STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

LEONARD POZNER,

Plaintiff-Respondent-Cross-Appellant,

v.

JAMES FETZER,

Defendant-Appellant-Cross-Respondent.

APPEAL NO. 2020AP121
Dane County Case No. 18CV3122
Hon. Frank D. Remington, presiding

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STATEMENT OF ISSUES

1. Did the Circuit Court err by foreclosing Dr. Fetzer's theory of defense?

Answered below: The Circuit Court did not foreclose Dr. Fetzer's theory of defense.

2. Did the Circuit Court err by granting summary judgment to Mr. Pozner on liability?

Answered below: The Circuit Court appropriately granted summary judgment to Mr. Pozner.

3. Did the Circuit Court erroneously fail to consider Dr. Fetzer's negligence at summary judgment?

Answered below: The Circuit Court appropriately granted summary judgment to Mr.

Pozner without making a specific finding regarding Dr. Fetzer's fault.

4. Did the Circuit Court err by allowing discussion of Dr. Fetzer's contempt at trial?

Answered below: The Circuit Court appropriately admitted discussion of Dr. Fetzer's contempt at trial.

5. Did the jury err by finding Dr. Fetzer liable without proof of incitement?

Answered below: The jury did not hold Dr. Fetzer liable for third-party lawlessness.

STATEMENT ON ORAL ARGUMENT

Mr. Pozner does not request oral argument because the briefs will fully develop and address the issues presented by Dr. Fetzer's appeal.

STATEMENT ON PUBLICATION

Mr. Pozner requests that the Court publish its decision because this case presents issues likely to be of continuing public interest and reviewing courts, which rely on appellate decisions for precedent and guidance.

STATEMENT OF CASE

Plaintiff-Respondent Leonard Pozner's son, N.P., was murdered at Sandy Hook Elementary School on December 14, 2012.

A few years later, Defendant-Appellant Dr. Fetzer published a book entitled, "Nobody Died at Sandy Hook: It was a FEMA Drill to Promote Gun Control." (R.94–196.) Dr. Fetzer asserted (among other things) that Mr. Pozner and the other families whose children were murdered at Sandy Hook

Elementary School were crisis actors. (*See, e.g., id.*) Dr. Fetzer also asserted that Mr. Pozner circulated a fake, forged, and fabricated death certificate for his deceased son, N.P. (R.99:pgs.25, 42.)

Mr. Pozner brought suit against Dr. Fetzer for defamation.[1] R.1. Mr. Pozner limited his suit to four statements he alleged were defamatory:

- "[N.P]'s death certificate is a fake, which we have proven on a dozen or more grounds."
- "[Mr. Pozner] sent her a death certificate, which turned out to be a fabrication."
- "As many Sandy Hook researches are aware, the very document [Mr.] Pozner circulated in 2014, with its inconsistent tones, fonts, and clear

[1] The Complaint originally named Mike Palecek and Wrongs Without Wremedies, LLC as Dr. Fetzer's co-defendants. R.1. Mr. Palecek and Wrongs Without Wremedies ultimately reached settlements, dismissing them from the action. (R.130; 233.)

digital manipulation, was clearly a forgery."

- "[N.P's death certificate] turned out to be a fabrication, with the bottom half of a real death certificate and the top half a fake, with no file number and the wrong estimated time of death at 11 AM, when 'officially' the shooting took place between 9:35-9:40 that morning."

(R.1:¶¶ 17–18; *see also* R.252.) Dr. Fetzer published these statements in his book and in a subsequent blog post.

STANDARD OF REVIEW

1. The Court of Appeals reviews the issue of whether an error is structural de novo; "'Whether a particular error is structural and therefore not subject to a harmless error review is a question of law for our independent review.'" *In re S.M.H.*, 2019 WI 14, ¶ 12, 385 Wis. 2d 418, 922 N.W.2d 807 (quoting

State v. Nelson, 2014 WI 70, ¶ 18, 355 Wis. 2d 722, 849 N.W.2d 317).

2. The Court of Appeals reviews a grant of summary judgment "independently, using the same methodology as the circuit court." *In re Estate of Oaks*, 2020 WI App 29, ¶ 11, 944 N.W.2d 611. The Court examines "the moving party's submissions to determine whether they establish a prima facie case for summary judgment." *Id.* "If the moving party has made a prima facie showing, we examine the opposing party's affidavits to determine whether a genuine issue exists as to any material fact." *Id.* "Ultimately, summary judgment is appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Wis. Stat. § 802.08(2)).

3. This Court only will grant Dr. Fetzer a new trial if in context of the entire trial an alleged error impacted his "substantial rights." Wis. Stat. § 805.18(2). This requires a showing of actual prejudice. *Bailey v. Bach*, 257 Wis. 604, 611, 44 N.W.2d 631, 635 (1950). Even if the Circuit Court erred by allowing tainted evidence at trial, this Court will not grant a new trial if the error is harmless. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768.

4. "Whether public policy precludes liability in a given case is a matter of law, which is decided" by the Court of Appeals "de novo." *Stephenson v.*

Universal Metrics, Inc., 2002 WI 30, ¶ 41, 241 Wis. 2d 171, 641 N.W.2d 158.

ARGUMENT

I. Summary of Argument

1. The Circuit Court did not issue an order that restricted Dr. Fetzer from arguing his defense. Moreover, the structural error doctrine does not apply in civil cases.

2. The Circuit Court appropriately granted summary judgment to Mr. Pozner. No material dispute of fact exists as to the statements' falsity. No evidence in the record supports Dr. Fetzer's assertion that summary judgment is not appropriate.

3. The Circuit Court did not err by granting summary judgment to Mr. Pozner

without considering Dr. Fetzer's fault as a media defendant. Mr. Pozner introduced evidence on each element of defamation, including evidence demonstrates fault. Dr. Fetzer waived this element in exchange for not producing documents. Finally, Dr. Fetzer did not raise this issue until after the Circuit Court entered summary judgment and no evidence exists to support a finding that Dr. Fetzer is a media defendant.

4. The Circuit Court properly admitted a statement by Mr. Pozner's counsel at trial regarding Dr. Fetzer's contempt. Even so, the statement did not actually prejudice Dr. Fetzer. Nor does the statement undermine the jury's verdict, because the record is replete with untainted evidence that supports the trial

outcome.

5. The jury did not hold Dr. Fetzer liable for third-party lawlessness without proof of incitement. Indeed, Mr. Pozner did not seek damages for vicarious liability or third-party incitement. Mr. Pozner asked the jury for compensatory damages for the emotional and reputational harm caused by Dr. Fetzer's defamatory statements. This harm does not turn on third-party lawlessness, but on harm to Mr. Pozner's reputation, and sufficient evidence of this harm exists to sustain the jury's verdict.

II. The Circuit Court did not preclude Dr. Fetzer from putting on a defense.

There are two reasons Dr. Fetzer's structural error contention lacks merit. First, the Circuit Court

did not preclude Dr. Fetzer from putting on his defense in the liability portion of the case. Second, the structural error doctrine does not apply to this civil case.

It is difficult to know exactly why Dr. Fetzer believes the Circuit Court precluded his defense, because his brief offers no citation to the record. The absence of a citation to the record is, by itself, a sufficient basis to deny Dr. Fetzer's argument. Wis. Stat. § 809.19(1)(e), requires "citations to the ... parts of the record relied on" and where a party fails to provide such a citation, "this court will refuse to consider such an argument...." *State v. Shaffer,* 96 Wis.2d 531, 546, 292 N.W.2d 370, 378 (Ct.App.1980); *see also Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, 305 Wis. 2d 658, 667, 741 N.W.2d 256, 261 ("We have

no duty to scour the record to review arguments unaccompanied by adequate record citation.").

Even if the record was searched, no order precluding Dr. Fetzer from making his spurious arguments would be found, because no such order or ruling exists. Early in the case, Mr. Pozner moved to strike Dr. Fetzer's Answer because it failed to respond to the allegations in Mr. Pozner's Complaint and instead rehashed Dr. Fetzer's theory that the Sandy Hook Elementary School shooting was a government conspiracy in which no one died. (R.15.) The Circuit Court denied Mr. Pozner's motion, thereby leaving open Dr. Fetzer's ability to argue that the Sandy Hook tragedy never occurred. (R.303:6 #2–25.)

Mr. Pozner also sought a protective order

because Dr. Fetzer's discovery requests were inconsistent with the proportionality requirements of Wis. Stat. § 804.01(2)(a) and (am). (R.29:3.) The Circuit Court heard argument on Mr. Pozner's motion. (R.303:8 #5–62 #22.) Mr. Pozner's motion was, in large part, granted, on the grounds that Dr. Fetzer's discovery requests failed to meet the proportionality requirements. (*Id.*)

But, the Circuit Court denied Mr. Pozner's motion and allowed discovery requests for information reasonable related to whether N.P. actually existed and actually died. (R.303:27 #21–24.) For example, the Circuit Court also denied Mr. Pozner's motion with respect to records of funeral expenses, noting that "if the defense theory is that this is a fraudulent death certificate because no

human existed, then in theory, possibly, if there were no expenses related to a funeral or burial, that might be consistent with their theory." (*Id.* at 31 #4–8.) Likewise, the Circuit Court required Mr. Pozner to produce a copy of N.P.'s original birth certificate, given Dr. Fetzer's theory that N.P. did not actually exist, holding "if [the birth certificate] exists, they will produce a photocopy of the original birth certificate." (*Id.* at 27 #21–22.)

None of the protective order determinations gives rise to a structural error. The Circuit Court underscored that it was "not ruling on motions in limine… [The Circuit Court is] not telling you what this trial is about." (*Id.* at 61 #23–25.) The Circuit Court likewise counseled Dr. Fetzer that he was free to conduct his own investigation and seek documents

on his own related to his theory of the case. (*Id*. at 44 #16–25.)

Dr. Fetzer received consistent direction from the Circuit Court when the court denied Dr. Fetzer's motion for DNA testing of two non-parties residing outside of Wisconsin. (*See* R.75; *see also* R.305:33 #14–36 #9.) There, the Circuit Court instructed Dr. Fetzer to "prepare your case the way you want or feel appropriate." (*Id.* at 36 #7-8.)

Indeed, despite now arguing that his defense was curtailed, Dr. Fetzer argued at nearly every hearing in this case that Sandy Hook never happened, that Mr. Pozner is an imposter, or that N.P. did not exist. (*See*, *e.g*., R.303:34 #13–35 #16; R.304:12 #16–19; R.305:17 #8–12; R.307:13 #23–15 #4; R.308:142 #7-25; R.310:45 #12–20.) Dr. Fetzer's

positions dramatically increased the complexity and cost of this litigation. To rebut the unsupported allegations, Mr. Pozner undertook two rounds of DNA testing, including one through a court-appointed expert, to establish that it was Mr. Pozner's son's deceased body that was examined by the Connecticut Chief Medical Examiner and documented in a post-mortem examination report. Mr. Pozner obtained third party discovery from the former Chief Medical Examiner who conducted N.P.'s post-mortem exam and the funeral home director that buried N.P. Dr. Fetzer questioned the medical examiner during the M.E.'s deposition, including questions relating to Dr. Fetzer's conspiracy theories that had nothing to do with N.P.'s death or post-mortem exam. The argument that the scope of Dr. Fetzer's defense

leading up to summary judgment was constrained by the Circuit Court is utterly inconsistent with the factual record.

Nor would structural error arise from the Court's refusal to allow Dr. Fetzer to argue at trial that Sandy Hook did not happen. The only issue at trial was damages. Dr. Fetzer's conspiracy theory had no bearing on Mr. Pozner's damages and was properly excluded.

Second, the structural error doctrine does not apply to this civil action. Dr. Fetzer did not face a criminal trial or an action that involved the State taking any action against him. As a result, Dr. Fetzer is wrong to argue that the structural error doctrine applies: "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional

guarantees that should define the framework of any *criminal trial*." *Weaver v. Massachusetts*, —— U.S. ——, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017) (emphasis added). Dr. Fetzer does not, and cannot, argue that the structural error doctrine should apply in this civil case.

Further, Mr. Pozner also does not address, let alone identify, what constitutional error resulted from the Circuit Court's alleged error. He must identify "Constitutional errors that are so intrinsically harmful to substantial rights that they 'are not amenable to harmless error analysis'" to argue there were structural errors. *State v. Travis*, 2013 WI 38, ¶ 55, 347 Wis. 2d 142, 167, 832 N.W.2d 491, 503 (quoting *State v. Harvey*, 2002 WI 93, ¶ 37, 254 Wis. 2d 442, 647 N.W.2d 189). He must do so

because "[o]nly a very limited number of errors 'require automatic reversal,' because 'most constitutional errors can be harmless . . . .'" *In re S.M.H.*, 2019 WI 14, ¶ 14, 385 Wis. 2d 418, 428, 922 N.W.2d 807, 812 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991)). As a result, "'there is a strong presumption that any . . . errors that may have occurred are subject to harmless-error analysis.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)).

Courts have generally found that structural errors fall within one of three categories: (1) errors where the "right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest;" (2) errors where "the effects of the error are simply too hard to measure;"

and (3) errors that "always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Examples of structural errors "include (but are not limited to) denying the defendant the right to counsel, the right to counsel of his choice, the right to self-representation, the right to an impartial judge, the right to a jury selected without reference to race, and the right to a public trial." *In re S.M.H.*, 2019 WI 14, ¶ 15 n.9.

Here, Dr. Fetzer has not identified a structural error by complaining about the supposed denial of the ability to present one of his defenses. (To be clear, Dr. Fetzer raised and pursued his defense that Mr. Pozner was a public figure until the day of the summary judgment hearing). He cannot because "a violation of the right to present a defense is subject to

harmless error analysis." *State v. Kramer*, 2006 WI App 133, ¶ 26, 294 Wis. 2d 780, 720 N.W.2d 459 (citing *Crane v. Kentucky*, 476 U.S. 683, 691 (1986)).

Dr. Fetzer was not precluded from putting on a defense at trial. To be clear, the trial was only on damages. Dr. Fetzer could have named and called his own expert. He did not. Instead, he cross-examined Mr. Pozner's expert as well as Mr. Pozner. Dr. Fetzer had identified other witnesses he was going to call at trial, but decided not to actually call those witnesses when the time came.

III. The falsity of Dr. Fetzer's statements was undisputed.

As he did below, Dr. Fetzer attempts on appeal to argue the truth of his defamatory statements by ignoring the context in which the defamatory statements occurred. He does so in two ways. First,

Dr. Fetzer attempts to take his claim that the death certificate is "fake" out of context. In his book and blog, Dr. Fetzer variously claimed N.P's death certificate is fake because portions of the text were "photoshopped into the document;" that the document suffers from "inconsistent tones, fonts, and clear digital manipulation;" and that the top half of the death certificate is fake and the bottom half is real. (R.99:25, 42; R.100:2–6.) Mr. Pozner introduced admissible evidence demonstrating the falsity of Dr. Fetzer's contentions on each of those theories, none of which was rebutted with admissible evidence by Dr. Fetzer. (R.308:117 #23–118 #6.)

Even if Mr. Pozner had not introduced unrebutted admissible evidence, Dr. Fetzer admitted in open court that the allegations of photoshopping or

document alterations in his book and blog were false. (*Id.* at 38 #23–40 #21.)

Dr. Fetzer now argues that the document Mr. Pozner uploaded in 2014 is fake because it is uncertified.[2] But none of Dr. Fetzer's defamatory statements alleged the death certificate uploaded by Mr. Pozner was fake because it was not certified. As such, he asks the Court ignore the context of his allegation in favor of a focus on the words "fake" "forgery" or "fabrication" in isolation. Dr. Fetzer's proposed process for evaluating the truth or falsity of the defamatory statements divorced from the context in which they were uttered is inconsistent with

[2] One must question how Dr. Fetzer, and his counsel for that matter, can continue to argue in good faith that the death certificate Mr. Pozner scanned in 2014 was uncertified, given the unrebutted evidence in the record that the document Mr. Pozner scanned contains a raised seal.

established Wisconsin law. *See Anderson v. Hebert*, 332 Wis. 2d 432, 444 (Wis. App. 2011); *see also Westby v. Madison Newspapers, Inc.*, 81 Wis.2d 1, 6 (1977).

The second way in which Dr. Fetzer urges reversal is by attempting to redirect the focus from the death certificate that Mr. Pozner actually uploaded in 2014 to other images or copies of the death certificate. In so doing, Dr. Fetzer misses entirely the focus of Mr. Pozner's defamation case. The gist of the defamatory statements in Dr. Fetzer's book and blog is that Mr. Pozner circulated a fake death certificate when he uploaded a copy of that death certificate in 2014. For example, one of the defamatory statements says:

> As many Sandy Hook researches are aware, the very document Pozner

> circulated in 2014, with its inconsistent tones, fonts and clear digital manipulation, was clearly a forgery.

(R.252.) Thus, the sole factual question must be whether the document Mr. Pozner circulated in 2014 was a forgery, fake, or fabrication.

In support of his motion for summary judgment, Mr. Pozner stated in an affidavit that the scanned death certificate image he uploaded in 2014 was obtained from one of several death certificates he received from the Newtown Clerk's office in 2014. (R.85:¶13.) Scans of those death certificates were attached to Mr. Pozner's affidavit. (*Id.*) The original documents themselves were made available for inspection and provided to the Circuit Court during the summary judgment hearing, and the Circuit Court noted the presence of the embossed seal.

(R.308:42 #3–6.)

Stunningly, Dr. Fetzer never sought in discovery the actual death certificate Mr. Pozner scanned and uploaded in 2014. He never requested a copy or inspection of the certified copy of that document. He never even requested a copy of the scan of that document that Mr. Pozner actually uploaded. His "experts" never examined the actual scan Defendant alleges to be fake, much less the paper document obtained by Mr. Pozner from Newtown.[3] Having never actually reviewed the document Mr. Pozner uploaded in 2014, Dr. Fetzer was in no position to respond with admissible evidence regarding the particular document Dr.

[3] That is important because Dr. Fetzer admitted that he may have altered the image he reproduced in his book. (R.308:130 #2–5.)

Fetzer's statements asserted was fake.

Dr. Fetzer suggests that Mr. Pozner attempted to prove the authenticity of the accused death certificate by referencing other purportedly authentic versions. (App. Br. at 21.) That is false. Instead, Mr. Pozner established that the very document that Dr. Fetzer's defamatory statements alleged to be fake was, in fact, authentic.

The focus on other copies is a red herring. Alleged differences between various copies of N.P.'s death certificate cannot create a genuine issue of material fact—they do not make it more likely that the certified document Mr. Pozner obtained from the Newtown clerk's office and uploaded in 2014 was fake. For all of the arguments about other copies of the death certificate, Dr. Fetzer assiduously avoided

addressing the one document that his defamatory statements alleged was fake.

Dr. Fetzer argues that the Circuit Court erred because it drew “all inferences against Fetzer.” (App. Br. at 1.) That allegation is unsupported by the record.

The Circuit Court was required to draw “reasonable” inferences in favor of the non-moving party. It is axiomatic that the Circuit Court was not required to draw unreasonable inferences in Dr. Fetzer’s favor. *See*, *e.g.*, *Morgan v. Penn. Gen. Ins. Co.*, 87 Wis. 2d 723, 73, 275 N.W.2d 660 (1979) (citation omitted) (holding unreasonable inferences not required in the context of a motion to dismiss).

The inferences that Dr. Fetzer sought were not reasonable. He argued that because there were

allegedly differences between documents, the Circuit Court should infer they are all fake.[4] (App. Br. at 9.) That was baseless conjecture, not supported by admissible evidence. To demonstrate why Dr. Fetzer's alleged differences did not create a genuine issue of material fact, Mr. Pozner introduced admissible evidence demonstrating that none of the "differences" were evidence of fakery, forgery, or fabrication, in particular the specific indicia specified

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[4] Although now characterized as "differences," most of the arguments raised by Dr. Fetzer during summary judgment related to irregularities between the death certificate and what he (a lay person) expected to see. For example, Dr. Fetzer took issue with the death certificate saying no autopsy was performed in light of N.P.'s post-mortem exam report. (*See* R.86:6.) In deposition, the former Chief Medical Examiner who conducted N.P.'s post-mortem exam explained the difference between a post-mortem exam and an autopsy, and confirmed that N.P. underwent the former. (R.138:Ex. A, 20 #23–22 #5.) Thus, there was no irregularity with that box in the death certificate. Each and every alleged irregularity was explained with the support of admissible evidence, rather than mere layperson speculation. As such, there were no inferences to draw in Dr. Fetzer's favor.

in Dr. Fetzer's book and blog. (R.131:15–16.)

Dr. Fetzer offers no law or policy requiring a circuit court to draw inferences that are inconsistent with unrebutted evidence. The Circuit Court's statement that the explanations for the differences between various certified copies of the death certificate "make sense to me . . . ." was merely recognition that Dr. Fetzer's proposed inferences were not "reasonable." (R.308:163.)

In conclusion, Mr. Pozner supported his motion for summary judgment with admissible evidence establishing the authenticity of the document Mr. Pozner scanned and uploaded in 2014 and that Dr. Fetzer's book and blog accused of being forged. None of the arguments Dr. Fetzer made in response to Mr. Pozner's motion were supported by admissible

evidence. More importantly, Dr. Fetzer admitted that the defamatory statements were false in the context in which they were published. Dr. Fetzer made no effort to dispute any other elements of defamation. As such, the Circuit Court was obligated to grant Mr. Pozner's motion.

IV. The Circuit Court appropriately granted summary judgment to Mr. Pozner without analyzing Dr. Fetzer's fault.

The Circuit Court did not err by failing to consider an argument that Dr. Fetzer did not raise. The issue of Dr. Fetzer's fault as a media defendant was never raised by Dr. Fetzer until *after* Dr. Fetzer lost. Dr. Fetzer assumes the Circuit Court had a duty to make this argument for him, but cites no authority for that position.

Even had Dr. Fetzer not waived this

affirmative defense, the Circuit Court noted that the summary judgment motion papers and supporting documents included sufficient evidence to support a finding of fault. (R.291:2.) Mr. Pozner provided ample evidence of Dr. Fetzer's fault in making the false statements. For any of these reasons, the Circuit Court did not err by granting Mr. Pozner's motion for summary judgment.

A defamation defendant bears the burden of raising and establishing a conditional privilege which grants immunity from liability for defamation based on a public policy which recognizes the social utility of encouraging the free flow of information. *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 498–500, 228 N.W.2d 737 (1975). As a *conditional* privilege, "the burden is on the defendant to prove the privilege as a

defense to defamation." *Id.* at 499 (citation omitted). Because Dr. Fetzer did not timely raise this defense, it is waived. *State v. Conway*, 34 Wis. 2d 76, 82–83, 148 N.W.2d 721 (1967) (noting this general rule in Wisconsin).

In particular, in the context of summary judgment arguments, when an issue "was not considered a genuine issue until after the [party] lost the case," the Court of Appeals will "deem the issue waived." *Pabst Brewing Co. v. City of Milwaukee*, 125 Wis. 2d 437, 460-61, 373 N.W.2d 680, 681 (Ct. App. 1985); see also *Paape v. Northern Assur. Co. of America*, 142 Wis. 2d 45, 53, 416 N.W.2d 665, 668-69. (holding when "none of the motion papers or supporting documents even suggests that the issue…be considered at the summary judgment

hearing" and a party fails to "alert[] the trial court to [the] error," the "issue is waived.").

Even if Dr. Fetzer had timely raised the issue, he points to no evidence in the record to support that he would be entitled to the privilege. The comments made during the pre-trial conference discuss Dr. Fetzer's prior assertions that he is a media figure. This was based not on an evidentiary showing but was instead based on Dr. Fetzer's arguments in relation to a discovery dispute.

Dr. Fetzer did not raise this conditional privilege as an affirmative defense or present evidence and argument in support of this defense at summary judgment. Nor did Dr. Fetzer attempt to raise this affirmative defense at trial. In fact, at the final pre-trial conference, Dr. Fetzer conceded that

the issue had been foreclosed at the summary judgment hearing and was no longer an open issue in the case. (R. 309:23 #23–24 #7.) Dr. Fetzer first raised this issue in post-trial briefings. It was too late at that point.

Finally, in exchange for Mr. Pozner dropping discovery requests, Dr. Fetzer obviated any burden for Mr. Pozner to produce any evidence of fault. In his answer and leading up to the summary judgment hearing, Dr. Fetzer presented the affirmative defense that Mr. Pozner was a public figure and therefore a conditional constitutional privilege existed. (R.2:1; R.86:14.) Mr. Pozner therefore sought discovery relevant to actual malice, and, in particular, Dr. Fetzer's knowledge of falsity at the time the statements were published. Even after the Circuit

Court ordered Dr. Fetzer to produce documents (R.128), Dr. Fetzer refused. (R.157.)

At the summary judgment hearing, Dr. Fetzer agreed to forego the issue of fault in exchange for Mr. Pozner dropping discovery requests that would have required Dr. Fetzer to turn over emails relevant to his knowledge that his statement were false. (R.308:165 #12–16 (Circuit Court concluding that Mr. Pozner is not a public person "based on the facts and the concession of the parties acquiescing to that").)

Although Dr. Fetzer now seems to contend that his concession was limited to the issue of Mr. Pozner's status as a public figure, his concession was made in the broader context of Mr. Pozner seeking discovery of documents that related to Dr. Fetzer's knowledge of falsity at the time the statements were

published. (*See, e.g.,* R.308:30 #23–32 #19.) Having induced Mr. Pozner to drop those discovery requests in exchange for not producing evidence that would demonstrate fault, Dr. Fetzer should not now be heard to demand that Mr. Pozner should nevertheless have provided evidence of negligence.

In any event, Plaintiff's Motion for Summary Judgment and Response to Dr. Fetzer's Motion for Summary Judgment both demonstrated that Dr. Fetzer acted with actual malice. (R.83:28–33; R.137:23–25.) Actual malice is a fault standard. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Dr. Fetzer failed to respond in any way to Mr. Pozner's evidence of fault or to present admissible evidence that he acted reasonably. In particular, he failed to respond to Mr.

Pozner's motion by setting "forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3). Thus, it was appropriate for the Circuit Court to find, as it did, that if Dr. Fetzer had pursued this defense the Circuit Court would have found that he acted with fault. (R.291:2.)

V. The Circuit Court appropriately admitted evidence of Dr. Fetzer's contempt at trial.

Dr. Fetzer is not entitled to a new trial just because the jury heard argument related to his violation of the protective order at trial. Dr. Fetzer has not and cannot show that this argument, in the context of the entire proceeding, impacted his "substantial rights." Wis. Stat. § 805.18(2). Nor can he show, "actual" prejudice. *Bailey v. Bach*, 257 Wis. 604, 611, 44 N.W.2d 631, 635 (1950) (holding that the

prejudice must be "actual" not "presumed").

Dr. Fetzer suffered no actual prejudice. At trial, Mr. Pozner referenced Dr. Fetzer's violation of the protective order during opening arguments, during cross-examination of Dr. Fetzer, and during closing arguments. (R.313:85 #22–86 #22, 144 #2–6, 122 #16–21.) Dr. Fetzer did not object. (*Id.*)

Mr. Pozner made this argument in support of his request for compensatory damages for emotional harm and reputational injury that he suffered as a result of Dr. Fetzer's defamatory statements. Dr. Fetzer defended against these damages by, among other things, claiming that his book was written by "a serious group and that the book . . . while it may be provocative in many respects [is] a serious book of academic research." (R.311:167 #10–13.) Dr. Fetzer

testified, "[T]he whole point in doing this research is to inform the public." (R.313:72 #20–21.) Dr. Fetzer's claims to be a serious researcher attempting to merely inform the public were belied by the fact that he violated the protective order.

In addition, Dr. Fetzer's failure to heed the Circuit Court's protective order is admissible evidence of the ongoing harm to Mr. Pozner. By sharing a confidential deposition video and transcript and thereby violating the Circuit Court's protective order, Dr. Fetzer continued his efforts to damage Mr. Pozner's reputation and to harm Mr. Pozner emotionally.[5] (R.291:12.) These actions are connected to the defamatory statements and are relevant to

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[5] Those efforts continue to this day. Dr. Fetzer violated the confidentiality order for a second time following trial and was again found in contempt by the Circuit Court in March of 2020.

compensatory damages. (*Id.*)

Even if the Circuit Court erred in admitting this argument, doing so should not "undermine" this Court's "confidence" in the trial's outcome and thus, the error is harmless. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768. Mr. Pozner testified about the dramatic impact the defamation has had on his reputation and emotional well-being. (R.313:38 #19–44 #2.) His expert, Dr. Lubit, testified about the permanent and profound impact of those injuries. (R.248.) Mr. Pozner introduced evidence that a PDF of Dr. Fetzer's book may have been accessed online as many as ten million times. (R.313:86 #23–88 #5.) Because the evidence amply supports the jury's verdict, this Court

should be confident in the trial's reliability.[6] *State v. Dyess*, 124 Wis. 2d 525, 545, 370 N.W.2d 222, 232-33 (1985).

Dr. Fetzer suggests that this evidence prejudiced him and that Mr. Pozner used this evidence to demonstrate Dr. Fetzer's character. Dr. Fetzer's own behavior in open court and in the presence of the jury amply demonstrated his character.[7] (R.313:74 #3–80 #16.) Therefore, even if the Circuit Court improperly allowed references to contempt, this error is harmless. Wis. Stat. § 805.18(2).

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[6] Moreover, there is no basis for Dr. Fetzer to assume that the jury gave more weight to minor statements by counsel than to Dr. Fetzer's own emotional outburst impugning the integrity of the court in full view of the jury. (R.313:74 #3–18.) Dr. Fetzer provided the jury a firsthand opportunity to evaluate Dr. Fetzer's character.

[7] At no point did Dr. Fetzer or his counsel seek any instruction to the jury on this issue.

Mr. Pozner sought damages because Dr. Fetzer's defamatory statements impacted his ability to heal from the trauma he suffered as a result of the horrific murder of his son. The fact that others believed Dr. Fetzer's defamatory statements supported Mr. Pozner's testimony as to how significantly Dr. Fetzer's statements impacted him. That Dr. Fetzer abused the litigation process by violating court orders to feed Mr. Pozner's confidential information to his hoaxer community was relevant to the evaluation of the harm caused by the defamatory statements to Mr. Pozner.

Dr. Lubit, the only expert presented at trial, explained the reasonableness of Mr. Pozner's emotional harm and anxiety caused by the ongoing defamation. (R.248.) This untainted, admissible

evidence of the extent and chronic nature of Mr. Pozner's injury supports the verdict. Because Dr. Fetzer failed to show that this evidence substantially harmed him, and failed to prove that the absence of this evidence would change the outcome in light of the plentiful evidence on which the jury verdict was based, Dr. Fetzer is not entitled to a new trial.

VI. The jury did not hold Dr. Fetzer liable for third-party lawlessness without proof of incitement.

Dr. Fetzer's final attempt to get out from under the judgment in this case is to assert constitutional and public policy arguments. The Circuit Court properly denied this belated effort. Mr. Pozner has never asserted an incitement or vicarious liability theory and did not do so at trial.

First, although Dr. Fetzer's counsel asked

questions at trial regarding incitement and raised the issue through attorney argument, he did not seek an instruction to the jury on the legal requirements for incitement. Wisconsin law requires that a party raise objections to jury instructions at the jury instruction conference. Wis. Stat. § 805.13(3). Failure to raise an objection to the jury instructions, including the alleged incompleteness of those instructions, constitutes waiver. *Id*; *see also State v. Trammell*, 2018 WI App 39, ¶ 12, 382 Wis. 2d 832, 917 N.W.2d 233, *aff'd,* 2019 WI 59, ¶ 12, 387 Wis. 2d 156, 928 N.W.2d 564. If Dr. Fetzer wanted to argue to the jury that Mr. Pozner attempted to meet the requirements of incitement or vicarious liability, he should have requested appropriate instructions and thereafter argued that Mr. Pozner failed to meet those legal

requirements. It is improper to speculate, as Dr. Fetzer is asking this Court, that the jury considered incitement and awarded damages on that basis rather than the theory of liability on which the jury was actually instructed.

Second, there is no indication that the jury awarded damages for anything other than the reputation and emotional harm resulting from Dr. Fetzer's defamation. The Circuit Court ruled as a matter of law that Dr. Fetzer defamed Mr. Pozner. (R.181:1.) The case proceeded to trial on one issue: What amount of, if any, compensatory damages is Mr. Pozner entitled to because of Dr. Fetzer's defamation?

Mr. Pozner never presented to the Circuit Court or the jury a claim for vicarious liability or

incitement. Mr. Pozner did not ask the jury—and the Circuit Court did not instruct the jury—to consider whether Dr. Fetzer was liable to Mr. Pozner as a result of third parties' actions. Mr. Pozner never raised incitement as a claim or theory of his case. Importantly, Dr. Fetzer did not object at trial to the testimony and evidence to which he now objects.

Dr. Fetzer now asserts that the jury's verdict violates his First Amendment rights and Wisconsin public policy because it is based on vicarious liability and third-party incitement, and not reputational harm. "[A] defamatory statement is one that tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Denny v. Mertz*, 106 Wis. 2d 636, 643, 318 N.W.2d 141, 144

(1982) (internal quotation marks and citation omitted). Reputational harm is inherently tied to a third party's view of Mr. Pozner. As such, Mr. Pozner presented evidence of the impact of the defamatory statements' impact on his reputation. Mr. Pozner told the jury about his concerns as to how third persons respond to him and how he has changed how he interacts with others. (R.313:32 #16–66 #8.) He corroborated his concerns with evidence that the defamatory statements have negatively impacted his reputation, "in the estimation of the community or to deter[ed] third persons from associating or dealing with him." *Denny v. Mertz*, 106 Wis. 2d at 643; 318 N.W.2d at 144.

Reputational harm manifests itself in how others view and treat a defamation victim. That is

the nature of a "reputation." Mr. Pozner's proof showed that when some people read statements such as those published by Dr. Fetzer, they targeted him as dishonest and unreliable. (R.313:40 #13–41 #18.)

The Lucy Richards evidence, for example, demonstrates why Mr. Pozner became cautious when interacting with others. Ms. Richards' messages claimed, among other things, that Mr. Pozner was hiding his son, which is consistent with Dr. Fetzer's accusation that Mr. Pozner's son did not actually die at Sandy Hook. (R.313:41 #5-10.) This is evidence of the impact of Dr. Fetzer's defamatory statement on Mr. Pozner's reputation. Importantly, Dr. Fetzer did not object to the admission or publication of the Lucy Richards messages at trial. (*Id.*)

At no point did Mr. Pozner allege that Dr.

Fetzer incited Lucy Richards to threaten his life, and Mr. Pozner did not seek damages for incitement or harassment by third parties. Indeed, the only questions on that point were those asked by Dr. Fetzer's counsel. (*See*, *e.g.*, R.313:94 #14–19.)

Mr. Pozner did not seek damages for vicarious liability stemming from these third parties' actions. Instead, Mr. Pozner asked the jury to award damages to him for the reputational harm he suffered. Part of that harm occurred—and still occurs—when third parties read Dr. Fetzer's defamatory statements and react or develop a negative opinion about Mr. Pozner. This admissible evidence proves how harmful Dr. Fetzer's statements are to Mr. Pozner.

Although couched as a First Amendment and public policy argument, Dr. Fetzer really attacks the

sufficiency of the evidence supporting the jury's verdict. To overturn the verdict, the Court must be "satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to" Mr. Pozner, "there is no credible evidence to sustain" a verdict for Mr. Pozner. Wis. Stat. § 805.14. The Circuit Court correctly found "that Mr. Pozner's claim for compensatory damages did not rest entirely on threats and harassment." (R.291:13.) Instead, "Mr. Pozner's claim for damages was also that the defamatory statements *themselves* harmed him." (*Id.* (emphasis in original).)

One expert testified in this case: Dr. Lubit. His testimony explained how Dr. Fetzer's statements prohibited Mr. Pozner from healing from the PTSD he suffered following the loss of his child. (*Id; see also*

R.248:43.) Dr. Fetzer did not offer his own expert testimony or any other evidence in rebuttal.

Mr. Pozner testified that the defamatory statements harmed his reputation and that he changed his behavior as a result of those statements. (R.313:40.) Dr. Fetzer cross-examined Mr. Pozner, but did not introduce evidence to the contrary. Indeed, Dr. Fetzer rested without presenting any evidence related to the harm suffered by Mr. Pozner. (R.313:93 #19–98 #7.)

Sufficient evidence exists to support the jury verdict. Mr. Pozner's testimony—credible and admissible—coupled with Dr. Lubit's expert testimony demonstrate the harm suffered by Mr. Pozner and support the jury's award of compensatory damages. This verdict does not affront Wisconsin's

public policy or Dr. Fetzer's constitutional rights. Instead, it awards reasonable damages to Mr. Pozner because of Dr. Fetzer's defamatory statements that "lowered him in the estimation of the community" and "deterred third persons from associating or dealing with him." *Mertz*, 106 Wis. 2d at 643.

CONCLUSION

For these reasons, this Court should affirm the Circuit Court and sustain the jury's verdict.

Respectfully submitted this 27th day of July, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief, including footnotes, is 6,686 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed and served on Defendant-Appellant James Fetzer as of this date.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 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 Wis. Stat. § 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.

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I hereby certify that I have submitted an electronic copy of the appendix which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix filed as of this date.

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CERTIFICATE OF MAILING

I hereby certify that on this 27th day of July, 2020, I caused this Brief and Appendix to be sent via U.S. Mail to:

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