

SUPPLEMENTAL POINT 1 – DEFAMATION

Plaintiffs claim that defendants' publication of the pocket parts was defamatory.

A person 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. 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.

A communication is any act by which a person brings an idea to another's attention. A communication may be made by speaking or by writing words or by another act or combination of acts that result in bringing an idea to another's attention.

A communication is defamatory if any portion of 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. A communication that states or implies that a person has acted in a way that would be inconsistent with the proper, honest, and lawful performance of his or her job, profession, or office, or has a character that would make him or her unfit to properly, honestly, and lawfully perform his or her job, profession, or office, is defamatory.

Source: Source: Pa. SSJI (Civ.), § 13.08 (2009)

SUPPLEMENTAL POINT 2 - DEFAMATION – PLAINTIFFS’ BURDEN OF PROOF

In an action for defamation, the plaintiffs have the burden of proving:

- (1) The communication’s publication by the defendants;
- (2) Its application to the plaintiffs;
- (3) The understanding by the recipient of its defamatory meaning;
- (4) The understanding by the recipient of it as intended to be applied to the plaintiffs; and
- (5) The falsity of the publication.

Source: 42 Pa. C.S.A. § 8343

SUPPLEMENTAL POINT 3 - DEFAMATION – PUBLICATION

A defendant is responsible for communicating a defamatory statement if the defendant personally communicated it or directed or participated in another's publication of the defamatory statement. The burden is on the plaintiffs to show that the defendant either personally published the communication or directed or participated in another's publication of the defamatory statement.

Source: Pa. SSJI (Civ.), § 13.09 (2009)

SUPPLEMENTAL POINT 4 - DEFAMATION – IDENTIFICATION OF THE PLAINTIFFS

It is not necessary for the plaintiffs to be specifically identified by name or official position for the communication to defame them. The plaintiffs may be defamed if the defendants intended the communication to refer to the plaintiffs, or if a description or reference tends to identify them. The plaintiffs also may be defamed where a recipient of the communication is familiar with the circumstances mentioned in the communication and recognizes that it concerns the plaintiffs. The burden is on the plaintiffs to show that a description or reference in the communication, or familiarity with the circumstances, would lead the recipients of the communication to reasonably understand it as referring to the plaintiffs.

Source: Pa. SSJI (Civ.), § 13.10 (2009)

SUPPLEMENTAL POINT 5 - MEANING OF STATEMENTS (REPLACING ORIGINAL POINT 1)

It is your duty to determine whether the intended audience of the pocket part would likely conclude that the plaintiffs authored an inaccurate and out-of-date supplement to the treatise.

In making this determination, you should consider the message the communication would send to the intended audience of the pocket part. This means you should consider the innuendoes and implications of what was said, as well as inferences the intended audience of the pocket part would have drawn from what may not have been said. You should also consider the context in which the statement was made.

It is not necessary that the defamatory statement be the primary focus of the communication in order for the plaintiffs to succeed on their claim. The plaintiffs may recover on the basis of even a small portion of a communication, if it is defamatory. It is not a defense that that portion is not the primary focus of the communication or that other portions may be sympathetic to the plaintiffs.

Source: Court's Order of December 8, 2010; Pa. SSJI (Civ.), § 13.08 (2009)

SUPPLEMENTAL POINT 6 – CONTRACT AS CONSENT TO DEFAMATION

Defendants claim that in the contracts between plaintiffs and defendants, plaintiffs consented to the statements at issue. A plaintiff consents to the making of defamatory statements only if the plaintiff knows the exact language that the defendant will use in those statements or has reason to know that such language may be defamatory.

Source: *PPG Industries, Inc. v. Zurawin*, 52 Fed. Appx. 570, 578 (3d Cir. 2002); Restatement (Second) of Torts § 583 (1977)

SUPPLEMENTAL POINT 7 - DEPOSITION TESTIMONY

You have heard the deposition testimony of certain witnesses. Deposition testimony is entitled to the same consideration as if the witness testified in court.

Source: Pa. SSJI (Civ.), § 2.05 (2009)

SUPPLEMENTAL POINT 8 - PUNITIVE DAMAGES AGAINST A PRINCIPAL

You may also award punitive damages against defendants, if you find that the actions of defendants' employee or employees

First, were outrageous;

Second, occurred during and within the scope of their duties; and

Third, were not committed to satisfy the employee's personal ill will or malice, but instead were committed with the intent to further defendants' interests.

Source: Pa. SSJI (Civ.), § 14.01 (2009)

**SUPPLEMENTAL POINT 9 - DAMAGES – DEFENDANTS’ UNSUCCESSFUL
ASSERTION OF TRUTH DEFENSE**

Defendants have maintained that they are not liable for defamation because the statements at issue were true. If you find that the defendants’ statements were not true, you may consider the defendants’ unsuccessful assertion of their truth to be a reiteration of the original defamation. You may consider that as an aggravation of the damages suffered by the plaintiffs, and you may also consider that when considering whether to award punitive damages against the defendants.

Source: *Will v. Press Pub. Co.*, 309 Pa. 539, 544, 164 A. 621, 623 (1932); *Bausewine v. Norristown Herald*, 351 Pa. 634, 647, 41 A.2d 736, 743 (1945); *Montgomery v. Dennison*, 363 Pa. 255, 267, 69 A.2d 520, 526-27 (1949)

SUPPLEMENTAL POINT 10 - PUNITIVE DAMAGES - DEFENDANTS' LACK OF REMORSE

In considering whether to award punitive damages, you may consider whether the defendants have demonstrated a lack of remorse for their conduct.

Source: *Kelvin Cryosystems, Inc. v. Lightnin, a Div. of SPX*, 2005 WL 2994693, at * 11 (E.D. Pa. Sept. 28, 2005), *aff'd*, 252 Fed. Appx. 469 (3d Cir. 2007)

SUPPLEMENTAL POINT 11 - NO NEGATIVE INFERENCE FROM CONSULTATION WITH COUNSEL

There has been testimony in this case about the fact that the plaintiffs contacted a lawyer after learning about the 2008-2009 Treatise. I instruct you that you should not draw any negative inference from the fact that the plaintiffs sought legal advice prior to contacting West.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2010, I served a true and correct copy of the foregoing Plaintiffs' Supplemental Proposed Jury Instructions upon the following counsel for defendants, as follows:

via the Court's Electronic Case Filing system:

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