BY THE COURT:

DATE SIGNED: December 12, 2019

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

LEONARD POZNER,

Plaintiff,

v.

JAMES FETZER, *et al.*,

Case No. 18CV3122

Defendants.

DECISION AND ORDER ON POST-VERDICT MOTIONS

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

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

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

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

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

ANALYSIS

A. Motion to vacate partial summary judgment

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

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

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

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

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

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

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legal process.

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

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

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

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

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

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

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

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

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

Dkt. 231, at 20-21.

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

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

Dkt. 231, at 24-25.

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

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

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

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

Dkt. 231, at 105.

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

B. Motion for a new trial

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

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

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

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

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

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

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

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

C. Sufficiency of the evidence

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

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

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

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

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

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

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

D. Pozner's post-verdict motions

1. Permanent injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Attorney fees

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

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

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

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

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

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

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

ORDER

IT IS ORDERED that:

1. Defendant Dr. Fetzer's post-verdict motions, Dkt. 331, are denied.

2. Plaintiff Mr. Pozner's application for attorney fees, Dkt. 327, is denied

3. Plaintiff Mr. Pozner's motion for a permanent injunction, Dkt. 329, is granted.

    a. Plaintiff's legal counsel is directed to draft an injunction consistent with the court's decision above.

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