

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

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

WEST’S PROPOSED JURY INSTRUCTIONS

Plaintiffs David Rudovsky and Leonard Sosnov (collectively, “Plaintiffs”) have four remaining causes of action against Defendants which should be grouped into two claims, namely: (1) unauthorized use of name (under Pennsylvania statute 42 Pa. C.S. § 8316 [Count III], and common law misappropriation of name [Count V]); and (2) defamation/false light (under Pennsylvania’s defamation statute, 42 Pa. C.S.A. § 8343 [Count IV], and common law false light [Count VI]).

Pursuant to the Court’s orders and individual practices, 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”), by their attorneys Satterlee Stephens Burke & Burke LLP, respectfully submit the following requests to charge the jury in the trial of this matter. West reserves the right to request additional or different instructions based on the evidence presented at trial.

Dated: New York, New York
December 14, 2010

SATTERLEE STEPHENS BURKE & BURKE LLP

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I. UNAUTHORIZED USE OF NAME

A. Count III For Violation of 42 Pa. C.S. § 8316

Plaintiffs allege that West used their names or likenesses without authorization when it listed Plaintiffs as authors along with West’s Publisher’s Staff on the 2008 Pocket Part.

One who uses the name or likeness of a natural person is responsible to that natural person for any loss or injury sustained by such use if it satisfies each of the following:

- (i) the party using the name or likeness did so without the written consent of the natural person;
- (ii) the natural person’s name or likeness has commercial value; and
- (iii) the name or likeness is used by a party for any commercial or advertising purpose.¹

The term “commercial value” means a valuable interest in a natural person’s name or likeness that is developed through the investment of time, effort and money.²

The term “commercial or advertising purpose” means the public use or holding out of a natural person’s name or likeness: (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, services or business; (ii) for the purpose of advertising or promoting products, merchandise, goods or services of a business; or (iii) for the purpose of fundraising.³

However, the term “commercial or advertising purpose” does not include the use of a natural person’s name or likeness when it is associated with the identification of that person as the author of or contributor to a written work under circumstances in which the written work

¹ See 42 Pa. C.S.A. § 8316(a).

² See *id.* at (e).

³ See *id.* at (e).

is lawfully produced or reproduced.⁴

Here, the parties have submitted evidence of a written contract concerning the Treatise and its pocket parts. If you determine that West used Plaintiffs' names or likenesses without written consent of the Plaintiffs, that the Plaintiffs' names or likenesses have a commercial value, and that West used the Plaintiffs' names or likenesses for a commercial or advertising purpose that was not connected to the Treatise, then you may find in favor of Plaintiffs, but you must also find that West, a publisher, had actual knowledge that it was using Plaintiffs' names without authorization.

Under Pennsylvania law, no person, firm, or corporation, including their employees and agents, in the business of producing, manufacturing, publishing or disseminating material for commercial or advertising purposes by any communications medium shall be held liable for unauthorized use of name or likeness unless they had actual knowledge of the unauthorized use of the name or likeness of a natural person.⁵

If you determine that West and its employees or agents reasonably believed they had a contractual right to use Plaintiffs' names or likenesses, or if they were unsure whether or not they had the contractual right to use Plaintiffs' names or likeness, then you must find in favor of West and against Plaintiffs on their claim for unauthorized use of name or likeness under the statute.

Conversely, if you determine that West and its employees or agents had actual knowledge that they were using Plaintiffs' names and likenesses in an unauthorized manner, then you may find in favor of Plaintiffs and against West on the claim for unauthorized use of name or likeness. In a few moments, I will instruct you with respect to damages for unauthorized use

⁴ See *id.* at (e)(2)(vi).

⁵ See *id.* (d).

of name or likeness.

B. Count V For Common Law Misappropriation of Name

Plaintiffs also assert that West invaded their privacy by misappropriating their names for the 2008 Pocket Part.

One who appropriates the name or likeness of another person for his or her own use or benefit is responsible to that person for all harm suffered as a result of this invasion of privacy.⁶ Written consent to use one's name or likeness is a complete defense to a claim for misappropriation of name.⁷

Moreover, the defendant must appropriate some value of the plaintiff's name or likeness, such as its reputation, prestige, social or commercial standing, or public interest for the defendant's own use or benefit.⁸

If you determine that Plaintiffs consented to West's use of their names or likenesses, then you must find in favor of West and against Plaintiffs on their claim for misappropriation of name. Likewise, if you determine that West did not appropriate the names or likenesses of the Plaintiffs for its own use or benefit, then you must find in favor of West and against Plaintiffs on the claim for misappropriation of name.

Finally, you must also find in favor of West if you conclude that West believed it had the contractual right to use Plaintiffs' names, even if you or the Court find that West did not have the contractual right to use their names.

Conversely, if you determine that West appropriated the names or likenesses of

⁶ Penn. Suggested Standard Civil Jury Instructions, § 13.12 (second alternative).

⁷ See Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963) ("One universally accepted principle of the right of privacy is that a consent to an invasion is a complete defense to the appropriation of a plaintiff's likeness to sell products"); 2 Summary of Pa. Jur. 2d Torts § 22:19, Effect of Release (stating that, to be actionable, invasions of privacy with respect to appropriation of name or likeness must be made without authority).

⁸ Restatement (Second) of Torts § 652C.

the Plaintiffs for its own use or benefit without the belief that they had Plaintiffs' written consent, then you may find in favor of Plaintiffs and against West on the claim for misappropriation of name. I will now instruct you on damages for misappropriation of name.

C. Damages For Misappropriation of Name Under Counts III and V

If you find in favor of Plaintiffs and against West on either of their claims for misappropriation of name, then you may award Plaintiffs damages in accordance with the following instructions.

Under Pennsylvania law, you may award Plaintiffs damages for any loss or injury that they actually sustained by West's misappropriation of their name or likeness, assuming that you determine that the names had commercial value and that West used Plaintiffs' names or likenesses without written consent of the Plaintiffs.⁹

You may not award Plaintiffs any punitive or presumed damages on their claims for misappropriation.¹⁰

⁹ 42 Pa. C.S.A. § 8316(a); see also Sternlicht v. Sternlicht, 583 Pa. 149, 163 (Pa. 2005) (“Where the legislature expressly provides a comprehensive legislative scheme, these provisions supersede the prior common law principles.”); In re D.L.H., 2 A.3d 505, 514 n.9 (Pa. 2010).

¹⁰ See id. (damages limited to “any loss or injury sustained by such [unauthorized] use”).

II. DEFAMATION AND FALSE LIGHT

The Plaintiffs claim that West's publication of the 2008 Pocket Part has defamed them and placed them in a false light.

A. Count IV for Defamation

1. Standard for Defamation

A person otherwise liable for publishing a communication that is defamatory of another is responsible for all harm suffered by the person defamed as a result of that publication.¹¹ The burden is on the plaintiff to prove the elements of a defamation claim, on which I will now instruct you, by a preponderance of the evidence.¹²

In an action for defamation under Pennsylvania law, the plaintiff has the burden of proving: (1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.¹³

Here, Plaintiffs assert that West's publication of the 2008 Pocket Part listing Plaintiffs as authors along with the West's Publisher's Staff was defamatory. It is not disputed that West published the 2008 Pocket Part; however, Plaintiffs must prove each of the other elements of defamation for you to find that West has liability, including that the 2008 Pocket Part had a defamatory meaning, that the subscribers to the Treatise understood it to be

¹¹ Penn. Suggested Standard Civil Jury Instructions, § 13.08 (2005).

¹² See id.

¹³ 42 Pa. Const. Stat. § 8343(a).

defamatory, that the subscribers believed that Plaintiffs wrote it, and that there was harm to the Plaintiffs.¹⁴

2. Defamatory Meaning

Where, as here, the publication can be interpreted in both a defamatory and nondefamatory manner, you must decide what the statement means.¹⁵ Words are not defamatory merely because they are annoying or embarrassing to the person referred to in the communication.¹⁶ A communication is defamatory if it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.¹⁷

“Defamation *per se* occurs where a publication ‘imputes to another conduct, characteristics or a condition that would adversely affect her in her lawful business or trade.’”¹⁸

If you find that the intended audience of the 2008 Pocket Part concluded that it was inaccurate and out-of-date, and that Plaintiffs authored it, I will hold that the pocket part constitutes libel *per se* because it would damage the Plaintiffs as legal authors and authorities on Pennsylvania criminal law.¹⁹

If, however, you find that the intended audience of the 2008 Pocket Part did not conclude that it was inaccurate and out-of-date, and/or that Plaintiffs had authored it, then you must find in favor of West because there is no libel *per se* and Plaintiffs have stipulated that they have suffered no economic damages.

¹⁴ See *id.*

¹⁵ Order filed Dec. 8, 2010 (quoting *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 n. 7).

¹⁶ Penn. Suggested Standard Civil Jury Instructions, § 13.14 (2005).

¹⁷ Penn. Suggested Standard Civil Jury Instructions, § 13.08 (2005).

¹⁸ Order filed Dec. 8, 2010 (quoting *Franklin Perscriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 343 (3d Cir. 2005)).

¹⁹ Order filed Dec. 8, 2010.

3. Consent

Consent to make a communication is an absolute defense to a claim for defamation.²⁰ If you find that Plaintiffs consented to West's publication of the 2008 Pocket Part listing Plaintiffs as authors along with West's Publisher's Staff, then you must return a verdict in favor of West and against the Plaintiffs on the defamation claim.

4. Truth

Truth is also an absolute defense to claims of defamation. If you find that the publication, even if it was defamatory of the Plaintiffs, was true or substantially true, you must return a verdict in favor of West and against the Plaintiffs on the defamation claim.²¹

B. Count V For Common Law Claim of False Light

Plaintiffs assert that West invaded their privacy by publicly placing them in a false light when it published the 2008 Pocket Part by listing Plaintiffs as authors along with West's Publisher's Staff.

Under Pennsylvania law, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

²⁰ See Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401, 405 (E.D. Pa. 1963) (stating that release signed by plaintiff precluded any liability on behalf of defendant with respect to the communications at issue and that "[s]uch consent negatives the existence of any tort in the first instance"); Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. 1986) (finding professor's consent to publication of his performance evaluations gave college absolute privilege against defamation claim with respect to those evaluations); see also Sobel v. Wingard, 531 A.2d 520, 522 (Pa. Super. 1987) (stating that evaluations of an employee by an employer are deemed to be consented to by employee and finding that "consent is an absolute privilege").

²¹ Pacitti v. Durr, 310 Fed. Appx. 526, 528-529, 2009 WL 325760, at *2 (3d Cir. [Pa.] 2009) ("[I]n Pennsylvania truth is an absolute defense to a defamation claim and a defendant need only show substantial, rather than complete, truth."); Tucker v. Fischbein, 237 F.3d 275, 287-88 (3d Cir. 2001); Pierce v. Capital Cities Comm., Inc., 576 F.2d 495, 507 n.46 (3d Cir. 1978); see also Gilbert v. Bionetics Corp., No. 98-2668, 2000 WL 807015, at *3 (E.D. Pa. June 6, 2000) ("The truth required to avoid liability for defamation is not complete truth, but rather substantial truth"); Bobb v. Kraybill, 354 Pa. Super. 361, 364, 511 A.2d 1379, 1380 (Pa. Super. 1986).

- (i) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (ii) The actor has actual knowledge of its falsity or acted in reckless disregard of its falsity.²²

Thus a publication is actionable under false light if it is not true, is highly offensive to a reasonable person and is publicized with knowledge or in reckless disregard of its falsity.²³

Further, to be actionable under false light, a publication must cause mental suffering, shame or humiliation to a person of ordinary sensibilities.²⁴

Conduct that is highly offensive to a reasonable person is conduct that a reasonable person, in similar circumstances, would find very objectionable or that a reasonable person in similar circumstances could be expected to take with serious offense.²⁵

Publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.²⁶

Written consent allowing a party to make public disclosures is a complete defense to a claim for false light invasion of privacy.²⁷

²² Larsen v. Phila. Newspapers, Inc., 543 A.2d 1181, 1188 (Pa. Super. Ct. 1988).

²³ Id.

²⁴ Id.; see also Curran v. Children's Serv. Ctr., 578 A.2d 8, 13 (Pa. Super. Ct. 1990).

²⁵ See id.

²⁶ See id.

²⁷ See McFadden v. United States of America, 2005 WL 1413196, at *6 (M.D. Pa. 2005) (finding signed written consent granting defendant right to make certain disclosures was dispositive of plaintiff's invasion of privacy claim); see also Am. Jur. § 92 (right of privacy waived by written consent).

If you determine that Plaintiffs consented to West’s use of their name with respect to the 2008 Pocket Part, then you must find in favor of West and against Plaintiffs on their claim for false light invasion of privacy.

Likewise, if you determine that the public did not conclude that the 2008 Pocket Part was substantially inaccurate and out of date, or that West’s publication of the 2008 Pocket Part listing Plaintiffs as authors along with West’s Publisher’s staff does not place Plaintiffs in a false light that would be highly offensive to a reasonable person or that West did not act with knowledge of the falsity of the matter or in reckless disregard of whether it was true or false, then you must find in favor of West and against Plaintiffs’ on the claim for false light.

Conversely, if you determine that the public concluded that the 2008 Pocket Part was substantially inaccurate and out of date and that its publication of the 2008 Pocket Part listing Plaintiffs as authors along with West’s “Publishing Staff” places Plaintiffs in a false light that would be highly offensive to a reasonable person and that West acted with knowledge of the falsity or in reckless disregard of whether it was true or false, then you may find in favor of Plaintiffs and against West on the claim for false light.

C. Damages For Defamation and False Light

1. Actual Malice and Damages

“[I]n the absence of actual malice . . . [plaintiff] cannot rely on a presumption of damages; he or she must offer actual specific evidence of such general damages.”²⁸ Here, if you find that West’s publication of the 2008 Pocket Part was defamatory or placed them in a false light, Plaintiffs are only entitled to the general damages that they prove unless Plaintiffs can also prove, by clear and convincing evidence, that West published the Pocket Part with “actual

²⁸ Beverly Enterprises v. Trump, 182 F.3d 183 n.2 (3rd Cir. 1999).

malice,” which means that West published it “with knowledge that it was false” or “with a high degree of awareness of probable falsity.”²⁹

2. Actual Malice

Actual malice is a legal term used in defamation and false light cases that should not be confused with the concept of malice as in evil intent or a motive arising from spite or ill will.³⁰ Actual malice means that, at the time that the statement was made, the party making the statement acted with knowledge that the statement was false or acted with reckless disregard of whether the statement was false or not.³¹ In other words, the plaintiff must demonstrate that the defendant in fact entertained serious doubts as to the truth of his publication, or acted with a high degree of awareness of probable falsity.³² Mere negligence does not suffice.³³

Actual malice is not established by proof of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”³⁴ Neither “unprofessional conduct” nor negligence rise to the level of actual malice.³⁵

Actual malice focuses solely on the defendant’s actual state of mind at the time of the publication.³⁶ An actual malice determination must “necessarily be drawn solely upon the

²⁹ Masson v. New Yorker Magazine, 501 U.S. 496, 510-11, 111 S.Ct. 2419, 2430 (1991); Gertz v. Robert Welsh, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 931 (3d Cir. (Pa.) 1990) (the *New York Times* standard of actual malice applies not only to defamation but to other torts such as intentional infliction of emotional distress and “false light”).

³⁰ See Masson v. New Yorker Magazine, 501 U.S. 496, 510-11, 111 S.Ct. 2419, 2430 (1991) (citing Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970)).

³¹ See id. (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964)).

³² See id.; see also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

³³ See id.

³⁴ Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 663-64 n. 5 (1989).

³⁵ Marcone v. Penthouse Int’l Magazine for Men, 954 F.2d 1072, 1090 (3d Cir. 1985).

³⁶ Bose Corp. v. Consumer Union of U.S., Inc., 466 U.S. 485, 512 (1984).

basis of the information that was available to and considered by the defendant prior to publication.”³⁷

Actual malice must be proven by Plaintiffs by clear and convincing evidence,³⁸ which is the highest standard of proof for civil claims.³⁹ The clear and convincing evidence standard requires evidence so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation as to the truth of the facts at issue.⁴⁰

“The actual malice standard is a rigorous, if not impossible, burden to meet in most circumstances.”⁴¹ In fact, the actual malice standard forbids the imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements.⁴²

Here, if you find that Plaintiffs have failed to establish by clear and convincing evidence that West acted with actual malice prior to publication of the 2008 Pocket Part – that is to say, that West published it “with knowledge that it was false” or “with a high degree of awareness of probable falsity” – then you may not award presumed damages or punitive damages; you may only consider general damages.

Conversely, if you find that Plaintiffs have established by clear and convincing evidence that West acted “with knowledge that it was false” or “with a high degree of awareness of probable falsity” prior to publishing the 2008 Pocket Part, then you may consider awarding Plaintiffs more than general damages, such as presumed damages or punitive damages, which I will explain to you shortly.

³⁷ McFarlane v. Sheridan Square Press, 91 F.3d 1501, 1508 (D.C. Cir. 1996).

³⁸ Masson v. New Yorker Magazine, 501 U.S. 496, 510-11, 111 S.Ct. 2419, 2430 (1991).

³⁹ See Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 192 (Pa. Super. Ct. 2003); see also Manning v. WPXI, Inc., 886 A.2d 1137, 1144 (Pa. Super. Ct. 2005).

⁴⁰ See Matter of Braig, 520 Pa. 409, 554 A.2d 493, 495 (Pa. 1989); see also Manning, 886 A.2d at 1144.

⁴¹ Bartlett v. Bradford Publishing, Inc., 885 A.2d 562, 566 (Pa. Super. 2005).

⁴² See id. (citing Norton v. Glenn, 580 Pa. 212, 860 A.2d 48, 56 (Pa. 2004)).

3. Presumed Damages

If you find that West's publication of the 2008 Pocket Part was defamatory, you are not to presume that Plaintiffs suffered damages. Under Pennsylvania law, presumed damages are those that are expected to result from defamation; they require no proof, but instead, as reflected in their name, are presumed under the law.⁴³ However, unless you find that West acted with actual malice by clear and convincing evidence as I described a few minutes ago, you cannot award Plaintiffs any presumed damages.⁴⁴ Without actual malice, a plaintiff cannot rely on presumed damages but must prove general damages.⁴⁵

4. General Damages

If you find that West's publication was defamatory or that it placed Plaintiffs in a false light, then Plaintiffs must still prove that they have suffered general damages. General damages are the harm to one's reputation or the personal humiliation that was caused by the communication.⁴⁶ Here, Plaintiffs have admitted that they have no evidence of harm to their reputations so you may only consider the humiliation element of general damages. Injury caused by personal humiliation is determined by the reaction of other persons in the community, and not

⁴³ Sprague v. American Bar Ass'n, 276 F. Supp. 2d 365, 368 (E.D. Pa. 2003).

⁴⁴ Beverly Enterprises v. Trump, 182 F.3d 183 n.2 (3rd Cir. 1999) ([I]n the absence of actual malice, even if the plaintiff need only prove general damage to reputation, as in a defamation *per se* case, he or she cannot rely on a presumption of damages; he or she must offer actual specific evidence of such general damages.”).

⁴⁵ Syngy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 581 (E.D. Pa. 1999), aff'd 229 F.3d 1139 (3d Cir. 2000) (even in cases of defamation *per se*, a plaintiff cannot rely on presumed damages but must prove “general damage, i.e., proof of reputational harm”); see also McNulty v. Citadel Broad. Co., 58 Fed. Appx. 556, 567 (3d Cir. 2003) (unpublished) (“even with defamation *per se*, the plaintiff must prove ‘general damages’”); Pyle v. Meritor Savings Bank, No. 92-7361, 1996 WL 115048, at *3 (E.D. Pa. Mar. 13, 1996) (“In a defamation *per se* case, a plaintiff must prove general damages from a defamatory publication and cannot rely upon presumed damages.”); Walker v. Grand Cent. Sanitation, Inc., 430 Pa. Super. 236, 634 A.2d 237, 242 (1993) (holding that plaintiffs in *per se* cases prove “damage to reputation” and may not rely upon presumed damages).

⁴⁶ See, e.g., McNulty v. Citadel Broad. Co., 58 Fed. Appx. 556, 567 (3d Cir. 2003); Syngy, Inc., 51 F. Supp. 2d at 582 (“plaintiff must show general damages where the alleged defamation is *per se*.”); Walker v. Grand Cent. Sanitation, Inc., 430 Pa. Super. 236, 634 A.2d 237, 242 (1993) (requiring that plaintiffs in *per se* cases prove “damage to reputation”).

by the party's self-estimation.⁴⁷ Plaintiffs' own embarrassment or annoyance is not sufficient to prove injury of personal humiliation.⁴⁸

If you determine that Plaintiffs have demonstrated that there was some personal humiliation caused by West's publication of the 2008 Pocket Part – as determined by the reaction of other persons in the community – then you may find that Plaintiffs are entitled to general damages.⁴⁹ Conversely, if you determine that Plaintiffs did not demonstrate that there was personal humiliation – as determined by the reaction of other persons in the community – then you must find that Plaintiffs are not entitled to any general damages.

5. Punitive Damages

Plaintiffs claim that they are entitled to punitive damages. Under Pennsylvania law, punitive damages serve a deterrence function as well as a punishment function.⁵⁰

Here, as an initial matter, the Plaintiffs must demonstrate by clear and convincing evidence that West's publication of the 2008 Pocket Part was made with actual malice in order to recover punitive damages.⁵¹ Again, actual malice means that West published the Pocket Part “with knowledge that it was false” or “with a high degree of awareness of probable falsity.”⁵²

⁴⁷ See Pyle v. Meritor Savings Bank, No. 92-7361, 1996 WL 115048, at *3 (E.D. Pa. Mar. 13, 1996).

⁴⁸ Scott-Taylor, Inc. v. Stokes, 425 Pa. 426, 428, 229 A.2d 733, 734 (1967); Kryeski v. Schott Glass Tech, Inc., 426 Pa. Super 105, 626 A.2d 595 (1993).

⁴⁹ See, e.g., SNA, Inc. v. Array, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999); McNulty, 58 Fed. Appx. at 567; Synogy, Inc., 51 F. Supp. 2d at 582; Walker, 634 A.2d at 242.

⁵⁰ G.J.D. v. Johnson, 447 Pa. Super. 340, 347, 669 A.2d 378, 382 (Pa. Super. 1995).

⁵¹ Gertz, 418 U.S. at 350 (“We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.”); Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 330, 485 A.2d 374, 388 (Pa. 1984), rev'd on other grounds, 475 U.S. 767; see also Oweida v. Tribune-Review Publ'g Co., 599 A.2d 230 (Pa. Super. Ct. 1991); Penn. Suggested Standard Civil Jury Instructions, § 13.10 Subcommittee Notes (2005).

⁵² Masson v. New Yorker Magazine, 501 U.S. 496, 510-11, 111 S.Ct. 2419, 2430 (1991); Gertz v. Robert Welsh, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

If you do not find that the Plaintiffs have proven by clear and convincing evidence that West acted with actual malice, then you cannot award Plaintiffs punitive damages.

Conversely, if you find that Plaintiffs have proven with clear and convincing evidence that West acted with actual malice, you may award Plaintiffs punitive damages.

However, even if you find that West published the Pocket Part with actual malice, you still may decide that Plaintiffs are not entitled to punitive damages.⁵³ When determining whether or not to award punitive damages, and the amount of those damages, you may take into account West's motive and purpose for publishing the 2008 Pocket Part, West's belief or knowledge, if any, of the publication's falsity; and the conduct of the Plaintiffs.⁵⁴

Any punitive damages, however, must bear some reasonable relationship to the actual damages, if any, that you award.⁵⁵

⁵³ See, e.g., Penn. Suggested Standard Civil Jury Instructions, § 13.10.

⁵⁴ See id.

⁵⁵ See BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996) (“The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.”).