

1 seal as well. So I'm just saying, when you get a chance
2 to say something, I just want to let you know, because
3 unless I tell you these things, then you would not know
4 that as a government official, a notary in the State of
5 Wisconsin, I've never been told where to put it. Usually
6 I put it over my signature, but I -- but I've never to my
7 knowledge been made aware that there's a right or wrong
8 place to put these things. So keep your thoughts.

9 MR. FETZER: You got it.

10 THE COURT: Mr. Zimmerman, finish.

11 MR. ZIMMERMAN: Thank you, Your Honor.

12 We've introduced this evidence. It was part of
13 Mr. Pozner's affidavit. He has stated that this is the
14 death certificate that he scanned and that was uploaded to
15 his Google Plus site.

16 THE COURT: So to make sure the record is clear,
17 what has now been marked as Exhibit 2 corresponds to the
18 Pozner affidavit, paragraphs 11 and 13, saying that
19 Exhibit 2 is the actual document he uploaded.

20 MR. ZIMMERMAN: With one small caveat, Your
21 Honor.

22 THE COURT: Okay.

23 MR. ZIMMERMAN: He did not say which of these
24 two was the one that he uploaded.

25 THE COURT: Okay.

1 MR. ZIMMERMAN: Just so the record is clear.

2 THE COURT: Okay. But as the Court has -- will

3 indicate, I've accepted for filing the one of the two that

4 had a slightly greater raised embossed seal. The two

5 otherwise were exactly the same except for the physical

6 location of the embossment.

7 MR. ZIMMERMAN: That's correct. And the record

8 from Mr. Pozner's affidavit shows -- states that he

9 obtained them on the same day from the Newtown Registrar

10 of Vital Records.

11 THE COURT: Okay. So can I -- I said I'm not

12 helping, but Dr. Fetzer, when you say to me sort of

13 extemporaneously as an outburst, *That's not the one he*

14 *uploaded*, I just want to let you know, that's not good

15 enough, because I have to decide a motion for summary

16 judgment based on competent, admissible evidence. And so

17 if there's some evidence that you want to show me in the

18 documents, in the affidavits, in the documents you've

19 submitted, then please do that. I just want to let you

20 know, because I'm going to rule based on the evidence,

21 that as a fundamental precept of the Wisconsin Rules of

22 Civil Procedure, a party cannot just rest upon their

23 pleadings or just their extemporaneous statements. I need

24 evidence. So --

25 MR. FETZER: Your --

1 THE COURT: -- when you get to be -- your
2 chance, please keep that in mind, too.

3 MR. FETZER: Just to make the obvious point,
4 Your Honor, I was sued for the death certificate published
5 in the book. It does not have the certification that is
6 shown here. This is a misrepresentation.

7 THE COURT: Okay.

8 MR. FETZER: The -- the document published in
9 the book has many features that are not present in this
10 document. This is a cleaned-up document, Your Honor.
11 That is not the document that is the basis of the suit
12 against me.

13 THE COURT: Okay. Just so I understand,
14 Dr. Fetzer's point, when I followed the affidavit of
15 Pozner and the exhibits, it -- I thought the death
16 certificate he uploaded then made its way to and was
17 included in the book.

18 MR. ZIMMERMAN: It -- by some -- by some path,
19 the death certificate he uploaded made its way and was
20 reproduced on page 181 of the book and 242 of the book.
21 That is correct, Your Honor.

22 THE COURT: And Dr. Fetzer, when he gets his
23 chance, is -- will say that if I looked at that page of
24 the book, do you think then -- and I compared it, are
25 there material differences?

1 MR. ZIMMERMAN: The key word being material,
2 Your Honor, and the answer there is no.

3 THE COURT: What are the differences in the book
4 as opposed to Exhibit 2?

5 MR. ZIMMERMAN: Plaintiff Pozner redacted
6 several of the boxes that appear in that death certificate
7 before he uploaded the death certificate to his son's
8 social media site.

9 THE COURT: Social security number.

10 MR. ZIMMERMAN: Social security number and the
11 location of his grave.

12 THE COURT: Okay.

13 MR. ZIMMERMAN: As he said in his affidavit, he
14 was concerned that someone might go to his son's grave
15 because he had received threats that people should exhume
16 his son's body in order to prove that it was actually
17 there.

18 THE COURT: Okay. Other than those redactions,
19 the copy of the death certificate in the book is the same
20 as Exhibit 2?

21 MR. ZIMMERMAN: No, Your Honor. There's one --
22 well, let me state, there are two different -- slightly
23 different images of the death certificate in the book.
24 The one on page 181 has a thin black border around it.
25 That is not present in the version of the death

1 certificate that Mr. Pozner uploaded. So that is not
2 attributable to the Plaintiff in this case, though it was
3 described by Defendants' expert.

4 THE COURT: Okay.

5 MR. ZIMMERMAN: Somewhere along the way as they
6 gathered documents off the internet, they pulled one that
7 had a black border around it, but it's not from my client.

8 THE COURT: All right.

9 MR. ZIMMERMAN: That's different than the copy
10 of the death certificate on page 242 that does not
11 contain --

12 MR. FETZER: This --

13 MR. ZIMMERMAN: -- the black border around it.

14 In addition, both of these death certificates
15 have been cropped so that they are not on an 8
16 1/2-by-11-size sheet of paper, but instead focus on the
17 material contents of the death certificate, the typed
18 information, the clerk's signature and the seal all appear
19 on the copy of the death certificate that appears in the
20 book.

21 MR. FETZER: Your Honor, I -- I don't want to
22 accuse Mr. Zimmerman of a shell game, but that is not the
23 death certificate for which I have been sued. It is much
24 more serious than he is allowing here. That death
25 certificate has certifications. The death certificate in

1 the book has no certifications, Your Honor. None.
2 That -- that stamp on the upper left is crucial. That is
3 a certification by the -- the town custodian of vital
4 records, Debbie Aurelia. It has to have a certification
5 on the left. It is not there -- in the book, it's not
6 there. I will give you copies when my occasion occurs to
7 show you that you are being misled by Mr. Zimmerman. I
8 hate to make this allegation, but it's as serious as it
9 could be.

10 Not only that, but the document has much -- many
11 texturals differences that have been eliminated from the
12 version you've seen. It had a dark text here which turns
13 out to be because there's a dark texture in the original
14 death certificate filled out by the medical examiner, Your
15 Honor. This is a very substantial misrepresentation of
16 the evidence in this case.

17 THE COURT: Well, okay. Let me just ask you
18 another question. My bailiff will bring you Exhibit 2.
19 Dr. Fetzer, is Exhibit 2 a fake?

20 MR. FETZER: Well, it is on multiple grounds,
21 Your Honor, but the point is it has this certification on
22 the left which was not in the book. I -- I have it.

23 THE COURT: Time out. Time out. I just -- I
24 want to work through and understand the positions.

25 MR. FETZER: Yes.

1 THE COURT: I understand that Mr. Zimmerman is
2 walking me through the journey of what he says, well,
3 actually what Leonard Pozner says in his affidavit is the
4 document which he uploaded. I understand the issue of the
5 redactions and the border and the split, and the issue of
6 whether an uploading can capture an embossed, but I'm just
7 asking a simple question. You have Exhibit 2 in your
8 hand. You can feel the embossment. Is Exhibit -- yes or
9 no, is Exhibit 2 a fake?

10 MR. FETZER: Yes.

11 THE COURT: Mr. Palecek, take Exhibit 2 in your
12 hands, please. Is Exhibit 2 a fake?

13 MR. PALECEK: I have no way of knowing.

14 THE COURT: Okay. Thank you for your candor.
15 My bailiff will retrieve Exhibit 2.

16 Okay. Go ahead, Mr. Zimmerman.

17 MR. ZIMMERMAN: Thank you, Your Honor.

18 I think the critical issue here is that
19 Defendants did not introduce admissible evidence that the
20 death certificate that Mr. Pozner uploaded was a fake.
21 The experts that Defendants hired to provide testimony in
22 this case did not review the digital file that Mr. Pozner
23 uploaded. They reviewed some other copy. And as we
24 showed in our motion to strike, which we'll talk about in
25 a moment, we know from the file size that it could not

1 have been the file that Mr. Pozner uploaded.

2 Now in the context of Photoshopping, that's
3 critically important, because at some point the allegation
4 was the file or the image was digitally manipulated. That
5 may be of less import today, given that they're agreeing
6 that the image was not Photoshopped, but we can see on
7 page 181 of the book, which is reproduced in slide 10 of
8 my presentation, the death certificate from the book that
9 contains, although hazy, an image of the embossed seal in
10 the lower left-hand corner. There's no evidence in the
11 record that the document was not certified.

12 And --

13 MR. FETZER: But --

14 MR. ZIMMERMAN: -- with respect, Defendant
15 Fetzer's statements that the certification is in the wrong
16 spot or that the document wasn't certified are not
17 admissible evidence. He's offered opinion testimony for
18 which he is not competent under Wisconsin law to provide.

19 They've provided two expert reports from people
20 who claim to be forensic document examiners, experts who
21 are allowed to testify in court about whether a document
22 is real or forged. Those individuals did not offer an
23 opinion that the death certificate was fake because it
24 lacked a seal. They did not offer that opinion based on
25 the image that was uploaded, and they were never provided

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the underlying documents.

We can call these originals in this case because they are the certified copy obtained from the Newtown clerk that bears the physical raised seal.

MR. FETZER: May --

MR. ZIMMERMAN: They are not the original death certificate that's held in the Newtown file cabinet somewhere, but in -- in either event, their forensic document analysts did not obtain these files because they didn't ask for them. In this case, with all of the discovery and all of the issues that have been before your court, no one has ever served a document request asking for the JPEG image that Mr. Pozner uploaded or the death certificates that were underlying that issue -- or that image. I apologize. So what everyone is working with from the Defendants' side are copies of copies of copies that they found somewhere out on the internet, and they are using those to say my client did something wrong or my client improperly distributed or possessed a modified or altered death certificate, but there's no admissible evidence in the record to support that contention, even if it was within the context of the statement in chapter 11, and it is not.

Where does that leave us? We identified the -- I'm sorry, I'm on slide 17. We identified the defamatory

1 content in our Complaint, the defamatory statement. We
2 showed that the defamatory statement actually appears in
3 the book, just where we said it would. We evaluated the
4 context of the statement to understand why the Defendants
5 claimed that the statement was fake. Plaintiff introduced
6 evidence to show that's wrong. Defendants did not
7 introduce admissible evidence to counter Plaintiff's
8 showing. Therefore, there is no genuine issue of material
9 fact on this element of defamation, the falsity of the
10 defamatory statement.

11 Your Honor, if I might, I'd like to address
12 quickly one statement from Defendant Fetzer's blog. This
13 appears on paragraph 18 of the Complaint. It's a slightly
14 longer statement, slide 19 of my presentation.

15 Slide 20 contains an excerpt from Exhibit P to
16 my declaration -- excuse me, Affidavit in Support of
17 Plaintiff's Motion for Summary Judgment. This is a
18 screenshot or a printout of that blog page, and the false
19 statement appears in the blog. There's no dispute on this
20 point.

21 On slide 21, we've identified the context of
22 this false statement. And as I said, Your Honor, this one
23 is a little bit different. Here, Defendant Fetzer accused
24 Plaintiff of circulating or providing to Ms. Kelley Watt a
25 fabrication with the bottom half of a real death

1 certificate and the top half of a fake. The allegation
2 there, Your Honor, is that they literally -- that my
3 client or someone upstream of my client literally combined
4 two documents to result in a fabricated death certificate.
5 There's no evidence in the record to support that
6 contention.

7 They go a little bit further here, Your Honor,
8 saying that there's no file number. I believe that refers
9 to the state file number box in the upper right-hand
10 corner, which we can talk about in just a moment, and the
11 wrong estimated time of death. That's the sum total of
12 the context from the blog about my client's son's death
13 certificate. Those -- none of those are accurate. None
14 of those reflect a fabricated death certificate.

15 On page 22, we can see three boxes from Noah
16 Pozner's death certificate that identify actual or
17 presumed time of death, time pronounced, and time of
18 injury.

19 And on slide 23, we have testimony from the
20 deposition of Dr. Carver. I skipped some slides earlier,
21 Your Honor. Dr. Carver is the chief -- was the Chief
22 Medical Examiner for the State of Connecticut for almost
23 three decades who personally performed the post-mortem
24 examination of Noah Pozner. He was deposed in this case,
25 including by Dr. Fetzer, who had ample opportunity to ask

1 him questions about the time of death notations on the
2 death certificate. And as the evidence showed, Dr. Carver
3 explained that the time of death numbers, times on the
4 death certificate, have nothing to do with determining the
5 moment when Noah Pozner was shot. They have everything to
6 do with determining the time in which Noah Pozner was
7 pronounced dead. We've included deposition excerpts in
8 the presentation, I won't belabor the Court with them, on
9 slide 23 and 24.

10 The affidavit includes more. This happens, Your
11 Honor, because sometimes they find a dead body in the
12 woods and it might be there for 20 years, and then the
13 medical examiner has to figure out when did the person
14 die. When did the injury occur. And if there are years
15 intervening the presumed death and the death -- the
16 medical examiners evaluation, they have to rely on much
17 more complicated forensic techniques to make that
18 determination.

19 But Dr. Carver stated with respect to these,
20 those are the dates and times that he received information
21 from competent EMTs that Noah Pozner and the other victims
22 had been pronounced dead. And for him, that was the end
23 of the inquiry. This is an administrative function, not
24 an investigatory function.

25 Having said that, on slide 25, Defendant Fetzer

1 did attempt to introduce evidence that Noah Pozner could
2 not have been pronounced dead because he contends no EMTs
3 went into the building. Your Honor, it's important,
4 obviously, in a motion for summary judgment to attach
5 evidence, which is why Wisconsin statutes require us to do
6 that, and then also to look carefully at that evidence.
7 Because the evidence that Mr. -- Dr. Fetzer attached, does
8 not say no EMTs went into that school. It says this EMT
9 and her crew did not enter the building. But we know from
10 the Connecticut State Police report that other EMTs did.

11 On page 26 of the presentation is an excerpt --
12 oh, I apologize. I've mislabelled that. It's an excerpt
13 from my affidavit. It includes statements from the
14 Connecticut State Police report from three paramedics who
15 entered the building and are the individuals who conducted
16 the determination that the victims were deceased. They're
17 all in the police report -- state police report. They're
18 admissible. The state police report is a public record.
19 They're not hearsay within hearsay. Neither of those
20 witnesses -- none of those three witnesses are available
21 to testify in the court today. So we have admissible
22 evidence that EMTs did enter the building, they did check
23 each one of the victims using a protocol, and eventually,
24 these victims were pronounced dead.

25 This is also consistent with the time of death

1 with the medical examiner's report. On page 27, we see an
2 excerpt. That report says the victims were pronounced
3 dead at 11:00 o'clock by paramedic, and that statement is
4 repeated in the medical examiner's notes from the field,
5 from the scene investigation.

6 Finally, Your Honor, let me address the absence
7 of a state file number. This is an issue that came up in
8 the case because some death certificates in Connecticut
9 are issued by the town and other death certificates in
10 Connecticut are issued by the state. They chose in their
11 wisdom to have a two-track system to release vital
12 documents. And because of that, there is a difference
13 between a document obtained from the town and one obtained
14 from the state.

15 We introduced evidence, again, through
16 Dr. Carver's deposition -- by the way, Dr. Carver
17 testified he has completed more than 13,000 death
18 certificates in his role as chief medical examiner for the
19 State of Connecticut, which is an astoundingly high
20 number, and he was easily able to explain the absence of
21 the file number on Noah Pozner's death certificate. The
22 copy that was obtained from Newtown, won't have a state
23 file number. The copy that's obtained from the state
24 vital records office, will, and it's as simple as that.

25 Even if we identified that difference, even if

1 we had a disagreement about the basis for that difference,
2 there is no evidence in the record that a state file
3 number on one document and the absence of a file number on
4 the other is evidence that the document is a fabrication.
5 There is nothing to connect that administrative difference
6 with the underlying possession or issuance of a fake
7 public record.

8 Your Honor, I'm probably going too far and
9 beating a dead horse on this, but there's also no evidence
10 that Noah Pozner's death certificate is a combination of
11 two documents. We know this because Dr. Carver testified
12 that he entered -- and actually, let me, if I can, take a
13 moment, Your Honor. We actually have an original death
14 certificate. May I approach?

15 THE COURT: Please.

16 MR. ZIMMERMAN: This is the original death
17 certificate form that's used by the State of Connecticut.
18 We obtained a copy -- we obtained an original from the
19 office of the chief medical examiner. It says "blank
20 copy" at the top so that no one will do anything nefarious
21 with it. You can see the size, shape, and tone of that
22 document.

23 Dr. Carver testified that his job is to complete
24 the shaded boxes. The funeral home director, Mr. Green,
25 testified that his job is to fill in the nonshaded boxes,

1 the registrar cites.

2 THE COURT: Should we mark this?

3 MR. ZIMMERMAN: Yes, Your Honor, please.

4 THE COURT: Mark it as Exhibit 3.

5 (Exhibit 3 marked for identification.)

6 THE COURT: Because the document, which is
7 marked for identification purposes as Exhibit 3, has
8 shaded portions, I do note that Exhibit 2, now I can
9 discern the shaded portions on the photocopy, but
10 photocopying don't accurately reflect I think what you're
11 demonstrating here.

12 MR. ZIMMERMAN: If I might just make sure that
13 the Defendants have had an opportunity to see the
14 document.

15 THE COURT: Okay. And for purpose of
16 identification, you -- you wrote -- you modified the blank
17 form by affixing the two words, "blank copy."

18 MR. ZIMMERMAN: I did not, Your Honor. The
19 office of the chief medical examiner did that before they
20 mailed it to me.

21 THE COURT: Okay. Now let's just -- offering
22 Exhibit 3, are you?

23 MR. ZIMMERMAN: Yes, Your Honor.

24 THE COURT: Any objection to the Court receiving
25 Exhibit 3?

1 MR. FETZER: None.

2 MR. PALECEK: No.

3 MR. ZIMMERMAN: The --

4 THE COURT: Let's just clean up. Exhibit 2.

5 Offering Exhibit 2?

6 MR. ZIMMERMAN: Yes, Your Honor.

7 THE COURT: Any objection?

8 MR. FETZER: No.

9 MR. PALECEK: No.

10 THE COURT: And Exhibit 1 is demonstrative.

11 MR. ZIMMERMAN: Yes, Your Honor.

12 THE COURT: We won't offer that as an exhibit.

13 (Exhibits 2 and 3 received into evidence.)

14 THE COURT: Go ahead, Mr. Zimmerman.

15 MR. ZIMMERMAN: Thank you, Your Honor.

16 We know that this could not -- that Noah

17 Pozner's death certificate could not be the combination of

18 a fake top half and a real bottom half of the death

19 certificate because the two individuals who are

20 responsible for entering the information on that document

21 provided admissible testimony that each of them entered

22 information on both the top and the bottom.

23 We can see from the shaded boxes on the

24 document, Your Honor, that Dr. Carver included information

25 on the top two shaded boxes and also a significant number

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STATE OF WISCONSIN, CIRCUIT COURT, DANE COUNTY

Caption: LEONARD POZNER

VS.

JAMES FETZER, et al.

Exhibit List
Continuation

Case No. 18CV3122

FILED

JUN 17 2019

DANE COUNTY CIRCUIT COURT

Type of Hearing ORAL ARGUMENTS

Date of Hearing 6/17/2019

Table with columns: Exhibit Information (Number, Description, Offered By, Received, Withdrawn, Denied, Original for Court Inspection, Biological Material) and Exhibit Management (Storage Location, Return Date To Whom, Date Destroyed). Contains 10 rows of exhibit data.

Continued on next page.

1 of shaded boxes in the middle of the document. He signed
2 it down toward the bottom.

3 Mr. Green is the -- I should have introduced
4 him -- funeral home director. He's been the funeral home
5 director at Abraham L. Green and Sons Funeral Home for 41
6 years, and he's a third generation Green in running that
7 family business. Like Dr. Carver, Your Honor, Mr. Green
8 has filled out a tremendous number of death certificates.

9 When one looks at the shaded boxes and the
10 nonshaded boxes, there's no possibility for combining a
11 real death certificate and a fake death certificate.
12 Moreover, as I've depicted on slide 29, we actually have
13 photocopies from the medical examiner's office, which they
14 copied the document before they turned it over to
15 Mr. Green's funeral home, along with Noah Pozner's body,
16 that shows us which information was entered into the
17 medical examiner's file copy before they turned the
18 original document over to the funeral home. The funeral
19 home then entered their information with a typewriter, old
20 school typewriter in the funeral home copy, and they made
21 a photocopy of the document. Those two photocopies appear
22 on page 29 along with the death certificate that's
23 depicted in Mr. Fetzer's book. And that shows us each
24 step along the way with the original document or a
25 photocopy of the original document, the information that

1 was entered. And what it leaves us with, Your Honor, is
2 no room for combining a true document and a face -- a fake
3 document to depict what was eventually portrayed in the
4 Defendants' book.

5 So where does that leave us? Again, Plaintiff
6 identified his statement in the Complaint. We've shown
7 that the statement appears in Defendant Fetzer's blog, we
8 evaluated the context to see why they said the document
9 was a fabrication combined from two different pieces of
10 paper, and showed that there is no way their statements
11 could be true. Those statements are false. Defendants
12 did not introduce any admissible evidence showing that the
13 statements they made in that blog could be true. As such,
14 there's no genuine issue of material fact on this element.

15 Your Honor, if I might turn to the remaining
16 elements of defamation, and as I said, I'll do this
17 quickly, because there are no disputes for the most part.
18 On page 32, we identified admissible evidence that the
19 defamatory material was published to third parties, and
20 Defendant Fetzer offered no evidence in response.

21 We provided evidence that the defamatory
22 statements referred to Plaintiff, as required by Wisconsin
23 law, and Defendant Fetzer offered no admissible evidence
24 in response.

25 And finally, we introduced evidence that the

1 language had a defamatory meaning as a matter of law, and
2 the Defendant didn't respond or offer any evidence in
3 response.

4 Your Honor, the last issue that I want to cover,
5 if I might, is the constitutional conditional privilege.
6 Here, there's no evidence in the record that Plaintiff
7 injected himself into a public controversy. This is
8 outlined on slide 33, Your Honor. Plaintiff introduced
9 admissible evidence that he did not --

10 THE COURT: Before -- before he was defamed.

11 MR. ZIMMERMAN: That's correct, Your Honor.
12 Before he was defamed. And we can get into the date and
13 timing on that, although, I'm not sure that it's relevant
14 at this point given the state of the record in Plaintiff's
15 Motion for Summary Judgment.

16 THE COURT: Well let's -- Mr. Palecek, do you
17 believe the Plaintiff, Leonard Pozner, injected himself
18 into this controversy before the date he was allegedly
19 defamed?

20 MR. PALECEK: Yes. I believe there was -- there
21 were -- I don't know what they are right now, but I think
22 there were letters to the president or things that he had
23 written earlier, and I think it was 2013. And I think he
24 was -- I don't have anything to -- any evidence, but I
25 think he was a public figure before our book.

1 THE COURT: Same question to you, Mr. Fetzer,
2 and then, Mr. Zimmerman can --

3 MR. FETZER: Well, on 14 January was published
4 an open letter from Leonard Pozner to the President of the
5 United States about gun control. That was one month after
6 the event, far before any allegedly defamatory publication
7 had been made. It was even before President Obama on the
8 16th of January signed no less than 23 executive orders to
9 constrain our access to weapons under the Second
10 Amendment.

11 THE COURT: Mr. Zimmerman?

12 MR. ZIMMERMAN: Yes, Your Honor.

13 There's no document in the record to support
14 that assertion. Defendant Fetzer noted his belief that
15 Plaintiff had made such a statement and provided a link to
16 an online newspaper article. That article is not
17 authenticated and is not in the record.

18 But even if it was, Your Honor, it does not talk
19 about Leonard Pozner. And on page 33, I included a
20 screenshot of it. It does talk about something it calls a
21 memorandum, and I can only assume this is what Defendant
22 Fetzer is talking about. We went and looked at that
23 memorandum in the interest of being complete, even though
24 neither it nor the article are in the record.

25 An excerpt from the memorandum appears on page

1 35 of my presentation, Your Honor, and it's interesting
2 because it's written as, "Initial Proposes by the Maternal
3 Family of Noah Pozner." And on that memorandum appear
4 names of people who purport to subscribe to the
5 memorandum's content. None of those names are Leonard
6 Pozner, for the obvious reason that he is the paternal
7 family of Noah Pozner. This information does not
8 establish that Leonard Pozner injected himself into any
9 public controversy before he was initially defamed by
10 these defendants.

11 THE COURT: Okay.

12 MR. ZIMMERMAN: So again, where does that leave
13 us, Your Honor? The Plaintiffs introduced admissible
14 evidence on each element of defamation. We established
15 that the statements are false as a matter of law. There's
16 no evidence to the contrary. There's no dispute on the
17 remaining elements of defamation, and there's no evidence
18 that Plaintiff injected himself into a public controversy
19 before this defamatory statement was initially published.

20 THE COURT: Okay.

21 MR. ZIMMERMAN: As such, Plaintiff should be
22 granted its Motion for Summary Judgment.

23 THE COURT: Thank you.

24 We'll just take our midmorning break and then
25 we'll come back with you, Dr. Fetzer.

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(Off the record at 10:06 a.m.)

(Back on the record at 10:15 a.m.)

THE COURT: Go back on the record.

Mr. Zimmerman, while you were out, Mr. Fetzer mentioned to me something words to the effect, he's been looking for a lawyer but can't find one. Mr. Palecek is doing the best he can.

Let me, again, I promised that I would say this every time we got together, I know you might be trying, but Mr. Palecek, Mr. Fetzer, you do need lawyers. I don't know whether you need a lawyer -- don't -- don't suggest that I'm making a suggestion you need a lawyer to win your case or to lose your case, but one thing I said, and I don't want to make you fret, Mr. Palecek, but I can't make assumptions that people know things. You know, this in a certain sense is a -- the Plaintiff is asking for a judgement, a judgment for money. And if they get a judgment for money, they have the rights to collect as a creditor. And one option to collect is to garnish a bank account, garnish your wages, foreclose on your home. If you had a lawyer, the lawyer would be telling you all this and weighing in terms of what you want to accomplish and what are the risks of litigation and the costs of a failure.

I do note, by the way, parenthetically, that

1 there's a counterclaim that we've bifurcated. But you do
2 understand that if the Plaintiff prevails, the
3 counterclaim is going to be dismissed because you can't be
4 guilty of malicious prosecution or abuse of process on a
5 meritorious claim.

6 Now I'm going to ask the same question again,
7 both of you, Mr. Palecek, you first, and Mr. Fetzer later,
8 after you've seen now the -- what's been marked as Exhibit
9 1, whether you've changed your mind in terms of what your
10 position is here today. Because I think it's important,
11 it might be subtle.

12 Defamation, we have the elements set forth on
13 page 2 succinctly by Mr. Zimmerman, page -- actually page
14 4, The elements of defamation of Wisconsin law are: a
15 false statement. And when I read your response, mostly
16 Dr. Fetzer's response, I didn't know -- I think I do
17 now -- I didn't know then whether the suggestion was
18 saying at the time I made the publication it -- it's what
19 I believed, which I now believe to be a false statement,
20 because I've now seen the evidence, I've probed the
21 details and nuances. So far the Defendants have taken the
22 position it was a statement allegedly was correct that
23 it's not false at the time it was published, it's not
24 false any time in between, and it's not false now. That's
25 what I'm hearing from them.

1 If, on the other hand, although they've changed
2 to say that now the part on Photoshopping was false, that
3 now they don't believe it was Photoshopped, but if you
4 come to the conclusion that now based on the new evidence
5 and the opportunity to see what the Plaintiffs have
6 proposed, that you think it is false, you should -- you
7 certainly should, if you had a lawyer, the lawyer would be
8 talking to you about that and what that position might
9 have on the issues in this case and when we go to trial.
10 Because you should understand, if I grant summary
11 judgment, we're going to trial. If I deny summary
12 judgment, we're going to trial. We're going to trial
13 regardless, except as it relates to the issues, of course,
14 of the -- with Dr. Fetzer brought some motions for summary
15 judgment too on some of the subsidiary issues that I'll
16 have to address.

17 But do you understand, Mr. Palecek, I have never
18 met you, we've been on the phone, but -- but I am
19 concerned about the challenges you both face being
20 unrepresented and the stakes that are at issue. So just
21 keep that in mind. I'm going to come back to you later on
22 before the day's end to talk about what you really want to
23 do in this case, whether you -- whether you want to step
24 aside, sort of talk to the Plaintiff, I don't know.
25 That's what lawyers would do for you.

1 Thank you, Mr. Zimmerman.

2 So I want to turn to the second part of
3 Mr. Zimmerman's presentation. It begins -- Thank you, and
4 I appreciate your PowerPoint presentation. It's the issue
5 of constitutional conditional privilege. We just touched
6 on it briefly. I want to pick up on that. When I asked
7 you, Mr. Palecek and then Mr. -- Dr. Fetzer, did the
8 Plaintiff inject himself into a public controversy, you
9 pointed out, yeah, well there was a letter you said he
10 wrote to the president. Mr. Zimmerman has responded to
11 that in two respects. First of all, just saying that is
12 so, is not evidence. You understand that it has to be
13 admissible evidence and admissible evidence is properly
14 authenticated.

15 Mr. Zimmerman has objected to even the
16 suggestion that that one thing that you mentioned should
17 be considered by the Court based on the rules of evidence,
18 but even if I were to consider it, he's gone and looked at
19 it and he says basically, but it doesn't refer to the
20 Plaintiff Leonard Pozner. His name doesn't appear. And
21 that to the extent there's an article refers to a
22 memorandum, the memorandum appears to be signed by others.

23 How do you respond to this issue? Dr. Fetzer?

24 MR. FETZER: Frankly, Your Honor, the other
25 issues are so much more fundamental, I'm not even

1 concerned about that. I don't -- and particularly, in
2 relation to his being a private person and the protection
3 of my sources, I'm willing that it be resolved on the
4 basis of his standing as a private person.

5 THE COURT: Mr. Palecek, your position on this
6 issue?

7 MR. PALECEK: Could you restate that for me,
8 please.

9 THE COURT: Okay. So here's the question.
10 There's another element or a slightly different test when
11 a plaintiff is allegedly defamed. There's a test for
12 just, let's say, this is my layperson language, ordinary
13 private individuals, and then of course there's a test for
14 public people. Like, you know, you turn on the TV,
15 President Trump says he's being defamed all the time, but
16 the test for him is different than maybe the test for you,
17 Mr. Palecek. You might just be a private individual and
18 the like, and the difference in this test depends upon to
19 what degree this individual has injected himself into the
20 controversy which was -- which involved or generated the
21 alleged defamatory statement.

22 So example, you can say all sorts of things
23 about the President of the United States that might be
24 defamatory if I said them about you, Mike Palecek, but we
25 allow that because of the nature of his office, his public

1 persona, his participation in the process.

2 Dr. Fetzer is saying that, in two respects, I
3 guess, for strategic grounds or otherwise or maybe he's
4 just convinced, he says I'm willing to concede that the
5 Plaintiff has not injected himself into the public
6 controversy such that the Plaintiff would then have to
7 prove an additional element of malice, understanding then
8 that the Plaintiffs then would then be withdrawing or
9 essentially standing down on their continuing discovery
10 objection to Dr. Fetzer's failure to produce the documents
11 submitted to him that he claims are protected by
12 journalistic privilege. Does that help explain the
13 question?

14 MR. PALECEK: No. I don't -- I don't know what
15 I'm being asked, actually.

16 THE COURT: You have to move that microphone
17 close. Just --

18 MR. PALECEK: I don't -- I'm sorry, but I -- I
19 don't really understand what I'm being asked.

20 THE COURT: Well --

21 MR. PALECEK: What are --

22 THE COURT: -- to some extent you sort of
23 hitched your wagon to Dr. Fetzer, and Dr. Fetzer just sort
24 of took off the side road, so he's kind of pulling you to
25 the side. Look it, I'll make it easy on you.

1 MR. PALECEK: Is it whether I believe
2 Mr. Pozner's a limited-purpose public figure?

3 THE COURT: Yes.

4 MR. PALECEK: Well I've heard that term and, you
5 know, and -- and I don't know. I mean, I -- I'm not a
6 legal expert. I don't -- is he a limited-purpose public
7 figure? Possibly. I don't know. I mean, does that -- is
8 that an acceptable answer?

9 THE COURT: That's a very -- any answer is
10 acceptable if it comes from you based on what you believe.

11 So here's the deal. I've reviewed the
12 Plaintiff's brief and the evidence, and I'm going to
13 conclude for two reasons that the Plaintiff has not
14 injected himself into the public controversy. First of
15 all, Dr. Fetzer has conceded the point. Either on the
16 merits or strategic, it doesn't make any difference, but a
17 point conceded then it is accepted by the Court. And then
18 to that extent, Mr. Palecek, since you kind of join in his
19 motion, coattailing on him, he's taking you with him, and
20 by nature of your strategy of sort of tucking in on what
21 he's doing, you've conceded the point as well.

22 But even if you haven't conceded the point, I'm
23 satisfied by your -- examining all the evidence that there
24 is no genuine issue on the material admissible facts that
25 are presented to the Court, and that the Plaintiff is

1 entitled to this: a ruling that he has not injected
2 himself into the public controversy.

3 Now that brings up, Mr. Zimmerman, maybe it's an
4 academic question, although it's befuddled judges, me or
5 other judges. You know, we've talked about motions for
6 summary judgment. You don't really get a judgment on this
7 issue, it's really more a pre-trial ruling that
8 admittedly -- admittedly affects how you present your
9 case. Is it a motion in limine to produce -- you know,
10 present any evidence to suggest that he is injecting
11 himself, you could frame it that way, but by agreeing on
12 this point which obviates the need for these additional
13 elements, you agree that's not a judgment, per se.

14 MR. ZIMMERMAN: I agree that this is a muddy
15 issue, Your Honor. When we look back at, for example,
16 Denny v. Mertz, they actually say in that case that the
17 issue was decided by the district court on the briefs,
18 affidavits, memoranda, etc., so they do seem to treat it
19 as if it's a summary judgment issue, but obviously, it's
20 only on one element of the defamation claim. So I'm not
21 sure from a procedural perspective how Your Honor wants to
22 document it, but I think we've received the instruction
23 and we'll, obviously, act accordingly.

24 THE COURT: This is why I entertained it and why
25 I granted it. I think motions for summary judgment are

1 sometimes overused by litigants who want to just make
2 their case simpler for trial, understanding that it
3 doesn't result in judgment -- a final order for purposes
4 of appeal. So I'm not inclined as a judge to go out on a
5 limb on a summary judgment which exposes the court and the
6 moving party to appeal on a de novo review when there's a
7 trial going to be had anyway, because if I was wrong and
8 the court of appeals says I'm wrong, then we all buy
9 ourselves a second trial.

10 I think there has to be more than just when a
11 motion for summary judgment is used as a motion to decide
12 a preliminary legal question, there has to be a reason for
13 it and you've demonstrated to me there is a reason.
14 Actually, Dr. Fetzer demonstrated a reason as well, that
15 it obviates the need and his concerns about the intrusion
16 into his claimed journalistic privilege.

17 The Plaintiff also then could rely on this
18 pre-trial ruling to materially change on how you would
19 present your case-in-chief. Obviously, if I didn't answer
20 the question, then you would have to put in evidence and
21 go to an area which would consume substantially amount of
22 the Court's time and potentially additional witnesses. So
23 to the extent that the motion for summary judgment as it's
24 used to decide a preliminary legal issue based on
25 undisputed facts, then I think it's appropriate.

1 Going forward then, so we're all on the same
2 page, we're not going to hear about this nuance in the
3 constitutional conditional privilege when we go to trial.
4 The Plaintiffs don't have to prove that the Defendants
5 acted with actual malice as which would be required in
6 that kind of scenario situation. The issue is resolved
7 and the matter is simplified, so to speak. That would be
8 the order of the Court and the law of the case.

9 Am I correct then that that then resolves the --
10 or moots Dr. Fetzer's Motion to Reconsider and his Motion
11 for Protective Order?

12 MS. BERLINGER: Yes, Your Honor.

13 MR. ZIMMERMAN: I believe that's correct. I
14 think there is the -- there may still be a question about
15 producing documents from sources that were not
16 confidential.

17 THE COURT: Okay. What we'll do -- what we'll
18 do then is we'll just clear the slate. If you want to
19 send him another set that you think then either don't
20 involve a journalistic privilege or you want to reframe
21 the issue now later -- in a new context with some new area
22 of inquiry, you can do that.

23 And if you -- Dr. Fetzer, if you get a set of
24 interrogatories or production of documents and you think
25 that this invokes the privilege, then you can invoke the

1 sometimes overused by litigants who want to just make
2 their case simpler for trial, understanding that it
3 doesn't result in judgment -- a final order for purposes
4 of appeal. So I'm not inclined as a judge to go out on a
5 limb on a summary judgment which exposes the court and the
6 moving party to appeal on a de novo review when there's a
7 trial going to be had anyway, because if I was wrong and
8 the court of appeals says I'm wrong, then we all buy
9 ourselves a second trial.

10 I think there has to be more than just when a
11 motion for summary judgment is used as a motion to decide
12 a preliminary legal question, there has to be a reason for
13 it and you've demonstrated to me there is a reason.
14 Actually, Dr. Fetzer demonstrated a reason as well, that
15 it obviates the need and his concerns about the intrusion
16 into his claimed journalistic privilege.

17 The Plaintiff also then could rely on this
18 pre-trial ruling to materially change on how you would
19 present your case-in-chief. Obviously, if I didn't answer
20 the question, then you would have to put in evidence and
21 go to an area which would consume substantially amount of
22 the Court's time and potentially additional witnesses. So
23 to the extent that the motion for summary judgment as it's
24 used to decide a preliminary legal issue based on
25 undisputed facts, then I think it's appropriate.

1 privilege. I'm not ruling on your privilege. I haven't
2 said anything about it. I think what we've done here is
3 mooted the issue, but it can come back before the Court,
4 but there's no current motion or matter before the Court
5 on this aspect. Does that satisfy the Plaintiff?

6 MR. ZIMMERMAN: Yes, Your Honor.

7 THE COURT: All right. Let's turn to some other
8 issues. Dr. Fetzer, you filed a Motion to Strike the
9 Friedman and S-I-N-E-L-N-I-K-O-V Affidavits. I've read
10 your brief. I've seen Plaintiff's Opposition to
11 Defendant's Motion to Strike the Friedman Affidavit. For
12 some reason I don't have a photocopy or didn't copy off to
13 the extent that you want to address this -- his Motion to
14 Strike the Sinelnikov deposition. Is there anything more
15 you want to add in addition to what you already wrote,
16 Dr. Fetzer?

17 MR. FETZER: I believe that's sufficient, Your
18 Honor.

19 THE COURT: Okay. I have some questions for
20 you.

21 I don't know what this -- when you write, you
22 say, "Defendant James Fetzer, in the first person
23 henceforth." I don't even know what that means. Does
24 that mean to exclude Mr. Palecek? Moves to strike the
25 affidavits of Friedman and Sinelnikov for foundational

1 alleged to have come directly from the medical examiner
2 who is not in -- that's not the proper source. He ought
3 not to have the sample, and it should have been obtained
4 from the state agency, that is the repository.

5 THE COURT: All right. Why don't we go back to
6 what the actual facts are, Mr. Zimmerman. I think I
7 understand the issue but -- or someone else is going to
8 take this one up?

9 MS. BERLINGER: I will be. Yes, Your Honor.

10 THE COURT: Okay. So what did you, so we're all
11 on the same page, tell me what you had hoped to accomplish
12 first with the Friedman affidavit. What does the Friedman
13 affidavit stand for?

14 MS. BERLINGER: To provide an independent source
15 or confirmation for the DNA test.

16 THE COURT: And Sinelnikov?

17 MS. BERLINGER: That's just to establish the
18 chain of custody of the DNA sample.

19 THE COURT: Now was -- were there one DNA test
20 or two DNA tests?

21 MS. BERLINGER: So there was the -- I believe
22 that there was the one that was done through this court.

23 THE COURT: Correct.

24 MS. BERLINGER: And then Plaintiff also obtained
25 a separate test.

1 THE COURT: Okay. And these affidavits are for
2 the separate test?

3 MS. BERLINGER: Yes.

4 THE COURT: All right. And do you -- and your
5 response to Dr. Fetzer's claim that somehow or another
6 Connecticut law makes the test inadmissible?

7 MS. BERLINGER: Even if it was a legal
8 impossibility for the ME's office to obtain a blood sample
9 for a DNA analysis, it doesn't mean that Dr. Friedman's
10 opinion is unreliable, which is the standard for expert
11 testimony. Mr. Fetzer's theory is based on his
12 interpretation of a statute.

13 THE COURT: Do you agree with his interpretation
14 as a lawyer?

15 MS. BERLINGER: What happened here -- we have
16 testimony from Dr. Carver as well that he took samples
17 from Noah Pozner's body and stored them in the toxicology
18 lab at the office of the chief medical examiner. That is
19 what happened.

20 THE COURT: And this -- and these are the
21 samples from which both the court ordered DNA test was
22 obtained and Dr. Friedman's test?

23 MS. BERLINGER: Correct.

24 THE COURT: So Dr. Fetzer, I don't see any
25 evidence that you've submitted that suggests that the

1 samples weren't taken from that location and that --

2 MR. FETZER: Well --

3 THE COURT: -- they were biological samples of
4 Noah Pozner.

5 MR. FETZER: Well, I believe they're biological
6 samples of a son of the Plaintiff, but that it's all been
7 grossly misrepresented, Your Honor, which is why I sought
8 to broaden the DNA testing to include Michael Vabner,
9 whose photographs as a child have been presented as the
10 Noah Pozner --

11 THE COURT: Okay. I'll get to that.

12 MR. FETZER: Yes.

13 THE COURT: So what evidence -- you say
14 essentially, Judge, don't believe this for a word because
15 it's not reliable. You understand that's not an objection
16 under the rules of evidence. What is your --

17 MR. FETZER: It is --

18 THE COURT: What is your --

19 MR. FETZER: It is an admissibility argument.
20 You are correct, Your Honor.

21 THE COURT: Okay.

22 MR. FETZER: That it is a matter of Connecticut
23 law that this was improper -- improper processing of a
24 sample, that it ought to have come from the center and not
25 from the medical examiner.

1 death certificate --

2 MR. FETZER: Death certificate.

3 THE COURT: -- or not.

4 Now, I do note that by easily looking at Exhibit

5 2, there are -- is a portion of the death certificate that

6 implicates Mr. Green and the Abraham L. Green and Sons,

7 and I accepted and reviewed the affidavit of Green for the

8 context of confirming the accuracy of those portions of

9 the death certificate attributed to him and his business.

10 Is that what you were intending me to do?

11 MR. ZIMMERMAN: That's certainly part of it,

12 Your Honor. There is a defense raised in Dr. Fetzer's

13 Motion for Summary Judgment for which the burial permit is

14 relevant and material and Mr. Green's testimony about the

15 process that he used to obtain the burial permit used in

16 the death certificate becomes important information.

17 THE COURT: Okay. Is there anything more you'd

18 like to say in support of your motion to strike the Green

19 affidavit, Dr. Fetzer?

20 MR. FETZER: Simply that in accordance with the

21 Court's desire to simplify the case for trial, that these

22 issues appear to be immaterial to whether or not the death

23 certificate is authentic or not, for which there's an

24 abundance of proof, and it doesn't hinge upon these

25 considerations, the affidavits from either of the parties

1 and those samples then and still now are in the
2 Connecticut Medical Examiner's office. And that when I
3 ordered the DNA test and that when they did the DNA test,
4 they started with those samples. Right?

5 MS. BERLINGER: Yes.

6 THE COURT: Okay. Do you have any -- I mean,
7 any evidence to contradict that portion of what they're
8 saying?

9 MR. FETZER: Your Honor precluded me from
10 offering all the evidence that Sandy Hook was in fact a
11 FEMA drill presented as a mass murder to promote gun
12 control. I have a mass of evidence to demonstrate that's
13 what happened. This is an elaborate charade involving key
14 figures in the state of Connecticut. It was a program
15 administrated by the Obama administration. He nullified
16 the Smith-Mundt Act of 1948 with the Smith-Mundt
17 Modernization Act of 2012 to bring us Sandy Hook, where
18 the Smith-Mundt Act of 1948 precluded the use of the same
19 techniques and propaganda --

20 THE COURT: Okay.

21 MR. FETZER: -- disinformation within the United
22 States --

23 THE COURT: Okay. Doctor. Doctor. Stop.

24 MR. FETZER: -- that heretofore have only been
25 used without.

1 THE COURT: Dr. Fetzer, I understand. And as
2 you know, we -- we're focussing on the Plaintiff's claim.
3 And I know you think it's -- they're using a very limited
4 and specific single cause of action to frustrate your
5 ability to relitigate whether or not Sandy Hook happened.
6 I understand all that. I'm focussing just on their
7 motion -- Excuse me, I'm focusing on your motion here and
8 you say -- I need to rule on your motion.

9 MR. FETZER: Yes.

10 THE COURT: And you say I should strike Friedman
11 and Sinelnikov's affidavits. I'm just trying to
12 understand. And I -- and to rule on your motion, I have
13 to know two things. What's -- what are the facts and what
14 is the law. And you're saying that I should strike them
15 because they're unreliable. Well, now you say it's
16 because of -- what did you say, admissibility or --

17 MR. FETZER: I believe the DNA methodology is
18 perfectly appropriate, Your Honor. The point is that the
19 samples were not obtained from the appropriate source and
20 therefore --

21 THE COURT: And that the samples you say did not
22 come from Noah Pozner but came from Michael Vabner.

23 MR. FETZER: Yes.

24 THE COURT: Okay.

25 MR. FETZER: Which -- which I would have sought

1 to prove had you allowed my expansion of DNA, this would
2 have altered the entire character of the case.

3 THE COURT: Well, what's done is done on that,
4 although, for purposes of the -- so I keep this in my
5 mind, obviously, I -- what you're saying is that you think
6 that's what it is and if you could do that then you would
7 prove it. But right now you're essentially saying that
8 the suggestion that the medical examiner's office
9 possesses DNA material from Noah Pozner is false.

10 MR. FETZER: Well, no. It's not legal. That it
11 was in violation of Connecticut law, Your Honor.

12 THE COURT: Okay. I'll rule on that. I -- I
13 disagree with you. I do not see that Connecticut law so
14 clearly states what it is that you are suggesting.

15 Alternatively, anyway, Dr. Fetzer, not being an
16 expert on Connecticut law, even if -- even if for some
17 reason Connecticut law did not allow for the repository of
18 the genetic material to be in the place in which it is,
19 the question is, is whether, as you say, the valid testing
20 of this genetic material yielded the acceptable conclusion
21 offered by Friedman and Sinelnikov that --

22 MR. FETZER: Your --

23 THE COURT: -- Lenny Pozner is the genetic
24 father of Noah Pozner, whose genetic material is in the
25 place that it's in. So for those reasons I'm going to

1 deny the Motion to Strike the Affidavits of Friedman and
2 Sinelnikov, and I'll deny your request for sanctions.

3 Let's turn to your Motion to Strike the Green
4 Affidavit. Dr. Fetzer, is there anything additional you
5 want to offer in support of your Motion to Strike the
6 Green Affidavit?

7 MR. FETZER: I believe it's laid out clearly,
8 Your Honor.

9 THE COURT: I have reviewed Plaintiff's
10 Opposition to Defendant's Motion to Strike Mr. Green's
11 Affidavit.

12 Dr. Fetzer, so I -- what is -- what's your --
13 what's your concern of the Green affidavit? Again, you
14 don't give me any evidence.

15 MR. FETZER: We --

16 THE COURT: You -- admissible evidence. You
17 point to some -- I think you pointed to something you
18 looked up on the internet, a license look up. First of
19 all, is there -- do you agree there is a person named
20 Samuel Green?

21 MR. FETZER: Yes.

22 THE COURT: Okay. So he exists. Is Samuel
23 Green in the funeral business?

24 MR. FETZER: He's licensed as an embalmer, Your
25 Honor.

1 THE COURT: Okay. Is there a business called
2 Abraham L. Green and Sons.

3 MR. FETZER: There is, Your Honor.

4 THE COURT: And that's the same Abraham L. Green
5 and Sons who filled out a portion of the death
6 certificate?

7 MR. FETZER: So it does appear, Your Honor, but
8 he was not licensed as a funeral director and there --
9 there are a variety of issues that are related to the
10 death certificate because it wasn't done in a timely
11 fashion, which we can address at the --

12 THE COURT: Okay. I'm just trying to rule on
13 your motion --

14 MR. FETZER: Yes, Your Honor.

15 THE COURT: -- to strike the affidavit.

16 So what are your evidentiary objections to --
17 for my looking at the Green affidavit? Let me say, when
18 you move to strike an affidavit, it's essentially then we
19 toss it aside, nothing contained therein should be
20 considered by the Court. If you deny the motion to strike
21 the affidavit, then the affidavit comes in. I -- it then
22 becomes facts from which this Court then can rely on the
23 underlying motion for summary judgment.

24 So what are your evidentiary objections to the
25 Green averments in his affidavit? What are you worried

1 about?

2 MR. FETZER: Well, that -- just creating a false
3 impression that there was actually a real body that was
4 really buried and so forth, Your Honor. I mean, it's an
5 elaborate fraud. I'm sorry to have to be so blunt about
6 it, but that's what's going on.

7 I appreciate the Court's desire to focus on the
8 death certificates. I've accepted that and I intend to
9 pursue that with all of my ability. So, you know, this is
10 a secondary but part of an elaborate charade that's being
11 perpetrated on the Court and the public.

12 THE COURT: Well, I understand your positions,
13 but my job as a judge is to sit up here, a couple feet
14 higher than everyone else, wearing a black robe, to guide
15 the parties as they litigate against each other in the
16 proper course of -- of courtroom conduct and the rules of
17 civil procedure and the rules of evidence.

18 Every party has a constitutional right to come
19 and press their case before the Court. All I know is
20 Leonard Pozner has a defamation case against the
21 Defendants, and I do acknowledge the Defendants have a
22 counterclaim against Leonard Pozner. A judge's
23 responsibility, Dr. Fetzer, is just to rule on the
24 questions that are asked of the Court as the parties
25 continue to prepare the case for the ultimate day in which

1 they will be judged by a jury of their peers. My job is
2 to rule on the evidence.

3 Now, you might say that's a rather myopic view,
4 Judge. I'd like you to sit back and consider this whole
5 issue. I have not read your book. I do not intend to
6 read your book because it would not be appropriate for me
7 to start educating myself about the larger controversy. I
8 understand your position, but that's not my function. My
9 function is, is to make sure the Plaintiff keeps the
10 preparation of his case in accordance with the rules in
11 Wisconsin and acknowledge and appreciate the defense and
12 your right to discovery and your right to file your own
13 motions and to oppose those.

14 So --

15 MR. FETZER: Where --

16 THE COURT: -- let me ask you a couple
17 questions, because once again, you say on page 3 of your
18 brief, paragraph 6, you fault Mr. Green for refers to a
19 burial permit. You say it's not been provided and you
20 say, "because the permit itself is the best evidence, his
21 reference to it must be ignored as hearsay."

22 There is this thing called the best evidence
23 rule and not reflected in the rules of civil procedure or
24 the rules of evidence, it applies. I'm not sure you
25 understand what the rule is and whether it applies here.

1 Do you know what the best evidence rule is, Dr. Fetzer?

2 MR. FETZER: I may not understand it perfectly,
3 Your Honor.

4 THE COURT: Well the best evidence rule, as I
5 understand it, is not an obligation for a party to give us
6 the best source of any particular factual proposition,
7 it's when the facts underlying a particular factual
8 proposition don't accurately reflect what is proposed and
9 that there is other maybe primary source that would be
10 better.

11 For instance, if a party would ask me to accept
12 quotations from a document the other side says are taken
13 out of context, and rather than for me to just trust the
14 contextual spin that the party puts on it, I say, you
15 know, better evidence of that is just give me a page out
16 of the book rather than you paraphrasing it.

17 That there would be better evidence does not
18 necessarily mean it's hearsay. Hearsay, Dr. Fetzer, is an
19 out-of-court statement offered for the proof.

20 Now, obviously, I don't even know,
21 Mr. Zimmerman, if you have the burial permit. Mr. Green
22 didn't see the need for the burial permit, he just
23 referred to it. Is this a red herring or a straw man?

24 MR. ZIMMERMAN: I -- I think, Your Honor,
25 Mr. Green was just describing the process of obtaining the

1 burial permit, not the contents of the permit itself.
2 But, we do have the burial permit, a sealed copy with us
3 here today, happy to introduce it into evidence.
4 THE COURT: I don't know that I need -- I don't
5 know that a burial permit is material. Are you suggesting
6 it is?
7 MR. ZIMMERMAN: It is not for that statement,
8 no.
9 THE COURT: Is it material?
10 MR. FETZER: I do not believe either of these
11 affidavits is material following the Court's observations
12 during conference calls that this -- this case revolves
13 around the death certificate and its authenticity and that
14 the Court wasn't concerned about the cause of death, the
15 nature of death, or any issues related thereto which
16 suggests to me that it may be a motion in limine to
17 exclude all of these irrelevancies is what's appropriate
18 from the Defendants.
19 THE COURT: Well, okay. I do understand, at
20 least, and, Mr. Zimmerman, correct me if I'm wrong, I did
21 understand the contents -- context of the Green affidavit,
22 acknowledging you accurately, to the Plaintiff's benefit,
23 are reiterating what I said. It didn't make much
24 difference, other extraneous circumstances. We were going
25 to focus on whether it was a false birth certificate --

1 death certificate --

2 MR. FETZER: Death certificate.

3 THE COURT: -- or not.

4 Now, I do note that by easily looking at Exhibit
5 2, there are -- is a portion of the death certificate that
6 implicates Mr. Green and the Abraham L. Green and Sons,
7 and I accepted and reviewed the affidavit of Green for the
8 context of confirming the accuracy of those portions of
9 the death certificate attributed to him and his business.
10 Is that what you were intending me to do?

11 MR. ZIMMERMAN: That's certainly part of it,
12 Your Honor. There is a defense raised in Dr. Fetzer's
13 Motion for Summary Judgment for which the burial permit is
14 relevant and material and Mr. Green's testimony about the
15 process that he used to obtain the burial permit used in
16 the death certificate becomes important information.

17 THE COURT: Okay. Is there anything more you'd
18 like to say in support of your motion to strike the Green
19 affidavit, Dr. Fetzer?

20 MR. FETZER: Simply that in accordance with the
21 Court's desire to simplify the case for trial, that these
22 issues appear to be immaterial to whether or not the death
23 certificate is authentic or not, for which there's an
24 abundance of proof, and it doesn't hinge upon these
25 considerations, the affidavits from either of the parties

1 that are on the subject of discussion here and now.

2 THE COURT: Well, not to mislead you, I don't
3 have a perfect picture of looking into the future of how
4 Mr. Green and Abraham L. Green and Sons factor into the
5 Plaintiffs as they present their case. So I can't say
6 what you're suggesting is, Fine, if this is not relevant,
7 Judge, I'm not going to be hearing about this later on.
8 I'm not saying that to you.

9 MR. FETZER: Yeah.

10 THE COURT: I'm just judging your affidavit. I
11 reviewed your -- I'm judging the affidavit. I reviewed
12 your objections. In particular, your paragraph 4;
13 paragraph 6, your reference to hearsay; paragraph 7, this
14 suggestion somehow or another that it's a friendly
15 deposition; paragraph 8 -- I went through your document,
16 Mr. Fetzer, trying to figure out what you were concerned
17 about it and then applied the rules of evidence that would
18 be attendant to a motion to strike.

19 I also did review the Dugan case, which you say
20 stands for the proposition the Court can strike an
21 affidavit as unreliable. I do not think that's really a
22 correct interpretation of the Dugan case, more so, I know
23 of no Wisconsin case that recognizes this kind of
24 pejorative unreliability. There are motions to strike,
25 but I believe they're -- they're -- they are formulaic in

1 the sense that you apply either a rule of evidence or some
2 other deficiency as set forth in state law that would
3 cause the affidavit to be rejected rather than just a
4 feeling of whether there's better evidence or unreliable.

5 For those reasons, I'm going to deny Mr. --
6 Dr. Fetzer's Motion to Strike the Green Affidavit.

7 Okay. We get to the, I think -- I think that
8 takes care of all the motions except the motions for
9 summary judgment, cross-motions for summary judgment. Did
10 I miss something?

11 MS. BERLINGER: Your Honor, we did move to
12 strike Defendants' experts as well.

13 THE COURT: That was set forth -- that was
14 argued in your brief in support of your motion for summary
15 judgment? Was there a separate -- I do recall that there
16 was sort of a truncated Daubert challenge.

17 MS. BERLINGER: It's a separate document, number
18 200.

19 THE COURT: Okay.

20 MS. BERLINGER: I'm sorry. It's number 202.

21 THE COURT: Okay. Have I taken care of all your
22 motions, except your Motion for Summary Judgment,
23 Dr. Fetzer?

24 MR. FETZER: You have, Your Honor.

25 THE COURT: All right. Now, I want to go back