 (finding that contempt was intentional).)

Dr. Fetzer initially stated under oath that he did not tell Ms. Maynard she could post the deposition. (R. 306 at ¶ 21.) After Dr. Fetzer was ordered to produced his email communications with Ms. Maynard, he confessed that he had, in fact given her permission to post that confidential document. (R. 332 at ¶ 2.)

G. Statement Regarding Dr. Fetzer's Recitation Of Facts

Dr. Fetzer takes liberty with the record in reciting the facts. Mr. Pozner will not spend this Court's time going line-by-line and pointing out errors or improper characterizations. But a few alleged "facts" bear additional scrutiny.

First, Dr. Fetzer (once again) claims the Circuit Court limited the scope of the action. (App. Br. at 5.) He misstates the record. The Circuit Court granted Mr. Pozner's protective order regarding discovery requests that the Circuit Court determined to be "…not relevant and not likely to lead to the discovery of anything relevant that will be admitted in this court." (R. 352 at 49:17-50:7.)

Second, Dr. Fetzer claims that Mr. Pozner's only concern over disclosure of confidential information was his image "rather than disclosure of any substantive information." (App. Br. at 6.) He is wrong. Mr. Pozner raised concerns over confidential medical information, including prescriptions, that were discussed in the deposition. (R. 359 at 74:5-10.)

Third, Dr. Fetzer alleges that the Circuit Court found that he "only" disclosed the deposition "for the purpose of seeking advice and counsel *as permitted under the law*." (App. Br. at 11 (emphasis added).) He mischaracterizes the record. The Circuit Court did find that Dr. Fetzer disclosed the transcript to Alison Maynard for the purpose of receiving legal advice, but also determined that Dr. Fetzer (who was then represented by an actual lawyer) sought that advice from a person "not authorized to practice law in Wisconsin." (R. 364 at 42:5-15.) Dr.

Fetzer can provide no support from the record to contend that his violation of the confidentiality order was authorized by law.

Fourth, he is incorrect to assert that $650,000 was "all" of the attorneys' fees incurred in the underlying action. (*Cf.* App. Br. at 11.) Mr. Pozner's bill of costs was in excess of $715,000. The parties agreed to reduce the award. (R. 344.)

Fifth, Dr. Fetzer is inaccurate to contend that the Circuit Court reiterated that "it had always wanted to award attorneys' fees…." (App. Br. at 9.) He cites to a portion of the record that says no such thing.

All of these examples demonstrate that Dr. Fetzer plays fast and loose with reality. As a result, this Court must carefully consider each and every factual statement upon which his appeal relies.

SUMMARY OF ARGUMENT

This really should have been a simple case. Dr. Fetzer did not contest most elements of defamation. Therefore, Mr. Pozner only had to prove that the death certificate he circulated was not fake. Mr. Pozner provided to the Court the actual death certificate that he obtained from the Newtown clerk. That original document, bearing all of the seals and certifications, is now in the Court of Appeals file for case 2020AP000121. Nearly all of the lawyers' time spent in this case was tied to Dr. Fetzer's attempts to use this case to gather non-public information for his fellow hoaxers. And Dr. Fetzer did just that, despite a court order designed to protect Mr. Pozner's confidential information.

Just two weeks after satisfying the Circuit Court's purge condition for his first contempt, Defendant James Fetzer once again leaked Mr. Pozner's confidential information to unauthorized recipients. As a result, Dr. Fetzer was found in contempt a second time for intentionally, flagrantly violating a court order requiring him to maintain confidentiality of information obtained in discovery.

For that second contempt, the Circuit Court imposed a remedial sanction under Wis. Stat. § 785.04(1)(e) after finding that the sanctions under the other subparts would not be effectual to terminate the contempt. The Circuit Court's sanction is not punitive because it is an attempt to deter Dr. Fetzer from violating the court's orders in the future rather than merely punishing his non-compliance. Although Dr. Fetzer now claims the sanction is excessive and he cannot pay it, he introduced no evidence in support that contention. Moreover, the Circuit Court expressly granted the right to a hearing on that issue at the appropriate time. Finally, there is no indication the Circuit Court was biased.

STANDARD OF REVIEW

Whether the circuit court's purge condition exceeded the court's authority is a question of law. *In re Marriage of Larsen*, 165 Wis. 2d 679, 682–83, 478 N.W.2d 18, 19 (1992). Questions of law are reviewed without deference to the decisions of the lower courts. *Id*.

Determining whether the contempt sanction was punitive or remedial is a question of law that the Court of Appeals reviews *de novo*. *In re Paternity of Cy C.J.*, 196 Wis. 2d 964, 968, 539 N.W.2d 703, 705 (Ct. App. 1995).

Dr. Fetzer's claim of bias was not raised below, so there is no circuit court decision to review. However, generally, a due process violation based on a claim of judicial bias is a matter of law subject to *de novo* review. *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 15, 392 Wis. 2d 49, 59, 944 N.W.2d 542, 547, cert. denied sub nom. *Carroll v. Miller*, No. 20-165, 2020 WL 6037237 (U.S. Oct. 13, 2020).

ARGUMENT

I. The Sanction Was Not Punitive

A. Dr. Fetzer Misquoted the Circuit Court Statement To Make It Appear Punitive

Dr. Fetzer argues the remedial sanction was punitive based on an out-of-context portion of a statement by the Circuit Court. (App. Br. at 10.) Read in full, the Circuit Court's statement does not evidence an intent to punish Dr. Fetzer for prior conduct. It is instead evidence of an intent to craft a sanction designed to deter future violations.

In his brief, Dr. Fetzer reproduces only a portion of a sentence from the transcript. Dr. Fetzer purports to do so in a quote, but does not identify the fragment

as only part of a broader statement through the use of ellipses. Given the Circuit Court's additional sentence, Dr. Fetzer's choice is troubling.[2]

Apart from the portion quoted by Dr. Fetzer, the Circuit Court's statement went on to say:

> …the fact that he's now been – done the same thing twice leads me to conclude and be concerned that **there very well may likely be continuing incidents of contemptuous behavior** in violation of this Court's order.

(R. 365 at 53:24-54:3 (emphasis added).) Only by ignoring the Circuit Court's statements can Dr. Fetzer argue that the Circuit Court was punishing him for past conduct, rather than securing Dr. Fetzer's future compliance with a court order he had already violated twice.

Securing future compliance with court orders is an acceptable aim for remedial sanctions. *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65, 69 (Ct. App. 1999). Dr. Fetzer's repeated, intentional violations of the confidentiality order justified measures that would secure his future compliance.

The Circuit Court's heightened concern for future violations was particularly appropriate given that Dr. Fetzer violated the confidentiality order

[2] This is part of an overarching trend in Dr. Fetzer's appellate filings to distort the record in this case. For example, Dr. Fetzer's Reply in the merits appeal claimed that Mr. Pozner illegally possessed such an uncertified death certificate, 2020AP000121 Reply Br. at 10, even though the *original* obtained from the Newtown clerk is in the court file (and has since been transferred to the Court of Appeals file), was examined by the Circuit Court on the record during the summary judgment hearing, and unquestionably contains the very certifications that Dr. Fetzer's filings continue to claim are absent. (*See* R. 185; *see also* R. 357 at 41:21-44:10.)

for a second time just two weeks after completing the purge conditions for his first violation.[3] The Circuit Court's statement represents a legally-permissible aim of remedial contempt: securing future compliance.

The record as a whole, and in particular the portion of the Circuit Court's statement omitted from Dr. Fetzer's brief, demonstrates that the purpose of the remedial sanction was to benefit Mr. Pozner by securing current and future compliance with the confidentiality order. As such, it cannot be characterized as punitive.

B. The Sanction Was Remedial Because It Provided Dr. Fetzer a Means of Terminating His Ongoing Contempt

Dr. Fetzer failed to establish that the sanction was punitive. To the contrary, all of the argument below, as well as Dr. Fetzer's concessions, indicate that the sanction was remedial in nature.

Dr. Fetzer cites cases that do not support his argument that this sanction was punitive. In *In re Paternity of CY C.J.*, the sanction was punitive because the term of imprisonment was set for a definite period of time and could not be ended by complying with the court's prior order. 196 Wis. 2d 964, 970, 539 N.W.2d 703 (Ct. App. 1995). Similarly, in *State ex rel. N.A. v. G.S.*, the jail sentenced imposed was also for a set period of time without the ability to purge

[3] *See* R. 306 at ¶ 14 (admitting that Dr. Fetzer provided Ms. Maynard a copy of the confidential transcript "on or about October 27, 2019"); *see also* R. 360 at 11:18-25 (finding on October 14, 2019 that Dr. Fetzer met purge conditions for initial contempt).

the sentence through compliance with the court order. 156 Wis. 2d 338, 342, 456 N.W.2d 867 (Ct. App. 1990). Here, unlike both of those cases, Fetzer can purge the condition, and thereby terminate his ongoing contempt, by paying the remedial sanction. Moreover, unlike those cases, Dr. Fetzer does not face a jail sentence.

The difference between a punitive sanction, which requires an elevated level of due process, and a remedial sanction, which does not, has been succinctly explained by the U.S. Supreme Court. "A contempt fine accordingly is considered civil and remedial if it either 'coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained.'" *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994), quoting *United States v. Mine Workers*, 330 U.S. 258, 303–304 (1947).

Wisconsin courts, of course, consider the same criteria to distinguish remedial from punitive sanctions. Punitive sanctions are "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." Wis. Stat. § 785.01(2); *see also Christensen v. Sullivan*, 2009 WI 87, ¶ 51, 320 Wis. 2d 76, 100, 768 N.W.2d 798, 810. In contrast, a remedial sanction is imposed "for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(3); *see also Christensen*, 320 Wis. 2d 76 at ¶ 54.

There are two ways an ongoing contempt can be terminated. A contemnor can terminate their ongoing contempt by securing compliance with the original order. *See Frisch v. Henrichs*, 2007 WI 102, ¶ 60, 304 Wis. 2d 1, 31, 736 N.W.2d 85, 100. Alternatively, a court can allow the contemnor to terminate the contempt by satisfying an alternative purge condition. *Id*.

The record as a whole supports the characterization of the sanction as remedial. The Circuit Court's focus remained at all times on a remedial sanction that would enable Dr. Fetzer to terminate his ongoing contempt.[4] For example, the Circuit Court specifically found that the remedial sanctions authorized by Wis. Stat. § 785.04(1)(a)-(d) "would be ineffectual to terminate the contempt." App. at 79 (emphasis added). Dr. Fetzer's counsel implicitly agreed that those subparts would be ineffectual to terminate the contempt by not objecting to relief under subpart (e). (R. 364 at 28:19-29:3.) The Circuit Court's consistent focus on crafting a remedial sanction that would enable Dr. Fetzer to terminate his ongoing contempt means the sanction is necessarily remedial.

It is inaccurate to recast the sanction as mere punishment for past contempt. The contempt sanction ordered by the Circuit Court gives Dr. Fetzer a path to cure his ongoing contempt without actually complying with the confidentiality order by retrieving the wrongfully leaked material.

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[4] Dr. Fetzer conceded that his contempt—a second violation of the confidentiality order—was ongoing. (App. at 61.)

C. The Circuit Court Did Not Rely On § 785.04(1)(a) To Impose Its Sanction.

Dr. Fetzer's argument that Wis. Stat. § 785.04(1)(a) does not authorize attorneys' fees as compensatory damages is wholly irrelevant to any issue on appeal. The Circuit Court did not impose its sanction under § 785.04(1)(a). The Circuit Court found that § 785(1)(a)-(d) would be ineffectual to terminate the contempt and therefore fashioned a remedy under subpart (e). (R. 365 at 365:19-22.)

Dr. Fetzer has offered no basis to find that the sanction under subpart (e) is punitive. All of the potential sanctions set forth in § 785.04(1) are described by statute as "remedial." *See* Wis. Stat. § 785.04(1)(stating "A court may impose one or more of the following *remedial* sanctions:" followed by the remedial sanctions set forth in subparts (a) through (e)) (emphasis added).

D. There Is A Nexus Between The Remedial Sanction And The Attorneys' Fees From The Underlying Case

Although Dr. Fetzer's brief presented as an question to be decided whether the sanction was distinct from the merits of the underlying action, his brief does not develop that issue. His brief merely restates, verbatim, an argument made prior to the contempt hearing. Without knowing why Dr. Fetzer contends the briefs, argument, and the findings of the Circuit Court at the contempt hearings below do not sufficiently tie the remedial sanction to the merits of the underlying defamation case, Mr. Pozner cannot fairly address this issue. Because this issue was not

meaningfully argued in Dr. Fetzer's opening brief, the Court should consider it waived.

To the extent Dr. Fetzer argues that "reasonably related" requires but-for causation, he offers no support in Wisconsin law. Dr. Fetzer's brief merely points out that the attorneys' fees, which were used as a measuring stick for the sanction, related to events that preceded the contempt. Dr. Fetzer does not explain why that makes the sanction legally deficient or lacking a relationship to the cause of the contempt.

Plaintiff briefed this issue extensively and argued it during the May 14, 2020, hearing. (*See* R. 324 at 5-8; R. 365 at 26:14-29:9.) Mr. Pozner filed this defamation case in part to seek to clear his name of the damage caused by Dr. Fetzer's falsehoods. (*See* R. 1, Compl. at ¶ 47.) Dr. Fetzer used the litigation to gather non-public material which he has used to continue to publicly smear Mr. Pozner. As the Circuit Court realized, Mr. Pozner is, in very real terms, worse off than when he started this litigation precisely because Dr. Fetzer violated court orders and leaked confidential information.

E. The Lack of an Evidentiary Hearing As To Mr. Pozner's Injuries Does Not Make the Sanction Punitive

Mr. Pozner's decision to forego an evidentiary hearing pursuant to Wis. Stat. § 785.04(1)(a) does not transform the Circuit Court's remedial sanction into a punitive one. Nor does it indicate a lack of harm to Mr. Pozner. The record

already contained evidence of the harm suffered by Mr. Pozner as a result of Dr. Fetzer leaking documents. (*See*, *e.g.*, R. 225 (Affidavit of Leonard Pozner); *see also* R. 365 at 30:14-31:2 (describing findings from evidence in the record of harm suffered by Mr. Pozner).) As Mr. Pozner explained to the Circuit Court, an additional evidentiary hearing would have provided Dr. Fetzer another opportunity to obtain yet more of Mr. Pozner's personal information to leak to Dr. Fetzer's followers. (R. 324 at 5.)

Mr. Pozner's concern is not merely academic. Dr. Fetzer and his cadre of hoaxers continue to attempt to gather and disseminate Mr. Pozner's private information. Because Mr. Pozner has been the subject of death threats, he has taken great pains to avoid public disclosure of his face and personal information, such as his home address. (*See*, *e.g.*, R. 225 (describing Mr. Pozner's efforts to keep his family safe by keeping his face out of the public eye).)

Just over a week ago, shortly before Mr. Pozner appeared on 60 Minutes, his face expertly obscured by a Hollywood special effects artist, Dr. Fetzer authored a blog post repeating his claim that Mr. Pozner is an imposter.[5] That blog included an image of Mr. Pozner taken from Mr. Pozner's previously-leaked deposition video.

The Circuit Court faced challenging circumstances in fashioning a sanction for Dr. Fetzer's second intentional violation of the confidentiality order. Mr.

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[5] https://phibetaiota.net/2021/01/james-fetzer-is-60-minutes-knowingly-interviewing-a-fake-lenny-pozner-about-alleged-fema-false-flag-event-known-as-sandy-hook/

Pozner requested incarceration as a means of coercing compliance with the confidentiality order. (R. 296 at 5.) Dr. Fetzer opposed that sanction, attesting to unspecified "major medical conditions" that would allegedly be worsened by incarceration. (R. 319 at ¶ 13.) The Circuit Court noted that it could impose a forfeiture of up to $2000 per day—which, well over a year into Dr. Fetzer's ongoing contempt, would far exceed the amount of the sanction ordered by the Circuit Court. (R. 364 at 27:14-18.)

Dr. Fetzer accepted the Circuit Court's finding that the sanctions in subparts (a) through (d) would be ineffective to terminate Dr. Fetzer's contempt. The Circuit Court therefore fashioned a sanction under subpart (e) that was intended to deter Dr. Fetzer from future violations of court orders. His previous contempt sanction, $7,000 plus efforts to contain the leaked material, was clearly not sufficient to deter Dr. Fetzer, given that he violated the Court's order again just two weeks after avoiding jail for his first violation.

Defendant Fetzer has not offered any basis to determine that setting the sanction under subpart (e) by considering the fees incurred by Mr. Pozner in the case-in-chief was inappropriate. Such argument is therefore waived.

II. Dr. Fetzer Did Not Establish An Inability To Comply With The Purge Condition

A. Dr. Fetzer Offered No Evidence of His Inability to Pay

Dr. Fetzer did not introduce any evidence demonstrating his purported inability to comply with the Circuit Court's alternative purge condition. At no point during or after Plaintiff submitted detailed records regarding the remedial contempt sanction did Dr. Fetzer introduce any evidence demonstrating his inability to comply.

Because there is no evidence in the record, Dr. Fetzer's entire argument is based on the fallacy that "everyone" knows Dr. Fetzer is unable to comply with the purge condition. For that he cites a statement by Mr. Pozner's counsel on an unrelated issue: the potential for an evidentiary hearing to ascertain Mr. Pozner's damages flowing from the second contempt. (*See* R. 364 at 24:17-25:18.) That statement, made at the March 17, 2020 hearing, focused solely on "money," not Dr. Fetzer's other assets.

Dr. Fetzer also cites App. 111, claiming that Plaintiff admitted that Dr. Fetzer lacked the ability to meet the alternative purge condition. (App. Br. at 19.) The record does not support Dr. Fetzer's characterization of the evidence. There, counsel for Mr. Pozner said "Defendant Fetzer has indicated that he will be unable to pay any meaningful part of that judgment," citing Dr. Fetzer's fundraising web page. First, that statement was made months before the amount of the contempt was determined. Second, and more importantly, Dr. Fetzer's self-serving claim of

poverty in his fundraising plea is a far cry from actual evidence of his inability to pay.

It is inaccurate for Dr. Fetzer suggest that his burden to supply evidence of his inability to pay was supplanted by Plaintiff's concession. Plaintiff noted in an April 21, 2020 reply brief that:

> Although Defendant Fetzer claims he cannot pay the amount, that is not at all clear. Plaintiff is engaged in an ongoing process of discovering Defendant Fetzer's assets. Although he probably does not have cash in the bank, Defendant Fetzer owns assets, including intangible assets such as intellectual property, that may be used to help satisfy the remedial sanction/purge condition.

(R. 331 at 4.)

Dr. Fetzer and his counsel had notice and every opportunity to provide evidence of his alleged inability to pay. At the May 14, 2020 hearing, more than four months after Plaintiff's motion initiating the second contempt, and a month after briefing was completed on the Circuit Court's proposed remedial sanction, the Circuit Court noted that Dr. Fetzer had yet to provide any evidence demonstrating his alleged inability to pay. (R. 365 at 48:25-49:4.)

Later, per the Circuit Court's order, Plaintiff submitted a bill of costs specifying the attorney fees incurred during the case. Thereafter Plaintiff and Defendant stipulated to a remedial contempt amount of $650,000. Even after the amount had been fixed, Dr. Fetzer failed to submit any evidence demonstrating an inability to satisfy the purge condition.

Dr. Fetzer argues that the Circuit Court should have, somehow, conducted a factual inquiry into Dr. Fetzer's ability to pay. Dr. Fetzer offers no legal basis to

put that affirmative burden on the Circuit Court in these circumstances. Dr. Fetzer was represented by competent counsel who surely understands that evidence, not mere attorney argument, is required in a court of law.

Indeed, on information and belief, Dr. Fetzer owns or controls intellectual property, including books he has authored, websites, blogs, and other potentially valuable intangible assets. Dr. Fetzer used the litigation to fuel a fundraising program, promising his believers that none of those donations would be used to satisfy the judgment in Mr. Pozner's case.

Moreover, Dr. Fetzer apparently chooses to not be compensated for his "work." He has time to host a weekly radio broadcast, post blogs, and organize a national conference. Dr. Fetzer has not demonstrated an inability to earn income sufficient to allow him to satisfy the contempt sanction—he instead asks this Court to make that finding without evidence. Despite his pleas of poverty, Dr. Fetzer apparently had enough spare cash to vacation in Las Vegas and to attend the 2019 Rose Bowl. (*See* R. 364 at 37:20-21.) Dr. Fetzer has offered no basis to distinguish his situation from any of the scores of reported family law cases where unemployed or underemployed contemnors claim an inability to satisfy a purge condition.

Finally, it is disingenuous for Dr. Fetzer to claim that any monetary sanction is inappropriate due to his alleged inability to pay, when he also begged the court to not incarcerate him due to his health conditions. (*See* R. 319 at 1-4.) Dr. Fetzer's position is essentially that the Circuit Court has no means by which to ensure his

compliance with court orders. He alleges that he is judgment-proof and in bad health and therefore above the law. Dr. Fetzer's attempt to plead poverty and thereby shirk responsibility for his second contempt should be rejected.

B. The Question of Dr. Fetzer's Inability to Pay is Premature

The question of Dr. Fetzer's alleged inability to pay the purge condition is not ripe. As the Circuit Court noted, in the event Dr. Fetzer does not pay the contempt and Plaintiff seeks to enforce it, Dr. Fetzer will then be able to argue (perhaps this time with evidence) that he is unable to meet the purge condition. *See Benn v. Benn*, 230 Wis. 2d 301, 312, 602 N.W.2d 65, 70 (Ct. App. 1999) (noting that determination of inability to meet purge condition could be evaluated after sanction had been imposed as long as that determination occurred before incarceration); *see also State ex rel. V.J.H. v. C.A.B.*, 163 Wis. 2d 833, 846, 472 N.W.2d 839, 844 (Ct. App. 1991) (imposing on contemnor the burden of showing that purge condition was not feasible).

Frisch v. Henrichs likewise demonstrates that the determination of a contemnor's ability to pay need not be simultaneous with the imposition of the sanction. There, the court imposed a $100,000 sanction at a June 15, 2004 hearing. 2007 WI 102, ¶¶ 22-23, 304 Wis. 2d 1, 15–16, 736 N.W.2d 85, 92–93. Later, at a hearing on overtrial, the court made factual findings confirming the contemnor's ability to pay. *Id*. at ¶ 24, n.20.

Like *Benn* and *Frisch*, the Circuit Court ensured that Dr. Fetzer would be allowed to attempt to demonstrate his inability to pay the contempt at a later date. (R. 365 at 50:25-51:15.) That opportunity is still available to Dr. Fetzer. Therefore, this question of whether the sanction is "feasible" is not ripe for determination.

III. There Is No Evidence Of Bias Or Impartiality

Defendant Fetzer has no reasonable basis to accuse the Circuit Court of being biased. None of Dr. Fetzer's arguments remotely suggest bias, much less rising to the level that would require reversal under due process principles.

A. Dr. Fetzer Failed To Adduce Any Evidence Of Bias

A party seeking to overcome the presumption that a judge has acted fairly, impartially, and without bias bears the burden to show bias by a preponderance of the evidence. *See In re Paternity of B.J.M.*, 2020 WI 56, ¶ 16, 392 Wis. 2d 49, 60, 944 N.W.2d 542, 547, cert. denied sub nom. *Carroll v. Miller*, No. 20-165, 2020 WL 6037237 (U.S. Oct. 13, 2020). The Wisconsin Supreme Court has acknowledged that "it is the exceptional case with extreme facts which rises to the level of a serious risk of actual bias." *Id.* at ¶ 24 (internal citations omitted).

Despite bearing that exceptionally high burden, Dr. Fetzer fails to cite to a single allegedly impartial statement or alleged unfair treatment in this entire section of his brief. Notably, Dr. Fetzer did not ask the Circuit Court to recuse itself

at any point during the allegedly unfair process. He raises the issue of bias for the first time on appeal.

Dr. Fetzer's brief broadly recites things he apparently thinks were unfair, but leaves to Mr. Pozner and this Court the task of sifting through the voluminous record to figure out what exactly he is complaining about. There are no facts to analyze. Nor are there findings—a given in light of his failure to seek recusal at the Circuit Court. In short, this argument has no more support or basis in reality than Dr. Fetzer's other conspiracy theories.

B. None Of The Litany of Wrongs Evidence Bias

1. Dr. Fetzer Identified No Biased Statements Or Predetermined Outcomes

Dr. Fetzer argues that objective bias can arise from a court's statements. (App. Br. at 24.) The case he cites, *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385, found bias where the judge decided an issue before it was properly presented. Fetzer offers no examples where this Circuit Court pre-decided any issues.[6]

[6] As described in the Statement Regarding Dr. Fetzer's Recitation of Facts, above, there is no support in the record for Dr. Fetzer's allegation that the Circuit Court stated that it always wanted to award attorneys' fees.

2. Dr. Fetzer Failed To Show That He Was Treated Unfairly

Dr. Fetzer also alleges that objective bias can arise where the totality of the facts demonstrate that a party was treated unfairly. (App. Br. at 24.) None of Dr. Fetzer's examples rise to the level of objective bias alone, much less under the totality of the circumstances.

Dr. Fetzer suggests that the Circuit Court is biased because the court invited Mr. Pozner to seek attorneys' fees after the trial concluded. (App. Br. at 25.) That is factually incorrect. The question of attorneys' fees was raised because Plaintiff requested attorneys' fees in his Complaint. (*See* Doc. 1, Compl. at ¶¶ 49, 51(b).) The Circuit Court was simply trying to determine what issues, if any, remained for post-trial consideration.

The Circuit Court identified the *Nationstar* case in a letter to the parties a few days after trial concluded. (*See* R. 263.) That does not evidence bias. If anything, the cite provided Dr. Fetzer a roadmap for avoiding imposition of attorneys' fees by highlighting that fees in *Nationstar* were awarded as an "equitable remedy.". *Id*. Indeed, the Circuit Court ultimately rejected Plaintiff's request for fees on those the grounds. (*See* R. 291 at 20.)

The Circuit Court, in discussions about post-trial filings, similarly directed the Plaintiff to address potential constitutional concerns associated with an injunction as discussed in *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015). Merely identifying cases that raise specific issues related to a matter before the

court does not evidence bias. It is a means by which a court can identify particular issues that the court wishes a party to address.

Nor did the Circuit Court evidence bias in the contempt process by suggesting a remedial sanction other than the one Plaintiff requested. The Circuit Court proposed its remedial sanction only after rejecting the sanction proposed by Plaintiff: Dr. Fetzer's incarceration until the leaked material was recovered and removed from the recipients' computer systems.

Nothing in Wis. Stat. § 785.04(1) requires a court to forego sanctions entirely if the court rejects the moving party's proposed sanction. A decision to not impose Plaintiff's requested sanction did not mean Defendant Fetzer would be allowed to remain in ongoing contempt without any sanction or other means to terminate the contempt. The Circuit Court was authorized by law to propose an appropriate sanction to secure Dr. Fetzer's present and future compliance with court orders. Defendant Fetzer can hardly complain of objective bias given the Circuit Court's refusal to incarcerate him, as Plaintiff requested.

Dr. Fetzer failed to raise this issue below. He failed to offer any actual evidence. He failed to cite to specific portions of the record in support of this appeal. For any and all of those reasons, his request to set aside the contempt sanction should be rejected.

CONCLUSION

This Court should deny Dr. Fetzer's efforts to skirt responsibility for the second intentional violation of the Circuit Court's confidentiality order.

January 14, 2021 Respectfully submitted,

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief, including footnotes, is 6,900 words.

January 14, 2021 Quarles & Brady

Electronically signed by Emily M. Feinstein

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

January 14, 2021 Quarles & Brady

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the records is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION REGARDING ELECTRONIC APPENDIX

I hereby certify that:

I have submitted an electronic copy of the appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

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CERTIFICATION OF MAILING

I hereby certify that on this 14th day of JANUARY, 2021, I caused this Brief and Appendix to be sent via U.S. Mail to:

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