

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

	:	
DAVID RUDOVSKY and	:	CIVIL ACTION –
LEONARD SOSNOV,	:	JURY TRIAL DEMANDED
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 09-CV-727
	:	
WEST PUBLISHING CORPORATION,	:	
WEST SERVICES INC., AND	:	
THOMSON LEGAL AND REGULATORY	:	
INC. t/a THOMSON WEST	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this ____ day of _____, 2011, upon consideration of Plaintiffs’ Motion for Reconsideration of the Portion of the Court’s March 30, 2011 Order Conditioning Denial of Defendants’ Motion for a New Trial on Plaintiffs’ Acceptance of a Reduced Amount of Punitive Damages, and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED. It is further ORDERED as follows:

1. Defendants’ Motion for Judgment as a Matter of Law is DENIED.
2. Defendants’ Motion for a New Trial is DENIED.
3. Judgment is hereby entered in favor of Plaintiff David Rudovsky

and against Defendants in the amount of _____.

4. Judgment is hereby entered in favor of Plaintiff Leonard Sosnov and against Defendants in the amount of _____.

BY THE COURT:

J.

**IN THE UNITED STATES DISTRICT COURT
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LEONARD SOSNOV,	:	CIVIL ACTION –
	:	JURY TRIAL DEMANDED
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WEST PUBLISHING CORPORATION,	:	
WEST SERVICES INC., AND	:	
THOMSON LEGAL AND REGULATORY	:	
INC. t/a THOMSON WEST	:	
	:	
Defendants.	:	

**PLAINTIFFS’ MOTION FOR RECONSIDERATION OF THE PORTION OF
THE COURT’S MARCH 30, 2011 ORDER CONDITIONING THE DENIAL OF
DEFENDANTS’ MOTION FOR A NEW TRIAL ON PLAINTIFFS’
ACCEPTANCE OF A REDUCED AMOUNT OF PUNITIVE DAMAGES**

Plaintiffs David Rudovsky, Esquire and Leonard Sosnov, Esquire, by and through their undersigned counsel, respectfully move the Court for reconsideration of the portion of the Court’s March 30, 2011 Order in which the Court conditioned the denial of defendants’ motion for a new trial on plaintiffs’ acceptance of a reduced amount of punitive damages.

The grounds supporting this Motion are set forth in the attached Memorandum of Law.

Respectfully submitted,

/s Noah H. Charlson

Richard L. Bazelon, Esquire
(I.D. No. 02505)
Noah H. Charlson, Esquire
(I.D. No. 89210)
Michael F.R. Harris, Esquire
(I.D. No. 56948)
BAZELON LESS & FELDMAN, P.C.
1515 Market Street, Suite 700
Philadelphia, PA 19102
(215) 568-1155

Attorneys for Plaintiffs
David Rudovsky and Leonard Sosnov

Dated: April 8, 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DAVID RUDOVSKY and
LEONARD SOSNOV,

Plaintiffs,

v.

WEST PUBLISHING CORPORATION,
WEST SERVICES INC., AND
THOMSON LEGAL AND REGULATORY
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Defendants.

:
: CIVIL ACTION –
: JURY TRIAL DEMANDED
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:

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION FOR RECONSIDERATION OF THE PORTION OF THE COURT’S
MARCH 30, 2011 ORDER CONDITIONING THE DENIAL OF DEFENDANTS’
MOTION FOR A NEW TRIAL ON PLAINTIFFS’ ACCEPTANCE OF A
REDUCED AMOUNT OF PUNITIVE DAMAGES**

Richard L. Bazelon, Esquire
(I.D. No. 02505)
Noah H. Charlson, Esquire
(I.D. No. 89210)
Michael F.R. Harris, Esquire
(I.D. No. 56948)
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1515 Market Street, Suite 700
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(215) 568-1155

Dated: April 8, 2011

Plaintiffs David Rudovsky, Esquire and Leonard Sosnov, Esquire, by and through their undersigned counsel, respectfully submit this memorandum of law in support of their motion for reconsideration of the portion of the Court's March 30, 2011 Order in which the Court conditioned the denial of defendants' motion for a new trial on plaintiffs' acceptance of a reduced amount of punitive damages.

I. INTRODUCTION

In its March 30, 2011 Order, the Court (1) denied defendants' motion for judgment as a matter of law, (2) ruled that if plaintiffs accepted a remittitur of the jury's verdict to \$200,000 per plaintiff (\$400,000 total), defendants' motion for a new trial would be denied, and (3) ruled that absent plaintiffs' acceptance of that remittitur, defendants' motion for a new trial would be granted.

Plaintiffs respectfully submit that the Court committed two clear errors of law. First, the Court of Appeals has made it clear that the grounds relied upon by the Court for reducing the punitive damage award are not valid. Accordingly, the Court should enter judgment in favor of the plaintiffs in an amount that is consistent with the jury verdict and due process principles. Second, if a reduction of punitive damages is constitutionally required, the Court should enter judgment in the maximum amount allowable under the Constitution – and should not force plaintiffs to choose between accepting a remittitur or a new trial.

II. LEGAL STANDARD

The purpose of a motion for reconsideration under Local Rule 7.1(g) is to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v.*

Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985), *cert. denied*, 476 U.S. 1171 (1986). Under this standard, reconsideration is appropriate when needed to correct a clear error of law or fact or to prevent manifest injustice. *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

III. ARGUMENT

A. The Court Erred In Ordering A Reduction In Punitive Damages

Plaintiffs respectfully submit that reconsideration is necessary and appropriate here to correct two clear errors of law.

First, the Court committed a clear error of law when it ordered a reduction in punitive damages. The jury awarded each plaintiff \$90,000 in compensatory damages and \$2.5 million in punitive damages. In its ruling on defendants' post-trial motions, the Court upheld the compensatory damages awards, but held that the amounts of the punitive damages awards exceeded Constitutional limits. The Court held that the "constitutional limit" for punitive damages was \$110,000 per plaintiff.

The Court ordered the reduction based on its belief that the jury was influenced by (1) the net worth of the defendants, and (2) evidence indicating that there was a need to deter defendants from similar misconduct in the future. As stated by the Court:

The jury may have been too much influenced by the net worth of the defendants, and undoubtedly was influenced to some extent by the defendants' own evidence at trial, which seemed to show that the defendants have learned nothing from the experience, and would be likely to continue to commit violations of individuals' rights in the future.

March 30, 2011 Memorandum, at 4.

The Court of Appeals has made it clear that it is entirely appropriate for juries to base punitive damages awards on defendants' net worth and the need for deterrence. In *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010), the Court of Appeals stated:

we are troubled by the district court's reasoning in reducing the punitive damages. There is certainly nothing wrong with a jury focusing on a "defendant's seeming insensitivity" in deciding how much to award as punitive damages.

* * * *

A jury can consider the relative wealth of a defendant in deciding what amount is sufficient to inflict the intended punishment. *See Restatement (Second) of Torts § 908(2) (1979)* (listing wealth as a factor which "can" be considered in determining punitive damages.).

Common sense suggests that a corner "mom and pop" store should not be subject to the same punitive level of damages as a company worth close to a billion dollars. The latter would simply not be deterred by an award that might be large enough to put the former out of business. Moreover, the record certainly supports a jury becoming "incensed" over Trans Union's "insensitivity" to Cortez's claim, and we are hard pressed to understand the district court's reliance on that possible reaction to what Trans Union did, and/or considerations of Trans Union's fiscal wealth as reasons to reduce the punitive award.

Id. at 718 n.37.

In *Cortez*, the Court of Appeals had no choice but to affirm on procedural grounds, because plaintiff had accepted the District Court's remittitur before filing her notice of appeal. *Id.* at 717, citing *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649 (1977), for the proposition that "a plaintiff cannot challenge a remittitur s/he has agreed to." However, the Court of Appeals made it very clear that District Courts should not order reductions of punitive damage awards based on a belief that juries were influenced by defendants' net worth and/or

insensitivity. Here, those were the only grounds given by the Court in reducing punitive damages.

Cortez is consistent with decades of binding precedent that establish that juries may properly base punitive damages awards on defendants' net worth and what amount is necessary to deter the defendants and others from committing similar misconduct in the future. *See, e.g., Donaldson v. Bernstein*, 104 F.3d 547, 557 (3d Cir. 1997); *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 740 (3d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975).

Plaintiffs respectfully submit that even if the Constitution requires a reduction of the jury's punitive damages awards, the maximum amount of punitive damages allowable under the Constitution far exceeds \$110,000 per plaintiff. That figure represents approximately a 1.2-to-1 ratio between punitive damages and compensatory damages, and remarkably is a mere 4% of the jury's verdict. We submit that this reduction is inconsistent with the deference required for jury verdicts under the Seventh Amendment.

The Third Circuit has held that such small ratios are the maximum amount allowable under the Constitution only when the compensatory damages are "substantial," *i.e.*, far higher than the \$90,000 per plaintiff awarded in this case. In *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13 (3d Cir. 2008), the Court collected cases demonstrating that "[o]ther courts have used a 1:1 ratio as a benchmark where compensatory damages are substantial." *Id.* at 28. The compensatory damage awards in those cases ranged from a low of \$366,939 to a high of \$4.025 million. *Id.* The *Jurinko* Court relied on those cases in deciding to reduce a punitive damage award to \$1,996,950.56, the same amount as the compensatory damage award. *Id.* at 30. *See*

also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (citing to large compensatory award of \$1 million).

By contrast, the Court of Appeals has held that a higher ratio between punitive damages and compensatory damages is constitutionally permissible where, as here, the compensatory damages are not as substantial. *See, e.g., CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.*, 499 F.3d 184, 193 (3d Cir. 2007) (approving 7:1 ratio between \$750,000 punitive damage award and \$109,000 punitive damage award).

Because the Court relied on improper grounds for ordering a reduction in punitive damages, the Court should reconsider its March 30, 2011 Order, and should enter judgment in favor of the plaintiffs in an amount that, given the jury verdict, is the maximum permitted under the Constitution.

B. Even If A Reduction In Punitive Damages Is Constitutionally Required, The Court Should Enter Judgment In The Maximum Amount Allowed By The Constitution

Assuming that there are grounds for a Constitutional reduction, the Court erred by making its denial of defendants' motion for a new trial conditional on plaintiffs' acceptance of the reduction ordered by the Court. Instead, when a Court finds that a reduction is constitutionally required, the Court should enter judgment in the maximum amount allowable under the Constitution – and should not force plaintiffs to choose between acceptance of a remittitur and a new trial.

As *Cortez* makes clear, there are two different types of reductions of punitive damages awards: “Constitutionally reduced verdicts” and “conditional remittiturs.” In our case, the Court ordered a Constitutionally reduced verdict on the ground that the jury’s punitive damages verdict

exceeded the maximum amount allowable under the Due Process Clause of the Constitution. By contrast, a Court orders a conditional remittitur when it finds that the jury's punitive damage award is "unreasonable" based on the evidence adduced at trial:

The court orders a remittitur when it believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court ... a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Cortez, 617 F.3d at 716, quoting *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1331 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999).¹

As noted, this Court ordered a Constitutionally reduced verdict, not a discretionary remittitur. See March 30, 2011 Memorandum, at 4-5 ("the constitutional limit in this case should be set at \$110,000 for each plaintiff"). When a court orders a constitutionally reduced verdict, it is not appropriate to give the plaintiffs the option of a new trial, as the order is a purely legal determination. Instead, the proper course is for the Court to enter judgment in the maximum amount allowable under the Constitution:

upon determination of the constitutional limit on a particular award, the district court may enter a judgment for that amount as a matter of law.

* * * *

The court may enter judgment only if it reduces that jury's verdict to the maximum permitted by the Constitution in that particular case, as any smaller amount would invade the province of the jury.

¹ Only when a court grants a conditional remittitur, must it give the plaintiff the option of a new trial. *Cortez*, 617 F.3d at 316, citing *Hetzel v. Prince William County, Va.*, 523 U.S. 208, 211 (1998). Here, the court's opinion is clearly based on a constitutional reduction, and the time for requesting a discretionary remittitur has passed. See Fed. R. Civ. P. 59(d).

Johansen, 170 F.3d at 1331 & n.16, citing *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). *Accord*, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002); *Tronzo v. Biomet*, 236 F.3d 1342, 1350-51 (Fed. Cir.), *cert. denied*, 534 U.S. 1035 (2001).

This rule is required because a Constitutionally imposed reduction of damages is a strictly legal determination, subject to *de novo* review by an appellate court. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001). Accordingly, a constitutionally imposed reduction in punitive damages is reviewable in the same manner as any legal ruling by a District Court.

This rule both (1) conserves judicial resources by avoiding unnecessary retrials, and (2) prevents the unfairness inherent in forcing a plaintiff to choose between a constitutionally reduced verdict and a new trial:

Giving a plaintiff the option of a new trial rather than accepting the constitutional maximum for this case would be of no value. If, on a new trial, the plaintiff was awarded punitive damages *less* than the constitutional maximum, he would have lost. If the plaintiff obtained *more* than the constitutional maximum, the award could not be sustained. Thus, a new trial provides only a “heads the defendant wins; tails the plaintiff loses” option.

Johansen, 170 F.3d at 1332 & n.19 (italics in original).

There is another strong reason for not requiring plaintiffs to choose between the reduction of punitive damages and a new trial. Under the Court’s Order, if plaintiffs do not accept the reduction, they may be required to proceed with a new trial, as an immediate appeal might be considered interlocutory. Indeed, the grant of a new trial could also preclude an immediate appeal by the defendants (on their post-trial claim for judgment as a matter of law), as such an appeal would be considered interlocutory. Plainly, it is far more efficient and fair to all parties to have this matter resolved by an appeal before any new trial proceedings. This would avoid the

time, expenses and, as the *Johansen* court ruled, the unfairness of a new trial.² If the Court amends its Order to state the amount of punitive damages it determines is the maximum permitted by due process principles, and does not require a choice between that amount and a new trial, both sides would be free to appeal and the case would be more fairly and timely resolved.

Accordingly, the Court committed a clear error of law when it ordered plaintiffs to choose between a Constitutionally reduced verdict and a new trial. If the Court determines that the Constitution requires a reduction of the jury's punitive damages awards, the Court should deny defendants' motion for a new trial, and enter judgment in favor of the plaintiffs for the full amount of compensatory damages awarded by the jury, plus the maximum amount of punitive damages allowable under the Constitution.

For the reasons stated in Section A, above, plaintiffs respectfully submit that the Court erred in its reasons for reducing the jury's punitive damages awards. However, if the Court determines that the Constitution does require a reduction, the Court should enter judgment in favor of the plaintiffs for the maximum amount allowable under the Constitution – an amount that is far in excess of \$110,000 per plaintiff.

² Due process protects plaintiffs' right to appeal a constitutional reduction of punitive damages as that is a legal issue to be reviewed *de novo* by the Court of Appeals. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). Moreover, given this Court's denial of the defendants' motions for a new trial or judgment as a matter of law, any new trial should be limited to punitive damages, the only legal error cited by this Court. *See Cortez*, 617 F.3d at 695 n.2.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Reconsideration of the Portion of the Court's March 30, 2011 Order Conditioning Denial of Defendants' Motion for a New Trial on Plaintiffs' Acceptance of a Reduced Amount of Punitive Damages should be granted, and the Court should deny defendants' motion for a new trial and enter judgment on the jury's verdict, without any reduction. To the extent that the Court determines that a reduction is Constitutionally required, the Court should enter final judgment in the amount of the jury's compensatory damages awards, plus the maximum amount of punitive damages allowed by the Constitution, without giving any party the option of a new trial.

Respectfully submitted,

/s Noah H. Charlson

Richard L. Bazelon, Esquire (I.D. No. 02505)
Noah H. Charlson, Esquire (I.D. No. 89210)
Michael F.R. Harris, Esquire (I.D. No. 56948)
BAZELON LESS & FELDMAN, P.C.
1515 Market Street, Suite 700
Philadelphia, PA 19102
(215) 568-1155

Attorneys for Plaintiffs
David Rudovsky and Leonard Sosnov

Dated: April 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, I served a true and correct copy of the foregoing Plaintiffs' Motion for Reconsideration of the Portion of the Court's March 30, 2011 Order Conditioning Denial of Defendants' Motion for a New Trial on Plaintiffs' Acceptance of a Reduced Amount of Punitive Damages, and supporting Memorandum of Law, upon the following counsel for defendants, as follows:

via the Court's Electronic Case Filing system:

Matthew J. Borger, Esquire
Klehr, Harrison, Harvey, Branzburg & Ellers LLP
260 South Broad Street
Philadelphia, PA 19102

via electronic mail:

James Rittinger, Esquire
Aaron Zeisler, Esquire
Satterlee Stephens Burke & Burke LLP
230 Park Avenue, Suite 1130
New York, NY 10169

s/Noah H. Charlson
Noah H. Charlson, Esquire