STATE OF WISCONSIN
SUPREME COURT

Leonard Pozner,

Plaintiff-Respondent,

v.

James Fetzer,

Defendant-Appellant-Petitioner.

Appeal No.: 2020AP121
2020AP1570

Cir. Ct. No. 2018CV3122

PETITION FOR REVIEW AND APPENDIX

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

PETITION FOR REVIEW

Defendant-Appellant-Petitioner, Professor James Fetzer ("Fetzer"), petitions the Supreme Court pursuant to Wis. Stats. §§ 808.10 and 809.62 to review the decision of the Court of Appeals District III in Pozner v. Fetzer, 2020AP121 and 2020AP1570, filed on March 18, 2021.

This Petition raises important First Amendment speech issues having broad significance. The case involves research concluding that the reported Sandy Hook shootings did not occur and that the event was staged by FEMA for the purpose of promoting gun control. Fetzer's Petition is limited to issues of broad applicability, although he disagrees with the outcome on other issues not included herein. This Petition should not be construed as agreement with issues not included for Supreme Court review.

Issues related to speech often involve controversial and emotional matters. "Happy speech" is not likely to be a subject of litigation. The rules of the courthouse, nonetheless, are designed to assure fair and even-handed treatment for all. "The point of all speech protection. . . is to shield just those choices of content that in someone's eyes are misguided or even hurtful." Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston, Inc., 515 U.S. 557, 574 (1995). "The proudest boast of our free speech

jurisprudence is that we protect the freedom to express even the thought that we hate." Matal v. Tam, 137 S. Ct. 1744, 1764 (2017).

The lower courts have been dismissive of the issues raised in this Petition, in violation of well-settled law. Guidance from the Supreme Court, therefore, will be invaluable, lest the appearance gain foothold that controversial speech is unprotected in Wisconsin. The issues raised aspire toward the goal of supporting a legal framework necessary to sustain the core values of the First Amendment.

STATEMENT OF ISSUES

I. Did the circuit court deny Fetzer due process by foreclosing a relevant defense, and an entire theory of the case, without justification?

Circuit Court Answer: The court stated that Fetzer could not pursue a line of defense denying that Sandy Hook happened. In motions after verdict, however, the court stated that Fetzer misconstrued the court's intent.

Court of Appeals Answer: The Court concluded that the circuit court did not improperly limit Fetzer's defense and theory of the case.

II. Did the circuit court err by summarily holding Fetzer liable for defamation without proof of fault?

Circuit Court Answer: The court initially failed to consider negligence as a necessary element of Pozner's case. The court subsequently ruled on motions after verdict that Fetzer waived the issue, and alternatively that Fetzer was negligent as a matter of law, without notice or opportunity to respond.

Court of Appeals Answer: The Court concluded that Fetzer forfeited his right to insist upon proof of negligence by not disputing an issue never raised by Pozner, although a necessary element of his prime facie case.

III. Does speaker liability for threats and harassment perpetrated by third-parties require proof of incitement?

Circuit Court Answer: The court held that speaker liability for third-party actions should be determined solely by standard causation principles. The court did not consider Fetzer's constitutional and public policy arguments that incitement is a necessary condition of a speaker's vicarious liability for the acts of others.

Court of Appeals Answer: The Court denied Fetzer's motion on the basis that threats and harassment constituted reputational evidence and that Fetzer forfeited appeal of the issue by not objecting to such evidence.

IV. Did the circuit court err by imposing an alternative purge condition for contempt without first considering ability to fulfill the condition?

Circuit Court Answer: The court refused to consider Fetzer's ability to pay a $650,000 alternative purge condition. The court deemed ability to pay to merely be a post-judgment collection issue.

Court of Appeals Answer: The Court ruled that Fetzer forfeited the right to insist that feasibility be considered before imposing an alternative sanction by not first requesting a hearing, although the burden of proof on this issue was not Fetzer's.

CRITERIA SUPPORTING REVIEW

This case satisfies the criteria for review under Wis. Stat. § 809.62(1r). The Petition presents issues of real and significant constitutional law and public policy. The Petition demonstrates a need for the Supreme Court to establish or provide guidelines for implementing policy within its authority. A decision by the Supreme Court also will help develop and clarify the law on important issues. The questions presented are, in some cases, unresolved and a decision

will have statewide impact. Finally, the questions presented are not factual in nature but involve matters of law that are likely to recur.

The law relating to the exclusion of relevant defenses and theories of a case is undeveloped as to if, and when, a circuit court can so act. Application of the fault standard in defamation cases involving media defendants, moreover is uncertain, including as to whether negligence should be treated as a necessary element of a plaintiff's prima facie case or as an affirmative defense. The standard for holding a speaker liable for lawless actions perpetrated by third-parties has not been addressed in Wisconsin. The resolution of this issue will have statewide impact. Finally, the Supreme Court should clarify that the feasibility of an alternative purge condition for contempt should be considered before imposing such a sanction, rather than as a subsequent defense to an enforcement action.

STATEMENT OF THE CASE

I. Nature Of The Case.

Leonard Pozner ("Pozner") filed suit against Fetzer alleging that he defamed Pozner by stating that Pozner circulated a false death certificate for his son Noah Pozner. The alleged defamations occurred in the book Nobody Died at Sandy Hook; It was a FEMA Drill to

Promote Gun Control (2015). A fourth defamation allegedly occurred in a blog published by Robert David Steele.

Dr. Fetzer is a former Marine Corps officer who has widely taught and published more than 24 books on the theoretical foundations of scientific knowledge, computer science, artificial intelligence, cognitive science and evolution and mentality. Fetzer earned his Ph.D. in the history and philosophy of science. He retired as McKnight Professor at the University of Minnesota, Duluth, and he has received many honors and awards for his teaching and research. (R. 159 at 14.) . He has devoted himself to collaborative research on complex and controversial events, including the JFK assassination, the moon landing, and other events, in more than 12 books. Fetzer brings together multiple noted experts to investigate what really happened in such cases. This is the approach he took in the published work involving Sandy Hook, which the 13 collaborators, including 5 other Ph.D. professors, conclude was staged to promote a bi-partisan gun control agenda. (R.159.)

The circuit court at the outset of this case narrowly limited its focus, advising Fetzer that whether Sandy Hook occurred was beyond the scope of this action, stating unequivocally:

> Whether or not Sandy Hook ever happened or not is not relevant to this – the—the truthfulness or the accuracy of the death certificate. Now, I understand

> the – The Defendants' overall theory in believing that it never happened, and I'm not going to take the bait and let this case go down that rabbit hole. (R. 303 at 49.)

The circuit court's limited view of the matter is further indicated by the court's refusal to "read your book because it would not be appropriate for me to start educating myself about the larger controversy." (R. 231 at 90.)

Pozner subsequently moved for partial summary judgment on liability, at which time the court initially considered whether Pozner was a limited public person, which affected whether Pozner needed to prove malice. (Id. at 73-74 and 77.) During argument, Fetzer then agreed to forgo his claim that Pozner was a public figure, thereby eliminating Pozner's burden to prove malice. Fetzer's concession also resolved a pending discovery motion, that did not affect Pozner's summary judgment submissions. (R.308 at 31.)

The court proceeded to address Pozner's motion for partial summary judgment on the issue of liability. The argument and questioning focused primarily on whether Fetzer's published statements were false, a necessary element of defamation. The court concluded that the published statements were false and that Pozner was entitled to summary judgment as a matter of law on the issue of liability. (Id. at 163.)

Although Pozner had the burden of proof, he did not argue in writing or in oral argument that Fetzer acted negligently. The court, in assessing whether Pozner made a prima facie case for summary judgment, also did not consider negligence or any other fault-based standard.

After determining that summary judgment on liability was warranted, the court set a date solely to determine the issue of any damages caused by Fetzer's statements. In the interim, Pozner brought a motion to hold Fetzer in contempt for having disclosed Pozner's video deposition. (R.213.) The entire deposition video was marked as confidential, but Pozner primarily argued that the disclosure of his video image was his concern, rather than disclosure of substantive information. (R.225.)

The court found Fetzer in contempt for disclosing the video deposition. In fashioning a remedy, the court advised Pozner that he could introduce evidence of the contempt during the upcoming trial on defamation damages. (R.310 at 91.)

The matter then proceeded ostensibly on Pozner's claim for damages caused by defamation. Pozner, however, did present evidence and argument of Fetzer's contempt, as prompted by the court. (R. 313 at 85-86.) He further presented evidence and argument

that third persons had threatened him, whereupon the jury returned a verdict of $450,000. (R.259.)

After denying Fetzer's post-verdict motions, the court entered judgment against Fetzer in the verdict amount of $450,000. (App. at 24). The court also entered a permanent injunction prohibiting Fetzer from prospectively publishing defamatory statements about the disputed death certificate. (Id. at 26-27).

Several months after trial, Pozner complained that Fetzer had again disclosed his confidential deposition. Fetzer then implemented prophylactic measures to eliminate any remaining version of Pozner's deposition from his own possession. (R. 305, 306, 303 and 313.) The circuit court, nonetheless, ordered Fetzer to pay all of Pozner's attorneys' fees for the prior defamation suit, ultimately totaling $650,000. (App. at 86.) The court imposed this sanction as an alternate purge condition, but refused to consider Fetzer's ability to pay such an amount. (App. at 91-92.) The court stated that ability to pay was merely a defense to a subsequent collection action, rather than a predicate to imposition of the condition. (App. at 92.)

II. Statement Of Relevant Facts.

A. Background.

Fetzer and co-defendant Mike Palecek co-edited and published the book Nobody Died at Sandy Hook: It was a FEMA Drill to

Promote Gun Control in 2015 ("Book"). (R.159 at 1.) The Book is a collection of research from 13 contributors, including six current or retired Ph.D. professors. (Id.) Fetzer too is a distinguished professor, who has published widely on scholarly matters. (Id. at 14). The Book, in its entirety, presented research underlying and supporting the conclusion that the Sandy Hook shootings did not occur as claimed.

Fetzer and Kelley Watt co-authored Chapter 11 of the Book. (Id. at 11; R.256). Pozner alleged that three statements in the Book were defamatory in claiming that he circulated a death certificate for Noah Pozner that was not authentic. The accused statements in the Book related to a purported death certificate that Pozner provided to Ms. Watt. (R.86 at 2).

Pozner attached a death certificate to his Complaint that is different than the death certificate referenced in Chapter 11 and elsewhere in the Book. (R.86 at 1-2). Most notably, the death certificate attached to the Complaint includes official certifications, while the death certificate discussed in Chapter 11 of the Book includes no certifications. (Id. at 2-3). Fetzer had never previously seen the death certificate attached to the Complaint. (Id. at 2).

B. Summary Judgment.

The court declared at the outset of this case that Fetzer could not defend his statements about the death certificate in the broader context of the research regarding Sandy Hook. (R.303 at 48-49).

The parties subsequently filed cross-motions for summary judgment. (R.82 and 86). In support of his motion for summary judgment, Fetzer submitted two additional versions of the purported death certificate obtained from the Town Clerk of Newton and from the State of Connecticut, all of which differed from one another, as well as from the death certificate at issue in Chapter 11 of the Book. (See R.83 and 158).

Fetzer presented evidence that the death certificate in the Book was materially different than the version attached to Pozner's Complaint. (R.86). The evidence, in fact, was undisputed that the death certificate in the Book is different than any of the other versions offered into evidence by both parties, all of which were therefore truly irrelevant.

Pozner further offered into evidence at the hearing on summary judgment an additional fifth version of the death certificate. The court received into evidence all of the different versions of the death certificate at the conclusion of the hearing, before ruling on summary judgment. (R.308 at 150 and R.182-92).

At the hearing, Fetzer described the undisputed differences between the various versions of the death certificate, including that the death certificate about which he wrote was not certified. (R.308 at 48, 50-51 and 119-147). By contrast, he made no statements in the Book about any of the other death certificates.

The court acknowledged as undisputed that the multiple versions of the death certificate were all different, including the uncertified death certificate from the Book. (Id. at 154.) The court, nonetheless, concluded that Fetzer's statements in Chapter 11 of the Book were false and defamatory, despite undisputed differences. Without explanation, the court stated that Pozner's explanation for the different variations of death certificate were "plausible" and "reasonable." (Id. at 163). The court did not expressly conclude, however, that the death certificate in Chapter 11 of the Book was authenticate despite lacking certification; nor did the court address reasonable inferences to be drawn from the evidence in favor of Fetzer.

C. Damages Determination.

Pozner testified relatively briefly at the trial of damages. He first testified that he was diagnosed with PTSD after the death of his son. (Id. at 37.) He also testified that his condition began to improve thereafter, but that disturbing and threatening harassment began

"when I [Pozner] started posting photos of Noah on his – on my social media page." (Id. at 52.) Pozner testified that harassment probably began before publication of Fetzer's statements. (Id. at 53.)

Pozner, nonetheless, attributed the threats to Fetzer's statements. In particular, Pozner received vile and disturbing voice messages from a woman named Lucy Richards that were dramatically played for the jury. (Id. at 42.)

Pozner's medical expert, Dr. Roy Lubit, also emphasized third-party threats in his testimony. Dr. Lubit testified as an expert in PTSD. (See R.248.) He opined that Pozner continues to suffer from PTSD, based on the doctor's telephone interview of Pozner. (Id. at 110.) Dr. Lubit never met Pozner, and he did not review any medical records in forming his opinions. (Id. at 61 and 63.)

Dr. Lubit testified repeatedly about the effect of third-party threats, including by Ms. Richards. "He [Pozner] is very uncomfortable going out because he has been threatened. There was a woman who threatened his life." (Id. at 31-32.) Describing Pozner as having suffered a second injury, after the original reported death of his son, Dr. Lubit returned to the issue of third-party threats. (Id. at 36.) Further, Dr. Lubit noted that "Well there was a woman who threatened his life and went to jail." (Id. at 55.)

Dr. Lubit likened Pozner's condition to having suffered a second PTSD event. He acknowledged that Fetzer's statements by themselves would not satisfy one of the criteria for diagnosing PTSD, which is exposure to death, threatened death, actual or threatened serious injury or actual or threatened sexual violence. (Id. at 70-72.) Dr. Lubit testified, however, that "having one's life threatened I think would certainly meet the diagnostic criteria for PTSD," referring again to Lucy Richards. (Id. at 72.) Dr. Lubit went on to state that "we have someone who is recovering, who then went downhill because of the stress and the threat he has experienced himself and concern for his family members' safety." (Id. at 76.)

Dr. Lubit admitted that he could not recall any case where something just appearing on the internet led to PTSD, but "the actions that Dr. Fetzer took led to various events, including a threat to kill him, harassment, etc." (Id. at 91.)

Dr. Lubit repeatedly returned to the Lucy Richards threat as undergirding his opinions. Thus, when summarizing his opinions, Dr. Lubit stated that "he [Pozner] was also threated by those actions that now there was a death threat which is sufficient to cause PTSD de novo, from scratch." (Id. at 103.) Dr. Lubit acknowledged that the death of a son at Sandy Hook would constitute a PTSD stressor, but

"the second stressor was people harassing him and – to the point of someone threatening his life." (Id. at 111.)

III. Court Of Appeals Decision

The Court of Appeals affirmed the circuit court on all issues, including those raised by this Petition. In particular the Court deemed the circuit court's limitation on discovery to not foreclose Fetzer's theory of defense. (App. at 15.) The Court also noted that Fetzer "argued" his theory but this was not treated by the circuit court as evidentiary. The Court did not otherwise disagree that foreclosing Fetzer from challenging the Sandy Hook occurrence would have denied due process.

The Court of Appeals also concluded that Fetzer waived any requirement of fault as to defamation claims against media defendants. (App. at 27.) The Court reasoned that Fetzer did not affirmatively dispute negligence, which Pozner did not first identify as an element of his prima facie case. The Court also concluded that Fetzer had not placed in issue his status as a member of the media, although the record is undisputed of his status. (App. at 28.)

The Court of Appeals deemed evidence of incitement as unnecessary because third party threats and harassment constituted reputational harm. (App. at 41.) The Court also concluded that Fetzer waived the issue by failing to object to such evidence and/or to request

an appropriate instruction. (App. at 42.) The Court of Appeals did not address Fetzer's public policy arguments relating to speaker liability for third-party lawlessness.

Finally, the Court of Appeals did not substantively address whether Fetzer's ability to pay a $650,000 forfeiture should have been considered by the circuit court prior to imposing the sanction. (App. at 53.) The Court reasoned that Fetzer was obliged to request a hearing in order to disprove his ability to pay, rather than requiring affirmative proof of feasibility by Pozner. (App. at 54.)

ARGUMENT

A. FORECLOSING A RELEVANT DEFENSE, AND AN ENTIRE THEORY OF THE CASE, VIOLATES DUE PROCESS.

1. The Circuit Court Foreclosed Fetzer's Theory of Defense.

The circuit court foreclosed Fetzer from defending on the basis of research establishing that Sandy Hook was a cover intended to promote gun control. The thesis and the substance of this research bore directly on the truth or falsity of Fetzer's alleged defamatory statements. The court, however, advised the parties that such a defense was "a rabbit hole we won't go down." (R. 303 at 49.) The court, moreover, at trial, cautioned counsel as well not to go down the foreclosed road. (R. 311 at 194-96.)

The circuit court erroneously foreclosed Fetzer from pursuing his theory of the case. The alleged defamation in this case arose in the context of the broader research by Fetzer, and others, that Sandy Hook did not happen as reported. The specific accused statements occurred in three chapters in the Book Nobody Died at Sandy Hook and a separate blog. The statements constituted a small part of the evidence argued in support of the faux Sandy Hook narrative. Based on Pozner's narrow Complaint, however, the court advised Fetzer that he could not support his defense by reference to the broader body of evidence.

The 13 contributors to the book concluded, with extensive and detailed proof, that the school had been closed by 2008; that there were no students present; and that Sandy Hook was a 2-day FEMA drill presented to the public as a mass murder to promote a gun control agenda. The Book even included the manual for the exercise, included as Appendix A in the book. The court's directive to Fetzer, however, foreclosed such evidence, which included the FBI's Consolidated Crime Report for 2012, showing the number of murders or non-negligent homicides in Newtown, Connecticut, the site of Sandy Hook, to be zero. This is significant because if no murders occurred in Newtown during 2012, then no mass murder occurred at Sandy Hook in December 2012. (The FEMA manual and the FBI

Crime Report were included in Fetzer's answer to the Complaint, and thus known to the court.)

The circuit court committed error that requires reversal of the court's final judgment. Fetzer's theory of defense was obviously relevant because if Sandy Hook did not happen as reported, then death certificates associated with that event also must necessarily be false. The evidence, and the theory of the defense, clearly make more likely that Fetzer's accused statements were true.

In State v. C.L.K., 385 Wis. 2d 418, 430, 922 N.W. 2d 807 (2019), the Wisconsin Supreme Court recognized that due process includes the right to present a complete defense before being deprived of life, liberty or property. An essential attribute of due process, moreover, is the "mutuality of the parties' opportunity to present their cases." Id. at 434. This includes the right to advance a party's theory of the case as part of "an intentionally-ordered construct designed to produce an intelligible and persuasive account… combining to produce depth, emphasis, cohesion, and– ultimately – understanding." Id. at 437. Presenting one's case only according to the other party's theory of the case is an error fundamentally affecting the adversarial nature of the proceeding. This lack of mutuality makes the proceeding "less like an adversarial contest between the parties and more like a continental-European inquisitorial proceeding." Id.

The foreclosure of Fetzer's Sandy Hook defense violated his right to due process and cannot be cured without reversing the circuit court and remanding for further proceedings. The error in this case constituted a structural error. A structural error is not discrete. It is something that affects the entire proceeding or affects it in an unquantifiable way. C.L.K, 2019 WI 14 at ¶ 11. Structural errors are so integral to a proceeding that they cannot be reviewed for harmlessness. "The whole point of the structural error doctrine is that some errors so undermine the proceedings' integrity that we cannot know what we do not know." Id. at ¶ 32.

The circuit court's error in this case left Pozner as the sole expositor of his theory of the case. With so much of the adversarial nature of the case excised, there is no adequate context within which to conduct a quantitative analysis of the effect of the court's error. Fetzer's alleged defamation in this case occurred in the context of a broader theory challenging the reported Sandy Hook narrative, consisting of disparate sources of evidence that mutually reinforce the ultimate conclusion, and which includes the falsity of resulting death certificates.

Efforts to now walk back the foreclosure of Fetzer's defense are belied by the circuit court's clear and unambiguous statement, considered in full:

> Whether or not Sandy Hook ever happened or not is not relevant to this–the–the truthfulness or the accuracy of the death certificate. Now, I understand the – The Defendants' overall theory in believing that it never happened, and I'm not going to take the bait and let this case go down that rabbit hole. (R. 303 at 49.)

The circuit court's limited view of the matter is further indicated by the court's refusal to "read your book because it would not be appropriate for me to start educating myself about the larger controversy." (R. 231 at 90.)

2. There Has Been No Adjudication of the Challenge to the Sandy Hook Narrative.

Despite foreclosing proof of Fetzer's defense, the circuit court and the Court of Appeals treat the defense as lacking merit as a matter of law. Without any reference to the record in this case, or opinion after trial on the question "Did anyone die at Sandy Hook," the Court of Appeals for the first time initiated the claim that adults and children died at Sandy Hook. In fact, however, no adjudication of whether Sandy Hook occurred as reported has ever occurred, in this case or any other.

The circuit court, nonetheless, declared that no one could believe that Sandy Hook did not occur as reported. (App. at 67.) The court's surmise, however, is not a proper basis for decision, nor otherwise does it make Fetzer's evidence incredible as a matter of law,

meaning "such as being in conflict with the uniform course of nature or with fully established or conceded facts." State v. King, 187 Wis. 2d 548, 562, 523 N.W. 2d 159 (Ct. App. 1994). The court did not even read Fetzer's Book before dismissing it, nor did the court consider that an uncertified death certificate could be deemed inauthentic by a jury.

The Court of Appeals makes similar unsupported statements of fact. Although res judicata is not specifically mentioned, the Court cites two cases implying that whether nobody died at Sandy Hook has been finally decided in other legal actions. (Alex Jones, et al. v. Haslin, No. 03-20-00008CV(2020), and Soto v. Bushmaster, 202 A.2d 262 (2019).) No attempt to prove that nobody died at Sandy Hook was made in either case, and quotes that people died at Sandy Hook from those cases constitute non-binding dicta as to the present case.

Each case brought before a court needs to be tried on the basis of its independent merits. Here, Fetzer was able to collate substantial proof in the Sandy Hook Book. Other evidence he would have presented included confirmation given to Paul Preston by Obama administration officials in the Department of Education that no children had been harmed at Sandy Hook during a drill to promote gun control.

Other potential evidence included a critique of the "official report" on Sandy Hook by Danbury State Attorney Stephen Sedensky, which fails to establish a causal nexus to connect the alleged Sandy Hook shooter, Adam Lanza, to the death of his mother or the alleged victims at Sandy Hook. This critique is included in Chapter 11 of the Sandy Hook book, co-authored by Fetzer and Kelley Watt, in which one of the alleged defamations is found.

The Supreme Court should consider this case from the same perspective as if a claim has been summarily dismissed, because that is effectively what has happened. Foreclosing Fetzer from pursuing his line of defense without an opportunity to be meaningfully heard violates the fundamental requisite of due process. Neylan v. Vorwald, 124 Wis. 2d 85, 95, 368 N.W. 2d 648 (1985).

B. COMPLAINTS THAT IMPLICATE SPEECH SHOULD BE LIBERALLY CONSTRUED TO REQUIRE CONSTITUTIONALLY MANDATED PROOF OF NEGLIGENCE.

1. First Amendment Precludes Liability Without Fault.

The circuit court granted Pozner's motion for partial summary judgment, determining that Fetzer was liable for defamation. In so ruling, the court first discussed whether Pozner was a public figure. Pozner's status as a public or private figure determined whether malice must be proved. During argument before the court, Fetzer

appearing pro se conceded that Pozner was not a public figure, which thereby resolved the malice question, as well as a pending discovery motion.

The circuit court, nonetheless, erred by granting Pozner's motion for partial summary judgment without considering whether Fetzer was negligent. The court found liability without fault based on the concession that Pozner was a private-figure plaintiff. The court's conclusion constituted a manifest error of law by failing to recognize and apply controlling precedent that requires proof of negligence as an essential element of Pozner's claim, independent of malice.

The Wisconsin Supreme Court, in Denny v. Mertz, 106 Wis. 2d 636, 318 N.W. 2d 141 (1982), recognized the constitutional requirement, established in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), that liability for defamation requires proof of fault by a media defendant. The Court held that a private individual must prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. Id. at 656.

Proof of negligence was an essential element of Pozner's case pursuant to Denny. It was not an affirmative defense, as the lower courts imply. Instead, it is the plaintiff's burden to prove in a defamation suit that a defendant's conduct satisfies a certain standard of fault; this burden does not create an affirmative defense that must

be plead. Cf. Snead v. Redland Aggregates, Ltd., 998 F. 2d. 1325, 1329 n. 5 (5th Cir. 1993). As the party seeking summary judgment, therefore, Pozner had the burden to establish the absence of a disputed issue as to all material facts, including negligence. Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W. 2d 473 (1980). He did not do so.

Fetzer, moreover, undeniably did not abandon his claim to be a journalist or member of the media. Pozner's own counsel emphatically acknowledged this fact at the Final Pretrial Conference.(R.309 at 24-25.) Pozner's pleadings also establish Fetzer's media or journalist status. In his Complaint, Pozner alleges that Fetzer is an editor of the book "Nobody Died at Sandy Hook." (R.1 at ¶ 3.) Pozner also alleges that Fetzer is a co-author of Chapter 11 in the referenced Book. (Id.) Finally, Pozner also alleged that Fetzer has made false claims against Pozner on one or more blog posts. (Id., ¶ 18). In addition to his Complaint, Pozner submitted evidence and argument supporting Fetzer's media or journalist credentials. (See R.102 at 17-18 and 20-21; R.172 at 3.) Fetzer also submitted a brief to the circuit court detailing his background and credentials as an investigative reporter. (R. 215 at 1-7.) Even the circuit court referred to Fetzer as a journalist. (R.310 at 87.)

The circuit court, therefore, granted summary judgment as a result of a manifest error of law, i.e., without considering fault as a

necessary element of Pozner's case. The court has effectively prosecuted a book and its editor in violation of well-settled law. Roth v. United States, 354 U.S. 470, 487 (1937); NAACP v. Button, 371 U.S. 415 (1963), From the Palmer Raids to the Patriot Act, a History of the Fight for Free Speech in America, Christopher M. Finan, Beacon Press, Boston, MA, 02108-2892, (May 1, 2008) ISBN 0807044296.

Summary judgment is only appropriate if a party is entitled to judgment in his favor as a matter of law. Wis. Stat. § 802.08(2). Here, Pozner was not entitled to summary judgment on the issue of liability without proof of fault, i.e., negligence. Pozner, in fact, did not even move for summary judgment on the issue of negligence, or otherwise raise or argue the issue. The court and the parties, however, including Fetzer pro se, overlooked the prima facie requirements of Denny at the time of summary judgment consideration.

The circuit court further erred by subsequently refusing to vacate summary judgment on liability after the issue was raised. The court initially reasoned that Fetzer failed to establish that he is a media defendant. The record is clear, however, from Pozner's first pleading and thereafter, that Fetzer qualifies as media. After all, the claimed defamation in this case occurred in the context of an entire book about Sandy Hook, as well as in a public blog.

The circuit court also wrongly concluded that Fetzer implicitly agreed to be treated as a private-person-defendant when he stipulated that Pozner was not a public figure. Fetzer's concession to treat Pozner as a private-person-plaintiff did not include any discussion, notice or agreement that Pozner would then not have to prove negligence.

The circuit court also mistakenly conflated malice and negligence. They are distinct concepts with unique elements of proof. Negligence requires proof that the defendant failed to exercise reasonable care. Grams, 97 Wis.2d at 656. By contrast, malice is not determined by whether a reasonably prudent person would have published the challenged statements in suit. Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 525, 542, 563 N.W. 2d 472 (1997). Even failure to investigate adequately does not constitute actual malice. Id.

Finally, the circuit court improperly attempted to cure its prior oversight by purporting to rule that Fetzer was negligent as a matter of law. The negligence issue was never argued by Pozner, and the issue was not briefed, argued or intimated at the prior summary judgment hearing. In these circumstances, the court, in the interest of fairness and due process, should have provided Fetzer notice and an opportunity to be heard. Due process requires notice reasonably

calculated to afford an opportunity to be heard and in a meaningful manner. See State ex rel. Schatz v. McCaughtry, 256 Wis. 2d 770, 777-78, 650 N.W. 2d 67 (Ct. App. 2002).

The Court of Appeals, for its part, concluded that Fetzer waived the circuit court's failure to consider the issue of negligence by not raising the issue as an affirmative defense. The Denny decision, however, holds that negligence is a necessary element of the Plaintiff's case-in-chief. This element of proof is not an affirmative defense as to which Fetzer had the burden of proof. His media status, nonetheless, was fully known and conceded.

The Court of Appeals also incorrectly reasoned that Fetzer waived the right to appellate review of the Denny issue by not raising the issue in the circuit court. The Court of Appeals relied on decisions where an appeal issue was never raised in the circuit court. This is not such a case, however, as Fetzer did raise the issue in the circuit court. (App. at 62.)

2. Negligence Is An Essential Element of a Speech Case Involving a Media Defendant, Proof of Which Circuit Courts Should Liberally Require When Considering Summary Judgment.

The lower courts are apparently uncertain how to handle the Denny negligence requirement as a necessary element of a plaintiff's prima facie case involving speech. As in the present case, courts are

misconstruing Denny as establishing negligence merely as an affirmative defense in cases involving media defendants. As a result, when conducting a summary judgment analysis, courts are not preemptively treating negligence as an element of a plaintiff's case-in- chief. The nuance was compounded in this case because Fetzer appeared at that time pro se.

Circuit courts do have an independent obligation to identify issues when considering a summary judgment motion. "The court must initially examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented." Grams, 97 Wis. 2d at 338. In such an examination, the pleadings are to be given a reasonable and liberal construction. Capt. Soma Boat Line, Inc. v. City of Wisconsin Dells, 56 Wis. 2d 838, 842, 203 N.W. 2d 369 (1973). How to apply this otherwise standard procedure to the negligence requirement imposed on plaintiffs in speech cases is being misconstrued in the lower courts.

The basis for requiring negligence as an element of a plaintiff's case-in-chief, under Denny, derives from the First Amendment. The requirement should not be casually dismissed. The Supreme Court, therefore, should clarify for circuit courts that complaints implicating speech be liberally construed to require compliance with the Gertz prohibition on liability without fault. Such a rule is all the more

important, moreover, in cases involving pro se defendants. Circuit courts have an obligation to give a liberal construction to a pro se litigant's submissions. Cf. State ex rel. Harris v. Smith, 220 Wis. 2d 158, 164, 582 N.W. 2d 131 (Ct. App. 1998).

The circuit court should have identified the negligence issue in this case from Pozner's Complaint, as well as other pleadings. The court then should have required undisputed proof of negligence as a predicate for summary judgment. Because Pozner did not address this issue in his motion, the court ultimately should have denied summary judgment in his favor. As the non-movant, moreover, the court should have liberally construed Fetzer's submissions in opposition to summary judgment, drawing all reasonable inferences in his favor, including the opinions of 2 forensic document examiners offered into evidence by Fetzer, which the court dismissed merely "as someone else's opinion." (R. 231 at 163.) Strasser v. Transtech Mobile Fleet Serv., Inc., 2000 WI 87, ¶56, 236 Wis. 2d 435, 613 N.W. 2d 142. Here, the circuit court and the Court of Appeals both erred by drawing inferences in favor of Pozner, the movant.

C. THE SUPREME COURT SHOULD RECOGNIZE A HEIGHTENED STANDARD FOR SPEAKER LIABILITY FOR THREATS AND HARASSMENT PERPETRATED BY THIRD-PARTIES.

1. The First Amendment Requires Proof of Incitement.

The United States Supreme Court has recognized that incitement by speech may be actionable, but more than a public audience is required. In Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969, the Supreme Court decided the seminal incitement case. The Brandenburg test has three key elements: (1) intent (embodied in the requirement that such speech should be directed to inciting or producing lawless action); (2) imminence (embodied in the phrase "imminent lawless action"); and (3) likelihood (embodied in the phrase "is likely to incite or produce such action"). Here, Fetzer's statements undeniably do not meet the standard for incitement.

An intent requirement is necessary pursuant to Brandenburg to prevent incitement from imposing strict liability on speakers. Strict liability offenses chill speech. Including an intent component in Brandenburg, therefore, thus protects against "the accidental inciter – the speaker whose language triggers a riot, but who had no intent to incite such lawlessness." Giles, Susan M., "Brandenburg v. State of Ohio: An 'Accidental' Too Easy") and "Incomplete Landmark Case,"

38 Cap. U. L. Rev. 517, 523 (2010). The Seventh Circuit recognized this principle in American Booksellers Ass'n, Inc. v. Hudnut, 771 F. 2d 323, 333 (7th Cir. 1985):

> A law awarding damages for assaults caused by speech also has the power to muzzle the press, and again courts would place careful limits on the scope of the right. Certainly no damages could be awarded unless the harm flowed directly from the speech and there was an element of intent on the part of the speaker, as in Sullivan and Brandenburg.

2. Public Policy Compels a Heightened Standard of Liability for Speech That allegedly Causes Third Party Lawlessness.

Six public policy factors bear upon ultimate liability, even in the face of proven or assumed wrongdoing, including: (1) the injury is too remote from the wrongful act; (2) the recovery is wholly out of proportion to the culpability of the tortfeasor; (3) the harm caused is highly extraordinary given the wrongful act; (4) recovery would place too unreasonable a burden on the tortfeasor; (5) recovery would be too likely to open the way to fraudulent claims; and (6) recovery would enter into a field that has no sensible or just stopping point. Hornbeck v. Archdiocese of Milwaukee, 2008 WI 98, ¶ 49, 313 Wis. 2d 294, 752 N.W. 2d 862. A court may refuse to impose liability on the basis of any of these factors. Id. The better practice, moreover, is to submit a case to the jury before determining whether any of these

public policy considerations preclude liability. Alvarado v. Sersh, 2003 WI 55, ¶ 18, 262 Wis. 2d 74, 662 N.W. 2d 350.

The public policy issue in this case concerns the appropriate standard to apply when considering liability for (1) speech that (2) a third party allegedly read, and (3) who then allegedly committed intentional acts of lawlessness.

To hold a speaker liable for the intervening or superseding intentional acts of a third party simply because the third party read or heard a speaker's statements would enter into a field that has no sensible or just stopping point; would place too unreasonable a burden on the speaker; would be wholly out of proportion to the culpability of the speaker; and would be too remote from the speaker's own actions. Without such a standard, even a reporter for NPR, or CNN, or FOX News, is constantly at risk of liability whenever a third party acts intentionally to harm someone after hearing or reading a reported story.

Without a heightened standard for incitement, the chain of causation between speech without action and third-party intentional tortfeasors becomes too remote to impose liability. Such remoteness goes to the question of proximate cause. "When a court precludes liability based on public policy factors, it is essentially concluding that despite the existence of cause-in-fact, the cause of the plaintiff's

injuries is not legally sufficient to allow recovery." Fandrey ex rel v. American Family Mut. Ins. Co., 2004 WI 62, ¶ 13, 272 Wis. 2d 46, 680 N.W. 2d 345.

An intervening or superseding intentional or criminal act typically precludes liability for those more remote in the chain of causation. Intervening intentional or criminal acts do not always preclude liability, such as when an actor at the time of his wrongful act realized or should have realized the likelihood that a situation might be created that a third person might avail himself to commit a tort or crime. Tobias v. County of Racine, 179 Wis. 2d 155, 162-3, 507 N.W. 2d 340 (Ct. App. 1993). The Tobias standard, however, is not easily applicable to a speech case, which does not create a situation that a third person might avail himself of in order to commit a tort or crime. Determining a standard applicable to speech without conduct, therefore, is an important and unresolved issue in Wisconsin.

The United States Supreme Court's Brandenburg standard provides a tested, workable and accepted test for identifying culpable speech that incites lawlessness. It is not a strict liability standard but allows for possible speaker liability in cases of active, intentional and imminent incitement, not present here.

The Court of Appeals avoided the public policy issue raised by Fetzer on grounds that he waived his concerns by not objecting to

evidence of third party actions and/or requesting an appropriate instruction. The issue, however, is not one of admissibility, jury instruction, or sufficiency of the evidence. The analysis of public policy assumes that all of the elements of a claim are proved. Sufficiency of the evidence, therefore, is not at issue from a public policy perspective, nor cause-in-fact. Contrary to the Court of Appeals analysis, however, legal proximate cause should be considered even for alleged reputational damages.

The Supreme Court's public policy analysis is separate from determining liability under the principles applicable to a particular cause of action. See Ladewig ex rel. Grischke v. Tremmel, 336 Wis.2d 216, 223-24, 802 N.W. 2d 511 (Ct. App. 2011). See also Nichols v. Progressive Northern Insurance Company, 308 Wis. 2d 17, 31, 746 N.W.2s 220 (2008). Thus, before determining whether public policy considerations preclude liability, "it is usually the better practice to submit the case to the jury for development of the record." Ladewig, 336 Wis. 2d at 224. In fact, issues of intervening or superseding cause cannot be effectively raised as a defense without the admission of the evidence giving rise to the public policy concern.

Thus, the Supreme Court should now address the standard of liability for speech that allegedly motivates lawlessness by third parties. The issue is ripe.

D. THE SUPREME COURT SHOULD CLARIFY THAT THE FEASIBILITY OF AN ALTERNATIVE PURGE CONDITION FOR CONTEMPT SHOULD BE CONSIDERED BEFORE BEING IMPOSED.

The circuit court ordered Fetzer to pay $650,000 as an alternative purge condition for contempt, without considering his ability to pay such an amount. The court reasoned that Fetzer could later defend against a collection action on the basis of his inability to pay. The feasibility of an alternative purge condition, however, must be determined in the first instance before such a condition is imposed.

Chapter 785 allows courts to impose an alternative purge condition, but that is qualified authority. Frisch v. Henrichs, 304 Wis. 2d 1, 31, 736 N.W. 2d 85 (2007). When a court decides to impose a purge condition outside of compliance with the original court order, several requirements must be met. "The purge condition should serve remedial aims; the contemnor should be able to fulfill the proposed purge; and the condition should be reasonably related to the cause or nature of the contempt." Frisch at 32, quoting Larson v. Larson, 165 Wis. 2d 679, 685, 478 N.W. 2d 18 (1992). Benn v. Benn, 230 Wis. 2d. 301, 311, 602 N.W. 2d. 65 (Ct. App. 1999); State ex rel V.G.H. v. C.A.B., 163 Wis. 2d. 833, 845, 472 N.W. 2d. 839 (Ct. App. 1991).

In this case, the award of attorneys' fees for the underlying defamation action does not satisfy the requirements for an alternative

purge condition. Fetzer disputes that the $650,000 sanction in this case satisfies any of the requirements of an appropriate alternative purge condition, but for purposes of this Petition the Supreme Court is asked to consider whether feasibility of a purge condition should be presumed, until the contemnor is later brought back into court for enforcement, or whether feasibility should be considered before a sanction is imposed.

The circuit court refused to consider Fetzer's ability to pay $650,000 as an alternative purge condition. Counsel for Fetzer inquired whether the court was making such a finding, to which the court replied that if Fetzer subsequently cannot pay the amount ordered, "then if he doesn't pay, I would have a hearing on his ability to pay. But that assumes that the creditor is not able to discharge or collect on the debt by other means." (R. 428 at 51.) The court went on to state that "if what you're saying is that, well, when am I going to get my time and date to show he's unable to pay? My response is not before the judgment is entered, but subsequently, depending on the creditor's next step in its attempt to collect said judgment." (Id.)

The Court of Appeals incorrectly concluded that Fetzer forfeited the right to a hearing on ability to pay by not initially requesting an evidentiary hearing. Fetzer does not claim in the first instance that the circuit court erred by refusing to have a hearing. The

court erred by refusing to consider, at all, the ability to pay as an issue before imposing the sanction. Counsel for Fetzer raised the issue in the circuit court as a matter that the court needed to address before imposing such an impossible sanction -- and one on which Fetzer did not have the burden of proof. (R. 428 at 50.) Because the record before the court did not otherwise support Fetzer's ability to pay, the court should not have imposed the sanction. The feasibility requirement for such a sanction was not established.

The circuit court's misunderstanding of the requirements to be met before imposing an alternative purge condition should be clarified by the Supreme Court, including as to allocation of the burden of proof. The Court should also clarify that the ability to fulfill an alternative purge condition is not presumed.

CONCLUSION

Fetzer does not seek preferential treatment by the issues raised in this Petition. Instead, he seeks merely to receive consideration in court that other litigants, including defendants, are accorded. In this case, Fetzer's arguments, related to the issues raised by his Petition, have been treated dismissively. The circuit court and the Court of Appeals drew all inferences against Fetzer, including inferences from the record on summary judgment, and they misallocated the burden of proof on critical issues. Both the circuit court and Court of Appeals

also steadfastly refused to consider Fetzer's public policy arguments relating to speaker liability for third-party lawlessness. As a result, the issues raised by this Petition should be resolved, and/or clarified by the Supreme Court.

For all the above reasons, the Supreme court should grant this Petition for Review.

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CERTIFICATE OF SERVICE

I certify that on May 7, 2021, a true and correct copy of Petition for Review and Appendix were mailed to:

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FORM & LENGTH CERTIFICATION

I hereby certify that this Petition for Review and Appendix conforms to the rules contained in Wis. Stat. §§809.62(4) and 809.19(8)(b) and (d), for a Petition produced with a proportional serif font. The length of this Petition is 8,000 words.

Richard L. Bolton, SBN 1001252

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that on May 7, 2021, I have submitted an electronic copy of the Petition for Review, excluding the Appendix, which complies with the requirements of s. 809.19(12)(f). I further certify that the electronic Petition is identical in content and format to the printed form of the Petition, excluding the Appendix, filed as of this date. A copy of this certificate has been served with the paper copies of this Petition for Review and Appendix filed with the court and served on all opposing parties.

Richard L. Bolton, SBN 1001252

CERTIFICATION AS TO APPENDIX

I hereby certify that on May 7, 2021, I filed with this Petition for Review, either as a separate document or as a part of this brief, an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(13)(f)

I hereby certify that, on May 7, 2021, I submitted an electronic copy of the appendix, which complies with the requirements of s. 809.19(13)(f). I further certify that the electronic appendix is identical in content to the printed form of the appendix served and filed on May 7, 2021. A copy of this certificate has been filed with the Court on May 7, 2021.

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