

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 16, 2010
Defendants.	)	9:58 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

For the Defendants: AARON M. ZEISLER, ESQUIRE  
JAMES F. RITTINGER, ESQUIRE  
SATTEERLEE STEPHENS BURKE &  
BURKE, LLP  
230 Park Avenue  
New York, NY 10169

1 MR. RITTINGER: Your Honor, may we -- may was be  
2 heard on a special verdict form? (No audible response) As I  
3 understand Your Honor's, it doesn't make any distinction  
4 between the finding of per se libel or actual malice. And I  
5 think the law is pretty clear, starting with New York Times v.  
6 Solesman (phonetic), that there should be special verdicts and  
7 -- given to juries in libel cases.

8 THE COURT: What's your position, Mr. Bazelon?

9 MR. BAZELON: Our -- our position, Your Honor, is  
10 that that would be covered in the charge.

11 THE COURT: At least that's what I plan to do.

12 MR. RITTINGER: But I'm talking about a special  
13 verdicts, Your Honor. The problem is at the -- at the -- when  
14 the -- when the jury comes in, if all they have is a  
15 compensatory damage award, you don't know what they did it on.  
16 Here, you -- here, it's even more compounded because they have  
17 to make a finding of libel per se based upon the instruction  
18 having to do with the user concluding. And we also have Third  
19 Circuit law on that as well, Your Honor.

20 THE COURT: Well, the problem with your form is the  
21 questions don't make much sense. "Did the users of the 2008  
22 pocket part conclude that it was inaccurate and out of date?"  
23 Does that mean that everybody that subscribed had to conclude  
24 that it was? It seems to me that it's --

25 MR. RITTINGER: Well, Your Honor --

1 THE COURT: -- it's libel as if only if one or two.

2 MR. RITTINGER: Your Honor, it can be modified, but  
3 that's taken from your order.

4 THE COURT: Pardon?

5 MR. RITTINGER: I -- I believe that is taken from  
6 your order. Your order uses intended users or intended  
7 audience.

8 THE COURT: What order? I didn't -- I've never had  
9 an order as to what --

10 MR. RITTINGER: No, your -- you -- your order of  
11 December 10th, when you determined that on our motion to re-  
12 argue -- we made a motion to re-argue, saying that the Court  
13 was supposed to, as a matter of law, determine whether a  
14 statement is libel as a per se or not. There is no dispute in  
15 this case that if -- if it's not libel per se, the case is  
16 over, because there's no special damages.

17 Your Honor has granted the motion to re-argue and --  
18 but then issued an order that said that you were going to give  
19 to the jury the question of whether the -- I think the words  
20 were intended audience concluded that the supplement was  
21 inaccurate or out of date, then you would determine that it was  
22 libel per se. So we're just -- we're -- we're using what we  
23 understand -- and by the way, that instruction is in -- in the  
24 instructions submitted by the plaintiffs as well.

25 MR. BAZELON: It certainly is not. There's --

1 MR. RITTINGER: Well, but --

2 MR. BAZELON: There's a major difference between -- I  
3 respectfully submit, Judge, between what Mr. Rittinger has just  
4 told you and what your order of December the -- I think it's  
5 December 8th said. Your order said, "It is for the jury to  
6 determine whether the intended audience of the pocket part  
7 would conclude," and -- and then it goes on, "would conclude  
8 that the plaintiffs authored an inaccurate and out-of-date  
9 supplement to the treatise.

10 What -- what that means, at least to me, and I don't  
11 want to be presumptuous, but I would expect to Your Honor, was  
12 that the jury looks at the facts as to what was published and  
13 uses it -- its judgment to determine what a reader would  
14 conclude, not -- it's much different than what Mr. Rittinger is  
15 saying. He's asking that there's a factual finding as to what  
16 readers actually did conclude as compared to what they would  
17 naturally, in the normal course, conclude based on the  
18 publication. That is a major difference. But in any event,  
19 Judge, that is covered in the instructions. And presumably,  
20 hopefully, the instructions will be so worded. Your Honor --

21 MR. RITTINGER: Your Honor, here's -- here's the  
22 problem.

23 THE COURT: Pardon?

24 MR. RITTINGER: I said here is the problem that we --  
25 that we face in terms of what we submit to -- I'm sorry.

1 with that.

2 THE COURT: What?

3 MR. BAZELON: And that's the issue we discussed  
4 before, Judge. And that is that what West is attempting to do  
5 is to frame this that the jury needs to find that there was an  
6 actual determination made by the audience. And that's the  
7 language that Mr. Ritterger is now proposing. And that's --  
8 that's not what Your Honor is doing in the rest of this charge.  
9 It's not what Your Honor said in his order.

10 THE COURT: Right.

11 MR. RITTINGER: Well, Your Honor, if you look at --  
12 if you -- if you look at the instruction on -- that is given,  
13 which really takes the language -- it's really just using the  
14 statute, which appears on page 1 and 2. It says, "The falsity  
15 of the publication." And that's -- that's what the statute  
16 requires, to -- the statute doesn't require it was not  
17 substantially true. It requires falsity. That's what a libel  
18 is. And I -- there's no citation for this. I don't know where  
19 it came from. I don't know if it came from -- I -- but if it  
20 -- if it says false and it says was understood, then it's  
21 consistent with the statute.

22 THE COURT: How about we split the difference, that  
23 it was false and would reasonably have been understood by those  
24 other than the plaintiffs as defamatory? (No audible response)  
25 Okay. What else do you got?

1 MR. RITTINGER: Well, Your Honor --

2 MR. BAZELON: Your Honor, so what -- what's the  
3 resolution that you were suggesting, Your Honor? Sorry, I  
4 don't mean to interrupt.

5 THE COURT: I'm agreeing with him that instead of  
6 saying it was not substantially true, it would -- that it was  
7 false. And instead of it might reasonably have been  
8 understood, that it would reasonably have been understood.

9 MR. RITTINGER: Yes, Your Honor.

10 THE COURT: Okay?

11 MR. BAZELON: Yes, Your Honor. You -- you should  
12 bear in mind that I don't normally prepare a written charge or  
13 read it to the jury. I like to listen to the arguments of  
14 counsel and then refute all their arguments that are improper.

15 MR. RITTINGER: Somehow I -- somehow I think I get  
16 that, Your Honor.

17 MR. BAZELON: I guess that keeps the argument short,  
18 Judge.

19 THE COURT: Right.

20 MR. RITTINGER: Your Honor, I -- I think we really  
21 need clarification to talk about the last couple, because I'm  
22 not sure what Your Honor's ruling is. It's -- and maybe if I  
23 could just -- it's our position that in order to recover either  
24 punitive damages, or put it the other way, I don't think  
25 there's any dispute about punitive damages. I think the

1 judicial question as to what the bounds of that are. It's not  
2 a jury question.

3 THE COURT: I'm not going to do anything about.  
4 We'll just take our chances with what the jury does. Okay.

5 MR. RITTINGER: Your Honor, we accept that. Just for  
6 purposes of the record and Rule 51, it's our position that we  
7 object to the instructions to the extent that they don't follow  
8 the ones that we last set -- sent in. And we object to the  
9 lack of a special verdict form, Your Honor, for the record.

10 THE COURT: What do you mean the lack of a special  
11 verdict form?

12 UNIDENTIFIED COUNSEL: What we have there is a  
13 special verdict.

14 MR. RITTINGER: No, for the -- for the -- to the  
15 extent that it doesn't follow the -- the special verdict that  
16 we last submitted to the Court. I want to -- I just want that  
17 on the record, Your Honor, for Appellate purposes.

18 THE COURT: He just wants it on the record. (Pause)  
19 In other words -- well, Your Honor, I -- I think what I'm being  
20 asked now, or being told is that we wanted a -- a -- at least a  
21 specific inquiry or question about actual malice in the -- in  
22 your --

23 UNIDENTIFIED COUNSEL: In the special verdict form.

24 MR. RITTINGER: -- verdict -- in your special verdict  
25 form.

1 THE COURT: That's going to be covered by the charge.  
2 That will be covered by the charge. I don't think we need a  
3 special question on that. Do we?

4 COURTROOM CLERK: Bring in the jury?

5 THE COURT: Pardon?

6 COURTROOM CLERK: Bring in the jury, Judge?

7 THE COURT: That's what we have them out there for,  
8 yes.

9 MR. BAZELON: Judge, I take it that -- that we will  
10 have a sidebar after the -- you instruct the jury, and that  
11 they are -- and that they leave to deliberate?

12 THE COURT: You have -- yes, if you need one. But  
13 you have all the exhibits ready to go out?

14 MR. BAZELON: We have all the exhibits ready to go  
15 out. And Your Honor, just for the -- just so I don't forget, I  
16 just want to remind Your Honor that we do have a request for  
17 injunctive relief in this case, which, in our view doesn't go  
18 to the jury. But I didn't want to be deemed to have waived it  
19 by not reminding Your Honor.

20 THE COURT: Would you be inclined to agree that we  
21 await the jury's finding on liability before we consider  
22 injunctive relief?

23 MR. BAZELON: Yes, Your Honor, I do. Thank you.

24 THE COURT: Okay.

25 COURTROOM CLERK: All rise.



1 discussed earlier.

2 The plaintiffs would still be entitled to recover  
3 damages for emotional distress that they suffered, if you  
4 accept their testimony. But they would not be entitled to  
5 damages to their reputation or -- as I say, presumed damages --  
6 or to punitive damages, unless they establish by fair and  
7 convincing evidence that the defendant acted with malice.  
8 Okay?

9 MR. RITTINGER: Thank you, Your Honor.

10 MR. BAZELON: Thank you, Your Honor.

11 THE COURT: I hope that doesn't change your minds.  
12 You may take -- follow that young lady.

13 COURTROOM CLERK: All rise.

14 THE COURT: And we will eagerly await your response.

15 (Jury out for deliberations)

16 THE COURT: And the charge as given is accepted to by  
17 every lawyer in the room --

18 MR. RITTINGER: Yes, Your Honor.

19 THE COURT: -- and so noted.

20 MR. BAZELON: Thank you.

21 THE COURT: Recess till we get a verdict.

22 (Recess)

23 COURTROOM CLERK: All rise.

24 THE COURT: Bring in the jury. The jury has  
25 submitted a question, which I assume you've received, have you?

1 that this was an update of Pennsylvania law and that it had  
2 been prepared by the plaintiffs, if they knew that was false or  
3 acted with reckless disregard as to whether it was false or  
4 not, they would be -- they would be guilty of actual malice,  
5 and that would enable you to award damages for any other  
6 consequences that you find that plaintiffs may have suffered.

7 Does that -- have I cleared that up or made a -- a  
8 mess of it?

9 MR. BAZELON: That's -- that's satisfactory, Your  
10 Honor.

11 THE COURT: Pardon?

12 MR. BAZELON: That's satisfactory.

13 THE COURT: Fine. Thank you.

14 But you must be unanimous in order to enter any of  
15 these questions. Okay? You may retire to the jury room and  
16 quick reach a verdict.

17 COURTROOM CLERK: All rise.

18 (Jury out for deliberations)

19 THE COURT: I will assume for the record that all the  
20 lawyers in the courtroom object to what I just said. And you  
21 will be able to raise it on appeal. (Pause)

22 MR. RITTINGER: Yeah, Your Honor, I'm wondering if it  
23 makes sense, since they wanted a written, we'd -- we'd just  
24 agree on the definition of actual malice right here and give it  
25 to them?

1 MR. CHARLSON: I can attest to the truth of that  
2 statement, though.

3 UNIDENTIFIED COUNSEL: I made it back, Your Honor.

4 UNIDENTIFIED COUNSEL: Mr. Charlson is our good luck.

5 (Pause)

6 COURTROOM CLERK: All rise.

7 (Jury in)

8 THE COURT: Good afternoon. Be seated, please. I  
9 will note for the record that we have two more questions you've  
10 sent in. And I'll try to dispose of them. The first question  
11 is, "In number one of the verdict form, the word 'establish' is  
12 used. Are we determining whether proof was provided? Or are  
13 we still working under the idea of presuming that at least one  
14 person could have thought less about either Professor Rudovsky  
15 or Professor Sosnov?"

16 As I've tried to make clear earlier -- first of all,  
17 the word established means to prove. So in order to answer the  
18 question yes, you must all agree that it is more likely than  
19 not on the basis of the evidence that yes is the correct  
20 answer. And that involves the analysis of the evidence, which  
21 is the proof. But to answer your question specifically, as I  
22 thought I made clear earlier, but maybe I didn't, if you find  
23 that the plaintiffs were defamed, the defendant issued a  
24 defamatory communication, then they are entitled to damages for  
25 emotional distress that find esta -- they established by the

1 evidence.

2 But if they also show that the defamation occurred --  
3 that the defendant West Publishing Company actually knew that  
4 it was false or had -- or acted in reckless of disregard of  
5 whether it was true or false, then they would be entitled to  
6 presumed damages. And there isn't much difference, but it --  
7 it would -- the law says that if the defendant acted with  
8 actual malice, it's presumed that the defendants (sic) suffered  
9 -- that the plaintiffs suffered some damage to their  
10 reputation. And you don't get -- don't have to have any actual  
11 proof that their reputations were -- that somebody else thought  
12 less of them. It's presumed that that happened if there was  
13 actual malice. And in order to have def -- defamation of any  
14 kind, you would have to show that the intended reader would  
15 probably have concluded that -- that the plaintiffs wrote the  
16 supplement and that the supplement was, to some extent, less  
17 than adequate.

18 Now, the second question is, "Are the determinings of  
19 plaintiffs dictated by any guide -- of damages, I'm sorry --  
20 dictated by any guidelines? Or are such determinations --  
21 determinings arbitrary?" The answer is, there are no specific  
22 guidelines. We leave that up to the common sense and good  
23 judgment of the jury as to what would be a fair and reasonable  
24 amount to award as damages. That does not make them arbitrary.  
25 We leave them up to the good judgment and common sense of the

1 jurors. That's what jurors are for. Okay?

2 UNIDENTIFIED COUNSEL: Thank you, Your Honor.

3 THE COURT: We'll see you soon, I hope.

4 (Jury out for deliberations)

5 THE COURT: Everybody has objections. They're all  
6 noted on record. We'll recess till we get a verdict, I hope.

7 MR. RITTINGER: Your Honor, I -- we have an  
8 objection.

9 THE COURT: Pardon?

10 MR. RITTINGER: I said, we have an objection, or a  
11 comment --

12 THE COURT: I said, I just noted you had an  
13 objection, I assumed.

14 MR. RITTINGER: I know, but -- well, I -- I thought  
15 Mr. Bazelon was going to go. Your Honor, it seems -- it seems  
16 to me that we've now -- the last two definitions of actual  
17 malice have not included the second sentence, which is so  
18 important in this case. That's that the plaintiffs must  
19 demonstrate -- in order to define reckless disregard, that the  
20 plaintiffs must demonstrate that the defendant, in fact,  
21 entertained serious doubts.

22 THE COURT: Oh, I did that often enough, I think.

23 (Recess)

24 COURTROOM CLERK: Court is now in session.

25 THE COURT: Good afternoon. Or evening. I

1           them?

2           MR. RITTINGER: No. No, Your Honor.

3           THE COURT: I think the -- you

4           MR. BAZELON: Your Honor --

5           THE COURT: -- offered what, seventeen-five each?

6           MR. RITTINGER: Yes, Your Honor.

7           THE COURT: And my figure was 15,000. So  
8           congratulations to somebody. I'm not sure who. We'll see you  
9           later.

10          MR. RITTINGER: Your Honor, you'll -- you'll take  
11          motions to set aside on paper then? Is that --

12          THE COURT: You don't have to, but if you want to  
13          file such motions, you may do it.

14          MR. RITTINGER: Well, I think -- I think we probably  
15          should under the circumstances.

16          THE COURT: You may do it any time you want within  
17          the time limit specified.

18          MR. RITTINGER: Within the 28 days. Thank you, Your  
19          Honor.

20          THE COURT: Okay. Good night, all.

21          UNIDENTIFIED COUNSEL: Thank you, Your Honor.

22                               (Briefly off the record)

23                               (Audio begins here)

24          MR. BAZELON: -- relief. The -- the request for  
25          injunctive relief.