STATE OF WISCONSIN
SUPREME COURT

LEONARD POZNER,

Plaintiff-Respondent,

v.

JAMES FETZER,

Defendant-Appellant.

APPEAL NO. 2020AP121 and 2020AP1570
Dane County Case No. 2018CV3122
Hon. Frank D. Remington, presiding

PLAINTIFF-RESPONDENT'S OPPOSITION TO APPELLANTS CORRECTED PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

Opposition To Petition For Review

This case does not raise any special or important issues, much less constitutional or essential policy concerns. The issues that Dr. Fetzer raises were decided as a result of the circuit court's cautious exercise of discretion. The narrow factual underpinnings of the issues raised in Dr. Fetzer's petition, in many instances the result of Dr. Fetzer's litigation strategies, mean they are highly unlikely to arise in other cases.

The circuit court did not violate Dr. Fetzer's due process rights by foreclosing relevant defenses. Dr. Fetzer bases this claim on a single, out-of-context, cherry-picked statement. In reality, the circuit court exercised its discretion on a discovery dispute and made that statement while ruling on one written discovery request. To avoid confusion, the court specifically noted that it was not deciding a motion *in limine* or otherwise circumscribing the scope of Dr. Fetzer's trial defenses. Over and over again, Dr. Fetzer worked to develop his defense as he deemed appropriate, regardless of the statement on which he now relies. Far from a real question of due process rights, the circuit court applied well-settled discovery principles to the facts of this case.

Similarly, this Court need not weigh in on well-settled defamation law because Dr. Fetzer chose not to not plead or pursue conditional privilege as an affirmative defense. Dr. Fetzer cites no case law in Wisconsin or anywhere else requiring a plaintiff or a court to independently ascertain a defendant's status as a media defendant.

Nor does Dr. Fetzer find support in the process for evaluating other conditional constitutional privileges, such as the actual malice requirement for public figures. Even if the circuit court would have considered fault, the circuit court's determination that Dr. Fetzer waived this issue was a reasonable exercise of the court's discretion. That is particularly true in light of Dr. Fetzer's agreement to abandon the conditional privilege he did raise, Mr. Pozner's alleged status as a public figure. Dr. Fetzer abandoned his conditional privilege defense in exchange for relief from Mr. Pozner's discovery requests, which would have also provided evidence of Dr. Fetzer's state of mind—evidence that would be relevant to negligence.

This Court need not address Dr. Fetzer's unsupported claim that he was found liable for third-party incitement. He was not. Dr. Fetzer implies he must have been because of evidence of reputational damage, but he has no evidence that the jury, *sua sponte*, found him liable of a

different tort in a trial limited to damages. And, if Dr. Fetzer was concerned that the evidence at issue could confuse the jury—to, for example, think it needed to decide whether he incited a third party to act—he needed to object to the admission of that evidence, move to strike related testimony, and seek a curative instruction. Dr. Fetzer did not do so and thereby forfeited the ability to raise any issues of error as a result.

Finally, Dr. Fetzer's claim that he cannot satisfy the circuit court's contempt sanction does not meet any of the criteria of Wis. Stat. (Rule) § 809.62(1r). During the contempt process for Dr. Fetzer's second willful violation of the circuit court's orders, a process that took place over a period of seven months, Dr. Fetzer never introduced any evidence suggesting that he would be unable to satisfy the circuit court's monetary contempt sanction. Dr. Fetzer instead asks this Court to flip the burden of showing capability of complying onto the circuit court or Mr. Pozner. This issue arises entirely out of Dr. Fetzer's strategic decision to not provide any evidence of his alleged inability to pay. It is not a novel legal issue nor one that is likely to arise often.

Statement of Issues

1. Did The Circuit Court Foreclose A Relevant Defense?

No. The Circuit Court ruled on whether Mr. Pozner had to respond to one written discovery request and explicitly told Dr. Fetzer it was not ruling on what evidence he could present. And, Dr. Fetzer continued to pursue the defense he now argues the Circuit Court foreclosed.

2. Did The Circuit Court Err By Holding That Dr. Fetzer Had Waived His Affirmative Defense

No. Dr. Fetzer waived the affirmative defense of being a media defendant, instead raising the affirmative defense that Mr. Pozner was a public figure. Dr. Fetzer later dropped that affirmative defense.

3. Did The Jury Award Damages Based On A Claim Of Incitement?

No. Dr. Fetzer has no evidence that the jury ignored the Circuit Court's instructions. If Dr. Fetzer was worried that the jury might think that Dr. Fetzer had incited a third party, he needed to object to the admission of the evidence he now argues led to a finding of incitement. He did not.

4. Did The Circuit Court Err By Imposing An Alternative Purge Condition Without Considering Dr. Fetzer's Alleged Inability To Pay?

No. The Circuit Court gave Dr. Fetzer the option for an evidentiary hearing on this issue and he chose not to have one.

Statement of the Case

This was a straightforward defamation action. Dr. Fetzer published a book and wrote a blog post claiming that Mr. Pozner circulated a death certificate that was "fake," "fabricated," and a "forgery" based on a host of perceived errors or inconsistencies. *Pozner v. Fetzer*, 2021 WI App 27, ¶ 6, 959 N.W.2d 89 (unpublished). Mr. Pozner pled a narrow cause of action related solely to Dr. Fetzer's allegation that Mr. Pozner circulated a fake death certificate (which would be a crime). *See id.*

I. The Circuit Court's Discovery Ruling.

Dr. Fetzer, with the assistance of counsel, answered with unfounded allegations that Mr. Pozner's son never existed, never died, and that the Sandy Hook school shooting was a federal government operation. (R.2 at 2.) Dr. Fetzer also alleged that Mr. Pozner was a public figure. Dr. Fetzer served extremely broad discovery requests. *Pozner*,

2021 WI App 27, at ¶ 5. Most were entirely unrelated to the underlying cause of action. For example, Dr. Fetzer asked Mr. Pozner to:

> Admit that Exhibit N, "Fabricated Passport of '[N.P.]'" includes a passport number with "666" as its middle digits, the occurrence of which by chance is so remote it appears to be telegraphing that the alleged [Sandy Hook Elementary School] shooting was a hoax that had Satanic elements.

(R. 32 at 5.)[1]

In response, Mr. Pozner sought a protective order based on his concern that Dr. Fetzer was seeking highly personal information unrelated to the narrow question before the court: whether N. P.'s death certificate was fake. (*See* R.29.)

In ruling on Mr. Pozner's motion, the circuit court warned Dr. Fetzer that he could not turn this case into "a complete fishing expedition," but carefully reviewed each disputed request, allowing some and excluding others. (*See* R.352) For example the circuit court excluded Dr. Fetzer's document requests for irrelevant and highly personal documents ranging from Mr. Pozner's ex-wife's religious conversion, to medical records relating to the *in-vitro* fertilization treatments the couple

[1] All citations to the record are to the record numbers from the index in the second appeal regarding the alternative purge condition, Appeal No. 2020AP001570.

undertook. (*See, e.g.*, *id.* at 32:17–19; 36:11–37:5, 39:21–44:1, 44:16-45:15, 50:14–51:7.) The parties eventually stipulated to a confidentiality order. (R.112.)

II. Dr. Fetzer Withdraws His "Public Figure" Affirmative Defense At The Summary Judgment Hearing.

Because Dr. Fetzer asserted a "public figure" affirmative defense and demanded that Mr. Pozner demonstrate actual malice, Mr. Pozner served discovery seeking information that would allow him to ascertain Dr. Fetzer's state of mind regarding the published statements. (*See* R.93.) Dr. Fetzer refused to produce responsive documents, claiming that they were highly personal and confidential. Mr. Pozner moved to compel and his motion was granted. (R.93; R.127.)

Dr. Fetzer brought a motion for reconsideration, arguing for the first time that he was a journalist entitled to a journalistic privilege. (R.157.) At the hearing on Dr. Fetzer's motion, the circuit court determined that the documents were relevant to Mr. Pozner's showing of actual malice, in particular, Dr. Fetzer's state of mind at the time he published the defamatory statements. (R.357 at 31:15–31:7.) Dr. Fetzer voluntarily dropped his assertion of a conditional privilege in exchange for Mr. Pozner dropping his document requests. (R. 357 at 71:24–73:4.)

III. The Circuit Court Granted Summary Judgment In Favor Of Mr. Pozner On Liability.

Mr. Pozner sought summary judgment on his defamation claim, but also moved for summary judgment on each of the affirmative defenses raised by each defendant. (*See* R. 83 at 35–41.) He did not move for summary judgment on the conditional privilege of a media defendant because no defendant asserted that privilege. (*See* R.2 (Dr. Fetzer's answer), R. 21 (Palacek's Answer), R.27 (Wrongs Without Wremedies, LLC's Answer).)

After the issues were fully briefed, the circuit court held a lengthy hearing, at which time the circuit court went through each element of defamation in detail and allowed each party to present evidence and argument. (*See* R. 357.) Dr. Fetzer conceded, on the record, to all elements of defamation except the falsity of the published statements. (*See id.* at 107:4–109:6.)

Mr. Pozner submitted evidence that the death certificate he circulated was authentic, and not "fake," "forged" or "fabricated," for the reasons Dr. Fetzer described in his book and internet post. (*See id.* at 34:6–67:23.) Dr. Fetzer did not introduce any admissible evidence that the document Mr. Pozner uploaded was fake. Indeed, Dr. Fetzer conceded on

the record that the various supposed indicia of forgery described in his book were all wrong. (*See id.* at 127:20–129:1.) The circuit court found that Dr. Fetzer's statements were false as a matter of law. (R. 357 at 165:11–18.)

Mr. Pozner also offered admissible evidence that Dr. Fetzer acted with reckless disregard for the truth or falsity of the statements. (*See*, *e.g.*, R.137 at 23-26.) Dr. Fetzer did not introduce any admissible evidence establishing that he acted reasonably in publishing the false statements. (*See* R.357.) Ultimately, the circuit court did not have to rule on Dr. Fetzer's conditional privilege because he had previously withdrawn it and did not raise the issue at the summary judgment hearing. (*See id.*)

IV. Mr. Pozner Is Awarded Compensatory Damages At Trial.

At the trial on compensatory damages, Mr. Pozner testified about how Dr. Fetzer's statements had caused him injury, including injury to his reputation. *Pozner*, 2021 WI App 27, ¶ 69. Specifically, he explained how his interactions with third parties have been impacted by Dr. Fetzer's statements. *Id.* One example was a series of messages left for Mr. Pozner by Lucy Richards, who was eventually prosecuted for making death threats. *Id.* Mr. Pozner also presented the deposition testimony of Dr. Roy Lubit, who opined regarding how Mr. Pozner continued to suffer

from PTSD as a direct result of Dr. Fetzer. *Id.* at 70–71. The jury awarded Mr. Pozner $450,000 in compensatory damages. *Id.* at ¶ 9.

V. Dr. Fetzer's Second Contempt Of Court.

Dr. Fetzer had already been held in contempt once for violating the confidentiality order by sending a copy of Mr. Pozner's videotaped deposition to a former lawyer not admitted *pro hac* vice in this matter who subsequently shared the video with others who used it to harass Mr. Pozner and other relatives of Sandy Hook victims. *See id.* at ¶¶ 59–62. Within weeks of the end of trial, Dr. Fetzer once again violated the circuit court's confidentiality order. He again sent Ms. Maynard information that she was not authorized to receive; this time the written transcript of Mr. Pozner's deposition. *Id.* at ¶ 89. Ms. Maynard once again sent the confidential information to hoaxers who have used that information in their ongoing efforts to harass and intimidate Mr. Pozner. *See id.*

Mr. Pozner brought a motion for an order to show cause and Dr. Fetzer was again held in contempt. *Id.* at ¶ 91. The circuit court issued an order requiring Dr. Fetzer to pay $650,000 as an alternative purge condition. *Id.*at ¶ 92.

VI. The Court Of Appeals Affirms The Circuit Court's Summary Judgment Ruling, Mr. Pozner's Damages Award, And The Circuit Court's Alternative Purge Condition For Dr. Fetzer's Second Contempt Of Court.

Dr. Fetzer appealed the circuit court's partial summary judgment decision and post-trial order imposing a monetary remedial sanction. The court of appeals affirmed the circuit court on both appeals. *Id.* at ¶ 114.

Regarding the summary judgment decision, the court of appeals found that the circuit court did not prevent Dr. Fetzer from presenting his defense theory when it made a narrow ruling related to Dr. Fetzer's discovery requests. *Id.* at ¶ 30. The court of appeals also found that there was no material dispute of fact regarding the falsity of the defamatory statements made by Dr. Fetzer. *Id.* at ¶ 45. Regarding Dr. Fetzer's argument that the circuit court was required to determine whether he was negligent when making his defamatory statements, the court of appeals rejected his argument on two grounds: 1) Dr. Fetzer forfeited the argument by not raising the issue before the circuit court on summary judgment; and 2) it was Dr. Fetzer's burden, not Mr. Pozner's, to raise and establish a conditional privilege. *Id.* at ¶¶ 49, 51. The court of appeals also rejected Dr. Fetzer's argument that he was held liable and

damages were awarded based on a theory the incitement of third parties, finding that Mr. Pozner's damages claims did not rest entirely on acts of third parties and Dr. Fetzer forfeited this argument by failing to raise the issue at trial. *Id.* at ¶¶ 84–85.

Finally, regarding the alternative purge condition imposed on Dr. Fetzer second contempt of court, the court of appeals held that Dr. Fetzer waived any evidentiary hearing on the issue at the hearing where the sanction was imposed. *Id.*at ¶ 104.

Argument

I. This Court Should Not Grant Dr. Fetzer's Petition to Second Guess the Circuit Court's Decisions on Individual Discovery Requests, None of Which Foreclosed Dr. Fetzer's Defense.

This Court should not accept review of Dr. Fetzer's petition to consider the argument that the circuit court foreclosed his defense. Dr. Fetzer argues that this Court should take the opportunity to develop the law relating to the exclusion of relevant defenses, but he cannot point to any specific defense that was excluded by the circuit court's statements, which related to a written discovery request. Nor does he provide any support for his position that a ruling on a discovery request amounts to the foreclosure of an entire defense, much less a due process violation.

Far from a due process violation, the statement cited by Dr. Fetzer confirms that the circuit court undertook a cautious exercise of discretion on a discovery dispute arising under Wis. Stat. § 804.01(2)(a)'s proportionality test. The circuit court repeatedly explained that its discovery rulings were not intended to curtail Dr. Fetzer's theory of defense. And, Dr. Fetzer did not feel so constrained as on summary judgment, Dr. Fetzer presented factual arguments premised on his theory that the Sandy Hook shooting did not occur.

The context surrounding the circuit court's statement makes clear that the statement only related to the court's ruling on the protective order, and not what Dr. Fetzer would be permitted to present at trial. At a hearing on a motion for protective order relating to specific written discovery requests, the circuit court warned Dr. Fetzer that he could not turn this case into "a complete fishing expedition" and partially granted the motion for protective order on specific requests. Dr. Fetzer does not suggest that the circuit court was incorrect in its decisions on any individual request. Rather, he relies on one statement the circuit court made to argue that the circuit court foreclosed his defense.

In fact, at that same hearing, the circuit court underscored that it was "not ruling on motions in limine… [The circuit court is] not telling

you what this trial is about." (R. 352 at 61:23–25; *id.* at 44:1–5 ("I envision there's going to be a lot of things you'll try to do to defend yourself and that's fine . . . . I'm not making rulings here on the rules of evidence.").) The circuit court likewise counseled Dr. Fetzer that he was free to conduct his own investigation and seek documents on his own related to his theory of the case. (*Id.* at 44:16–25.)

As the Court of Appeals held:

> looking at the March 2019 hearing transcript in its entirety, it is manifest from the circuit court's statements and rulings at the hearing that the circuit court did not bar Fetzer from asserting any particular factual defense. Instead, the circuit court only limited the breadth of information and documents Fetzer could obtain from Pozner during pre-trial discovery under Wisconsin's discovery rules. Indeed, despite now arguing that his defense was curtailed, Dr. Fetzer argued at nearly every hearing in this case that Sandy Hook never happened, that Mr. Pozner is an imposter, or that N.P. did not exist.

Pozner, 2021 WI App 27, ¶ 28.

Despite now claiming that his defense was curtailed, Dr. Fetzer argued at nearly every hearing in this case that Sandy Hook never happened, that Mr. Pozner is an imposter, or that N.P. did not exist. (*See*, *e.g.*, R. 352 at 34:13–35; R.353 at 12:16–19; R.354 at 17:8–12; R.356 at 13:23–14:15; R.357 at 142:7-25; R.359 at 45:12–20.) The Court of Appeals recognized as much, noting several examples where Dr. Fetzer argued his

factual theory of defense in subsequent hearings. *Pozner v. Fetzer*, 2021 WI App 27, at ¶ 29 (citing example from June 4, 2019 hearing and an example "which is illustrative of several" from the summary judgment hearing).

The argument that the scope of Dr. Fetzer's defense leading up to summary judgment was constrained by the circuit court is utterly inconsistent with the factual record. The circuit court made a proper decision on a standard discovery dispute, narrowly tied to the facts of the underlying litigation. Contrary to Dr. Fetzer's assertion, this issue does not raise any constitutional concerns. The case does not even touch upon the issue of structural error or when a circuit court can exclude relevant defenses. Indeed the Court of Appeals did not even find it necessary to address whether a structural error occurred because it found the facts established that the circuit court did not preclude Dr. Fetzer from pursuing a theory of defense at summary judgment. *Id.* at ¶ 30, n.13. In his petition, Dr. Fetzer attempts to transform factual issues into legal ones using bald assertions. (*See, e.g.*, Pet. at 16, 18–19.) However, the shooting at Sandy Hook Elementary School was not the focus of this case, and Dr. Fetzer's contention that it did not occur raises at most a question of fact, inappropriate for review under Wis. Stat. (Rule) § 809.62(1r)(c)(3).

Dr. Fetzer's petition does not meet any of the criteria for Wisconsin Supreme Court review on his claim that his defense was foreclosed. The court of appeal's decision is based on the facts of this case, rather than the application of federal or state constitutional law. *Id.* at ¶ 20 (noting Dr. Fetzer's argument rested on two factual premises, both of which failed). Nor is the court of appeal's decision in conflict with any decisions of the United States Supreme Court, the Wisconsin Supreme Court or other court of appeals' decisions. The outcome of this issue turned on the facts of the case, not the application of law. As a result, Dr. Fetzer's petition does not meet the criteria for review enumerated in Wis. Stat. (Rule) § 809.62(1r) and should be denied.

II. This Court Should Not Consider Making New Law on a Conditional Privilege Dr. Fetzer Failed to Raise as An Affirmative Defense.

A. There is No Need For New Law On Conditional Privilege, Especially in the Context of a Party Who Chose Not to Raise the Conditional Privilege Until After Trial.

This Court should not weigh in to create new law on an argument that Dr. Fetzer did not raise until after trial. Dr. Fetzer failed to raise the conditional defense of a media defendant, and thereby impose a higher burden on Mr. Pozner, until *after* Dr. Fetzer lost. Setting aside his waiver

of this defense, Dr. Fetzer seeks to reverse the burden for affirmative defenses and place the burden on the plaintiff rather than the defendant to plead the condition for application of the privilege. Wisconsin precedent makes clear that it was Dr. Fetzer's burden—and choice— to raise this defense. Further, Dr. Fetzer seeks to impose on the circuit court a duty to act as his advocate, to suggest and make this argument for him, but cites no authority for that position. In fact what Dr. Fetzer requests is itself contrary to long-accepted judicial policy.

Dr. Fetzer did not assert he was a media defendant, thus proof of negligence was not required. Wisconsin law recognizes that proof of negligence is an element of a plaintiff's prima facie case against a media defendant, but it is not an element of a plaintiff's prima facie case against a non-media defendant. *Denny v. Mertz*, 106 Wis.2d 636, 654, 660, 318 N.W.2d 141 (1982) (establishing an elevated standard of fault for media defendants and declining to extend that heightened standard to a non-media defendant). While not binding on this Court, the Wisconsin Jury Instructions also confirm that Wisconsin law "implie[s] the existence of [fault] from the publication of a defamatory statement itself *unless a conditional privilege applies*." Wis. JI-Civil 2500, n.1 (2016).

It is axiomatic that a defendant must qualify as "media" before *Denny's* negligence standard can apply. As the court of appeals acknowledged, Dr. Fetzer "did not raise the question of negligence or his alleged membership in the 'media' as a factual dispute as he was required to do in summary judgment." *Pozner*, 2021 WI App 27, at ¶ 50. Because Dr. Fetzer never raised the issue, Mr. Pozner never had an opportunity to seek judicial determination about whether Dr. Fetzer's self-published book qualified him as a media defendant, or whether Wisconsin law protects Dr. Fetzer's internet statements as "media."

Although Dr. Fetzer argues that lower courts are applying the *Denny* standard improperly, he identifies no instances of such error. Dr. Fetzer notes that courts must examine the pleadings, yet he identifies nothing in any of the pleadings filed by any of the parties in this case that would have mandated application of the elevated standard.

Dr. Fetzer further argues that everyone conceded that he was entitled to a media privilege. That is false. For both counts of defamation, Mr. Pozner's Complaint alleged that the defamatory publications were not privileged. (*See*, *e.g.*, R.1 at ¶¶ 28, 37.) Dr. Fetzer did not raise the conditional privilege of a media defendant in his answer and raised no affirmative defenses, thus a showing of negligence was not required.

Neither the circuit court nor Mr. Pozner was required to raise the defense on Dr. Fetzer's behalf. The defendant has the burden to raise and establish any conditional constitutional privilege which would grant immunity from liability for defamation. *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 498–500, 228 N.W.2d 737 (1975). As the court of appeals explained "under Wisconsin law, is it not the plaintiff but the defendant who bears the burden of raising and establishing a conditional privilege (such as the news media defense raised by [Dr.] Fetzer) that may grant immunity from liability for defamation." *Pozner*, 2021 WI App 27, ¶51 (collecting cases).

Dr. Fetzer insists the circuit court and court of appeals erred in not considering an issue he did not timely raise. It is not the court's responsibility to make arguments or raise issues on behalf of litigants. Wisconsin courts have long accepted as a matter of public policy that courts "cannot serve as both advocate and judge." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (declining to decide issues the court would need first to "develop" for the defendant); *Mucek v. Nationwide Communc'ns*, 2002 WI App 60, ¶ 67 n.7, 252 Wis. 2d 426, 643 N.W.2d 98 ("But it was not the duty of the trial court or opposing counsel to make [the plaintiff's] case for her."). The circuit court was under no

obligation to assert on behalf of Dr. Fetzer the defense he now claims, nor was the court of appeals obligated to consider it. Dr. Fetzer's petition asks for review to be granted on his alleged status in direct conflict with this policy.

Even had Dr. Fetzer not waived this affirmative defense, the circuit court noted that the summary judgment motion papers and supporting documents included sufficient evidence to support a finding of fault. (R.291 at 2.) Mr. Pozner's summary judgment briefs provided ample evidence that Dr. Fetzer acted in reckless disregard for the truth or falsity of his statements.

Dr. Fetzer's suggestion that the circuit court erred by refusing to consider the opinions of Dr. Fetzer's two alleged experts when it granted summary judgment is factually erroneous and irrelevant to the § 809.62(1r) factors. The circuit court did not "merely" dismiss the experts' reports as "someone else's opinion." Petition at 29. Those opinions were the subject of Mr. Pozner's *Daubert* motions (R.164) and the circuit court noted that had it not granted summary judgment on the stated grounds, the *Daubert* motions would have been granted and the experts' opinions excluded. (R.357 at 164:17–22.)

Dr. Fetzer asks this Court to impose a standard that presumes one's status as a media defendant without any threshold determination that the status properly applies. That is inconsistent with Wisconsin's treatment of conditional constitutional privileges. The fact that a conditional constitutional privilege is derived from the First Amendment does not mean it applies even when not raised by a defendant. The actual malice standard for public figures is clearly required by the First Amendment, but Dr. Fetzer does not contend that it arises in the absence of a defendant's pleading. The circuit court never had an opportunity to consider the threshold question of Dr. Fetzer's alleged status as a media defendant, because Dr. Fetzer never raised the issue.

Dr. Fetzer's petition does not satisfy the criteria for granting review on this issue. *Denny v. Mertz* was decided decades ago and took an approach shared by the majority of jurisdictions who have considered the issue. *See Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 117 (Iowa 1984) (citing *Denny* and explaining that applying the common-law standard where a defendant does not assert media status is good policy and has been adopted in many jurisdictions). Yet, Dr. Fetzer failed to identify even one instance where this issue has since arisen. That is ample evidence that this is not an issue that is likely to arise and therefore

not appropriate grounds for granting Dr. Fetzer's petition. Nor is the court of appeal's decision in contravention of constitutional law or controlling opinions of the United States Supreme Court or Wisconsin courts. In all these respect, Dr. Fetzer's petition fails to meet the standards for review set forth in Wis. Stat. (Rule) § 809.62(1r).

B. Dr. Fetzer Waived His Conditional Constitutional Privileges.

In exchange for Mr. Pozner dropping discovery requests, Dr. Fetzer waived any requirement that Mr. Pozner to produce evidence of fault of any kind. In his answer and leading up to the summary judgment hearing, Dr. Fetzer presented the affirmative defense that Mr. Pozner was a public figure and therefore asserted that a conditional constitutional privilege existed. (R.2 at 1; R.86 at 14.) Mr. Pozner sought discovery relevant to Dr. Fetzer's state of mind at the time the statements were published. Even after the circuit court ordered Dr. Fetzer to produce documents (R.128), Dr. Fetzer refused. (R.157.)

At the summary judgment hearing, Dr. Fetzer agreed to forego the issue of fault in exchange for Mr. Pozner dropping discovery requests that would have required Dr. Fetzer to turn over emails relevant to his knowledge that his statement were false. (R.357 at 165:12–16 (circuit court

concluding that Mr. Pozner is not a limited purpose public figure "based on the facts and the concession of the parties acquiescing to that").)

Although Dr. Fetzer now argues that his concession was limited to the issue of Mr. Pozner's status as a public figure, his concession was made in the broader context of Mr. Pozner seeking discovery of documents that related to Dr. Fetzer's knowledge and actions around the time of publication. (*See, e.g., id.* at 30:23–32.) Having induced Mr. Pozner to drop those discovery requests in exchange for dropping the only asserted conditional privilege, Dr. Fetzer should not now be heard to demand that Mr. Pozner should nevertheless have provided evidence of negligence.

Dr. Fetzer's failure to timely raise his alleged "media" status means it was waived. *State v. Conway*, 34 Wis. 2d 76, 82–83, 148 N.W.2d 721 (1967) (noting this general rule in Wisconsin). In fact, at the final pre-trial conference, Dr. Fetzer conceded that the issue had been foreclosed at the summary judgment hearing and was no longer an open issue in the case. (R.358 at 23:23–24.) Dr. Fetzer first raised this issue in post-trial briefings. It was too late at that point.

Given Dr. Fetzer's waiver, this issue does not meet the criteria for Wisconsin Supreme Court review. The circuit court and court of

appeals determinations were made in light of the particular facts of this case, especially Dr. Fetzer's refusal to produce discovery relevant to his state of mind. There are no important constitutional or policy concerns that will be decided or clarified by granting this petition. Dr. Fetzer offers an undeveloped argument that, in following well-established Wisconsin precedent that does not conflict with controlling opinions of the United States or Wisconsin Supreme Court, the court of appeals put forth the "appearance . . . that controversial speech is unprotected in Wisconsin" and therefore requires guidance from this Court. (Pet. At 2.) This simply is not the case. The lower court decisions were nothing more than the application of well-settled principles to the particular facts of this case and were the result of the litigation strategies employed by the litigants.

III. Dr. Fetzer Forfeited Any Objections He Had to the Evidence He Alleges Required a New Incitement Standard.

Dr. Fetzer is wrong to suggest he has an incitement argument worthy of this Court's review. He failed to raise this issue at trial, failed to object to the admission of evidence about which he now complains, failed to move to strike, and failed to seek the necessary jury instructions. As

the Court of Appeals concluded, under both Wisconsin Supreme Court precedent and Wis. Stat. § 901.03(1), Dr. Fetzer forfeited any objection on appeal related to the jury's consideration of this evidence.

Because he cannot excuse his failure to raise this defense in an answer or at trial, Dr. Fetzer argues that the Wisconsin Supreme Court has long held that the forfeiture rule does not apply when considering issues of public policy. Again, he is wrong. He cites to one case involving a motion to dismiss, meaning the public policy defense was raised as the first response to the complaint. *See Nichols v. Progressive Northern Ins., Co.*, 2008 WI 20, ¶ 2, 308 Wis. 2d 17, 746 N.W.2d 220. He cites to a second case, *Ladewig v. ex rel. Grischke v. Tremmel*, but that case also does not conclude that a party can first raise a public policy defense to liability in a post-trial motion. 2011 WI App 111, 336 Wis. 2d 216, 802 N.W.2d 511.

Dr. Fetzer was required to raise every defense in law or in fact in his answer. Wis. Stat. § 802.06(2)(a). He made no mention of his current position, that there is not a "legally sufficient" basis to allow for Mr. Pozner to recover damages. (Pet. at 32–33). If he did not realize this defense might apply until some point after filing his answer, Mr. Pozner could have amended his answer or sought leave to do so, *see* Wis. Stat. § 802.09(1), but he did not.

Even assuming Dr. Fetzer did not need to raise this issue in his answer, at the very least he needed to object to this evidence when Mr. Pozner moved to have it admitted at trial in order to argue error now. Wis. Stat. § 901.03(1). If, as Dr. Fetzer now implies, the probative value of this evidence is outweighed by the risk of juror confusion over what claims are at issue, he needed to raise this issue before the evidence was admitted. At the very least, he could have raised the issue on a motion to strike or sought a curative instruction. He did neither.

This Court has repeatedly explained the important reasons why litigants may not raise errors for the first time on appeal:

> Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

State v. Huebner, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727 (citations omitted). In this case, for example, had Dr. Fetzer objected or moved to strike, the trial court could have considered a curative jury instruction.

While Dr. Fetzer may be right that no Wisconsin Court has addressed the standard for incitement, he fails to offer a reason why this Court should do so in this case. Mr. Pozner did not bring an incitement claim. Dr. Fetzer provides no evidence that the jury, *sua sponte*, held him liable—at a trial in which the only issue was damages—for a tort on which they were not instructed. Instead, Dr. Fetzer raises concerns about evidence demonstrating that others believed his defamatory statements which negatively impacted Mr. Pozner's reputation. But, he failed to object to that admission of evidence at the circuit court and that failure alone is reason enough for this Court to deny his petition. *See Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974) ("The practice of this court is not to consider an issue raised for the first time on appeal" because it would "deprive this court of the informed thinking of the trial judge on the matter.").

IV. The Court Of Appeals Finding Of Waiver Was Correct And Dr. Fetzer Did Not Establish An Inability To Comply With The Purge Condition.

A. The Court Of Appeals Correctly Ruled Dr. Fetzer Waived His Right To An Evidentiary Hearing Regarding His Alternative Purge Condition.

Dr. Fetzer's petition does not raise a novel or unresolved issue of law regarding the timing of the inquiry into his alleged inability to pay. No "clarification" is required because the court of appeals found that Dr. Fetzer waived his right to have an evidentiary hearing on this issue. *Pozner*, 2021 WI App 27, at ¶ 104. At the hearing where the circuit court imposed the purge condition, the circuit court specifically asked Dr. Fetzer's counsel whether he wanted to have an evidentiary hearing, which Dr. Fetzer's counsel declined:

> THE COURT: Dr. Fetzer—Mr. Bolton, I don't know if you intended to turn this final oral argument into an evidentiary hearing, but I'll take your cue as to how you'd like to proceed. . . . How would you like to proceed, Mr. Bolton?
>
> MR. BOLTON: Your Honor, I would—I would—my preference would be to proceed as scheduled—with oral arguments rather than an evidentiary hearing.

(R.365 at 9:6–24.) Based on the above exchange, the court of appeals found that Dr. Fetzer "waived the right to have an evidentiary hearing on this particular issue, and cannot be heard to complain of the circuit court's failure to hold such an evidentiary hearing when he declined the opportunity." *Pozner*, 2021 WI App 27, at ¶ 104. Given the court of appeal's finding that Dr. Fetzer waived his right to the evidentiary hearing regarding his ability to pay any alternative purge condition, the

timing of when it was to occur is irrelevant. As a result of Dr. Fetzer's waiver, this issue does not satisfy the requirements for Wisconsin Supreme Court review.

Setting the waiver aside, Wisconsin courts have already addressed this issue, and found that a hearing regarding a contemnor's ability to pay a purge condition does not need to be held before the sanction is imposed. In *Frisch v. Henricks*, the court imposed a $100,000 sanction at a June 15, 2004 hearing. 2007 WI 102, ¶¶ 22–23, 304 Wis. 2d 1, 736 N.W.2d 85. Later, at a hearing on overtrial, the court made factual findings confirming the contemnor's ability to pay. *Id*. at ¶ 24, n.20. Consistent with *Frisch*, *Benn v. Benn* held that the determination of a contemnor's inability to meet a purge condition can be evaluated after the sanction had been imposed as long as that determination occurs before incarceration. 230 Wis. 2d 301, 312, 602 N.W.2d 65 (Ct. App. 1999).

Like *Benn* and *Frisch*, the circuit court provided a procedural mechanism by which Dr. Fetzer will be allowed to attempt to demonstrate his inability to pay the contempt. (R. 365 at 50:25-51:15.) That opportunity is still available to Dr. Fetzer. At the time Mr. Pozner seeks to enforce the judgment, Dr. Fetzer's ability to pay the remedial sanction will be evaluated. That it is done contemporaneously with collection

makes sense, because a contemnor's resources may be different at the time of collection than they were at the time the contempt was ordered. Wisconsin law is clear as to the timing of an evaluation into a contemnor's ability to satisfy an alternative purge condition. As a result, no clarification of Wisconsin law is required and this issue does not meet the criteria for Wisconsin Supreme Court review.

B. Dr. Fetzer Offered No Evidence of His Inability to Pay At The Second Contempt Hearing.

Even if the circuit court was required to assess Dr. Fetzer's ability to pay before imposing an alternative purge condition, Dr. Fetzer did not introduce any evidence demonstrating his purported inability to comply with the circuit court's alternative purge condition. At no point during or after Mr. Pozner submitted detailed records regarding the remedial contempt sanction did Dr. Fetzer introduce any evidence demonstrating his inability to comply.

Dr. Fetzer argues that the circuit court should have, somehow, conducted a factual inquiry into Dr. Fetzer's ability to pay. Dr. Fetzer offers no legal basis to put that affirmative burden on the circuit court in these circumstances. Indeed, Wisconsin law already puts that burden squarely on the contemnor. *State ex rel. V.J.H. v. C.A.B.*, 163 Wis. 2d 833,

472 N.W.2d 839 (Ct. App. 1991) (imposing on contemnor the burden of showing that purge condition was not feasible). Dr. Fetzer was represented by competent counsel who surely understands that evidence, not mere attorney argument, is required in a court of law.

During the entire seven month contempt process, Dr. Fetzer never introduced evidence of his purported inability to satisfy the remedial contempt. Dr. Fetzer and his counsel had notice and every opportunity to provide evidence of his alleged inability to pay. At the May 14, 2020 hearing, more than four months after Mr. Pozner's motion initiating the second contempt, and a month after briefing was completed on the circuit court's proposed remedial sanction, the circuit court noted that Dr. Fetzer had yet to provide any evidence demonstrating his alleged inability to pay. (R. 365 at 48:25–49:4.)

As a practical matter, it would be unworkable to put the burden on the circuit court or the aggrieved party to show that the contemnor has the ability to pay. The contemnor is in control of all relevant evidence related to the contemnor's ability to pay. Shifting the burden away from the contemnor would require adoption of discovery or investigative processes to a contempt proceeding. Wisconsin law does not require clarification regarding the burden of production of evidence of a

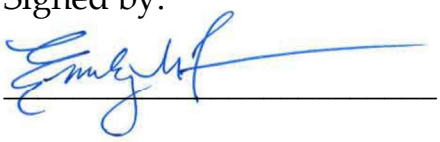
contemnor's ability to pay. The law already puts that burden on Dr. Fetzer. Moreover, this issue is inextricably tied to the narrow factual circumstances created by Dr. Fetzer's failure to provide any evidence. For each of these reasons, this Court should deny his petition.

Conclusion

This Court should deny Dr. Fetzer's petition for review in its entirety.

June 7, 2021 Respectfully submitted,

Signed by:



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) §§ 809.62(4) and 809.19(8)(b) and (d) as to form and length for a brief produced with a proportional serif font. The length of this brief, including footnotes, is 6842 words.

June 7, 2021 Quarles & Brady

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12)(f). I further certify that the electronic brief is identical in content and format to the printed form of the brief, filed as of this date.

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June 7, 2021 Quarles & Brady

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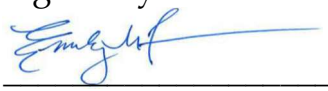

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. (Rule) § 809.62(3).

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

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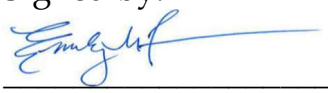

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June 7, 2021 Quarles & Brady

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CERTIFICATION OF MAILING

I hereby certify that on this 7th day of June, I caused this Brief to be sent via U.S. Mail to:

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