

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER,

Defendant.

PLAINTIFF'S SUPPLEMENTAL BRIEF FOLLOWING HEARING ON
PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE

During the March 17, 2020 hearing on Plaintiff's Motion for an Order to Show Cause, the Court requested supplemental briefing on two potential contempt sanctions resulting from Dr. Fetzer's violation of the Court's Confidentiality Order. *See also* Dkt. No. 408. First, the Court asked if Plaintiff would like an evidentiary hearing to determine Plaintiff's damages caused by the release of his confidential information, and if so, what procedures would apply during such a hearing. Second, the Court asked if Plaintiff would like the Court to award attorney's fees for the underlying action as a sanction under Wis. Stat. § 785.04(1)(e).

I. BACKGROUND

Plaintiff initiated this action against Defendant Fetzer, claiming that Defendant Fetzer defamed him by alleging that Plaintiff released a fake death certificate for Plaintiff's son as part of a government conspiracy to fake the mass casualty incident at Sandy Hook Elementary School. Dkt. No. 1.

Plaintiff moved for a Confidentiality Order to allow the parties to produce confidential information without risk of public disclosure. Dkt. No. 86. One of the grounds for Plaintiff's request was that Defendant Fetzer would use discovery in this case to gather materials for his conspiracy theory blogs and those of his fellow conspiracy theorists, especially those attacking Plaintiff. *Id.* at 3. Although Defendant Fetzer initially opposed Plaintiff's motion, *see* dkt. no. 93, Defendant Fetzer later consented to the Confidentiality Order. Dkt. No. 123 at 43:7-17.

At the hearing at which the Court addressed the Confidentiality Order, the Court expressly—and in detail—explained the impact of and the consequences for violating the Confidentiality Order. *Id.* at 44:20-47:15. Defendant Fetzer expressly stated that he understood. *Id.* at 47:15. Perhaps hoping to avoid the consequences of his actions, Defendant Fetzer testified—under oath—that he did not understand those consequences at the March 17, 2020 hearing. Dkt. No. 410 at 35:12-18 and 39:22-40:7. Defendant Fetzer was not telling the truth. In addition to telling the Court he understood these consequences when the Court entered the Confidentiality Order (dkt. no. 123 at 44:20-47:15), Defendant Fetzer was present in the courtroom on September 5, 2019 when the Court read back his acknowledgment of the potential consequences of violating the Confidentiality Order. Dkt. No. 284 at 86:7-87:20.

With the Confidentiality Order in place, Plaintiff was deposed on May 28, 2019. Defendants insisted on videotaping his deposition, and Plaintiff agreed, after raising the concern that Defendants would misuse the video. *See* Dkt. No. 270 at 5. There can be no doubt that both the written transcript of Plaintiff's deposition and the video

recording of it were designated “Confidential” under the Confidentiality Order. *See* Dkt. No. 262. In an abundance of caution, both the written transcript and each digital video file from his deposition was labeled “confidential.” *See* Dkt. No. 259, ¶ 9; *see also* Dkt. No. 263.

In September of 2019, Plaintiff notified the Court that Defendant Fetzer had violated the Confidentiality Order by releasing the confidential deposition transcript to multiple unauthorized recipients. Dkt. No. 270. During the resulting contempt hearing, the Court warned Defendant Fetzer that additional acts of contempt would result in cumulative sanctions. Dkt. No. 285 at 99:9-13. The Court then held Defendant Fetzer in contempt and imposed remedial sanctions. Dkt. No. 274.

Plaintiff’s compensatory damages were tried to a jury on October 14-15, 2019. *See* Dkt. Nos. 298 and 301. The jury awarded Mr. Pozner \$450,000. *See* Dkt. No. 300. Final judgment was entered on December 12, 2019. *See* Dkt. No. 355.

On December 30, 2019, Plaintiff learned that Ms. Alison Maynard had publicly released his confidential video deposition. *See* Dkt. No. 357, ¶ 2. Ms. Maynard also posted Mr. Pozner’s deposition transcript. *Id.*, ¶ 6. The blog post refers readers to Defendant Fetzer’s book, *Nobody Died At Sandy Hook*, and accuses Plaintiff of being part of a massive conspiracy related to the Sandy Hook mass casualty incident. Dkt. No. 358.

Plaintiff brought another motion for an order to show cause for this second violation. *See* Dkt. No. 362. After briefing (dkt. nos. 362, 379, and 387), the Court held

a hearing for Defendant Fetzer's second violation of the Confidentiality Order. *See* Dkt. No. 410.

At that hearing, Defendant Fetzer testified under oath that he provided the deposition transcript to Ms. Maynard so that she could assist in his "research." He provided the transcript to Ms. Maynard so that she could help him continue to research a basis for his defamatory statements. Dkt. No. 410 at 39:3-17.

Having read the briefs and heard the arguments of counsel and Defendant's sworn statements, the Court found that Defendant Fetzer had intentionally violated the Confidentiality Order, and that the contempt was ongoing. *Id.* at 32:19-20. The Defendant implicitly conceded that none of the remedial sanctions in Wis. Stat. § 785.04(1)(a)-(e) would be effectual to terminate contempt. *See, e.g., id.* at 28:21-29:3 (consenting to production of Defendant Fetzer's communications under Wis. Stat. § 785.04(1)(e)).

The Court then directed Plaintiff to determine whether an evidentiary hearing to determine Plaintiff's damages caused by the release of his confidential information would be an appropriate remedial sanction, and if so, what procedures would apply during such a hearing. The Court also asked Plaintiff to brief "the nexus between the fees incurred in the underlying case as it relates now to the actual contemptuous behavior." *Id.* at 43:14-44:6.

II. ARGUMENT

A. Damages under Wis. Stat. § 7845.04(1)(a) are not sufficient.

An evidentiary hearing on damages is not an appropriate remedial sanction. A jury already awarded Mr. Pozner \$450,000. Dkt. No. 300. The Court awarded costs.

Dkt. No. 355. Defendant Fetzer has indicated that he will be unable to pay any meaningful part of that judgment. Dkt. No. 326. Therefore, adding additional damages will not secure Defendant Fetzer's compliance.

Moreover, Defendant Fetzer will clearly use such a hearing to gather and disseminate more information about Mr. Pozner to his conspiracy theorist followers. *See, e.g.*, Dkt. No. 285 at 27:5-28:14 (Defendant Fetzer describing his sharing of the confidential deposition to further his theory that Plaintiff is an imposter). Exposing Mr. Pozner to more of Defendant Fetzer's invasive questioning is not the purpose of a remedial sanction.

Finally, an evidentiary hearing will cost Mr. Pozner time and money. Because the harm to Mr. Pozner is emotional in nature, it will likely require expert testimony. Even if the Court were to award costs for that evidentiary hearing, Defendant Fetzer's financial situation means he will be unable to pay those costs, leaving Mr. Pozner responsible for the costs of such a hearing. Therefore, Plaintiff asks this Court to not pursue an evidentiary proceeding as to damages flowing from Defendant Fetzer's ongoing contempt.

B. Defendant Fetzer's contemptuous conduct is tied to the underlying case.

Defendant Fetzer's decision to once again intentionally violate the Court's Confidentiality Order is part of the same course of harassment and vilification that formed the basis for the underlying defamation case. In particular, Plaintiff's defamation case was premised on four statements published by Defendant Fetzer,

each of which accused Plaintiff of circulating a fake, forged, or fabricated death certificate for his son, Noah Pozner. *See* Dkt. No. 1, ¶¶ 17-18.

During the case, Defendant Fetzer argued that the death certificate uploaded by Mr. Pozner and which was later portrayed in Defendant Fetzer's book was different than other versions. *See, e.g.*, Dkt. No. 176 at 3 (describing alleged differences between various copies of Noah Pozner's death certificate). Defendant Fetzer further argued those differences somehow proved that the death certificate portrayed in his book was also a fake, and therefore the defamatory statements were true. *See, e.g.*, Dkt. No. 227 at 7-8 (arguing differences in death certificates meant defamatory statements were true). Defendant Fetzer argued that by bringing the defamation case with knowledge that the death certificate was fake, Plaintiff committed a fraud on the court—and asserted counterclaims to that effect. *See* Dkt. No. 53, ¶¶ 12 and 15.

Defendant Fetzer's affidavit on his response to this second contempt admits that he provided Plaintiff's confidential deposition transcript to Ms. Maynard for the purpose of helping him research "truthfulness of representations made before the Court by Mr. Pozner and/or his counsel regarding the death certificate issue in this case." Dkt. No. 380, ¶14. During the March 17, 2020 hearing, Defendant Fetzer testified that the "the content of this deposition is what is crucial," because in his view it relates to the authenticity of Noah Pozner's death certificate:

On two different occasions, first in relation to Dave Gahary's attorney and second in relation to me, Mr. Pozner, the plaintiff, agreed that the copy of the death certificate we published in the book was the same as the

copy of the death certificate he had made available to my researcher associate, Kelley Watt.

This means that Mr. Zimmerman is not acting here altruistically or on behalf of his client but seeking to protect himself from a fraud upon the court that he falsely testified during the summary judgment that that was not the death certificate that his client had provided but another, which was in fact a fifth fake death certificate, which I contested at the time was a shell game, but it was in fact a bait and switch. I have no doubt. I've examined that death certificate with a magnifying glass. It is a fake, Your Honor.

Dkt. No. 410 at 35:19-36:11.

Defendant also testified that he did not give his informed consent to the Confidentiality Order (*id.* at 35:12-18, 39:22-40:7), even though the Court, in detail, explained to Defendant Fetzter and obtained confirmation of his understanding of the impact of and consequences for violating the Confidentiality Order. *See* Dkt. No. 123 at 40:20-47:15. Not only does Defendant Fetzter continue to flout this Court's Confidentiality Order, but he is not truthful about his understanding of the order, highlighting his misconduct and misuse of this litigation for his own motives.

Further, the contemptuous act of providing Plaintiff's confidential transcript enabled Defendant's hoaxer colleagues to continue their broader range of attacks on Plaintiff, including their false claim that Plaintiff is not actually himself. These spurious attacks are a continuation of frivolous arguments Defendant made during the course of the litigation. *See, e.g.,* Dkt. No. 5, at ¶28 ("Just as 'Noah Pozner' appears to be a fiction, the plaintiff, styling himself 'Leonard Pozner' appears to be a fiction as well."). Defendant Fetzter's counterclaims also contained that frivolous allegation. *See* Dkt. No. 53, ¶ 19.

During the first contempt hearing, Defendant Fetzter attempted to justify his unauthorized disclosure of Mr. Pozner's video deposition to Wolfgang Halbig on the grounds that Mr. Halbig would be able to help him determine if Mr. Pozner was actually himself. *See* Dkt. No. 285 at 44:14-20. Similarly, Ms. Maynard's December 2019 blog post used the video deposition to argue that Plaintiff is an imposter. *See* Dkt. No. 358 at 2-3. Halbig, in turn, appended images from Plaintiff's deposition to emails accusing Plaintiff and other parents of Sandy Hook victims of being imposters. *See* Dkt. No. 268.

As Plaintiff noted in its Motion for Attorney's Fees, Defendant Fetzter acted in bad faith throughout this litigation, ignoring the rules and this Court's orders so he could further his conspiracy theories. *See* Dkt. No. 327. Defendant Fetzter's decision to once again share Plaintiff's confidential deposition with suspended, former-lawyer Alison Maynard was expressly tied to the underlying substantive issues in the litigation. This sustained misconduct and contemptuous behavior supports an award of Plaintiff's case-long attorney fees under Wis. Stat. § 785.04(1)(e).

III. CONCLUSION

Defendant Fetzter disclosed Plaintiff's confidential information to enable his hoaxer colleagues to continue to attack Mr. Pozner. His reasons for doing so were expressly tied to the underlying issues in dispute in the litigation. As such, a nexus exists to allow the Court to issue a remedial sanction requiring Defendant Fetzter to pay Plaintiff's attorney's fees and costs for the entire litigation.

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