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P R O C E E D I N G S

THE COURT: Good morning. This is 18 CV 3122, Leonard Pozner versus James Fetzer. May I have the appearances, please.

MR. PFLUM: Attorney Randy J. Pflum appears on behalf of the plaintiff, Leonard Pozner. And with me appearing as co-counsel is Attorney Jacob Zimmerman.

THE COURT: Good morning. Welcome. For the defense?

MS. SCHANK: Good morning, your Honor. Attorney Jennifer Schank of Fuhrman & Dodge, S.C. appears on behalf of Dr. James Fetzer for the limited purpose of this motion. Also present via this Zoom is Dr. James Fetzer, who has identified himself and is at a separate location, your Honor.

THE COURT: Welcome.

So we're on the Court's calendar because the plaintiff filed what it calls a Motion for Turnover of Property to Apply Property to Satisfy the Judgment.

I have been benefited by the briefs filed by the parties. I've studied those briefs. I do have a couple of questions, and then I intend to rule on the motion from the bench.

Let's start with Mr. Pflum. I usually in all my cases where I have an oral argument begin by just

1 asking you, is there any more that you would like to add
2 in support of your motion that's not repetitive to what
3 you wrote?

4 MR. PFLUM: Your Honor, at this time I have
5 nothing further to add. And I would be happy to address
6 any -- Attorney Zimmerman and I would be happy to address
7 any questions from the Court.

8 THE COURT: All right. I do have a question.
9 I know Ms. Schank has raised some questions about the
10 ability to what I'll call attach this property.

11 It seems to me there are three questions before
12 the Court this morning. One, whether this kind of
13 property can be attached and used to satisfy part of a
14 judgment. Two -- and that's a legal question, by the
15 way.

16 Two, the second question is if it can,
17 factually, is this Mr. -- is this Professor Fetzer's
18 property?

19 And then three, if it can be attached and if it
20 is his property, what amount does the plaintiff suggest
21 should be set off against the monetary judgment against
22 the defendant?

23 So let's set aside the first question, the
24 question of law, because I believe that was briefed
25 thoroughly by the parties.

1 The second question I can set aside for now. I
2 do have a couple questions on Dr. Fetzer's ownership
3 interest in the property. But the third question is is,
4 Mr. Pflum, you don't really tell me how much the property
5 is worth in the plaintiff's opinion and what credit will
6 he give in satisfaction or personal satisfaction of the
7 judgment.

8 MR. PFLUM: Thank you, your Honor. Dr. Fetzer
9 testified during his supplemental exam that in 2019 --
10 and I apologize if this is not laid out clearly in the
11 briefing, but Dr. Fetzer did testify in 2019 that Wrongs
12 Without Wremedies sold off part of the stock of "Nobody
13 Died at Sandy Hook," and he received approximately
14 \$25,000 in royalties. It follows that the remaining
15 editions from the plaintiff's perspective that Dr. Fetzer
16 holds the copyright to those, those editions are also
17 worth an amount not less than \$25,000 as well. And if
18 the Court agrees with us on the remaining questions about
19 whether this is property, this is the type of property
20 that can be applied and turned over, whether Mr. Fetzer
21 does have -- this is actually his property, we would
22 argue or we would offset the judgment by \$25,000 per
23 edition. That's our position.

24 THE COURT: Refresh my recollection how many
25 editions are there.

1 MR. PFLUM: I believe there's four, so in grand
2 total, we would contend that \$25,000 per edition would
3 offset the judgment \$100,000.

4 THE COURT: All right. So Ms. Schank, working
5 our way backward, we now know how much it's worth. Your
6 client, Professor Fetzer, it was slightly ambiguous, and
7 I want to follow up, but let's say he takes the position
8 that, as he has in part, that none of these things are
9 worth anything, a combination of they're not worth
10 anything because they're not being published, they can't
11 be published, or they say they're not worth anything to
12 him because he doesn't even own 'em.

13 So if we assume that they are in Dr. Fetzer's
14 position worthless in terms of a monetary value, and if
15 they have no value to him because they are not being
16 published, can't be published, or not owned by him, why
17 wouldn't he say they want to credit me \$100,000, I'm okay
18 with that?

19 Would you like to go in a breakout room with
20 your client?

21 MS. SCHANK: Um, sure, your Honor, because the
22 \$25,000 setoff is a new --- something new that we didn't
23 know or discuss, so that would be -- if we could have
24 that opportunity, we could be pretty quick and --

25 THE COURT: All right. So let me raise the

1 second point that I'd like you to discuss with your
2 client. And I'm gonna sort of trickle out my current
3 thoughts.

4 I do agree with the plaintiff that this is the
5 kind of property that can be attached. The complications
6 that have been raised by Dr. Fetzer over his ownership
7 interest, it occurred to me, could they not be considered
8 as follows. So Dr. Fetzer says, without reciting back
9 this particular aspect of each individual item of
10 property, he says I don't own that, let's say their
11 domain name. Somebody else does. You can buy it. It's
12 not mine.

13 In real estate, Ms. Schank, which I think maybe
14 you also have some experience, it's not uncommon when you
15 have a party that it's not clear what any and all
16 ownership interest is in the property, then they say,
17 well, look at, I don't know what it is, but I'll give you
18 a quitclaim deed. Whatever I have -- oh, by the way, I
19 don't think I have anything, but if I do have anything,
20 I'm assigning my interest, whatever it is, to you. And
21 if it is worth -- if it's no interest, let caveat emptor.
22 If it's something, well, okay, good luck to you. That's
23 your problem to deal with, whatever you want to do. I
24 don't know what I'm assigning to you. But whatever I
25 have, it's yours.

1 Why not take that approach? At least what I'd
2 like to have you talk to Dr. Fetzer is of the items of
3 property that the plaintiff seeks to attach, I would
4 assume some things like the domain name that he says he
5 doesn't own, that he says, well, okay, I'll give an
6 assignment of all my right, title and interest in it
7 because I don't own anything, it's not worth fighting
8 over, if that's what his position is.

9 So what I thought is, at least in terms of
10 where I was thinking as a resolution of the issue is now
11 that you know the monetary value of by the plaintiff what
12 is sought, does Dr. Fetzer agree or disagree that it is
13 of that much more? Or I assume if he thinks it's worth
14 less, you don't need to say anything. If you think it's
15 worth more, and then why worry about the quality of the
16 rights being transferred because that can be just the
17 plaintiff's problem. That's the question I'm gonna be
18 asking you after you get out of your breakout room. Let
19 me see if I can do that right now.

20 MR. FETZER: Jennifer, I'm good to address
21 these issues.

22 MS. SCHANK: We're gonna go into a breakout
23 room, Dr. Fetzer. So you see on your screen the pop-up
24 where it says "Find Room 1?" If you can click "Find."
25 Oh, it looks like you already did.

1 THE COURT: Yeah. There you go.

2 Just before you go, Ms. Schank, please tell him
3 that -- never mind. I'm just going to mute and stop
4 video. We'll watch to see when they come back, Mr.
5 Pflum.

6 MR. PFLUM: Thank you, your Honor.

7 (Recess)

8 THE COURT: Okay. Let's go back on the record.
9 Ms. Schank.

10 MS. SCHANK: Your Honor, after conferring with
11 my client, we respectfully decline any I'm not sure what
12 we want to call it, but \$100,000 credit, essentially,
13 against the judgment as a means to resolve today's
14 motion.

15 I have some responses to some of the questions
16 that the Court has posed. First, regarding ownership, I
17 think that is a very determinative factor as to why Dr.
18 Fetzner believes that he cannot even, you know, he cannot
19 -- he is not the owner of the books. He has testified to
20 that. Therefore, he cannot turn them over. I don't
21 think that --

22 THE COURT: But Ms. Schank, I think it's really
23 important to use specific language to address this
24 particular factual scenario, and I'm sorry to interrupt
25 you, but I'm not suggesting that he, let's say, perjures

1 himself or force him into saying an untruth that "I own
2 the books and I'll give you my ownership interest."

3 Let's assume from the point of departure the
4 accuracy of the statements he made in your brief that he
5 has no ownership interest. The question then would be is
6 notwithstanding, should I nonetheless by court order
7 transfer to the plaintiff whatever interest Dr. Fetzer
8 has in these assets ranging from sole ownership or no
9 ownership? And my question to you is, let's assuming he
10 does not own them at all, there's no interest in it, I
11 assume Mr. Pflum will continue to say we understand that,
12 your Honor, and we'll take that risk on ourselves. If we
13 essentially buy nothing, it's worth \$100,000 spent. No
14 returns allowed. They go into this transaction with open
15 eyes.

16 So I interrupted you by saying I don't think
17 the question is asking Dr. Fetzer to acknowledge an
18 ownership interest. He can say he doesn't have any
19 interest in it. My question is should I nonetheless
20 transfer any possible right, title and interest that he
21 may have over to the plaintiff for the plaintiff to worry
22 about?

23 MS. SCHANK: Yes, your Honor. And to try to
24 respond to that a little more direct, I apologize for not
25 being clear, but I think the issue with that is that the

1 plaintiff in his reply brief notes that there are 13
2 authors of the content. It seems to be not really in the
3 spirit of Wisconsin collection laws and also creates sort
4 of a slippery slope to have a court order saying, you
5 know, here, plaintiff, judgment creditor, essentially,
6 have at it as to figuring out who owners are, and I'm
7 gonna grant your motion for turnover as to Dr. Fetzner's
8 potential assets, when the plaintiff really hasn't even
9 shown who owns those assets.

10 So to me, that is a very confusing concept that
11 doesn't really comply with the spirit of what Wisconsin
12 Statute chapters 815 and 816 stand for to turn over
13 property to satisfy a judgment, your Honor.

14 THE COURT: Let me give you a hypothetical, Ms.
15 Schank. Let's say, Ms. Schank, you and three of your
16 college friends bought a cabin in northern Wisconsin.
17 Let's say it's titled in College Friends Partnership, and
18 the members of the partners are you and your three
19 friends. Let's say then you have a judgment taken
20 against you, and the creditor wants your assets and
21 understands you have a one-quarter interest in this
22 million-dollar cottage in northern Wisconsin.

23 Are you saying to me then that this asset, a
24 quarter of which you own, is untouchable because of the
25 fact that you happen to own it with three other people?

1 MS. SCHANK: No, your Honor.

2 THE COURT: Well, isn't that the situation
3 here? I want to make clear, and I think Mr. Pflum will
4 correct me if I'm wrong, nothing that's being asked of
5 the Court today and nothing I do here will affect any
6 ownership rights of any other person than Dr. Fetzer.

7 MR. ZIMMERMAN: Your Honor, can I address
8 that? This is Jake Zimmerman.

9 THE COURT: Okay.

10 MR. ZIMMERMAN: Just because I have some
11 additional familiarity with intellectual property.
12 You're exactly right, your Honor. Federal law 17 U.S.C.
13 section 201 defines the ownership of a collective work.
14 And there are multiple levels of copyright that arise in
15 a collective work such as this one where there are 13
16 authors. Section 201(c) says the copyright in each
17 individual chapter resides with the author of that
18 chapter, but the copyright to the work as a whole, to the
19 collective work, resides in the person who compiled the
20 collective work, in this case, Dr. Fetzer.

21 Does that answer the Court's question?

22 THE COURT: It does.

23 Ms. Schank, your response?

24 MS. SCHANK: If I may first go back quickly to
25 the hypothetical that you provided me to just kind of

1 expand why I answered the way I did quickly is that I
2 think that the difference there would be step one of
3 proving the ownership. I hypothetically assume that
4 under that scenario, my name would be on a title or on
5 some kind of operating agreement for the LLC that owns
6 the property. So I believe we're still skipping the step
7 one ownership proof.

8 THE COURT: Okay. Okay. But if that's what
9 you want me to do, then that's fine.

10 Mr. Pflum, I read with some care your brief.
11 You chose a discreet set of assets that you want to be
12 turned over to the plaintiff; right?

13 MR. PFLUM: Yes. Yes, your Honor.

14 THE COURT: And the plaintiff is suggesting
15 there is a factual basis to support the assertion that
16 Dr. Fetzer has an ownership interest in these assets;
17 correct?

18 MR. PFLUM: Yes, your Honor. Correct.

19 THE COURT: Now, I understand Dr. Fetzer has
20 waffled, so to speak, testifying to one thing in his
21 deposition and another in his affidavit. The sham
22 affidavit rule is lurking about here. But I'll address
23 that, Ms. Schank, by a specific question to Mr. Pflum.

24 Mr. Pflum, are you asking me to turn over any
25 asset that you know Dr. Fetzer has no interest in?

1 MR. PFLUM: No. We are only seeking assets
2 that Dr. Fetzer has an interest in by his -- by his means
3 of organizing the -- by organizing the collective work as
4 Attorney Zimmerman just described.

5 THE COURT: And you believe that in your motion
6 and supporting documents, you have made a factual basis
7 to support that statement?

8 MR. PFLUM: Yes, your Honor, because we believe
9 that by Dr. Fetzer distributing, being able to distribute
10 the works and by operation of copyright law that Dr.
11 Fetzer has the ownership interest in the copyright and
12 with the ability and the right to distribute those works.
13 Whether that's written down on a piece of paper
14 somewhere, we have not seen that. However, by our review
15 of copyright law, his ownership interest arose through --
16 by operation of law.

17 THE COURT: So Mr. Pflum, last question for
18 you. If I understand the plaintiff's argument as to
19 ownership, it's really a mixed question of fact and law.
20 The facts have been adduced during the deposition of
21 James Fetzer and in this case over his own statements as
22 to his participation, his creation, his authorship, his
23 editorializing these documents, also his deposition
24 testimony, also his belief at that time over his
25 ownership or rights or entitlement to this property, plus

1 an application of law to those basic facts of the
2 copyright law which then, therefore, creates a conclusion
3 of one way or the other Dr. Fetzer's ownership of this
4 property. Am I correct understanding the plaintiff's
5 argument?

6 MR. PFLUM: Yes, your Honor.

7 THE COURT: All right. Ms. Schank, back to
8 you. I think that I've addressed the ownership interest.
9 I do conclude that the plaintiff has satisfied me as to
10 that mixed question of fact and law that Dr. Fetzer has
11 an ownership interest in the property that's being
12 sought. How much so I don't think can under the
13 copyright law be quantified at this point nor need be
14 quantified in order to grant the motion for the
15 attachment to turn over the property.

16 Ms. Schank?

17 MS. SCHANK: Yes, your Honor. I'd like to just
18 point out a couple other things now that the Court has
19 made a determination on the ownership.

20 We argue that there is no value in any of these
21 assets and, therefore, you know, even if there's some
22 nominal value, that value would be exempt under statutes.

23 THE COURT: So we'll talk about the exemption
24 later, but Ms. Schank, Ms. Schank -- hang on, Dr. Fetzer.
25 Ms. Schank, I'm kind of loath to accept your argument

1 that the assets have no value if I'm inclined to agree
2 with the plaintiff that it has the legal authority to
3 seize the assets. I know it's sort of a -- it's more
4 than just a technical decision. But I'm sure it would be
5 a worse outcome for your client to lose the property and
6 be credited nothing than it would be to lose the property
7 and see a \$100,000 reduction on the judgment.

8 How do you propose to delicately balance? Are
9 you gonna put all your eggs in the basket of saying,
10 Judge, do what you need to do, but I want you to find the
11 property has no value?

12 MS. SCHANK: No, your Honor. But I guess, you
13 know, we feel that it's still relevant and important to
14 point out this Court's order from December of 2019 which
15 prohibited Dr. Fetzner from making certain statements.
16 Those statements are contained in the books. And so it's
17 difficult to understand how the plaintiff would either
18 wish to or how these books could be distributed.

19 I believe Attorney Pflum today stated that he
20 believes that Dr. Fetzner could have distributed the
21 books. But that's not entirely accurate. I believe
22 under that court order of this Court, it would -- he
23 would be prohibited from that specific content of
24 statements.

25 THE COURT: But Ms. Schank, you're backing me

1 into a corner, so to speak. If I agree with your
2 argument or the analysis which you apply, then I must
3 come to the conclusion as a finding of facts that these
4 assets have no monetary value.

5 MS. SCHANK: Your Honor, in response to that, I
6 think this may be a set of circumstances where
7 appointment of a receiver would be appropriate to
8 untangle some of the valuation and specifics of the
9 property behind this and other owners, given the
10 circumstances.

11 Jim, just -- put yourself on mute, Jim, 'cause
12 I'm catching your background a little bit, please.

13 MR. FETZER: Well, I would like to speak,
14 Jennifer.

15 THE COURT: Well, Dr. Fetzer, some things just
16 don't change. It is the standard court practice when
17 individuals are represented by counsel that they speak
18 through counsel. I'm happy to put you back in a breakout
19 room so you can talk to the lawyer about the things which
20 you feel I should understand.

21 MR. FETZER: Well, they're issues that I
22 understand even better than my attorney, your Honor, and
23 I have several key points to make, including the fact
24 that the properties have --

25 THE COURT: Hang on a second. Hang on. Ms.

1 Schank?

2 MS. SCHANK: Yeah. Could we go in a breakout
3 room, your Honor?

4 THE COURT: Okay. Very good. Hang on.

5 Okay. Let's take a little break here.

6 (Recess)

7 THE COURT: Ms. Schank?

8 MS. SCHANK: Yes, your Honor. We're ready to
9 pick up where we left off. But you may have to remind me
10 if the Court was posing a question for me to directly
11 answer.

12 THE COURT: Well, I think we were having a
13 general discussion about whether the argument you were
14 tendering as to the ability to seize property with no
15 value created a conundrum that if I agreed that it could
16 be seized, whether I should give no value to your client.
17 Now, I don't know whether you can argue effectively in
18 the alternative or whether you have to make a concession
19 choosing among two different strategies that are
20 inconsistent with each other because -- because Mr. Pflum
21 argues, at least with regard to the publication, there is
22 a value and as a factual basis has suggested the
23 royalties Dr. Fetzer earned prior to the Court's
24 injunction.

25 Now, that's the factual basis the plaintiff

1 suggests. Is that overly generous because of the hiatus
2 on the publication of the documents because of the
3 pendency of the Court's injunction? Maybe so.

4 MS. SCHANK: Yes, your Honor. I mean, I think
5 in terms of findings of fact, perhaps that there could be
6 a finding that -- you know, I'm trying to think of other
7 proceedings related to executions and sales of property
8 to satisfy judgment. Perhaps there's a finding of an
9 estimated value, but then an additional finding that the
10 debtor can assert exemptions and an additional finding
11 that the property really has to, you know, under 815
12 it'll be sold by sheriff's sale was my understanding. So
13 at that point, I guess then all the parties do know the
14 actual value.

15 THE COURT: But you argue -- this isn't really
16 a problem for me, Mr. Schank, because strategically, the
17 defendant has argued the property has no value. So what
18 possible reason would I entertain further proceedings to
19 establish a value when the possessor of the property is
20 testifying or presenting an argument that it has no
21 value? Usually, it's the opposite. The debtor comes in
22 and says, Judge, this is a million-dollar piece of
23 property, and the creditor says it is not, we'll let the
24 market determine by putting it on the market, which will
25 establish value.

1 the plaintiff's motive in making this motion is.

2 Based on the arguments the way I understand
3 them, the plaintiff's argument is that each time Dr.
4 Fetzer puts content out to the world, whether that's on a
5 blog or the internet or Facebook, then can the plaintiff
6 file a motion for turnover, get control of that property
7 and do as the plaintiff wishes, like deleting the
8 property or just simply having control? And I don't
9 think that is within the spirit of Wisconsin Collection
10 Law. I don't think that that's -- I think it's
11 contraindicative of Wisconsin statutes. And there's a
12 big difference under the case law and what the law
13 requires to a judgment creditor requiring a judgment
14 debtor to turn over property versus turning over proceeds
15 from that property. And we outlined that in our brief
16 and cited some case law to that effect.

17 But I think this is creating a very slippery
18 slope as to then what does a judgment debtor have to turn
19 over because I want to emphasize the very big importance
20 on this Court's order prohibiting certain statements that
21 are contained in these books that the plaintiff requests
22 to turn over. They can't be distributed. I can't
23 imagine that the plaintiff would ever, you know,
24 voluntarily allow the sale of these allegedly defamatory
25 books.

1 So overall, I don't think that this motion is
2 to satisfy the plaintiff's judgment. This motion has
3 different motives. And regardless of what the findings
4 of fact might be as to ownership and value and the legal
5 question of can, you know, copyright rights be turned
6 over, I think that this is a very, very thin line between
7 what should a motion for turnover to satisfy a judgment
8 in Wisconsin be used for.

9 THE COURT: Mr. Pflum, before your reply, Ms.
10 Schank, I don't know of any support in Wisconsin
11 Collections Law for the proposition that the court need
12 concern itself with the creditor's motive. Can you cite
13 any case or argument in support? I mean, maybe the
14 motive is nefarious. The question is, is the property,
15 is it subject to seizure or attachment, and what is it
16 worth? Why would the motive be relevant? And if you
17 believe it is, what is your authority?

18 MS. SCHANK: I believe it's just relevant from
19 the -- from a policy perspective and legislative intent
20 in writing Chapters 815 and 816. There are specific
21 standards and procedures set forth in those statutes, and
22 the intent of those statutes is to collect property from
23 a judgment debtor to apply to a judgment. And I would
24 argue that those statutes even just read literally show
25 that that policy and legislative intent is to collect

1 money for a judgment, not to have, you know, some other
2 motive or even a nefarious motive, whatever the judgment
3 creditor's motive is, that that's not in the spirit of
4 Wisconsin Collection Law, your Honor.

5 THE COURT: Thank you.

6 Mr. Pflum, it's your motion. You get the last
7 word.

8 MR. PFLUM: I think Attorney Schank said --
9 laid out our -- laid out how Wisconsin law, collection
10 law, should work. Plaintiff has identified an interest
11 in property that we think has value, and we are before
12 the Court to apply that property to a judgment debt.

13 Section 816.08 of Wisconsin law says the Court
14 may apply any property to satisfy the judgment, and that
15 is our motive here today.

16 Attorney Schank also addressed a part of the
17 domain content. And if I may, your Honor, I'd like to
18 have Attorney Zimmerman address that portion of her
19 argument.

20 THE COURT: Okay. Mr. Zimmerman.

21 MR. ZIMMERMAN: Thank you, your Honor.

22 From an intellectual property perspective, when
23 an author creates an original work, a copyright arises as
24 a matter of law. That is an asset in this case of Dr.
25 Fetzer. Every time he posts something to his blog, a

1 copyright exists as a matter of law. We think that
2 there's at least some value associated with those works
3 and, therefore, we think it's appropriate to apply them
4 to the debt, to the judgment in this case. And if Dr.
5 Fetzner were to write a new book and offer it on the
6 market and it had value, hypothetically, we think
7 Mr. Pozner would have the right under Wisconsin law and
8 under federal law to seek involuntary turnover of that
9 property, as long as we can establish some value to
10 offset the judgment.

11 And we're not here saying we think these things
12 have pennies of value. We're here saying they have real
13 dollar value and we're willing to offset a significant
14 portion of the judgment in exchange for turnover of the
15 property.

16 THE COURT: And I think as to the point Ms.
17 Schank was making about this hypothetical, well, what
18 about what Mr. Fetzner does tomorrow? And I think,
19 Mr. Zimmerman, you're saying nothing we do or say here
20 today with regard to the turnover of the property sought
21 applies prospectively in this hypothetical creation of
22 intellectual property at a later date.

23 MR. ZIMMERMAN: Yes, your Honor. That's
24 exactly right. If Dr. Fetzner was in the furniture-making
25 business, we're not asking for chairs that he hasn't made

1 yet. But in the future, if he were to create a new thing
2 that has value, my client has the right to attempt to
3 take that property in exchange for an offset in the
4 amount of the judgment.

5 THE COURT: All right.

6 MR. ZIMMERMAN: If Dr. Fetzer wins the lottery
7 next year, we have a right to go after those assets,
8 which are dollars and are intangible. Intellectual
9 property is not different than that. We're looking at
10 things that he has created and for which he has an
11 existing copyright ownership.

12 THE COURT: Thank you, Mr. Zimmerman.

13 Mr. Pflum, anything further?

14 MR. PFLUM: Nothing further, your Honor. Thank
15 you.

16 THE COURT: All right. Since they
17 double-teamed you, Ms. Schank, anything that you'd like
18 to add in sur-reply?

19 MS. SCHANK: Yes, your Honor. I guess I would
20 like to address then Dr. Fetzer's entitlement to a
21 statutory exemption. I don't think I was able to cover
22 that. But under 815.18(3)(b), I'm not sure how this
23 would work given the sort of, in my mind, hypothetical
24 \$25,000 value. But we do on the record assert
25 Dr. Fetzer's exemption, which would be in the amount of

1 \$15,000.

2 THE COURT: How is that consistent with your
3 argument and your assertion the property has no value?
4 How do I -- how do I work all this sort of complicated
5 iterations so that, Judge, first we want you to find
6 there's no value 'cause we think that's a correct answer
7 to the factual question?

8 MR. FETZER: Can the attorney and I have a
9 separate moment to consult, your Honor?

10 THE COURT: Let me finish with my thought. And
11 then to say, well, I want to argue in the alternative
12 that now we say it has value and we want a \$15,000
13 exemption. But how would that work? Play it out for me.
14 I mean, if we turn it over, since this is -- since this
15 is not -- these assets are not actually something that
16 apparently can be liquidated to cash. You know, I
17 understand the exemption of taking the bank account or
18 we're gonna seize the house or the car or the like. Just
19 I want you to tell me how you think this would work first
20 with regard to your factual assertion that it has no
21 value, and then assuming it has a \$25,000 or \$100,000
22 value, what are you actually proposing?

23 MS. SCHANK: Sure, your Honor. What I'm
24 actually proposing or the way I believe that procedurally
25 the next steps would be if the Court does order the

1 turnover of certain property would be that then
2 statutorily, the plaintiff has to sell the property to
3 apply to the judgment. And at that point, then if there
4 is value, we'll know, and then Dr. Fetzer at that point
5 would -- that's when he would assert his exemption.

6 So I think there are some contingencies the way
7 I procedurally think that that process would go if the
8 Court orders turnover today.

9 THE COURT: Mr. Pflum?

10 MR. PFLUM: Your Honor, reviewing 815.18, we do
11 not believe that exemption applies. It's for business
12 property. Ms. Schank has not identified a specific piece
13 of property in which to apply that \$15,000 exemption to.
14 815(3)(b) -- 815.18(3)(b) says it's business and farm
15 property, equipment, inventory, farm products and
16 professional books used in the business of the debtor.

17 Mr. -- as we argue, Mr. Fetzer created a
18 copyright in books. I do not believe that -- we do not
19 believe that that particular exemption would apply
20 because he's not using these professional books in the
21 ongoing -- in an ongoing business. And --

22 THE COURT: Go ahead.

23 MR. PFLUM: As to the other point, how this
24 would apply, if they do identify a particular piece of
25 property to offset the exemption, then I think it

1 speaks -- I think that what the Court, or how it would
2 apply this would be an \$85,000 reduction to the judgment
3 as opposed to a \$100,000 application.

4 THE COURT: Well, yeah, I agree. I was gonna
5 -- thank you, Mr. Pflum. I'm interrupting you.

6 Ms. Schank, so first of all, setting aside
7 Mr. Pflum's legal argument that it doesn't apply at all,
8 but even if it did, so here we're talking about things
9 that can't be published, but have, under your own
10 client's testimony, have no value. So are you suggesting
11 that then if I do turn it over, what you want me to order
12 the plaintiff to do is to have a sale, a sheriff's sale?
13 If nobody bids on it, it just cost your client \$100,000.
14 Is that what you want?

15 MS. SCHANK: Um, I can't speak to what I want,
16 your Honor, but I think that if there's -- if the Court
17 orders turnover, regardless of who wants what, I
18 struggle, your Honor, with our hypothetical of talking
19 about dollar amounts because I've never -- you know,
20 typically in motions for turnover to satisfy judgment, it
21 seems to me that rather than the plaintiff simply -- they
22 still have to follow sale procedures and execution
23 procedures under the statutes versus, you know, we have
24 findings of fact and a court order on our motion for
25 turnover, but then what is the question --

1 THE COURT: There is a provision that allows
2 the debtor and the creditor to stipulate as to value if
3 there's no genuine dispute. I mean, this is a \$100,000
4 question.

5 Now, I should actually say parenthetically, if
6 Dr. Fetzer's point is it's worth \$125,000, I'll give you
7 an opportunity to go in a breakout room to talk about
8 this, but this right now is a \$100,000 question. And it
9 just seems to me a little odd and quite telling that the
10 debtor would take a position that a property that the
11 creditor wants to value at \$100,000 has no value, and
12 just to prove Dr. Fetzer's point, if ordered turned over,
13 the creditor should sell the property or try to sell the
14 property at no value. So --

15 MR. FETZER: May I consult with my attorney,
16 your Honor?

17 THE COURT: Okay. I'll put you in a breakout
18 room. Last breakout room, though.

19 MS. SCHANK: Thank you, your Honor.

20 MR. PFLUM: Thank you, your Honor.

21 (Recess)

22 THE COURT: Welcome back.

23 MS. SCHANK: Thank you, your Honor, for the --
24 we appreciate your courtesy in giving us all these
25 breaks. Just a couple quick comments.

1 We, after conferring -- after conferring with
2 my client, we're not willing to stipulate to any amount
3 of a value as to the property. And just two very brief
4 comments, and then I'll conclude my comments.

5 THE COURT? Because this isn't -- I mean, a
6 couple thoughts. Ms. Schank, is this a marital debt?

7 MS. SCHANK: No. I do not believe so, your
8 Honor. The judgment was against Dr. Fetzer only, and it
9 was, I believe, a tort claim related to the defamation
10 claims, and his spouse was never implicated. I'd ask
11 that Attorney Pflum confirm that, but that's --

12 THE COURT: I was there. I know what it was.
13 But I'm not so sure -- I do a lot of family law, and I'm
14 not sure it's clear. And I wonder what Mrs. Fetzer
15 thinks about leaving \$100,000 on the table, so to speak.
16 So I just want to let you know before you finish your
17 thoughts of refusal to concede value, you should be
18 prepared then for me finding accepting the factual
19 assertion by the debtor, that I will accept the assertion
20 that the property has no value. And if I make that
21 finding of fact, then there's no need to sell the
22 property on the market.

23 But even if I didn't do that to you, Ms.
24 Schank -- and I will confess, I'm at the outer edges of
25 my understanding of collections law, but there are I

1 believe in the statutes alternative ways of valuing the
2 asset that is being seized. You don't have to sell
3 everything on the sheriff's sale. You can set the value
4 through an appraisal. Correct?

5 MS. SCHANK: I think that's correct, your
6 Honor.

7 THE COURT: All right. So who better to
8 appraise the value of this asset than your own client
9 who's telling me under oath it's not worth anything?

10 So if we went the value route, I don't know why
11 we'd even have a contested case if the debtor's position
12 is it has no value. But even if I assume Dr. Fetzer's
13 factual assertion, I mean, are you saying that you think
14 a -- I mean, this is Mr. Pflum's point. So we get
15 someone to appraise the intellectual property who's
16 knowledgeable in training, and they'll say to a
17 reasonable degree of certainty given the circumstances of
18 the property, it's not worth anything. Well, then you've
19 answered the question. There's no setoff against the
20 property if it has no value.

21 But let's say that the guy says it's worth
22 \$100,000. The only thing you've accomplished is then the
23 debt is reduced by \$85,000. The judgment still stands.
24 I'm just not sure how this --

25 MR. FETZER: Your Honor, just to clarify the

1 point --

2 THE COURT: Mr. Fetzner --

3 MS. SCHANK: Jim --

4 MR. FETZNER: -- there is no value as long as it
5 cannot be marketed. If the book could be marketed, it
6 would have value.

7 THE COURT: The record will reflect that I've
8 muted Dr. Fetzner. It's not any disrespect to you,
9 Dr. Fetzner, but the judge is supposed to maintain the
10 control and order in a court proceeding, and that
11 includes the longstanding principle that persons
12 represented by counsel speak through counsel. And I know
13 Ms. Schank would like to speak on your behalf and has not
14 yielded her legal responsibility to her client.

15 I mean, I understand, Ms. Schank, but I just
16 think that perhaps for the sake of argument, the debtor
17 has lost the perspective of the long-term goal of
18 removing the Fetznors from beneath this mounting debt.

19 All right. I'll address that. Mr. Pflum, I
20 guess -- I guess if in fact -- I think Ms. Schank
21 probably makes the point, look at, I think you could
22 argue that your valuation of the asset of \$100,000 is
23 grossly inflated. So if the plaintiff, if the debtor
24 demand is refusing to acknowledge or accept that as to a
25 stipulated, then I think what they're saying is the value

1 should be determined by the processes set forth in the
2 statutes. I think she's right on that. It doesn't mean
3 that you don't turn the property over. It means that the
4 creditor needs to make objective the valuation of the
5 property.

6 If Dr. Fetzer wants to find an expert that says
7 it's worth a million dollars, well, we'll see. I guess
8 it's something I should hear. I don't know how he's
9 gonna find someone given his own statement that it's not
10 of any monetary value. The law -- the court order
11 prohibiting Dr. Fetzer from continuing or repeating his
12 defamatory statements is not gonna go away or be changed,
13 so that aspect of the property's value is static.

14 So Mr. Pflum, I mean, I guess don't you think
15 Ms. Schank is right, they can demand an independent
16 valuation even though a reasonable person would think
17 it's gonna be far less than the offer made by the
18 plaintiff -- excuse me -- made by, yeah, the plaintiff?

19 MR. PFLUM: Yes, your Honor. I agree that
20 under 815.18(7), the value of any property subject to an
21 exemption shall be determined by agreement of the
22 parties, which we do not have, or a commercially
23 reasonable manner. And if your Honor isn't inclined to
24 have an appraisal, we -- you know, I believe that
25 Attorney Schank has mentioned this as well, that if a

1 receiver needs to be appointed in order to apply this,
2 apply the copyright to the -- to satisfy the judgment
3 through a sale, we would -- we can certainly file a
4 motion.

5 THE COURT: We don't have to go that far
6 because I think the creditor retains the power to decide
7 what the creditor wants to do with the seized property.
8 The creditor might say, look at, I mean, if I was -- if
9 this was an agricultural case, the debtor would say,
10 listen, I want my tractor back, it's my collateral and I
11 want you to take it to satisfy the judgment, and I don't
12 want to sell it. I want to use it to plow the fields.

13 So I'm not asking the plaintiff to make a
14 decision today over what commercially reasonable way the
15 plaintiff wants to set the value because it's very likely
16 that the plaintiff does not want to put this particular
17 -- these particular assets back into the market for
18 continued use by anybody else. What I know about the
19 case, I would think that would be the situation that
20 Mr. Pozner is buying an asset, the source of what
21 frustration he's had over the many years in continuing
22 and forming the basis in the underlying defamation case.
23 So I don't know that it's gonna go that direction, and I
24 don't know that I need a receiver.

25 If Ms. Schank wants to challenge the valuation

1 offered by the creditor, I think she has that right. And
2 if the appraisal comes out as Dr. Fetzer seems to
3 suggest, it's worth nothing, then Mr. Pozner will still
4 have the asset, but the setoff will be zero, or a dollar,
5 a nominal value.

6 But I think, Ms. Schank, I assume you've
7 talked, even though I said it was the last one, I assume
8 that this is a risk that your client wants to take
9 because of his rejection of the proposed valuation by
10 stipulation.

11 MS. SCHANK: It is -- it is a decision that we
12 have discussed, and there are -- that's not the only
13 reason, your Honor. But, you know, there are other
14 reasons we still feel that there's a procedure set in
15 place to seize and sell assets.

16 THE COURT: Let's use the statute. I think,
17 Mr. Pflum, it's not to seizure or to sell. That's not
18 what collections is. It's for seizure and to assess
19 value in a commercially reasonable manner.

20 I mean, you're not suggesting that every
21 creditor always is required to sell an asset because
22 that's the only commercially reasonable way to establish
23 its value. There are other ways because the statute
24 recognizes that by using those terms. Do you disagree,
25 Ms. Schank?

1 MS. SCHANK: I may disagree, your Honor, but I
2 want to take a look at the statute before I disagree. If
3 you'll give me one second, please.

4 (Pause)

5 MS. SCHANK: So the point that I disagree with
6 a little bit, your Honor, is that under 815.29, that
7 talks about -- I mean, the language of the statute talks
8 about sale after seizure of property to apply to a
9 judgment. I'm trying to think of collection situations
10 that I think I've seen, and I think I've seen a fair
11 amount of them, where a judgment creditor is just able to
12 hold on to property with I guess arguably adding on
13 disputed value.

14 I'm trying to picture how this would actually
15 work.

16 THE COURT: I would envision -- look, there's
17 no question a debtor is entitled to a setoff for the
18 reasonable valuation of the property seized. I agree
19 with you completely. I do not agree that the only method
20 of determining its reasonable value is to sell it. In
21 fact, that might be the worst way to sell intellectual
22 property. I mean, this isn't a house or a car. A debtor
23 might say the property, that the market for the property
24 is not conducive to a sale on the Dane County Courthouse
25 steps and that the proper way of giving the credit to the

1 debtor would be an alternative valuation by persons
2 knowledgeable over the value of intellectual property.

3 So I think, though, if that is --and I don't
4 believe that's a unilateral decision that can be made by
5 the creditor alone, that if the debtor challenges the
6 valuation, I mean, I think either party essentially could
7 ask the Court absent an agreement to make that judicial
8 determination which for intellectual property might be
9 fairer to both parties.

10 All right. Thank you very much. I do conclude
11 after careful consideration of the written material and I
12 think in consideration of the arguments made by counsel I
13 will go ahead and grant the motion. I believe I can
14 answer the questions that I posed at the outset of this
15 hearing as follows.

16 This is property that can be seized by the
17 creditor, and I do agree with the legal arguments, the
18 cases and analysis set forth in the plaintiff's brief and
19 reply brief on that question which I adopt and
20 incorporate in my oral decision from the bench on that
21 issue.

22 I'm gonna do a favor. I believe that -- I
23 believe that the plaintiff has made an offer for a
24 valuation for the property far in excess of what I think
25 based on Dr. Fetzer's position is its worth. I do think

1 that if the debtor continues to maintain the position
2 that it is worth some other value, I don't know why
3 anyone would want further litigation to say something is
4 worth less than what the creditors, but I guess Dr.
5 Fetzer has that right to say it's some valuation
6 different. I do think that a commercially reasonable
7 manner is an alternative other than a sale, and I don't
8 think under the circumstances considering the equities
9 and the position of the parties that it's appropriate to
10 appoint a receiver. I didn't even get into who's gonna
11 pay for the receiver, but the expenditure and additional
12 financial resources in this case at this time under these
13 circumstances do not warrant it.

14 I think, Ms. Schank, I will give the debtor 20
15 days to state its position with regard to the valuation
16 of the property that's seized. If the debtor asserts
17 that the valuation is anything different than the offered
18 amount, then you are to write the Court. And 30 days
19 thereafter, Mr. Pflum, if you can draft an order for my
20 signature, 30 days after making a statement that is -- I
21 think 10 days to make a decision as to valuation. If you
22 say we disagree with the valuation, then 30 days
23 thereafter -- no, I should say 60 days thereafter, the
24 debtor should submit to the Court an evidentiary basis,
25 namely, an appraisal by an expert, as to what the debtor

1 believes the property is worth. That appraisal for the
2 debtor's suggestion as to the valuation of the property
3 then will be considered by the Court.

4 Mr. Pflum, if the plaintiff wants to submit its
5 own appraisal for the valuation, it should do that 60
6 days thereafter. Upon receiving both appraisals for the
7 valuation, the Court will either issue a written decision
8 or schedule it on for further oral proceedings.

9 Finally, as to the issue of ownership or not,
10 I'm satisfied that there is a factual basis to support
11 the plaintiff's assertion that Dr. Fetzer has some
12 ownership interest in all the assets that are seized of
13 some kind and to some degree.

14 So to the extent that Dr. Fetzer's affidavit is
15 directly inconsistent with his prior sworn testimony, I
16 will strike those provisions under the Wisconsin sham
17 affidavit rule.

18 Dr. Fetzer, the sham affidavit rule says a
19 dispensable procedure within the discretion of the Court
20 to say the best evidence of a person's factual knowledge
21 is at the deposition taken available for cross
22 examination. A subsequently prepared affidavit that's
23 inconsistent with the oral answers made under oath at a
24 deposition are not to be considered by the Court. And in
25 those circumstances, I believe there is a factual basis

1 for the plaintiff's assertion of not only ownership of
2 the property, but the nature and degree of what interest
3 may exist.

4 So essentially, I view this as a creditor
5 essentially getting a quitclaim from the debtor,
6 understanding the debtor may take the position
7 anecdotally that this isn't his property. That's the
8 creditor's problem. And nothing I say or do as
9 acknowledged by Mr. Pflum should suggest that my decision
10 affects other persons or entities having an ownership
11 interest in the seized property, only that Leonard Pozner
12 now stands in the shoes of Dr. James Fetzer and that
13 Leonard Pozner possesses all the rights, title and
14 interest in the property to whatever degree they exist
15 that were formerly possessed by Dr. Fetzer.

16 If we need to have a separate hearing on the
17 valuation, I'll schedule a separate hearing because I do
18 believe Dr. Fetzer is entitled to an accurate setoff of
19 the value of this property. And as I indicated, I choose
20 to accept the commercially reasonable method to determine
21 the value of the property by expert testimony and written
22 appraisals.

23 Mr. Pflum, or I should say Ms. Schank, have I
24 missed any issue? Have I not addressed every argument
25 that you've raised?

1 I should say parenthetically I guess we can
2 deal with the setoff issue after if we have a hearing on
3 the valuation of the property. I know, I will
4 acknowledge the plaintiff's position that the setoff does
5 not apply as a matter of law. But there's no sense in
6 me, Mr. Pflum, making a call on that if we're going to
7 have another hearing over valuation. The plaintiff
8 retains its ability to argue that the setoff doesn't
9 apply as a matter of law.

10 Alternatively, once we've determined value by
11 appraisal, I can make a decision in the alternative even
12 if it did apply what the setoff would be.

13 Ms. Schank, have I addressed all the issues and
14 arguments that you intended to present here this morning?

15 MS. SCHANK: Yes, your Honor. If I could
16 comment on one thing, one aspect of your ruling, if I
17 may.

18 THE COURT: Okay.

19 MS. SCHANK: There was a reference, you struck
20 -- the Court struck some paragraphs from Dr. Fetzer's
21 affidavit given his prior supplemental examination
22 testimony. And I just wanted to clarify that that
23 supplemental examination was taken in March of 2020 and,
24 you know, some of the testimony simply just changed as to
25 ownership. Specifically, what I'm talking about is the

1 domain names are -- evidence and exhibits attached to
2 Dr. Fetzner's affidavit show that the domain names'
3 actually ownership lapsed in between 2020 and now. So I
4 just wanted to put that on the record.

5 THE COURT: Well, thank you. And I think that
6 point may deserve some elaboration.

7 The truth be told, Ms. Schank, even if I -- I
8 did read the affidavit of Dr. Fetzner. Even if I accepted
9 it and didn't do anything about it, it wouldn't change my
10 legal conclusions and my conclusions made here today. I
11 pointed it out only in that I did not want to give
12 credence to a further argument that when faced with
13 inconsistent evidentiary testimony, a statement made
14 during a deposition or a statement made in a subsequent
15 affidavit, where inconsistent, the prior recorded
16 testimony during the deposition will prevail under the
17 sham affidavit rule. If in fact they're not inconsistent
18 because of the passage of time, then the point that I'm
19 making may not apply.

20 MS. SCHANK: Thank, your Honor.

21 THE COURT: Mr. Pflum, anything further from
22 you?

23 MR. PFLUM: Your Honor, just to clarify the
24 dates, the motion is granted --

25 THE COURT: -- effective immediately.

1 MR. PFLUM: -- effective immediately. Dr.
2 Fetzner has 20 days to submit a valuation.

3 THE COURT: No. He has -- let's say this. He
4 has 10 days to tell me in writing whether he accepts the
5 plaintiff's valuation of the property now owned by
6 Leonard Pozner. If he says I do not accept it and I
7 choose to employ the Court's alternative commercially
8 reasonable manner of valuing the property, then 60 days
9 thereafter, or 70 days from today, he's to submit expert
10 testimony in the form of an appraisal. The plaintiff
11 then gets 60 days thereafter to make a decision what the
12 plaintiff wants to do.

13 I mean, if I accept the appraisal, whatever it
14 is, then you don't need to do anything. But if I
15 disagree, then Mr. Pozner will submit his own appraisal,
16 I will look at that and then make a decision on further
17 scheduling thereafter.

18 MR. PFLUM: Thank you, your Honor.

19 THE COURT: Anything else, Mr. Pflum?

20 MR. PFLUM: No, your Honor. Thank you.

21 THE COURT: Thank you very much.

22 Mr. Zimmerman, anything further from you?

23 MR. ZIMMERMAN: No, your Honor. Thank you.

24 THE COURT: Thank you very much, ladies and
25 gentlemen. Appreciate you calling in. Have a good rest

1 of the day. We're adjourned.

2 MR. PFLUM: Thank you, your Honor. You as
3 well.

4

5 STATE OF WISCONSIN)
6 COUNTY OF DANE) ss:
7

8 I, ANN M. ALBERT, Court Reporter, do hereby certify
9 that I reported in stenographic machine shorthand the hearing
10 held in the above-entitled matter before the Honorable FRANK
11 D. REMINGTON, on the 24th day of June, 2022, and that the
12 foregoing is an accurate and complete transcript of my
13 shorthand notes and the whole thereof.

14 Dated this 7th day of July, 2022.

15 Electronically signed by:

16

Ann M. Albert
Court Reporter

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