

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

LEONARD POZNER,
Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER;
MIKE PALECEK;
WRONGS WITHOUT WREMEDIES, LLC;
Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT FETZER'S MOTION TO STRIKE
THE FRIEDMAN AFFIDAVIT

Defendant Fetzer has no rational argument or evidentiary basis in support of his request to strike these affidavits. His request for sanction is utterly without merit.

A. Motion to Strike Friedman and Sinelnikov Affidavits

Defendant Fetzer has failed to show that any of the expert opinions offered by Dr. Friedman are inadmissible.

First, Defendant Fetzer is wrong about the ability of the medical examiner's office to maintain samples. Doc. #185 at 2-3. The medical examiner's office undoubtedly has statutory authority to maintain blood samples. Connecticut Gen. Stat. § 19a-415a specifies the conditions upon which such samples, expressly including samples suitable for DNA testing, must be released by the medical examiner's office:

(b) Upon receiving the written consent of a deceased person's next of kin, the Office of the Chief Medical Examiner shall release biologic material of the deceased person to a clinical laboratory, licensed in accordance with the provisions of section 19a-30, for the purpose of determining paternity or for the purpose of determining a diagnosis of a life-threatening illness in a living individual.

It would be hard for the medical examiner's office to comply with § 19a-415a if the medical examiner's office had turned over all samples to another department, as Mr. Fetzner presumes.

Even if it was a "legal impossibility" for the medical examiner's office to maintain blood for DNA analysis, that would not render the medical examiner's office's retention of the samples a "factual impossibility." Indeed, the evidence in the record conclusively demonstrates that the medical examiner's office collected and maintained blood from Noah Pozner. Doc. #170 at 20-21; Doc. #105. Upon receiving written consent from Mr. Pozner, the medical examiner's office not only sent a portion of Noah Pozner's blood sample to a licensed clinical lab so that Dr. Friedman could have it tested, they also sent a portion of Noah Pozner's blood sample to Dr. Baird's licensed clinical lab where Dr. Friedman's results were *independently validated*. Doc. #105.¹

¹ Although Defendant Fetzner argues that there is no chain of custody for the DNA testing, he has no evidence to support that contention. Defendant Fetzner has never requested chain of custody documents related to either the Friedman or Baird DNA opinions. On its face, Dr. Baird's report specifies that the "CHILD" DNA was obtained from a blood card and the sample was collected December 15, 2012, which is same day Noah Pozner's post mortem exam was completed. Doc. #157 (DNA Test results); Doc. #120 at Ex. I (certified post mortem examination). Thus, there is a reasonable basis for Dr. Baird's proffered opinion.

If Defendant Fetzer thought there was a chain of custody problem at the medical examiner's office he should have asked Dr. Carver. Defendant Fetzer was present and had the opportunity to depose Dr. Carver, the medical examiner, on this issue. *See* Doc. 196 at ¶ 22. He did not do so (nor did any of the other Defendants).

The DNA testing results page, Friedman Ex. A, sets forth information about the source of each sample and also the results of the testing. In particular, it says that sample "C1" was from M.E. Case No. 12-17604. That is the medical examiner's case number assigned to Noah Pozner. *See* Doc. #120 at Ex. I (certified medical examiner's report), Ex. J (certified copy of Noah Pozner's death certificate); Doc. #170 (Carver Aff.) at ¶6, ¶10.

Dr. Friedman, as an expert witness, can offer opinions based on information of the type that is reasonably relied upon by experts in his field in order to reach his conclusions. *See* Wis. Stat. § 907.03. Here, Dr. Friedman relied on his own skill, experience, and personal knowledge, plus the chain of custody information provided by Dr. Sinelnikov. Friedman Aff. at ¶¶7-9, Ex. B (Sinelnikov Aff). The Sinelnikov affidavit confirmed that industry standard chain of custody procedures were observed. *Id.* at Ex. B.

That Mr. Fetzer does not understand the Sinelnikov affidavit does not render it unreliable. Dr. Fetzer's "best evidence" argument is inapposite because Plaintiff did not seek to admit the Sinelnikov affidavit or chain of custody documents into evidence. But even if the Sinelnikov affidavit were stricken, Dr. Friedman's testimony would be admissible. Dr. Friedman is not obligated to disclose his underlying facts or

data in the absence of an order by the Court or in cross-exam. Wis. Stat. § 907.05. Moreover, neither Dr. Sinelnikov's affidavit nor the underlying chain of custody documents need to be admissible for Dr. Friedman to appropriately rely on them. *See* Wis. Stat. § 907.03. Defendant Fetzer has provided no basis to strike the Friedman Affidavit or to show that Dr. Friedman's reliance on the Sinelnikov Affidavit was improper.

B. Defendant Fetzer's Request for Sanctions

Defendant Fetzer has no basis for requesting sanctions. Doc. #97. Dr. Friedman conducted DNA testing *in addition to* the testing performed by Dr. Baird. *Compare* Doc. #157 (Baird DNA results); Doc. #105 at Ex. C (Friedman DNA results). At this point two separate rounds of DNA testing, each with their own chain of custody, confirm that the sample maintained by the Connecticut Office of the Chief Medical Examiner has a greater than 99.99% chance of being from Leonard Pozner's son.

The Court's Order appointing Dr. Baird did not forbid Plaintiff from conducting additional DNA testing. Defendant Fetzer identified no court order or discovery request or any other fathomable basis that would support sanctions. Plaintiff did not violate any Court's order for DNA testing, and therefore Defendant Fetzer's request for sanctions must be denied.

II. CONCLUSION

Defendant Fetzer has offered no valid grounds to strike the Affidavit of Dr. Friedman or Dr. Sinelnikov. His request for sanctions is frivolous.

Dated: June 12, 2019

MESHBESHER & SPENCE LTD.

/s/ Genevieve M. Zimmerman

Genevieve M. Zimmerman (WI #1100693)

1616 Park Avenue South

Minneapolis, MN 55404

Phone: (612) 339-9121

Fax: (612) 339-9188

Email: gzimmerman@meshbesh.com

THE ZIMMERMAN FIRM LLC

Jake Zimmerman (*Pro Hac Vice*)

1043 Grand Ave. #255

Saint Paul, MN 55105

Phone: (651) 983-1896

Email: jake@zimmerman-firm.com

QUARLES & BRADY LLP

Emily M. Feinstein (WI SBN: 1037924)

emily.feinstein@quarles.com

Marisa L. Berlinger (WI SBN: 1104791)

marisa.berlinger@quarles.com

33 East Main Street

Suite 900

Madison, WI 53703-3095

(608) 251-5000 phone

(608) 251-9166 facsimile

Attorneys for Plaintiff Leonard Pozner