STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BRANCH 8

LEONARD POZNER, CASE NO. 2018-CV-003122

Plaintiff,

vs.

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

FETZER'S MOTION TO STRIKE FRIEDMAN AND SINELNIKOV AFFIDAVITS, INCLUDING REQUEST FOR SANCTIONS

Defendant James Fetzer, in the first person henceforth, moves to strike the affidavits of Alan Friedman, Ph.D., and Mr. Alexander Sinelnikov for foundational unreliability and violation of a court order. As grounds therefore I state as follows:

1. Dr. Friedman's affidavit states, at ¶7:

> . . . a biological sample from Noah Samuel Pozner (M.E. Case No. 12-17604) was provided by the Office of the Chief Medical Examiner, 11 Shuttle Rd., Farmington, CT 06032.

2. This is a legal impossibility. While Connecticut law requires the Chief Medical Examiner to take DNA samples from homicide victims, it does not permit him to retain the samples. Conn. Gen. Stat. 19a-407a (2012), "DNA Typing," says:

> (a) After performing any death scene investigation when homicide is suspected, the official with custody of the human remains shall ensure that the human remains are delivered to the Office of the Chief Medical Examiner.
>
> (b) The Chief Medical Examiner shall obtain from the human remains (1) samples of tissue suitable for DNA typing, if possible, or (2) samples of whole bone or hair suitable for DNA typing. *The Chief Medical Examiner shall immediately submit the samples obtained to the Division of Scientific Services within the Department of Emergency Services and Public Protection.* (Emphasis added.)

3. It is clear from this statute that if the Chief Medical Examiner had samples of tissue for DNA typing from Noah Pozner in his possession, at *any* time—let alone over six years later—he would have violated this law requiring him to "immediately submit the samples" to DESPP. The law does not authorize him to hold anything back. Thus, whatever DNA sample Dr. Friedman analyzed did not come from the Chief Medical Examiner of the State of Connecticut.

4. The chain of custody affidavit provided by Alexander Sinelnikov, Ph.D. (Dr. Friedman's Exhibit B) does not cure this problem. Dr. Sinelnikov only says, vaguely, that he received a "blood card sent by courier mail service," without identifying where it originated, or even the name of the "deceased individual" it was supposed to have come from. His reference to the "proper chain of custody forms" is, moreover, hearsay, the best evidence being the signed forms themselves. But chain of custody could be perfectly established and there would still be the "fruit-from-the-poisonous-tree" problem that no one knows where the sample that was put in the first tamper-resistant envelope came from originally.

5. The analysis Plaintiff has presented from Dr. Friedman, as well as the DNA profiles themselves, by Dr. Sinelnikov, violate the court's order issued at the April 18, 2019, hearing on Plaintiff's motion for genetic testing. The court ordered the samples be tested by Dr. Michael Baird of DDC-DNA Diagnostics Center in Madison. Instead, they were DNA-profiled by Independent Forensics DNA Testing & Technology in Lombard, Illinois, which produced Friedman's Exhibit C (the results). Dr. Friedman himself is with Helix Biotech in Milwaukee (¶4).

ARGUMENT

A trial court can strike an affidavit as unreliable, *see Dugan v. R.J. Corman R. Co.*, 344 F.3d 662, 669 (7th Cir. 2003), which is what the court must do here with the Friedman and Sinelnikov affidavits. "The weight to be given the testimony of any witness depends in part upon

his knowledge of things about which he is interrogated." *American Securit Co. v. Hamilton Glass Co.*, 254 F.2d 889 (7th Cir. 1958). As demonstrated, the DNA sample of Noah Samuel Pozner could not have come from the Office of the Connecticut Chief Medical Examiner, since as a matter of law that office had no such samples. It can be charitably assumed that neither Dr. Sinelnikov nor Dr. Friedman knew that to be the case. Dr. Friedman's statement about the origin of the sample is wrong. Dr. Sinelnikov's affidavit is so vague it cannot be given weight for any purpose.

Wis. Stat. 802.08(3), states, "Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." As demonstrated, neither Dr. Friedman nor Dr. Sinelnikov had personal knowledge of *whose* DNA they analyzed. Their affidavits have no probative value as to any issue before the court.

There must be consequences to the Plaintiff from the violation of the court order. The sanction I request is that Michael Vabner appear at DDC-DNA in Madison, along with Leonard Pozner and Veronique de la Rosa, in the near future—in my presence, and at Plaintiff's expense—for DNA profiling and analysis by Dr. Michael Baird, and that I be permitted to take Michael Vabner's deposition *duces tecum* at that time.

WHEREFORE, the Friedman and Sinelnikov affidavits must be stricken, and the sanction I have requested imposed on Mr. Zimmerman and Plaintiff for their willful violation of the court's order about who should perform the DNA analysis, in the interest of justice.

/s/ James Fetzer

Date: 7 June 2019 Signed: _____

James Fetzer