STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Leonard Pozner,
Plaintiff-Respondent
and Cross-Appellant,

v.

Appeal No. 2020AP121

James Fetzer,
Defendant-Appellant
and Cross-Respondent.

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

BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION.

Defendant-Appellant, Professor James Fetzer ("Fetzer"), comes before the Court uniquely despised. Fetzer and others have questioned in their published research whether reported shootings at Sandy Hook actually occurred. He is reviled and viewed with contempt for his published research and opinions. Nonetheless, he is entitled to impartial and dispassionate consideration in the court of law, which he has not received.

Judgment for $450,000, due to allegedly defamatory statements, has been entered against Fetzer, and in favor of Plaintiff Respondent, Leonard Pozner ("Pozner"), in circumstances that warrant reversal. The trial court ("court") entered summary judgment on liability by drawing all inferences against Fetzer and without considering fault. In fact, the court rejected the entire Sandy Hook body of research by Fetzer and others as a matter of intuition rather than proof, which the court foreclosed as an unwelcome "rabbit hole."

The court also biased damages against Fetzer by inviting the admission of character evidence to show "what kind of person" is Fetzer. The court also refused to consider whether a speaker is liable for the threatening actions of third persons, who allegedly read Fetzer's publications about Sandy Hook, but which publications do not call for or incite lawlessness.

II. STATEMENT OF ISSUES PRESENTED.

Issue No. I: Did the court err by foreclosing Fetzer's theory of defense?

Trial court answer: The court precluded Fetzer from challenging the reported Sandy Hook narrative as part of his defense.

Issue No. II: Did the court erroneously grant summary judgment to Pozner on the issue of liability despite disputed issues of material fact?

Trial court answer: The court ruled that Fetzer's statements were untrue, while drawing all inferences in favor of Pozner.

Issue No. III: Did the court erroneously grant summary judgment without fault against Fetzer, a media defendant?

Trial court answer: The court initially failed to consider negligence as a necessary element of Pozner's case. The court subsequently ruled that the appellant was negligent as a matter of law, without notice or opportunity to respond, based on the court's assumption that Sandy Hook deniers are inherently misguided.

Issue No. IV: Did the court erroneously admit evidence at trial of a discovery-related contempt?

Trial court answer: The court admitted evidence at trial that Fetzer disclosed the confidential deposition of Pozner obtained in discovery. The court admitted this contempt evidence during the trial of Pozner's damages for defamation, ostensibly as character evidence.

Issue No. V: Is a media speaker vicariously liable for third-party lawlessness, without proof of incitement?

Trial 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 for a media speaker's vicarious liability.

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Oral argument is requested given the complex factual and legal issues involved.

Publication also is requested to provide guidance on important legal issues of first impression.

IV. STATEMENT OF THE CASE.

A. Nature Of The Case.

Pozner brought suit against Fetzer, alleging that Fetzer defamed him in a controversial book of research questioning whether reported shootings at Sandy Hook actually occurred. (R.1). Pozner made a very narrow complaint against Fetzer, that did not purport to disprove the overriding premise of Fetzer's thesis. (R.303 at 55.) Instead, Pozner focused on four isolated statements made by Fetzer about a death certificate, the authenticity of which Fetzer disputed.

In the event, the case became a one-sided repudiation of Sandy Hook doubters; one-sided because the court precluded Fetzer from attempting to prove the basis for doubt about Sandy Hook, with the court ultimately concluding that no one could rationally doubt the Sandy Hook tragedy as reported. The court, however, first declared that the reality of Sandy Hook could not be litigated in this matter in defense of Pozner's Complaint. (R.303 at 48-49.)

The court then ruled on summary judgment that Fetzer is liable as a matter of law for his published statements. (R.308 at 163.) The case, as a result, proceeded to trial solely on the issue of damages. Pozner argued at trial that he suffers from post-traumatic stress disorder caused by the threats of third parties who allegedly read Fetzer's published statements. Pozner conceded that Fetzer's statements did not call for targeted lawlessness, but the jury nonetheless awarded $450,000 in damages. (R.259.)

B. Procedural Status Leading Up To Appeal And Disposition In The Trial Court.

Pozner filed suit against Fetzer alleging that he defamed Pozner by alleging that Pozner circulated a false death certificate for Noah Pozner. Three of 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 Fetzer.

Pozner's Complaint purported to be restricted only to statements by Fetzer about the death certificate. Pozner thereby sought to avoid challenging the research of Fetzer and others questioning the Sandy Hook narrative. The trial court agreed to this limited focus, advising Fetzer that whether Sandy Hook occurred as reported was beyond the scope of this action. "It's a rabbit hole we won't go down." (R.303 at 149.)

Pozner then moved for partial summary judgment on liability. The parties fully briefed the motion, as well as Pozner's cross motion for summary judgment. Pozner sought only partial summary judgment on the issue of liability. The motions were fully briefed and came before the court for oral argument on June 17, 2019. Fetzer proceeded *pro se*, unable to find willing representation.

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 the discussion of that issue, Fetzer 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.) Certain requested discovery from Fetzer became irrelevant by agreeing to Pozner's status as a private person.

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 trial court set a date solely to try the issue of any damages caused by Fetzer's statements.

In the interim, between summary judgment and trial, Pozner brought a motion to hold Fetzer in contempt for having disclosed to third parties the video deposition of Pozner. (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.) Fetzer, who was newly represented, objected on the basis that such evidence was irrelevant to defamation damages and prejudicial.

The court justified admission of the contempt evidence as being relevant to punitive damages sought by Pozner. (*Id.* at 91-97.) The court stated that evidence of contempt was relevant to show the jury the type of person that is Fetzer. (*Id.* at 97.)

Pozner, however, withdrew his claim for punitive damages prior to trial. The court then changed horses, and said that such evidence was relevant to damages,

articulating an unspecified cause of action, but one quite unlike the defamation trial before the jury. (R.311 at 25-27.)

Trial 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.)

Fetzer then made post-verdict motions, which the trial court denied. (R.282.) As a first argument, Fetzer moved the Court to vacate its earlier summary judgment decision because Pozner's claim required overlooked proof of fault, i.e., negligence. This issue was not argued or addressed during the summary judgment hearing and the court made no finding of fault.

The court denied Fetzer's motion to vacate partial summary judgment, concluding that Fetzer waived the issue when he agreed to consider Pozner to be a private person, thereby making proof of malice unnecessary. (App. at 5-7.) The court alternatively ruled that Fetzer was negligent as a matter of law, although Fetzer had no notice or opportunity to address the issue of fault, which was an essential element on which Pozner had the burden to come forward, based on Fetzer's media status. (*Id.* at 12.)

The court also denied Fetzer's post-verdict motion asking for new trial because evidence of contempt should not have been admitted at trial. The court reasoned that the contempt was relevant to an amorphous theory of conspiracy liability, albeit not the issue of defamation before the jury.

Finally, the court denied Fetzer's motion that liability for third-party actions should not be imposed for speech in the absence of proof of incitement. Fetzer argued

that incitement is a constitutional predicate for speech liability by media defendants. Fetzer also argued that incitement should be required under Wisconsin law as a matter of public policy, co-extensive with the First Amendment. (R.282 at 9-14.)

The court denied Fetzer's public policy motion, concluding that the actions of third parties should be judged pursuant to common law principles of causation. (App. at 15.) The court did not address Fetzer's constitutional and public policy arguments. The court simply rejected the public policy argument without analysis. (*Id.*)

The court then 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 of Noah Pozner. (*Id.* at 26-27).

C. Statement Of Facts.

1. 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 narrative did not occur as reported.

Pozner alleged that three statements in the Book were defamatory in claiming that Pozner circulated a death certificate for Noah Pozner that was not authentic. (Id. At

11; R. 256.) 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 of 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).

2. Summary Judgment.

The court declared at the outset that Fetzer could not defend his statements about the death certificate in the broader context of his thesis that the reported Sandy Hook narrative is false. (R.303 at 48-49).

The parties then filed cross-motions for summary judgment. (R.82 and 86). In support of his motion for summary judgment, Pozner submitted additional versions of the purported death certificate, 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 versions offered by Pozner. (R.86). The evidence, in fact, was undisputed that the death certificate in the Book is different than the versions offered into evidence by Pozner, including for lack of official certification.

Pozner further offered into evidence, at the hearing on summary judgment, two additional purported versions 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 Pozner's 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.

3. Discovery Sanction.

Pozner subsequently filed a contempt motion against Fetzer, prior to trial, due to disclosure of Pozner's confidential video deposition. (R.210.) Fetzer complained, that the video disclosed his visual appearance. Pozner claimed that he previously had been subject to harassment, and so he sought to conceal his physical appearance. Pozner did not claim any specific harassment or threats as a result of the video disclosure. (R.225.)

The court held Fetzer to be in contempt and ruled, in part, that evidence related to the contempt would be admissible in the upcoming trial of defamation damages. (R.306 at 91-92.) Fetzer objected on grounds of prejudice and relevance. The court concluded,

however, that the evidence would be admissible on the issue of punitive damages so that the jury "may know the type of person that Professor Fetzer is." (*Id.* at 97.) The court acknowledged that the evidence was not relevant to compensatory damages. (*Id.* at 96.)

Pozner, however, withdrew his claim for punitive damages prior to trial. Fetzer then renewed his objection to the admissibility of evidence related to contempt. The court rejected Fetzer's objection concluding anew that the evidence was relevant to Pozner's damages. (R.311 at 25-27.) The court articulated a rambling theory of liability and damages distinct from defamation. (*Id.* at 122.)

4. Trial.

Pozner subsequently introduced evidence of the contempt ruling through questioning of Fetzer. (r.312 AT 85-86.) Pozner, however, did not offer any evidence of claimed damages resulting from disclosure of the video deposition. Pozner's counsel, in closing, nonetheless, argued that the contempt violation was evidence that Fetzer is an "alt-right" serial violator of the rules of society. (*Id.* at 122.)

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

Pozner, nonetheless, attributes the threats of which he complains 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.)

Richards apparently was criminally convicted for the messages that she left on Pozner's recording device. (*Id.* at 41.)

Pozner admits, however, that he does not know what motivated Ms. Richards to make threats. (*Id.* at 47.) Pozner also admits that Ms. Richards acted of her own volition. (*Id.* at 48.) Pozner also concedes that other persons who have made threats acted of their own volition. (*Id.* at 50.) Pozner also concedes that he does not know the basis for other threats. (*Id.*) Pozner also acknowledges that he does not know what caused various persons to make threats. (*Id.* at 57.) Pozner also agrees that there is nothing in Fetzer's statements calling for anyone to engage in illegal or criminal activity. (*Id.*) In fact, he acknowledged that Fetzer's statements are "not an instruction to do something to me, no." (*Id.*)

Pozner testified that his recovery from the initial trauma of his son's death began deteriorating after he began searching the internet for stories about Sandy Hook, and after Pozner published his son's death certificate online. "I [Pozner] searched Noah's name and I saw all of the stuff written about him. That was upsetting to see." (*Id.* at 57.)

Pozner himself began actively searching out information about Sandy Hook, including content published by Sandy Hook skeptics. "I [Pozner] started looking at all content that was published online about Sandy Hook and there were errors in regular media also that I was addressing, not just denial content, but the way Noah was being reported on in the news." (*Id.* at 58.) According to Pozner, this self-directed exposure itself still causes him emotional distress, which he continues to actively do. (*Id.* at 59). Pozner actually spends considerable time trying to have Sandy Hook content removed

from the internet, claiming to have had over 1,500 items of content removed from YouTube. (*Id.* at 60).

Aside from his general pre-occupation with Sandy Hook content on the internet, separate and distinct from Fetzer's statements at issue, Pozner claims to have become withdrawn as a result of harassment and threats. (*Id.* at 65.) Pozner, however, also testified that he was not active in community affairs or community groups prior to Sandy Hook, which has not changed. (*Id.* at 66.)

Other than Pozner's testimony about safety concerns resulting from third-party threats, Pozner did not provide any other substantive evidence to support to a significant damage claim. For instance, Pozner did not claim he had or was receiving any sort of professional treatment. Pozner did not claim any damages associated with the cost of medical or psychological treatment. Pozner did not claim any wage loss. In fact, Pozner presented no evidence of any special damages.

Pozner's medical expert, Dr. Roy Lubit, for his part, also emphasized third-party threats in his assessment. 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:

> "This [invalidation] is – this is people out there threatening him. He – you know trying to make him a pariah, when they are spreading false rumors about what – about him and that he is part of this hoax to take away their civic – their basic rights and people are threatening him. And it's pretty scary – I would assume it would be pretty scary to have people calling up and – or going to his home and – threatening him. I know he mentioned there was someone, I think in Florida, who went to jail for threatening his life." (*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 the Lucy Richards incident. (*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.

Dr. Lubit's opinions were not limited just to the statements found to be defamatory. According to Dr. Lubit, Fetzer's general thesis, that Sandy Hook did not occur, is integral to his opinions. Dr. Lubit noted that "it is a legal issue for the Court and the jury to decide to what extent he [Fetzer] may be responsible for the harassment and threats that followed, his claiming that Sandy Hook never occurred and that Mr. Pozner didn't have a son, or that his son didn't die there and that he was perpetrating a fraud on the American people." *Id.*

In fact, Dr. Lubit testified that there were other publications by Fetzer, other than the defamatory ones, still online, according to his casual investigation. *Id.* at 44. Dr. Lubit also testified about "the effect of dealing with people who questioned whether the event, the Sandy Hook event itself occurred." *Id.* at 52. He also testified that "it's my understanding that Dr. Fetzer was a key person in launching accusations that the ma – that there was no massacre, and that – the pictures were faked, that – and that Mr. Pozner – the death certificate was faked. What the death certificate was faked." *Id.* at 53.

Dr. Lubit, ultimately, did not know whether Lucy Richards' threats occurred before or after Fetzer's statements at issue. *Id.* at 55-56. Nonetheless, Dr. Lubit testified that Fetzer more generally has been critical of Pozner. "I [Dr. Lubit] went on the internet yesterday and I saw a website by Mr. – by Dr. Fetzer continuing to say negative things about Mr. Pozner." *Id.* at 56.

Fetzer's statements at issue in this case were not essential to Dr. Lubit's opinion. He reasoned that Sandy Hook deniers, in general, had the same effect, explaining that:

> "Well I [Dr. Lubit] think the denial of the event is part of denial. I can't – I think that's part of it. You know, denying that it occurred is then saying that he is part of concocting this hoax on the – and fraud on the American people and its like, then where is his son? Did he never have a son, then, since Sandy Hook never occurred?"

V. STANDARD OF REVIEW.

1. Whether a particular error is structural and therefore not subject to harmless error review is a question of law for independent appellate review. *State v. C.L.K.*, 2019 WI 14, ¶ 12, 385 Wis.2d. 418, 922 N.W.2d. 807. The standard of review, therefore, is *de novo*. *Id.*

2. The Court of Appeals reviews a grant of summary judgment using the same methodology of the circuit court. *CED Properties v. City of Oshkosh*, 2018 WI. 24, ¶17, 380 Wis.2d 399, 895 N.W. 2d 855 (2017). Summary judgment is only appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden to establish the absence of a genuine disputed issue as to any material fact. *Oddsen v. Henry*, 2016 WI. App. 30, ¶25, 368 Wis.2d 318, 878 N.W.2d 720, citing *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980).

Summary judgement is a drastic remedy. The moving party must clearly be entitled to judgment as a matter of law. *CED Properties*, 2018 WI. 24 at ¶19. "A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." *Grams*, 97 Wis.2d at 338. The nonmoving party is entitled to the benefit of all favorable facts and reasonable inferences drawn in his favor. *Id.*

3. The interpretation of an evidentiary rule presents a question of law, while the decision whether to admit evidence is reviewed under an abuse of discretion standard.

State v. Anderson, 163 Wis.2d 342, 346, 471 N.W.2d 279 (1991). A misapplication or erroneous view of the law constitutes an abuse of discretion. *Id.*, citing *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968). "A trial court's misapplication of the law is an erroneous exercise of discretion on which we [Court of Appeals] must reverse the trial court's ruling." *State v. Smith*, 203 Wis.2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996); *State v. Tarantino*, 157 Wis.2d 199, 207-08, 458 N.W.2d 582 (Ct. App. 1990).

4. Whether public policy bars a claim in any given case is a question of law for the Court of Appeals to decide *de novo*. *Rockweit v. Senecal*, 197 Wis.2d 409, 425, 451 N.W.2d 742 (1995). Whether public policy precludes liability is a matter of law that is decided on appeal without deference. *Smaxwell v. Bayard*, 274 Wis.2d 278, 305, 682 N.W.2d 923 (2004).

VI. ARGUMENT.

A. SUMMARY OF ARGUMENT.

1. The court erroneously declared at the outset of this case that Fetzer could not argue his thesis that the reported Sandy Hook narrative is false. Although this argument undeniably bears upon whether the Noah Pozner death certificate was authentic, the court declared that this defense was beyond the scope of Pozner's Complaint. This structural error by the court affected the entire conduct of this matter from beginning to end. Errors of this type require automatic reversal.

2. The court erred in concluding that Fetzer's statements about the Noah Pozner death certificate were undisputedly false. Pozner actually presented evidence to authenticate versions of the death certificate different than the one which he circulated himself, and which was in Fetzer's book about Sandy Hook. Pozner's evidence did not explain why the version circulated privately by Pozner is different than the official death

certificate. A jury could have reasonably inferred that Pozner's private-issue death certificate was not authentic. The court, however, drew reasonable inferences in favor of Pozner, rather than Fetzer.

3. The court also erred in granting summary judgment on liability without considering whether Fetzer was negligent. As a media defendant, liability cannot be imposed for defamation without fault, i.e. negligence. The court erred, by concluding that Pozner was entitled to judgment as a matter of law without considering fault. When the issue was brought to the court's attention by motion to vacate, the court concluded *sua sponte* that Fetzer was negligent, without providing notice or opportunity to address the issue, and which issue Pozner had never raised or argued. The court based its ultimate negligence conclusion on its intuition that no one could reasonably question whether Sandy Hook occurred, despite having previously precluded Fetzer from presenting research questioning the Sandy Hook shootings.

4. The court further erred by admitting evidence at trial that Fetzer improperly disclosed Pozner's confidential deposition. The court admitted this evidence during the damage phase of Pozner's defamation case, based on the court's own initiative. The court justified admission of Fetzer's contempt as being relevant to punitive damages. The court stated that such evidence was admissible "to show the type of person" that is Fetzer. Pozner, however, withdrew his claim for punitive damages prior to trial, whereupon the court flip-flopped, ostensibly receiving such evidence as relevant to Pozner's damages. Pozner, however, introduced no evidence at trial of damages resulting from the disclosure of his deposition. The disclosure violation,

nonetheless, interjected a different theory of damages, distinct from Pozner's defamation claim, but without explanation to the jury.

5. Finally, the court erred by refusing to consider Fetzer's constitutional and public policy arguments relating to vicarious speaker liability for third-party actions, in the absence of incitement. Pozner claimed that he was threatened by third parties, which he attributed to persons having read Fetzer's Book. Pozner presented no evidence, however, that Fetzer's statements satisfied any standard for incitement. The court, however, refused to consider constitutional and public policy grounds for requiring incitement as a condition of speaker liability. The court, instead, held that the common law standard of causation was sufficient to impose speaker liability for third-party actions, which is a dangerous path. In fact, Pozner introduced no evidence that third-party harassers had even read Fetzer's statements.

B. THE TRIAL COURT ERRED BY FORECLOSING FETZER'S THEORY OF DEFENSE.

The court erroneously foreclosed Fetzer from pursuing his theory of the case. The alleged defamation in this case arose in the context of the broader thesis by Fetzer, and others, that the reported Sandy Hook narrative is false. The specific accused statements occurred in one chapter in the Book *Nobody Died at Sandy Hook.* The statements alleged in Pozner's Complaint, however, focused on a small part of the evidence argued in support of the faux Sandy Hook narrative. Based on Pozner's narrow Complaint, the court advised Fetzer that he could not support his defense by reference to his broader thesis.

The court committed a structural error that warrants reversal of the final judgment entered against him. The court's underlying rationale, that the evidence was irrelevant,

was not correct. As the court recognized, if the entire Sandy Hook narrative is false, then death certificates associated with that event also must necessarily be false. The evidence, makes more likely that Fetzer's accused statements were true.

The court's preclusion of the broader Sandy Hook defense 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. A trial is not just a contest between competing facts; it is a contest "the constructs in which they are presented, something practitioners call the theory of the case." *Id.*, at ¶ 27. 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 court's error in this case left Pozner as the sole expositor of the theory of the case. With so much of the adversarial nature of the trial excised, there is no adequate context within which to conduct a quantitative analysis of the missing testimony.

Fetzer's alleged defamation in this case occurred in the context of a broader theory challenging the Sandy Hook narrative, consisting of disparate sources of evidence that mutually reinforce the ultimate conclusion, and which includes the falsity of resulting death certificates. By denying Fetzer the opportunity to present his defense, and his theory of the case, the court's error is structural and requires automatic reversal.

C. THE FALSITY OF FETZER'S ACCUSED STATEMENTS WAS A DISPUTED ISSUE OF FACT.

The court also erred in concluding that Fetzer's accused statements were false beyond dispute. Fetzer argued that the death certificate to which his accused statements referred was different than the death certificate attached to Pozner's Complaint. In fact,

by the time of the court's summary judgment decision, at the end of hearing on said motion, five different versions of the death certificate were before the court. The court acknowledged the differences in the death certificates, but concluded that Pozner provided plausible evidence to justify the differences. In doing so, the court drew inferences in favor of Pozner, as the moving party, rather than considering inferences favorable to Fetzer. The court turned the summary judgment process on its head.

The court ultimately had five different death certificates before it at the end of the hearing on summary judgment. Only one of the five was the subject of Fetzer's published statements. Other versions of the death certificate had not previously even been seen by Fetzer at the time of his original statements. Significantly, moreover, the one death certificate he had seen, and the subject of his published statements, had neither Town nor State certification. Other discrepancies were also established including differing notations; and – written state file numbers; empty information boxes on the different versions, all of which was brought to the court's attention.

The court acknowledged that "Dr. Fetzer, you have correctly pointed out on more than one occasion the differences between the various copies." (R.308 at 154.) At that point, however, instead of recognizing that the death certificate at issue actually does differ from versions presented by Pozner as authentic, and instead of drawing reasonable inferences in favor of the non-moving party, the court concluded that Pozner's explanation for differences "makes sense to me and provide a plausible and acceptable explanation for those differences." (R.308 at 163).

The trial court, significantly, however, did not expressly conclude that the death certificate that was the subject of Fetzer's accused statements was complete and

authentic. The court, instead, simply accepted differences without considering whether those differences affected the truth of Fetzer's statements. The court even ignored Fetzer's citation to Connecticut law that precludes anyone from obtaining an uncertified copy of a death certificate, except an approved genealogical researcher or state or federal agencies. *See Conn. General Stat. Sec. 7-51a (2012).*

Pozner, for his part, attempted to prove the authenticity of the accused death certificate by referencing other purportedly authentic versions. The court, in fact, may have *sub silencio* considered the differences between an authentic death certificate and the version that Pozner distributed to be insignificant, but these differences are critical to whether Fetzer's accused statements were true or not. In particular, an uncertified death certificate, as in the Book, is significant but the court ignored this fact. A jury, however, could have reasonably concluded that an uncertified death certificate is not authentic.

In the end, the court erroneously granted summary judgment without considering reasonable inferences in Fetzer's favor. Summary judgment is a drastic remedy, and in this case, the court incorrectly resolved disputed issues of fact to support summary judgment. The court's erroneous usurpation of the jury's proper role was compounded by the court's foreclosure of Fetzer's right to develop the theory of his case in the context of the broader thesis challenging the reported Sandy Hook narrative.

D. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT WITHOUT FAULT.

The court granted Pozner's motion for partial summary judgment, determining that Fetzer was liable on Pozner's defamation claim. 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 conceded that Pozner was not a public figure, which thereby resolved the malice question, as well as a pending discovery motion.

The 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 misapplication of law because negligence still remained an element of Pozner's claim, independent of malice.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the Supreme Court held that the interest of a person in recovering damages for injury to reputation must be balanced against the encouragement of the exercise of First Amendment Rights. The Court concluded that the *New York Times* standard did not adequately take this reputational interest into account when a private individual is defamed. The Court, therefore, held that states can set their own standard for liability in private-plaintiff defamation cases as long as "liability without fault is not imposed." *Gertz*, 418 U.S. at 347.

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*, that liability requires proof of fault. Thus, 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. "The Court concludes that the public policy balance favors the application of a negligence standard in defamation actions by private individuals against a media defendant." *Id.*

Here, the court erred by granting partial summary judgment to the Pozner without determining whether Fetzer acted negligently. The court, instead, treated Fetzer as if strictly liable for otherwise defamatory statements, but Fetzer undeniably was subject to the negligence standard. The court's failure to consider and/or apply a negligence standard, constituted a clear error of law. Pozner, therefore, was not entitled as a matter of law to partial summary judgment on the issue of liability.

Proof of negligence was an essential element of Pozner's case under the *Denny* decision. It was not an affirmative defense. 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, it was Pozner's burden to establish the absence of a disputed issue as to all material facts, including negligence. *Grams*, 97 Wis.2d at 338. He did not do so.

Fetzer, moreover, undeniably did not abandon his claim to be a journalist or member of the media. Pozner's counsel acknowledged this very fact at the Final Pretrial Conference:

> I don't think that he [Fetzer] dropped the argument or his position that he's a journalist. I mean, he's published any number of books. He has a blog. He, I think, would say if he were here today that he believes that it is his duty as a journalist to let everybody know about all these things that he believes he has investigated and uncovered. And so the 2511 [instruction] is we think the appropriate jury instruction here because while Mr. Pozner is a private figure, the Defendant, Mr. Fetzer, has repeatedly and over and over again taken the position that he is a media figure.

(R.309 at 24-25).

Pozner's own pleadings 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.*) Pozner also alleges that "Fetzer has claimed for years that the Sandy Hook shooting was a government conspiracy. Fetzer and Palecek released the original edition of 'Nobody Died at Sandy Hook' in October 2015." (*Id.*, ¶ 12). Pozner further alleged that Fetzer published a second edition of the book in 2016. (*Id.*, ¶ 16). Finally, Pozner alleged that Professor 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.) Even the court referred to Fetzer as a journalist. (R.310 at 87).

Pozner disingenuously claims that only someone working as a newspaper reporter or such, like Jimmy Olson, constitutes a journalist or media professional. In fact, media defendants are not just those who "impartially disseminate information," or "issue unsolicited, disinterested and neutral commentary as to matters of public interest." *Ortega Trujillo v. Banco Centro Del Ecuador*, 17 F. Supp. 2d 1334, 1338 (S.D. Fla. 1998). The term also applies to those "who editorialize as to matters of public interest without being commissioned to do so by their clients." *Id. See also*, *Tobinic v. Novella*, 2015 WL 1191 267 at *8 (S.D. Fla. 2015). The Supreme Court decision in *Gertz*, itself, refers broadly and frequently to publishers and broadcasters of allegedly defamatory material. More recently, in *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014), the Court of Appeals also rejected any distinction between institutional

press and non-traditional sources, such as bloggers. Certainly an author of a book qualifies for First Amendment protection.

The court 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. But summary judgment is only appropriate if a party is entitled to judgment in his favor as a matter of law. 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, although it was his burden.

The court further erred by refusing to vacate summary judgment on liability after the issue was raised. The court initially argued that Fetzer failed to establish a record that he is a media defendant. The record is clear, however, from Pozner's first pleading and thereafter, that Fetzer is of the media. 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 court, for its part, offered no reasoning or authority questioning Fetzer's qualification as a First-Amendment media defendant.

The court also wrongly concluded that Fetzer agreed to be treated as a private person defendant when he stipulated that Pozner was not a public figure. Fetzer's agreement 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 court, however, merely presumes that Fetzer would have made such a waiver even if he had actually known that the court would thereby find liability without fault. Such a presumption of an unknown waiver, made by the court, was an error of law.

Finally, the court attempted to cover its tracks by ruling that Fetzer, in fact, was negligent as a matter of law. The negligence issue was never argued by Pozner, however, and the issue was not briefed, raised 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. When the rights or interests of a person are sought to be affected by judicial decree, due process requires that the individual be given notice reasonably calculated to afford the person 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). In this case, the court did not notify the parties of its intent to treat Fetzer's motion to vacate as a motion to consider negligence on the merits without notice to be heard.

The court's after-the-fact conclusion of negligence is remarkable in yet another way. The court reasons that Fetzer necessarily was negligent because no one could believe that Sandy Hook did not occur as reported. The court's personal surmise 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). In fact, the court apparently did not even read the Book before dismissing it. Nor did the court consider that Fetzer's concerns about an uncertified death certificate might be deemed reasonable by a jury. The court also disregarded 2 expert reports submitted by Fetzer confirming the lack of authenticity of the document published in the Book, dismissing them as merely "another person's opinion." (R. 308 at 156.)

The court's soliloquy, moreover, came only after the court earlier had warned Fetzer that whether Sandy Hook occurred as reported in main stream media would not be part of this case, nor would discovery related thereto be permitted. According to the court, "we're not going down that rabbit hole." (R.303 at 49). Yet, the court itself then did just that, after first prohibiting Fetzer from arguing to the contrary. Due process in such circumstances required notice and an opportunity for Fetzer to be meaningfully heard, especially when the court becomes advocate. In any event, the record does not support the court's reasoning, which was beyond the scope of Pozner's motion.

E. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE OF CHARACTER.

A new trial is also warranted because of irrelevant and prejudicial evidence and argument presented to the jury. Pozner elicited testimony and argument about the court's prior contempt ruling so as to persuade the jury that Fetzer is a person of bad character. This testimony and argument had nothing to do with proving defamation damages, which was the issue before the jury. The sole purpose of the evidence and argument was to prejudice the jury against Fetzer.

The court previously invited Pozner *sua sponte* to offer evidence that Fetzer violated a discovery protective order in this case. Fetzer objected to the court's ruling at the time it was made. He contended that the court's contempt ruling was irrelevant to the issue of damages for defamation. The court, however, considered that evidence of the contempt ruling was relevant to "show the type of person" Fetzer is. The court deemed such evidence relevant to punitive damages at issue.

Pozner subsequently withdrew his claim for punitive damages, before trial, eliminating the court's basis for inviting Pozner to present evidence of contempt at trial.

The court then flip-flopped and ruled that Pozner could present evidence of the prior contempt as part of Pozner's case for compensatory damages. Fetzer renewed his objection, including on grounds that evidence of the contempt ruling was irrelevant and prejudicial, but the court ruled that such evidence could be presented.

Evidence and argument regarding the contempt ruling was improperly allowed during the trial of Pozner's defamation damages. The court previously granted Pozner's motion for partial summary judgment on the issue of liability, thereby foreclosing any argument that "type of person" evidence was relevant to the issue of liability. Pozner's withdrawal of his claim for punitive damages also eliminated any argument that such evidence and argument was relevant to the issue of "malice". The single issue presented to the jury at trial, therefore, was ostensibly limited exclusively to Pozner's alleged damages resulting from defamation. Fetzer's culpability and character were not relevant to Pozner's claim for damages.

Evidence regarding the court's contempt ruling was highly prejudicial. The evidence was effectively admitted for purposes of proving character. Character evidence, however, is deemed highly prejudicial and subject to carefully defined restrictions. For example, specific instances of conduct are not admissible as a method of proving character unless character or a trait of character of a person is an essential element of a charge, claim or defense. *See State v. Evans*, 187 Wis. 2d 66, 80, 522 N.W.2d 554 (Ct. App. 1994).

Fetzer's character was not an essential element of Pozner's claim for damages. As a result, the evidentiary rules governing character evidence limit its admissibility. As

the Court noted in *Milenkovic v. State*, 86 Wis. 2d 272, 278, 272 N.W.2d 320 (Ct. App. 1978):

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of the fact to reward the good ... and to punish the bad... because of their respective characters despite what the evidence in the case shows actually happened.

The rules of evidence governing character evidence justifiably limit its use. *State v. Evans*, 187 Wis. 2d at 83. In cases where character evidence is not material as an essential element of a plaintiff's claim, such evidence is not permitted because the jury may give the evidence too much weight, including by inviting the jury to punish Fetzer for reasons unrelated to the issues immediately before it. The erroneous admission of the contempt evidence, coupled with highlighting this evidence during closing argument, was prejudicial, and therefore compels the need for a new trial. *Smith v. Goshaw*, 219 WI App 23, ¶ 22, 387 Wis.2d 620, 928 N.W.2d 619.

The court itself initially recognized that evidence of contempt was not admissible to prove compensatory damages caused by defamation. Instead, the court stated that such evidence was "relevant for the jury to consider in determining the amount of punitive damages." The court further stated that evidence of contempt was relevant "for the jury to consider in ascertaining what kind of person Dr. Fetzer is."

When Pozner withdrew his claim for punitive damages shortly before trial, the trial court's initial rationale for admitting evidence of contempt became explicitly debunked. The court, accordingly, advanced a new theory, suggesting that such evidence was admissible on the question of damages, while articulating a conspiracy-like theory of liability.

Pozner, in fact, did not testify at all that the contempt had caused damages. Instead, he simply elicited testimony from Fetzer that Fetzer violated a court order making his deposition confidential. No evidence was elicited that the deposition included the defamatory statements before the court, simply that Fetzer violated a court order. Pozner then argued in closing that the evidence of contempt proved that Fetzer is a rule breaker by nature. Pozner's counsel argued:

> "He [Professor Fetzer] testified to you today that he promised to follow the protective order of this Court and the laws of this country. He violated it. He told you right from the stand. Yet. He took that deposition clip. He knew it was confidential, and what did he do? He spread that around too in violation of this Court's order.
> Now you people all showed up for jury service, because that is a huge part of how our government continues to run, how this society continues to work. We enforce the laws. Professor Fetzer has evidenced an ongoing continuous systematic rejection of that system."

The court candidly recognized initially that the evidence of contempt would be used to show "the type of person" that is Fetzer. That did not change. The evidence was not admissible on compensatory damages, and certainly not admissible on a theory of liability not before the jury. The evidence, in fact, was not offered to prove compensatory damages, but to show that Fetzer is a bad person, even though Pozner withdrew any claim for punitive damages. The evidence was admitted for an improper purpose; it was offered for that purpose; and it served its purpose in the jury's verdict.

Interjecting contempt evidence into a completely unrelated damage trial was itself a structural error as described above. *See C.L.K.*, 2019 WI 14 at ¶ 11. The jury had no way of understanding what to do with such evidence, without instruction or relationship to other evidence, except to conclude that damages could be awarded for being a

scoundrel. Combining two unrelated claims, without explanation, moreover, results in prejudicial effect that cannot be easily measured. It is also unprecedented.

Even under a harmless error standard, Fetzer is entitled a new trial. The burden of proving harmless error is on the beneficiary of the error. *State v. Crowell*, 149 Wis.2d 859, 873, 440 N.W.2d 352 (1989). Pozner's burden, then, in this case is to establish that there is no reasonable possibility that the error contributed to the jury's verdict. *Id.* Here, as both Pozner and the trial court acknowledge, the entire purpose of admitting contempt evidence was to affect and enhance Pozner's damages. That it did.

F. VICARIOUS LIABILITY FOR THREATS AND HARASSMENT PERPETRATED BY THIRD-PARTIES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PUBLIC POLICY OF WISCONSIN.

1. First Amendment Requires Incitement.

Vicarious liability for incitement by publication, violates the First Amendment to the United States Constitution, as well as Wisconsin public policy concerning remote and attenuated intervening acts of third parties.

Incitement by speech is not casually established. The United States Supreme Court has recognized that incitement by speech may be actionable, consistent with the First Amendment, but more than a public audience is required. In *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), the Supreme Court decided the seminal incitement case, summarized by this well-established principle:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id., at 447.

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"). "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

Fetzer's statements undeniably do not meet the standard for incitement. There is no evidence that Fetzer spoke with the intent to incite or produce lawless action. There is no evidence of imminence, meaning not only threats impending or ready to take place, but also expected or likely to occur. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 658 (1973). Nor is there any evidence that Fetzer's statements were likely to incite or produce lawless conduct by third persons.

In *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973), the Supreme Court emphasized that *Brandenburg's* "directed to" facet means that a speaker's words must be "intended to produce" unlawful action. Furthermore, such intent can be determined by a "rational inference from the import of the language." *Id.*, at 109.

An intent requirement is necessary pursuant to *Brandenburg* to prevent incitement from imposing strict liability on speakers. "Strict liability penalizes a speaker for an unintended aspect of her message and disregards her actual communicative projects. It reaches speakers who do not intend harm and who are reasonably unaware of the harmful aspects of their speech." Kendrick, Leslie, *"Free Speech and Guilty Minds"* 114 Colum. L. Rev. 1255, 1281 (2014).

Strict liability offenses, in turn, harm First Amendment interests because they chill speech. "Speakers who face strict liability will stay silent when uncertain of the accuracy of their information." *Id.*, at 1277. Including an intent component in *Brandenburg* 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 *Brandenburg* test recognizes that most speech without conduct is not likely to incite lawless activity by remote third persons. Incitement, moreover, is unrelated to reputational injury, which is the only ostensible basis of recovery. As the court noted in *Bustos v. A & E Television Networks*, 646 F.3d 762, 769 (10th Cir. 2011), inciting violence might have been cause to indict for defamation at one time under English criminal law, but "it's not actionable under contemporary American law." Furthermore, listeners' reaction to speech, is generally not even recognized as a "secondary effect" for purposes of analyzing regulations of speech. "The emotive impact of speech on its audience is not a secondary effect." *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 112 S. Ct. 2538, 2549, 120 L. Ed. 2d 305 (1992).

The evidence in the immediate case is insufficient to justify incitement liability even if Dr. Fetzer's statements are otherwise proscribable under defamation principles. "The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts." *Id.*, at 2544.

In the present case, no credible evidence supports the necessary elements for incitement liability. There is simply no "direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 132 S. Ct. 2537, 2549, 183 L. Ed. 2d 574 (2012).

Even speech that is hateful or hurtful does not, as such, provide the direct causal linkage necessary to sustain liability for incitement. "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 Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), quoted in *Snyder v. Phelps*, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172 (2011). Here, persons may disagree with Fetzer's research and conclusions, and they may find his statements to be hurtful or even hateful, but none of these emotions provide grounds for incitement liability. "The proudest boast of our free speech *jurisprudence* is that we protect the freedom to express the thought that we hate." *Matal v. Tam*, 137 S. Ct. 1744, 1764, 198 L. Ed. 2d 366 (2017).

2. Public Policy Should Limit Vicarious Liability.

The absence of any credible evidence of incitement by Fetzer intrinsically taints the jury's verdict as a matter of constitutional mandate. The verdict, however, is also tainted as a matter of Wisconsin public policy. The Wisconsin Supreme Court has considered six public policy grounds upon which Wisconsin courts may deny liability, even in the face of proven or assumed wrongdoing, including: (1) the injury is too remote from Fetzer's 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. *See 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 impose liability for (1) speech that (2) third parties allegedly read, and (3) who then allegedly committed intentional acts of lawlessness. Pozner essentially would impose strict liability whenever a third person reads something and then commits acts of lawlessness. As a matter of reasonable public policy, however, a more rigorous standard must be applied to distinguish incitement as a proscribable category of speech.

To hold a speaker liable for the intervening or superceding 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 a reported story. A speaker's liability needs must be based on something more than mere publication.

Without a standard for incitement, the chain of causation between speech without action and third-party intentional tortfeasors is 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 superceding 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 issue, in fact, is largely unresolved throughout the country. Nonetheless, it is an important issue that needs to be answered, as it arises regularly in court and beyond. For example, as a matter of considerable discussion, people have questioned whether or not speakers should bear legal responsibility or liability for the intentional acts of third parties who may have heard disparaging comments. The issue is not limited to politicians, of course, and poses challenges to any speaker, investigative journalist or

researcher, who cannot control or predict the actions of third-party listeners. The standard of liability for such persons cannot simply be that of "read and respond."

The appropriate standard is not decided in Wisconsin. The United States Supreme Court's *Brandenburg* test, however, 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.

Pozner cannot now disavow his own theory of the case. He cannot claim that he never tied his damage claim to actions of third parties purportedly incited by Fetzer's writings. He did so. As his first witness, Pozner called Dr. Roy Lubit, who testified that Pozner suffered a second post-traumatic stress injury as a result of threats and harassment by third persons, who theoretically were inspired by Fetzer. Dr. Lubit repeatedly emphasized threats and harassment by third persons as the basis for his PTSD diagnosis. Pozner's counsel then continued to emphasize throughout the trial, and in argument, that Dr. Lubit was the only expert speaking to Pozner's alleged damages.

Lest any doubt remain as to his theory of the case, Pozner followed Dr. Lubit with dramatic audio recordings of criminal threats by a woman named Lucy Richards. Pozner also offered into evidence written transcriptions of these calls in order memorialize and imprint the memory. While never linked to Fetzer, Pozner based his damage claim on the intervening actions of such third persons. Incitement was the linchpin of Pozner's day in court.

Public policy, undergirded by the First Amendment, weighs against a liberal policy of incitement liability. Casual liability for the uninvited actions of the readers of

speech is a dangerous precedent. Pozner may dismissively reject the debate as lofty, but not worthy of substantive response. Addressing head on the issue of liability for incitement by speech, however, is not haughty or pretentious, and the First Amendment is not merely hortatory or precatory. Free speech is not an abstract aspiration. On the contrary, the limits on liability for alleged incitement are fundamental to an informed and intellectually vibrant society.

By any standard, Pozner's proof of indictment is insufficient. There is no evidence that Fetzer intended to incite or cause lawless action. There is no evidence that Fetzer's writings provoked imminent lawless action. There is no evidence that Fetzer's research was likely to incite or produce lawless action. There is no evidence of foreseeability. There is not even any evidence that persons who committed lawless acts actually read Fetzer's writings. Nor is there evidence that any person who committed lawless acts was impelled or motivated by Fetzer's writings.

Lacking sufficient evidence for vicarious incitement liability, the jury's verdict cannot stand. Such liability is the centerpiece of Pozner's damage claim, made clear by Dr. Lubit. Otherwise, Pozner's award could not at all be justified, particularly in the absence of any claim for punitive damages. Without incitement liability, the jury's verdict is patently excessive.

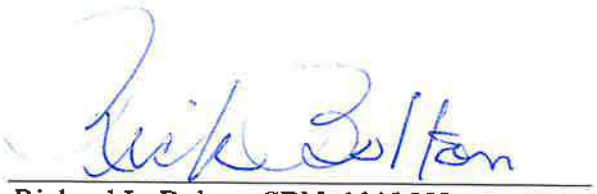
Pozner presented no evidence of medical treatment. Pozner presented no evidence of medical expense. Pozner presented no evidence of wage loss. Pozner presented no evidence that Fetzer's words caused disabling effect. Without the claimed trauma of third-party intervenors, the verdict award is wholly unsupportable. Thus, a new trial is warranted with instruction from this Court.

CONCLUSION

The judgment of the circuit court should be reversed and the matter remanded with instructions.

Dated this 24rd day of June, 2020.

BOARDMAN & CLARK LLP



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FORM AND LENGTH CERTIFICATION

I hereby certify this Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this Brief is 10,998 words.

Dated this 24rd day of June, 2020.

BOARDMAN & CLARK LLP

/s/ Richard Bolton

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stats. §809.19(12)(f).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24rd day of June, 2020.

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