STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs. Case No. 18-CV-3122

JAMES FETZER, et al.,

Defendant.

**DEFENDANT'S MOTIONS AFTER VERDICT**

## I. MOTION TO VACATE PARTIAL SUMMARY JUDGMENT.

**The Defendant, Professor James Fetzer ("Professor Fetzer"), moves the Court to vacate the Court's order granting partial summary judgment to the Plaintiff on the issue of liability.**

The Court previously granted Plaintiff's motion for partial summary judgment determining that Professor Fetzer was liable on Plaintiff's defamation claim. In so ruling, the Court first discussed whether the Plaintiff was a public figure. Determining the Plaintiff's status as a public or private figure impacted whether malice must be proved. During argument before the Court, Professor Fetzer stipulated that Plaintiff was not a public figure, which thereby resolved the malice question.

The Court erred, nonetheless, by granting Plaintiff's motion for partial summary judgment on the issue of liability. In particular, the Court considered incorrectly that liability without fault was appropriate in a defamation suit by a private figure plaintiff. The Court's conclusion constituted a manifest error of law.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S. Ct. 2997, 3010, 41 L. Ed. 2d 789 (1974), the United States Supreme Court held that actual malice is not required to be proved by a private individual in a defamation suit. By contrast, in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Supreme Court previously held that a public official only recovered damages for a defamatory statement concerning his official conduct if the official could prove that the statement was made with actual malice, that is knowledge that it was false or with reckless disregard of whether it was false or not.

The *New York Times* standard was expanded to cover a wider range of potential plaintiffs and defendants in *Curtis Publishing Co. v. Butts*, 388, U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). In *Curtis Publishing*, the Supreme Court expanded the public official class to include "public figures" within the ambit of the *New York Times* standard.

In *Gertz*, the Supreme Court held that the interests 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 reputation interest into account when a private individual was 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 was not imposed." 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*, including the requirement that liability without fault not be imposed. The Supreme Court then considered what standard of liability to apply in private-plaintiff actions not involving public officials or public figures. The Supreme Court noted that a majority of jurisdictions have held that private individuals must prove that defendants were negligent in order to prevail. *Id*. 653

For itself, the Wisconsin Supreme 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 Plaintiff without determining whether Professor Fetzer acted negligently. The Court, instead, assumed the Defendant to be strictly liable for otherwise defamatory statements, but Professor Fetzer undeniably is subject to the negligence standard, as recognized by the Court and Plaintiff during instruction conference on September 5, 2019. The Court's failure to consider and/or apply a negligence standard, constituted a manifest and clear error of law. The Plaintiff was not entitled as a matter of law to partial summary judgment on the issue of liability.

The Court should vacate the prior summary judgment order granted in the Plaintiff's favor and against the defendants. The Court further should order a full trial on liability. The resulting trial also should include the question of damages, which is inseparable from liability, including the need to match potential negligence with potential damages. A jury must determine when a defamatory statement was negligently made and then the jury must match alleged damages to specific wrongful acts by the Defendant.

As a first order of business, the Court should vacate its order granting partial summary judgment on the question of liability. The Court's decision to grant partial summary judgment, imposing liability without fault, violated the decisions of the United States Supreme Court and the Wisconsin Supreme Court. Trial of liability should proceed.

## II. MOTION FOR NEW TRIAL BASED ON ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE.

**Defendant Professor Fetzer moves the Court for a new trial due to the prejudicial admission and argument as to the Court's prior contempt ruling.**

A new trial is warranted because of irrelevant and prejudicial evidence and argument presented to the jury. The Plaintiff elicited detailed testimony and argued passionately about the

Court's prior contempt ruling so as to persuade the jury that Defendant is a person of bad character. This testimony had nothing to do with proving damages, which was the issue before the jury. The sole purpose of the evidence and argument was to prejudice the jury against the Defendant.

The Court previously ruled that the Plaintiff could offer evidence regarding the Court's ruling that Professor Fetzer violated the discovery protective order in this case. Professor Fetzer objected to the Court's ruling at the time it was made. Professor Fetzer 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" Professor Fetzer is. The Court deemed such evidence relevant to punitive damages at issue.

The Plaintiff subsequently withdrew his claim for punitive damages. The Court, nonetheless, ruled that the Plaintiff could present evidence regarding the prior contempt ruling as part of the Plaintiff's case for compensatory damages. Professor Fetzer renewed his objection, including on the grounds that evidence of the contempt ruling was irrelevant and prejudicial. The Court ruled that such evidence could be presented, *albeit* without using the specific word "contempt." The Court's ruling allowed the Plaintiff to present evidence and argument relating to Professor Fetzer's violation of the Court's protective order.

The Plaintiff then proceeded to present detailed evidence regarding Professor Fetzer's violation of the protective order. The Plaintiff also argued at considerable length during closing about the protective order violation and the Court's ruling, all the while impugning Professor Fetzer's character as a basis for more bucks.

Evidence and argument regarding the contempt ruling was improperly allowed during the trial of Plaintiff's defamation damages. The Court previously granted Plaintiff'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. Plaintiff's withdrawal of his claim for punitive damages also eliminated any argument that such evidence and argument was relevant to express malice, pertinent to that issue. The sole remaining issue presented to the jury at trial, therefore, was limited exclusively to the Plaintiff's alleged damages resulting from defamation. Professor Fetzer's culpability and character were not relevant to Plaintiff's claim for damages.

Evidence regarding the Court's contempt ruling was not just irrelevant. The Court's order that such evidence be permitted as part of the sanction for contempt was itself improper as a punitive measure.

The Court's contempt ruling occurred in the context of an ongoing civil action. Only remedial sanctions, therefore, could be imposed for the purpose of terminating a continuing contempt of court. Wis. Stat. § 785.01(3). Punitive sanctions, by contrast, are imposed to punish a past contempt of court for the purpose of upholding the authority of the court. Wis. Stat. § 785.01(2). A court imposing a punitive sanction is not specifically concerned with protecting private rights; because the sanction is directed only at past conduct, its imposition cannot directly aid a litigant harmed by the contempt. A punitive sanction, moreover, requires that a district attorney, attorney general or special prosecutor prosecute the matter by filing a complaint and following the procedures set out in the criminal code. Wis. Stat. § 785.03(1)(b).

The Court's order in this case that evidence of the Court's contempt ruling be admissible at trial was improperly punitive, rather than remedial. The order was not calculated to terminate a past or continuing contempt. The Court also provided no opportunity for cure or purge. On the contrary, the Court indicated that such evidence would be admitted for the purpose of showing "the type of person" that the Defendant is. Such a purpose is not remedial, nor was it relevant to the Plaintiff's claim for compensatory damages for defamation.

Evidence regarding the Court's contempt ruling was highly prejudicial. The evidence was ostensibly admitted for purposes of proving character. Character evidence 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).

Professor Fetzer's character was not an essential element of Plaintiff'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 for the above reason. *State v. Evans*, 187 Wis. 2d at 83. In cases where character evidence is not material as an essential element of 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 the defendant for reasons unrelated to the issues immediately before it.

The evidence and argument regarding the Court's contempt order was prejudicial and outweighed any probative possible value of the evidence. The evidence and argument was not probative of defamation damages in any way, shape or form. The evidence and argument was intended to impugn the Defendant for the purpose of awarding enhanced damages. The Court erroneously ordered that such evidence be admitted, including as a punitive sanction. A new trial, as result, should be granted.

## III. MOTION FOR NEW TRIAL ON THE BASIS OF INSUFFICIENT EVIDENCE OF INCITEMENT.

**Professor Fetzer moves the Court for a new trial on the basis of insufficient evidence of causal incitement which formed the basis of Plaintiff's claimed damages.**

The Plaintiff individually and by expert testimony attributed the primary effects of the defamatory statements, as found by the Court, to independent threats and harassment by third parties. Dr. Roy Lubit, in fact, claimed that such threats and harassment caused Plaintiff to suffer a second post traumatic stress injury. Plaintiff further testified that threats and harassment have caused him fear and precipitated residential moves and other protective measures. No credible evidence, however, connected alleged threats and harassment to the defamatory statements that are the basis of Plaintiff's Complaint.

No evidence linked threats and harassment to Professor Fetzer's published statements. No third party testified that he or she acted in response to Professor Fetzer's statements. No evidence established that any third party had read Professor Fetzer's statements. No evidence established that Professor Fetzer directed or encouraged any third party to make threats or to harass the Plaintiff. No evidence distinguished Professor Fetzer's statements from those of other Sandy Hook skeptics. The conclusion, therefore, including by Dr. Lubit, that Professor Fetzer's statements were the driving influence for any threats or harassment is completely unsupported by the evidence of record beyond conclusory speculation.

Nor did the Plaintiff present any evidence of foreseeability. The jury heard no evidence that Professor Fetzer's prior writings had ever motivated persons to make threats or to harass. In fact, to the contrary, Plaintiff testified that he began to be harassed and threatened beginning with his own publication of his son's picture on the internet.

No credible evidence supports Plaintiff's theory of damages based upon threats and harassment purportedly caused by Professor Fetzer's statements. A new trial is warranted, therefore, because of the integral reliance on such theory to support Plaintiff's damage claim. In the absence of credible evidence linking Professor Fetzer's statements to third-party threats and harassment, the jury's determination of damages was improperly speculative.

Professor Fetzer alternatively moves the Court for remittitur of the jury's verdict in the absence of credible evidence of causal incitement. In absence of such evidence, the jury's verdict is excessive. Professor Fetzer recommends as a reasonable remittitur an amount not to exceed $50,000.

## IV. MOTION FOR NEW TRIAL ON FIRST AMENDMENT AND PUBLIC POLICY GROUNDS.

**Professor Fetzer moves the Court for a new trial on the basis that 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.**

Vicarious liability for incitement by publication violates the First Amendment to the United States Constitution, as well as Wisconsin public policy regulating proximate cause from 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 regulated 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).

Professor Fetzer's statements undeniably do not meet the standard for incitement. There is no evidence that Professor 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 Professor Fetzer's statements were likely to incite or produce lawless conduct by third persons.

The Plaintiff implicitly applies a less vigorous test than *Brandenburg*, which essentially makes incitement a strict liability test. The Plaintiff's standard is essentially a variation of the three "R's": (1) Riting (publication); (2) Reading (by third party who commits lawless act); and (3) Rithmetic (total up the damages). This is far too a lenient standard under rule recognized construction of the *Brandenburg* test.

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, moreover, 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, constitute 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 Professor 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).

The absence of any credible evidence of incitement by Professor 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 the defendant'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 committed intentional acts of lawlessness. The Plaintiff 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 politicians, such as President Trump, should bear some legal responsibility or liability for the intentional acts of third parties who may have heard disparaging comments by the President. The issue arises, as well, with respect to other political speakers of varying disposition. 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 liability for such persons cannot simply be that of "read and respond."

The appropriate common law 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.

Professor Fetzer's statements in the present case, under any accepted test for incitement, should not be the basis for an award of damages due to the actions of third parties. No credible evidence was presented to the jury that would support an award of damages based on alleged third-party threats and harassment of the Plaintiff. The jury's verdict cannot stand as a matter of public policy. A new trial on damages is warranted, therefore, subject to standards for incitement liability.

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