

FILED
05-28-2020
CIRCUIT COURT
DANE COUNTY, WI
2018CV003122

1 STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

2 BRANCH 8

3 LEONARD POZNER,

4 Plaintiff, ORAL ARGUMENT

5 vs. Case No. 18-CV-3122

6 JAMES FETZER,
7 Defendant.

9 HONORABLE FRANK D. REMINGTON PRESIDING

10 Thursday, May 14, 2020

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14 A P P E A R A N C E S:

15 Attorney Jacob Zimmerman, Attorney Emily Feinstein and
16 Attorney Emily Stedman appeared via video conferencing on
behalf of the Plaintiff, Leonard Pozner.

17 Attorney Rich Bolton appeared via video conferencing on
18 behalf of the Defendant, James Fetzer, who also appeared via
video conferencing.

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22 Reported By: Meredith A. Seymour
Official Court Reporter

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1 stenographer.

2 We're on the Court's calendar for an oral
3 argument on Mr. Pozner's motion, continuing motion for
4 contempt. I've read the briefs. I want to compliment
5 the parties once again on the quality of their written
6 argument in framing the question. I believe I
7 understand the issue before the Court.

8 I have some specific questions I want to work
9 through before I make a decision. I plan to make an
10 oral ruling this morning depending of course on the
11 answers to the questions that I get.

12 This case is obviously now pending in the
13 Court of Appeals and it very well may be that what
14 decision I make will join the issues that are now
15 currently before the appellate court.

16 In a perfect world, I could turn out a
17 written decision. But given the expediency and the
18 urgency of the issues now before the Court, I'll opt
19 for an oral ruling.

20 By now, you all have figured out how I
21 operate the court. I will turn to you, Mr. Zimmerman,
22 and ask if there's anything else you want to add in
23 addition to what you wrote, and then I will ask
24 Mr. Bolton the same question.

25 Mr. Zimmerman.

1 MR. ZIMMERMAN: No, Your Honor. Nothing
2 further.

3 THE COURT: Mr. Bolton?

4 MR. BOLTON: No, Your Honor.

5 THE COURT: So Mr. Bolton, here's the problem
6 that I have. Now, for purposes of the motion, you
7 agree that Dr. Fetzer not once, but twice violated the
8 Court's confidentiality order.

9 MR. BOLTON: Yes, Your Honor.

10 THE COURT: And the confidentiality order was
11 an order entered into by the Court on the stipulation
12 and request of the parties, including Dr. Fetzer,
13 correct?

14 MR. BOLTON: I believe that's true.
15 Although, as you know from our last hearing, and maybe
16 I'm recalling incorrectly, Professor Fetzer was not
17 represented and did not -- I believe his testimony was
18 fully understand what he -- what he was -- what the
19 stipulation was.

20 THE COURT: Well, he says that, but what do I
21 make of that, Mr. Bolton? Dr. Fetzer is a -- was a
22 tenured faculty at the University of Minnesota-Duluth,
23 a recognized academician in his field, attained an
24 educational level of the highest magnitude and order,
25 entitling him to the preface Doctor. He has had some

1 experience in litigation. And additionally, he's -- in
2 addition to being an educated man, he's an author of
3 numerous publications.

4 Mr. Bolton, he's not the kind of person
5 ordinarily that comes back before the Court and says I
6 didn't understand of what I was agreeing to when his
7 agreement was reduced to writing.

8 How should I square the two up given the
9 qualities that describe Dr. Fetzner?

10 MR. BOLTON: Well, you know, I'm not sure --
11 I guess I'm not sure that -- that you need to. I'm not
12 -- Your Honor, I'm not arg -- we -- I have not made the
13 argument that -- that we're taking the positions that
14 the confidentiality order was inapplicable or -- or
15 defective.

16 THE COURT: Other than him saying so, what
17 facts would I rely on to conclude that Dr. Fetzner did
18 not intentionally violate the Court's order?

19 MR. BOLTON: Well -- um -- again, focusing
20 on -- focusing on the second contempt motion, Your
21 Honor, so the actions that brought us here: First of
22 all, in regard to violating the confidentiality with
23 regard to the -- the video transcript, after -- after
24 that first contempt hearing back in September,
25 Professor Fetzner did not distribute or publish or give

1 to anybody else, other than me, the video transcript.

2 He did -- and we acknowledge -- he did give
3 the written transcript to Ms. Alison Maynard, and his
4 testimony was -- at the March 17th hearing of this year
5 -- was that at the time that he did that, he was
6 focused on that the video image was the -- the video
7 image of Mr. Pozner was what was prohibited and did
8 not -- and again, I'm not saying he -- we're obviously
9 not saying he was right in the conclusion, but believed
10 that the transcript was not subject to that.

11 And in terms of evidence that that was his
12 belief, I believe that not only in addition to
13 Professor Fetzner, but I've seen communications from
14 Ms. Maynard indicating that -- that she, her perception
15 and understanding was that that was what
16 Professor Fetzner believed.

17 THE COURT: You didn't really quite answer my
18 question other than to say the only evidence you would
19 suggest supports a finding that it was unintentional,
20 was Dr. Fetzner's simple statement that he didn't
21 understand that it was prohibited by the order; nothing
22 more, but nothing less; is that what I understand the
23 evidence is before the Court on that question?

24 MR. BOLTON: Yes, Your Honor.

25 THE COURT: Mr. Bolton, next question. I

1 think it's a fair characterization to say that
2 Leonard Pozner filed this action to enjoin what he
3 ultimately proved was ongoing publication of defamatory
4 statements; do you agree?

5 MR. BOLTON: I agree that the -- that the
6 action that was commenced was a very focused action
7 alleging that four particular statements were
8 defamatory.

9 THE COURT: And then Mr. Pozner in
10 prosecuting his case and intensifying before the jury,
11 related to this Court and to the jurors, the stress,
12 the harm, and the exposure he was suffering after the
13 Sandy Hook incident as a result of Dr. Fetzler's
14 continuing claim that he didn't have a son, that he
15 falsified the documents, and that he -- and that the
16 event never occurred.

17 DR. FETZER: I made none of those assertions.

18 THE COURT: So let the record reflect I
19 understand that --

20 DR. FETZER: -- Rich, let me speak.

21 Your Honor, if I might clarify the record, I
22 made none of those assertions which the Court has just
23 reviewed. I made none of these. I merely addressed
24 the document. I didn't assert whether or not he had a
25 son. I didn't assert whether or not he had falsified

1 the document. Those have been myths perpetrated by
2 defense counsel for political purposes.

3 But the description you just gave of the case
4 is that it's faulty, it is wrong, it is false.

5 THE COURT: So I don't know if you intended,
6 Dr. Fetzer, you said it was some falsity perpetrated by
7 defense counsel. Well, that would be Mr. Bolton.

8 DR. FETZER: No. I'm a representative of the
9 plaintiff.

10 And Your Honor, the only reason I shared the
11 video transcript was because from my reading of the
12 statutes, it was permissible to have a remodel witness
13 for the -- to the authenticity or identity of the
14 person who gave their deposition whom I believe then
15 and believe now was not the same person who's image has
16 appeared worldwide around the world millions of times
17 who's not the same person. When I pointed that out to
18 the Court, you said not in your court. But my
19 understanding of the statutes was that was permissible.

20 The reason I subsequently shared the written
21 transcript was because Ms. Maynard was giving me legal
22 counsel in her right to exercise the First Amendment
23 right. We never had any commercial agreement, she got
24 no money from me. The practice of law requires that
25 you receive financial reimbursement for legal counsel.

1 She never received any financial reimbursement; and
2 therefore, --

3 THE COURT: -- Mr. --

4 DR. FETZER: -- was not engaged in the
5 practice of law.

6 THE COURT: Dr. Fetzer -- Mr. Bolton, I don't
7 know if you intended to turn this final oral argument
8 into an evidentiary hearing, but I'll take your cue as
9 to how you'd like to proceed. The problem is is rather
10 than focusing on the remaining issue, Dr. Fetzer once
11 again opens up a whole myriad of problems given his
12 perhaps well-meaning, but seriously misguided
13 characterization.

14 Case in point -- case in point is obviously
15 any lawyer with a law degree knows that you can
16 practice law and give legal advice and indeed have an
17 attorney-client relationship without a contract for
18 remuneration. But that's a -- that is a distraction
19 for the Court on today's hearing.

20 How would you like to proceed, Mr. Bolton?

21 MR. BOLTON: Your Honor, I would -- I would
22 -- my preference would be to proceed as scheduled with
23 -- with oral arguments rather than an evidentiary
24 hearing.

25 THE COURT: Okay. So Mr. Bolton, I'll read

1 the four specific injunctive provisions that
2 Leonard Pozner was successful in having this Court
3 issue. One is that Dr. Fetzner is permanently enjoined
4 from communicating by any means that -- that the Pozner
5 death certificate is a fake, that Mr. Pozner sent a
6 death certificate which turned out to be a fabrication,
7 that the death certificate that was circulated said
8 that was clearly a forgery, and that Noah Pozner's
9 death certificate turned out to be a fabrication.

10 My question to you, Mr. Bolton, is I believe
11 in considering now the -- the last turn of events, one
12 could characterize the judgment issue given to him, the
13 plaintiff, by the jury, and the order that the Court
14 issued as pursuant to his request, could safely be
15 saying that he succeeded in obtaining the relief and
16 the peace and a repose that he intended by commencing
17 this action.

18 Yet, it's not over, that as demonstrated by
19 Mr. -- Dr. Fetzner's most recent statements a moment
20 ago, it appears to me that Leonard Pozner today,
21 May 14th, arguably is in a worse position -- he was
22 with regard to the harm that he believes Dr. Fetzner has
23 perpetrated upon him, than he was when he commenced the
24 lawsuit. That although the injunction is -- was
25 entered and that he's got a piece of paper called a

1 judgment, the harassment and I think the word he used
2 at trial, the nightmare, yet continues, continues in
3 that Dr. Fetzer has continued to argue that apparently
4 the person who testified in my courtroom is not the
5 same person who was present at the time immediately
6 after the Sandy Hook massacre, and that it's a
7 character or an actor perpetrating a fraud upon the
8 Court.

9 If I conclude that the plaintiff,
10 Leonard Pozner, is in a worse position today than he
11 was, why not entertain his request to make him whole or
12 restore himself to the position he was prior to
13 commencing this action and awarding him an amount of
14 money to reimburse for the attorneys' fees that he's --
15 that are due and owing?

16 MR. BOLTON: My answer to that, Your Honor,
17 is that I find myself -- I find myself now defending an
18 entirely new cause of action. The cause of action that
19 was initiated by Mr. Pozner was narrowly focused on
20 statements of defamation. And -- and -- and what the
21 Court is -- is -- is asking is that -- that there's
22 some whole new -- that -- that Professor Fetzer is now
23 liable or some other cause of action that I don't
24 really know what to call. But -- but -- but
25 euphemistically, I'll call it a harassment cause of

1 action.

2 THE COURT: Mr. Bolton, let's just call it --
3 for sake of clarity, let's call it contempt.

4 MR. BOLTON: Okay. And -- and that's fine.
5 But the contempt, Your Honor -- the contempt is not
6 coterminous with the cause of action that was initiated
7 by the plaintiff. Let's say that the -- that the
8 contempt never occurred; the plaintiff would still have
9 had to prosecute his action for defamation, and that
10 wouldn't have occurred. And if the argument now is
11 that somehow the act of pros -- the act of the defense,
12 that the defense was improper in some sense, that is --
13 that is an issue that, you know, in terms of an award
14 of attorneys' fees for some form of improper litigation
15 or over-litigation or in terms of defending the action
16 that was brought, those are different. And that would
17 have occurred and -- and there -- the contempt is not
18 the same as the underlying cause of action.

19 THE COURT: I understand that, Mr. Bolton.
20 As I work through these issues, I'm prepared to make
21 the finding and do so find that once again, Dr. Fetzer
22 is in contempt of Court. I do conclude as a matter of
23 fact and I'll make the finding of fact that Dr. Fetzer
24 intentionally violated the court order.

25 I'll also, based on my experience in the

1 case, having seen the demeanor of the defendant and
2 hearing him once again, I do not believe that he was
3 confused. I do not judge him to be credible. And I
4 conclude that based on his knowledge, education, and
5 training that he's far too intelligent, too
6 well-educated, and too experienced to have made the
7 mistake that he claims that he just did not know.

8 Having so held him in contempt, now for the
9 second time, do you agree, Mr. Bolton, that the
10 contempt is continuing? Now, I understand that
11 factually, you suggested that Ms. Maynard is -- I think
12 the words that you used at one point in the courtroom,
13 stuff the genie back in the bottle, perhaps.

14 But do you also agree that the deposition
15 transcript has been disseminated more widely and will
16 never be assuredly removed from the possession of those
17 that are not authorized?

18 MR. BOLTON: I don't disagree with that, Your
19 Honor.

20 THE COURT: All right.

21 So having found that the contempt is
22 continuing, the purpose of the hearing is to fashion a
23 remedy to address continuing contempt.

24 In preparation for the hearing today, I
25 always turn to the judicial bench book, and the Frisch

1 versus Henrichs case from 2007, contempt is considered
2 to be continuing if compliance comes too late to cure
3 the problems caused by noncompliance. And I think
4 factually, that aptly describes the situation, where
5 now, the defendant once again finds a new issue, arisen
6 in violation of the Court's order, attacking his
7 credibility, his very existence, and it's not likely to
8 now or ever be terminated.

9 The procedure under 785.03 as outlined in the
10 bench book says the following, that the -- is to be
11 initiated by a person aggrieved by the contempt which
12 is Leonard Pozner and that it's been properly moved and
13 served and the burden being accepted by Mr. Pozner, the
14 Court has held a hearing now twice, taken evidence, and
15 is prepared to make findings.

16 The Henrichs case is very helpful, as
17 reflected in the bench book, that there's a broad
18 interpretation of remedial contempt.

19 So there is a -- sanctions made available for
20 continuing contempt under 785.04(1)(a) that would
21 compensate a loss or injury suffered by a party, but
22 that's not alone. Of course I could put in -- Mr.
23 Fetzner in jail; that's not being sought after here. I
24 could order he -- to pay forfeitures. Or there could
25 be an order designed to ensure compliance with the

1 prior order of the Court.

2 But under 785.04(1)(e), Mr. Bolton, if the
3 Court finds the proceeding sanctions would be
4 ineffectual to terminate the contempt, the Court may
5 fashion a different sanction. And I think you agree
6 that essentially whether I would put him in jail or
7 issue an ongoing forfeiture, right now the fact of the
8 matter is terminating the ongoing contempt is beyond
9 Dr. Fetzer's control, there will not be a situation
10 where he can, as in using your term, stuff the genie in
11 the bottle.

12 So you're right, we're looking at a different
13 question. The question is not the same as the
14 defamation that was tried to the jury. The question is
15 what to do about Dr. Fetzer's contempt. And my point
16 about the attorneys' fees having raised sua sponte was
17 what is the nexus between reimbursing the plaintiff for
18 the attorneys' fees and the contempt? And the point is
19 the nexus is that the ultimate relief that
20 Leonard Pozner was hoping to obtain by filing,
21 prosecuting, and succeeding this case is now more
22 elusive than it was. Not only does Dr. Fetzer continue
23 apparently to perpetuate his belief that the death
24 certificate is a fake and a forgery, that nobody died
25 at Sandy Hook, but now additionally, apparently he

1 believes that the individual who testified in Dane
2 County Circuit Court is a dif -- person different
3 than -- than -- than the man who was photographed
4 holding Noah Pozner prior to his untimely death.

5 Mr. Zimmerman, is your client essentially now
6 in a worse position today than he was when he hoped to
7 end the nightmare by commencing this action and that
8 the payment, the debt he owes for the attorneys' fees
9 now makes him financially worse off than what he was
10 before?

11 MR. ZIMMERMAN: I don't think there's any
12 question, Your Honor, yes, that he is in a worse
13 position now than he was when he initiated the
14 litigation, in large part because of the tactics the
15 defendant engaged in which we briefed relatively
16 extensively in our post-trial briefing on the question
17 of attorneys' fees and which does connect closely with
18 the contemptuous act. The releasing the deposition was
19 part and parcel of the defendant's attempt, ongoing
20 attempt, to malign Mr. Pozner.

21 THE COURT: Mr. Zimmerman, have I -- have I
22 correctly characterized Mr. Pozner's intent in
23 commencing this action? I mean, these are what I
24 discern from my role as the judge, but perhaps it could
25 be stated in a different way or a better way by you

1 representing his interests.

2 What did he --

3 MR. ZIMMERMAN: -- No, Your Honor.

4 THE COURT: What did he intend, and why is he
5 in a worse position today? I mean, after all, he has a
6 piece of paper called a judgment.

7 MR. ZIMMERMAN: That's correct, Your Honor.
8 He does have a piece of paper called a judgment. He
9 intended to try to eliminate this defamatory language
10 or statements that were made against him and to hold
11 Dr. Fetzer and the co-defendants responsible for
12 publishing false statements that have injured
13 Mr. Pozner.

14 THE COURT: Mr. Bolton, my last question for
15 you is -- is if I understand your argument, it is this,
16 that, yes, for sake of argument, Dr. Fetzer violated
17 the court order, yes, that the violation of the court
18 order is contemptuous, that he tried to put the genie
19 back in the bottle, he tried to get the document or the
20 video or the transcript back, he was partially
21 successful, but that his -- in violation of the court
22 order can never now be terminated because the document
23 has been disseminated too widely and too broadly, and
24 because of that, there's really nothing more can be
25 done.

1 How does that seem fair and how does that
2 seem just when a person violates a court order twice,
3 having concluded that in both cases it was intentional,
4 that simply because now the -- the fix is beyond its
5 control, there's no sanction to be issued by the Court?
6 Mr. Bolton?

7 MR. BOLTON: Your Honor, let me -- my
8 response to that is -- is -- is -- is -- is this.
9 First of all, when you say that it -- it -- it can't be
10 undone and it's continuing, I don't disagree with you
11 with that. But what I do disagree with then is that --
12 that there's some level of pervasiveness going on.

13 There was no -- there's no -- there's no
14 testimony or evidence, affidavit or otherwise by
15 Mr. Pozner that -- that this second -- the release of
16 the transcript, that -- that he suffered any ill effect
17 from that, that -- that he's ever even been contacted
18 by anybody who -- who sought or that -- and -- and Your
19 Honor actually gave the plaintiff the opportunity to
20 have an evidentiary hearing on how this had impacted
21 him, and -- and the plaintiff declined that
22 opportunity.

23 So when you -- to say that it's continuing is
24 not to say that it's pervasive or still significantly
25 impacting Mr. Pozner. So I -- so -- so when -- when --

1 when you -- when you ask Attorney Zimmerman to create a
2 record one way or the other as to whether or not
3 Mr. Pozner is worse off now as a result of this second,
4 and -- and plaintiff declined an opportunity to have an
5 evidentiary hearing on that, when -- when
6 Attorney Zimmerman says absolutely, he's worse off, I
7 mean, I expected him to say that as you expected him to
8 say that when -- when -- when -- when the question was
9 offered -- offered up to him. But that's not evidence.
10 And so the impact on -- on the plaintiff, there's no --
11 there's no evidence in this record or -- and quite
12 frankly, that I'm aware of, even outside the record, as
13 to the impact that the Court is implying.

14 The -- and so the notion then -- the further
15 notion that Attorney Zimmerman, yes, you brought this
16 action as -- as a defamation action, but wasn't it --
17 you asked him, Your Honor, wasn't it actually -- wasn't
18 his objective broader than that? And again, I could
19 not ask -- you know, even if we had an evidentiary
20 hearing, I could not ask Mr. Pozner that because
21 obviously that would be a privileged communication.

22 But I end up with a situation where I -- I --
23 I can't -- I can't address what I'm now told was the
24 broader perspective or purpose. But what I do know is
25 that the lawsuit that was commenced alleged certain

1 things, and that's what -- and that was what was
2 defended against.

3 And -- and -- and I go back to -- I'm now --
4 I'm now -- the argument is now made, yes, it was a
5 defamation action, but was it really the purpose of
6 something else? In terms of -- in terms of what was --
7 what was presented and that Professor Fetzer had to
8 defend against, he defended against the lawsuit
9 initiated by the plaintiff for defamation and -- and if
10 in fact the argument is made that somehow the very act
11 of defending that lawsuit as a defamation action
12 actually should make him liable for a broader cause of
13 action of harassment I think is inappropriate. I think
14 the question of -- of whether or not -- you know,
15 certainly if there was -- certainly Professor Fetzer
16 was entitled to defend against a lawsuit that was --
17 was initiated against him. And -- and within the
18 context of that lawsuit, there are methods if -- if --
19 if there was -- if there was -- if the argument was
20 made that -- that some action during the defense of the
21 lawsuit either by Professor Fetzer or by myself crossed
22 the line and was frivolous or we over -- you know -- or
23 that -- and the defense of the lawsuit that we did
24 something inappropriate, that question of -- of -- of
25 seeking fees and some sanction or litigation conduct,

1 that's -- that's part of the underlying action, and
2 it's not part of the contempt.

3 The -- the -- the -- you know, the remedy --
4 the remedy -- I mean, you ask isn't it -- how is that
5 fair if there's not an effective remedy? But fairness
6 is not really -- the test then in a remedial situation:
7 A, you're trying to obtain compliance, or in a
8 situation as in Frisch -- and I would note by the way
9 that -- that I was the one that brought the -- the --
10 to the Court's attention the very case of Frisch. And
11 in that situation where -- where you have a -- a
12 contempt that can't be retroactively -- or can't be
13 undone, then an alternative purge condition or remedy
14 in -- subject to conditions is appropriate. But in
15 that situation, what you're really trying to do then is
16 to compensate essentially the -- the party that's
17 bringing the contempt action, essentially trying to
18 compensate them for, you know, basically the injury or
19 loss suffered as a result of the contempt, as a result
20 of the contempt. And the underlying -- the defense of
21 the underlying lawsuit was not a result of the
22 contempt. And -- and to the extent that some sort of
23 compensatory award is appropriate as a result of the
24 contempt of court, the Court -- the Court gave the
25 plaintiff an opportunity to make a case for whatever

1 injury or loss resulted from the contempt of court.

2 In Frisch, you know, the Court awarded --
3 ordered \$100,000 -- basically the alternative purge
4 condition. But in that situation, the \$100,000 was --
5 was -- was supported by the fact that the plaintiff in
6 that case had presented evidence that -- that because
7 of the untimely production of tax returns, that her --
8 the time by which she -- for when she could go back to
9 court and get a modification of child support had
10 passed, but that she estimated that -- that as a result
11 of not having that information, that she lost roughly
12 \$220,000 in potential child support.

13 And the Court concluded then that a \$100,000
14 was supported by the actual injury that the plaintiff
15 justified on the record. But it wasn't a number that
16 was unrelated to the contempt. And here, the
17 attorneys' fees that -- that the Court suggested that
18 the plaintiff seek, the defense of the defamation
19 action is not something that occurred as a result of
20 the contempt. And to the extent that the argument is
21 made that it's part of a pattern, there's a -- like I
22 say, that's a -- that's a cause of action that's
23 different than that -- that was -- was -- was brought
24 and defended against, and to the extent then that the
25 attorneys' fees are being considered as an award

1 because of a broad, you know, pattern of harassment.
2 Then quite frankly, I think that -- that -- then I
3 would request that we have an opportunity to present
4 evidence on -- on -- on that broader question of
5 whether or not the contempt is part of some -- some
6 other cause of action that I -- that I don't know
7 about.

8 The other thing I would also note is that in
9 terms of putting the plaintiff back in the position,
10 you know, the lawsuit -- this is not -- we're not
11 looking at a statutory fee shifting statute where
12 some -- like consumer protection statute where
13 sometimes you have, you know, sort of private attorney
14 general interest. This is a -- this is a cause of
15 action, an action initiated by an individual for its
16 own personal benefit.

17 And -- and with regard to the attorneys'
18 fees, my understanding from what I have seen on the --
19 at least on the public record, is that the plaintiff's
20 counsel did this -- prosecuted this action pro bono,
21 and -- and in fact have taken kudos for -- for having
22 taken on this case and challenged the -- the Sandy Hook
23 doubters on a pro bono basis.

24 But -- but -- but to say then that fees are
25 necessary in order to put Mr. Pozner, make him whole, I

1 -- I don't think there's anything in the record to
2 indicate that Mr. Pozner has actually incurred or is
3 liable for the fees of -- of prosecuting this action.

4 THE COURT: Okay. So -- thank you,
5 Mr. Bolton.

6 I'll make two observations and then reframe
7 the question and then turn it to you, Mr. Zimmerman.

8 First of all, on that last point, having --
9 as you know, Mr. Bolton, having previously been in the
10 Attorney General's Office, parties may be entitled --
11 lawyers may be entitled to the payment of their fees
12 upon success in litigation, without regard to the
13 contract between the lawyer and the client. Otherwise,
14 entities like Legal Action of Wisconsin who does not
15 regularly charge persons for their services would
16 otherwise be unable to seek upon success for the
17 payment of fees. Attorneys General would not be able
18 to seek the payment of fees against, for example, the
19 pharmaceutical industry having succeeded in proving
20 their case because there is no contract for payment of
21 fees. So the contractor, the agreement between
22 Mr. Pozner and his counsel may be one factor, but not
23 -- not ultimately be the -- detrimental to their
24 request for fees.

25 I agree with you, Mr. Bolton, that there has

1 to be a nexus between the relief being asked for today
2 and the contempt. I'll let Mr. Zimmerman provide a
3 factual basis. And Mr. Zimmerman, Mr. Bolton's
4 earliest comments in his summation suggested that there
5 were not a sufficient factual basis, and I'd ask you to
6 address this.

7 The nexus between -- as I understood it, was
8 predicated on the Court's authority under (1)(e) where
9 the Court, upon finding that the proceeding sanctions
10 in 785.04 being ineffectual, which I do so find, the
11 Court has the ability to fashion a different sanction.
12 I agree that the sanction has to bear a relation to the
13 contempt.

14 Now, my last observation is you're right,
15 Mr. Bolton, I did ask Mr. Zimmerman if he would like to
16 have an evidentiary hearing, and that evidentiary
17 hearing would be, in my opinion, required if Mr. Pozner
18 was asking for sanctions under 785.04(1)(a), a payment
19 or to compensate for loss or injuries suffered by him
20 as a result of the contempt.

21 His decision not to testify about the pain or
22 suffering or distress or emotional aspect does not
23 necessarily mean that there is no sum that could be
24 paid to compensate him as a result of the contempt.
25 It's only that he, in my opinion, by deciding not to

1 proceed with a hearing, waived a claim for a sum based
2 on the personal effect as to Mr. Pozner's emotions and
3 the like. Mr. Zimmerman always maintained that -- that
4 the attorneys' fees should be paid by Dr. Fetzler, and
5 that as I understand it, Mr. Zimmerman, you believe
6 that there is a nexus now between the payment of those
7 fees and the continuing contempt of Dr. Fetzler.

8 So Mr. Zimmerman, address the facts in the
9 record that support that nexus and why it is that you
10 believe that the Court has the authority under
11 785.04(1)(e) to fashion that sanction as appropriate in
12 the circumstances of this case. Mr. Zimmerman?

13 MR. ZIMMERMAN: Yes, Your Honor.

14 First, I think this is important that the
15 Court address this, at least a little bit, that the
16 contempt sanction need not flow immediately or
17 uninterruptedly from the cause of action as pled in the
18 original complaint. Instead, as the Court said, there
19 must be a nexus, there must be a relationship between
20 the remedial sanction granted by the Court and the
21 underlying contemptuous action.

22 So here in our briefs we laid out, I believe
23 very clearly and in an unrebutted fashion, the actions
24 taken by Dr. Fetzler during the course of this case, in
25 large part, an attempt to continue to besmirch

1 Mr. Pozner, and in fact, to use the documents and
2 information produced in discovery in this case as
3 ammunition for those ongoing attacks.

4 Your Honor, at the very first hearing in this
5 case, we, the plaintiffs, brought a motion to -- for a
6 protective order, in response to some of Dr. Fetzer's
7 initial discovery requests. And at that very first
8 hearing, we reflected a concern that Dr. Fetzer was
9 going to use this case to uncover personal information
10 about Mr. Pozner and share that information with his
11 followers. We identified additional concerns in that
12 regard when we moved for a protective order in this
13 case. The Court accepted briefing on that, the Court
14 heard argument on that, and as a result of the
15 argument, the parties reached a stipulation during a
16 hearing which was reflected in the record. At that
17 time, we identified specific concerns that Dr. Fetzer
18 was going to use the discovery in this case to
19 embarrass or to harass Mr. Pozner, and that's exactly
20 what has happened.

21 The deposition, which was supposed to be
22 confidential, was leaked publicly and was used by both
23 Ms. Maynard and Wolfgang Halbig for their own ends, not
24 necessarily directed toward Mr. Pozner, but
25 peripherally impacting him because they continued to

1 suggest that he's part of a grand conspiracy to defraud
2 the entire nation and the world by claiming that he
3 didn't -- or that by claiming that his son died at
4 Sandy Hook when they claim no such thing occurred.

5 So there is a clear connection between the
6 pattern of behavior that occurred during the litigation
7 and for which the attorneys spent an inordinate amount
8 of time.

9 And the contemptuous action of releasing the
10 deposition transcript. We know, Your Honor, that the
11 -- the defendant released the deposition transcript as
12 part of his effort to continue to make suggestion that
13 Mr. Pozner is not Mr. Pozner. That -- that is
14 absolutely a part of the tactics that they undertook in
15 defending the case. We saw time and time again claims
16 that Mr. Pozner was not Mr. Pozner. They wanted DNA
17 samples from folks that were not parties to the case,
18 as part of their effort to suggest that Mr. Pozner is
19 not Mr. Pozner and he's someone else and the kid was
20 someone else's kid and none of it actually happened.

21 So I don't think there's any question that
22 there's a close connection between the action that
23 Professor Fetzer took that led to this contempt -- that
24 is releasing the confidential deposition transcript to
25 Ms. Maynard -- and the tactics that they undertook in

1 the defense of this case.

2 I don't see any requirement in the law, Your
3 Honor, that the nexus be between the complaint as pled
4 by the plaintiff and the contemptuous action that was
5 undertaken by the defense. That's just not a
6 requirement. What we had to show was a nexus between
7 the contemptuous action in the underlying case. The
8 underlying case is what gave rise to the attorneys'
9 fees.

10 THE COURT: Thank you very much,
11 Mr. Zimmerman. I appreciate the courts -- I appreciate
12 the counsels coming this morning and helping to clarify
13 the issues.

14 I already indicated that I conclude that
15 Dr. Fetzer has yet, once again, been in contempt of the
16 Court.

17 I do make the finding of fact that he
18 intentionally violated the Court's order not once, but
19 twice. I judge his credibility in such a way that I do
20 not believe that he was confused nor do I think it's
21 reasonable to be confused given the nature of the
22 confidentiality order that was agreed, drafted, and
23 written, and understood by a preeminently well-educated
24 individual, distinguished member of the University of
25 Minnesota faculty. He knew and certainly he should

1 have known that what he was doing was in direct
2 contravention and violated a court order.

3 I do have a recollection -- I thought you --
4 maybe you were going to remind me, Mr. Zimmerman -- but
5 at some point during this Court's handling the case,
6 the Court took the time to enter into a colloquy with
7 Dr. Fetzer, laying out the consequences that he would
8 face, swift and sure, as a result of any violation of
9 the Court's order. There should have been no doubt
10 whatsoever in his mind after that exchange that he
11 should have been ever vigilant to -- to pay heed to
12 this Court's orders. And yet, he did disregard the
13 Court's order, not -- but once, but twice.

14 I do make the finding of fact that based on
15 the Court's review of the record and as to you,
16 Mr. Bolton, your recitation of whether -- what is being
17 suggested here is confidential and attorney-client, not
18 at all, I make the decisions and the findings here in
19 part and the record before the Court on the present
20 motion, but also the Court's recollection of
21 Mr. Pozner's testimony in the underlying trial and his
22 articulation of the reason for the commencement action
23 and the harm that he said he was suffering as a result
24 of the defamation that he ultimately proved.

25 I do conclude factually that the plaintiff is

1 now in a worse position than he was before seeking to
2 enjoin the defendant's defamatory statements.

3 I do conclude that the plaintiff has expended
4 substantial monetary resources in the pursuit of the
5 vindication of his legal claims, but on the pursuit of
6 his peace and repose and quiet that he's been trying to
7 obtain since the death of his son, and that very much
8 very likely, based on Court's understanding of the
9 parties, that the monetary award be given to him is
10 likely uncollectible in part or in whole.

11 That -- I do make a finding that immediately
12 after the defendant's release of the confidential
13 information, the plaintiff experienced a renewed
14 harassment, and in particular, putting him now at
15 greater personal risk than ever before.

16 The plaintiff request it's indemnifying
17 himself for the fees incurred I believe is reasonable
18 compensation for the injury he now suffers as a result
19 of the contempt.

20 I conclude factually and based on my review
21 of this case and my research of the law that other
22 sanctions would be ineffectual to terminate the
23 contempt, and that -- that the contempt I believe is
24 agreed by the parties, not ever likely to be contained.

25 To that extent, the plaintiff could ask that

1 the Court incarcerate Dr. Fetzer for his contemptuous
2 behavior. The plaintiff could ask that the Court add
3 to the monetary consequences of his action a forfeiture
4 that would be non-dischargeable. Again, I believe, as
5 a pragmatic point, that the plaintiff understands and
6 is consistent with his simple desire to be left alone,
7 that such action would either -- would otherwise
8 inflame the passions of the parties and those
9 interested and not likely to have any kind of
10 productive, nonpunitive effect.

11 So Dr. Fetzer, I guess can count himself
12 lucky that he's not going off to the Dane County Jail,
13 especially in today's pandemic situation, or being
14 penalized or punished with the award of forfe -- only
15 that Mr. Pozner be made whole by the reimbursement of
16 the fees that were expended or incurred, without regard
17 to whether he was personally liable or not, undeniably
18 incurred by competent and able legal counsel.

19 I do conclude the Court's authority under
20 785.04(1)(e) to be applicable to this case, that this
21 is the only alternative remedy that is deemed
22 appropriate.

23 I also conclude that the plaintiff has met
24 its burden and established a nexus between the requests
25 for reimbursement of the fees and the contempt that the

1 Court has found to be current, ongoing, and not likely
2 to be terminated any time soon.

3 So therefore, I'm going to grant the
4 plaintiff's motion and issue an award, issue a judgment
5 for actual attorneys' fees incurred on two alternative
6 theories. One is simply as it relates to the contempt
7 and the connection between the fees expended since
8 commencement of this action, but also just taking the
9 total amount as being an amount appropriate sanction in
10 the independent right, and independent of that nexus,
11 to be an appropriate consequence for the --
12 Dr. Fetzer's repeated contemptuous behavior.

13 I would note parenthetically, this is not a
14 situation where the Court is addressing a singular act
15 of contempt, notwithstanding the Court's admonitions to
16 the defendant earlier on, one could suggest that on the
17 first contempt, then he's rightfully educated and made
18 the wiser; this is the second contempt.

19 And also think the sanction being awarded is
20 an appropriate consequence to make sure that Dr. Fetzer
21 understands and knows that there are consequences to
22 his contemptuous behavior, and the consequences to his
23 contemptuous behavior in this case are simply mere
24 financial consequences, that the fact that he's now
25 been -- done the same thing twice leads me to conclude

1 and be concerned that there very well may likely be
2 continuing incidents of contemptuous behavior in
3 violation of this Court's order.

4 There needs to be consequences to actions and
5 that the defendant comes before this Court and suggests
6 that it's simply the -- the factual circumstances are
7 such that it can't be purged and can't be rectified, so
8 there's nothing that can be done. I disregard that,
9 and I think the consequences that the plaintiff are --
10 is asking for in this case are fair and I think
11 reasonable, are within the Court's power and authority,
12 its inherent power and its statutory authority, and the
13 Court will so grant the motion and enter judgment
14 accordingly.

15 Mr. Zimmerman, you'll draft an order for the
16 Court's signature, I suppose reducing an order, and
17 then an order for an amended judgment to be added to
18 the previous judgment that was awarded by the jury
19 after trial.

20 Anything further on this matter at this time,
21 Mr. Zimmerman?

22 MR. ZIMMERMAN: Yes, Your Honor. I think
23 that there's an outstanding proposed order before the
24 Court on the attorneys' fees required to bring the
25 motion for sanction. The amount of fees were disputed.

1 So I think there may be a question or may be
2 questions by the Court. We'd love to answer any of
3 those questions.

4 THE COURT: All right. Let me look at that
5 -- thank you. Oh. There is a lose end. I have in my
6 queue -- I apologize. I didn't -- I read it and I
7 thought I needed to wait for today. There is a
8 proposed order following the contempt hearing. It was
9 submitted some time ago and held without objection.

10 Mr. Bolton, I'm turning to the proposed order
11 filed by Ms. Stedman. That should have -- I believe I
12 should have signed it by now, but it's hanging out
13 there in my queue.

14 Any objection to signing that order? This is
15 the one that came after the January 9th hearing.

16 MR. BOLTON: Not -- not as to form, Your
17 Honor.

18 THE COURT: All right.

19 So I apologize for overlooking that order.
20 And I'll go ahead and sign that now.

21 So is there another proposed order? I don't
22 see it in my queue. Can I look at the language? When
23 did that --

24 MR. ZIMMERMAN: -- Yeah. I believe, Your
25 Honor, that it was -- the proposed order following the

1 March contempt hearing. And in that proposed order,
2 the Court granted the attorneys' fees for the time
3 required to bring the second contempt motion. The
4 parties -- or the plaintiff then submitted an
5 accounting essentially for the attorneys' fees.
6 Mr. Bolton opposed that.

7 THE COURT: I found it.

8 Mr. Bolton, there's a proposed order dated
9 4/20, filed on 4/20. Any objection to the -- the Court
10 signing this order?

11 MR. BOLTON: Your Honor, I don't have it in
12 front of me. So I'm not -- I'm not sure exactly -- is
13 that the -- is that the order that you were just
14 discussing that was in your queue and you asked me --

15 THE COURT: -- No. That was -- the one I was
16 discussing was way back in January. Let me read to you
17 -- this proposed order -- no. Actually this is the
18 January. That talks about an expert, Jack Mullen, and
19 the like; that I'm not signing.

20 I'm not seeing that. Maybe Ms. -- who?
21 Ms. Feinstein or Ms. Stedman? Does this -- can you --
22 is it something other than the order that -- out
23 with -- on January 9th?

24 MR. ZIMMERMAN: I believe that's the correct
25 order, Your Honor. Let me double-check.

1 MR. BOLTON: The January order would have
2 probably been filed with the initial request to show
3 cause. So that would have been prior to the March 17th
4 hearing that we had.

5 THE COURT: Okay. This one -- this one is
6 made -- it starts out on January 9th, 2020, plaintiff,
7 Leonard Pozner, filed an amended notice of motion, a
8 motion for sanction, because on the order that -- for
9 the reasons stated on the record at the March 17th
10 hearing, the Court finds the defendant intentionally
11 violated the Court's confidentiality order, is in
12 contempt, and further order that the defendant's
13 contempt is ongoing. Now it is further ordered that
14 the defendant pay plaintiff's reasonable attorneys'
15 fees for bringing the motion. The parties will brief
16 the issue of fees under 785.04, pursuant to the Court's
17 scheduling order. It's ordered -- further ordered that
18 on or before March 27th.

19 Okay. So that was the one -- I think I -- I
20 don't think there's any objection to that. That was
21 after the first hearing, was prospective today that set
22 the briefing, and then the last remaining loose end,
23 the plaintiff's request for the attorneys' fees.

24 I believe -- I believe if that's the one I
25 just signed, and if not, any objection to signing that

1 order? It should have been -- honestly, and I
2 apologize, should have been signed some time ago.

3 MR. BOLTON: Yeah. If I'm -- if I'm -- if
4 I'm understanding correctly, I -- I did not object to
5 and I do not object to the form of that order that you
6 -- that you ordered fees for the -- for bringing the
7 contempt motion and that that -- and that that would be
8 briefed.

9 Now having said that, I don't mean to imply
10 then that because I did oppose the -- the amount of the
11 request. So by -- by agreeing to the form of the order
12 that you -- that you awarded that subject to then
13 submission and determination of reasonableness and
14 whatnot, I'm fine. But I don't want -- I'm not -- I'm
15 not saying that I'm -- that there was not objection to
16 the amount of the request.

17 THE COURT: So this particular order, and I
18 have to -- though I clicked sign it, the last two
19 paragraphs, I'm not -- may have been made moot,
20 Mr. Zimmerman. The last paragraph says that -- that
21 within five days of the day of the order, defendant
22 shall produce to plaintiff all documents and
23 communications by and between the defendant and any
24 other person relating to or referring to plaintiff's
25 deposition. And then the last paragraph talks about

1 producing expert report for Jack Mullen. I don't think
2 that's no longer pertinent; is it, Mr. Zimmerman?

3 MR. ZIMMERMAN: The defendant I think has
4 complied, you know, at least in large part into our
5 satisfaction with those two paragraphs, Your Honor. It
6 -- it may be from a purely procedural perspective
7 acceptable to do it and say had this been entered on
8 the 20th, the defendant complied with it; and
9 therefore, the production of those documents was
10 pursuant to court order as opposed to being just purely
11 voluntarily. But there's no future requirement.

12 THE COURT: All right. To that extent, of
13 course if Counsel understands it, sometimes the Court
14 has the authority to issue oral orders that are binding
15 on the parties, even though it takes some time to
16 reduce them to writing. So the fact that it isn't --
17 hadn't been signed does not, nonetheless, detract from
18 the Court having issued the order orally from the
19 bench.

20 But Mr. Bolton, Mr. Zimmerman says that there
21 is nothing more that he expects the defendant to do
22 today, going prospective without -- with regard to this
23 order, now knowing that whatever was required of the
24 order you've successfully satisfied him; are there any
25 objections?

1 MR. BOLTON: No, Your Honor.

2 THE COURT: All right. So the Court will
3 enter that order with today's date on it.

4 Now, what to do about the -- there are -- I
5 usually handle fee requests. There's the easy way to
6 do it; this is a little different. We've got a number
7 of lawyers.

8 You -- refresh my recollection,
9 Mr. Zimmerman, I bel -- what have you submitted to me
10 to substantiate the amount of fees?

11 MR. ZIMMERMAN: Your Honor, we submitted a
12 brief with a description of the work required and the
13 number of hours that was expended by Mr. Pozner's legal
14 team to research the contempt motion and the facts
15 surrounding contemptuous behavior and to brief that and
16 bring it before the Court and appear for oral argument.

17 THE COURT: No. I'm talking about now the
18 Court entering an order, granting the plaintiff's
19 request for the fees back to the filing of the case,
20 the underlying litigation.

21 MR. ZIMMERMAN: Your Honor, we have not yet
22 submitted anything to substantiate that number. It's
23 my understanding that similar to a bill of costs
24 following a, you know, judgment in an underlying
25 matter, we would submit in effect an accounting of the

1 hours that were expended by Mr. Pozner's legal team
2 during the case-in-chief.

3 THE COURT: All right. So that -- that
4 remains to be done?

5 MR. ZIMMERMAN: That's correct, Your Honor.
6 The only attorneys' fees issue that's outstanding right
7 now that we're looking for a -- a determination by the
8 Court is the attorneys' fees that were required to
9 bring the second contempt motion itself.

10 THE COURT: And what are your objections,
11 Mr. Bolton, to the Court granting the order based on
12 the facts submitted by the plaintiff?

13 MR. BOLTON: Your Honor, I -- I felt that the
14 amount was excessive, unreasonable, and -- and was not
15 actually justi -- or substantiated. I -- I've never
16 actually seen a fee request with at least -- detail as
17 to the dates that work was done and the amount, and --
18 and -- and the tasks that were performed, and none of
19 that was provided.

20 THE COURT: And are we -- you're referring to
21 the attachments or to the affidavit of Ms. Stedman?

22 MR. BOLTON: Yes, Your Honor.

23 THE COURT: So just so we understand what is
24 the precise issue, it's stated in paragraph 3 the
25 hourly rates, Mr. Zimmerman at 450, Ms. Feinstein at

1 460, and Ms. Stedman at 320. Mr. Zimmerman practices
2 in the Twin Cities, Ms. Feinstein and Stedman in
3 Madison.

4 Are you objecting to the reasonableness of
5 their hourly rate?

6 MR. BOLTON: I did not object to the
7 reasonableness of the rate.

8 THE COURT: All right. So that's paragraph
9 3.

10 And then the total -- the total fee requested
11 was \$13,072. If I understand, Ms. Stedman, there was
12 -- you did not actually submit a -- a -- an itemization
13 essentially of what would be an invoice or a bill, it
14 would be characterized in the fee for service between a
15 lawyer and a client?

16 MS. STEDMAN: That is correct, Your Honor.

17 THE COURT: How do you want to proceed,
18 Ms. Stedman? You know, there's two ways to go. I
19 have, from experience -- you're right, Mr. Bolton --
20 often we see a version of the lawyer's bill. It might
21 be redacted to preserve attorney-client confidentiality
22 in some respects, but you at least have dates and hours
23 and some description of what was done.

24 On the other hand, having worked on most
25 recent -- well, the State's pharmaceutical litigation

1 and the tobacco litigation, we know that the lawyers
2 representing the State were successful in obtaining
3 fees without an itemization on the grounds that in the
4 cases, the Habush firm, that they didn't bill hourly,
5 they billed out in a sort of a lone star fashion. So
6 you can get fees and costs without the itemized bill
7 that's not necessarily a requirement.

8 I do note that the total -- the total amount
9 is -- for three lawyers working on it and the time the
10 Court spent itself appears to be relatively modest.

11 I guess, Ms. Stedman, I -- I've got your
12 hourly rate of 17 hours for Mr. Zimmerman and 4.9 for
13 Ms. Feinstein and 9.9 for Ms. Stedman. My quick
14 calculation is about 32 hours.

15 How many hours did you spend, Mr. Bolton, by
16 way of comparison, preparing yourself and attending the
17 Court's hearing on the first round of contempt?

18 MR. BOLTON: You know, Your Honor, I don't
19 have my -- I don't have my billing records in front of
20 me. But what I can -- what I can tell you is that it
21 would have been significantly less than 10 hours.

22 THE COURT: So how would you like to proceed,
23 Ms. Stedman? Would you just like to simply say Judge,
24 I gave you what I want to give you, I think that's
25 enough for the Court to conclude that the fees are

1 reasonable, or you can say Judge, I mean, we've got
2 nothing to hide, there are some records behind those.
3 You're going to have to make the same decision now in
4 the Court's awarding the actual fees for the underlying
5 action as well. Maybe you want to be consistent.

6 Maybe I'll turn to Mr. Zimmerman and address
7 you that question, because it ties in to how you want
8 to proceed on the -- the Court's order today.

9 MR. ZIMMERMAN: Your Honor, I appreciate the
10 potential or proposal to be consistent, but I'm -- I'm
11 not sure that it's necessarily required in -- in this
12 instance.

13 I think we will provide a detailed recitation
14 of time spent for the case-in-chief, given the amount
15 of work. We can give invoices, redacted of course to
16 protect the attorney-client privilege or work product
17 to the extent that's reflected in anyone's billing
18 records.

19 For this matter though, Your Honor, I would
20 ask that the Court consider the submission as presented
21 in light of the issues that were raised, the arguments
22 presented by the lawyers in the briefing leading up to
23 this issue, and that we'll -- we'll deal with the
24 detailed invoices for time spend during the
25 case-in-chief separately.

1 THE COURT: So you want me to make a decision
2 just based on what you've submitted?

3 MR. ZIMMERMAN: Yes, Your Honor, for this --
4 for this narrow fee request. Yes, Your Honor.

5 THE COURT: You understand if I do that, I
6 may come to a conclusion that would not be the same
7 conclusion if I had the ability to review an
8 itemization?

9 MR. ZIMMERMAN: I do understand that. Yes,
10 Your Honor.

11 THE COURT: Then I've got two questions.
12 There was some written work associated with the
13 underlying motion.

14 Who did the draftsmanship of the written
15 briefs? You Ms. Stedman or Ms. Feinstein?

16 MR. ZIMMERMAN: Ms. Stedman and I did, Your
17 Honor. Yes.

18 THE COURT: And my recollection,
19 Mr. Zimmerman, you did -- did you do the argument?

20 MR. ZIMMERMAN: I did, Your Honor. Yes.

21 THE COURT: So I can ask Ms. Feinstein or I
22 can ask you, Mr. Zimmerman: What was Ms. Feinstein's
23 role if you and Ms. Stedman did the briefs and you did
24 the argument?

25 MR. ZIMMERMAN: I can answer that, Your

1 Honor. She provided legal advice, strategic advice on
2 how to proceed with this issue. We had some client
3 counseling decisions to make and issues that we
4 discussed internally, and that information was then
5 provided back to the client.

6 THE COURT: All right. Is there anything
7 more that you'd like to say in support of your fee
8 request based on the factual basis set forth in the
9 affidavit of Ms. Stedman, Mr. Zimmerman?

10 MR. ZIMMERMAN: No, Your Honor. I think
11 that's it.

12 THE COURT: Mr. Bolton, your final comments
13 as to the Court ruling based on the present factual
14 record before it?

15 MR. BOLTON: I have nothing further, Your
16 Honor.

17 THE COURT: Well, please don't take this as
18 any disrespect, but I'm going to go ahead and grant the
19 fee request. I'm going to reduce the fee request and
20 delete that which was attributed to Ms. Feinstein; I
21 mean no disrespect. But I, you know, in my younger
22 days when I see large firms and you have moot courts
23 and multiple lawyers, I really have to look at the
24 individual contribution. I know that a firm and a
25 client shouldn't be penalized for having the talent of

1 multiple lawyers, and I don't for the moment mean to
2 imply that it wasn't a valuable service being provided.

3 But on the other hand, I do have an
4 obligation to Dr. Fetzer who ultimately is being asked
5 to pay the bill, and that when more than one lawyer
6 work on a similar case, that person who pays the bill
7 has a right to dial down into the intimacies as to
8 whether it's just being doubled up and -- or whether it
9 could have been done by one.

10 I'm satisfied that Mr. Zimmerman's fee is
11 reasonable both in his hourly and the amount of time,
12 and also based on the representation of Ms. Stedman,
13 worked closely with Mr. Zimmerman in preparing the
14 written argument.

15 So therefore, I'll grant Ms. Stedman's
16 request for fees, both in the number of hours and her
17 hourly rate, and to reduce the fee request by 4.9 hours
18 at the rate of \$460 an hour, that not having been
19 sufficiently presented to the Court in a detail which I
20 think would be necessary to impose those attorneys'
21 fees on Dr. Fetzer.

22 Okay. Did that -- takes care of that loose
23 end. Any other loose ends, Mr. Zimmerman?

24 MR. ZIMMERMAN: No, Your Honor. Thank you.

25 THE COURT: Any other loose ends, Mr. Bolton?

1 MR. BOLTON: Your Honor, there's one -- one
2 point I'd like to at least ask the Court's
3 clarification on in regard to the -- the Court's
4 decision in terms of awarding the fees of the
5 underlying actions.

6 Is the Court finding one way or the other as
7 to whether or not Professor Fetzner has the ability to
8 fulfill that type of an alternative order?

9 THE COURT: I don't understand the question.

10 MR. BOLTON: Well, my understanding is that
11 when the Court imposes in a situation like this, an
12 alternative purge condition, because obviously, for
13 instance, my understanding is that even if the purge
14 can't be -- for the contempt -- is ongoing, that if you
15 -- satisfaction of the -- of the alternative order, as
16 discussed in Frisch, satisfaction of that order then
17 actually terminates or ends the continuing contempt.

18 But in Frisch, one of the requirements for
19 the alternative is that the -- that the condition or
20 that the contempt I should be able to fulfill the
21 proposed purge.

22 And so my question is are -- are you finding
23 that to be unnecessary or are you making a finding in
24 regard to Professor Fetzner's ability to pay?

25 THE COURT: Well, what facts do I have before

1 the Court that other than the suggestion that he's a
2 retired professor on a Minnesota pension, owning a
3 house in Oregon, Wisconsin, that he doesn't have the
4 ability to pay?

5 MR. BOLTON: My response to that, Your Honor,
6 is this: In previous -- I always find myself -- the
7 opposing counsel will make a statement on an issue and
8 then I'm assuming that, you know, I accept that, and
9 then -- and then I'm confronted with that you didn't
10 actually disprove. And what I'm getting at here on
11 this particular issue is that in the earlier
12 submissions, plaintiff's counsel indicated that certain
13 alternatives, he proposed a jail time, he proposed
14 different document production things because they felt
15 that Professor Fetzer -- that -- that -- that a
16 compensatory, a dollar amount was not going to be --
17 get him anywhere anyway because he didn't have the
18 ability to pay that.

19 Having said that, I did not assume that I
20 needed to, as part of this hearing, disprove
21 Professor Fetzer's ability to pay. And I don't
22 understand in Frisch that it is my -- that I actually
23 have the burden of proof on that issue.

24 THE COURT: I don't understand -- I think --
25 I think you're getting ahead of the cart before the

1 horse. I mean, I think everyone -- well, I concluded
2 that I was not willing to use incarceration, because I
3 didn't think it was going to make a decision. We could
4 put Mr. -- Dr. Fetzer in jail, and when the day is
5 done, he'd serve out a 6-months and nothing would be
6 different. So that I did not think would be an
7 appropriate sanction because of the reality that
8 Dr. Fetzer even stipulates to that the consequences of
9 his contempt would never be rectified. Similarly
10 because of his financial situations; I didn't think
11 that if I hit him with up to \$2,000 a day in forfeiture
12 that he would ever be able to terminate the ongoing
13 contempt because how far and wide it has been
14 disseminated.

15 I concluded that the only remedy that where
16 those sanctions would be ineffectual or terminate the
17 contempt, I was fashioning a distinct -- a different
18 sanction and I was coming at it from two different view
19 points: A sanction to put Mr. Pozner in a position he
20 otherwise would have been because he's worse off now
21 than when he started to be made whole; and second, I
22 just fixed the total amount as being appropriate as a
23 consequence of Dr. Fetzer's ongoing and -- contempt,
24 where nothing else would be effectual to terminate it.

25 Now, if what you say is okay, I understand

1 that, there's an amount and we entered, if -- if he
2 doesn't pay it, my understanding is then Mr. Pozner
3 come back and say Judge, he didn't pay what you
4 ordered, you should hold him once again in contempt for
5 not paying the consequences of being held in contempt,
6 and at that time, then if he doesn't pay, I would have
7 a hearing of his ability to pay. But that assumes that
8 the creditor is not able to discharge or collect on the
9 debts by other means.

10 I do think that if what you're saying is
11 that, well, when am I going to get my time and date to
12 show he's unable to pay? My response is not before the
13 judgment is entered, but subsequently, depending upon
14 the creditor's next step in its attempt to collect said
15 judgment.

16 MR. BOLTON: Your Honor, I understand -- I
17 understand your reasoning. I don't think -- that's not
18 how I read the Frisch decision. When I -- and I'm
19 looking at page 32 of the decision so -- or I call it
20 the Frisch decision, the Henrichs decision, 304 Wis.2d,
21 one at page 32. And -- and paragraph 64 says when a
22 Court decides to provide a purge condition outside of
23 compliance with the original court order, which is what
24 we're dealing with here, several requirements must be
25 met. The purge condition should serve remedial aims,

1 the contemnor should be able to fulfill the proposed
2 purge, and the condition should be reasonably related
3 to the cause or nature of the contempt. And I don't
4 agree with the relationship, but you ruled on that.

5 But in terms of the contemnor should be able
6 to fulfill the proposed purge, the use of proposed
7 purge suggests to me that the termination of -- that
8 that issue is -- is -- is part of not the subsequent --
9 he didn't -- he didn't pay, therefore we bring another
10 contempt motion, my understanding is that that's part
11 of the initial package of considerations.

12 And I don't understand that I -- and I
13 certainly didn't understand that I had the burden of
14 proof on that issue. But if I do, then I would request
15 that -- that I'd be given an opportunity to address
16 that issue.

17 But I -- I think -- I think it's an issue
18 that doesn't come later, I think it's an issue that
19 comes now, and I don't think it's an issue that I have
20 the burden of proof on.

21 But -- but in all honestly, I'm not just
22 trying to quibble there. Plaintiff's counsel in their
23 previous submissions all but indicated that they've
24 done supplemental examination of Professor Fetzer and
25 his wife, all but acknowledged that, you know, he

1 doesn't have significant financial means.

2 THE COURT: Well, I'm not going to schedule
3 any more hearings. I scheduled one more than what we
4 had originally intended, and so this -- if I were to do
5 that, it would be the third hearing on the plaintiff's
6 request for contempt.

7 We only had this hearing today to consider a
8 fairly limited question, and I decided that question
9 based on the submissions of the parties. Whether
10 something wasn't submitted that should have been or
11 could have been, there's nothing more that can be done
12 about that today.

13 I intend, for reasons I started out with, to
14 conclude this case needs to have some closure and
15 finality. It's already on the merits in the Court of
16 Appeals, and the longer the case languishes in the
17 circuit court on these ancillary issues, will deny both
18 Dr. Fetzner and Mr. Pozner their day in the appellate
19 court.

20 Just let's leave it at this, Mr. Bolton,
21 rather than debate the Frisch case. I have the Frisch
22 case on my desk, I've got it bookmarked, and I've
23 studied it. And suffice to say that for the reasons
24 I've stated, I believe that in the facts of this case
25 and the admitted intentional repeated contempt of the

1 defendant that the judgment granting the plaintiff's
2 actual attorneys' fees is appropriate within the
3 Court's inherent power, in its statutory power, and
4 supported by the facts in the record, and that will be
5 the order of the Court.

6 I don't mean to be disrespectful, but at some
7 point, you know, if I'm wrong, then I expect then the
8 finality will be obtained by either party in the Court
9 of Appeals. I -- except for tabulating the final
10 amount that is waiting for the plaintiff's counsel to
11 submit to the Court, I may or may not have a hearing on
12 it on the amount. I wanted to get that in and then
13 give you some time to respond, and then there will be
14 no further hearings or proceedings in this case. As
15 far as I'm concerned, the proceedings in the circuit
16 court are going to be concluded.

17 Mr. Zimmerman, let's get a sense for when
18 you're going to get this actual fee request in in the
19 -- both in its amount and its supporting documentation.

20 MR. ZIMMERMAN: Your Honor, in normal
21 circumstances, I would say we could turn it around
22 pretty quickly, but we're all working from out of
23 office and at least in Minnesota. I think people are
24 -- Wisconsin may be going back sooner than expected or
25 others or -- I guess I would ask for maybe 21 days to

1 --

2 THE COURT: -- No problem --

3 MR. ZIMMERMAN: -- get everything together
4 and get it in.

5 THE COURT: No problem. Today is the 14th --
6 the 21st, 22nd -- that's June. I guess that's June --
7 let's say -- how about Monday, June 8th?

8 MR. ZIMMERMAN: That will be fine, Your
9 Honor. Thank you.

10 THE COURT: Mr. Bolton, how many days
11 thereafter would you like to have your response, I
12 guess both on the -- I assume the hourly rates are
13 going to stay the same; are they not, Ms. Stedman,
14 possibly, Ms. Feinstein?

15 MR. ZIMMERMAN: Your Honor, I think I can
16 answer that. I believe they will be the same. It's
17 possible -- and I'll check this with my co-counsel --
18 it's possible that some hourly rates were slightly
19 lower last year as is normal, rates tend to go up year
20 after year --

21 THE COURT: -- Well, I asked the question --
22 I asked the question because if they're the same rates,
23 then having stipulated to reasonableness as to the
24 rates, then that won't be an issue that I need to
25 decide; I'll focus on the number of hours.

1 So knowing that will probably -- if in fact
2 it's the same hourly rate, Mr. Bolton, how long will it
3 take you to turn around and get your response on the
4 number of hours?

5 MR. BOLTON: Um, Your Honor, I appreciate 21
6 days from thereafter as well.

7 THE COURT: All right. So I said June 8 --
8 how about June 29th?

9 MR. BOLTON: That's fine, Your Honor.

10 THE COURT: And then I'll give the plaintiff
11 just one week -- one week to get -- oh, that's over the
12 July 4th weekend. No, it'd be more than that.

13 I'll give to July 13th for any reply.

14 MR. BOLTON: Thank you, Your Honor.

15 THE COURT: I intend then to decide that
16 remaining issue on the briefs submitted without further
17 hearing or oral argument.

18 Okay. Now, have I concluded everything or we
19 addressed everything that's presently before the Court?
20 I think you already said yes, Mr. Zimmerman?

21 MR. ZIMMERMAN: That's correct, Your Honor.
22 Thank you.

23 THE COURT: Now can you say yes to that,
24 Mr. Bolton, or is there anything else?

25 MR. BOLTON: I did say yes, Your Honor.

1 THE COURT: All right. Thank you very much
2 for calling in. I appreciate the hard work everyone's
3 put to the case and the quality of the legal
4 representation. It's an interesting case. I wish -- I
5 wish everyone the best as -- wherever your journey may
6 take you.

7 Thank you for calling in. We'll stand
8 adjourned.

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STATE OF WISCONSIN)
) SS:
COUNTY OF DANE)

I, Meredith A. Seymour, District Court Reporter, do hereby certify that the foregoing proceedings were stenographically reported by me and reduced to writing under my personal direction to the best of my ability.

Dated and signed this 28th day of May, 2020.

electronically signed

Meredith A. Seymour
District Court Reporter