

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUDOVSKY and)	09-CV-0727
LEONARD SOSNOV,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
)	
WEST PUBLISHING)	
CORPORATION, WEST SERVICES,)	
INC., and THOMPSON LEGAL)	
AND REGULATORY, INC., t/a)	
THOMPSON WEST,)	Philadelphia, PA
)	December 15, 2010
Defendants.)	10:19 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN P. FULLAM
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	RICHARD L. BAZELON, ESQUIRE MATTHEW R. SKOLNIK, ESQUIRE NOAH H. CHARLSON, ESQUIRE BAZELON, LESS & FELDMAN, P.C. 1515 Market Street Suite 700 Philadelphia, PA 19102
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For the Defendants:	AARON M. ZEISLER, ESQUIRE JAMES F. RITTINGER, ESQUIRE SATTERLEE STEPHENS BURKE & BURKE, LLP 230 Park Avenue New York, NY 10169
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Audio Operator:	DENNIS TAYLOR
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1 there read that supplement and concluded that it was
2 inaccurate and out of date, and, therefore, thought less of
3 the plaintiff or thought that it in any way damaged their
4 reputation, there's no evidence about that -- none. If it's
5 not libelous per se, then the case is over.

6 And I thought -- what I started to say, Your Honor,
7 is that that's implicit in Your Honor's decision. But even if
8 it's not implicit in Your Honor's decision, the law is clear.
9 If it's not libelous per se, they have to have some proof of
10 actual damages, and they don't have any. So that ends the
11 case there.

12 You then move to the subject of, even under -- even
13 if somehow you get by those -- those obstacles, you then move
14 to the fact that they're asking for presumed damages and --
15 and punitive damages, Your Honor, as well.

16 THE COURT: Right.

17 MR. RITTINGER: In order to recover either under
18 Gertz and the progeny -- this is the Supreme Court of the
19 United States that we're talking about now, Your Honor. And
20 they have to prove knowledge of falsity and reckless disregard
21 for the truth as Your Honor knows.

22 There is absolutely no evidence in this case that
23 West knew that what it was doing was inaccurate and out of
24 date.

25 THE COURT: Well, did West or did it -- did West or

1 did it not know that the plaintiffs had not prepared the
2 supplement?

3 MR. RITTINGER: Yes, they knew that the defendants
4 (sic) had not prepared the supplement.

5 THE COURT: Then why did they put their name on it?

6 MR. RITTINGER: Because they had a contractual right
7 to do it, and that's been conceded.

8 THE COURT: Contractual right to put their name on
9 something that they didn't do -- that they didn't contribute
10 to?

11 MR. RITTINGER: Your Honor, the plaintiffs testified
12 that they had a contractual right. The only problem -- they
13 didn't have a contractual right to put their name on something
14 that -- and I'll use their term -- a sham. That they didn't
15 have.

16 THE COURT: Right.

17 MR. RITTINGER: But there's no evidence that they
18 knew it was a sham.

19 THE COURT: Well, what -- what about the last two
20 witnesses? They certainly -- their testimony is subject to
21 the interpretation that they submitted it without knowing
22 whether it was any good or not.

23 MR. RITTINGER: I'm -- Your Honor, if I understood
24 what you just said --

25 THE COURT: The last two videotaped witnesses --

1 MR. RITTINGER: Yes.

2 THE COURT: -- the incompetence, the total
3 incompetence.

4 MR. RITTINGER: Your Honor, they -- the Supreme
5 Court has held, and we've cited cases to you that a high
6 departure from normal editorial standards is not sufficient.

7 THE COURT: A what kind of departure?

8 MR. RITTINGER: A high departure, a strong
9 departure. I forget the language, Your Honor, but I think
10 we've quoted in the -- I'm sorry.

11 "Highly unreasonable conduct constituting an extreme
12 departure from the standards of investigation and reporting
13 adhered to by responsible publishers is not sufficient."

14 Your Honor, there's no question that they put in
15 evidence that we were negligent, but they didn't put in
16 evidence that we were trying to do anything or that we -- even
17 if you want to interpret that as a high departure or an
18 extreme departure, it is not sufficient to constitute actual
19 malice as a matter of law.

20 And it's especially not sufficient to constitute
21 actual malice when you take the testimony of these people who,
22 she did do something, she may have -- she was too young, she
23 shouldn't have done it. There's no question about that. But
24 she certainly didn't intend to do anything wrong. She thought
25 she was doing her best, and she should -- and she should have

1 been supervised.

2 Of course, this shouldn't have happened, but that
3 does not mean, as a matter of law, it comes close to
4 approaching the actual malice standard. If it doesn't
5 approach the actual malice standard, then no presumed damages,
6 and we're back again. So for all of those various reasons,
7 Your Honor, this case should not go to the jury and it should
8 end right now.

9 THE COURT: Wow. Okay. Let's hear from the other
10 side.

11 MR. BAZELON: Your Honor, let me start with
12 defamation. With respect to defamation, as Your Honor knows,
13 there's been a lot of briefing, and Your Honor issued an order
14 on December the 8th of this year.

15 And Your Honor read -- Your Honor stated that,
16 "Where the publication" -- and now I'm quoting -- "can be
17 interpreted in both a defamatory and a non-defamatory manner,
18 the jury, on proper instruction, must decide what the
19 statement means."

20 The operative language here in the context of Mr.
21 Rittinger's argument is, "can be interpreted." It's not that
22 you have to bring in members of the public and say they
23 interpret it that way.

24 And Your Honor went on in the next sentence and
25 said, "It's for the jury to determine whether the intended

1 And constitutional malice, Your Honor, I come back
2 to the same thing, it's -- they did a great job of proving
3 that we could have done a better job, that we were negligent.
4 Maybe -- maybe even -- I don't -- I don't think you can get to
5 gross negligence, but maybe you could, but you don't get to
6 the standard that the Supreme Court said, a high degree of
7 awareness of probable falsity, serious doubts. Why in the
8 world would West ever publish anything that it thought was
9 inaccurate and out of date? It makes no sense, and there's no
10 evidence about it. It's the last thing that they would do.

11 Instead, what do they do by coming in here and
12 defending themselves from these claims for money, what they do
13 is, they -- they subject themselves to criticism in the press,
14 but they did -- to any way -- to say that they would have done
15 that intentionally or with actual malice, there's simply isn't
16 sufficient proof, Your Honor. There's proof of negligence,
17 nothing beyond that. That ends the case for the reasons that
18 we talked about, not just as to -- Mr. Bazelon has not said a
19 word and cannot say a word that this is not -- about a public
20 concern. It's a constitutional libel case. It is not -- and,
21 Your Honor, which I -- which I suppose is also -- when --

22 THE COURT: You lost me there. What -- you've used
23 that expression before. What is a constitutional libel?

24 MR. RITTINGER: I'm sorry.

25 THE COURT: What is a constitutional libel? You've

1 correct?

2 A Yes, it is.

3 THE COURT: Is there a date on it, when it was
4 issued?

5 THE WITNESS: The bound volume's in 2005, and the
6 pocket part is 2010.

7 THE COURT: Thank you.

8 BY MR. CHARLSON:

9 Q Ms. Maess, I -- can you tell me whether any of the 36
10 cases on the list that I gave you that didn't appear in either
11 the 2008 or 2009 pocket parts are cited in "West's
12 Pennsylvania Practice?"

13 A Do you want me to check?

14 Q You are welcome to. Well, let me ask you this. Let
15 me -- let me change the question, Ms. Maess.

16 Did Sarah Redzic have access to "West Pennsylvania
17 Practice" -- "Pennsylvania Criminal Practice" when she was
18 preparing the 2008 pocket part?

19 MR. ZEISLER: Objection.

20 THE COURT: Objection overruled.

21 THE WITNESS: I believe she would have been
22 responsible for this product, as well.

23 BY MR. CHARLSON:

24 Q Okay. She was responsible for the update to this

1 product, as well?

2 A No. I think she was responsible for the title. I
3 think -- I'm guessing. I have to look.

4 Q So by being responsible she would have edited the pocket
5 part at the end of 2008 to "Pennsylvania Criminal Practice?"

6 A I don't know for sure.

7 Q But that would -- you would expect that, correct?

8 A It's possible.

9 Q If that was her area of responsibility.

10 A It's possible.

11 Q Well, I'm --

12 THE COURT: She doesn't know.

13 MR. ZEISLER: Fair enough.

14 BY MR. CHARLSON:

15 Q And Chris Gimeno, whom you represented had prepared the
16 April 2009 pocket part, she also would have had access, would
17 she not, to the Wasserbly and Moore treatise published by
18 West?

19 A I don't know what she had access to at the time she was
20 writing.

21 Q Well, would West have made any of its products available
22 to her for the purpose of updating this?

23 A Authors can have complementary Westlaw and some print
24 products if they're interested. Most of them have Westlaw.

1 THE WITNESS: Okay. Thank you. The majority of our
2 authors are on a 15 percent royalty. So a 15 percent royalty
3 in this case would have been something, I think, under \$3,000
4 because it's a -- by royalty, 15 percent of the revenue. So,
5 for example, I don't think it's unfair to say that Mr.
6 Rudovsky gets 15 percent on "Police Misconduct." I mean it's
7 fairly typical in the business. I would say virtually all of
8 our authors who have royalties fall into that category.

9 So when you're pricing a product and you're trying
10 to figure out how to invest in a product, you want to keep the
11 authoring costs around that amount, but 15 percent on a -- on
12 a very small list, it's just not -- it's not going to work.

13 And so in this in this case 15 percent on a \$17,000
14 product would have been something less than \$3,000, and we
15 knew we couldn't do that. On the other hand, it could no
16 longer sustain the \$10,000 that we were spending on it up to
17 this point, and I think this has to do probably more with a
18 declining list and as people migrate away from the print.

19 But in any case, we thought that \$5,000, while
20 significantly more than the 15 percent but significantly less
21 than the 10,000 that we were -- started with would be an
22 appropriate number.

23 BY MR. CHARLSON:

24 Q Well, is it your position -- is it West's position in

1 Q -- 06003.

2 A Okay. Okay.

3 Q Now, this -- this is a guide to West's attorney editors,
4 correct?

5 A Yes.

6 Q And the -- and this guides reads, "Do I conduct a
7 publishability review on a product with a low margin?"

8 Do you know what "low margin" refers to in this document?

9 A We would use the term "low margin" to really reflect a
10 profitability study that would be done --

11 Q So --

12 A -- taking the expenses out against the, you know, taking
13 the bottom line against the top line and seeing what the
14 margin would be.

15 Q So low margin -- a product with a low margin is a product
16 that doesn't make a lot of money for West?

17 A It's a product with low profit, yes.

18 Q And so was it West's advice, the guidelines, to its
19 attorney editors in 2008 that you must use your best business
20 judgment in determining the appropriate level of review of a
21 submission on a product with a low margin?

22 A (No audible response)

23 Q Was it -- was that West's position?

24 A I think it's -- I think -- yes. We spend more time on

1 large high revenue products than on a lower, smaller product.
2 That's true.

3 Q Including in determining whether or not the manuscript is
4 sufficient -- of sufficient qualities to publish, correct?

5 A No, because at the time -- remember, this -- this is
6 where it got very fuzzy in the organization, and this is what
7 we tried to correct when we -- when we changed the policy and
8 we submitted the new supplement.

9 Q So this language -- well, what's meant by, "You must use
10 your best business judgment," in determining the appropriate
11 level of review of a submission on a product with a low
12 margin?

13 A I believe the intent behind this paragraph is to say, "If
14 you have two products and you're going to spend a lot of time
15 on one and less time on the other, you're going to take the
16 product that's more important to the customer and has more
17 customers."

18 Q Based on which product has a higher margin, correct?

19 A Well, the margin would be dictated by the number of
20 customers.

21 MR. CHARLSON: I have no further questions, Your
22 Honor.

23 MR. ZEISLER: Brief redirect, Your Honor.

24 THE COURT: Pardon?