STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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

Leonard Pozner,

Plaintiff-Respondent, Appeal No. 2020AP1570

v.

James Fetzer,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. INTRODUCTION.

A. THE LAW.

The circuit court erred as a matter of law by awarding $650,000 as an alternative purge condition. The court refused to consider Fetzer's ability to fulfill such a condition and no causal nexus exists between the purge condition and the contempt at issue. The purge condition is plainly punitive and incapable of any remedial purpose.

An alternative purge condition must be feasible to be imposed. In the case of a monetary purge condition, moreover, the contempt at issue must be a cause of the amount awarded. These requirements are not met in the present case.

Pozner argues unpersuasively that fee-shifting should be awarded because Fetzer allegedly acted inappropriately in defense of the underlying defamation suit he initiated. The circuit court denied fees in the underlying action, however, and Pozner dismissed his appeal of that decision. Pozner, moreover, never complied with the Wis. Stat. § 802.05 safe-harbor requirements for making such a claim.

The circuit court, in effect, concluded that the contempt at issue was part of a concerted effort to harass Pozner. The court, therefore, imposed a punitive sanction for a wrong not alleged or proved by Pozner.

The circuit court may disagree with Fetzer's research and conclusions about the mainstream Sandy Hook narrative. Fetzer, however, should be allowed a fair opportunity to defend against that claim, if held to account for such.

Here, the circuit court acted with bias and unfairness by sanctioning Fetzer under the guise of a contempt sanction that is not causally related to the actual contempt charged. On the contrary, the court refused to allow Fetzer to defend his criticism of the mainstream Sandy Hook narrative.

B. THE HIGHER GROUND.

These, then, are the matters that Fetzer brings before the Court of Appeals, which Fetzer's counsel has attempted throughout to advocate fairly and without polemic. Thus, Pozner's rebukes of counsel, therefore, seem unwarranted and they seem more to be calculated instances of the pot calling the kettle black. Certainly, Sandy Hook skeptics are substantially unpopular, and so impugning their integrity might be thought a useful appellate strategy. But a strategy is what it is.

Pozner's strategy itself takes liberties with the facts to unfairly provoke and stir emotion. For example, Pozner suggests that Fetzer derives great profit from his endeavors. Having conducted post-verdict collection efforts, Pozner knows as a matter of fact that Fetzer is today an elderly man of limited means.

Pozner also makes multiple unwarranted insinuations, such as that Fetzer has sought to acquire donations – promising none will used to pay off the underlying judgment against him – as though they were for his personal benefit. Fetzer has emphasized that any donations are strictly for legal defense. The trip to Pasadena for the 2020 Rose Bowl was to visit his favorite aunt in a hospice with not long to live. Fetzer's son-in-law proposed coming, with a friend they would meet in Las Vegas, for the Badger game, which made the trip trip less personally

distressing. The aunt died three months later. Fetzer paid for the trip with his own personal resources.

Pozner also knows that Fetzer did not widely disseminate Pozner's deposition image. The contempt at issue resulted from Fetzer providing Pozner's deposition to a single person, Alison Maynard, for input regarding his appeal in the underlying defamation action. (R. 306.) Pozner, moreover, also ignores the remedial corrective measures that Fetzer immediately took in response to the deposition disclosure at issue in this appeal. The measures that he voluntarily undertook included the deletion of all Pozner deposition transcripts and videos in his possession or control. (R.319.) Ms. Maynard has also deleted Pozner's deposition from her own possession and control at Fetzer's insistence. (R.303.)

Pozner further mischaracterizes Fetzer's motives for questioning his identity. Fetzer's motivation was to establish that the person who appeared at his deposition was not, in fact, Leonard Pozner, a reasonable even if unconventional defense. (R. 231.) Fetzer argued that the person presenting at the deposition appeared markedly dissimilar from known prior images of Pozner. According to Fetzer's personal observation, the deponent appeared to be 20 years younger than the real Pozner and at least 100 lbs. lighter, as the record indicates. (R. 231 at 19-21.)

Pozner similarly attacks the motivation for the entire research and investigation underlying Sandy Hook skepticism. Fetzer himself 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 to collaborative research with other experts on complex and controversial events, such as Sandy Hook, which he and 12 other collaborators concluded was staged to promote a gun control agenda. (R. 159.) One can disagree with their conclusions, but the motivation, both constitutionally and historically, serves a salutary purpose.

II. THE PREDICATES FOR AN ALTERNATIVE PURGE CONDITION WERE NOT SATISFIED IN THIS CASE.

A. THE CIRCUIT COURT REFUSED TO CONSIDER FETZER'S INABILITY TO FULFILL A $650,000 ALTERNATIVE PURGE CONDITION.

Pozner argues unpersuasively that ability to pay an alternative purge condition is not a condition precedent to imposition of such an award. He argues, that ability to pay is merely a defense to a subsequent contempt holding in an enforcement action. The Wisconsin Supreme Court, however, has unambiguously held that ability to pay is a predicate to the imposition of an alternative purge condition: "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." *Frisch v. Henrich*, 304 Wis.2d 1, 32, quoting *Larson v. Larson*, 165 Wis.2d 679, 685, 478 N.W.2d 18 (1992).

Pozner also argues disingenuously, at best, that Fetzer failed to disprove his ability to pay. Pozner, however, cites no authority for the proposition that Fetzer had the burden of proof on this issue, or that he is presumed to have sufficient

means. Pozner also ignores his own admission that Fetzer lacks the means to fulfill a purge condition requiring him to pay attorneys' fees for the underlying defamation action. Pozner's attorneys expressly acknowledged, after post-verdict discovery, that Fetzer did not even have the means to satisfy the $450,000 judgment in the underlying defamation action. (App. At 26-27.)

Fetzer, moreover, previously testified that he had extremely limited resources, including less than $10,000 in savings accounts, less than $250,000 in a retirement account, and a mobile trailer. (R. 285 at 34-35.) The mobile trailer subsequently was ordered by the court to be sold at auction, subject to a minimum bid of $30,000, but no bids were submitted. (R. 338.)

The circuit court itself acknowledged Fetzer's limited financial means. The court stated that "based on its understanding of the parties, the monetary award to be given to him is unlikely collectible in part or in whole." (App. at 79.) Nonetheless, when Fetzer's counsel raised the issue of ability to pay, the court emphatically denied any evidentiary hearing as to the issue of Fetzer's means. (App. at 101.)

The circuit court, incorrectly, considered ability to pay as only a post-judgment issue. The court stated "that if what you're [Attorney Bolton] saying is that, well, where am I going to get my time and date to show he is unable to pay? My response is not before the judgment is entered, but subsequently, depending on the creditors' next step in its attempt to collect said judgment." (App. at 99.) That

said, the court entered its order as a final appealable decision. (R. 349.) Failure to appeal, therefore, would close the door to a later challenge on the merits.

III. THE CIRCUIT COURT'S $650,000 AWARD WAS EXPLICITLY PUNITIVE.

The circuit court expressly acknowledged that the award of attorneys' fees for the underlying defamation suit was specifically and substantially intended for punitive purposes. The court stated that the sanction imposed, independent of any nexus between the contempt and the sanction, is "an appropriate consequence for the - - Dr. Fetzer's repeated contemptuous behavior." (App. at 81.) The court further stated:

> I would note parenthetically this is not a situation where the Court is addressing a singular act of contempt, notwithstanding the Court's admonitions to the defendant earlier on. One could suggest that on this first contempt, that he is rightfully educated and made the wiser; this is the second contempt.
>
> And also, I think the sanction being awarded is an appropriate consequence to make sure that Dr. Fetzer understands and knows that there are consequences to his contemptuous behavior and the consequences to his contemptuous behavior in this case are simply mere financial consequences, that the fact that he's now been - - done the same thing twice leads me to conclude and to be concerned that there very well may likely be continuing incidents of contemptuous behavior in violation of this Court's order. (App. at 81-82.)

The circuit court's words make clear the imposition of an inappropriate punitive sanction. Pozner argues that the sanction was also remedial, but he disregards the court's sentencing-like lecture describing the sanction imposed. He ignores the court's plain language, but even if the court had alternative rationales in mind, punishment was a substantial factor in the court's decision. The court's error was not harmless in the least.

The burden of proving harmless error is on the beneficiary of the error. *State v. Crowell*, 149 Wis.2d 859, 873, 440 N.W.2d 352 (1989). Pozner's burden, then, is to establish that the error complained of did not affect Fetzer's substantial rights. See Wis. Stat. § 805.18(2). Pozner does not carry this burden because Fetzer undeniably was not sanctioned in accordance with the procedures outlined in Wis. Stat. § 785.03(1)(b), applicable to punitive contempt. *State ex rel. N.A. U.G.S.*, 156 Wis.2d 388, 392, 456 N.W.2d 867 (Ct. App. 1990). As a result, the court's contempt sanction is void ab initio. *In re Paternity of CY C.J.*, 196 Wis.2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995).

IV. THE CONTEMPT AT ISSUE DID NOT CAUSE POZNER TO INCUR ATTORNEYS' FEES FOR THE UNDERLYING DEFAMATION ACTION.

An alternative purge condition also "must be reasonably related to the cause or nature of the contempt." *Frisch*, 304 Wis.2d at 32; *Benn v. Benn*, 230 Wis.2d 301, 311, 602 N.W.2d 65 (Ct. App. 1999); *State ex rel VGH v. C.A.B.*, 163 Wis.2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991). This prerequisite, however, is not present in the instant case.

The "reasonably related" standard has been consistently construed to require a causal nexus between the contempt and the sanction imposed. Thus, in *Frisch*, the circuit court imposed a $100,000 alternative purge condition for failure to timely provide income tax returns, which amount approximated the plaintiff's loss caused by the contempt. This element of causation, moreover, is recognized to inhere in multiple circumstances requiring a nexus relationship. See also *Everson*

v. Lorenz, 280 Wis.2d 1, 24, 695 N.W.2d 298 (2005) ("causation nexus" must exist between alleged misconduct and damage claimed); *Fischer v. Ganju*, 168 Wis.2d 834, 857, 45 N.W.2d 10 (1992) (causal nexus must exist between negligent act and resulting injury to recover damages); *State v. Rash*, 2003 WI App. 32, ¶ 6, 260 Wis.2d 369, 659 N.W.2d 189 (for purposes of restitution, a causal nexus must exist between the defendant's criminal activity and alleged damage).

It cannot be gainsaid that the contempt at issue here lacks a causal nexus to Pozner's underlying defamation suit. The contempt relates to matters distinct from a cause of action for defamation. The fees incurred in the defamation suit simply do not have a causal relationship to the contempt, as to which the circuit court separately awarded fees. (R.359 at 64-66; App. at88-95.)

Pozner argues without explanation that causation is not required as a necessary predicate of an alternative purge condition. He concedes, nonetheless, the necessity of some kind of nexus between contempt and an alternative purge condition. That nexus must involve the concept of causation, lest it have no anchored meaning at all. Without causation, one has an amorphous concept that lacks remedial purpose and instead becomes arbitrary.

The circuit court purported to justify its decision on the basis that Pozner was adversely affected by the contempt at issue. In fact, however, Pozner submitted no evidence that the contempt at issue caused any harm to him. He made no such allegation in his motion. (R.296 and 297.) He declined the court's

offer to allow evidence of any adverse effect. (App. at 73.) Instead, the court led Pozner's counsel to simply argue that Pozner was worse off than if he had not sued Fetzer for defamation. (App. at 64.) The court's prompting notwithstanding, there is no evidence that the contempt at issue caused any particular harm to Pozner.

Evidence of adverse effect would not constitute a nexus to Pozner's defamation claim, in any event. The elements of defamation, and the damages awardable for defamation, are distinct from the contempt at issue. The circuit court tried to reason around this reality by "supposing' that the purpose of Pozner's defamation suit was more encompassing than appears on its face. According to the court, Pozner intended the defamation suit to essentially shut down the Sandy Hook skeptics, including their perceived harassment of Pozner. The scope of Pozner's defamation suit against Fetzer, however, was markedly less than the court's after-the-fact characterization.

The circuit court stressed in the underlying action that Pozner's claim on the merits was narrowly limited to four specific statements. (R.303 at 55.) In fact, the court described the broader Sandy Hook controversy as a "rabbit hole" down which the court refused to go. (R 303 at 149.) Whatever effect the circuit court assumes from the contempt at issue, therefore, it is unrelated to the judgment in the underlying defamation suit.

Pozner's limited purpose defamation suit, and the circuit court's permanent injunction against specific words, was not rendered nugatory by the contempt at

issue. As a matter of fact, no claim is made that Fetzer has violated the court's injunction. No causal nexus exists between the underlying defamation suit and the contempt.

V. POZNER'S DEFAMATION SUIT IS NOT OTHERWISE FEE-SHIFTING.

Pozner argues *sub silencio* that the circuit court's alternative purge condition is warranted because of alleged discovery abuses in the underlying defamation suit. Fetzer denies any such offenses, which ostensibly occurred when Fetzer appeared as an unrepresented *pro se* litigant. In the first place, however, alleged discovery abuses do not bear a causal nexus to the contempt at issue.

Assuming, but denying, that discovery abuses occurred in the underlying defamation suit, Pozner did not follow the safe harbor provisions of Wis. Stat. § 803.05 as a necessary predicate. Pozner, nevertheless, sought fees in the underlying action with the same arguments made now, which the circuit court denied. (R. 361 at 45.) Pozner then cross-appealed the denial of fees in that matter, but subsequently dismissed his cross-appeal. As a result, the circuit court lacked jurisdiction to essentially reconsider that denial, but which Pozner now argues the court can do through the backdoor.

Pozner also implies that the circuit court's alternative purge condition is appropriate because Fetzer continued to engage in extra-judicial speech relating to the Sandy Hook narrative. Pozner complains that Fetzer continues to blog about Sandy Hook; reports on the legal proceedings brought by Pozner; continues to

investigate issues related to Sandy Hook, including verification of Plaintiff's identity; attempts to raise defense funds; etc. Again, Fetzer disputes Pozner's appellate characterizations, but which have no causal nexus to the contempt at issue, in any event.

Pozner essentially complains of Fetzer's exercise of protected extra-judicial speech rights under the First Amendment. Even speech that is hateful or hurtful, however, does not provide Pozner the elusive causal nexus he seeks. "The point of all speech protection...is to shield just those choices of content that in someone's eyes are misguided or even hurtful. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557, 574, 115 S.Ct. 2338 (1995), quoted in *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011). Here, some people may disagree with Fetzer's research and conclusions, and some may find his statements to be hurtful, but none of these emotions provide grounds for the circuit court's alternative purge condition. "The proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate. *Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017).

VI. THE CIRCUIT COURT ACTED WITH THE OBJECTIVE APPEARANCE OF BIAS.

Pozner dismissively rejects Fetzer's judicial bias claim for want of express words of impartiality. The circuit court's actions, however, belie any objective appearance of impartiality, even if the court's iron will were to be imposed wearing a velvet glove.

The appearance of bias offends constitutional due process principles whenever a reasonable person, taking into consideration human psychological tendencies and weaknesses, concludes that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances. *State v. Gudgeon*, 295 Wis.2d 189, 206, 720 N.W.2d 114 (Ct. App. 2006).

The circuit court clearly, and improperly, evinced an apparent desire to award Pozner attorneys' fees for the underlying defamation action. See Id. at 207-08. The court's predisposition manifested itself on multiple occasions, including by prompting Pozner's counsel to request relief that he had not otherwise sought. An objectively reasonable person would conclude that the court had an outcome in mind, to which the court was seeking to attach a cause. Thus, while the court need not personally embrace Fetzer, it crossed the line separating judicial partiality from impartiality by repeatedly advocating for Pozner – and the outcome wanted by the court.

VII. CONCLUSION.

For all the above reasons, therefore, as well as those stated in Fetzer's brief-in-chief, the Court of Appeals should reverse the circuit court's alternative purge condition and remand for further proceedings.

Dated this 4th day of February, 2021.

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