RUDOVSKY et al v. WEST PUBLISHING CORPORATION et al Doc. 64

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

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

WEST'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR RECONSIDERATION

West's motion for reconsideration should be granted and the Court should enter a memorandum and order dismissing plaintiffs' defamation claim (Count IV).

ARGUMENT

I. West's Reconsideration Motion Should Be Granted

West's motion asked the Court to reconsider that portion of its Memorandum which stated that "a jury could conclude that the pocket part constituted defamation *per se*" (Mem. at 6) because, in the first instance, the Court was required to make this determination as a matter of law. See West's Br. at 3, quoting Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, 184 (1966) ("The question of whether the language was actionable *Per se* is in the first instance a matter of law for the Court."). Plaintiffs agree with West, and respectfully, the Court should reconsider the issue. See Pls.' Opp. at 3 ("West is correct that the question of whether statements are defamatory *per se* is a matter of law for the Court to decide.").

II. Plaintiffs Are Incorrect That "All Libels Constitute Defamation *Per Se*" and West Did Not Mischaracterize the Authorities Upon Which It Relied

The Court should reject Plaintiffs' new argument that "all libels constitute defamation *per se*" (see Pls.' Proposed Order at 2; Pls.' Opp. at 2) since a defamatory statement – even when

Dockets.Justia.com

written – still must fall into one of several defined *per se* categories in order to constitute defamation *per se*, as both West and Plaintiffs had argued in their original summary judgment briefing. See Dkt. # 52 (West's SJ Br. at 9); Dkt. # 55 (Pls.' SJ Opp. at 18). Indeed, Plaintiffs fail to address four libel cases cited by West (three of which were affirmed by the Third Circuit) in which the district court assessed whether a written statement fell into one of Pennsylvania's four categories and was therefore libelous *per se*. See Franklin Prescriptions, Inc. v. The New York Times Co., 2004 WL 1770296 (E.D. Pa. Aug. 5, 2004), aff'd 424 F.3d 336 (3d Cir. Pa. 2005); Capozzi v. Lucas, 2004 WL 5572908 (M.D. Pa. Aug. 25, 2004), aff'd, 148 Fed. Appx. 138 (3d Cir. 2005); Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570 (E.D. Pa. 1999), aff'd 229 F.3d 1139 (3d Cir. Pa. 2000); and Mediaworks, Inc. v. Lasky, 1999 WL 695585 (E.D. Pa. Aug. 26, 1999) – all of which are discussed infra.

Moreover, the only two cases that Plaintiffs cite in support of their proposition that "Pennsylvania did away with the distinction between 'libel *per se*' and other types of libel more than 25 years ago" (Pls.' Opp. at 5) are Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 483 A.2d 456 (1984), and Rhine v. Dick Clark Productions, Inc., 2000 WL 14875 (E.D. Pa. Jan. 10, 2000). See Pls.' Opp. at 5-6. Yet, Rhine is a slander case that makes no holding about libel whatsoever and has never been cited by another court. Rhine, 2000 WL 14875, at *3. And Agriss,[1] while admittedly rejecting **one meaning** of libel *per se* (the "*per se*/*per quod*" distinction) by stating that "there is no longer any sound reason to distinguish for purposes of actionability between libels which are 'defamatory on their face' and libels which are defamatory through extrinsic facts and circumstances" (Agriss, 334 Pa. Super. at 327), the court did ***not* dispense with the other meaning of *per* se** which still applies – namely, whether or not the publication is of such a character as to make the publisher liable for defamation even when no special harm results from it. See id. at 326 (adopting Section 569 of the Restatement (Second) of Torts for libel).

[1] Agriss was also later modified by the Pennsylvania Superior Court in 1993 in Walker v. Grand Cent. Sanitation, Inc., 430 Pa. Super. 236, 250-51 (1993), which held that plaintiffs must still prove actual damages – even in *per se* cases. See Walker, 430 Pa. Super. at 250-51; see also Mediaworks, 1999 WL 695585, at *9.

A. The Restatement

Indeed, according to Section 569 of the Restatement (Second) of Torts (which plaintiffs argue is current Pennsylvania law – Pls.' Opp. at 7), one must assess the character of the libelous publication (i.e., the four *per se* categories) in order to determine whether or not it is actionable *per se*:

> *Meaning of "actionable per se."* The words "actionable per se" are used throughout the various comments in this Chapter to denote the fact that **the publication is *of such a character* as to make the publisher liable for defamation although no special harm results from it**, unless the defamatory matter is true or the defamer was privileged to publish it. If the defamer has the requisite fault, a false and defamatory publication that is actionable per se enables a plaintiff to recover for actual harm unless the defendant establishes the privileged character of the publication.

REST 2D TORTS § 569 (1977), Cmt. b (emphasis added). Addressing the "character" of the publication, Section 569 discusses the four categories of written statements that are actionable *per se*:

- "Libelous and slanderous imputations of crime;"
- "Libelous and slanderous imputations affecting another's business, trade, profession or office;"
- "Libelous imputation of immorality;" and
- "Libelous accusations of untruthfulness or dishonesty."

See § 569, Cmts. d, e, f & g.

Clearly, not all libel is defamatory *per se* as Plaintiffs profess – otherwise, the four categories set forth in Section 569 would be meaningless. Indeed, in Wilson v. Benjamin, 332 Pa. Super. 211, 221, 481 A.2d 328, 333 (1984) (which was decided in the same year as Agriss by the same court), the court cites Section 569 and analyzes whether the allegedly defamatory newsletters at issue on appeal were libelous or libelous *per se* based upon the character of the statements:

> Specifically, the newsletters, *inter alia,* falsely accused Wilson of misrepresenting his qualifications for the position sought; accused Hynson of defaming the integrity of a member of the rating panel; and made allegations of breaking and entering and stealing against both appellees. **Since the statements were libelous *per se,* appellees did not have to establish special harm**. *See* Restatement (Second) of Torts § 569.

(emphasis added).

B. The Sack Treatise

West also did not misrepresent the Sack Treatise as Plaintiffs assert. Pls.' Opp. at 10. The Sack Treatise does not state that Pennsylvania has adopted Plaintiffs' purported rule that all libel constitutes defamation *per se*. Rather, the Sack Treatise supports West. Professor Sack states that the Third Circuit interprets Pennsylvania law as requiring a court to use the slander *per se* categories in assessing whether or not a libel is actionable *per se*.

Specifically, in Section 2:8.6 of the Sack Treatise, entitled "Special Rules in Other Jurisdictions," Part B "Georgia, Virginia, Kansas, Nebraska, Illinois, Wisconsin, North Carolina, Utah, South Carolina, Iowa, Louisiana, and Pennsylvania," Professor Sack's entire discussion of Pennsylvania law (though obviously brief) is as follows:

> The Third Circuit seems to have read Pennsylvania law to incorporate slander per se principles into libel per se analysis, although whether the Pennsylvania courts mean to do so is not altogether clear. *See* Franklin Prescriptions, Inc. v. N.Y. Times Co., 424 F.3d 336, 343, 33 Media L. Rep. (BNA) 2254 (3d Cir. 2005) (citing slander per se case in arriving at libel per se rule).

See Sack on Defamation, § 2:8.6[B]. Like Plaintiffs' discussion of Agriss, Plaintiffs focus on the *per se*/*per quod* meaning of *per se* while ignoring the other meaning requiring that a written statement fall into one of Pennsylvania's four defined *per se* categories (borrowed from slander *per se* analysis) in order to constitute defamation *per se*. Id.; Franklin Prescriptions, Inc. v. N.Y. Times Co., 424 F.3d 336, 343 (3d Cir. 2005); see also Franklin Prescriptions, 2004 WL 1770296, at *8 (E.D. Pa. Aug. 5, 2004); Capozzi, 2004 WL 5572908, at *7; Synygy, Inc., 51 F. Supp. 2d at 583; Mediaworks, 1999 WL 695585 at *9; Wilson, 332 Pa. Super. at 221.

C. The Case Law Addressing Libel That West Cited and Plaintiffs Ignored

Plaintiffs also fail to distinguish, or even address, the libel cases cited by West – cases which demonstrate that courts in this Circuit distinguish between libel and libel *per se* based upon the four *per se* categories and the character of the statement at issue. For example, Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570 (E.D. Pa. 1999), aff'd 229 F.3d 1139 (3d Cir. Pa. 2000) involved an allegedly defamatory slide shown at a business conference. The Synygy Court found that the slide "cannot constitute defamation *per se*" because "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 (emphasis added). The Synygy Court's analysis of the character of the slide would have been wholly unnecessary if "all libels constitute defamation *per se*" as Plaintiffs erroneously suggest.

Similarly, Franklin Prescriptions, Inc. v. The New York Times Co., 2004 WL 1770296 (E.D. Pa. Aug. 5, 2004), aff'd, 424 F.3d 336 (3d Cir. Pa. 2005) – indisputably a libel case involving an article published by the Times – demonstrates that all libel does not constitute defamation *per se*. At issue in Franklin Prescriptions was an article published by the Times containing a printout of Franklin's website that warned consumers about the risks of purchasing pharmaceuticals over the internet, especially from "sites that fail or refuse to provide a United States address and phone number" (no U.S. address or number was listed for Franklin). Id. Franklin lost at trial because the jury had found it suffered no actual harm from the publication, and Franklin's contention on its motion for a new trial was that "the Court erred by not instructing the jury on the issue of defamation *per se*." Id. at *8. In addressing the libel issue, the court held that:

> Under Pennsylvania law, communications containing 'words imputing (i) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct,' are considered defamatory *per se*. When a statement is defamatory *per se*, a plaintiff can recover general damages (*i.e.*, harm to reputation) and need not prove special damages (*i.e.*, pecuniary loss). Whether the allegedly defamatory statements are defamatory *per se* is a question for the court.

Id. Here, as in Synygy, the Franklin Court's analysis of the purported libel and whether or not it fit into one of the *per se* categories would have been totally unnecessary if Plaintiffs were correct that "all libels constitute defamation *per se*."

Also cited by West (and ignored by Plaintiffs) is Mediaworks, Inc. v. Lasky, 1999 WL 695585 (E.D. Pa. Aug. 26, 1999), in which the District Court reviewed an erroneous libel decision of the bankruptcy court concerning a letter, finding that the bankruptcy court had "misstated and consequently misapplied Pennsylvania defamation law in cases involving defamation *per se*." Id. at *8. Specifically, the court held that "a defendant who publishes a statement which can be

considered defamation *per se* is only liable for the proven, actual harm the publication causes." Id. at *9 (emphasis added). Again, there would be no need in a libel case such as Mediaworks to determine whether or not an allegedly libelous statement can be "considered defamatory *per se*" if all libel automatically constituted defamation *per se* as Plaintiffs now suggest.

Tellingly, Plaintiffs' opposition avoids any discussion of these cases, and their attempt to distinguish another libel case cited by West, Capozzi v. Lucas, 2004 WL 5572908, at *7 (M.D. Pa. Aug. 25, 2004), aff'd, 148 Fed. Appx. 138 (3d Cir. 2005), falls flat. Capozzi involved a letter charging plaintiffs with improper billing of their clients, and the court analyzed whether or not the statements therein constituted defamation *per se* based upon the four Pennsylvania defamation *per se* categories. Id. at *7. In trying to "distinguish" Capozzi, Plaintiffs merely assert that Cappozzi "appears to be an example of a court mistakenly applying the concept of slander *per se* to a libel case." Pls.' Opp. at 12 n.2. To the contrary, Synygy, Franklin Prescriptions, Mediaworks and Cappozi reveal that all libel is not defamation *per se* – the Court in the first instance must make this determination based upon the four categories.

Indeed, any purportedly defamatory statement (even when written) must be assessed to see whether it is "of such a character" to qualify as defamation *per se*. REST 2D TORTS § 569, Cmt. b; Wilson, 332 Pa. Super. at 221; Franklin Prescriptions, 2004 WL 1770296, at *8; Capozzi, 2004 WL 5572908, at *7; Synygy, Inc., 51 F. Supp. 2d at 583; Mediaworks, 1999 WL 695585 at *9.[2]

D. Pennsylvania's Defamation Statute

Plaintiffs also ignore West's citation to the Pennsylvania statute governing all defamation claims – whether libel or slander – a statute which provides that a defamation plaintiff has the

[2] Plaintiffs erroneously suggest that Marcone v. Penthouse Intern., Ltd., 754 F.2d 1072 (3d Cir. 1985) supports their position that all libel is defamation *per se*. However, the Court of Appeals in Marcone merely held that "Penthouse's assertion regarding the significance of Marcone's failure to prove 'special damages' is also not in conflict with Pennsylvania law. The district court held that the article constituted libel per se and thus proof of special damages was not required." Id. at 1079. The Court then addressed Pennsylvania's rules governing actual damages (id. at 1080) – it did not reject the application of the *per se* rule set forth in the Restatement requiring the court to assess the character of the publication and whether it falls under one of the libel *per se* categories. Indeed, as discussed above, the Third Circuit in the more recent 2005 case, Franklin Prescriptions, used the slander *per se* categories in arriving at a libel *per se* rule.

burden of pleading and proving special damages:

> 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.

42 Pa. Const. Stat. § 8343(a)(6); West's Br. at 8. According to Walker, the special damages requirement may only be avoided if the statements constitute defamation *per se*, and here, West's statements do not. See Walker, 430 Pa. Super. at 246.

III. Plaintiffs Ignore West's Point That West Made No Libelous Statements About Plaintiffs, Much Less Ones "Of Such A Character" To Be Libelous *Per Se*

Plaintiffs' opposition brief also completely avoids West's point that West has made no statements impugning Plaintiffs' skill or disparaging Plaintiffs in their business or profession for defamation *per se* to be found. West's Br. at 6-7. As West has demonstrated, the Court must first make an assessment as to whether the alleged defamatory statements at issue – (i) that Plaintiffs and West's Publisher's Staff authored the 2008-2009 Pocket Part, and (ii) that the Pocket Part is an update (Am. Compl. ¶¶ 37, 38) – are "of such a character" to qualify as defamation *per se*. It is clear, however, that these statements – the only allegedly defamatory statements ever identified by Plaintiffs – do not constitute defamation *per se* because they do not satisfy any of Pennsylvania's four defamation *per se* categories: "communications containing 'words imputing (i) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct,' are considered defamatory *per se*." Franklin, 2004 WL 1770296, at *8. 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" (West's Br. at 7), the pocket part does not charge Plaintiffs with any business misconduct or unfitness to teach or practice law. Plaintiffs obviously continue to avoid this issue because West's statements that the parties authored the 2008-2009 Pocket Part and that it is an update do not constitute libelous statements, much less statements that are "of such a character" so as to constitute libel *per se*. Accordingly, West respectfully submits that the Court should have dismissed Plaintiffs' defamation claim.

CONCLUSION

For these reasons and those set forth in its moving brief, 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: August 18, 2010

Respectfully submitted,

/s/ James F. Rittinger
James F. Rittinger, Esq.w (admitted *pro hac vice*)
Aaron M. Zeisler, Esq. (admitted *pro hac vice*)
SATTERLEE STEPHENS BURKE & BURKE LLP
230 Park Avenue, 11th Floor
New York, NY 10169-0079
Tel: (212) 818-9200
Email: jrittinger@ssbb.com
azeisler@ssbb.com

/s/ Matthew J. Borger
Matthew J. Borger, Esq.
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103
Tel: (215) 568-6060
Email: mborger@klehr.com

CERTIFICATE OF SERVICE

I, Matthew J. Borger, hereby certify that West's Reply Memorandum of Law in Further Support of Its Motion For Reconsideration 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:

Richard L. Bazelon
Noah H. Charlson
BAZELON LESS & FELDMAN, P.C.
1515 Market Street, Suite 700
Philadelphia, PA 19102-1907
215-568-1155

Dated: August 18, 2010

/s/ Matthew J. Borger
Matthew J. Borger, Esquire