STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,
Plaintiff,

vs.

Case No. 18CV3122

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

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S POST-TRIAL MOTIONS

Throughout this case, Defendant James Fetzer has failed to plead or assert valid legal defenses to his actions, failed to produce admissible evidence to support his positions, and failed to provide argument sufficient to overcome Plaintiff Leonard Pozner's claims. Despite that, and following a jury verdict against him, Dr. Fetzer asks the Court to vacate its partial summary judgment ruling and grant a new trial. Dkt. No. 331. Dr. Fetzer's requests fail: First, the Court properly granted summary judgment to Mr. Pozner. Dr. Fetzer not only waived any defense that he is a media defendant but the Court also applied the correct legal standard. Second, the Court appropriately held Dr. Fetzer in contempt for violating a protective order and any error caused by referencing the contemptuous behavior is harmless. Third, Mr. Pozner did not base his damages theory on incitement or vicarious liability, and Dr. Fetzer waived this argument by failing to object at trial. Fourth, Dr. Fetzer's cursory request for remitter has no factual or legal basis.

Dr. Fetzer has offered no legal or factual basis to vacate the jury verdict or any ruling of this Court. Mr. Pozner, therefore, asks the Court to deny all of Dr. Fetzer's post-trial motions.

## I. BACKGROUND

In November 2018, Mr. Pozner filed a civil complaint against Dr. Fetzer, alleging that Dr. Fetzer made four defamatory statements about Mr. Pozner. Dkt. No. 1, ¶¶ 17-18. Mr. Pozner moved for summary judgment that each of the four statements was defamatory. Dkt. No. 101. The Court granted Mr. Pozner's motion. Dkt. No. 230. A damages trial followed.

At trial, Mr. Pozner offered testimony from Dr. Roy Lubit—a forensic psychiatrist whom the parties stipulated is an expert. Dr. Lubit expertly characterized Mr. Pozner's injury as a secondary injury exacerbating his initial PTSD. Dr. Lubit testified that he believed the secondary injury was caused by Dr. Fetzer's defamatory statements.

Mr. Pozner also testified at trial. Trial Transcript, Day 2, at 32-66. He spoke about the reputational harm he suffered as a result of Dr. Fetzer's statements. *Id.* at 38:19-44:2. He also testified about the impact that reputational harm has on his everyday life, as well as the mental anguish and harm the statements caused. *Id.* When called to testify, Dr. Fetzer admitted that his publications included the four defamatory statements and that he had done nothing to remove or correct the declarations. *Id.* at 69:19-70:4; 73:10-74:5; 80:19-81:2; 81:22-82:7; 84:10-85:17.

The jury awarded Mr. Pozner compensatory damages of $450,000.

## II. ARGUMENT

### A. The Court properly granted summary judgment to Mr. Pozner.

Although styled as a motion to vacate the verdict, much of Dr. Fetzer's motion is really a motion to reconsider the Court's summary judgment determination. Dkt. No. 331 at 1-3. As such, Dr. Fetzer bears the burden of establishing either newly discovered evidence or a manifest error of law or fact. *See Schapiro v. Pokos*, 2011 WI App 97, ¶ 18, 334 Wis. 2d 694, 706, 802 N.W.2d 204, 210. Dr. Fetzer identified no new evidence and no manifest error of law in the summary judgment process. In fact, not only did the Court apply the correct legal standard, but, importantly, Dr. Fetzer waived any argument regarding his newly-alleged status as a media defendant.

#### 1. Dr. Fetzer waived any argument that he is a media defendant.

Dr. Fetzer does nothing more than identify the uncontroversial fact that Wisconsin applies different fault standards to different combinations of defamation plaintiffs and defendants. He then attempts to cast himself as a "media defendant" entitled to a higher standard of fault. Importantly, at no point during this case, let alone during summary judgment briefing, did Dr. Fetzer sufficiently allege, much less establish by admissible evidence, that he is a media defendant subject to an elevated legal standard.

In Wisconsin, a defamation defendant has the burden of raising and establishing a conditional privilege—an immunity from liability for defamation based on a public policy which recognizes the social utility of encouraging the free flow of information. *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 498-500, 228 N.W.2d 737,

744-45 (1975). While the *Calero* Court addressed the conditional privilege available to former employers when discussing former employees with prospective employers, the standard is the same for all conditional privileges. As with all conditional privileges, "the burden is on the defendant to prove the privilege as a defense to defamation." *Id.* at 499 (citation omitted).

Here, Dr. Fetzer failed to raise an affirmative defense of the conditional privilege afforded to a media defendant, failed to bring forth evidence that he was a member of the media, failed to argue the conditional privilege applied at summary judgment, failed to request a jury instruction on the conditional privilege, and failed to submit a proposed special verdict on this allegedly applicable privilege. By waiting until after the jury verdict to raise this issue he has waived it.

In fact, prior to this motion, Dr. Fetzer only alleged he was a "news person" one time in this case, in a motion to reconsider a motion to compel, but even then he provided no evidence to support his claims. In that motion Dr. Fetzer asked this Court to reconsider an order compelling him to produce his communications with others about Mr. Pozner and Noah. *See generally*, Dkt. No. 156. Mr. Pozner sought that information as proof that Dr. Fetzer acted with actual malice. Despite being ordered to provide that information, Dr. Fetzer refused to do so, claiming he was a news person. *Id.* But, Dr. Fetzer failed to support that claim with any evidence and his motion to reconsider was ultimately mooted when Dr. Fetzer agreed to abandon the only conditional privilege he had alleged—that Mr. Pozner was a public figure. (Dkt. no. 231 at 77; *see also infra*).

Having waived any applicable conditional privilege and still failing to provide any supporting evidence, Dr. Fetzer now argues that somehow a discussion at the final pre-trial conference entitles him to a new trial. But, neither Mr Pozner nor the Court were responsible for raising Dr. Fetzer's privilege. Moreover, the Court noted that it never "made any decision characterizing James Fetzer" during the summary judgment proceedings, and in particular, "did not make any rulings on whether or not James Fetzer could claim he was a media defendant." Dkt. No. 284 at 27-28. Nor did the Court take a position on that subject during the final pretrial conference. The record is entirely inconsistent with any suggestion that the Court "recognized" that Dr. Fetzer was a media defendant or otherwise subject to the negligence standard.

**2. The Court did not apply the wrong standard of fault.**

Given that he failed to allege this conditional privilege or bring forth any evidence to support it, Dr. Fetzer cannot show that the Court applied the wrong legal standard. The United States Supreme Court, in *Gertz v. Robert Welch, Inc.*, granted states—including Wisconsin—ample leeway to determine the requisite level of fault in a private-party defamation case. 418 U.S. 323 (1974). The Wisconsin Supreme Court later explained that fault in a private party defamation case, by way of malice, is presumed from the act of publication. *Denny v. Mertz*, 106 Wis. 2d 626, 318 N.W.2d 141 (1982). Thus, the Court was correct to hold that because Mr. Pozner is a private individual, Wisconsin law presumes that Dr. Fetzer acted with malice when he published the defamatory statements. Dkt. No. 231 at 74-75, 77.

Even if the law required Mr. Pozner to prove malice, Dr. Fetzer ignores the fact that Mr. Pozner proved actual malice by providing undisputed evidence of it on summary judgment. Dkt. No. 102 at 28-33. In an abundance of caution, Mr. Pozner provided evidence that Dr. Fetzer acted with actual malice in the event the Court determined Mr. Pozner was a public figure. Dr. Fetzer failed to provide admissible evidence to create a dispute of fact on this point. Thus, even if Dr. Fetzer was right on the law, he is wrong to argue that on summary judgment the Court found liability without undisputed evidence of fault.

Because Defendant Fetzer cannot establish that the Court committed manifest error by applying the private party standard to Dr. Fetzer's defamatory statements, he has failed to meet the requirements for vacating this Court's summary judgment decision.

**B. The Court's contempt decision was proper.**

**1. The Court appropriately authorized remedial sanctions.**

The Court had ample authority to allow Mr. Pozner to mention Dr. Fetzer's contempt. "A court's power to use contempt stems from the inherent authority of the court. The power may, however, within limitations, be regulated by the legislature." *Griffin v. Reeve*, 141 Wis.2d 699, 706 n.4, 416 N.W.2d 612 (1987); *see also Frisch v. Henrichs*, 2007 WI 102, ¶ 32, 304 Wis. 2d 1, 20, 736 N.W.2d 85, 94-95. Wisconsin codified remedial contempt in Wis. Stat. § 785.01. A Court may impose remedial sanctions for the purpose of ending a continuing contempt. Wis. Stat. § 785.01(3).

The Court did not exceed its inherent or statutory authority by failing to set a purge condition. At the contempt hearing, the Court specifically found that Dr.

Fetzer's contempt was ongoing and that the remedial measures set forth in Wis. Stat. § 785.04(1) were ineffectual to terminate the contempt. Dkt. No. 285. Therefore the Court granted Mr. Pozner the opportunity to mention the contemptuous conduct at trial. *See* Dkt. No. 285 at 98.

On the first day of trial, the Court determined that Dr. Fetzer had not fully complied with the purge condition of "put[ting] the genie back in the bottle." *See* Trial Transcript, Jury Selection and Day 1, at 22-23. As such, the Court properly allowed Mr. Pozner to tell the jury about Dr. Fetzer's failure to comply with the Court's order.

**2. Even if improper, any error is harmless.**

Dr. Fetzer has failed to show that the few statements to the jury about his contempt were anything other than harmless error. To succeed on his request for a new trial, Dr. Fetzer must demonstrate that in the context of the entire proceeding, the alleged error "affected the substantial rights of the party seeking . . . a new trial." Wis. Stat. § 805.18(2). The alleged prejudice must be "actual," not merely "presumed," before a new trial can be ordered. *Bailey v. Bach*, 257 Wis. 604, 611, 44 N.W.2d 631, 635 (1950). An error is harmless unless it is sufficient "to undermine the reviewing court's confidence in the outcome of the proceeding." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, 00-1739. Where the verdict is supported by evidence untainted by error, the Court's confidence in the reliability of the proceeding is less likely to be undermined. *State v. Dyess*, 124 Wis. 2d 525, 545, 370 N.W.2d 222, 232–33 (1985).

Dr. Fetzer surmises that the jury may have been prejudiced by argument about his failure to abide the Court's order because it could have been understood as a

reflection on his character. But to the extent the jury reached any understanding of Defendant Fetzer's character, it is far more likely to have been informed by their own perception of Defendant Fetzer's outburst from the witness stand. *See* Trial Transcript, Day 2, at 67-93.

It is just as likely that the jury understood that Dr. Fetzer's behavior was part of the ongoing harassment that Mr. Pozner described to Dr. Lubit. That harassment was evidence of the reasonableness of the degree of emotional harm and anxiety caused by Dr. Fetzer's ongoing defamation. Ultimately, given the evidence presented to the jury about the extent and chronic nature of Mr. Pozner's injury, Dr. Fetzer has failed to show that the jury's verdict would have been different in the absence of the minor remarks regarding contempt. And regardless, Dr. Fetzer failed to object to the references made to Dr. Fetzer's contemptuous conduct—during opening arguments, during his own examination, and during closing arguments. This waives any objection. Therefore, the Court should deny Dr. Fetzer's request for a new trial based on the reference to his contemptuous behavior.

**C. Plaintiff's damages were not based on incitement.**

Defendant Fetzer's incitement arguments are straw men. Plaintiff did not seek damages for incitement or for the threats or harassment he suffered at the hands of third parties. Mr. Pozner sought damages for injury to his reputation and for emotional harm. As described below, Mr. Pozner supported his damages claim with testimony about his concerns related to reputational harm and the reasons why those concerns should be viewed as reasonable. He supported his emotional-harm damages claim with testimony about the way the defamatory statements made him feel when

he read or learned of them. As a result, the damages award was not based on incitement and the verdict should stand.

**1. The evidence supports the jury's verdict.**

Mr. Pozner's testimony alone was sufficient to sustain the jury's verdict. Under Wis. Stat. § 805.14(1), the Court must consider "all credible evidence and reasonable inferences therefrom in the light most favorable to the [Plaintiff]." Dr. Fetzer's motion challenging the sufficiency of the evidence must fail because there was evidence in the record to support the jury's verdict. *Id*. S*ee also Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶ 47, 341 Wis. 2d 119, 143, 815 N.W.2d 314, 326, decision clarified on denial of reconsideration, 2012 WI 74, ¶ 47, 342 Wis. 2d 254, 823 N.W.2d 266 (stating that no motion challenging the sufficiency of the evidence can be granted unless there is "no credible evidence" to sustain the verdict). There was unquestionably credible evidence sufficient to sustain the verdict.

Mr. Pozner testified about injury to his reputation and testified about his emotional harm. Mr. Pozner also testified that he was seeking damages for injury to his reputation because the defamatory statements cause people to believe that he lied about his son's death, that his son did not die. Trial Transcript, Day 2 at 40. He testified that his concern about the way people will respond has impacted the way he interacts with other people. *Id*. He supported his concern that people might accuse him of being a "villain" by describing the threats made by Lucy Richards. *Id*. at 40-41. The testimony about Lucy Richards demonstrates the reasonableness of Mr. Pozner's cautious approach to dealing with people for the first time due to the injury

to his reputation caused by Dr. Fetzer's defamatory statements. This testimony is sufficient to support the jury's verdict.

Mr. Pozner also testified extensively about his own emotional response to Dr. Fetzer's defamatory statements. *See* Trial Transcript, Day 2, at 38-39 (testifying about his emotional state upon reading the defamatory statements). Again, the existence of that heartfelt and credible testimony by Mr. Pozner about his emotional injury provided the jury more than enough evidence upon which to render its verdict.

The test is not whether the jury was presented with evidence that does not support the verdict. The test is whether there is any credible evidence that does support the verdict. Plaintiff offered credible, admissible evidence upon which the jury could have rendered its verdict. As such, Defendant has failed to establish the insufficiency of the evidence.

**2. Dr. Fetzer waived this argument by failing to object at trial.**

To the extent Defendant now argues that Mr. Pozner should not have been allowed to introduce evidence of threats or harassment, Dr. Fetzer waived those arguments by not objecting to such evidence at or before trial. *See* Wis. Stat. § 901.03. Defendant Fetzer knew that threats and harassment were likely to be a part of Mr. Pozner's case—his lawyer questioned Dr. Lubit about those threats and harassment extensively in his videotaped deposition taken more than a week before opening statements. *See* Trial Exhibit 1, Dkt. No. 305. In fact, through this line of questioning, Dr. Fetzer himself introduced evidence of threats and harassment. So, despite notice

that Mr. Pozner would introduce evidence of harassment, Dr. Fetzer never objected, waiving this argument.

**3. Mr. Pozner did not seek damages for vicarious liability.**

As described above, Mr. Pozner based his damages request on reputational harm and emotional injury. Although Dr. Fetzer argues that the jury based its verdict on vicarious liability, he does not support this argument with any record citations.

Mr. Pozner did not seek damages for incitement or harassment, vicariously or otherwise. While Dr. Fetzer tries to make this into a constitutional issue, the simple reality is that the impact of a defamatory statement on a reader of that statement goes to the heart of reputational harm. It is precisely the impact on a remote third party's subjective view of a defamation victim that is being compensated for by damages for reputational harm. Reputational harm may manifest itself in any number of different ways: anything from a reader's refusal to do business with the defamation victim to accusations that the defamation victim is a villain. Dr. Fetzer offers no basis to deviate from the longstanding right to recover for reputational harm in defamation cases.

But in this case there is no need to decide such lofty questions. The evidence of harassment and threats were offered to demonstrate why Dr. Fetzer's defamatory statements were so harmful to Mr. Pozner's reputation and to his emotional condition. Although Dr. Fetzer was well aware that such statements would be a part of Mr. Pozner's case (they were discussed in Dr. Lubit's videotaped deposition and formed a part of Dr. Fetzer's cross examination of Dr. Lubit), Defendant did not move to exclude such evidence *in limine*, and did not object to Mr. Pozner's or Dr. Lubit's

testimony regarding those threats. Having made no effort to exclude the allegedly prejudicial evidence, Dr. Fetzer cannot now complain.

### D. Remittitur

Defendant Fetzer has offered no basis for reducing the jury's verdict. Remittitur is appropriate only when a verdict on damages is excessive in light of the evidence viewed in the light most favorable to the jury verdict. *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 668, 529 N.W.2d 905, 912 (1995). Defendant Fetzer offered no evidence and no support for his bare bones contention that the jury verdict was excessive. Dkt. No. 331 at 8.

Mr. Pozner offered credible testimony regarding the impact his reputational damage has on his everyday life. Likewise Dr. Lubit testified that Mr. Pozner's secondary injury is chronic in nature. Given the impact on his daily life and the likelihood that it will last the rest of his life, Dr. Fetzer has no basis to disturb the jury's award.

## III. CONCLUSION

Dr. Fetzer asks this Court to vacate its summary judgment ruling and order a new trial. His efforts fail. Dr. Fetzer waived many—if not all—of his arguments by failing to provide admissible evidence that he is a media defendant, by failing to assert an affirmative defense that he is a media defendant, by failing to object to evidence before and during trial, and by failing to support his requests with substantive evidence—including citations to the trial record. Therefore, the Court should deny each of Dr. Fetzer's post-trial requests.

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