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

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

ORDER

AND NOW, this __ day of _____, 2010, upon consideration of the Defendants' Motion For Reconsideration Of That Portion Of The Court's July 15, 2010 Memorandum and Order Addressing Defamation *Per Se* (the "Motion"), the parties' submissions in support thereof and in opposition thereto, the arguments and/or hearings thereon, and all prior pleadings and proceedings had herein, IT IS HEREBY ORDERED that Defendants' Motion is GRANTED. Count IV (defamation) of the Amended Complaint is DISMISSED WITH PREJUDICE.

BY THE COURT:

_____
John P. Fullam, Sr. J.

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Defendants.	:	

WEST'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THAT PORTION OF THE COURT'S JULY 15, 2010 MEMORANDUM AND ORDER ADDRESSING DEFAMATION *PER SE*

Defendants West Publishing Corporation, West Services Inc., and Thomson Reuters (Legal) Inc. (formerly known as Thomson Legal and Regulatory Inc.) d/b/a Thomson West (together "West") submit this memorandum of law, pursuant to Local Rule 7.1(g), in support of West's motion for reconsideration of that portion of the Court's July 15, 2010 Memorandum and Order ("Mem.") in which the Court holds that "a ***jury*** could conclude that the pocket part constituted defamation *per se* . . ." (emphasis added), because the issue of whether or not the pocket part constituted defamation *per se* is a matter of law for the Court to decide. Accordingly, West respectfully requests that the Court grant its motion for reconsideration and, for the reasons set forth herein, find that the 2008-2009 pocket part did not constitute defamation *per se* and enter a memorandum/order dismissing plaintiffs' defamation claim (Count IV).

ARGUMENT

I. 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.'" Shaw v. Parker Hannifin Corp., 2008 WL 2609827, at *2 (E.D. Pa. June 27, 2008) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985), cert. denied, 476 U.S. 1171, 106 S.Ct. 2895, 90 L.Ed.2d 982 (1986)); Local R. Civ. P. 7.1(g), Comment 6(c). "Under this standard, a party seeking reconsideration may prevail if it meets at least one of the following grounds for relief: '(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.'" Shaw, 2008 WL 2609827, at *2 (citing Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)); see also Houston v. Easton Area School Dist., 2008 WL 4646105, at *4 (E.D. Pa. Oct. 8, 2008).

While West recognizes that reconsideration pursuant to Local Rule 7.1(g) is a sparingly-used remedy, West believes that reconsideration of the Court's Memorandum and Order addressing defamation *per se* is appropriate here "to correct a clear error of law;" specifically, the Court's holding that "a jury could conclude that the pocket part constituted defamation *per se* . . .." See Mem. at 6. It is for the Court – not for a jury – to conclude whether or not the 2008-2009 pocket part constituted defamation *per se*. Respectfully, the Court must decide this issue.

II. THE COURT SHOULD CORRECT THAT PORTION OF ITS MEMORANDUM HOLDING THAT "A JURY COULD CONCLUDE THAT THE POCKET PART CONSTITUTED DEFAMATION *PER SE* "

As was set forth in West's summary judgment brief, "Whether the words allegedly used by a defendant were defamatory *per se* is also a question for the court." See West's SJ Br. at 9-10 & n.2 (quoting Synygy, 51 F. Supp. 2d 570, 580 (E.D. Pa. 1999), aff'd 229 F.3d 1139 (3d Cir. Pa. 2000)). Indeed, the Court was required to make two determinations as a matter of law in its defamation analysis: first, whether or not the 2008-2009 pocket part is capable of a defamatory

meaning (which the Court decided it was – see Mem. at 5-6); and second, if the 2008-2009 pocket part was capable of defamatory meaning, whether it constituted defamation *per se* (an issue that the Court improperly stated the jury would decide – see Mem. at 6). Yet, as the Synygy court clearly held:

> It is for the court to determine whether the statement at issue is capable of a defamatory meaning. Corabi v. Curtis Publ. Co., 441 Pa. 432, 273 A.2d 899 (1971). . . . Once a court determines that the statement is capable of defamatory meaning, one of the requirements under the Pennsylvania defamation statute is that the plaintiff prove that it suffered special harm. 42 Pa.Cons.Stat.Ann. § 8343(a)(6). Special harm requires proof of a specific monetary or out-of-pocket loss as a result of the defamation. See Restatement (Second) of Torts, § 575 (1976 Main Vol). A plaintiff can be relieved of the requirement of proving special damages, however, where spoken words constitute defamation (slander) per se. Clemente v. Espinosa, 749 F. Supp. 672, 677 (E.D.Pa.1990). Whether the words allegedly used by a defendant were defamatory *per se* is also a question for the court. Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966).

Synygy, 51 F.Supp.2d at 580 (emphasis added).

This Court's holding that "a jury could conclude that the pocket part constituted defamation *per se*" (Mem. at 6) is a clear error of law because the Pennsylvania Supreme Court in Fox v. Kahn and courts in the Third Circuit, such as Franklin Prescriptions (cited by this Court at page 6 of its decision), have unambiguously held that whether or not words are defamatory *per se* is a question of law for the Court. See Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, 184 (Pa.1966) ("The question of whether the language was actionable *Per se* is in the first instance a matter of law for the Court."); Franklin Prescriptions, Inc. v. The New York Times Co., 2004 WL 1770296, at *8 (E.D. Pa. Aug. 5, 2004) ("Whether the allegedly defamatory statements are defamatory *per se* is a question for the court."), aff'd 424 F.3d 336 (3d Cir. Pa. 2005); Synygy, 51 F. Supp. 2d at 580 (same); Mediaworks, Inc. v. Lasky, 1999 WL 695585, at *7 (E.D. Pa. Aug. 26, 1999) (same); see also, Point III, infra (citing additional cases determining that statements were capable of defamatory meaning and then analyzing whether those statements were defamatory *per se*).

Based upon the foregoing, West respectfully submits that the Court should correct this error of law and issue a ruling as to whether or not the 2008-2009 pocket part constituted defamation *per se*.

III. AS WEST ARGUED ON SUMMARY JUDGMENT, THE POCKET PART DOES NOT AS A MATTER OF LAW CONSTITUTE DEFAMATION *PER SE*

West correctly stated in its summary judgment brief that, in Pennsylvania, "defamation *per se* arises **only** by 'words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct.'" West's SJ Br. at 9 (quoting Clemente, 749 F. Supp. at 677) (emphasis added). Moreover, as West argued in its summary judgment brief:

> Here, Plaintiffs' defamation claim should fail as defamation *per se* because the allegedly defamatory communication – that the 2008-2009 Pocket Part was co-authored by Plaintiffs and West's Publisher's Staff – **does not impute any business misconduct to Plaintiffs *on its face***. See Am. Compl., Ex. A. **In addition, the statement itself does not ascribe conduct to Plaintiffs that makes them unfit to practice law.** Synygy, 51 F. Supp. 2d at 580. Thus, Plaintiffs' defamation claim does not qualify as libel *per se*, and accordingly, Plaintiffs must demonstrate special harm.

West's SJ Br. at 10 (emphasis added).

Further, as West's stated in its brief, "a statement only constitutes libel *per se* when its defamatory meaning is apparent on its face; if extrinsic facts are required to understand the libel, it is not *per se* defamatory. See West's SJ Br. at 10 (citing Robert D. Sack, Sack on Defamation § 2.8.3 (April 2009)). Specifically, Judge Sack wrote:

> All libel was once actionable without proof of special damages. . . . Most jurisdictions, however, have embraced a different rule. Only libel whose defamatory meaning is apparent on the face of the communication is libelous *per se* (without proof of special damages). If on the face of the statement it is not libelous, but in light of extrinsic facts known by the recipient it is libelous, it may support a cause of action only with proof of "special damages."

Id.

Here, as the Court's decision states, Pennsylvania follows the Restatement (Second) Torts § 573 for defamation affecting business, trade or profession by requiring that the

defamatory statements "ascribes to another conduct . . . that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession . . .." Mem. at 6; Rest. 2d Torts § 573 (2009). However, as Comment "c" to Section 573 makes clear, there must be actual statements impugning plaintiff's skill or disparaging plaintiff in his or her business or profession for defamation *per se* to be found:

> Statements that a physician is a drunkard or a quack, or that he is incompetent or negligent in the practice of his profession, are actionable. So too, a charge that a physician is dishonest in his fees is actionable, although an imputation of dishonesty in other respects does not affect his character or reputation as a physician. Similarly, charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a business man or tradesman do not so affect him. Statements concerning merchants that question their solvency or honesty in business come within the rule stated in this Section, as do statements charging any other quality that would have a direct tendency to alienate custom.

Rest. 2d Torts § 573, cmt. c; see also Illustration No. 4 ("A, says to B that C, a lawyer, is ignorant and unqualified to practice law. A is subject to liability to C without proof of special harm.").

The Synygy case that West cited in its summary judgment brief is particularly instructive in demonstrating that the 2008-2009 pocket part cannot constitute defamation *per se*. In Synygy, the court found that a slide shown at a conference could not constitute defamation *per se* because "[t]he slide did not facially defame plaintiff":

> Plaintiff also fails to prove the sixth element of a defamation claim-special harm. 42 Pa.Cons.Stat.Ann. § 8343(a)(6). The slide shown at the conference cannot constitute defamation *per se.* The slide did not facially defame plaintiff. The only text on the slide was the Webster's Dictionary definition of the word "simulate." Although the absence of plaintiff's name in the slide is not dispositive, *Cosgrove Studio & Camera Shop, Inc. v. Pane,* 408 Pa. 314, 182 A.2d 751, 753 (1962), the link between an assertion of plaintiff's business misconduct and the dictionary definition of "simulate" is simply too attenuated to support a claim of defamation *per se.*

Synygy, 51 F.Supp.2d at 583.

Indeed, courts finding defamation *per se* have done so only when the allegedly defamatory words themselves directly impute "(1) criminal offense, (2) loathsome disease, (3)

business misconduct, or (4) serious sexual misconduct" as set forth in Clemente. See, e.g., Keeshan v. Home Depot, U.S.A., Inc., 2001 WL 310601, at *14 (E.D. Pa. Mar. 27, 2001) ("The Court finds that the allegedly defamatory statement that Mr. Keeshan was terminated because he stole money from petty cash imputes business misconduct and is therefore slanderous *per se*."); Clemente, 749 F. Supp. at 677-78 (finding that statements were capable of defamatory meaning and also constituted slander *per se* because, "[a]t minimum, accusing an attorney of having Mafia ties imputes both a disregard for the law he is charged to uphold, and a character inconsistent with that required of a member of the legal profession."); AMI Affiliates, Inc. v. U.S. of Housing and Urban Development, 1995 WL 752387, at *6 (E.D. Pa. Dec. 15, 1995) (finding defamation *per se* because "a statement that an individual in the business of owning and operating properties co-insured by HUD is under criminal investigation by the HUD Inspector General [is] particularly detrimental to that individual's business reputation."); Capozzi v. Lucas, 2004 WL 5572908, at *7 (M.D. Pa. Aug. 25, 2004) ("In light of the fact that the Letter charges Plaintiffs with improper billing of their clients within the scope of their business, we conclude that the relevant statement is defamatory *per se.*"); Hensley v. Nationwide Mut. Ins. Co., 1999 WL 391071, at *1, 3 (E.D. Pa. June 14, 1999) (finding statements that plaintiff wrongfully gained access to insurance company's facility and fraudulently obtained insurance policy constituted "slander *per se* because the statements complained of accuse them of committing the crimes burglary, trespass, and forgery."); Klump v. Nazareth Area School Dist., 425 F.Supp.2d 622, 638 (E.D. Pa. 2006) ("Because plaintiffs allege that defendant Superintendent Lesky publicly accused plaintiff Christopher Klump of illegal criminal drug activity, his words constitute slander *per se*.").

Here, in total contrast to the above-cited examples, neither the 2008-2009 pocket part's cover page nor the pocket part itself can constitute defamation *per se* as a matter of law because they do not facially defame Rudovsky or Sosnov in their fitness to teach or practice law. In assessing the allegedly defamatory statements actually complained of by plaintiffs – that West (i) published the cover page to the 2008-2009 Pocket Part which states that it was "by David Rudovsky and Leonard Sosnov" and "The Publisher's Staff," and (ii) represented "that the

publication in fact constitutes a '2008-09 pocket part' – *i.e.*, an update to the Treatise" (Am. Compl. ¶¶ 37, 38) – it is clear that these statements do not charge plaintiffs with any business misconduct or unfitness to teach or practice law.

Instead, the reader must first rely upon extrinsic facts and make an assessment as to the quality of the pocket part and whether or not it reflects poorly on plaintiffs. Specifically, the reader must see plaintiffs' names on the pocket part, read the contents of the pocket part, rely upon extrinsic facts (such as the cases or statutes that plaintiffs say were improperly excluded), and make an assessment as to whether or not the pocket part is insufficient – and even then – the reader must put all of that information together and conclude that the reader thinks less of plaintiffs. These determinations, however, are dependent upon external facts which necessarily remove the pocket part from the realm of defamation *per se*. See Rest. 2d Torts § 573; Sack on Defamation § 2.8.3. Unlike calling plaintiffs "perjurers" or "burglars," or claiming that they are "unqualified to practice law," "improper[ly] bill[ed] their clients," "stole money" or have "Mafia ties," the pocket part does not charge plaintiffs with any business misconduct or unfitness to teach or practice law. Compare also Clemente, 749 F. Supp. at 678 ("Statements relating to attorneys impute business misconduct and are slanderous *per se* where they tend to 'show a lack of character or a total disregard of professional ethics.... or [where they] accuse an attorney of unprofessional conduct.'"). West has made no such statements about plaintiffs in the pocket part or otherwise, and accordingly, the Court should rule that the pocket part did not constitute defamation *per se*.

Furthermore, and while not dispositive, plaintiffs' total lack of evidence that anyone thought any less of them because of the pocket part belies any suggestion that the pocket part constituted defamation *per se*. The only evidence of any damages whatsoever is the almost anecdotal testimony of one plaintiff that he was "humiliated" (the other testified that he was not). Yet, despite Herculean efforts by plaintiffs' attorneys to claim that the pocket part was devastating and damaging (for example, by asserting at oral argument that it was the equal of calling an attorney a member of the Mafia), the fact that plaintiffs: (i) could not find one person who even complained about the pocket part (or thought less of the plaintiffs because of it), and (ii) conceded

that they suffered not one cent of damages, confirms that the pocket part does not even remotely approach what has ever been properly held to be defamation *per se*.

For these reasons, West respectfully submits that the Court should find as a matter of law that the pocket part does not constitute defamation *per se*.

IV. BECAUSE PLAINTIFFS HAVE CONCEDED THAT THEY HAVE SUFFERED NO SPECIAL DAMAGES, COUNT IV FOR DEFAMATION SHOULD BE DISMISSED

By statute in Pennsylvania, a defamation plaintiff has the burden of pleading and proving special damages. See 42 Pa. Const. Stat. § 8343(a)(6) ("In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: … (6) Special harm resulting to the plaintiff from its publication"); McCabe v. Village Voice, Inc., 550 F. Supp. 525, 528-529 (E.D. Pa. 1982) ("Pennsylvania law requires that in a defamation action where the defamation is not actionable *per se*, the plaintiff has the burden of pleading and proving special damages."). Here, in light of Section 8343(a)(6), plaintiffs agree with West, as they must, that special damages are required if there is no defamation *per se*. See, e.g., Pls.' SJ Opp. at 18 n. 7 ("Evidence of special damages is required where the defamation does not amount to slander *per se*.").

Yet, plaintiffs have stipulated that they have suffered no special damages. See Pls.' SJ Opp. at 22 ("As defendants note in their brief, plaintiffs have stipulated that they are not making any claim for special damages, *i.e.*, 'any lost opportunity, revenue as a result of lost opportunity, lost jobs, [or] lost teaching assignments.'"). Accordingly, West should be granted summary judgment on plaintiffs' defamation claim (Count IV) upon a finding that the pocket part does not constitute defamation *per se*. See West's SJ Br. at 9 (citing 42 Pa. Const. Stat. § 8343(a)(6); McCabe, 550 F. Supp. at 529-530; Fogel v. Forbes, 500 F. Supp. 1081 (E.D. Pa. 1980)).

CONCLUSION

West respectfully requests that the Court: (i) grant West's motion for reconsideration; (ii) find that the 2008-2009 pocket part did not constitute defamation *per se*; and (iii) enter a memorandum/order dismissing plaintiffs' defamation claim (Count IV).

Dated: July 29, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew J. Borger, hereby certify that Defendants' Motion For Reconsideration Of That Portion Of The Court's July 15, 2010 Memorandum and Order Addressing Defamation *Per Se* has been filed electronically and is available for viewing and downloading from the Court's ECF system. I further certify that on this date I served the foregoing upon counsel listed below via first class mail as follows:

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