



1 (Proceeding began at 1:30 p.m.)

2 THE COURT: This is 18-CV-3122, Leonard Pozner  
3 versus James Fetzer, et al.

4 May I have the appearances, please.

5 MS. FEINSTEIN: Good morning, Your Honor. Emily  
6 Feinstein from Quarles and Brady here on behalf of the  
7 Plaintiff.

8 MR. ZIMMERMAN: Jake Zimmerman on behalf of the  
9 Plaintiff.

10 MS. ZIMMERMAN: Good afternoon, Your Honor.  
11 Genevieve Zimmerman also with the Plaintiff.

12 THE COURT: Welcome.

13 MR. BOLTON: And Rich Bolton for the Defendants.

14 THE COURT: Welcome, Mr. Bolton. Good to have  
15 you here.

16 MR. BOLTON: I thought you'd say that.

17 THE COURT: Yeah. Well, I always observe, I  
18 think Mr. and Mrs. Zimmerman and Ms. Feinstein might also  
19 know that there are a lot of things -- there's a lot of  
20 problems you'll avoid when there's a lawyer on the other  
21 side.

22 MR. BOLTON: I understand that.

23 THE COURT: Okay. We're here for the final  
24 pre-trial conference. I've gone through what's been  
25 filed. I intend to just run through the jury

1 instructions, special verdict, the motions in limine, talk  
2 about the witnesses, order of witnesses, any other issue  
3 that you want to take up so we can hit the ground running  
4 right away the first day of trial.

5 Before I start with what things I want to  
6 accomplish, is there anything, Ms. Feinstein, that you  
7 want to take up first? Or Mr. Zimmerman?

8 MS. FEINSTEIN: Nothing that needs to be taken  
9 up first.

10 THE COURT: Mr. Bolton?

11 MR. BOLTON: No, Your Honor.

12 THE COURT: Okay. So since the summary judgment  
13 hearing, the parties were aware that I did get a letter  
14 from at least one individual. The truth be told, I  
15 actually don't currently remember even what it said. I  
16 don't know if, Mr. Bolton, you got that. I think it was,  
17 my recollection, didn't really like what I was doing. I  
18 have become aware of, because of the news worthiness, that  
19 there were some articles in the paper, some things posted,  
20 none of which have any bearing on the function that I  
21 serve and how I intend to handle this case.

22 However, the first issue I want to raise is the  
23 task of selecting the jury. And I just propose, and then  
24 I'll hear from you as to what your thoughts are, that we  
25 consider an anonymous jury. I've never had one. No

1 recollection of one being in Dane County. But there --  
2 they do exist. And, I would be amenable to it if both  
3 parties wanted it.

4 Before I ask you what you think, here's the way  
5 I thought. I'm not sure that it benefits or hurts  
6 disproportionately either of the parties. One could assume  
7 that a juror who then is anonymous might more likely  
8 render a verdict based on the facts and the law that I  
9 give rather than their own personal feelings about -- of  
10 retaliation.

11 I will tell you, I did have one defamation case  
12 as a judge, and when I went back after they found the  
13 defendant had defamed the plaintiff, one of the questions  
14 of the jurors was, well, I'm a little worried, is he going  
15 to -- the defendant -- come to my house? Obviously, those  
16 external thoughts of the personal interest of the jurors  
17 are not germane to the process.

18 So would an anonymous juror more likely give  
19 the -- the defendants a fair and impartial day not knowing  
20 that if they were to agree with the defendants, their  
21 names and addresses wouldn't appear in the news? Would  
22 they be more fair and partial to the plaintiff, fearing  
23 that if they ruled for the plaintiff, their names and  
24 addresses wouldn't appear in the public documents  
25 ascertainable by groups that are interested in this issue

1 from a -- the same vantage point as the defendants?

2 Just to keep you on your toes, I'll switch up,  
3 rather than Plaintiff, Mr. Bolton, what do you think?

4 MR. BOLTON: I don't know that I have an opinion  
5 on it right now, Your Honor.

6 THE COURT: Mr. Zimmerman? Or Ms. -- I don't  
7 want to ignore you. Who wants to do the talking today?  
8 Ms. Feinstein, you are sort of in the lead chair there.

9 MS. FEINSTEIN: It does make me feel important,  
10 Your Honor.

11 THE COURT: There you go. I like that.

12 MS. FEINSTEIN: We don't have a problem with  
13 that, Your Honor. I think I know I personally have not,  
14 maybe luckily, gotten any letters like the Court got, but  
15 I would -- I am somewhat surprised I haven't. Hopefully  
16 they're all going to Mr. Zimmerman at this point. But,  
17 no, we don't have a problem with an anonymous jury.

18 THE COURT: I'm a little worried about the jury  
19 selection. I don't even know how many jurors to call. I  
20 did talk to the juror clerk about how many spares we have  
21 downstairs in the case that we have an usually high number  
22 of people who don't want to serve.

23 I will tell you all maybe what you've witnessed  
24 before, but from my vantage point, hearing it from me. I  
25 can see when a juror raises their hand and says something

1           like, I don't think I can be fair and impartial. Then I  
2           have a colloquy about, well, you understand that you  
3           haven't heard the evidence. Can't you sit there and hear  
4           the evidence and listen attentively and apply the law?  
5           Sometimes they say, I think I can do that, and then I  
6           don't strike for cause. If they are steadfast in saying,  
7           Nope, I can't. I made up my mind. The guy's guilty. And  
8           then I let them go. I can see it, they -- the person on  
9           their right looks over to the left, the person on their  
10          left looks over to their right, and all the hands start  
11          coming up and it's a -- it's a snowball. It will  
12          snowball. I'm a little concerned that one way or the  
13          other, I mean, I'm not -- I'm not saying this benefits the  
14          Plaintiff or the Defendants, but don't want to run out of  
15          jurors. If the jurors' names were not in the public  
16          record, then that might allay some of the concerns about  
17          the jurors' possibility about fearful of retribution by  
18          any vantage point.

19                   MR. BOLTON: So the proposal or the suggestion,  
20           Your Honor, is how would it work then?

21                   THE COURT: Well it would work exactly like  
22           before. Molly has an example. Why don't we just hand  
23           them what the jury clerk just threw together. You'll get  
24           that sheet of paper that you always get except for the  
25           names and addresses won't be in the columns. We'll just

1 refer to them as juror number --

2 THE CLERK: Pool number.

3 THE COURT: By their pool number. And then the  
4 little carbon copies, we'll do the same thing. We'll just  
5 -- we will just obliterate or we'll create a facsimile  
6 that does not have -- does not have the last name. Now  
7 maybe we can keep the first name or we just would  
8 instruct -- these are filled out on the day of jury --  
9 we'd instruct them to leave the last name and the spouse's  
10 last names blank. Otherwise, you would have all the  
11 information, just not their names and not their addresses.

12 MR. BOLTON: So that's the only -- that would be  
13 the only change in terms of the process that we'd follow  
14 then?

15 THE COURT: I believe so.

16 MR. BOLTON: Yeah. I -- I don't have any  
17 objection to that, Your Honor.

18 MS. FEINSTEIN: And then, Your Honor, would we,  
19 essentially, before we file the special verdict form or  
20 post it on, you know, that that would be the foreman's or  
21 foreperson's name would be redacted?

22 THE COURT: No, just put the number down.

23 MS. FEINSTEIN: Just put the number down.

24 THE COURT: The court record would have -- we'd  
25 have the court record under seal would have the names with

1 the pool numbers.

2 All right. Let's do this. Sensing that all the  
3 parties -- both parties -- all parties are in agreement,  
4 we'll go ahead that way. If for some reason, Mr. Bolton,  
5 in talking to your client, because I understand they're  
6 not here, or, Ms. Feinstein, talking to your client, there  
7 is a change, then we can easily -- very easily switch  
8 back. But we'll proceed then with an anonymous jury. If  
9 you do want to change your mind on that then I'd like you  
10 to let me know one week before the jury trial.

11 All right. Let's take up the -- the details  
12 with regard to getting the jury trial in the time. We  
13 have it on for one week. Plaintiff is obviously going to  
14 open, having the burden of proof.

15 Ms. Feinstein, how many witnesses do you have?

16 MS. FEINSTEIN: Your Honor, can I -- sorry, go  
17 back to the picking of the -- the issues about picking the  
18 jury?

19 THE COURT: Yeah.

20 MS. FEINSTEIN: With respect to your concern  
21 about kind of jurors looking to their right and left and  
22 seeing how other people answer questions and having some  
23 concerns about jurors expressing their concerns about  
24 being unbiassed, do we think it might help if we did *voir*  
25 *dire* individually? It would be less efficient, I



1 understand, but, meaning, individual pool members would be  
2 *voir dire* alone.

3 THE COURT: You know, I don't think so. Dane  
4 County's always had sort of a nonindividual *voir dire* that  
5 I know of. It's very efficient. My sister and  
6 brother-in-law practice law in Minneapolis. They don't --  
7 and jury selection takes like weeks. I can't --  
8 Mr. Zimmerman, your home jurisdiction, I can't imagine.  
9 Generally speaking, you know, in Dane County, I don't know  
10 that I've ever heard of even a homicide trial that takes  
11 more than a day to pick the jury. There's just no such  
12 thing as a multiday jury pick.

13 Going back to it, all we've decided here today  
14 is just simply not have the names and addresses of the  
15 jurors in the public record. I mean, I don't know --  
16 we're going to proceed that way. I mean, again, I'm not  
17 sure what the names mean anyway. I do ask the question,  
18 are you familiar with the lawyers or the parties, and so  
19 if there's that familiarity that otherwise the name would  
20 have been recognized. I doubt that applies to Mr. Pozner,  
21 not really being from Dane County. I don't know with your  
22 client, I mean, he's a recent transplant to Dane County.  
23 Mike Palecek isn't from Dane County --

24 MR. BOLTON: Right.

25 THE COURT: -- so the chances they would have a

1 personal relationship. It's possible the lawyers might  
2 know someone.

3 I don't -- I'm not saying that you should change  
4 your *voir dire* in any respect because of that. You can  
5 ask -- I'm not limiting the questions either of the  
6 parties ask.

7 There were a couple -- you reminded me. Thank  
8 you, Ms. Feinstein. Would the parties like me to ask the  
9 jurors any specific questions other than the standard, Do  
10 you live in Dane County? Have you been convicted of a  
11 felony? This trial lasted a week, do you know of any  
12 reason why you can't serve? There have been cases -- I've  
13 had a couple of cases in which the lawyers wanted me to  
14 ask a certain set of questions. Ms. Feinstein?

15 MS. FEINSTEIN: No, Your Honor.

16 THE COURT: What do you think, Mr. Bolton?

17 MR. BOLTON: As I sit here, I -- I have not -- I  
18 don't have a list of specific questions.

19 THE COURT: Because, you know, in federal court,  
20 the tradition is the judge does ask a lot of questions,  
21 many of which are proposed by the lawyers. Some may feel  
22 that it becomes then less confrontational for the juror to  
23 have that maybe perhaps delicate inquiry coming from the  
24 Court rather than from the parties.

25 MR. BOLTON: Well, Your Honor -- I'm sorry. And

1           that process that they use in the federal court, I don't  
2           have any problem with that. Now, typically, they will ask  
3           the lawyers to submit some questions to the Court in  
4           advance then and then the Court will make some decisions  
5           on what questions from the -- from those --

6                       THE COURT: Right.

7                       MR. BOLTON: -- offered by the attorneys, and  
8           that might be advantageous as well. I can tell you that,  
9           you know, I'm not going to be inundating the Court with  
10          seven pages of questions, but -- but if the Court wants to  
11          basically conduct the *voir dire* with some input from the  
12          lawyers, I don't have any problem with that.

13                      THE COURT: No, I don't want -- I don't want to  
14          do that. I just simply wanted to raise the possibility  
15          that either side might want the Court to ask some  
16          questions. I'll tell you what, as we proceed, I won't,  
17          but if you want me to, no later than a week before the  
18          trial, respond and say, On further reflection, I would  
19          request that the Court ask the following questions. And  
20          then we can take up whether there's objections to them  
21          first thing Monday morning on the day of the trial.  
22          That's about all I can think of on the jury selection.

23                      The e-mails that have been coming into the Court  
24          have been saved. I did share with you the letter that I  
25          have. I haven't -- I'm aware that e-mails have come in.

1 I have not relied on the e-mails. They play no part in  
2 it. You're welcome to get copies of them if you'd like.

3 Ms. Feinstein?

4 MS. FEINSTEIN: We don't need to see them, Your  
5 Honor.

6 THE COURT: Mr. Bolton?

7 MR. BOLTON: When you say e-mails, from -- from  
8 just --

9 THE COURT: Well, some e-mails come in from --  
10 one of the deputy clerks is -- apparently, has the  
11 misfortune on being on a group distribution list. I did  
12 save them because I had thought early on about the issue  
13 of an anonymous jury that I -- were there -- where there  
14 wasn't an agreement, I believed I would need to make a  
15 factual record that this case was different than other  
16 cases because of the public's interest and the kind of --  
17 the kind of nature of the interest that this case has  
18 generated. And that if these communications -- these  
19 e-mails or these postings or the like, I felt that at the  
20 time would be perhaps relevant to a factual basis for  
21 creating -- for having an anonymous jury. My name is  
22 right down here in black and white, I mean, so it's not  
23 for me, but -- but like I say, I just had saved them for  
24 that purpose, but since there's a stipulation on the  
25 anonymous jury then I don't think that they need to be

1 necessarily made a record in this case.

2 MR. BOLTON: I'm -- I'm in agreement with that,  
3 Your Honor.

4 THE COURT: Okay. All right. Anything else on  
5 the jury selection?

6 And then hearing that --

7 MR. BOLTON: What -- I guess I'd ask one  
8 question. Obviously, there are two defendants. Are -- in  
9 terms of strikes then, each defendant gets strikes then  
10 or?

11 THE COURT: No. I think -- I'm -- I'm mostly  
12 familiar with the law, not prepared for the -- having  
13 prepared. I think the law is, Mr. Bolton, is it depends  
14 on the -- sort of the infinity or the relationship of the  
15 co-defendants. Now, for example, if the co-defendants  
16 each had their own individual lawyer and their interests  
17 were not necessarily aligned, then that -- that might  
18 generate.

19 I'll give you an example. When, many years ago,  
20 I tried the pharmaceutical case, the question was what  
21 came up in the litigation -- multistate litigation is if  
22 you had a case against multiple defendants, do they get  
23 one set or are they sharing the line. So there is case  
24 law on it.

25 My impression having dealing with your clients,

1 Mr. Fetzer and Mr. Palecek, is they're pretty much aligned  
2 completely in their interests and their positions, their  
3 perspective, their involvement, and their representation.  
4 Are you asking for me --

5 MR. BOLTON: Well, I'm not sure -- I'm not sure  
6 I necessarily -- for instance, on potential punitive  
7 damages whether or not, you know, their positions would  
8 necessarily be identical.

9 THE COURT: Let's do this.

10 MR. BOLTON: Pardon?

11 THE COURT: Let's do this, Mr. Bolton. You --  
12 you do -- tentatively, you don't -- you'll get sort of one  
13 set of strikes on each side. I can tell you, I think  
14 it's -- it's a jury of 12, we'll pull two alternates, 14,  
15 and each of you will get four strikes, so I'll seat 22.  
16 If you think then you get another set of strikes, file a  
17 brief in support of that request. And, like I said, the  
18 case law is out there. I think --

19 MR. BOLTON: The proposal though or what Your  
20 Honor is saying is that right now as it stands is that  
21 each -- each table would have four?

22 THE COURT: Correct.

23 MR. BOLTON: Okay.

24 THE COURT: Is that acceptable to you as you sit  
25 here today?

1 MR. BOLTON: It is, but I -- I would at least  
2 reserve the right to look at it and if I -- if I -- if  
3 I -- if I come to a different conclusion, advise the  
4 Court.

5 THE COURT: Okay. Just bear in mind if we start  
6 stacking up lots of stuff for Monday morning, I'd like to  
7 get the jury up quickly and get this in. So have --  
8 barring hearing from you to the -- to the contrary, we'll  
9 just each -- each side will get the four strikes.

10 Anything else on the jury selection or the  
11 process?

12 MS. FEINSTEIN: No, Your Honor.

13 THE COURT: Okay. Now, how many -- the  
14 Plaintiff, how many witnesses?

15 MS. FEINSTEIN: Three, Your Honor.

16 THE COURT: And who are your witnesses?

17 MS. FEINSTEIN: Our client, Mr. Pozner,  
18 Mr. Lubit -- excuse me, Dr. Lubit, and Mr. --

19 THE COURT: How do you spell Lubit?

20 MS. FEINSTEIN: L-U-B-I-T.

21 THE COURT: Okay.

22 MS. FEINSTEIN: And then Defendant Fetzter.

23 THE COURT: Okay. Who's your first witness and  
24 how long do you suppose the first witness will take on  
25 direct?

1 MS. FEINSTEIN: Mr. Pozner, and we believe  
2 probably about an hour.

3 THE COURT: Okay. And next, number 2 is?

4 MS. FEINSTEIN: Lubit, Dr. Lubit.

5 THE COURT: And how long?

6 MS. FEINSTEIN: Probably as well, about an hour.

7 THE COURT: All right. And then Fetzer, cross,  
8 adverse?

9 MS. FEINSTEIN: Probably about an hour, but he  
10 can go on sometimes, Your Honor.

11 THE COURT: All right. So my experience is when  
12 you say an hour direct, that's about two hours on the  
13 stand, give or take a little for cross. Fetzer might be a  
14 little different because he may be recalled. I don't know  
15 if you'll do your -- your whole direct or you'll wait.

16 My guess is then, Mr. Bolton, you ought to be  
17 prepared to put your first witness on either first thing  
18 or second thing Tuesday morning. Who -- how many  
19 witnesses do you have?

20 MR. BOLTON: You know, Your Honor, I apologize.  
21 I'm not absolutely certain. But I think it's going to  
22 probably including the defendants, themselves, probably a  
23 total of about six.

24 THE COURT: Who's your first witness?

25 MR. BOLTON: I think the first witness would be



1 Mr. Fetzler.

2 THE COURT: Okay. Second witness?

3 MR. BOLTON: Kelley Watt.

4 THE COURT: How long is --

5 MR. BOLTON: Two hours.

6 THE COURT: Okay. And who's your third witness?

7 MR. BOLTON: And again, Your Honor, I'm not, you

8 know, absolutely certain of this -- of these or the -- but

9 I think the third one would be Larry Rivera.

10 THE COURT: And how long?

11 MR. BOLTON: Again, two hours.

12 THE COURT: Okay. Next?

13 MR. BOLTON: Larry Wickstrom.

14 THE COURT: How long?

15 MR. BOLTON: Two hours.

16 THE COURT: All right. Next?

17 MR. BOLTON: Anthony Mead.

18 THE COURT: How long?

19 MR. BOLTON: Hour and a half.

20 THE COURT: Next?

21 MR. BOLTON: Robert Steele, again, about two

22 hours.

23 THE COURT: Okay.

24 MR. BOLTON: And Mr. Palecek, um, an hour and a

25 half.

1 THE COURT: Okay. So you're not calling Scott  
2 Bennett?

3 MR. BOLTON: Um, again, I -- no, I don't -- I  
4 did not list him, and I -- that would be my position right  
5 now. And, again, I guess what I would ask is if I -- if I  
6 go over these and make a -- another decision, that I would  
7 advise the Court by Monday of this next week if there's  
8 any -- any changes to --

9 THE COURT: Okay.

10 MR. BOLTON: -- my proposed witness list.

11 THE COURT: All right. I don't -- when I -- by  
12 asking that question, I don't intend to so much absolutely  
13 lock you in, but if -- if the parties had listed dozens  
14 and dozens of witnesses that clearly could not be heard  
15 from in the span of the trial, then obviously, we have a  
16 problem. I mean, given the Plaintiff, essentially,  
17 closing their case sometime on Tuesday-ish, it looks like  
18 you have at most about two days of trial.

19 MR. BOLTON: I think that's about right, Your  
20 Honor.

21 THE COURT: And so that -- I always say I like  
22 to get it to the jury no later than lunch time on Friday.

23 Okay. Anything further on the witnesses?  
24 Ms. Feinstein?

25 MR. BOLTON: Your Honor --

1 MS. FEINSTEIN: No, Your Honor.

2 MR. BOLTON: -- what -- what I might propose  
3 with opposing counsel is -- and I think we've talked about  
4 this a little bit as well -- that -- and I -- I don't have  
5 a particular date in mind, I will share with him a witness  
6 list and tell him specifically if, you know, if somebody  
7 is a certainty or I'm uncertain.

8 THE COURT: I don't think you have to do  
9 anything more than what you've done. I've looked at  
10 what -- the names you've given me.

11 MR. BOLTON: Okay.

12 THE COURT: Are -- are included on the  
13 defendants' -- your clients' witness lists. So those  
14 names should not be a surprise to the Plaintiff.

15 And, quite honestly, you named off every one of  
16 them except for Bennett, and I don't even know what  
17 Bennett would say and how long it would be, but because I  
18 think your case is -- you said I needed two days, that's  
19 not unreasonable for a defendant -- two defendants in a  
20 one-week trial. But if you want to have mutual agreements  
21 to make your jobs better, I don't discourage that and  
22 certainly, I encourage it.

23 MR. BOLTON: Okay, Your Honor.

24 THE COURT: All right. Let's turn to the  
25 special verdict. Ms. Feinstein, I would say your special

1 verdict could be characterized, it seems to me, is that  
2 you've taken, essentially, every statement and turned them  
3 into a separate cause of action.

4 MS. FEINSTEIN: I -- I think that -- I think the  
5 difference between the special -- there are a couple  
6 differences between our special verdict, but that's one  
7 major difference is they basically say statements for each  
8 defendant, whereas we go through the various statements.  
9 Your Honor, we have discussed theirs versus ours on  
10 whether it's necessary to go through the specific  
11 statements, and we're fine with respect to the statements,  
12 to adopt the version that they've proposed.

13 THE COURT: I like that. You read my mind. I  
14 thought it was cleaner, it's simpler. It reduces the  
15 possibility of confusion for the jury. The problem also  
16 for yours, slightly, respectfully, was it didn't have the  
17 instructions, and usually, if jurors can get confused,  
18 they'll get confused on, well, they didn't answer yes, do  
19 they go onto the next. I think also the single question  
20 is consistent with the case -- the way the case has been  
21 pled and prosecuted. All right.

22 So then turning to Defendants' Proposed Special  
23 Verdict. Mr. Bolton, you note that Jury Instruction 2520  
24 does have a choice between the terms actual malice and  
25 express malice. The Plaintiff in their proposed jury

1 instructions and special verdict used actual. Does it  
2 make a difference to you?

3 MR. BOLTON: Your Honor, I -- in this particular  
4 case, I'm not sure that I have a preference one way or the  
5 other. What I would say is this. I think -- I think the  
6 actual, the -- I think the correct law on this is that  
7 where you do not have a public interest defendant, I think  
8 that it is actually -- the correct standard is expressed  
9 rather than actual.

10 THE COURT: Let's see what 2520 says. You had  
11 2513. 2513 is expressed malice. That jury instruction  
12 says:

13 Express malice exists when a defamatory statement is  
14 made or published concerning a person for motives of ill  
15 will, bad intent, envy, spite, hatred, revenge, or other  
16 bad motives against the person defamed.

17 Express malice cannot be inferred solely from the fact  
18 that a statement was false and injurious to the plaintiff.  
19 In determining whether either defendant acted with express  
20 malice in making the statement about plaintiff, you will  
21 take into consideration the words used and all other facts  
22 and circumstances existing at the time the statement was  
23 made or published.

24 2520 is defamation for punitive damages. So  
25 they both have -- excuse me, 2511. So 2520 is the general

1 that defines the punitive damages in a defamation case,  
2 and then it instructs us to say, Where you're proceeding  
3 under express malice, you give Jury Instruction 2513; if  
4 you're proceeding under actual malice, give Jury  
5 Instruction 2511.

6 25 -- I've read 2513. 2511:

7 Because of protections afforded a defendant such as  
8 Mr. Fetzer or Mr. Palecek under the First Amendment of the  
9 Constitution, Mr. Pozner must prove that any defamatory  
10 statements published by the defendants were made with  
11 actual malice before you award punitive damages.

12 Did you research this, Ms. Feinstein? I  
13 don't -- you -- you add --

14 MS. FEINSTEIN: If -- Your Honor, I believe part  
15 of the reason we picked 2511 is because Mr. Fetzer has  
16 said he's a journalist. It was a -- there was a motion at  
17 our last hearing that the Court didn't -- in the end  
18 didn't need to take up where he was arguing that he had a  
19 privilege as a journalist to not respond to certain  
20 discovery requests, and so I think we anticipated he would  
21 continue to take that position.

22 MR. BOLTON: And, I guess, I -- I'm uncertain in  
23 terms of what the Court's conclusion was then at the  
24 summary judgment --

25 THE COURT: Well --

1 MR. BOLTON: -- hearing.

2 THE COURT: I'll fill you in.

3 MR. BOLTON: Yeah.

4 THE COURT: It wasn't so much --

5 MR. BOLTON: And I've read the transcript.

6 THE COURT: Okay. He made a concession -- a  
7 significant concession. He did not want to produce  
8 certain documents because he claimed he was a journalist  
9 and therefore, entitled to a privilege to withhold his  
10 source information.

11 The Plaintiffs, when asked, said that the  
12 information was relevant to the question of the element  
13 of -- that applies to the difference between a public  
14 person or a private individual. And then when your client  
15 then discerned the relevance of this proceeding under that  
16 theory, I asked, well, if you agree that Mr. Pozner is not  
17 a public person, then the Plaintiff said they'll withdraw  
18 the request and they don't need it and they don't need to  
19 prove it. And so in exchange for not having to produce  
20 what he didn't want to, what he may have very well been  
21 required to, he said he agreed that Mr. Pozner could be  
22 treated as a private individual.

23 MR. BOLTON: And -- and that's my understanding  
24 as well. But I guess what I'm -- I'm -- and maybe I'm not  
25 fully understanding counsel then. Is -- is the question

1           then of -- of the journalist privilege still an open issue  
2           in the case then or is that?

3                     THE COURT:    It's not.

4                     MR. BOLTON:   Okay.

5                     THE COURT:    I don't believe so.

6                     MR. BOLTON:   Yeah.  And -- and, Your Honor, that  
7           was how I read the transcript as well.

8                     But the -- the instruction they're proposing  
9           then, in terms of the constitutional privilege, I think,  
10          is premised on -- on there still being the journalist  
11          privilege in the case.  And that's why -- that's why --  
12          that's why my proposed instruction did not use the actual  
13          malice, because I thought -- I was construing the  
14          situation then as basically being a private person lawsuit  
15          for defamation against a private defendant, and in that  
16          situation, I think the -- I think the standard for malice  
17          is expressed malice in that situation.

18                    THE COURT:    Ms. Feinstein?

19                    MS. FEINSTEIN:  Your Honor, Mr. Fetzer -- I  
20          think the motion to compel and the journalistic privilege  
21          issue that came up at the last hearing ended up not being  
22          necessary based on the Court's determination on summary  
23          judgment, and the fact that Mr. Fetzer just really didn't  
24          pursue this idea that he thought our client was a public  
25          figure, but I don't think that he dropped the argument or



1 his position that he's a journalist. I mean, he's  
2 published any number of books. He has a blog. He, I  
3 think, would say if he were here today that he believes  
4 that it is his duty as a journalist to let everybody know  
5 about all these things that he believes he has  
6 investigated and uncovered. And so the 2511 is we think  
7 the appropriate jury instruction here because while  
8 Mr. Pozner is a private figure, the Defendant, Mr. Fetzer,  
9 has repeatedly and over and over again taken the position  
10 that he is a media figure.

11 THE COURT: All right. Let's -- I got it now.  
12 I see -- 2511, I think, it applies obviously, as it says,  
13 to media defendant or private figure with a constitutional  
14 privilege that they used actual malice.

15 The discussion we had about Mr. Fetzer's and  
16 Mr. Palecek's waiver and the discovery went to his  
17 concession as to Mr. Pozner. They said, well, at one  
18 point there was an argument that Mr. Pozner was a public  
19 figure, and then in that respect then, the Plaintiff,  
20 Mr. Pozner, in the discovery was asked -- sent discovery  
21 to Mr. Fetzer which he did not want to produce.  
22 Mr. Fetzer, in exchange for not having to produce it,  
23 conceded that Mr. Pozner was a public individual and not a  
24 public figure, which then relieved the Plaintiff of the  
25 additional elements or proof that would be necessary were

1           you a public individual. 2511 focuses not on the  
2           Plaintiff but on the nature of the Defendant.

3                        Look, here's what -- I mean, we're not going to  
4           decide here today. I like to have a discussion early on.  
5           It seems to me when we get to our instruction conference,  
6           we'll then have the benefit of knowing what Mr. Fetzer  
7           actually has said in his testimony and which particular  
8           instruction more appropriately applies. I mean, it's one  
9           or the other.

10                      MR. BOLTON: I --

11                      THE COURT: And -- yeah?

12                      MR. BOLTON: Well, and I agree, Your Honor.

13           And, so just for clarification then, which -- which has  
14           come from counsel and from Your Honor, the question of the  
15           journalist privilege then is -- is not at this point  
16           foreclosed by the summary judgment motion hearing.

17                      THE COURT: I -- I don't think -- I'll tell you,  
18           I don't think we talked about -- we didn't -- we didn't  
19           talk about it in that context, to my recollection. I know  
20           there's a transcript. My recollection was, it was very  
21           simply, that when I asked, maybe it was Mr. Zimmerman, why  
22           he wanted this, he said, Well, look, Judge, they're  
23           claiming that Mr. Pozner is a public figure, and I forgot  
24           the exact words, we need this information because it was  
25           relevant to the elements that associated with that

1 characteristic if that's what applies. And I thought that  
2 was a valid argument. And then when Mr. Fetzer understood  
3 the argument, and then understanding that if Leonard  
4 Pozner was just simply a private individual and that whole  
5 line of discovery was no longer necessary, he acquiesced.

6 MS. FEINSTEIN: And, to be clear, Your Honor, we  
7 are only talking about the journalistic privilege at that  
8 hearing in the context of his objections to responding to  
9 discovery and we -- based on your memory, which is also  
10 our memory, we agreed that we didn't need to pursue  
11 whether he should respond to that discovery because the  
12 issue was no longer necessary or wasn't relevant anymore.

13 THE COURT: But, Ms. Feinstein -- but the  
14 concession, I think to the great advantage of the  
15 Plaintiff coming out of that hearing, was Mr. Pozner comes  
16 into the trial as simply a private individual.

17 MS. FEINSTEIN: That's -- that's correct. And  
18 the other thing then is, of course, on summary judgment,  
19 the Defendants failed to bring forth any evidence to show  
20 that Lenny Pozner was a public figure.

21 THE COURT: Right.

22 MS. FEINSTEIN: They conceded it.

23 THE COURT: That's foreclosed.

24 MS. FEINSTEIN: Yes. Exactly.

25 THE COURT: I don't remember in that discussion

1 or in the summary judgment I made any decision  
2 characterizing James Fetzer.

3 MS. FEINSTEIN: I think that's right. I was  
4 just saying that's what he's been telling us all along.

5 THE COURT: All right. So the answer to your  
6 question is, I guess, no, I did not make any rulings on  
7 whether or not James Fetzer could claim he was a media  
8 defendant.

9 MR. BOLTON: But -- may I speak then, Your  
10 Honor?

11 THE COURT: Yeah.

12 MR. BOLTON: That issue then, being an open  
13 issue, if -- if we were to prevail on that issue, would  
14 also implicate the Court's summary judgment determination,  
15 because it would be a defense to not just the punitive  
16 damage, but it would be a defense -- the actual malice  
17 then standard would go to the fundamental nonpunitive  
18 damage but the liability question itself. And so  
19 that's -- that issue being open then, I think -- I think  
20 the issue --

21 THE COURT: I don't understand. I don't follow.  
22 I mean, I -- I'm not obviously going to -- I'm not  
23 cracking open the summary judgment, but -- but that was --  
24 what you just said to me -- first of all, I do two things.  
25 In my mind, I thought that puzzles me, and then out of the

1 side of my eye Ms. Feinstein and Mr. Zimmerman are shaking  
2 their heads. No, the Court ruled on summary judgment that  
3 this Plaintiff had presented sufficient facts. There was  
4 no genuine dispute as to any of the material facts, and  
5 that the Defendants had defamed Leonard Pozner.

6 MR. BOLTON: But, Your Honor, the -- and that  
7 goes to the question of whether or not the statement, and  
8 there are other factors as well, but the disputed one that  
9 was discussed at length was whether, true or false, in  
10 whether that was a disputed issue of fact. But the  
11 question of privilege also goes to -- in other words, if  
12 one is acting with the -- with the privilege, that also  
13 is -- is a defense to liability.

14 MS. FEINSTEIN: It's a defense he would have to  
15 raise in opposition to our summary judgment and did not.  
16 So this is a really interesting discussion, maybe would be  
17 a subject of an interesting *Wisconsin Lawyer* article, but  
18 at this point, he didn't raise it in defense to summary  
19 judgment, and so it's foreclosed.

20 THE COURT: Well he didn't -- none of this was  
21 discussed or raised. And -- and the discussion I'm having  
22 now for I think largely your benefit, Mr. Bolton, because  
23 you weren't there, and also, Ms. Feinstein, and the  
24 Zimmermans, is this discussion becomes germane in terms of  
25 how you're going to try your case.

1           Make no mistake, the Court already ruled on  
2           liability. So if -- if you're saying that, well, this is  
3           an interesting issue and if you're saying that it  
4           wasn't -- it -- so far we've been talking about the  
5           concession your client made in the context of that hearing  
6           as it related to the motion to compel. Now you're saying  
7           is, okay, the reason why I'm asking for actual malice is  
8           because this is a defense to the summary judgment, this  
9           is -- this is the instruction for the jury and also, by  
10          the way, a defense to summary judgment, you can't have  
11          that both ways.

12           Look, we're not here -- I'm not here today to  
13          tell you how to put -- try your case. We're going to  
14          go -- we're going to pick a jury and the jury is going to  
15          answer the questions on the special verdict. We'll figure  
16          out whether it's actual malice or express malice when we  
17          get to the jury instruction conference. That's all I'm  
18          talking about today, which jury instructions. I just  
19          pointed out there were two different. What -- what more  
20          in particular, I raised it because the Plaintiff has  
21          consented to the Defendants' version of the proposed  
22          special verdict. I only note that when we decide on the  
23          instruction, we should conform the question to the word  
24          used in the instruction. If we're using in Question  
25          Number 2 expressed malice, well then we ought to give the

1 expressed malice instruction. If we're using the actual  
2 malice instruction, then we should change that word on  
3 Question Number 2 in your proposed special verdict and  
4 Question Number 4 with Mr. Palecek.

5 Okay. Jury instructions, I took a look through.  
6 They're very similar. A couple of things.

7 I don't ordinarily, unless you want to argue  
8 strenuously, let the jurors ask questions. I've only had  
9 that one time and it -- the questions -- the only  
10 interesting part was, is how it tells the lawyers how  
11 misguided the jurors are in asking questions that you  
12 can't understand and it let's you then change, perhaps, up  
13 how you're putting your case in. It slows things down  
14 immensely and I think runs the risk of confusing. I knew  
15 that was in Plaintiff's proposed. I'm not inclined to  
16 give that one unless you wanted to be heard on that.

17 MS. FEINSTEIN: We're fine with that, Your  
18 Honor.

19 THE COURT: Otherwise, when we -- we get to the  
20 jury instruction conference, probably, Mr. Bolton -- well  
21 you both did -- I guess what I'd like you to do is,  
22 Ms. Feinstein, between now and the trial to get together  
23 with Mr. Bolton and produce, if you would, Ms. Feinstein,  
24 take this responsibility, three packets for me. This  
25 packet, Judge, is a ready-to-go, camera-ready group of

1 instructions we agree on; pile number two is, these are  
2 the ones the Plaintiff wants but the Defendant doesn't  
3 agree to; and pile number three is just put together,  
4 these are the ones the Defendants want that the Plaintiff  
5 doesn't agree to.

6 Interestingly enough, I think Ms. Feinstein did  
7 something that taught me a little lesson. I always  
8 thought that when I did Jury Instruction 50, then all of a  
9 sudden we're repeating a lot of stuff, even in a short  
10 trial, it's repetitive. I kind of like the idea that  
11 because it was in 50, the preliminary instruction, for  
12 example, the Plaintiff didn't propose that we read it all  
13 over again.

14 MR. BOLTON: No, and in -- and I agree. When  
15 I -- when I put it together, I recognized then that some  
16 of them are redundant, and I'm certainly not proposing  
17 that you repeat some of those. So those --

18 THE COURT: Funny thing is, is I always do  
19 because that's what always the lawyers want and --

20 MR. BOLTON: Oh.

21 THE COURT: -- then I find it to be  
22 counterproductive because the jury is sort of looking at  
23 me like, How many times are you going to tell me this?  
24 And they're rather benign parts of the instructions.

25 MR. BOLTON: Yeah. And I recognized when I was



1 finalizing them the redundancy there, and I was too lazy  
2 to have my assistant take them out.

3 THE COURT: That's okay. So now you're going --  
4 that will speed us along at the jury instructions if I  
5 simply have three piles to go and the two of you get  
6 together on the ones that you agree to.

7 Ms. Feinstein, thank you, and actually,  
8 Mr. Bolton, thank you as well. A lot of times people just  
9 give me the blank instruction and they don't make the  
10 choices and fill in the blank. Both of you did that.  
11 Thank you for that. And when you get the agreed to, make  
12 sure it's an agreement as to the changes which is  
13 striked -- which is struck and put in.

14 The only one I wanted to touch on is the, quote,  
15 Introductory Statement on Litigation and the Court's Prior  
16 Determination, you proposed as an instruction. I've got  
17 some problems with this. I think the discussion really  
18 should be not necessarily in a document called  
19 Introductory Statement on the Litigation and Court's Prior  
20 Determination, but I think there is a provision in the  
21 court process for the Court to inform the jury what are  
22 some of the stipulated facts. Now those could be just  
23 stipulated facts because they're stipulated to or they  
24 could be facts found in the context of the Motion for  
25 Summary Judgment. So rather than sort of complicate

1 things like this is my findings of fact, I think many of  
2 the things that they put in this document, Mr. Bolton,  
3 you'd stipulate to anyway.

4 The first two paragraphs, if you pull it out,  
5 are sort of in the form of an instruction. I would note,  
6 Ms. Feinstein, something you'll have to put in, any time I  
7 talk about compensation, you remember you have to put in,  
8 comma, if any. I mean, it's very important for me not to  
9 suggest that there has to be compensation because there  
10 might not be any.

11 So rather than for me say, "I'm going to read a  
12 short statement to try to help you understand the history  
13 and background that led to this trial. These statements  
14 have been established by the evidence and must be accepted  
15 by you, the jury, as established facts." I think the  
16 better way to do it is to say, There are certain facts of  
17 which the parties do not disagree, and then I'm to find --  
18 and then I'm going to give you those now. I mean, that  
19 then benefits both parties in that context or it doesn't  
20 disadvantage the context -- each party -- does not  
21 disadvantage one particular party, saying that I ruled  
22 against it, it just says they agreed to it.

23 For example, you'll have -- and then I think the  
24 discussion has to be fairly careful, Ms. Feinstein.  
25 Ordinarily, I mean, I don't think Mr. Fetzer's going to

1 agree that Noah Samuel Pozner was born on November 20th,  
2 2006 in Danbury, Connecticut. Now -- right?

3 MR. BOLTON: Yeah.

4 THE COURT: Or maybe he will?

5 MR. BOLTON: Your Honor, and if I can talk more  
6 generally on that. I think that -- that the whole  
7 instruction is inappropriate. For instance -- for  
8 instance, if you have a case that's going to trial and  
9 there's been a summary judgment motion and decisions, I --  
10 I have not seen that the Court then instructs the jury as  
11 to the findings of fact in that hearing that were found to  
12 be either stipulated to or -- or that the Court determined  
13 were undisputed.

14 Generally, if there's -- if there's an issue  
15 that has -- for instance, in this particular case, the  
16 question of whether or not the Defendant -- or the  
17 Plaintiff was -- was -- suffered any injury as a result of  
18 the four statements, I don't think actually depends upon  
19 any prior determination. So I don't know that the  
20 Court -- or the jury needs to be instructed at all about  
21 the summary judgment motion. And, certainly, the extent  
22 of what they're doing here, I've never seen done, you  
23 know, where -- where you go through a summary judgment  
24 decision, say you've got a written decision, and then  
25 instruct the jury in lieu of --

1 THE COURT: Oh, but Mr. Bolton, I have seen it  
2 done. It is done. Not very often because a lot of times  
3 I think the lawyers think it's a lot more complicated to  
4 then argue about particular verbiage and the like, but,  
5 look, I -- on summary judgment I concluded that the  
6 Defendants defamed Leonard Pozner by claiming that Noah  
7 Pozner's birth -- excuse me, death certificate was a fake,  
8 a fraud. Right? You know that?

9 MR. BOLTON: And -- and, Your Honor, in terms of  
10 the task before the jury, I don't even think they need to  
11 know that. But -- but nonetheless, I don't think you need  
12 to instruct them --

13 THE COURT: But -- but --

14 MR. BOLTON: -- any more than that.

15 THE COURT: But you agree, without conceding the  
16 point -- I mean, granted, I'm not asking you to agree that  
17 I made the right decision as a waiver or anything. You  
18 agree that implicit in the Court's determination that the  
19 statements that the death certificate was false and  
20 fabricated is an acceptance that, in fact, the death  
21 certificate was not false and not fabricated and  
22 therefore, correctly and legally identified a natural  
23 person named Noah Pozner who was born and died on -- as  
24 set forth on the death certificate. So having concluded  
25 the death certificate was not a false statement or a

1 fabrication or a fraud, how could I not then say,  
2 implicitly, that there was a real person named Noah Samuel  
3 Pozner. And why would I then make the Plaintiff have to  
4 prove that because your clients had taken the position  
5 that he doesn't exist and never did, that he's -- that  
6 the --

7 MR. BOLTON: I'm not saying that they do have to  
8 prove that. I'm saying that it's not relevant --

9 THE COURT: If they don't have to prove it, how  
10 do I -- how do I then -- I mean, this is the whole  
11 subject -- this is a critical fact in understanding the  
12 defamation. I mean, let's not overcomplicate it. Leonard  
13 Pozner had a son named Noah, Leonard Pozner's son died,  
14 and the death certificate was prepared, and it was not a  
15 fabrication, a falsity, a fraud. That I -- I've made --  
16 that's all done and over with. It's been determined.

17 MR. BOLTON: But I don't think the jury needs to  
18 be instructed on that.

19 THE COURT: Don't you -- but the jury needs to  
20 be -- the jury needs to know that to understand the nature  
21 of the defamation.

22 MR. BOLTON: Your Honor, if, in fact -- if, in  
23 fact, it is the case then that the facts underlying  
24 liability are interwoven with -- with any damage  
25 determination, then I think it's inappropriate to order a

1 trial set strictly on damages.

2 The -- the cases, including the U.S. Supreme  
3 Court has said that, you know, in terms of ordering a  
4 trial solely on damages, that you need to be careful that  
5 if the -- if the damages question is closely interwoven  
6 with the liability question, then it's inappropriate to  
7 order a trial only -- only on the damages.

8 THE COURT: Okay. Well I don't think it is  
9 closely interwoven because the Court on summary judgment  
10 said there was no genuine dispute as to the fact that  
11 there existed a person named Noah Pozner and that he died.  
12 I mean, I don't -- I don't even get into the summary  
13 judgment because the Plaintiff's way of prosecuting the  
14 case didn't even need to talk about the manner in which he  
15 died, only that he died, and that he died on that date as  
16 recorded on a death certificate that was prepared by  
17 the -- by the Connecticut authorities.

18 So the trial on damages is now knowing that  
19 there was a man named Leonard Pozner who had a son named  
20 Noah who died but then was subjected to the defamatory  
21 statements of others by the defendants, how was he  
22 damaged?

23 Well, Ms. Feinstein, I don't like the language.  
24 I mean, I think tactically speaking, a number of these  
25 things here can easily be just put in quite quickly

1 through your client anyway. I mean, a good example is  
2 this, my guess is Leonard Pozner's going to start out by  
3 saying who he is and that he had a son and his son died.  
4 I -- I think the way to handle this is -- and the cleanest  
5 way to do it is -- is to leave it at that.

6 If during the course of the defense -- I mean,  
7 make no mistake, Mr. Bolton, if -- if your witness -- if  
8 your clients testify that, in fact, Noah Samuel Pozner  
9 never existed, then I would be giving an instruction that  
10 that -- they should disregard that testimony. The Court  
11 already determined that he did exist. So I think we ought  
12 to come back and see what -- I mean, I view this as  
13 mostly -- well, in large part a curative instruction by a  
14 defense tactic intended to overcomplicate, no disrespect  
15 to Mr. Bolton, because this -- things are changing now  
16 that we have a lawyer on the other side, but when  
17 Mr. Palecek and Mr. Fetzer were unrepresented, I honestly  
18 did not -- I was not confident that their defense of the  
19 case wouldn't try to regurgitate and reargue issues  
20 already decided by the Court.

21 MR. BOLTON: Well, Your Honor, you don't need to  
22 make any excuse for me. If I'm trying -- if I'm  
23 overcomplicating it, I think it's because, in fact, the  
24 standards that are applicable to when -- when they --  
25 when -- when liability is not tried with a damage case,

1 the -- the rules that are applicable in that situation I  
2 think are more complicated than -- and I'm willing -- I'm  
3 willing to give the Court a short memorandum on that,  
4 but --

5 THE COURT: No. We're going to go forward.  
6 Here's what I propose to do. I think much of what you put  
7 in here is -- is more than necessary. I think basically,  
8 Ms. Feinstein, is in the introduction I'm going to explain  
9 that -- I'm going to explain that the Court has  
10 resolved -- I don't, let's say words to -- I'm going to  
11 tell the Court [sic] that there were previous court  
12 proceedings in which the Court concluded the following --  
13 and I think you just go right down the elements of  
14 defamation -- that Noah Pozner is the Plaintiff in this  
15 case and that he had a son. I don't remember off the top  
16 of my head, but is his birth date on the death  
17 certificate?

18 MS. FEINSTEIN: I believe so.

19 MR. ZIMMERMAN: I believe it is.

20 THE COURT: If it is then you can put that in  
21 the finding, and that he died. You have no -- I have no  
22 problem telling the jury the salient facts as set forth in  
23 the death certificate, which I concluded there was no  
24 genuine issue of material facts over its completeness and  
25 authenticity. And you can say that I can tell them that



1 the Defendants, I think in your summary judgment, a simple  
2 statement, had alleged that the death certificate was a  
3 fake or a fraud, and the Court concluded it was not, and  
4 determined that the Defendants had, in fact, defamed the  
5 Plaintiff in this case. That the function of the Court  
6 today is to hear those remaining issues, whether the  
7 Defendant is entitled to compensatory damages, if any, and  
8 whether the Defendant -- excuse me, the Plaintiff is  
9 entitled to compensatory damages, if any, and whether the  
10 Plaintiff is entitled to punitive damages, if any. You  
11 will hear evidence on that and the Court will instruct you  
12 on the law.

13 The reason I say that, Mr. Bolton, is I don't  
14 think -- you can give me the law. I'd be happy to  
15 consider -- I welcome to read whatever you want to submit.  
16 I think it might help educate me, but I -- but I never  
17 viewed this as being very complicated. I think the  
18 Plaintiff on summary judgment had proved liability,  
19 established all the elements of defamation, and the Court  
20 concluded that the Defendants defamed Leonard Pozner, and  
21 that we were going to trial on damages. Period.

22 MR. BOLTON: I would have less objection if  
23 that's all we told the jury. But the notion then that we  
24 have to go through the hearing and pick and choose what in  
25 the hearing was --

1 THE COURT: No.

2 MR. BOLTON: -- framed --

3 THE COURT: I agree with you. I don't -- look  
4 it. I'm always mindful of the power of the Court when the  
5 Court says to the jury, especially at the outset, this is  
6 what happened. I don't want to -- I don't view my  
7 function, obviously, as to advantage or disadvantage each  
8 side other than just to set the context and frame the  
9 question.

10 MS. FEINSTEIN: And --

11 MR. BOLTON: But, Your Honor.

12 MS. FEINSTEIN: -- well, Your Honor, I was going  
13 to say, we're happy to try to work with Mr. Bolton on this  
14 revision. We actually sent this proposal to Mr. Bolton in  
15 advance of filing it, as we had discussed at the end of  
16 the summary judgment hearing, to try to work with the  
17 other side to do it. We didn't hear a response from him  
18 before our deadline, but we're happy with the Court's  
19 guidance today, revise this, provide it to Mr. Bolton, and  
20 see what we can come up with.

21 THE COURT: All I want to give is give a context  
22 to a jury who are picking up a case that -- where  
23 liability has already been determined and determined now  
24 its damages.

25 MR. BOLTON: Well --

1           THE COURT: So redraft that, send it to  
2           Mr. Bolton, and if you can agree that, for example,  
3           Mr. Bolton thinks that there's more in it and that you  
4           don't really need it anyway because it's not all that  
5           important, then we don't have a problem. I view this as  
6           an -- I think this is an introductory instruction.

7           MR. BOLTON: And, Your Honor, I will work with  
8           counsel to try and come up with this. But at the same  
9           time, I don't want to -- I don't want to be put in the  
10          position then if I work with them then I have waived any  
11          objection to it as well.

12          THE COURT: You have -- the Court will give you  
13          a standing objection that nothing you agree to  
14          necessarily -- well, no. Let me back up on that. I mean,  
15          look. I don't think -- I think if -- if what's proposed  
16          is objectionable to you, you shouldn't agree to it.  
17          Because I don't want to -- I don't want to give you the  
18          benefit of having agreed to something but then claim that  
19          on appeal you can raise arguments to the Plaintiff's  
20          counsel or to me that were never said. Because that's not  
21          fair to Ms. Feinstein if you say, Okay, I agree to that,  
22          but knowing that -- that you really have a great argument  
23          that it was wrong and then all of a sudden see how it  
24          turns out and then find out, Well, I have a standing  
25          objection, although I said it was okay, I never told them

1 about my concerns and I want to raise them for the first  
2 time on appeal.

3 MR. BOLTON: I understand. But to the extent --  
4 the other side of the coin is that to the extent that I'm  
5 directed to work to come up with a statement to say that  
6 then by having done that I waived my -- my more  
7 fundamental objection.

8 THE COURT: No. No. This is -- let's say this.  
9 Ms. Feinstein has heard my comments. She'll come up with  
10 a redraft. She'll share that with you. I'll then hear  
11 your objections, if any, as to what she has produced.

12 MR. BOLTON: And can I anticipate one right now  
13 that maybe we can -- I would object particularly to  
14 including anything with regard to the standard of proof  
15 for summary judgment in the statement. And the reason I  
16 say that is because if we instruct the jury that there's  
17 no -- there was no disputed issue of fact as to A, B, and  
18 C, it pretty much then answers, you know, the --

19 THE COURT: I don't intend --

20 MR. BOLTON: -- actual malice question and  
21 becomes I can't win on it.

22 THE COURT: I would not intend to use words  
23 summary judgment, burden of proof, standard. I think the  
24 language I would use is simple and straight forward, is in  
25 prior proceedings the Court made the following findings of

1 fact or something just, these are the facts the Court find  
2 and based on those facts the Court concluded that the  
3 Defendants had defamed the Plaintiff. The only legal  
4 words I would use is facts, findings, conclusions,  
5 defamation. I don't want to get into summary judgment  
6 methodology, no genuine dispute as to material facts  
7 because the jurors' eyes will start spinning around. So I  
8 agree with you, that I don't anticipate would be in there.

9 MR. BOLTON: Okay. Good.

10 THE COURT: It would be as simple as that.  
11 Here's the facts. This is what you need to know. So it's  
12 like the inside flap of the front jacket of the book. Now  
13 you're going to hear the rest of the story how it's  
14 impacted Leonard Pozner both in his claim for compensatory  
15 and punitive damages. All right. So that will take care  
16 of then your, sort of, how to handle that.

17 Defendants' Motions in Limine. Let's start with  
18 the Defendants' Motions in Limine. I think both are in  
19 agreement that there would be no reference to the prior  
20 settlement of Wrongs Without Wremedies, right?

21 MS. FEINSTEIN: Yes, Your Honor.

22 THE COURT: Do we even need to tell anyone that  
23 there even was a defendant Wrongs Without Wremedies, that  
24 they were in and now they're out? Is it even going to  
25 come up? From the Plaintiff's standpoint, is there even a

1 reason to mention, other than possibly maybe -- were they  
2 the publishers of the --

3 MS. FEINSTEIN: I think that there may -- to the  
4 extent that there's any reference to Wrongs Without  
5 Wremedies, it would come up in the context of a witness  
6 talking about what happened, but not that they were named  
7 as a party in this case and that there was a resolution or  
8 anything along those lines.

9 THE COURT: Do you agree with that?

10 MR. BOLTON: I do, Your Honor. And then just as  
11 a clarification, there is a reference to it though in the  
12 Plaintiff's proposed instructions.

13 MS. FEINSTEIN: We can take that out.

14 THE COURT: Take it out.

15 The other thing I learned too is we'll have to  
16 make sure the court calendar -- right now it does not  
17 refer to them. It's Leonard Pozner v. James Fetzer, et  
18 al. I learned when I did the pharmaceutical case, the  
19 long caption had all the pharmaceutical companies and the  
20 jurors every time they walked by the calendar wondered  
21 when they're going to hear about everybody else. So it's  
22 not on the calendar. It won't be on the documents. It  
23 won't be on the caption. We don't give the caption to the  
24 jurors on the jury instructions.

25 But I'll go ahead and by stipulation of the

1 parties grant the motion in limine. There won't be any  
2 reference to Wrongs Without Remedies being sued or  
3 settlement in particular. The only mention might be is  
4 sort of factually in a transactional way as to its role in  
5 publishing certain statements.

6 Mr. Bolton's Number 2 is a motion excluding any  
7 evidence or reference to the partial summary judgment  
8 determination by the Court. I think I've dealt with that.  
9 I agree with you, we're not going to get into the  
10 nomenclature of summary judgment, the burden of proof. I  
11 do intend to, and Ms. Feinstein will be preparing a  
12 preliminary instruction that uses ordinary words that  
13 tells the jury what the Court did in preliminary  
14 proceedings, and that will then segue into the Court's  
15 function of -- the jury's function of determining damages.

16 Number 3. You wanted no reference to punitive  
17 damages until or unless the Court makes a determination  
18 that the Plaintiff has made a sufficient case for punitive  
19 damages. Questions to be submitted by the jury. Pretty  
20 standard. Any response to that, Ms. Feinstein?

21 MS. FEINSTEIN: I think it's -- if I understand  
22 that, I think that's standard. I think it's part of the  
23 comments of the jury instructions, and if that's what they  
24 intend to ask for, then we don't have any objection to  
25 that.

1           But I guess my question is when we were just  
2 talking about the instruction that I'm going to redraft,  
3 you said, you know, the issues remaining are compensatory  
4 damages and punitive damages.

5           THE COURT: Well then let's clear that up, just  
6 say damages.

7           MS. FEINSTEIN: Just say damages?

8           THE COURT: Just say damages.

9           MS. FEINSTEIN: And then can we in *voir dire* ask  
10 whether any of the panel members are so opposed to  
11 punitive damages that they couldn't --

12          THE COURT: Good question.

13          MS. FEINSTEIN: -- couldn't award them?

14          THE COURT: Mr. Bolton?

15          MR. BOLTON: I think -- I think the answer is --  
16 would be no, because, for instance, I think the reference  
17 to punitive damages in the opening statement, until the  
18 Court has made that threshold determination at the  
19 conclusion of the case, I think would be inappropriate.  
20 So --

21          THE COURT: That doesn't -- that doesn't seem  
22 right to me. That -- I mean, if you were a plaintiff's  
23 lawyer and you were asking for it, because there are  
24 people in this world that are just opposed in principle to  
25 the idea of civil punitive damages, and as a lawyer trying



1 to vet people, that's certainly, if you were a plaintiff's  
2 lawyer and that person had that opinion, regardless of the  
3 evidence and the instructions of the Court, you'd really  
4 want to know that in the abstract.

5 MR. BOLTON: Well then -- in terms of what the  
6 Court said was relatively standard about my motion then,  
7 am I -- am I correct though that that reference to  
8 punitive damages in the opening statement would be  
9 inappropriate? Because, I mean, if, in fact, my motion is  
10 relatively standard except that it doesn't prohibit  
11 anything, then I'm not sure what would be --

12 THE COURT: No. Your motion goes to, I think,  
13 the valid point that the prejudicial effect of a party  
14 putting in a case repeatedly demanding punitive damage and  
15 punishing with the potential that there is insufficient  
16 evidence is inappropriate. That the prejudicial effect of  
17 talking about it in the case in advance of having to make  
18 sure that the facts are there to support it warrants not  
19 mentioning it.

20 Ms. Feinstein's question is entirely different.  
21 It has nothing to do with prejudicing the jury. To the  
22 contrary, it goes to what's the jury -- which jurors do  
23 you want to sit to hear the evidence. So, no, once -- the  
24 opening statements are to the panel that's been sworn.  
25 Prohibiting it to be statement -- stated until the case --

1           until, as you say, makes a determination the Plaintiff has  
2           made a sufficient case for punitive damages goes to the  
3           trial.

4                       MR. BOLTON:   Okay.

5                       THE COURT:   What they're asking for is the jury  
6           selection process.

7                       MR. BOLTON:   I'll accept that, Your Honor.

8                       THE COURT:   All right.

9                       Now, I will be completely candid and honest with  
10          the -- the Plaintiff's lawyers.  Although, I'm familiar  
11          with this principle, I don't know -- you'll have to tell  
12          me when it is you're going to want me to make that finding  
13          and how it affects, in fact, how you put your case in.  I  
14          don't know how it works as a practical matter whether you  
15          ask that -- I mean, it seems to me then if you wait until  
16          all your evidence is in, then why even ask me, except  
17          maybe on cross-examining the defendants in their case.  I  
18          don't know.

19                      MS. FEINSTEIN:  I -- I think, Your Honor, and  
20          this is a helpful discussion to have, but as I understand  
21          it, this ruling doesn't prevent us from asking questions,  
22          for example, of Defendant Fetzer that establish that he  
23          was going after Mr. Pozner and making these statements  
24          intentionally; that he thought Mr. Pozner was a liar; that  
25          he was calling Mr. Pozner a crisis actor.  You know, those

1 kinds of things, that's fine.

2 I think where it comes into play would be, for  
3 example, if we wanted to admit evidence of his net worth,  
4 which there are probably other issues with that, or, you  
5 know, something along those lines, and then I think it  
6 goes to perhaps closing arguments. But I think --

7 THE COURT: Okay.

8 MS. FEINSTEIN: -- as far as asking him  
9 questions about --

10 THE COURT: You agree to that?

11 MS. FEINSTEIN: -- his intention and those kind  
12 of things, you know, without us telling, you know, saying,  
13 So now I want to talk to you about our availability of  
14 punitive damages.

15 THE COURT: Here's what I think. The real  
16 purpose of a good motion in limine is for everyone to walk  
17 out of the court knowing what's allowed and what's not  
18 allowed. What I've simply said is that unless the Court  
19 makes a determination that you made a sufficient case,  
20 you're not going to say the words punitive damages. I  
21 don't even think you'd say the word punitive or punish.  
22 You can say the word damage, clearly. How you prove and  
23 the questions you ask, without saying punitive damages, is  
24 up to you, right? You agree with that, Mr. Bolton?

25 MR. BOLTON: I do.

1 THE COURT: All right. Let's go to the  
2 Plaintiff's motions. Well, have I discussed and ruled on  
3 all your motions in limine, Mr. Bolton?

4 MR. BOLTON: Yes, Your Honor.

5 THE COURT: Are there any other motions in  
6 limine or issues you want to bring up?

7 MR. BOLTON: None that I have right now, Your  
8 Honor.

9 THE COURT: All right. So let's turn to the  
10 Plaintiff's. Plaintiff seeks an order prohibiting  
11 reference to findings of fact and liability as previously  
12 decided by the Court at summary judgment. I think we've  
13 talked about that, and I don't think that I can give --  
14 articulate a coherent order on this request that would  
15 sufficiently define what Mr. Bolton can ask or not ask or  
16 what can be -- the witnesses say or not say.

17 There is one issue that I want to bring up. So  
18 before Mr. Bolton came on board, I think to the  
19 consternation of his clients, I made the ruling that we  
20 were not going to relitigate Sandy Hook. Plaintiffs  
21 hadn't pled the case that way. They didn't want to  
22 prosecute that way. The only question was a very, very  
23 narrow focus: Was Defendant Fetzler and Palecek's  
24 statement that the death certificate was a fraud, a  
25 falsity, and that Noah -- excuse me, Leonard Pozner

1           perpetrated it on, whether that was defamation.

2                   Mr. Fetzer, in particular, took issue with that.  
3           He wanted to and, in fact, had told the Court he thought  
4           that finally he had a venue to litigate his theory that  
5           Sandy Hook never happened. And so, on summary judgment  
6           and on discovery, we didn't go there.

7                   Now you're asking for punitive damages, and  
8           let's say, regarding whether it's expressed or actual, in  
9           order to get punitive damages, the jury has to deliberate  
10          on, essentially, Mr. Fetzer's and Mr. Palecek's state of  
11          mind. Right, Ms. Feinstein?

12                   MS. FEINSTEIN: Yes, Your Honor.

13                   THE COURT: Does that -- doesn't that give them  
14          the ability to say, Look, I said this because I thought it  
15          was a hoax perpetrated by the Obama administration who  
16          hired crisis actors to -- I mean, that's -- that's their  
17          claim. Now, I mean, Mr. Fetzer does -- is -- I mean, I'm  
18          not telling Mr. Bolton how to put in his defense, but I  
19          mean, I'm mindful of the fact that I can't circumscribe  
20          the Defendants so tightly in the context of a punitive  
21          damage case that I did necessarily on the summary  
22          judgment. Don't you think if they want, they can start  
23          talking about their theory, the reason why it wasn't with  
24          malice is they genuinely believed Sandy Hook never  
25          happened?

1 MS. FEINSTEIN: Your Honor, I think the problem  
2 here is that they -- we're not talking about Sandy Hook.  
3 We're talking about the specific statements about the  
4 death certificate here; fake, forgery, fabrication.  
5 Right? And why they made those specific statements  
6 against Mr. Pozner. We know from summary judgment that  
7 the original statements were made because, basically, as  
8 far as I can tell, they didn't take a look at what a death  
9 certificate looks like in the State of Connecticut as  
10 part -- was part of the problem. Right? But they  
11 continued to press this against Mr. Pozner, and I think,  
12 but by limiting our discussion and our case on punitive  
13 damages to the statements that are at issue here, which is  
14 that -- the defamatory statements, I think that is  
15 going -- that will help limit this whole -- I mean,  
16 because if we're going to have -- if Mr. Fetzer is going  
17 to be able to come in here, and it sounds like with his  
18 witness list, that's what he wants to do, litigate whether  
19 Sandy Hook actually happened, then I think we're going to  
20 need more than a week.

21 THE COURT: Well, no, I've got his hours. He's  
22 got two days. So I'm less concerned about -- I'm very  
23 concerned about the length of the defense. I'm less  
24 concerned about what he does during those periods of time.

25 Well, Mr. Bolton, I mean, I think -- I wonder,

1 because compensatory damages are all intrinsic to Leonard  
2 Pozner, how it affected him, how his -- he went to the  
3 doctor, and these things -- that's all focussing on the  
4 Plaintiff himself, compensatory damages. That would be  
5 very clean. We wouldn't have to talk about Fetzer and  
6 Palecek at all. When you talk about then malice, state of  
7 mind, do you intend to tell the jury why it is they made  
8 these defamatory statements?

9 MR. BOLTON: Absolutely.

10 THE COURT: Do you intent to put in a case -- a  
11 defense that would attempt to convince the jury that Sandy  
12 Hook was -- Sandy Hook was a hoax?

13 MR. BOLTON: I don't have to convince them of  
14 that for -- on the punitive damage. I have to convince  
15 them that -- that this was their understanding and that  
16 that was what was motivating them. I'm not going to ask  
17 the jury to believe one way or the other that question.  
18 But -- but it is definitely -- the question of punitive  
19 damages does not hinge upon whether or not Sandy Hook  
20 occurred or not. And so, in terms of the context of -- of  
21 their actions, I think the explanation in the broader  
22 context is essential.

23 THE COURT: Ms. Feinstein?

24 MS. FEINSTEIN: I mean, I think, Your Honor,  
25 that they've said in their book exactly why they're making

1           these statements, and it was litigated on summary  
2           judgment. So, you know, I think -- I don't think that  
3           there is a need to relitigate whether Sandy Hook happened.  
4           That's -- that's our -- that's our concern.

5                   THE COURT: I -- I appreciate your concern or  
6           your client's concern, although, my role is to be fair to  
7           both parties. But let me ask you this. When Leonard  
8           Pozner takes the stand, is he going to talk about the way  
9           in which his child died? I mean, I understand -- while  
10          you're debating this. I mean, lawyers on summary judgment  
11          methodology can be sort of cold and dispassionate in terms  
12          of this is an easy question, here's the document, I can  
13          prove the truth, I have genetic testing and the like. But  
14          when you're talking to 14 men and women and truly trying  
15          to get compensatory damages or punitive damages, I would  
16          have thought that you'd want to start with the story about  
17          Noah Pozner going off to elementary school in Sandy Hook,  
18          Connecticut.

19                   MS. FEINSTEIN: Well, I think, Your Honor, the  
20          problem with that is that we aren't contending that these  
21          folks killed Noah Pozner and we can't deny that that  
22          happened and that obviously impacted, as it would impact  
23          any of us if our children were slaughtered, that it  
24          impacted Mr. Pozner. What --

25                   THE COURT: But --



1 MS. FEINSTEIN: -- we're arguing about is how  
2 their defamatory statements --

3 THE COURT: No my question --

4 MS. FEINSTEIN: -- added on to that.

5 THE COURT: My question is trying to, in the  
6 week we have, to let the Plaintiff present the Plaintiff's  
7 case and let the defense present the defense.

8 I -- you tell me if I'm wrong. Leonard Pozner  
9 is going to talk about the death of his son and the way  
10 his son died.

11 MS. FEINSTEIN: I think our intention is not  
12 to -- is, you know, obviously we have to refer to -- refer  
13 to the fact that his son is dead, but our intention is not  
14 to go into -- we've said we're going to take an hour with  
15 him. That doesn't give us time to really go into all the  
16 details of that. But to really, like I said, that  
17 incident happened, but our focus is going to be on how in  
18 addition to kind of that baseline, the Defendants' conduct  
19 harmed our client. We aren't going to deny that that  
20 baseline exists and, you know, try to, like I said, tell  
21 the -- convince the jury that these folks are -- should  
22 compensate Mr. Pozner for the grief that he suffered as a  
23 result of his son dying. We're -- that's not our  
24 intention. Our intention -- and the -- Judge, I think in  
25 the instruction that I'm redrafting, it is going to say,

1           you've mentioned, you know, the statements from the death  
2           certificate. So that's going to be a fact, but that  
3           isn't -- absolutely not going to be our focus at all, Your  
4           Honor.

5                   THE COURT: Okay. So then -- okay. Regardless,  
6           but what about Mr. Bolton's point? I mean, what if, just  
7           hypothetically speaking, you had a case in which a  
8           defamatory statement was made by a person who was not  
9           competent. What you're asking me essentially is to say,  
10          in the defense, having found that the defendants made a  
11          defamatory statement, lawyer comes in and says, Judge, all  
12          right, my client made that statement, and with due respect  
13          to the Court, I understand that you've ruled the statement  
14          is defamatory, but I intend to prove that my client was  
15          not competent, and therefore, an incompetent defendant  
16          can't have actual malice. In order to prove in my  
17          hypothetical that his client's not competent, he needs to  
18          tell the jury this, hypothetically -- I'm not saying this  
19          characterizes your client, Mr. Bolton -- but  
20          hypothetically speaking, this wild and crazy theory about  
21          spectacular things that are not true but yet believed by  
22          the Defendant in this hypothetical, which if the jury  
23          concluded actually happened, might enable them to say  
24          that's not actual malice. That's a, hypothetically, a  
25          disturbed individual that didn't know what he or she was

1           doing.  And your -- what you're saying is in this  
2           hypothetical, I shouldn't let the incompetent defendant  
3           try to defend the defamation case by proving his client  
4           was incompetent.  That doesn't seem fair.

5                   MS. FEINSTEIN:  I think, Your Honor, we're  
6           actually talking about something a little bit different,  
7           because we're talking about if they want to say that they  
8           believed it, I -- you know, I think they're going to run  
9           into some issues on cross-examination.  But I think the  
10          question -- the question here is whether they were acting  
11          by targeting Lenny here with actual malice, and I think  
12          that there is not -- the problem I have is that it would  
13          be improper for them to ask the jury to make a finding of  
14          fact, essentially, that's different than what you had  
15          already -- than the finding that you already made.  So I  
16          have a problem with that.

17                   But I also think that -- that we don't need to  
18          relitigate Sandy Hook for these folks.

19                   THE COURT:  So --

20                   MS. FEINSTEIN:  If they want to say that they  
21          actually believed it to be true, then I think, you know,  
22          the problem here is that Fetzer's conceded on the record  
23          that he doesn't believe that the statement -- he doesn't  
24          believe those statements are true.  Right?  He's said that  
25          here on summary judgment.  Right?  So there's a difference

1           between why did they publish the book versus the specific  
2           statements. So that's -- that's the issue I'm having. I  
3           mean, he sat here and he said, right? *Well, now, yeah. I*  
4           *see -- I don't believe it anymore.* And in fact --

5                         THE COURT: Well some --

6                         MS. FEINSTEIN: -- at summary judgment --

7                         THE COURT: Some --

8                         MS. FEINSTEIN: -- he put together --

9                         THE COURT: Some parts.

10                        MS. FEINSTEIN: -- a different defense about  
11           what was false or what made it fake, fabricated, or forged  
12           than he put together in the book.

13                        THE COURT: I understand. He conceded some but  
14           not all. He -- I believe he acquiesced that he was now  
15           satisfied that his earlier claims -- I can't remember  
16           which one -- that he was satisfied now he was wrong.  
17           Look, the whole purpose of my having this discussion is to  
18           enable the lawyers to do their jobs in the week that we  
19           have.

20                        I'm going to deny your motion in limine as  
21           you've drafted it, Number 1, for two reasons. One is, I  
22           don't think I could clearly define for Mr. Bolton the  
23           contours of what he can't do through his questions and  
24           what he cannot elicit from his clients.

25                        I do agree with you that the Plaintiff has

1 utilized the summary judgment methodology and already  
2 proven that -- the legal conclusion that there was  
3 defamation, and consistent with that, the facts I found to  
4 support that conclusion, that there was a death  
5 certificate, that it was not false, that it contained this  
6 information. And that I have no problem instructing the  
7 jury that Leonard Pozner had a child and the child's name  
8 was Noah Pozner, the child died, and any other information  
9 on the death certificate. And that the Defendants'  
10 statements that he fabricated it, part or all of the  
11 information, is -- was defamation.

12 I tend to agree with Mr. Bolton that to defend  
13 his client against punitive damages, he has to tell the  
14 story -- he has to tell the story from their perspective  
15 why they did this. And we know what Mike Palecek and  
16 James Fetzer said and says, so be prepared for the fact  
17 that he said, They said it because they believed there was  
18 no Sandy Hook massacre. Nobody died at Sandy Hook. I  
19 mean, I have no doubt in the course of the two days  
20 somebody's going to mention the title of the book, *Nobody*  
21 *Died at Sandy Hook*.

22 MR. BOLTON: In fact, Your Honor, I don't know  
23 that there's been any motion to even exclude the book, and  
24 I -- I can't imagine that -- that a chapter in a book  
25 which is alleged to be defamatory is going to be coming in

1 without the entire book.

2 THE COURT: Maybe so. But you ought to be  
3 prepared for that. And what I attempt to accomplish in my  
4 final pre-trial conference is just to let you know that, I  
5 mean, you can make whatever objections -- evidentiary  
6 objections are pertinent at the time and I'll rule on  
7 them.

8 Please don't anyone make an objection in front  
9 of the jury that says, Judge, they're violating the  
10 Court's order or that you already ruled on that. If you  
11 think that either of the parties have done something then  
12 you can ask for a sidebar. That's inherently prejudicial  
13 and I do not allow it.

14 I think when you flip the focus to the  
15 Defendants and ask the jury to look into their minds,  
16 Mr. Bolton, you open the door to allow them, Mr. Bolton,  
17 to tell the story, arguably fantastic story, that was set  
18 forth in the book they published. And quite honestly, for  
19 the jury to truly understand succinctly what this is  
20 about, I would think that the Plaintiff would want that to  
21 some extent anyway, because it, I would think, it defines  
22 who he is and how it's affected him in the context of the  
23 specific allegation that this -- he fabricated and  
24 falsified a death certificate for an alleged child he  
25 never had.

1           So for trial, I just want to let you know,  
2           Ms. Feinstein, I think there's more going to be coming in  
3           than what came in on summary judgment, because the summary  
4           judgment was a very -- I want to make a record on that  
5           because it had come up. The summary judgment was a very  
6           carefully pled, presented, and argued question by the  
7           Plaintiff limiting the issue, and it was decided. Summary  
8           judgment did not decide actual or express malice or the  
9           nature of Mr. Pozner or Mr. Palecek. To the contrary, I  
10          didn't let them tell me why it is they made those alleged  
11          statement -- why they made those statements, because it  
12          wasn't relevant to that issue that the Plaintiffs -- that  
13          the Plaintiff presented. Now I think you have the  
14          opportunity to tell that story.

15                 But just bear in mind, I do keep track of time.  
16                 I've got your notes about the two hours, two hours. If I  
17                 add that up, you're going to probably start on Tuesday  
18                 morning, you're going to be done Thursday by noon.

19                 MR. BOLTON: Well let me ask you this. Am I --  
20                 have I created then a limit?

21                 THE COURT: Have you created a limit?

22                 MR. BOLTON: In other words, are you saying  
23                 that -- that -- that my estimate -- my time estimates are  
24                 a binding commitment and that by noon on Thursday, I'm  
25                 done or --

1 THE COURT: I don't have a clock. I don't have  
2 a bell I ring or a gong that I bang. What it means is as  
3 follows. I don't have my -- let me make a record on this,  
4 so that anyone knows what I'm doing and why. When we had  
5 our scheduling conference, I handle them always the same  
6 way. We don't ordinarily do them on the record, I don't  
7 remember if I did, but there comes a time in which we pick  
8 a trial date and then I ask people how long is it going to  
9 need to try the case. And if anyone says it's a two week,  
10 it's a three week, it's a four week, I'll ask some  
11 questions, but I always give the time people tell me they  
12 need to put their case in. And in this case, I can tell  
13 you, nobody asked for more than a week. The plan was one  
14 week. All right. So that's number one.

15 Number two. In terms of the Defendant, well,  
16 remember, the Plaintiff has the burden of proof. So if  
17 you took the time and you cut it in half, you ought to  
18 give the Plaintiff a little more than half because they  
19 have the burden of proof. Now I see that the -- the  
20 Plaintiff can -- believes it's sort of like, *Name That*  
21 *Tune*, it can prove its case in three bars, three  
22 witnesses, about three hours of direct, that's about six  
23 hours of testimony. That's like less than one day.

24 So if you said, Judge, if I use those  
25 conventions of the defense should not really be any longer



1 than the plaintiff's case, you should have a day. You  
2 want to double it. Fine. You can have two days. But if  
3 you say I need to sort of put in testimony, three to one,  
4 I need three days, then either you're going into issues  
5 not raised by the plaintiff or it's not relevant, and then  
6 there will be increasingly sustained objections of  
7 relevance, and then it creates a situation where the jury  
8 perceives that the Court's speeding a long the defense.  
9 You know how that works.

10 I -- Mr. Bolton and I are the same -- actually,  
11 might be the same age. I've known Mr. Bolton since law  
12 school days. He's an experienced trial lawyer. So have  
13 you limited? Yeah. I don't -- I don't have Monday. We  
14 don't have court on the weekends and Monday's something  
15 else. So it's Friday. You have Monday to Friday. If  
16 you're only halfway done Friday morning, you've got a big  
17 problem. And it's -- can only be, I think in my mind, is  
18 that it's because you've lost control of your defense and  
19 you're putting in much, much more than really is necessary  
20 given the Plaintiff's case. And you'll likely hear from  
21 me, outside the presence of the jury, my consternation.

22 The other thing, I can make a finding, because I  
23 hear from the jury is one week is a huge amount of time.  
24 Remember, humans today are -- used to be in my generation  
25 it was 30 minutes, because that's how long a TV show

1           lasted. Now attention spans are not five days. It  
2           doesn't benefit any of the parties. This is not a  
3           five-day trial.

4                        So you do what you need to do, but I can't see  
5           how the defense should take more than twice the time the  
6           Plaintiff does given they don't have the burden of proof.

7                        MR. BOLTON: Well, I understand and I hear, Your  
8           Honor, and I will try to be -- and I agree, I think the  
9           more efficient is better.

10                      But I will also say that, you know, the Court's  
11           rule of thumb explanations that the defense should always  
12           be or should generally be less than the Plaintiff and what  
13           not because they have the burden of proof, I think in this  
14           particular case, and probably in many cases and certainly  
15           many defamation cases, the question of punitive damages, I  
16           think, skews those sort of standard expectations. But I'm  
17           not saying that -- I'm not intending for this case to go  
18           beyond the one week.

19                      THE COURT: Okay. So if the Plaintiff -- look,  
20           this is -- if things go ordinarily and I think we'll be a  
21           little slower on jury selection, but ordinarily, the  
22           Plaintiff calls its first witness about 1:00 o'clock on  
23           Monday. Because after you pick a jury, they've got to go  
24           move their cars, go out for lunch. That's ordinarily.  
25           We've got six hours. We take a 15 minute break in the

1 morning, 15 minute break in the afternoon. In the  
2 afternoon, if you come back at 1:00 that's -- we go to  
3 4:30, so that's three and a half hours on the first day.  
4 I envision, Ms. Feinstein, you know, even with a slower  
5 jury selection, you'll be finished by lunch time Tuesday.

6 This is the final pre-trial conference. This is  
7 my attempt which I tell people at the scheduling  
8 conference you should come to the final pre-trial  
9 conference -- I know you weren't there, maybe you've been  
10 at my final pre-trial conference -- but you should come  
11 here knowing -- ready to try your case. So if you call  
12 your first witness on -- after lunch Tuesday, when I add  
13 up your time, you've got nine and a half hours of direct.  
14 That's -- that's, let's say, 20 hours of testimony. Okay.  
15 That might be two and a half days. So do you envision  
16 under any circumstances that you won't complete your  
17 defense by the end of Thursday?

18 MR. BOLTON: No, I don't contemplate that.

19 THE COURT: Okay.

20 MR. BOLTON: I do contemplate not finishing by  
21 Thursday.

22 THE COURT: All right.

23 MR. BOLTON: I didn't mean to be provocative by  
24 my -- I was really just -- because I know there are some  
25 courts where they do have a timer. And so when I -- my

1 real question was simply, am I -- you know, is there -- is  
2 there an egg timer that I need to keep track of. But I  
3 didn't mean to imply that I was intending to --

4 THE COURT: No.

5 MR. BOLTON: -- stretch this out into an  
6 endurance.

7 THE COURT: I think it benefits the process and  
8 I think I do my job better if you get a sense of what  
9 might expectations are, right or wrong. And my  
10 expectations are I want this to go to the jury on Friday.  
11 Sometime, I mean, if it's Friday at lunch, I'm okay with  
12 that. But I don't want to send it to the jury at -- I  
13 want to finish that week and I don't want to send it to  
14 the jury at 6:00 o'clock.

15 I think, with due respect, Mr. Bolton, my worry,  
16 given my experience now, is as follows. Mr. Palecek seems  
17 to be a man of very few words, maybe because he's sitting  
18 next to Mr. Fetzer. That's just in the cases that I've  
19 had here. I don't think that -- I'm not anticipating a  
20 problem in which you'll have witness -- lack of control  
21 over Mr. Palecek on the stand who won't stop talking.

22 Mr. Fetzer -- Professor Fetzer, Dr. Fetzer has,  
23 in my experience in court, exhibited a proclivity toward  
24 perhaps it's professorial discourse. Now, maybe every  
25 question is a 15 minute answer. I don't know. I think

1           what I'm saying to you is you ought to meet with your  
2           client and say, look, we're going have to cut this back.  
3           You don't have all the time in the world to tell your  
4           story. You're going to tell your story, I'm going to get  
5           it in, but we've got to be succinct and efficient, and  
6           you've got to stay on point and answer the questions.  
7           Because I envision the problem is, is you're not going to  
8           limit Mr. Fetzer to a couple hours if you let him start  
9           talking.

10                   All right. So for those reasons, I'm going to  
11           deny the Motion in Limine No. 1, but, Ms. Feinstein, you  
12           certainly have leave to raise any kind of evidentiary  
13           objection at the time these questions are asked.

14                   Number 2. Prohibit reference to the impact of  
15           other negative or defamatory statement on the Plaintiff's  
16           reputation. What's your response to that one?

17                   MR. BOLTON: I'm not exactly -- I don't  
18           completely understand the nature of the motion. I think  
19           the motion is saying that to the extent that I want to  
20           present evidence or argument relating to the questions of  
21           causation and whether or not damages are speculative, that  
22           I cannot do that. And so to the extent that that's the  
23           intent of the motion, then I obviously oppose it.

24                   MS. FEINSTEIN: Your --

25                   THE COURT: Well, why don't you tell me what you

1 had hoped that you would come out of today knowing --  
2 everyone knowing what is out of bounds?

3 MS. FEINSTEIN: Sure, Your Honor. So let's --  
4 let's use a hypothetical. Let's say that three different  
5 people have made statements about me that may be  
6 defamatory and in one instance, one of those people,  
7 Person A, has -- I've sued and the Court has determined on  
8 summary judgment that those statements are defamatory and  
9 so we are going to a damages case about the statements  
10 that Person A made about me and how that has damaged me.

11 What we would ask -- what we ask the Court to  
12 decide is that the defendant cannot come into court and  
13 say, Oh, yeah, sure, you have -- you're claiming that you  
14 were hurt but really you were hurt by Persons B and C, and  
15 not -- you know, and Persons B and C were really the ones  
16 that were damaging your reputation and not so much me, or  
17 to the extent that there is damage, we only did part of it  
18 because it was B and C and we were A and so lots of harm  
19 was done. And that's -- that's the incremental harm issue  
20 that we're -- we're here to talk about the harm that was  
21 done to Mr. Pozner by these Defendants and we believe the  
22 law in Wisconsin doesn't recognize the doctrine of  
23 incremental harm.

24 THE COURT: Okay. Let's --

25 MS. FEINSTEIN: I'm sorry. I said that wrong.

1 Let's say that I already have -- that they're going to  
2 come in and say that I have a bad reputation to begin  
3 with. It's -- I think -- I'm talking about the eggshell  
4 plaintiff, right? It doesn't -- you know, they have to  
5 take me as I come to them when they made their defamatory  
6 statements.

7 THE COURT: Let me rephrase it this way, see if  
8 we can take it in pieces. Mr. Bolton, let's say they want  
9 a motion in limine, nobody should talk about defamatory  
10 statements made by somebody else. Do you think it's  
11 relevant that, let's say, Mr. Fetzer says, Oh, Joe Blow  
12 repeatedly says Leonard Pozner is a liar and a cheat.  
13 What's the possible relevance of someone else's defamatory  
14 statements?

15 MR. BOLTON: Well, the suggestion there is then  
16 that there is no -- no limitation in terms of causation.  
17 If, in fact, for instance, let's say that -- that there  
18 was evidence that other people made statements about  
19 someone and it had no effect on them, they claimed that it  
20 was -- that they were completely, you know, immune to it,  
21 but then -- but then in terms of the narrow issue that  
22 they've tried to confine this case to, that it was -- that  
23 it was, you know, just the most traumatic event in the  
24 world. To say that I can't argue facts and present  
25 evidence that would go to the question of causation, I --

1 THE COURT: No, that's not what I'm saying. Let  
2 me see if I can say it this way. I -- there are two  
3 aspects. Certainly, you can cross-examine on causation.  
4 My question is very simple. I don't think it's fair for,  
5 let's say, James Fetzer to say in defense that my  
6 defamatory statement didn't really harm Leonard Pozner  
7 because 25 other people said the same thing or worse. The  
8 reason I think that's inappropriate is, is, well, maybe  
9 Mr. Pozner thinks those are all defamatory, those are all  
10 hurtful and spiteful: What does he do now? Now he's  
11 pushed back on the heels to say, Well, do I -- why didn't  
12 I sue them? They're not here. They could be slightly  
13 different in the context of what they said. So the actual  
14 statements made by anyone else I don't think -- I think  
15 are highly prejudicial and not probative.

16 Now, I do think, Ms. Feinstein, that Mr. Bolton  
17 perhaps on cross-examination of Mr. Pozner can say just  
18 generically speaking, that, you know, maybe he had  
19 described on how hard this has been and the nature of  
20 these kinds of things that people have been saying or  
21 something like that. I think Mr. Bolton can make sort of  
22 a general reference to say, like, Yeah, but why is this  
23 one statement so damaging to you in the context of the way  
24 that you've been living your life.

25 MS. FEINSTEIN: I think that's fine, Your Honor.



1 Our concern would be -- and I apologize because I messed  
2 up my argument to begin with -- but our concern would be  
3 if the defense is going to come after Mr. Pozner and say,  
4 well, you didn't have much of a reputation to begin with  
5 before we made these statements, that's the doctrine of  
6 incremental harm.

7 MR. BOLTON: I don't intend to do that.

8 THE COURT: One thing -- I don't know if you  
9 know Mr. Bolton. I would say this -- I'd say this about  
10 anyone. If he says he's not going to do it, he's not  
11 going to do it. You can take him at his word for that. I  
12 don't think that would be right anyway to sort of trash  
13 the guy and say he's got a bad reputation, you can't  
14 damage a guy that's already bad.

15 Mr. Bolton, I think you can ask those questions  
16 without getting into the specific statements made by  
17 specific individuals. I don't think it's fair to Leonard  
18 Pozner, for example, for James Fetzer to say, Well, I  
19 might have said that but Kelley Watt said a lot worse.  
20 Why isn't she here? Do you think that -- are you  
21 intending to do something like that by way of comparison?

22 MR. BOLTON: I think -- I think -- I don't  
23 anticipate asking that specific question. But what I will  
24 say more generically is that the notion of -- in terms of  
25 trying to establish for Plaintiff damages, and

1 particularly for emotional distress or that type of -- the  
2 question of causation comes up all the time, and it's  
3 disputed and it's -- it's questioned. And so to say  
4 that -- that there's something unique about damages here  
5 that we're going basically not -- that the -- that the  
6 issues and challenges to causation are not relevant or  
7 whether or not damages are speculative or not, I don't  
8 know that those general rules that would be applicable to  
9 other cases are thrown out the window. The fact that a  
10 damage case may be difficult is not -- is not a basis then  
11 for simply simplifying it for the sake of efficiency.

12 THE COURT: Okay. This is what we're going to  
13 do. Ms. Feinstein, this is another example where I agree  
14 with you in principle. I think what is best for me to do  
15 is rule on the objection when I hear the question. This  
16 will guide you. I presently don't think what some other  
17 person -- what some other third party said, specifically  
18 if you name the name, my ears will perk up. If you say  
19 that this other person said this. Sort of like other  
20 prior bad acts of other individuals, it -- you know, it --  
21 its probative value is completely outweighed by the  
22 prejudicial effect, like I shouldn't be held accountable  
23 because a lot of people say bad stuff about him.

24 Now, having said that, context is everything. I  
25 think context is a component of causation. And I think

1 that if he's asked this question about, well, I don't  
2 know, strategically if he intends to do it, but if he  
3 wants to try to put in a case like, Hey, toughen up,  
4 Leonard Pozner. So what's the big deal? I mean, a lot of  
5 people -- I mean, a lot of bad things have been said about  
6 you, like why should you get anything for this one? I  
7 mean, I think he can talk in a general sense of context  
8 being probative of causation. And that -- that doesn't  
9 bother me. But I have to really listen to the question.

10 I don't think that Leonard Pozner should then  
11 have to defend himself as to why he didn't sue other  
12 people for specific statements. But he has to -- he will  
13 have to explain in his causation a little bit about  
14 himself on why it is he's asking for what you're going to  
15 ask for from these two people for those statements that  
16 they make. And the jury's going to know or suspect, well,  
17 I need to know a little bit about context anyway because  
18 it's possible they're going to hear about the things he's  
19 been doing to defend himself and his sons and they might  
20 wonder about that. So if Mr. Bolton wants to ask a  
21 question, he should be prepared for your client to have an  
22 answer to why is it that he's here asking for that amount  
23 of money from these two people without regard to having  
24 other things swirling about.

25 So one thing I do tell you guys, which I think

1           you know anyway, I do have realtime so I can -- I can  
2           watch as I listen, and I do have the ability to actually  
3           look at the exact question when it's framed in ruling on  
4           an objection.

5                       Once again, by denying your motions in limine,  
6           I'm not saying I don't agree with your principles, I'm  
7           just saying that these are issues that I can't articulate  
8           in such a way that would be so clear as to give Mr. Bolton  
9           the benefit of knowing what's in and what's out. I think  
10          the comments I make should guide the parties on how I'm  
11          likely to rule when the question is made and an objection  
12          is tendered.

13                      Ms. Feinstein, have I ruled on all your motions  
14          in limine?

15                      MS. FEINSTEIN: Yes, Your Honor.

16                      THE COURT: Okay. Oh, I have to be corrected.  
17          Thank you from my clerk. Three preemptory challenges.  
18          Judicial Benchbook CV 12-13. This is what it says: Each  
19          party is entitled to three preemptory challenges exercised  
20          alternatively, beginning with the plaintiff.

21                      Mr. Bolton, here's the Benchbook says, When two  
22          or more defendants have adverse interests, Court in its  
23          discretion may allow each defendant three strikes.

24                      So we'll go with the 12, plus 2 is 15, plus 6 is  
25          21. Call up 21 people.

1                   If you think that you can establish  
2           Mr. Palecek's interest are adverse to Mr. Fetzer, then  
3           I'll hear from you as to whether Mr. Fetzer should have  
4           his own set of three strikes.

5                   MR. BOLTON: So right now the number is -- what  
6           number?

7                   THE COURT: Three.

8                   MR. BOLTON: Yeah.

9                   THE COURT: Three.

10                  MR. BOLTON: Okay.

11                  THE COURT: Anything else? Anything else that  
12           you guys want to talk about?

13                  MR. ZIMMERMAN: We do have one thing, Your  
14           Honor, if I might.

15                  THE COURT: Okay.

16                  MR. ZIMMERMAN: It recently came to our  
17           attention that Defendant Fetzer forwarded the videotape  
18           deposition of my client to a number of individuals. That  
19           deposition was marked confidential under the order that  
20           Your Honor issued. The individuals who received that, it  
21           is our understanding, have forwarded screenshots, and we  
22           are not sure what other information, to any number of  
23           unrelated third-party individuals. Discovery in this case  
24           is closed. We can't meaningfully do anything to determine  
25           how far this confidential information has spread.

1 THE COURT: I'm sorry, I don't have a perfect  
2 recollection of the circumstances in which I concluded  
3 that the deposition is confidential.

4 MR. ZIMMERMAN: The -- Your Honor entered a  
5 confidentiality order by which the parties had the ability  
6 to designate a document or other discovery as  
7 confidential. It would be treated as confidential and not  
8 disclosed to any third parties until and unless there was  
9 a challenge and the Court determined that the document or  
10 discovery was not confidential.

11 Here, for example, Your Honor, the videotape  
12 deposition includes testimony about my client's  
13 psychiatric or psychological treatments, which I don't  
14 think would be difficult under Wisconsin law to establish  
15 are entitled to confidentiality. Moreover, the transcript  
16 itself is marked confidential on every page, and there was  
17 a pretty extensive discussion at the end of that  
18 deposition about how important it was that the deposition  
19 doesn't find its way splashed out onto the internet.

20 THE COURT: I do have a recollection, but maybe  
21 I'm conflating cases. Did there come a time,  
22 Mr. Zimmerman, in which I admonished the defendants about  
23 the importance of staying on task and not trying this case  
24 in the -- a public forum?

25 MR. ZIMMERMAN: In the context of that

1 confidentiality order, which was a stipulated order  
2 entered into by all the defendants -- I believe  
3 Mr. Palecek wasn't on the call, but he assented to it  
4 later -- Your Honor actually instructed all of the parties  
5 that violations of the Court's order would be dealt with  
6 and had the potential for extremely serious consequences,  
7 I believe you stated, up to and including incarceration in  
8 Dane County Jail. So there was a fairly extensive  
9 explanation by the Court as to the importance of complying  
10 with the Court's confidentiality order.

11 THE COURT: Did you talk to Mr. Bolton about  
12 this yet?

13 MR. ZIMMERMAN: We've started talking, and --  
14 again, we can't do discovery on it. So I'm not sure what  
15 the process should be for us, which is why I raise it. I  
16 think we're looking for guidance.

17 I would just say though, Your Honor, your  
18 concern that you raised at the very beginning about an  
19 anonymous jury I don't think is an irrational concern.  
20 You've received e-mails, I've received e-mails, my client  
21 continues to receive extensive communications. He has had  
22 death threats before. And going into that deposition,  
23 there was an understanding that the video would be kept  
24 confidential. There are now pictures of my client, new  
25 up-to-date pictures of my client circulating among the

1 very people who he is most concerned about.

2 THE COURT: Did you get a chance to talk to your  
3 client about this, Mr. Bolton?

4 MR. BOLTON: I have, Your Honor.

5 THE COURT: What did he say?

6 MR. BOLTON: My understanding, and I'm not  
7 disclosing anything that I haven't previously told  
8 Mr. Zimmerman, my understanding, and I -- I think  
9 Mr. Fetzer was questioned about this at his deposition  
10 yesterday -- is that he shared the deposition with two  
11 individuals. I have told him --

12 THE COURT: Who?

13 MR. BOLTON: Um, Mr. Zimmerman, who -- I'm  
14 spacing out on the name of the -- Halbig? Is that --

15 MR. ZIMMERMAN: Wolfgang Halbig.

16 MR. BOLTON: Who is an individual who, as I  
17 understand it, was previously sued also by Mr. Pozner.

18 And then -- and then there was a second  
19 individual. Who -- the individual, I don't recall her  
20 name, but who came up in the Court's -- in the summary  
21 judgment hearing who had provided some assistance in  
22 briefing, I believe, some --

23 THE COURT: This -- this --

24 MR. BOLTON: It was a woman.

25 THE COURT: -- lawyer?



1 MR. BOLTON: Yeah.

2 THE COURT: Purported lawyer --

3 MR. BOLTON: Yeah.

4 THE COURT: -- who's not licensed to practice  
5 law?

6 MR. BOLTON: Yes. Yeah. Yeah.

7 THE COURT: So let's set that one aside.

8 Wolfgang Halbig. Why did he send this to this person?

9 He's not a witness. He's not an expert. He's not -- have  
10 any involvement in this case. In fact, it sounds even  
11 worse that your client would share it with a person who  
12 Mr. Pozner previously sued elsewhere.

13 MR. BOLTON: I don't know the answer to that,  
14 Your Honor. But what I will tell you is that I have --  
15 and -- I neither knew that it was going to happen nor --  
16 and I probably should have -- did I know that it was  
17 marked confidential. I've instructed him not to happen --  
18 for that not to happen. I have also communicated with  
19 Mr. Halbig that -- that he is not to circulate it in  
20 any --

21 THE COURT: Well you've got no leverage on that.

22 MR. BOLTON: Pardon me?

23 THE COURT: You have no leverage on Mr. Halbig.

24 MR. BOLTON: Your Honor --

25 THE COURT: Is it H-A-L-B --

1 MR. ZIMMERMAN: I-G, Your Honor.

2 THE COURT: I-G.

3 MR. ZIMMERMAN: And by way of context, my  
4 client's former -- my client's lawsuit against Mr. Halbig  
5 was for disclosing personal information, including all of  
6 his previous addresses and his social security number  
7 publicly.

8 The attorney was suspended from Colorado after  
9 she accused the Colorado Supreme Court of being involved  
10 in a grand conspiracy, and the conditions of her  
11 reinstatement were a psychiatric evaluation, which she  
12 determined she would not undertake.

13 Your Honor, respectfully, these are about the  
14 two worst people that could have received this kind of  
15 confidential information. And, you're right, Halbig is a  
16 Florida resident. As far as we know, Alison Maynard is a  
17 Texas resident. The Court has no ability to constrain  
18 their behavior nor has their -- have their prior acts  
19 indicated that they would be people who would be amenable  
20 to constraint.

21 THE COURT: What are you asking me to do?

22 MR. ZIMMERMAN: Your Honor, we'd like the Court  
23 to undertake an investigation. Figure out who Mr. Halbig  
24 sent it to. How broadly did this go, to the extent  
25 Dr. Fetzer has access to that information or can otherwise

1 provide access to that information.

2 THE COURT: Well, I don't do investigations.  
3 That's sort of like -- that's Italy, you know, you have  
4 Italian magistrate, but we can notice up and Mr. Fetzer  
5 can be required to come to court to testify, and you can  
6 examine him and the Court can examine him too. I mean,  
7 you're asking -- it's a motion for contempt.

8 MR. ZIMMERMAN: (Nods head in the affirmative.)

9 THE COURT: And I probably -- I do have a  
10 recollection, because Mr. Fetzer and Mr. Palecek were  
11 unrepresented, I went through the language one necessarily  
12 has to put in a motion to apprise them of the sanctions,  
13 which could include incarceration, most people -- to most  
14 that is the worst, or it could be other things regarding  
15 the litigation, like, if -- if he was the plaintiff,  
16 dismissal, or now making findings of other some facts.  
17 Those I would need though to hear from you as to what you  
18 want and then I would take those into consideration.

19 Look, I think, Mr. Bolton, I think it's pretty  
20 clear, apparently, these are the facts. I would have to  
21 look back, but apparently -- well, not apparently, I  
22 signed a confidentiality order. Mr. Zimmerman is saying,  
23 as an officer of the court, that everyone agreed to a  
24 confidentiality order. The deposition -- at the time of  
25 the deposition, did you take the deposition or you were

1           there?

2                   MR. ZIMMERMAN: This was my client's deposition,  
3 but I was there defending him, yes, Your Honor.

4                   THE COURT: And you are saying there was some  
5 discussion on the deposition transcript reiterating the  
6 confidential nature of the deposition?

7                   MR. ZIMMERMAN: That's correct, Your Honor.

8                   THE COURT: And the deposition itself is stated  
9 confidential by the court reporter.

10                  MR. ZIMMERMAN: That's correct, Your Honor.

11                  THE COURT: I note that your client is -- he  
12 repeatedly tells me he's an educated man. He's a former,  
13 I want to say McKnight, that might not be, professor at  
14 the University of Minnesota Duluth. He's got a PhD. He  
15 certainly can read, right, Mr. Bolton?

16                  MR. BOLTON: I -- Your Honor, I'm going to  
17 interpret that as a rhetorical question. But -- but --

18                  THE COURT: It was a rhetorical.

19                  MR. BOLTON: -- treating -- but treating it as  
20 such, I will concede that my client can read.

21                  THE COURT: You concede what?

22                  MR. BOLTON: That he can read. That was the  
23 question as I understood it.

24                  THE COURT: Are you going to concede that he  
25 violated the Court's order?

1 MR. BOLTON: I believe that's the -- I believe  
2 that to be true, Your Honor.

3 THE COURT: Well then there needs to be  
4 consequences. You would like to pursue this matter?

5 MR. ZIMMERMAN: Yes, I -- I think we have to,  
6 Your Honor.

7 THE COURT: All right. Well then we are now --  
8 are you sticking around town? Do you want to come back  
9 tomorrow afternoon?

10 MR. ZIMMERMAN: Unfortunately, Your Honor, I'm  
11 not and unable to come back tomorrow afternoon.

12 THE COURT: Okay. We'll go off the record and  
13 see if we can find some schedule.

14 (Off-the-record discussion.)

15 THE COURT: We'll go back on the record. I do  
16 need -- we need to follow format. You need to file a  
17 motion for contempt. I believe there needs to -- you can  
18 easily find -- Ms. Feinstein can find it -- there's some  
19 language that needs to be put in there. Ordinarily it has  
20 to be personally served on the contemptuous party.  
21 Mr. Bolton will accept service. And because we're going  
22 to pick a date that's mutually convenient, then  
23 presumably, the date in the notice of motion and motion  
24 will be acceptable to the parties.

25 THE CLERK: What's this meeting you have Friday?

1 THE COURT: Go off the record.

2 (Off-the-record discussion.)

3 THE COURT: Once again -- we'll go back on the  
4 record. My clerk, she is the best clerk in Dane County,  
5 by the way.

6 MS. FEINSTEIN: Now that we're on the record.

7 THE COURT: Yeah. May 3rd, 2019:

8 "If a party is determined to have breached the  
9 confidentiality agreement, those -- that party may be held  
10 after notice and a hearing in contempt of court. Let me  
11 make very clear, any party who is shown to intentionally  
12 violate the terms and conditions of a confidentiality  
13 order in this case should subject themselves and be  
14 prepared for the possibility of such remedies as  
15 incarceration in the Dane County Jail. More importantly,  
16 in civil actions, it may result in a dismissal of the  
17 claims, a dismissal of counterclaims. It may result in  
18 the Court making findings of fact that will be read to the  
19 jury if this case goes to the jury. Essentially, the  
20 consequences of an intentional proven violation of the  
21 confidentiality order will be serious, swift, and severe.

22 "Make no mistake about it, everything I've read about  
23 this case, there's this constant sort of tug and pull,  
24 maybe even on behalf of all the parties, given that  
25 Mr. Pozner, himself, has given interviews and appears in

1 the paper. So I'm not simply saying this about Wrongs  
2 Without Wremedies, Mr. Fetzner, or -- or you, Mr. Palecek.  
3 I'm saying this about everyone.

4 "There may be a temptation to use the information  
5 that's discovered in this case to perpetuate the online or  
6 media debate that's going on and will continue to go on,  
7 but if I find out that any party -- any party has breached  
8 this confidentiality agreement and the party that accuses  
9 the other has proven to the Court, the consequence will be  
10 significant.

11 "I'm not going to let this litigation become ensnared  
12 or enmeshed in this overall, overriding controversy in  
13 dispute. That's between you gentlemen and the entities  
14 elsewhere beyond the scope of this agreement -- beyond the  
15 scope of this litigation. My job, and the authority of  
16 the Court is to protect the confidentiality of these  
17 documents in the context of this litigation and to see  
18 whether the Plaintiff can prove by a preponderance of the  
19 evidence the claim it's brought."

20 And that was May 3rd, 2019.

21 THE CLERK: That was the transcript date.

22 THE COURT: What's that?

23 THE CLERK: That was the transcript date. The  
24 hearing was actually April 26th.

25 THE COURT: April 26th. Unfortunately, I guess

1           it came to fruition.

2                   I mean, I'm curious if Mr. Zimmerman doesn't ask  
3 the question or Ms. Feinstein doesn't ask the question,  
4 we'd like to know why he did this.

5                   Okay. Is that time convenient for you,  
6 Mr. Bolton?

7                   MR. BOLTON: Yep. Works for me.

8                   THE COURT: All right. You can put that on the  
9 notice of motion and motion. Anything else?

10                  MR. ZIMMERMAN: No, Your Honor. Thank you.

11                  THE COURT: Anything, Mr. Bolton?

12                  MR. BOLTON: No, Your Honor.

13                  THE COURT: All right. Thank you very much for  
14 coming.

15                   Now we won't have an opportunity to get together  
16 until the day of trial. I always sometimes say to people  
17 if you settle the case then let me know. I think that's  
18 probably -- well, my mother always said hope springs  
19 eternal, but the chances of this settling are probably  
20 slim to none. Just bear in mind that if someone changes  
21 their mind about the trial, because of the number of  
22 jurors we'll be summoning in, the last time for me to  
23 avoid inconveniencing Dane County residents will be about  
24 Thursday at lunch. So please, if you think that this case  
25 is not going to trial, I'd like to know so we don't



1 inconvenience these people who have jobs and lives and  
2 there are costs associated with -- with that.

3 Unless I get something from you, Mr. Bolton, on  
4 the strikes, I think that was the only loose end, right?  
5 We'll just pick -- we'll 8:30 --

6 MR. BOLTON: You gave me at least the -- if, in  
7 fact, on the anonymous --

8 THE COURT: Oh.

9 MR. BOLTON: -- anonymity issue. As I -- as I  
10 say, I don't -- I don't anticipate having any further  
11 thoughts on that, but if I do, I will let the Court know  
12 immediately.

13 THE COURT: Okay.

14 MS. FEINSTEIN: And then, Your Honor, you asked  
15 me to resubmit the introductory instruction based on the  
16 discussion today --

17 THE COURT: Thank you.

18 MS. FEINSTEIN: -- and the questions. When  
19 would you like that?

20 THE COURT: Well, that's the -- you can have --  
21 maybe have that done sometime the Friday before the trial,  
22 so at least Mr. Bolton can have it over the weekend and  
23 not multitask. I -- hopefully that will be agreed to by  
24 the parties as to be -- just other than a bareboned  
25 recitation of the facts relating to the death certificate.

1           Make no mention to the process of the procedure or the  
2           Court's role in this matter.

3                     Although, we will get together, I guess, next  
4           Friday. Maybe by then rather than let me know by trial,  
5           by that date, make a final decision on the  
6           confidentiality -- the anonymous jury.

7                     MR. BOLTON: Yeah.

8                     THE COURT: And the strikes. So we don't push  
9           it.

10                    MR. BOLTON: I will do that, Your Honor.

11                    THE COURT: So we don't push that until Monday  
12           morning.

13                    MR. BOLTON: Yeah.

14                    THE COURT: Other than that, come at 8:30 Monday  
15           morning. We have about a half-hour time. The jury has to  
16           watch a video and then they'll start coming up. I'm going  
17           to probably ask for two to three times what I ordinarily  
18           ask for. We'll see if we can get this though in fairly  
19           quickly.

20                    There was one other thing, if -- presently, I'm  
21           not intending to ask the jury any *voir dire* questions.

22                    Okay. Thank you very much. We'll see you in a  
23           week.

24                    (Proceeding concluded at 3:46 p.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 5th day  
 7 of September, 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 one copy of the  
 10 transcript were prepared by pursuant to Statute.

11 Dated this 23rd day of September, 2019.

12

13

Electronically signed by:

14

15

*Colleen C. Clark*  
 COLLEEN C. CLARK, RPR  
 OFFICIAL COURT REPORTER

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The foregoing certification of this transcript  
 does not apply to any reproduction of the same by  
 any means unless under the direct control and/or  
 direction of the certifying reporter.

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