

1 (Proceeding began at 9:11 a.m.)

2 THE COURT: All right. This is case 18-CV-3122,
3 Leonard Pozner versus James Fetzer. Jake Zimmerman
4 appears on the phone for the plaintiff. Have the
5 appearance in court, please.

6 MS. FEINSTEIN: Good morning, Your Honor. Emily
7 Feinstein from the law firm of Quarles and Brady here for
8 the plaintiff.

9 MS. STEDMAN: And Attorney Emily Stedman of
10 Quarles and Brady for the plaintiff.

11 MR. BOLTON: Rich Bolton for the defendant.

12 THE COURT: Great. Thanks for coming in this
13 morning. I have on the court's calendar a number of
14 motions. I'll take up the defendant's motions first.

15 I have reviewed the briefs. I've done some
16 research. And I'll confess to you that I have a draft in
17 progress, in large part, because as you know that the
18 timeline on post-trial motions is pretty short. I'll get
19 the written decision out tomorrow. Depending upon what I
20 hear and learn today, I'll probably give you the answers
21 to the questions and then it will be supported by the
22 written decision. On the other hand, if I hear something
23 today that changes my mind, then you won't get an answer
24 today, I'll have to think about what I heard, but I'll
25 still try to get the written decision out tomorrow.

1 We're on the court's calendar for an oral
2 argument. I always scheduling oral arguments to
3 accomplish a couple things. Ordinarily, it's usually to
4 give an oral decision. Well, due to the nature of this
5 case and the issues raised, I think a written decision
6 would be preferable. But, an oral argument does provide
7 me with an opportunity to confirm the issues as I
8 understand them and the arguments as been presented and
9 then ask some questions for clarification.

10 I thought the briefs were very, very good and
11 outline the law. There are some nuances I want to ask
12 you, Mr. Bolton, about in the arguments that you've made.

13 And so I don't suppose this will last too long,
14 but I'll turn to each of you, as I usually do in my
15 process, and ask as to the motion you brought, is there
16 anything else you want to add now in addition and not
17 duplicative of what you wrote?

18 MR. BOLTON: No, Your Honor.

19 THE COURT: As to the defendant's motions, is
20 there anything else you'd like to add in addition to and
21 not duplicating what you wrote?

22 MR. ZIMMERMAN: As to the plaintiff's motions,
23 Your Honor?

24 THE COURT: Yeah. Who's going to do the
25 talking?

1 MS. FEINSTEIN: On the defendant's motion,
2 that's me.

3 THE COURT: Okay. Yeah.

4 MS. FEINSTEIN: Your Honor, we would just add
5 that on summary judgment we provided un rebutted evidence
6 under the standard that Mr. Bolton is raising now at this
7 late hour, and so we would say that if the Court is
8 concerned that the wrong standard of law applies,
9 obviously, we still believe and we've argued that the
10 plaintiff -- or, I'm sorry, that Dr. Fetzer had a duty to
11 raise this affirmative defense and bring it to the Court,
12 and by not raising the affirmative defense, he waived it
13 just like he would have waived a statute of limitations
14 defense if he hadn't raised it or a personal jurisdiction
15 defense if he hasn't waived it. But if the Court is
16 concerned, the Court can just simply revisit the summary
17 judgment and determine as is clear from summary judgment
18 that there was no genuine issue of material fact as to the
19 fact that Defendant Fetzer acted with the requisite intent
20 for if he was a media defendant.

21 THE COURT: Okay. So, Mr. Bolton, here's how I
22 understand your arguments. You are challenging the
23 Court's prior decision on the motion for summary judgment
24 where I found liability. In particular, you argue, Judge,
25 now retrospective, because you weren't there and not

1 retained, based on your review of the record and the
2 files, you believe that one of the elements of defamation
3 you say applies is negligence or a fault, and because that
4 was not addressed directly in this Court's decision on the
5 motion for summary judgment, you think it should have been
6 and because it wasn't, then I should change my mind and
7 vacate the liability and schedule for such other further
8 proceedings as necessary. Basically, broad outline of the
9 first issue?

10 MR. BOLTON: Yes, Your Honor.

11 THE COURT: Okay. So undoubtedly, you -- you
12 weren't there, no offense intended, so you'd have to
13 create your argument based on review of the record. The
14 first issue, of course, is though you're at a
15 disadvantage, I was there, Ms. Feinstein was there. There
16 came a time in the plaintiff's motion to compel the
17 production of Dr. Fetzer's documents supporting his
18 research and the statements he made against Leonard Pozner
19 because Dr. Fetzer refused to produce those documents.
20 You know that?

21 MR. BOLTON: I do know that, Your Honor.

22 THE COURT: Okay. And, in the context of the
23 question framed, the plaintiff said, I need these
24 documents if I'm going to be able to adequately prepare
25 for principally the issue of how we characterize the

1 plaintiff, whether the plaintiff is -- has injected him or
2 herself into the controversy or a public -- a public -- I
3 forgot the word -- presence?

4 MR. BOLTON: Figure.

5 THE COURT: Public figure. Thank you.

6 But there was, now, in reviewing the
7 transcripts, there was some discussion about -- at least
8 some discussion about how those documents would be used
9 for another similar question as to whether Dr. Fetzer
10 was -- used ordinary care in coming to the statements that
11 he made. Although, maybe those two words "ordinary care"
12 weren't used, don't you agree that in order for the
13 plaintiff to meet its burden of proof, accepting your
14 argument that negligence is a critical element of the
15 claim for defamation, that the plaintiff would have needed
16 the documents and the research upon which Dr. Fetzer
17 relied to argue that he did not exercise ordinary care?

18 MR. BOLTON: I -- I don't think so, Your Honor.
19 But I will also say that the discussion that was had, as I
20 understand it on the record, was in the -- was in the
21 context as you've indicated of a discovery motion. So
22 it --

23 THE COURT: How would the plaintiff prove
24 Dr. Fetzer did not exercise ordinary care if the plaintiff
25 was not able to see what facts upon which Dr. Fetzer

1 relied in coming to the conclusion that Leonard Pozner
2 falsified and fabricated Noah Pozner's death certificate?

3 MR. BOLTON: I -- their position is that -- that
4 they established that with the information that they
5 provided to the Court already.

6 THE COURT: No. I will grant you that I didn't
7 directly address this element when the Court granted the
8 plaintiff summary judgment on liability, and I will say in
9 sort of reconstructing the timeline and analyzing the
10 Court's process, it's because it never came up. You agree
11 that Dr. Fetzer never raised the issue of negligence being
12 an element?

13 MR. BOLTON: I agree he did not specifically
14 raise it as an element of the plaintiff's case.

15 THE COURT: Okay. So it never came up. I
16 didn't use the word negligence in a decision. I don't
17 believe that the plaintiff argued or articulated that that
18 was one of the elements that it needed to prove to
19 establish liability.

20 Do you agree that the Court, the plaintiff, and
21 James Fetzer, himself, assumed that it wasn't an element
22 because in exchange for not releasing his research
23 materials, he essentially agreed that this was a case of a
24 private individual against a private individual?

25 MR. BOLTON: I don't believe that Professor

1 Fetzer contemplated the issue at all.

2 THE COURT: And how do you -- what facts do you
3 have to support that statement?

4 MR. BOLTON: Well, the fact that it was not
5 considered by the Court or raised by the plaintiff. I can
6 tell you -- my hesitancy here is that I don't -- I don't
7 want to waive an attorney-client privilege, but if you ask
8 me what facts do I have that Professor Fetzer did not
9 contemplate the issue during the discussion that the Court
10 had, obviously, the discussion with the Court was far
11 broad ranging and it was not -- it was not raised by
12 either the Court or the plaintiff and it was not raised
13 by -- by the plaintiff.

14 Now, if the suggestion is that, well, Mr. Fetzer
15 or Professor Fetzer necessarily should have known that
16 that was an element, then that same presumption should
17 apply to the plaintiff that they knew it was and that --

18 THE COURT: Unless -- unless the plaintiff was
19 operating under the reasonable assumption that Dr. Fetzer
20 negated the element by his concession made in the context
21 of the discovery dispute.

22 MR. BOLTON: Well, I don't -- I wouldn't draw
23 that conclusion because that discussion occurred at an
24 oral argument before the Court and the plaintiff had
25 already submitted their brief in support and in reply of

1 summary judgment and had never raised the issue.

2 THE COURT: Okay. So you agree that to respond
3 to your motion then, the first decision I'll have to make
4 is whether there was a waiver or not. All right. Let's
5 put that one aside.

6 As Ms. Feinstein has just brought up, she says,
7 Judge, okay, fine, although she argues that I -- I should
8 not need to, but if I go ahead now and look back at the
9 affidavits and the evidence submitted by both parties on
10 the cross-motions for summary judgment, the facts are not
11 genuinely in dispute and those facts should yield the
12 Court now retrospective to the conclusion that Dr. Fetzer
13 did not exercise ordinary care in making the defamatory
14 statements against Leonard Pozner.

15 MR. BOLTON: I don't agree with that, Your
16 Honor.

17 THE COURT: Okay. What facts -- well, first of
18 all, do you disagree with my statement that Dr. Fetzer
19 approached the cross-motions for summary judgment with the
20 principle that none of the material facts were in dispute?

21 MR. BOLTON: I'm not sure I -- your question is
22 did Professor Fetzer approach the summary judgment from
23 the perspective that there were no disputed issues of
24 fact?

25 THE COURT: Correct.

1 MR. BOLTON: Um, I don't -- I don't agree with
2 that.

3 THE COURT: Well, I don't want to make this like
4 an I gotcha moment, but I've read the transcript. I don't
5 see anywhere in the transcript that he's said that. We
6 had a lengthy oral argument on the cross-motions for
7 summary judgment.

8 I would submit, Mr. Bolton, and I know it's not
9 fair because you weren't there, you weren't representing
10 him. Dr. Fetzer approached the issue from the perspective
11 that he believed all the facts were not in dispute and
12 that I should come to the conclusion that nobody died at
13 Sandy Hook and that Leonard Pozner falsified and
14 fabricated Noah Pozner's death certificate and, no, there
15 was never even a Noah Pozner. He didn't exist. But do
16 you think that a reasonable -- do you think that that's
17 not a reasonable summary of the Court's consideration of
18 the cross-motions for summary judgment?

19 MR. BOLTON: I think there was extensive
20 discussion on four elements of the plaintiff's case, and
21 on the issue of truth or falsity, there was extensive
22 discussion and disagreement.

23 THE COURT: Okay. What facts do you believe
24 were in dispute -- what material facts were genuinely
25 disputed that would preclude me from concluding now that

1 Professor Fetzler did not exercise ordinary care?

2 MR. BOLTON: Your Honor, I'll be honest, I'm not
3 prepared to argue the specifics as if it was the -- as if
4 that was the summary judgment issue before the Court right
5 now. What I would ask is if -- that if the Court wants to
6 consider that issue as if -- as if it is part of the
7 summary judgment analysis, I would request an opportunity
8 then to actually address that issue as -- as an issue
9 raised on summary judgment and as an issue, either as it's
10 been -- as it was addressed in the submissions by the
11 parties or -- and I would want to look carefully at the
12 record.

13 It may -- it may also be appropriate that --
14 that or it may be inappropriate to consider the issue of
15 negligence on the existing record as a summary judgment,
16 given that that issue was not raised as a summary judgment
17 issue by the plaintiff.

18 THE COURT: Well, here's the problem with that,
19 Mr. Bolton, is I don't have time to do that. I'm going to
20 lose jurisdiction I think in a matter of days by operation
21 of statute. I can't hold on to this case post jury
22 verdict. It's going to go to the court of appeals long
23 before I would give you that time to do that.

24 MR. BOLTON: Can I respond?

25 THE COURT: But -- Yeah.

1 MR. BOLTON: What I would -- the -- the
2 answer -- your -- your statement assumes the answer. It
3 assumes since I'm going to deny the motion, it has to be
4 done with a certain period of time, but if, in fact, the
5 Court felt that that was an essential issue that needed to
6 be considered -- fully considered as part of the summary
7 judgment ruling, then I think the Court -- and the Court
8 could do that within the time frame that it's talking
9 about, vacate the summary judgment for that consideration.

10 THE COURT: Well how would I vacate the summary
11 judgment before we actually had the briefs? No. I'm
12 going to tell you right now that runs contrary to the
13 statutes. Statutes are really clear that this train is
14 moving toward the court of appeals and there's nothing the
15 circuit court can do.

16 I don't think it's unfair for me to ask you that
17 question, Mr. Bolton, and certainly, Ms. Feinstein is
18 prepared to make an argument on it. Because for purposes
19 of finality, if you're right that if there wasn't a
20 waiver -- let's -- assuming that I say there wasn't a
21 waiver, and that now, because it's raised now, it was the
22 Court's responsibility to find facts necessary to meet all
23 the elements, and if one of the elements is considering
24 Dr. Fetzler a media defendant, that is he failed to
25 exercise ordinary care, I think that the Court can and

1 should look back at the evidence that was submitted and
2 associated with the cross-motions for summary judgment to
3 see whether the facts relating to that conclusion were
4 genuinely disputed.

5 Now, you're right. If I concluded that there
6 were one or more material facts genuinely disputed and
7 therefore summary judgment wasn't appropriate then the
8 remedy would be to vacate the decision on summary
9 judgment. But it's the midnight hour. I need to do that
10 today, and I intend to address that here and in my
11 decision.

12 And I'm just telling you out of complete candor,
13 I mean, it's -- I don't want to trick you, because when
14 the issue's raised and my belief was that was the
15 appropriate methodology for resolving this issue, as
16 Ms. Feinstein raised, untimely raising this issue
17 nonetheless, okay, let's look at and see whether it makes
18 any difference. And I came to that conclusion that that's
19 the methodology because as you know, Mr. Bolton, that the
20 standard of review in the court of appeals on summary
21 judgment is *de novo* anyway, so you're going to have to --
22 without regard to whether I'm right or wrong, if I don't
23 vacate and don't reverse myself and then I guess I'd have
24 to vacate the jury verdict completely, the court of
25 appeals is going to ask the same question, because the

1 court of appeals is not going to reverse and remand for
2 further proceedings if on a *de novo* review all the
3 evidence is before the court, none of it is genuinely
4 disputed.

5 So my question back to you is, and you can
6 say -- you can say I don't know right now, I know of no
7 fact. I wanted to give you the opportunity in oral
8 argument to tell me, Judge, well, okay, fine. Here are
9 the facts that I believe were material to the question of
10 ordinary care that the parties were disputing and it would
11 be inappropriate for you to resolve the dispute of that
12 material fact on summary judgment.

13 MR. BOLTON: And, Your Honor --

14 THE COURT: I'm saying, I've looked. I can't
15 find a single fact material to that analysis that would
16 lead me to the conclusion there was a genuine dispute.

17 MR. BOLTON: Well, Your Honor, I -- and I'm not
18 going to speak with the specificity that I think Your
19 Honor wants. What I would say that -- and I would -- and
20 I would rely upon the summary judgment submissions by
21 Professor Fetzer which I think details in -- explains in
22 great detail the basis for the conclusions that he made.

23 Now, I will admit that in -- in the -- in the
24 hearing before the Court, Professor Fetzer said that there
25 were some parts of what he said that the basis that he --

1 he now would recognize were not true, although, he also
2 said that his ultimate conclusion was correct. But he
3 also spoke and submitted evidence as to the basis for what
4 he said at the time that he said it. And -- and while I
5 don't think malice -- the malice standard is the same as
6 negligence, he did speak to in great detail as to why he
7 was not acting with malice, and I think a lot of that
8 evidence also goes to the issue of negligence.

9 So I -- I would refer to the submissions and the
10 argument of Professor Fetzer as well that -- that the --
11 that the unstated issue of negligence, it wasn't an issue
12 that was raised, but if we go back and treat it as -- as
13 an issue just from the submissions that were made, I still
14 believe that there's a disputed issue of fact as to
15 whether or not Professor Fetzer acted negligently in the
16 statements that he made. I think -- I think the record
17 supports the basis for why he made the statements that he
18 made at the time. I also believe that -- that if the
19 issue had been -- had been raised, specifically in the
20 summary judgment motion, then the issue might also have
21 been more directly addressed, because I don't believe that
22 the malice -- that malice and negligence are necessarily
23 the same.

24 So, for instance, in -- in the supreme court --
25 U.S. Supreme Court decision where it said no liability

1 without fault, the court said that as to whether or not
2 the standard that a state court wanted to apply, it
3 would -- it would -- it would rely upon the decision of
4 the different -- the different states. Some states have,
5 in fact, continued with a malice standard, that the false
6 standard is malice, others have said negligence, but the
7 two are not necessarily the same.

8 THE COURT: Well, I agree with that. And I
9 think -- I wish I would have seen this, I don't remember
10 seeing it at the time I had my oral argument, but the
11 Wisconsin Jury Instruction 2500 provides an excellent law
12 note for judges on how you look at types of defamation
13 actions. And I would respectfully say, Mr. Bolton, you're
14 kind of conflating some issues unnecessarily.

15 The actual malice that was set forth in the New
16 York Times v. Sullivan case becomes relevant when the
17 defamation is between a public figure and a media
18 defendant or a private individual in a matter of public
19 concern with the constitutional privilege. There's no
20 question that the context of the waiver that Dr. Fetzer
21 made knowingly and understandingly was to concede that
22 Noah Pozner was not a public figure. That was addressed
23 directly, it was stated clearly and concisely; that he had
24 not injected himself in a matter of public concern at the
25 time those statements were made.

1 The concept of negligence comes up in a
2 situation of a private individual who's suing a media
3 defendant or a private individual in a matter of public
4 concern with a constitutional privilege, and that's the
5 Dalton case. And the element does, in a private
6 individual against the media defendant, Gertz teaches us
7 that negligence is an element, again, where there's a
8 public figure, which doesn't apply, then the actual
9 malice.

10 So though we talked about actual malice at the
11 time of the discovery dispute and when your client waived,
12 it was at that time in the context of how we characterized
13 Leonard Pozner. Once Dr. Fetzer waived his claim as to
14 Leonard Pozner and agreed to, essentially, that Leonard
15 Pozner was for purposes of the Court's analysis and for
16 defamation was a private individual, then the issue then
17 became whether it was a private individual against a
18 private individual with no nonconstitutional privileges
19 and no -- no privileges. Now the issue after verdict is,
20 courts should have taken a step back and addressed more
21 clearly the characterization of Dr. Fetzer that he was --
22 that it would be err to assume that he was simply a
23 private individual, that he always claimed he was a media,
24 although he said he was a researcher -- academic
25 researcher, nonetheless, that he didn't waive that. I

1 understand that's the waiver argument. The transcript
2 goes on and we talk about that.

3 But the point is, I'm going to ask you one more
4 time and I'm going to leave it at that, I mean, even if
5 the negligence question becomes relevant, because I
6 conclude that Dr. Fetzner did not waive his privileges
7 associated with being a member of the media, the Court can
8 and should then now look back at the record to determine
9 whether the plaintiff would be entitled to summary
10 judgment on this additional element presently.

11 Ms. Feinstein, that's what your -- you argued, that's what
12 you were asking me to do anyway.

13 So Mr. Bolton, I can't punt it, there's not
14 enough time, and I don't believe -- right now I'm telling
15 you that I -- I see that there's any genuine dispute as to
16 the facts material to the question of negligence, or
17 stated alternatively, whether Dr. Fetzner exercised
18 ordinary care. Can you think of any fact that he
19 responded to or suggested that he -- that the parties were
20 disputing that would preclude summary judgment on the
21 question of negligence?

22 MR. BOLTON: Yes, and I refer back to the
23 submissions that Professor Fetzner made on the summary
24 judgment and the discussion, including his explanation for
25 why at the time he made his statements he felt that --

1 that the birth [sic] certificate was a fabrication. Now,
2 Professor Fetzter, there's extensive evidence as to
3 differences between the birth certificate that
4 professor -- or that Mr. Pozner presented to publicly
5 versus what was characterized as the official birth
6 certificate. And -- and so there was extensive discussion
7 about those differences and the basis for -- for why
8 Professor Fetzter reached that conclusion.

9 Now, Your Honor concluded that the
10 differences -- that you did not believe the differences
11 were material so as to preclude summary judgment on the
12 issue of truth or false -- falsity. But that's -- but --
13 but that conclusion is, again, is separate and distinct
14 from the issue of negligence. So there was Professor
15 Fetzter --

16 THE COURT: Well what more would Fetzter tell me
17 were I to give him a new hearing on it? First of all, he
18 marked and asked me to read the book, which I did review,
19 which should have outlined all of his research supporting
20 all of his statements. I heard him say and in the context
21 of his motion for summary judgment, that he believed that
22 everything he said was true and correct and then, in fact,
23 at one point, Mr. Bolton, Dr. Fetzter said, I welcome the
24 lawsuit because it would provide for me now a public forum
25 to prove that nobody died at Sandy Hook.

1 I'm telling you right now, and I'd like you to
2 weigh in on it, I don't remember a single occasion in
3 which Dr. Fetzer responded to a fact propounded by Leonard
4 Pozner where Dr. Fetzer said, That's not true.

5 MR. BOLTON: Well, I don't have the record in
6 front of me, Your Honor, but I -- but I do believe that --
7 that the submission -- now you disagreed whether they were
8 material or not and that's -- that's the prerogative of
9 the Court, and I understand that. But as to whether or
10 not, for instance -- and you began the discussion by
11 saying, asking me whether or not Professor Fetzer, isn't
12 it true that he conceded at least the four non-media
13 elements of -- of defamation, and I said, He did not
14 concede the issue of truth or falsity. And -- and I --
15 and I still think that's true.

16 THE COURT: What do you mean by that? Let's
17 talk about truth or falsity. Because I said then and I'll
18 say now, when I reflect on the evidence, I mean, it's
19 clear that both parties admitted there were different
20 versions of the death certificate being circulated. One
21 had a number, one had the name of the funeral home. There
22 were -- that after listening to the evidence in summary
23 judgment, I said that Dr. Fetzer and the parties -- and
24 the plaintiff agreed that -- that there were different
25 versions of the death certificate being circulated around,

1 and that all Dr. Fetzer had proved that was just that;
2 there are different versions.

3 Leonard Pozner explained or Attorney Zimmerman
4 explained, well, that makes sense because the single piece
5 of paper moves through a multiple of different hands and
6 entities and organizations, each placing their mark upon
7 it. Dr. Fetzer seemed to acknowledge that because that's
8 when he reversed himself and said -- he admitted that his
9 claim that it -- that certain opinions he had at the time
10 were no longer relevant but his conclusion still remained.
11 He gave up the complaint about the border around the
12 document being placed on it. He also seemed to abandon
13 the argument about the different fonts. The explanation
14 being that if the funeral home had a typewriter it might
15 be in Times New Roman and if the medical examiner had it
16 in Courier, the font would be different as to each
17 individual. You agree he confessed error in some of the
18 bases of his assertion that the death certificate was a
19 fabrication?

20 MR. BOLTON: I would call it an admission rather
21 than a confession, but --

22 THE COURT: Okay.

23 MR. BOLTON: -- but I agree with you.

24 THE COURT: So when you say that I didn't think
25 they were material, I said in conclusion that -- that

1 there were different versions of the same certificate does
2 not make any of them a fake or a fabrication.

3 So -- well, let's turn to you, Ms. Feinstein.
4 You agree that there are a number of different versions of
5 the single death certificate floating around?

6 MS. FEINSTEIN: I think that's right, Your
7 Honor. I think one of the primary reasons that there are
8 kind of two big differences is one is kept, I want to say,
9 within the county and one is kept within the state
10 records.

11 THE COURT: And both parties admitted that,
12 yeah, you've got two death certificates and they're
13 different.

14 MS. FEINSTEIN: I -- I would say the differences
15 are minimal. The substance of the death certificate are
16 the same, but yes.

17 THE COURT: Well, they're different.

18 So when you say, Mr. Bolton, that I didn't think
19 it was material, I want to push back and say all of that's
20 material, but it just wasn't generally disputed. I mean,
21 Leonard Pozner did not dispute the point that Dr. Fetzner
22 was making that there was a version out there that didn't
23 have a number stamped on it that was placed later, but he
24 explained the reason why the number was not on that
25 version was because it hadn't been passed on to the next

1 step of the proceeding. So what fact did your client
2 submit to me in the context of his motion for summary
3 judgment that I concluded was not material?

4 MR. BOLTON: My -- Your Honor, my -- my comment
5 previously was that when you addressed the issue of
6 materiality, materiality went to the issue of truth or
7 falsity, but it -- it did not go -- it does not go to the
8 issue of negligence.

9 THE COURT: All right. Well let's leave it at
10 that, because I'm not going to get a -- I mean, I
11 appreciate it. I think here's what I will say is you've
12 not told me any particular fact that you think is
13 genuinely in dispute that would preclude me from now
14 concluding that the plaintiff was, had it been raised,
15 would be entitled to summary judgment on the negligence,
16 but you're not waiving the ability to argue that later on,
17 on a *de novo* review in the court of appeals, which you'd
18 have a right to do anyway.

19 MR. BOLTON: Well, and I would say, you know,
20 you noted that Professor Fetzer relied on the entire book
21 and other evidence. The -- the issue that the plaintiffs
22 and that the Court wanted -- wanted to narrow it to the
23 four specific statements, but I also think that the issue
24 of whether or not Professor Fetzer had a reasonable basis
25 for stating that the birth [sic] certificate was a

1 fabrication, I think -- I think the broader context is
2 also extraordinarily relevant, because obviously, the
3 birth certificate occurs in the context of -- of the
4 broader analysis.

5 THE COURT: Death certificate?

6 MR. BOLTON: Pardon?

7 THE COURT: Death certificate? You said birth
8 certificate.

9 MR. BOLTON: I'm -- yeah. I'm sorry. Yep.
10 I -- Thank you.

11 THE COURT: All right. I'll address that in my
12 written decision.

13 Mr. Bolton, you'd like a new trial, and you
14 believe that when Mr. Zimmerman asked Dr. Fetzer about his
15 contemptuous behavior, that was a reversible error to
16 allow the jury to hear that. Is there anything more you
17 want to --

18 MR. BOLTON: No, Your Honor.

19 THE COURT: So why do you think that that was a
20 punitive sanction? Why do you think that was a punitive
21 sanction? You agree that Dr. Fetzer confessed that he was
22 in contempt of court. He admitted that he violated the
23 Court's confidentiality order and that he did something
24 that the Court took great pains to admonish him not to do.
25 Right?

1 MR. BOLTON: We -- we did not -- we -- at the
2 contempt hearing, that was our position, Your Honor.

3 THE COURT: Okay. And that the purge condition
4 that I said is, okay -- actually over Mr. Zimmerman's
5 arguments about what the purge conditions should be, I
6 said, okay, just get it back. But -- but as you --
7 actually, I confirmed, as you just said, put the genie
8 back in the bottle. And we know when he came to court, he
9 was not able to do that. One of the, I think it was
10 Mr. Halbig, refused to return what had been sent to him
11 via another individual, correct?

12 MR. BOLTON: That's right. That's correct, Your
13 Honor.

14 THE COURT: Okay. So I assume Dr. Fetzner is not
15 arguing that I should have -- having failed to satisfy the
16 purge conditions, I assume he's not suggesting I should
17 have put him in jail?

18 MR. BOLTON: Say that again, Your Honor?

19 THE COURT: I assume he's not now arguing that
20 the appropriate remedy for his failure to purge his
21 contempt was that I should put him in jail.

22 MR. BOLTON: Well, Your Honor, in all due
23 respect, I have to believe that that's somewhat of a
24 rhetorical question, but I will answer it as a
25 non-rhetorical question. We are not asking to have

1 Professor Fetzer jailed.

2 THE COURT: Okay. And I could have imposed
3 additional monetary sanctions up to \$2,000 a day and I
4 didn't. I essentially said it is what it is. There's not
5 much we can do about it. Wolfgang Halbig has the image.
6 Dr. Fetzer confessed that he was working with Wolfgang
7 Halbig to pursue their theory that the man sitting in
8 court was not the same man holding a child at the time of
9 the shooting at Sandy Hook.

10 Do you know -- how do you respond, and I'll give
11 you an opportunity to respond, how do you respond to the
12 point that Dr. Fetzer's behavior, and his -- and his
13 description of his motivation to involve Wolfgang Halbig
14 into this now new theory that there's a new actor
15 portraying the person of Leonard Pozner in court, and the
16 fact that maybe Dr. Fetzer even said Wolfgang Halbig would
17 be a surprise rebuttal witness, does that not go to
18 Leonard Pozner's claim for post-traumatic stress syndrome,
19 and wasn't it made relevant when his doctor said that it
20 is the actions of James Fetzer that precludes him from
21 recovering from the death of his child? Isn't it
22 relevant -- wasn't it relevant that now, by violating the
23 court order and disseminating the picture to Halbig and
24 making the assertion that Fetzer did, that this is not
25 even a real Leonard Pozner, it's a new actor, doesn't that

1 go to Leonard Pozner's damages on the stress that he has
2 been receiving at the hands of Dr. Fetzter?

3 MR. BOLTON: No.

4 THE COURT: Why not?

5 MR. BOLTON: There's no -- there's no connection
6 between that -- between that disclosure and anything to do
7 with -- with Mr. Pozner.

8 THE COURT: Mr. Pozner testified that he read
9 and Dr. Fetzter did not deny, in fact, he admitted that
10 Dr. Fetzter's new theory was, is that the man who sat for
11 the deposition, who was appearing in court was a new
12 actor, different than the actor which portrayed Leonard
13 Pozner at the time of the shooting. You agree that that
14 was his position?

15 MR. BOLTON: Say --

16 THE COURT: Dr. Fetzter told me that the reason
17 he sent the image out was because he believed that the
18 picture of the man who sat for the deposition, which was
19 the same man who was in the court, is not the same man who
20 was holding a child at the time the Sandy Hook massacre
21 was publicized; that those were two different people. Do
22 you remember him saying that?

23 MR. BOLTON: I do, Your Honor.

24 THE COURT: Okay. And I assume it's still your
25 client's position that the man who came and testified in

1 court, who testified in the deposition, is not Leonard
2 Pozner, that nobody died at Sandy Hook, and he never had a
3 child named Noah. That this is one more crisis actor
4 hired by the Obama administration to perpetuate the fraud
5 that somebody died at Sandy Hook. That's your client's
6 position. That, I assume, is still your client's position
7 now?

8 MR. BOLTON: I -- I'm not sure that -- whatever
9 his position is right now is --

10 THE COURT: That was his position at the time.

11 MR. BOLTON: That's correct.

12 THE COURT: And so Leonard Pozner testified or
13 through Mr. Zimmerman asked him what the consequences,
14 something to the effect that this was his worst nightmare,
15 that just when he thought that the passage of time would
16 make his grieving more tolerable, here this man who
17 previously accused him of falsifying a death certificate
18 for a child he doesn't have is now accusing this man of
19 not even being the real Leonard Pozner but an actor
20 pretending to be so. Why is that not relevant to the
21 testimony of that very same person who sat before the jury
22 to say the nightmare never ends?

23 MR. BOLTON: Well, the reason I -- and I -- and
24 the reason as I stated in our motion and as I stated to
25 the Court on two different occasions, the issue that was

1 presented to the jury was the issue of damages resulting
2 from defamatory statements. And -- and so what you're
3 saying is that this -- this may be relevant to the claim
4 post-traumatic stress. It's not related to the defamation
5 statements that was presented to the jury --

6 THE COURT: Well it is -- it is in the sense
7 that the four statements that the plaintiff sued on for
8 defamation, one way or the other, captured your client's
9 position that nobody died at Sandy Hook; that Leonard
10 Pozner, if there ever was a Leonard Pozner, fabricated a
11 death certificate for a Noah Pozner who may never have
12 existed; and that Dr. Fetzer said the whole reason for
13 violating the court's order was to gather evidence in
14 support of his defense, namely, to call Wolfgang Halbig as
15 a rebuttal witness to prove that the accusation that
16 Pozner fabricated the death certificate was true. Did not
17 Dr. Fetzer make his actions relevant when he incorporated
18 his work with Halbig and his suggestion that Halbig should
19 testify at trial?

20 MR. BOLTON: I don't agree with that, Your
21 Honor.

22 THE COURT: Well, that's -- fair enough. I
23 don't want -- I'm not expecting my arguments here to be so
24 persuasive as you'll sort of say, you know, I agree with
25 you. I give up on that one. I mean, I just -- I can't

1 really give you a meaningful opportunity to respond unless
2 I tell you what my feeling is in terms of reconstructing
3 the evidence and addressing the issues that you raised.

4 MR. BOLTON: But --

5 THE COURT: Is there anything more,
6 Ms. Feinstein, you'd like to add to the -- the kind of
7 forensic analysis of the decision to allow the jury to
8 hear that Mr. Fetzer violated the court's order?

9 MS. FEINSTEIN: No, Your Honor.

10 THE COURT: I don't know the sufficiency of the
11 evidence argued, Mr. Bolton. It's a good argument. I
12 don't -- is there anything else you want to add? The
13 sufficiency of the evidence, it's a pretty high standard
14 to prove. Anything else you'd like to tell me before I
15 give you my ruling on your motions?

16 MR. BOLTON: No, Your Honor.

17 THE COURT: Anything else?

18 MS. FEINSTEIN: No, Your Honor.

19 THE COURT: I'm going to issue a written
20 decision, and I appreciate you answering my questions.
21 I'm not going to vacate the summary judgment motion
22 decision -- not going to vacate the order granting the
23 plaintiff partial summary judgment. I'll address the
24 issue of waiver and whether it was a harmless error, even
25 considering now a retrospective analysis of the facts that

1 were submitted in the cross-motions.

2 I'm not going to grant your motion for a new
3 trial. I do not think it was an error to allow the jury
4 to hear what it did.

5 And I do believe there is sufficient evidence,
6 and I'm not going to grant the motion for a new trial on
7 sufficiency evidence.

8 Let's turn to the plaintiff's post-verdict
9 motions. Permanent injunction. Does Dr. Fetzer intend to
10 keep repeating the statement that Mr. Pozner's son's death
11 certificate is a fake which Dr. Fetzer has proven on a
12 dozen or more grounds?

13 MR. BOLTON: Professor Fetzer does not intend to
14 make statements that -- that Mr. Pozner fabricated the
15 death certificate.

16 THE COURT: Does your client intend to then make
17 a statement that Mr. Pozner sent a death certificate which
18 turned out to be a fabrication?

19 MR. BOLTON: Um, what I would say is that --
20 that statement as it appears in the publications that --
21 that the plaintiff raised, that it is not our intention to
22 continue to publish those or to make those statements. In
23 other words, the statements that are in the book in the
24 Chapter 11, I believe it is, and in the -- and in the --
25 in the memo or the blog, it is not his intention and --

1 THE COURT: Well, let's make very clear, because
2 I'm going to ask you the same question from two different
3 perspectives. It's been suggested that maybe Dr. Fetzer
4 doesn't even oppose an injunction that prohibits him from
5 making the four statements that were shown to the jury
6 that were marked as an exhibit as stated in that exhibit.

7 MR. BOLTON: As stated and as presented to the
8 jury, we -- we do not contest that.

9 THE COURT: Okay. So by way -- by way of
10 stipulation of the parties, I'll go ahead and grant the
11 injunction barring Dr. Fetzer from making those four
12 statements.

13 Now, but let's make very clear, because
14 you've -- you've said something that I think is nuanced.
15 You've said that furthermore, your client does not believe
16 that -- I guess your client's not going to say that
17 Mr. Pozner falsified or fabricated the death certificate.
18 In fact, I think he testified that he claimed he never
19 said Mr. Pozner did that, it was his theory that, using
20 the passive voice, that the death certificate was false or
21 was a fabrication without attribution to any particular
22 individual. So your client will agree that he's not going
23 to say Leonard Pozner falsified or fabricated a death
24 certificate? "Yes" or "no."

25 MR. BOLTON: That is correct.

1 THE COURT: Okay. Does he intend to say that
2 Noah Pozner's death certificate is false or a fabrication
3 without regard to whom may have done so?

4 MR. BOLTON: I don't know whether he intends to
5 state that or not. But what I would also say is that --
6 as I said, so I'm not -- I'm not shying away from what I
7 said. I think if he -- I think the statement, if it were
8 made, that the birth [sic] certificate was a -- was not --
9 was a fabrication and did not state that -- that
10 Mr. Pozner did the fabrication, I don't think that that
11 would -- I think that would be -- to go that far would be
12 an improper prior restraint.

13 THE COURT: Okay. Well then -- then I want you
14 to rethink your -- your concession. Because when I look
15 at the second statement -- well, even the first statement.
16 The first statement says, which I guess you said you
17 agreed to, but let's make sure that that's what your
18 client is willing to do. The first statement says
19 Mr. Pozner's son's death certificate is fake. So if you
20 tell me now that they intend -- he intends to continue to
21 make the assertion that Mr. Pozner's son's death
22 certificate is a fake, how does that not violate the order
23 if I issue it as stipulated by the parties?

24 MR. BOLTON: Well, okay. Then let me -- let me
25 backtrack then. My -- it is my -- it is our position that

1 and -- and -- and as I understood the plaintiff's position
2 was that that statement in the context of paragraph -- of
3 Chapter 11 in the book, that that particular, in that
4 context, that it clearly raised the implication that
5 Mr. Pozner fabricated -- did the fabrication. But I think
6 if you in -- in another context, the statement that -- if
7 made that the -- that the birth -- or that the death
8 certificate was -- is a fabrication, that does not
9 implicate Mr. Pozner, then I think that that is not --

10 THE COURT: I don't know how -- Mr. Bolton,
11 that's kind of a revisionistic theory. When you look at
12 the four statements that were shown to the jury, that at
13 least at one time you agreed to enjoin your client, all of
14 them are written in the passive voice. None of them make
15 the assertion that Mr. Pozner falsified or fabricated the
16 death certificate. Let me read them to you and see if you
17 agree.

18 Mr. Pozner's son's death certificate is fake.
19 That doesn't say who faked it. It just said Noah Pozner's
20 death certificate is a fake. You agree?

21 MR. BOLTON: I agree, but -- but, Your Honor --

22 THE COURT: Okay. Let's just go through it.

23 MR. BOLTON: All right.

24 THE COURT: The second one. Mr. Pozner sent a
25 death certificate, which turned out to be a fabrication.

1 You agree that's a passive voice. That doesn't say
2 Mr. Pozner fabricated, it's just that he sent a death
3 certificate that turned out to be a fabrication. That
4 does not accuse Mr. Pozner of fabricating the death
5 certificate. Do you agree? That statement.

6 MR. BOLTON: That statement, in isolation, I
7 agree.

8 THE COURT: Third one was, As many Sandy Hook
9 researchers are aware, the very document Pozner circulated
10 in 2014, with its inconsistent tones, fonts and clear
11 digital manipulation, was clearly a forgery. Now that
12 one's a little closer, but it doesn't say in the direct
13 voice, Leonard Pozner forged the document. It just says
14 he circulated a document which was a forgery. That
15 doesn't really accuse Leonard Pozner of forging the
16 document, does it?

17 MR. BOLTON: Okay. I agree with that, Your
18 Honor.

19 THE COURT: And then the last one, Mr. Pozner's
20 son's death certificate turned out to be a fabrication.
21 That also doesn't accuse Leonard Pozner of doing the
22 fabricating, right?

23 MR. BOLTON: I agree.

24 THE COURT: So if I -- if I enjoin Dr. Fetzer
25 from making these statements, unless you tell me something

1 that I should reflect on, if you come back and I find out
2 he said Noah Pozner's death certificate is a forgery, it's
3 false and a fabrication, I don't read the injunction to
4 allow him that latitude.

5 MR. BOLTON: Okay. Your Honor, you've persuaded
6 me. And so I -- I will backtrack. What -- to the extent,
7 what we would agree to is to not make statements that
8 indicate that -- or imply that Mr. Pozner was responsible
9 for the fabrication. But I agree with Your Honor that to
10 the extent that statements are made regarding the death
11 certificate that do not directly imply or state that
12 Mr. Pozner was -- was responsible for creating the
13 fabrication, then I -- then I don't agree that the -- that
14 an injunction should go that far.

15 And that's why, you know, the -- I believe it
16 may have been a second circuit decision that I cited in my
17 brief, that where they -- where they address that very
18 issue. That -- that context is important. And the
19 statement in one context, and -- and that was the context
20 in which the plaintiff presented this case, that the
21 context in Chapter 11 was that those four statements
22 implied that -- that Mr. Pozner was -- was responsible
23 for --

24 THE COURT: No. But Justice -- Judge -- Judge
25 Sykes --

1 MR. BOLTON: Pardon me?

2 THE COURT: Judge Diane Sykes wrote in McCarthy,
3 "An emerging modern trend, however, acknowledges the
4 general rule," against prior restraint, "but allows for
5 the possibility of a narrowly tailored permanent
6 injunctive relief as a remedy for defamation as long as
7 the injunction prohibits only the repetition of the
8 specific statements found at trial to be false and
9 defamatory." So if I take Judge Sykes' advice to heart,
10 we know that the four statements were shown to the jury as
11 an exhibit, were found by the jury to be false and
12 defamatory --

13 MR. BOLTON: No, the jury did not find that. In
14 our case? Or in -- I'm not sure I understand. Maybe I
15 misunderstood you.

16 THE COURT: Okay. Well, no. You're right. I
17 guess they assumed them to be false and defamatory; that I
18 found them to be false and defamatory.

19 MR. BOLTON: That I agree with.

20 THE COURT: That that at least then meets the
21 narrowly tailored remedy to prohibit only the repetition
22 of the specific statements filed by the Court to be false
23 and defamatory. And that would be appropriate prior
24 restraint notwithstanding the First Amendment. Do you
25 agree?

1 MR. BOLTON: I don't -- I don't agree, but --
2 but as I -- as I said, but I'm not intending to -- it is
3 not my intent to object to a -- an injunction that would
4 prohibit Professor Fetzer from making statements that --
5 that Mr. Pozner was responsible -- was personally
6 responsible for --

7 THE COURT: Okay. But how --

8 MR. BOLTON: -- a fabrication.

9 THE COURT: -- do we -- What do we tell Leonard
10 Pozner if that was the limits of his success? If
11 Dr. Fetzer goes out and says Noah Pozner's death
12 certificate is a fabrication. Isn't that tantamount to
13 him reiterating his theory that Noah Pozner never existed?

14 MR. BOLTON: I -- I -- I don't think so, Your
15 Honor. And -- and --

16 THE COURT: Well, okay. But --

17 MR. BOLTON: But --

18 THE COURT: -- Dr. Fetzer --

19 MR. BOLTON: But what I would also say is
20 that -- that the context of this case is the defamation --
21 the defamation of Mr. Pozner. So -- so, for instance,
22 what you're getting at in a sense is --

23 THE COURT: Well, but Leonard Pozner --

24 MR. BOLTON: -- if the --

25 THE COURT: Leonard Pozner maintained he had a

1 son named Noah who was murdered at Sandy Hook. And so
2 Leonard Pozner testified that the hardest part of getting
3 over and the harm that he suffered at the hands of
4 Dr. Fetzer was that to say that Noah Pozner's death
5 certificate was a false fabrication was tantamount to
6 saying, as Dr. Fetzer said directly, that there was never
7 anyone named Noah Pozner; that, according to Dr. Fetzer's
8 book, the pictures are somehow or another a part of Reuben
9 Vabner who is a different individual. So you agree that
10 your own client's theory of this event was that there
11 never was a person named Noah Pozner and that's what he
12 said and that does he continue, notwithstanding the court
13 trial, in his -- to make the statements that there never
14 was a child named Noah Pozner?

15 MR. BOLTON: What I'll say is that I don't
16 believe that statement is defamatory of Mr. Pozner. This
17 case was postured as a defamation. And the plaintiffs
18 went to great lengths to say we do not want to litigate
19 the basic theory of the book -- of the entire book.
20 And -- and what Your Honor and what the plaintiffs are
21 arguing for is basically an injunction against the -- the
22 broader issue. And the broader issue was not litigated
23 and it was not -- it was not -- it was a strategic
24 decision by the plaintiffs, and Your Honor went to
25 considerable lengths to say we're not -- we're not --

1 THE COURT: If that --

2 MR. BOLTON: -- we're not litigating whether or
3 not Sandy Hook occurred.

4 THE COURT: If that was the -- if that was true,
5 Mr. Bolton, and that was the limits, then why did Leonard
6 Pozner -- why did Attorney Zimmerman ask me to order
7 genetic tests to prove that his genetic material compared
8 to the genetic material that the medical examiner had for
9 Noah Pozner proved that Leonard Pozner was Noah Pozner's
10 father? If it was just all about, okay, I'm sorry I said
11 you fabricated it, why would -- why do you think the
12 plaintiff asked for genetic tests?

13 MR. BOLTON: It was related to exploring
14 defenses.

15 THE COURT: What is -- explain that.

16 MR. BOLTON: And the plaintiff -- and the
17 defendant did not define the scope of the case and Your
18 Honor said we're not litigating whether or not -- you
19 know, the broader issue raised by the book.

20 What I -- what I would say is this, Your Honor.
21 And the concession that I would make is that Professor
22 Fetzer would agree not to publish -- and, in fact, I
23 believe has already withdrawn from any -- any access from
24 his websites or otherwise Chapter 11 from the book.
25 It's -- that -- that was the context in which the

1 defamation case was raised and we would agree to basically
2 withdraw that chapter from -- from the public record.

3 THE COURT: Okay. Here's what I'm going to do.
4 Although you offered and then retracted, I'm going to
5 issue a permanent injunction prohibiting the defendant
6 from saying the four exact statements that were shown to
7 the jury as they were written. The injunction will be
8 tailored narrowly and they will be limited to that, the
9 four statements that were published as an exhibit.

10 I will tell you this, I don't read those four
11 statements to be so narrow -- narrowly drafted. If, in
12 fact, I find out on a motion for contempt that Dr. Fetzer
13 continues to assert that the death certificate is a fake
14 or that it turned out to be a fabrication or that it was
15 clearly a forgery, without regard to who did it, that's
16 going to be a violation as -- as I understand this
17 narrowly tailored injunction.

18 What I will say, and I won't put it in my
19 injunction, if, on the other hand, picking up on what you
20 just said, Mr. Bolton, if James Fetzer wants to forget
21 about Noah Pozner and Leonard Pozner and continue his
22 theory that nobody died at Sandy Hook but goes forward
23 never mentioning the Pozners or anything about the
24 Pozners, then -- then I think they -- Ms. Feinstein, do
25 you agree that then they've skirted around the parameters

1 of this narrowly tailored injunction?

2 MS. FEINSTEIN: Your Honor --

3 MR. ZIMMERMAN: Your Honor, this is
4 Mr. Zimmerman, and I can address that.

5 THE COURT: Okay. Mr. Zimmerman.

6 MR. ZIMMERMAN: I think the answer to that is
7 no. That unless they were to say Noah Pozner must have
8 died somewhere else in Sandy Hook or maybe Noah Pozner was
9 the only person to have died at Sandy Hook, then maybe
10 that is at least theoretically true. But the problem is
11 the record has established that Noah Pozner died in Sandy
12 Hook, Connecticut on that day and a death certificate
13 issued. The defamation then arises, essentially,
14 automatically, right? Because we all agree it is conceded
15 that Mr. Pozner circulated a death certificate for his
16 son. That, in Connecticut, would be a crime. So saying
17 he circulated a death certificate, as Your Honor noted,
18 that turned out to be fake, is defamation.

19 And by implication, because Mr. Pozner, as they
20 have said, is the most well known of all the Sandy Hook
21 parents and Noah Pozner is well known to be a Sandy Hook
22 victim, I think if he comes out and says, Nobody died at
23 Sandy Hook, it necessarily means Mr. Pozner circulated a
24 fake death certificate for his son. And I don't -- I
25 don't see how they can get around that unless they were to

1 affirmatively say, Except Noah Pozner -- nobody died at
2 Sandy Hook except Noah Pozner, because otherwise, the
3 implication is always there.

4 MR. BOLTON: May I respond?

5 THE COURT: Wait. I don't -- did he cut out?
6 Mr. Zimmerman?

7 MR. ZIMMERMAN: Nope. I'm here, Your Honor.
8 That was -- that was really the end of the statement.

9 THE COURT: It was sort of like, like a
10 Canadian, you ended the last sentence on sort of a lower
11 tone.

12 MR. ZIMMERMAN: It's -- it's Minnesota. The
13 nature of my accent.

14 THE COURT: Well, look it, that -- I'm not going
15 to talk about that now, because, Mr. Zimmerman, in the
16 end, you want me to tailor this injunction to prohibit
17 those four statements, correct?

18 MR. ZIMMERMAN: That's correct. Yes, Your
19 Honor.

20 THE COURT: I mean, then the scope -- you may --
21 you may make a very good point that -- but I would have to
22 judge what statement Dr. Fetzer subsequently makes in the
23 context or according to what that statement is. You may
24 very well be back and you may very well be right that if
25 he continues to assert that nobody died at Sandy Hook, by

1 implication, that's an indirect violation of the Court's
2 injunction and tantamount to saying that the death
3 certificate which shows that Noah Pozner did die at Sandy
4 Hook is impliedly itself a fabrication. But I'm going to
5 go ahead and begin by granting the request for injunctive
6 relief and draw that narrowly tailored.

7 Now, I want to say something I will address in
8 my decision, because it's been reported widely among, I
9 think, uninformed people. You agree that the First
10 Amendment does not protect defamatory speech, right,
11 Mr. Bolton?

12 MR. BOLTON: Um, I pause because the -- the -- I
13 don't want to give -- there are supreme court cases that
14 also say that the statement that the First Amendment does
15 not protect defamatory is -- is an overstatement. What --
16 what I believe to be the case is that it does not violate
17 the -- the First Amendment to penalize defamatory
18 statements. But I'm not sure that -- and I know it may be
19 a distinction without a meaning, but I know there are
20 supreme court cases that also say when we say, for
21 instance, that the First Amendment does not protect or
22 apply to defamatory statements or statements that incite
23 or whatever it be, that that is -- that that's not
24 technically correct. But I -- but if what you're saying
25 is, is it -- is it okay to sanction defamatory speech

1 consistent with the First Amendment, I believe that the
2 cases do say that.

3 THE COURT: All right. Okay. The last issue is
4 attorney's fees. I'm going to deny -- for reasons I'll
5 set forth in the record, I'm going to deny the request for
6 attorney's fees. But for the fact that I don't have legal
7 authority, I would grant attorney's fees.

8 I don't read Nationstar as extending the holding
9 in a foreclosure where the Court has longstanding power of
10 an equitable court to extend to an actions at law.
11 There's just nothing in Nationstar that makes me believe
12 that the Wisconsin Supreme Court intended to apply the
13 same principles there to cases purely at law. If the
14 supreme court wants to extend it, that's up to the supreme
15 court.

16 I think, factually speaking, this would be a
17 good case to consider an issue that -- where it should be
18 extended. But as a circuit court judge bound by what I
19 believe to be the limits of the holding, I can only read
20 Nationstar to apply to the facts of that case and the
21 longstanding historical precedent that a court in a
22 foreclosure both acts in law and in equity.

23 I read Nationstar to say that where a court sits
24 in equity, there is an opportunity to fashion that type of
25 make-whole remedy, but an action in a defamation action is

1 an action at law, and that good or bad, the American Rule
2 applies, which -- which means each party bears their own
3 costs.

4 Finally, last but not least, did you get a
5 chance to see the bill of costs, Mr. Bolton?

6 MR. BOLTON: The bill of costs that was
7 submitted?

8 THE COURT: Correct.

9 MR. BOLTON: Yeah. I don't have any -- there
10 was nothing that I objected to.

11 THE COURT: Okay. The Court will then grant the
12 plaintiff's request for statutory costs. That does, I
13 believe, have a \$500 attorney's fees provided for in the
14 statute.

15 MR. BOLTON: Good heavens.

16 THE COURT: There you go.

17 MR. BOLTON: I'm just teasing, Your Honor.

18 THE COURT: Okay. Anything further?

19 MS. STEDMAN: No, Your Honor.

20 THE COURT: Did I address all the issues that
21 the plaintiff wanted to do post verdict?

22 MS. STEDMAN: Yes, Your Honor.

23 THE COURT: All right. Anything that I missed,
24 Mr. Bolton?

25 MR. BOLTON: You -- I believe you have addressed

1 our motions and our response to their motions.

2 So the -- the issue that -- and I'm -- I
3 anticipate that the Court will address this in its -- in
4 its written decision, the issue -- the public policy issue
5 in terms of remoteness and incitement you did not
6 specifically address, but I -- I interpret from your --
7 your statements that that will be addressed and that
8 you're -- you're not accepting my argument on that.

9 THE COURT: Well, I did not address it here.
10 Let me just ask you one question. Do you deny that
11 Leonard Pozner testified as to the damages that he
12 believed he suffered as a result of reading the four
13 defamatory statements?

14 MR. BOLTON: I don't believe that that -- I do
15 not believe that he -- I believe that he -- he did, but he
16 also indicated, and -- and Dr. Lubit indicated that the
17 third-party threats and harassment were the most damaging
18 in terms of the diagnosis of a second post-traumatic
19 stress disorder. So I don't -- I don't -- I don't believe
20 that the record supports that you can -- that you can
21 separate the third-party threats and --

22 THE COURT: Okay.

23 MR. BOLTON: -- can conclude that the damages
24 are completely unrelated -- that the jury awarded are
25 completely unrelated to those.

1 THE COURT: So you -- if I understand what
2 you're saying, you concede that Leonard Pozner testified
3 as to the damages he suffered directly or as a result of
4 the defamatory statements.

5 MR. BOLTON: I don't believe that he testified
6 that those damages -- that that was the same as what
7 Dr. Lubit testified to as the basis for his opinions.

8 THE COURT: That wasn't my question. My
9 question was did he -- did -- I reviewed the record. Do
10 you agree that Leonard Pozner testified then, something to
11 the words of the effect, that when he read the defamatory
12 statements it did two things. It said, accepting as true,
13 it meant that, I was a liar; I didn't have a child; that I
14 was engaged in this conspiracy; and that it prevented me
15 from getting over the grief of the loss of my child; that
16 he testified at length about how those four defamatory
17 statements made him feel, including that he felt that he
18 was not able to recover from the death of his child.
19 You -- is that an unfair characterization of -- of that
20 portion of Mr. Pozner's testimony?

21 MR. BOLTON: I don't have it in front of me,
22 but -- but if you say that -- that those statements -- but
23 if I look at -- if I look at this record, if I look at the
24 argument and the testimony by Dr. Lubit and by Mr. Pozner
25 and by argument by counsel, if I'm -- for me to conclude

1 that the damage awarded by the jury is separable from the
2 third-party complaints or harassment and threats, I -- I
3 would have to conclude that I may not have been present
4 for the trial. I mean --

5 THE COURT: Okay. So you're saying -- I think
6 what you're saying is that even though there was some
7 evidence that there was damages directly as a result of
8 the statements, there was also more impactful evidence
9 about third-party harassment that Pozner claimed were
10 related to the four defamatory statements.

11 MR. BOLTON: I would say that, in fact, what we
12 heard most dramatically, we heard -- we heard an audio
13 presentation, and then -- and then the statements were, if
14 I recall right, and I -- I may not recall, I think a
15 transcription of the audio then was also displayed to the
16 jury.

17 THE COURT: Why didn't you object to that?

18 MR. BOLTON: Pardon?

19 THE COURT: Why didn't you object to that?

20 MR. BOLTON: Because I think -- I guess
21 because -- for instance, when I look at the -- when I look
22 at, as Your Honor asked me to do, to look at the
23 instruction for causation, causation is a fairly broad
24 instruction, so I didn't think it was -- it seems to me
25 that it raises an issue, the public policy issue that I

1 raise, and that is -- and the public policy issues are, as
2 I understand, typically raised post verdict when the Court
3 has the full -- both the Court and any appellate court has
4 the full context then of it.

5 So I guess -- I think it -- and as I've -- as
6 I've argued in our brief, I think the issue is not so
7 much, for instance, my -- my argument in part is that
8 there wasn't sufficient evidence to connect the
9 third-party complaints to the -- to the publications.

10 THE COURT: So why didn't you -- why didn't you
11 object?

12 MR. BOLTON: Pardon me?

13 THE COURT: Why didn't you object and keep the
14 whole audiotape out and the suggestion that Richards
15 somehow or another acted at the behest of Fetzer?

16 MR. BOLTON: Well, Your Honor, I mean the notion
17 then that -- I mean, the dilemma then is that when you've
18 got a remote cause for public policy purposes, there's
19 intervening cause or supervening cause, the -- the dilemma
20 then is that if you want to argue that -- that these are
21 too remote but that they are actually causative, you --
22 the suggestion of the plaintiff and Your Honor is that if
23 you think something else was responsible for the damage
24 but that it's not actionable for public policy reasons or
25 not, then you should exclude that evidence. But as soon

1 as I exclude the evidence that I think is -- is the
2 intervening cause, you don't have intervening cause, for
3 instance, if -- if you don't present the evidence of the
4 intervening cause.

5 So if you say, well, if you think that that --
6 that was the cause of the factor and that that's not
7 actionable, you should have kept it out so that the only
8 evidence -- so that you shouldn't -- you -- you then can't
9 argue that something else was causative. So it -- I think
10 it's -- I don't think it's so much an admissibility issue
11 as a question of whether or not that type of remoteness --

12 THE COURT: Okay. Fair enough.

13 MR. BOLTON: -- is actionable.

14 THE COURT: Fair enough. I actually think that
15 had you objected to it and had I known Dr. Fetzer's
16 response to your cross-examination, I probably wouldn't
17 have overruled the objection. You asked Dr. Fetzer
18 something like, how do you even know that Lucy Richards'
19 statements had anything to do with Dr. Fetzer. Do you
20 remember asking him -- Mr. Pozner that question?

21 MR. BOLTON: Yeah. And --

22 THE COURT: And he said --

23 MR. BOLTON: I may have misunderstood your
24 question.

25 THE COURT: He said --

1 MR. BOLTON: I remember asking Mr. Pozner that
2 question. I don't remember asking Mr. Fetzer that
3 question.

4 THE COURT: I'm sorry. You did ask Mr. Pozner.
5 If I said Fetzer, I misspoke. And Pozner said, well,
6 clearly they were or he understood them to be connected
7 because as he understood the Lucy Richards was enjoined by
8 the criminal court as a condition of her conviction that
9 she not access to or read Dr. Fetzer's blog or book, which
10 does, I think, support your probably decision not to
11 object knowing that Pozner -- that Richards', in fact,
12 criminal conviction and order of the criminal court was to
13 separate her from James Fetzer, and that I think a
14 reasonable inference from that is that she was, in fact,
15 motivated by Fetzer's accusations with regard to Leonard
16 Pozner, and that's why she chose Leonard Pozner to call
17 and make those statements. But, I mean, it is what it is.

18 MR. BOLTON: Can I -- can I make one -- while
19 you're thinking there. What I also recall Mr. Pozner
20 saying, and by the way, the -- the criminal court matter
21 was not -- he was basically -- Lucy Richards was basically
22 told not to access, not just this book, but basically stay
23 away from any of the publications in --

24 THE COURT: I don't know that. That's not
25 what -- that's not what the testimony --

1 MR. BOLTON: What I was also --

2 THE COURT: It may be true.

3 MR. BOLTON: What is part of his testimony is I
4 think that he said, I think that -- I think her
5 statements, the statements that she made on the phone
6 call, a lot of the language was -- was similar, taken
7 from -- from -- from --

8 THE COURT: The language out of the book.
9 Chapter 11.

10 MR. BOLTON: -- the book. And -- and there's
11 nothing -- the statements that she made have nothing to do
12 with -- they're not even -- there's no similarity between
13 the alleged defamatory statements and her statements at
14 all.

15 THE COURT: Okay. All right. Well, it is what
16 it is. Like I said, I thought I -- I mean, the point was
17 without -- it was offered, played to the jury without
18 objection, and the jury heard it. Now, if you're asking
19 me then to weigh the public policy and try to untangle it
20 all, for reasons I'll put in the record, I'm not going
21 to -- public policy does not warrant granting your motion
22 for new trial.

23 Okay. I might get this written decision out yet
24 today. I've already told you how it's going to rule. It
25 will be a final order for purposes. There are no other

1 proceedings -- for purposes of appeal. There will be no
2 other proceedings in the circuit court.

3 I'll make sure -- you know, we have so few jury
4 trials. I'll make sure we sign judgment on the verdict,
5 now having as consistent with the Court's denial of the
6 defendant's post-trial motions.

7 I guess, just so it's easy to be done, I'd like,
8 Mr. Zimmerman or Ms. Feinstein, someone should draft an
9 injunction. It should be a separate document that's
10 pretty simple. It's just enjoining those four statements.
11 And if there's an alleged contempt then we'll deal with
12 that at the time it's made.

13 My advice to Mr. -- Dr. Fetzer would be is that
14 he forget about Leonard Pozner and Noah Pozner and as a
15 start to his reorienting his view of the world and leave
16 that family alone.

17 But if he wants to continue to skirt the limits
18 and maybe go so far as you say, Mr. Zimmerman, which
19 I'm -- I'm not saying I agree with your analysis, but you
20 certainly have leave to raise it at the time, if it
21 becomes a question for the Court, I'll decide it on the
22 motion.

23 Please tell him though that the consequences of
24 a contempt of an injunction are contempt of court and that
25 the consequences then become more and more serious.

1 MR. BOLTON: Yeah. I understand that, Your
2 Honor. I fully understand that.

3 The -- what -- what troubles me is in regard to
4 Attorney Zimmerman's comments and then Your Honor's
5 comments is that -- that it's not clear then what exactly
6 is enjoined. For instance, I believe that Attorney
7 Zimmerman is suggesting then that the entire book, because
8 the book, to the extent that it denies anyone died at
9 Sandy Hook, that the book then by implication implicates
10 Mr. Pozner -- Pozner. And -- and --

11 THE COURT: Well, I'm not going to -- I'm not
12 going to resolve that today. And I'm not going to kind of
13 be lulled into confusing the clarity of the scope of the
14 injunction that I think is warranted.

15 I'm going to issue an injunction that prohibits
16 the four statements that were shown to the jury that the
17 Court found to be defamatory. It's as simple as that.
18 And I think they're extraordinarily clear. Even if you
19 sort of rephrase them, the core of each of the separate --
20 four separate statements is -- is the following:

21 Mr. -- Dr. Fetzer is enjoined from making the statement
22 that Mr. Pozner's son's death certificate is a fake.
23 Period. Simple as can be. He's no longer able to say
24 that that death certificate is a fake.

25 He's no longer able to say that the death certificate

1 is a fabrication.

2 He's no longer able to say that the death certificate
3 is a forgery.

4 Those are taken directly from the four statements that
5 were shown to the jury and found by this Court to be
6 defamatory.

7 Now whether he can be creative and cute and
8 nuanced to say something more or to skirt around it, we'll
9 just have to judge him at the time, but you'll give him
10 advice.

11 I understand Mr. Zimmerman is saying how can you
12 both say that it's not a fake, a fabrication or a forgery
13 and yet say the event which is reflected on the death
14 certificate never happened. I understand what
15 Mr. Zimmerman is saying, but that's a decision that would
16 have to be made in the context of seeing what Dr. Fetzer
17 says.

18 If I continue to sort of belabor the point, then
19 I -- then I undermine my -- the point that an injunction
20 can be narrowly tailored and concise.

21 For those reasons, the Court, like I said, is
22 going to deny the defendant's motions, grant the
23 plaintiff's motion for an injunction, and deny the
24 plaintiff's motion for attorney's fees. We'll enter
25 judgment on the verdict and grant the plaintiff statutory

1 fees and costs.

2 Like I said, I might get this decision out
3 before the end of the day. Thank you very much.

4 MS. FEINSTEIN: Thank you, Your Honor.

5 MR. ZIMMERMAN: Your Honor, can I just -- a
6 couple very quick housekeeping questions?

7 THE COURT: Yes.

8 MR. ZIMMERMAN: The final judgment, Your Honor,
9 will dismiss the counterclaims, correct? I don't know
10 that we've received an order from the Court formally
11 dismissing --

12 THE COURT: Well, that's true.

13 MR. ZIMMERMAN: -- the counterclaims.

14 THE COURT: I think we agreed early on that
15 if -- the counterclaims certainly was -- although
16 Dr. Fetzer -- I think I asked you about this at one point,
17 and you said certainly if the verdict is for the
18 plaintiff, then there's no abuse of process or fraud upon
19 the court.

20 MR. BOLTON: Right.

21 MR. ZIMMERMAN: And I believe it was discussed
22 on the record even, but I'm not sure there's any order
23 from the Court formally dismissing the counterclaims.

24 THE COURT: Do you think there are any viable
25 counterclaims that would preclude this Court from entering

1 judgment as a final order, no further proceedings?

2 MR. BOLTON: No, Your Honor.

3 THE COURT: All right. So why don't --

4 MR. ZIMMERMAN: That's fine --

5 THE COURT: -- Mr. Zimmerman --

6 MR. ZIMMERMAN: -- with us.

7 THE COURT: Then the plaintiff, why don't you
8 guys draft a second order, too. I did not address that in
9 my decision on the motions. Draft a second order for that
10 in addition to the injunction.

11 MR. ZIMMERMAN: And, Your Honor, the very last
12 issue is at trial we moved to conform the pleadings -- to
13 amend the pleadings to conform to the evidence, and I
14 think the Court's final judgment probably should address
15 that. We provided evidence that the PDF version of the
16 book included the statements found to be defamatory by the
17 Court. And that was not -- I believe the defendant did
18 not object to plaintiff's motion -- oral motion.

19 THE COURT: Did not, and the Court granted it.
20 But I don't --

21 MR. ZIMMERMAN: That's correct.

22 THE COURT: But I don't -- what -- Do you think
23 I need to do anything more than that? It was on the
24 record in the Court's order unopposed.

25 MR. ZIMMERMAN: I think that's correct. I think

1 we can work with what was on the record in the transcript.
2 That's acceptable.

3 THE COURT: Okay. Do you think I need to do
4 anything more on that, Mr. Bolton?

5 MR. BOLTON: Oh, you've done too much, Your
6 Honor, already. No. I'm fine with that, Your Honor.

7 THE COURT: Okay. Thank you very much.
8 Anything else, Mr. Zimmerman?

9 MR. ZIMMERMAN: No, Your Honor. Thank you for
10 your time.

11 THE COURT: Thank you very much.

12 MR. ZIMMERMAN: And for letting me join by
13 phone. I appreciate it.

14 THE COURT: Thank you very much. Ladies and
15 gentlemen, let me just say, I appreciate the quality of
16 the legal representation.

17 I especially, whether it might not seem like it
18 when you suffer under my withering questions, Mr. Bolton,
19 there's no question I think the attorneys for the
20 plaintiff will recognize that having you here made this
21 case a lot better than having gone through it with an
22 unrepresented party. Obviously, the record is replete
23 with the fact that Mr. -- Dr. Fetzer was so perhaps
24 earnest in his beliefs that he had trouble staying on
25 point and answering questions succinctly. I want to

1 express my appreciate, ironically, for you taking this
2 case and shepherding your client through this, even though
3 maybe it didn't turn out the way it -- it -- your client
4 had hoped.

5 I had begged your client repeatedly to go out
6 and find a lawyer and he had told me that, repeatedly,
7 that no one wanted to take his case. I know some people
8 have said why would you take his case, but I think that
9 begs the question that it's a credit to the legal
10 profession, the recognition and understanding that even
11 people who defame others are entitled to representation,
12 and I know that I have benefitted greatly by -- in our
13 adversarial system by the issues and the arguments that
14 you've raised. So I appreciate you taking this on and
15 assisting the Court.

16 MR. BOLTON: Thank you, Your Honor.

17 THE COURT: And good -- thank you also for the
18 firm of Quarles and Brady and Mr. and Mrs. Zimmerman for
19 coming to the court on this very important case involving
20 such significant and substantial issues. It was really
21 excellent lawyering under rather unfortunate factual
22 circumstances.

23 Thank you very much.

24 (Proceeding concluded at 10:43 a.m.)
25

1 STATE OF WISCONSIN)
 ss.)
 2 COUNTY OF DANE)

3 I, COLLEEN C. CLARK, Registered Professional
 4 Reporter, Official Court Reporter, Branch 8, Dane County
 5 Circuit Court, hereby certify that I reported in Stenographic
 6 shorthand the proceedings had before the Court on this 12th day
 7 of December, 2019, and that the foregoing transcript is a true
 8 and correct copy of the said Stenographic notes thereof.

9 On this day the original and two copies of the
 10 transcript were prepared by pursuant to Statute.

11 Dated this 25th day of February, 2020.

12
 13 Electronically signed by:

14
 15 Colleen C. Clark
 COLLEEN C. CLARK, RPR
 16 OFFICIAL COURT REPORTER

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