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.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL

SATTERLEE STEPHENS BURKE & BURKE LLP
James F. Rittinger, Esquire (adm. *pro hac vice*)
Aaron M. Zeisler, Esquire (adm. *pro hac vice*)
230 Park Avenue, 11th Floor
New York, New York 10169
Tel: (212) 818-9200

KLEHR HARRISON HARVEY BRANZBURG LLP
Matthew J. Borger, Esq.
1835 Market Street, Suite 1400
Philadelphia, PA 19103
Tel: (215) 568-6060

Dated: January 13, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

Defendants West Publishing Corporation, West Services, Inc. and Thomson Legal & Regulatory, Inc. (herein, "West"), through their undersigned attorneys, respectfully submit this memorandum of law in support of their renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59, following the jury verdict returned on December 16, 2010, and the judgment entered thereon on December 17.

PRELIMINARY STATEMENT

The case just tried by this Court and that is the subject of this motion is, it seems safe to say, not a typical defamation claim. Defendant West stands accused of no direct slur against plaintiffs. Rather, the allegedly defamatory publication is a treatise supplement that used plaintiffs' names – which plaintiffs conceded West had a contractual right to do. Because that supplement was not up to West's standards, plaintiffs claim that West defamed them and cast them in an offensive false light through the purportedly implied suggestion that plaintiffs had created and/or endorsed a substandard work. It is difficult to imagine a case further afield from the typical defamation claim, or further beyond the ordinary experience of jurors.

The case is unusual in another sense: the evidence presented does not reveal any substantial dispute as to the significant material facts. Plaintiffs, and West, are well-respected in their fields and had, prior to this incident, a long, fruitful and mutually beneficial relationship – which actually continues, at least with Professor Rudovsky. West did not devote the attention and resources to the 2008 Supplement that it should have, and the result was a product that no one was proud of. Other than the plaintiffs' understandable personal reaction, however, there is no reason to believe, and certainly no evidence at trial, that anyone thought less of plaintiffs or that plaintiffs suffered in any tangible way from the publication in the brief time it was in circulation.

And yet, the jury returned a verdict that, in essence, depended upon a conclusion that West had *deliberately* published a supplement so grossly inadequate as to lessen plaintiffs' reputation. Of course, this would necessarily lessen West's own reputation as well, and given the relatively small financial revenues associated with this publication (to the point that West seriously considered its discontinuance), the motive for West to act in such a fashion is difficult to fathom. Moreover, the jury concluded that these facts warranted not merely compensating plaintiffs (quite substantially) for any injury, but *punishing* West with a frankly shocking exemplary damages award. It does not take any detailed parsing of the legal issues to know that something here is seriously amiss, and that this verdict simply cannot stand.

Whatever else might have been legitimately in dispute in this action and at trial, the following were not, or cannot now, be legitimately disputed:

1. Plaintiffs did not offer any evidence at trial that one person, other than themselves, read the 2008 Supplement and concluded that it was inaccurate and out of date, let alone that it defamed plaintiffs.

2. The 2009 Supplement specifically stated on its cover that it was not authored by the plaintiffs.

3. The plaintiffs conceded that they could not, and therefore did not, offer any evidence of monetary loss or loss of reputation and that their sole compensatory loss was limited to "humiliation" damages.

4. However inadequate the 2008 Supplement (or the 2009 Supplement for that matter) may have been, the plaintiffs offered no evidence at trial that West entertained "serious doubts" or "a high degree of awareness" of its inadequacy prior to its publication, as they must do (by clear and convincing evidence) in order to establish the constitutional requisite of actual malice for recovery of either presumed or punitive damages. Indeed, the evidence that was offered was to the exact opposite effect.

5. In addition to no proof of actual malice, plaintiffs offered at trial no proof of common law malice, ill will or intent to harm plaintiffs.

6. As the Court itself recognized, the jury instructions were the exact opposite of clear and orderly and, as the jury's questions unequivocally demonstrate, it was not just improperly charged, but was utterly confused by the instructions that it did receive. *See, e.g.*, 12/16 Tr. 115 ("See now that is what happens when I have a written form. I mess it up."); *id.* 119 ("I think I've messed

up enough"); *id.* 121 ("Now I've messed it up enough"); *id.* 122 ("One of the problems, members of the jury, with charging you in installments is that I sometimes miss what I should have done, or think I did it, and I didn't.").[1]

7. All of the above notwithstanding, the jury verdict of $90,000 each in compensatory (actual and presumed) damages, and $2.5 million each in punitive damages, or $5.18 million in total damages (especially in contrast to the Court's valuation at the conclusion of the evidentiary phase of the trial of $15,000 for each plaintiff or $30,000 in total), is not just excessive and against the weight of the evidence, but is constitutionally prohibited.

As detailed herein, the foregoing compels that this Court grant judgment as a matter of law to West or, at a minimum, to vacate the judgment and reset for a new trial. First, the evidence was insufficient (indeed, it was nonexistent) to establish that West acted with actual malice, i.e., that West published the 2008 Supplement knowing (or entertaining substantial doubts) that it was so grossly inadequate as to be defamatory. Plaintiffs certainly did not present evidence of the "convincing clarity" required by the First Amendment. The failure of proof on this point requires judgment for West on the false light claim, the punitive damages claim, and precludes any compensatory damages award based (in whole or in part) on presumed damages to reputation. The presumed and punitive damages claims also fail because (1) plaintiffs did not produce evidence of common-law malice on the part of West, and (2) Pennsylvania law only allows recovery for damages that can actually be proven (i.e., does not allow presumed damages).

Second, the plaintiffs failed to produce any evidence that any recipient or reader of the 2008 Supplement discerned the allegedly defamatory implication therein. Although this failure of evidence may not be surprising given the way that readers use such supplements (and the knowledge of extrinsic facts necessary to "connect the dots" to plaintiffs' reputations), plaintiffs'

[1] Excerpts of the trial transcripts referenced herein – December 13, 14, 15 and 16 – are included as Exhibits A, B, C and D, respectively, to the Declaration of Aaron M. Zeisler ("Zeisler Decl.").

failure nonetheless compels judgment on the defamation claim for West because Pennsylvania law requires plaintiffs to carry that evidentiary burden.

Finally, even to the extent that it could be said plaintiffs had (barely) produced sufficient evidence to legally sustain any of the jury's findings, there were substantial errors in the jury instructions that confused and misled the jury and, quite apparently, led to a verdict that is simply against the great weight of the evidence. The jury's award of punitive damages is also well beyond anything allowable as a matter of constitutional due process and for that reason as well must be vacated or at least reduced substantially.

PROCEDURAL HISTORY

The complaint in this action was originally filed by plaintiffs, Professors David Rudovsky and Leonard Sosnov, on February 19, 2009 and amended on March 24, 2009 (as amended, the "Complaint" (Zeisler Decl. Ex. H). As the Court is aware, the Complaint is based on the publication by West in December 2008 of a supplement or "pocket part" (the "2008 Supplement") to the West-published treatise originally authored by plaintiffs, *Criminal Procedure* (part of West's "Pennsylvania Practice" series) (the "Treatise"). It is the plaintiffs' contention that the 2008 Supplement was such an inadequate update of the relevant law that they were harmed by the association of their names with it as authors. The Complaint stated six causes of action: two under the Lanham Act (false advertising and false endorsement); two Pennsylvania claims for unauthorized use or appropriation of plaintiffs' names; and, as relevant here, claims for defamation and false light invasion of privacy.

According to the Complaint, "the publication of the [2008 Supplement] constitutes a false statement that the Plaintiffs authored the publication and that it is an update and revision which contains information to bring the Treatise current in accordance with professional standards." (Compl. ¶ 87.) This is then alleged to be defamatory because, in plaintiffs' words, the 2008

Supplement was a "sham" that "does not contain substantial relevant material that the legal community would expect in such a publication in order for it to meet minimum professional standards." (*Id.* ¶ 88.) The false light claim asserts that the publication of the 2008 Supplement constituted a "major misrepresentation" of (1) Plaintiff's activities, because they had no involvement with the supplement; and of (2) Plaintiff's beliefs, because the publication "represents that Plaintiffs approve of the [2008 Supplement] as updated and revised so that it is current for use in 2008-09, when in fact they do not." (*Id.* ¶ 103-04.)

After this Court denied plaintiffs' motion for a preliminary injunction, and denied West's motion to dismiss on various contractual defenses, the parties conducted discovery. On July 15, 2010, the Court granted West's motion for summary judgment on the Lanham Act claims, holding that the communicative products (such as the 2008 Supplement) are not "goods" for purposes of the Lanham Act. As this Court noted, if it were otherwise then publishers like West would be placed on the horns of a dilemma, with potential claims for failing to credit authors such as Plaintiffs if their names were not attributed to the work, but facing potential claims for false "sponsorship or approval" if they did. *See Rudovsky v. West Pub'g Corp.*, 2010 WL 2804844, at *1-2 (E.D. Pa. 2010).

With respect to the defamation claim, the Court held that to the extent "the pocket part communicates that purported experts on a legal subject had provided outdated and incomplete information, knowing that the reader would rely upon it, a jury could conclude that the pocket part constituted defamation *per se*, because the work 'ascribes to another conduct ... that would adversely affect his fitness for the proper conduct of his lawful business.'" *Id.* at *3 (quoting Restatement (Second) of Torts § 573)). On West's motion for reconsideration, the Court agreed with West that the *per se* question is not one for the jury, but held that if the jury determined that

"the intended audience of the pocket part would conclude that the plaintiffs authored an inaccurate and out-of-date supplement to the treatise," then the Court would hold that "this would tend to damage the plaintiffs as legal authors and authorities on Pennsylvania criminal law and constitute defamation *per se*." (Order on Reconsideration, December 8, 2010 (Zeisler Decl. Ex. L).)

The trial on defamation, false light and the two appropriation-of-name claims went to trial beginning December 13, 2010. Plaintiffs each testified in support of their claims. Both plaintiffs testified that they had received no complaints or any other type of communication from any reader of the 2008 Supplement that suggested that anyone had read it and thought less of them. (12/14 Tr. 39, 43-44, 96, 100.) They likewise testified that they could point to no tangible adverse impacts on their jobs or finances from the publication. (*Id.* 7-8; 100.) The only evidence, in fact, that plaintiffs presented as to any impact from the publication of the 2008 Supplement was their own testimony as to their claimed "humiliation." (12/13 Tr. 78-79; 12/14 Tr. 84-89.) Plaintiffs also conceded that West had a contractual right to use their names on the 2008 Supplement (provided that it was not a "sham"). (12/14 Tr. 21-22, 31, 46, 97.)

Plaintiffs also played deposition testimony from four West employees, including Sarah Redzic, the Attorney Editor who had actually authored the 2008 Supplement, and Catharine Smith, her then-supervisor. Significantly, none of these employees testified that they believed, or even had reason to believe, that the 2008 Supplement was inadequate, nor that they had any goal other to produce a sufficient update. *See infra* § II.C.

After the close of plaintiffs' case, West moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a), as to all claims. (Tr. 12/15 at 9-35.) The court granted West's motion

as to the two appropriation of name claims, which are not addressed in this motion.[2] The Court denied the motion as to the defamation and false light claims (*id.* 35-38); accordingly, pursuant to Fed. R. Civ. P. 50(b), the Court is considered to have submitted these claims to the jury subject to later decision on the legal issues raised.

On December 16, the jury returned a verdict in plaintiffs' favor, finding liability for both defamation and false light. The jury awarded each plaintiff $90,000 in compensatory (actual and presumed) damages and $5 million in punitive damages. *See* Zeisler Decl. Ex. I (Verdict Sheet). The Court entered judgment in accordance with the verdict on December 17. This motion has been filed within 28 days of that entry, pursuant to Fed. R. Civ. P. 50(b).

ARGUMENT

I. LEGAL STANDARDS

In assessing a renewed motion for judgment as a matter of law under Rule 50(b), the court must determine whether there is legally sufficient evidence from which the jury could find for the nonmoving party, i.e., plaintiffs here. While the court is generally required, under Rule 50, to give the benefit of all reasonable inferences to the nonmoving party, a "mere scintilla" of evidence will not suffice. *See Goodman v. Pennsylvania Turnpike Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002) ("The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.") Moreover, where a heightened burden of proof is present – e.g., a requirement that an element be proved by clear and convincing evidence – the court must take that higher quantum requirement into account and determine whether the evidence is

[2] The Court also stated that it was granting the motion as to the Lanham Act claims, apparently to reaffirm its earlier ruling on summary judgment.

sufficient for the jury to find that the higher quantum has been met. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

A new trial may be granted under Rule 59 for, *inter alia*, errors in the jury instructions or where the verdict is against the weight of the evidence. Where an error is found, reversal is required unless it is harmless, i.e., that it is "highly probable" that the error did not affect the jury verdict. *See McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (3d Cir. 1985); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 350 (3d Cir. 1999). With respect to the weight of the evidence, the court may grant a new trial "where the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 364 (3d Cir. 1998). Unlike a motion under Rule 50, however, under Rule 59 the court is not required to give the benefit of all inferences to the nonmoving party. *See Whelan v. Teledyne Metalworking Prods.*, 2006 WL 39156, at *7 (W.D. Pa. 2006), *aff'd*, 226 F. App'x 141 (3d Cir. 2007).

The normal standards applicable to these motions must, however, be adjusted due to the nature of this case. Because the First Amendment requires courts to be vigilant in defamation cases lest protected speech be punished or even chilled due to the possibility of tort liability, courts have an obligation to "'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)); *see also ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir. 1985). "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case

by a jury or by a trial judge." *Bose*, 466 U.S. at 501. Under this standard, it is the "affirmative duty of a reviewing court" to conduct, in essence, a *de novo* review of constitutionally relevant questions – in particular, a finding of actual malice. *Marcone*, 754 F.2d at 1088. The independent review obligation, moreover, is not limited to appellate courts; it is equally applicable to a district court's determination of post-trial motions for judgment as a matter of law. *See Kendall v. Daily News Pub'g Co.*, 2010 WL 2218633, at *2 (V.I. Super. 2010); *Osorio v. Source Enters., Inc.*, 2007 WL 683985, at *7 (S.D.N.Y. 2007); *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1355 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996); *Phillips v. Ingham County*, 371 F. Supp. 2d 918, 929-30 (W.D. Mich. 2005); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1245-46 (N.D. Ill. 1986), *aff'd in part, rev'd in part on other grounds*, 827 F.2d 1119 (7th Cir. 1987).[3]

II. THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S FINDING OF ACTUAL MALICE

The evidence presented at trial cannot support the jury's apparent finding that West acted with "actual malice" (i.e., constitutional malice). This required, *inter alia*, clear and convincing proof that when West put out the 2008 Supplement, it knew – or, at a minimum, entertained serious doubts – that the publication was of such poor quality as to be defamatory to the plaintiffs.[4] There is zero evidence – none – of such knowledge on the part of anyone at West, much less of a clear and convincing nature. While the evidence could support a finding that

[3] The standards for appellate review of a motion for judgment as a matter of law and this Court's review of the same motion are, of course, identical. *See, e.g., Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 211 (3d Cir. 2009).

[4] Although plaintiffs put forward evidence relating to the supposed inadequacies of the April 2009 Supplement, the jury was only charged, with plaintiffs' consent, as to the publication of the 2008 Supplement. *See* 12/16 Tr. 10, 105-06, 109. The 2008 Supplement was also the only allegedly defamatory publication named in the amended complaint. (Compl. ¶ 87-89, 103-04.) Accordingly, it is clear that the judgment cannot be defended by pointing to evidence relating to the April 2009 Supplement, and West does not address that publication, other than to point out that the fact that the April 2009 Supplement did not name plaintiffs (*see* Joint Ex. 4 (Zeisler Decl. Ex. J)) would, by itself, preclude establishment of any claim based on that publication.

West should have done a better job in preparing and reviewing the Supplement prior to publication, the law is crystal clear that even if this rose to the level of negligence – and even if it constituted an "extreme departure from professional standards," *Harte-Hanks Comm'c'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) – that does not satisfy the actual malice standard required by the First Amendment. This failure on the part of plaintiffs requires (1) that the punitive damages award be vacated and the claim for such damages dismissed; (2) that the jury's compensatory damage award be vacated because it relies in part on impermissible presumed damages; and (3) that judgment be rendered for West on the false light claim, which requires a showing of actual malice.

A. Plaintiffs Were Required to Establish Actual Malice

It has long been established that, in order to provide the "breathing space" required by the First Amendment, that under certain circumstances liability for defamation and similar torts requires that the plaintiff establish that the defendant have published the allegedly actionable statement with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)); *Tucker v. Fischbein*, 237 F.3d 275, 284 (3d Cir. 2001). Where a matter is of public concern – as is conceded to be the case here[5] – a showing of actual malice is a constitutional prerequisite for the award of either presumed damages or punitive damages. *See Gertz*, 418 U.S. at 348-50; *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 929 (3d Cir. 1990). A showing of actual malice is similarly required by the First Amendment for a private individual to recover for false light

[5] Plaintiffs' counsel conceded that the matter here was a matter of public concern so as to make the actual malice standard applicable. (12/15 Tr. 34-35.) Even if he had not done so, there can be no question that the evidence plaintiffs presented about the importance of their treatise to lawyers, prosecutors, judges, and defendants requires such a finding. *See, e.g.*, 12/13 Tr. 52-53, 64-65; 12/14 Tr. 77-78.

invasion of privacy, at least where the matter is of public concern.[6] *See Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

The "reckless disregard" that is required to establish actual malice is of a particularly stringent nature: it requires that the defendant "must have made the false publication with a high degree of awareness of … probable falsity or must have entertained serious doubts as to the truth of his publication." *Harte-Hanks*, 491 U.S. at 667. "[E]ven an extreme departure from professional standards, without more, will not support a finding of actual malice. Likewise, a failure to investigate, standing alone, does not constitute actual malice." *Tucker*, 237 F.3d at 286 (citations omitted); *see Harte-Hanks*, 491 U.S. at 666; *see also Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1090 (3d Cir. 1985) ("unprofessional, even negligent" publication "cannot be said to rise to the level of actual malice"). "Nor is the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice." *Harte-Hanks*, 491 U.S. at 667.

Actual malice must, moreover, be proven by clear and convincing evidence, and this standard must be considered by the court in determining whether sufficient evidence was adduced by plaintiffs. *See Tucker*, 237 F.3d at 284; *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986). That is, the court must determine not merely that there was *some* evidence, but whether there was enough to allow the jury to find actual malice by clear and convincing evidence.

[6] As discussed *infra* § IV.B, Pennsylvania common law likewise requires a showing of actual malice to maintain a claim for false light invasion of privacy.

B. In This Case, "Actual Malice" Requires Knowledge That the 2008 Supplement Was Defamatory

The alleged defamation here is certainly not the ordinary case. While it may be said that the gist of plaintiffs' complaint is that West stated that they had, in effect, incompetently produced the 2008 Supplement, plainly West did not make any such statement directly. To the extent plaintiffs complain about the fact that West listed them as the authors of the supplement, that statement is, without more, clearly not defamatory. And to the extent that West stated that the 2008 Supplement was an adequate update of Pennsylvania law, again, that by itself is neither defamatory nor does it concern plaintiffs. And the combination of these statements, read as the implied statement that plaintiffs authored the treatise *and* considered it an adequate update, is not, on its face, defamatory. What allegedly makes the publication defamatory is the purported knowledge on the part of some readers of facts that would lead them to recognize that the supplement was inadequate – indeed, *so* inadequate as to "tend[] so to harm the reputation of [plaintiffs] as to lower [them] in the estimation of the community or to deter third persons from associating or dealing with [them]." *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001).

In other words, this is a case of defamation by implication or innuendo. And in such cases, the requirement of actual malice necessarily takes on an added dimension: it is not enough merely to show that the defendant had knowledge of or was reckless as to the statement's *falsity*; the plaintiff must also show it intended, or at least knew of, the allegedly defamatory implications of the publication:

> If a plaintiff … must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.

Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1318 (7th Cir. 1988); *see also Howard v. Antilla*, 294 F.3d 244, 252-53 (1st Cir. 2002) ("The actual malice test thus mandates a *subjective* inquiry" and requires evidence that defendant "intended or knew of the implications"); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998) (in defamation by implication case, plaintiff "must show that a jury could reasonably find by clear and convincing evidence that [defendant] 'intended to convey the defamatory impression'") (quoting *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990)); *Corporate Training Unlimited, Inc. v. Nat'l Broad. Co.*, 981 F. Supp. 112, 121 (E.D.N.Y. 1997) (plaintiff "must show by clear and convincing evidence that the defendant intended or was subjectively aware of the implication allegedly raised."); *Masson*, 832 F. Supp. at 1362-66; *see also Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915, 921-22 (Mich. App. 2004) (applying same standard to false light case).

In other words, to establish actual malice, it was not enough for plaintiffs to establish that West knew (or was reckless in the constitutional sense) that the (implied) statement, "plaintiffs wrote the 2008 Supplement" was false; nor was it sufficient to establish that West knew (or was reckless) that the (implied) statement, "plaintiffs say the 2008 Supplement is an adequate update" was false. Neither of those statements is defamatory. Rather, plaintiffs have to show that West knew that the (implied) statement that "plaintiffs wrote a substantially inaccurate pocket part" was false – which logically requires that West must also have intended to actually make such a statement, or at least knew that the 2008 Supplement was of such poor quality as to defame plaintiffs.[7] There was simply *no* such evidence.

[7] As stated in *Masson*, because actual malice requires something more than negligence, it is insufficient to establish merely that "a reasonable person would have perceived the defamatory meaning." 832 F. Supp. at 1366; *see also Howard*, 294 F.3d at 254 (actual malice not established where evidence "showed, at most, that [defendant] should have foreseen" the defamatory implication of the publication). That is the most that plaintiffs established here.

C. There Was No Evidence of Actual Malice, Much Less of Convincing Clarity

It is not an exaggeration to state that there is no evidence – none – in the trial record that anyone at West intended, knew, or entertained substantial doubts that the 2008 Supplement was of such poor quality as to be defamatory to plaintiffs. The only evidence plaintiffs put forward at all as to West's state of mind was the deposition testimony of West's employees, only two of which – Sarah Redzic and Catherine Smith – had any involvement whatsoever with the 2008 Supplement.[8]

Redzic, the Attorney Editor who actually wrote the 2008 Supplement, testified that her goal was to prepare an update "that in our judgment would be sufficient" (Redzic Tr. 74[9]), to "provid[e] current and accurate coverage of the law" (*id.* 114) and to prepare a supplement that was "complete from the perspective of the publication and its intended customers," i.e., that would "cover material that the customer could reasonably expect to find covered" (*id.* 114-15). To that end, she testified she started with the prior year's supplement, KeyCited the cases therein and followed the research leads that led to, and reviewed all the rules of criminal procedure to check for updates. (*Id.* 54-55.) At no time, however, did Redzic testify that she felt she had not met her goals or that she had considered the steps she took to be inadequate.

As for Catherine Smith, who was Redzic's supervisor at the time, she testified that, as was the normal practice for internally prepared materials, she did not review the supplement before it went out (Smith Tr. 49-50), and there was no testimony or evidence to the contrary. Nor was there any evidence that Smith had any reason to think that Redzic had not done a

[8] Plaintiffs presented deposition testimony from Teri Kruk, Director of Content Operations at West, but she testified that she had nothing to do with the 2008 Supplement. (Kruk Tr. 11-12.) Plaintiffs also presented testimony from Karen Earley, another Attorney Editor at West; none of her testimony concerned the 2008 Supplement, however, but rather only her lack of knowledge as to Redzic's training. (12/14 Tr. 68-70.)

[9] The deposition testimony of Redzic, Smith, and Kruk was presented by videotape at trial and is not included in the court transcript. The referenced portions of the transcripts of their depositions are included as Zeisler Decl. Exs. E, F and G, respectively.

sufficient job. Defendants' witness, Jean Maess, also testified that she was unaware of anyone at West who believed that the 2008 Supplement was inadequate before it was mailed out. (12/15 Tr. 47.)

In short, the testimony of all the witnesses was consistent that Redzic tried to do a good job and believed she had, and that no one else at West knew, entertained substantial doubts, or even had reason to believe that the 2008 Supplement was inadequate. Plaintiffs introduced not a shred of evidence to the contrary. Thus, even if the jury could disbelieve the testimony of each of these witnesses, there was still no affirmative evidence from which the jury could conclude that West knew, or entertained substantial doubts, that the 2008 Supplement was so inadequate as to be defamatory of the plaintiffs. *See Bose*, 466 U.S. at 512.

Bose is particularly instructive. The defendant consumer magazine had reviewed plaintiffs' speaker system and reported negatively, and falsely (as found by the district court), as to the quality of the sound experienced by the test panel. The sole employee of defendant who actually witnessed the test, and was thus in a position to know whether the review was true or false, was the employee who actually wrote the review. *Id.* at 494. On the subject of actual malice, the author testified that he believed his description was accurate, testimony the district court found incredible and discredited. See *id*. at 497. But the Supreme Court stated that even if disbelieved, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. … [The disbelieved witness'] testimony does not rebut any inference of actual malice that the record otherwise supports, but it is equally clear that *it does not constitute clear and convincing evidence of actual malice*." *Id*. at 512 (emphasis added).

Now, the process West employed may have been inadequate – indeed, Jean Maess admitted as much. (12/15 Tr. 50.) It may have been negligent to assign an inexperienced

Attorney Editor to write the supplement. (*Id.* 56.) It might have even been deemed an "extreme departure" from professional standards. But that is simply not enough. To establish actual malice, plaintiffs had to show that West had actual doubts about the supplement's adequacy, and there was simply no evidence to that effect. There was certainly insufficient evidence from which the jury could find actual malice by clear and convincing evidence, as this Court must assess. *See Tucker*, 237 F.3d at 284.

Moreover, the Court must examine the record for itself and determine whether actual malice was proven, not merely assess whether the jury could have so found. And while, under the independent review mandated by the constitution, the Court still may defer to the jury's determinations of credibility, there are simply no such competing credibility determinations to make here. *No one* testified as to doubts by West, and *no evidence* was presented of such doubts. West submits that this Court, in the exercise of its constitutional function of independent review, simply cannot reach the conclusion that the plaintiffs established, with convincing clarity, that West acted with actual malice.

D. The Absence of Actual Malice Requires Judgment for West on the Punitive Damages Claim, and Vacatur of the Compensatory Damages Award

The insufficiency – or, rather, the complete absence – of evidence to support a finding of actual malice has a number of consequences that are fatal to the judgment in plaintiffs' favor. First, because this is a matter of public concern, a finding of actual malice was necessary to sustain any award of punitive damages. *U.S. Healthcare*, 898 F.2d at 929. Accordingly, judgment for West on the punitive damages claim is required.

Second, plaintiffs are not entitled to recover for presumed damages, i.e., damages for harm to reputation in the absence of actual evidence of such harm. *See id.* Plaintiffs here offered no evidence of reputational harm and relied solely on the availability of presumed damages.

(12/14 Tr. 39; 43-44; 96; 100.). And the jury was instructed (although inadequately, see *infra* Section V) that it could presume damages for reputational injury, provided that actual malice was established. (12/16 Tr. 112-13; 119-20; 122-23.)

However, although West requested that the jury be instructed to provide separate amounts for presumed damages and damages for "humiliation" which plaintiffs did provide evidence (12/16 Tr. 5-9; 102-03), the Court provided only a general verdict sheet for *all* compensatory damages, regardless of basis. (Zeisler Decl. Ex. I.) Even assuming, therefore, that there was competent evidence of nonreputational harm (i.e., humiliation), it is impossible to tell whether any part of the $90,000 per plaintiff awarded was based on the clearly impermissible basis of presumed reputational harm. In such circumstances, the well-established "general verdict rule" requires that the award be vacated and retried. *See Wilburn,* 139 F.3d at 360 ("Where a jury has returned a general verdict and one theory of liability is not sustained by the evidence or legally sound, the verdict cannot stand because the court cannot determine whether the jury based its verdict on an improper ground."); *Brokerage Concepts, Inc. v. US Healthcare, Inc.*, 140 F.3d 494, 534 (3d Cir. 1998); *Greenbelt Coop. Pub'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).[10]

Finally, the absence of actual malice requires that the verdict of liability for false light invasion of privacy cannot stand, and judgment as a matter of law should be entered for West on that claim. At least where (as here) the publication involves a matter of public concern, the First Amendment requires a showing of actual malice for a finding of liability for false light invasion of privacy. *See Hill*, 385 U.S. at 387-88. This is a requirement of Pennsylvania common law as well. "Negligence may not support a claim of false light; '[r]ather, the person making the

[10] As discussed *infra* § IV.A, presumed damages are not allowable under Pennsylvania law, period, even where actual malice is proven. Accordingly, under the general verdict rule the damages award must be vacated in any case.

statement that is accused of rendering another in a false light must act with knowledge of or ... in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.'" *Ciolli v. Iravani*, 651 F. Supp. 2d 356, 376 (E.D. Pa. 2009) (quoting *Rush v. Phila. Newspapers, Inc.*, 732 A.2d 648, 654 (Pa. Super. Ct. 1999)).

Again, the impermissibility of the jury's verdict on false light, by itself, renders the damage award subject to vacatur under the general verdict rule. Even if the jury's verdict of defamation were proper, it is impossible to tell whether, or to what it extent, the damages award (both compensatory and punitive) was based upon the impermissible false light finding. Moreover, the possibility that the jury might have awarded less damages based on defamation alone is more than fanciful speculation. False light protects a plaintiff's interest in freedom from emotional harm; defamation protects one's interest in reputation. *See Hill*, 385 U.S. at 385 n.9. But as discussed, the plaintiffs presented only evidence of emotional harm and none to their reputations. The possibility, then, that the bulk of the damages award was due to the false light verdict is substantial.

III. THERE IS NO EVIDENCE THAT ANYONE UNDERSTOOD THE SUPPLEMENT AS DEFAMATORY OF PLAINTIFFS

Judgment as a matter of law is also required for West on the defamation claim because it is not sufficient for plaintiffs merely to show that the 2008 Supplement was capable of defamatory meaning. Even assuming that it was capable of such meaning, under Pennsylvania law plaintiff still has the burden to prove that the recipients actually understood the defamatory meaning alleged. Plaintiffs provided *no* evidence that anyone read the supplement and thought less of them – and, given the hurdles to a reader being capable of understanding the supplement as defamatory, it certainly cannot be presumed merely from publication.

By statute, Pennsylvania requires a defamation plaintiff to prove not only "[t]he defamatory character of the communication," Pa. Cons. Stat. § 8343(a)(1), but also "[t]he understanding by the recipient of its defamatory meaning," *id.* (a)(4). Clearly, the Pennsylvania legislature considered these to be distinct elements of the plaintiffs' case. And if "the defamatory character of the communication" means that the communication *could* be understood as defamatory, then it necessarily means that (a)(4) requires the plaintiff to prove that the recipients – or, at least, *a* recipient – *actually understood* the communication to be defamatory.

And that is precisely how courts have understood the statute. In *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001), the Third Circuit recited the statutory elements of defamation under § 8343 and stated that "[u]nder Pennsylvania law, the court must decide at the outset whether a statement is capable of defamatory meaning. If the court determines that the statement is capable of a defamatory meaning, the jury must then decide whether the recipient *actually understood the statement to be defamatory*." *Id.* at 281-82 (emphasis added and citations omitted). After determining that the statements at issue were "capable of lowering the [plaintiffs'] reputation in the eyes of the community and of causing others to avoid associating with them," *id.* at 283, the court went on to say,

> not only were the defendants' statements capable of a defamatory meaning, but the [plaintiffs] adduced evidence that their reputations were in fact adversely affected. *See* 42 Pa. Cons. Stat. Ann. § 8343(a)(4) (requiring plaintiff to prove that the recipient understood the statement as defamatory).

Id. The court reached this conclusion based on evidence presented by the plaintiff of persons in the community who stated, *inter alia*, that she had suffered a "blow to her credibility" and "humiliation." *Id.*; *see also Capozzi v. Lucas*, 2004 WL 5572908, at *7 (M.D. Pa. 2004) (testimony of recipients established element of recipient understanding of defamatory meaning) *aff'd,* 148 F. App'x 138 (3d Cir. 2005); *Rockwell v. Allegheny Health, Educ. & Research Found.*,

19 F. Supp. 2d 401, 407 (E.D. Pa. 1998) (same); *Wilson v. Slatalla*, 970 F. Supp. 405, 415 (E.D. Pa. 1997) ("If the court deems a statement capable of defamatory meaning, the jury must determine if recipients of the communication *have understood* it to be defamatory.") (emphasis added).

Similarly, in *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570 (E.D. Pa. 1999), *aff'd*, 229 F.3d 1139 (3d Cir. 2000), the court was faced with a claim that the defendant, a competitor of plaintiff, had defamed plaintiff by presenting a slide at a conference with a dictionary definition of "simulate" – which also happened to be the then-name of plaintiff's company – stating its meaning as "to assume the outward qualities or appearance of, often with the intent to deceive." *Id.* at 574. The slide show had also quoted directly from plaintiffs' sales brochures. *Id.* Granting the defendant's motion for summary judgment, the court stated,

> Under Pennsylvania law, the fourth element of a defamation claim is that the reader or listener understand the defamatory meaning. 42 Pa. Cons. Stat. Ann. § 8343(a)(4). Plaintiff fails to satisfy this essential element. … [P]laintiff offers only one conference attendee out of eighty-one who even connected the slide with plaintiff. That one attendee was not able to recall what the slide said about plaintiff, beyond the fact that there was a dictionary definition used. There is simply not sufficient evidence that any person in the audience understood the slide as defamatory. Although the issue of what the audience understood is normally an issue for the jury, *there is no evidence that anyone understood the slide to say anything defamatory about plaintiff*. There is insufficient evidence to go to the jury on this essential element of defamation.

Id. at 582-83 (emphasis added); *see also Mediaworks, Inc. v. Lasky*, 1999 WL 695585, at *8 (E.D. Pa. 1999) (reversing bankruptcy court where no finding as to actual understanding by recipients of defamatory meaning).

Synygy is directly on-point here.[11] As with the slide in *Synygy*, there was nothing defamatory on its face about the 2008 Supplement. As in *Synygy*, only persons with sufficient

[11] While *Synygy* was a summary judgment determination, the standards for summary judgment and post-verdict judgment as a matter of law are identical. *Anderson*, 477 U.S. at 251-52.

knowledge of extrinsic facts could "connect the dots" to discover the allegedly defamatory meaning of the communication. And as in *Synygy*, plaintiffs here have produced absolutely no evidence that anyone did so.[12]

Here, plaintiffs admitted at trial that no one contacted them to complain or tell them in any way that they found the supplement lacking. (12/14 Tr. 39; 43-44; 96, 100.) They admitted that they had no evidence of any lost business or other opportunities. (*Id.* 7-8; 100.) And the testimony from West likewise showed that no complaints had been received. (12/15 Tr. 46.)

Nor can one presume understanding by the recipients. In the ordinary libel case, the defamatory meaning is clear on its face, such that publication, in effect, means understanding by the recipients. If West had put out a statement directly saying that plaintiffs had incompetently authored the supplement, then there would be little question that any person who read that statement would understand the defamatory meaning.

But this is most emphatically not such a case. The statement that plaintiffs authored the supplement, even if false, is clearly not defamatory in itself. Nor is the statement that the 2008 Supplement was an adequate update (nor does that statement, by itself, concern plaintiffs). Even the combination of these two – i.e., the allegedly implied statement that plaintiffs authored the supplement and consider it an adequate update – is by itself not defamatory. It is only the reader who perceives and understands the alleged inadequacies that would understand the purportedly defamatory character. And, even at that, one or two inaccuracies would not suffice – it is to be expected that all supplements contain these. Rather, the reader would have to realize that the inaccuracies were so numerous and so severe as to cause one to lose respect for the authors – i.e. that these errors would "tend[] so to harm the reputation of another as to lower him in the

[12] Indeed, if anything the communication in *Synygy* should have been even more actionable because it cannot reasonably be contended that the plaintiff there did not intend precisely the defamatory implication claimed by plaintiff. There is no evidence of such intent here.

estimation of the community or to deter third persons from associating or dealing with him." *Remick*, 238 F.3d at 261.

Thus, the hurdles to anyone understanding the defamatory implication are significant. The reader would have to:

- Read a portion of the supplement that is alleged to have been inaccurate;
- Have knowledge of the facts that made it inaccurate (e.g., knowledge of the case's reversal);
- Have sufficient expertise in the field to understand the significance of the error;
- Determine that the inaccuracy was not merely due to the publishing time lag that affects all written treatises;[13]
- Repeat the foregoing a sufficient number of times, with significant enough errors, to draw a poor inference as to the authors' competence; and
- Do all of this within the three to four months the 2008 Supplement was in place.[14]

As Professor Sosnov stated, "You're not going to read the whole thing. [Readers] are not going to know that it's completely deficient unless for some reason they get upset enough to read the whole table of cases like I did. … [T]hey're not going to know how bad it is." (12/14 Tr. 88.)

Under these circumstances, it is hardly surprising that plaintiffs had no evidence of understanding by the recipients. And that lack of evidence is, in this case, indicative of only one conclusion: that no recipient did have such understanding. But at a minimum, the conclusion that plaintiffs failed to carry their burden on this element is inescapable.

Accordingly, judgment as a matter of law for West on the defamation claim is required. Combined with the failure of proof as to false light previously discussed, this requires judgment be entered in West's favor in its entirety. And, even if the Court were to deem the false light

[13] *See* 12/14 Tr. 40-41 (readers are aware that pocket parts may be up to nine months out of date); *id*. 96.

[14] Professor Sosnov testified that it would only be the (hypothetical) reader who happened to look up areas that were inadequate perhaps three or four times that would think any less of the plaintiffs. (12/14 Tr. 87-88, 93.) Of course, there was no proof that this ever happened.

claim sustainable, the failure of the defamation claim by itself requires vacatur and retrial of damages due to the general verdict rule previously discussed.

IV. THE DAMAGES AWARD CANNOT BE SUSTAINED, EVEN IF THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH LIABILITY

A. Presumed Damages Are Not Allowed Under Pennsylvania Common Law

As discussed *supra* Section II, presumed damages are not recoverable as a matter of constitutional law because the plaintiffs failed to adduce clear and convincing evidence of actual malice. However, presumed damages are not recoverable, period, under Pennsylvania law – the only damages recoverable in a defamation action are those that are proven. *See Walker v. Grand Central Sanitation, Inc.*, 634 A.2d 237, 243-44 (Pa. Super. Ct. 1993); *Donaldson v. Informatica Corp.*, 2009 WL 4348819, at *17, *adhered to on reconsideration*, 2009 WL 5184380, at *2 (W.D. Pa. 2009) ("courts applying Pennsylvania law have rejected the 'presumed damages' theory"); *Smith v. IMG Worldwide, Inc.*, 437 F. Supp. 2d 297, 307 (E.D. Pa. 2006); *Franklin Prescriptions, Inc. v. New York Times Co.*, 2004 WL 1770296, at *6-7 (E.D. Pa. 2004), *aff'd*, 424 F.3d 336 (3d Cir. 2005); *Capozzi*, 2004 WL 5572908, at *8; *Synygy*, 51 F. Supp. 2d at 581-82; *Haltzman v. Brill*, 29 Pa. D. & C. 4th 356, 364-65 (Pa. Com. Pl. 1995).[15] Because plaintiffs' damage award relies upon the theory of presumed damages to reputation, it must be vacated. *See supra* § II.D.

[15] The Third Circuit, in *Beverly Enters., Inc. v. Trump*, 182 F.3d 183 (3d Cir. 1999), stated that "[u]nder Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages." *Id.* at 188 n.2. This statement is pure dictum, however: the plaintiff had argued that actual malice relieved it of the necessity of proving *special* damages, and the Court was explaining that plaintiff was confusing special and presumed damages. *See id.* There was no issue in the case, however, as to whether Pennsylvania law allows for presumed damages. Moreover, the Court did not even cite to *Walker*, the Pennsylvania Superior Court case adopting the Restatement's requirement of actual damages. The questionable nature of this dictum in *Beverly* was recognized later by the Third Circuit in *Franklin Prescriptions*, where the court held that it was not plain error for the district court to refuse a presumed damages instruction, saying that it was "not entirely clear" whether Pennsylvania law allowed presumed damages. *See* 424 F.3d at 341-43; *see also PPG Indus., Inc. v. Zurawin*, 52 F. App'x 570, 579 (3d Cir. 2002) ("Pennsylvania law requires a plaintiff in a defamation action to prove that the defendant's statements caused 'actual harm' to the plaintiff's reputation."); *Franklin Prescriptions*, 2004 WL 1770296, at *7 n.36.

B. Plaintiffs Failed to Prove Common Law Malice to Support Punitive Damages

In addition to the fact that the plaintiffs failed to establish actual (i.e., constitutional) malice, the punitive damages award must also be vacated because the plaintiffs failed to establish common-law malice. *See Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365, 375 (E.D. Pa. 2003) ("Pennsylvania law imposes an additional prerequisite, beyond the constitutional requirement, to a defamation plaintiff's recovery of punitive damages. … [I]n order to recover punitive damages, a defamation plaintiff must show that a defendant acted with common law malice."); *DiSalle v. P.G. Pub'g Co.*, 544 A.2d 1345, 1369-71 (Pa. Super. Ct. 1988); Restatement (Second) Torts § 908;[16] *see also PPG Indus. v. Zurawin*, 52 F. App'x 570, 579-80 (3d Cir. 2002). To establish common-law malice, the plaintiff must show conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others … conduct which is malicious, wanton, reckless, willful, or oppressive." *DiSalle*, 544 A.2d at 1364; *see also Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 616 (3d Cir. 1991) (conduct must be "outrageous" to award punitive, and "clearly outrageous" to justify vicarious imposition of punitives). Conduct that is merely negligent – even grossly negligent – does not suffice. *See Vance v. 46 and 2, Inc.*, 920 A.2d 202, 206-07 (Pa. Super. Ct. 2007).

Common-law malice differs from "actual malice" in the constitutional sense in that the former concerns the defendant's state of mind with respect to the *plaintiff*, while the latter concerns the defendant's state of mind with respect to the *truth*. *Disalle*, 544 A.2d at 1369; *Sprague*, 276 F. Supp. 2d at 376 n.17. While undoubtedly these two issues may overlap significantly, they are not identical; thus, even if plaintiffs had provided sufficient evidence to establish actual malice, that alone would not suffice to establish the common-law malice that is

[16] Restatement § 908 "is the law in Pennsylvania on punitive damages." *DiSalle*, 544 A.2d at 1371. "'Courts in libel cases should be guided by the same general rules regarding damages that govern other types of tort recovery." *Id.* at 1370.

also required to support punitive damages. *See Zurawin*, 52 F. App'x at 579-80 ("[Plaintiff] did not submit sufficient evidence to allow a reasonable jury to conclude that [defendant] acted with common law malice merely by submitting sufficient evidence to permit the conclusion that [defendant] acted with actual malice.").

And plaintiffs have not provided such evidence. There was absolutely no evidence suggesting that the relationship between plaintiffs and West to that point was anything other than successful, or that anyone at West bore any ill will or spite towards the plaintiffs. (12/14 Tr. 46, 95-96; 12/15 Tr. 46.) Indeed, the fact that Professor Rudovsky continues to have, by his own admission, a successful authorial relationship with West would seem to conclusively belie any such attitude, as well as to suggest that Rudovsky himself hardly sees West as reprehensible or evil. (12/14 Tr. 10, 46.)

Nor is there evidence of the recklessness required to establish punitive damages. As previously discussed, there is no evidence that anyone at West believed or entertained substantial doubts that the 2008 Supplement was even inadequate, much less grossly so – and that absence of actual malice itself precludes an award of punitive damages. But even that were not so, there is also no evidence that anyone at West believed that the publication of the supplement was in any way a violation of the rights of plaintiffs. There is no evidence that anyone subjectively entertained the possibility that what they were doing was defamatory of plaintiffs. And it is uncontroverted – plaintiffs explicitly admitted this at trial – that the 2000 contract gave West the right to use the plaintiffs' names even in the absence of their involvement. (12/14 Tr. 21-22; 97-98; 12/15 Tr. 44.) In fact, as Jean Maess testified, given the undisputed fact that the majority of

the supplement was written by plaintiffs, to leave their names off "would be a bigger problem." (12/15 Tr. 44.)[17]

At bottom, punitive damages are designed to "punish and deter publication with actual or apparent ill will," *DiSalle*, 544 A.2d at 1371, and the requirements of actual and common-law malice are designed to ensure that the power of the courts to go beyond legitimate compensation into punitive measures goes no farther than necessary to fulfill Pennsylvania's legitimate interest in that regard. But whatever the conceded inadequacies of West's process in putting on the supplement, there is simply no evidence that it was the kind of wanton, willful conduct that demands punishment.

C. The Due Process Clause Forbids the Jury Award of Punitive Damages Here

In fact, not only is the award here unjustified as a matter of Pennsylvania law (as well as inconsistent with the First Amendment), even if Pennsylvania law did allow for punishment under these circumstances, the jury's award here is patently inconsistent with constitutional due process requirements. As the Supreme Court has stated,

> The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)); see also *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189-90 (3d Cir. 2007). A determination that a punitive damage award violates due process (as opposed to being a determination that the amount is not

[17] As this Court also recognized in its decision granting summary judgment on the Lanham Act claims, publishers like West face the potential for liability whether they use the authors' names or do not – at least, if plaintiffs' arguments on the Lanham Act held sway.

supported by the evidence) is a determination as a matter of law under Rule 50, and thus the Court may enter reduced judgment without affording plaintiff the option of a new trial. See *Cortez v. Trans Union, LLC*, 617 F.3d 688, 715-16 (3d Cir. 2010).[18]

In assessing whether a punitive damage award comports with due process, courts are instructed to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418. "The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 419.[19]

With respect to the first prong, the Supreme Court has given the following guidelines:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. at 419.

One need not even examine these factors in detail to realize that, of the words one could use to describe West's conduct here – unfortunate, perhaps even careless or negligent –

[18] Plaintiffs' counsel recognized that questions of the potential excessiveness of the punitive damages award are proper subjects for post-verdict motions to the Court. (12/16 Tr. 99-102.)

[19] Because there is no statutory or civil penalty comparable to a defamation award, the third factor in this analysis is not pertinent to this case. *See CGB*, 499 F.3d at 189-90.

"reprehensible" does not come to mind. West put out a supplement under the plaintiffs' names – which it admittedly had the contractual right to do – that, due (perhaps) to haste and insufficient attention, was not what it should have been. And, upon plaintiffs' counsel bringing the issue to West's attention, West rapidly took significant steps to correct the situation – putting out a letter to subscribers the next month admitting the error, and issuing a new and more complete supplement two months later that no longer had plaintiffs' names attached. (*See* Joint Exs. 4, 30 (Zeisler Decl. Exs. J, K); 12/14 Tr. 34-38, 98-99; 12/15 Tr. 47-48.) This is simply not the type of egregious conduct that warrants punitive damages. And plaintiffs – who admitted they lost no business, could not tell of anyone who thought less of them, and presented only their own testimony as to their emotional distress – surely were more than fully compensated (if any compensation was warranted) by the jury's compensatory damages award.

Analyzing the reprehensibility factors quoted above leaves no doubt that the award cannot stand – indeed, that a punitive damages award is not proper at all. There was no physical harm done to plaintiffs; West's conduct certainly evinced no indifference to health or safety; plaintiffs cannot in any way be said to have financial vulnerability; and there was no evidence or claim that the actions of West involved "malice, trickery or deceit." Moreover, there was no evidence of repeat conduct – either that West had behaved similarly prior to this incident, *see* 12/14 Tr. 46, or that West had persisted in its course of conduct once the deficiency in the supplement was brought to West's attention (indeed, West acted promptly to correct the problem). *See Gore*, 517 U.S. at 579 ("[I]t is also significant that there is no evidence that [defendant] persisted in a course of conduct after it had been adjudged unlawful on even one

occasion").[20] In short, not a single one of the factors is present here; this absence, as stated in *Campbell*, "renders *any* award suspect." *Id.* (emphasis added).

As for the second *Gore* guidepost, the Court has stated that in practice, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. Moreover, the Court held that ratios of 2, 3 or 4 to 1 are more likely to be close to the constitutional line, and where compensatory damages are "substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Here, the ratio of punitive to compensatory damages is approximately 28:1. This is far beyond anything the Supreme Court has ever approved, and vastly exceeds the guidelines stated in *Campbell*. A ratio of this magnitude could be justified only where "a particularly egregious act has resulted in only a small amount of economic damages." *Id*; *see also CGB*, 499 F.3d at 192-93 (18:1 ratio was excessive and required to be reduced).

Indeed, in this case, one can hardly dispute that the compensatory (actual and presumed) damages of $90,000 each that the jury awarded are "substantial," particularly given that plaintiffs admitted that they had no proof of *any* harm except their own claims of emotional distress.[21] Certainly, the compensatory award alone vastly exceeded (by a factor of 6:1) the Court's own assessment at the conclusion of the evidentiary phase of the trial of the worth of the case. (12/16

[20] As the Supreme Court held in *Gore*, it may also be pertinent if the line between permissible and impermissible conduct is unclear, and there is no evidence that the defendant acted in anything other than good faith in attempting to assess that line. *See Gore*, 517 U.S. at 579. In this case, plaintiffs of course admitted that West had the right to use their names even on supplements they had not authored, as long as the work was "adequate." (12/14 Tr. 21-22.) This is hardly a clear line, and even if West's conduct fell on the wrong side of it, the evidence from Sarah Redzic was that she was *trying* to produce a supplement that was "sufficient." (Redzic Tr. 74.)

[21] As the Supreme Court held in *Campbell*, where the compensatory damages award is intended largely to compensate for the purported distress and humiliation allegedly caused by defendants' actions, the compensatory award already has satisfied a major role of punitive damages, and the court should be wary of duplication. *See* 538 U.S. at 426.

Tr. 135-36.) Under these circumstances, assuming any punitive damages award can comport with due process (and due to the lack of actual and common law malice, and under the first *Gore* factor, it cannot), then this is surely a case where a maximum ratio of 1:1 reaches "the outermost limit of the due process guarantee." *Id.*

V. AT A MINIMUM, A NEW TRIAL IS REQUIRED

Should the Court determine that there was legally sufficient evidence to support the verdict in plaintiffs' favor, the Court should nevertheless grant a new trial, pursuant to Fed R. Civ. P. 59, due to the fact that (1) there were prejudicial errors in the jury instructions; (2) the verdict is against the great weight of the evidence; and (3) the award of damages is excessive and unsupported by the evidence.

A. The Jury Instructions Confused the Jury and Misstated the Law, to West's Prejudice

Jury instructions constitute reversible error where they "fail[ ] to fairly and adequately present the issues in the case without confusing or misleading the jury." *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73 (3d Cir. 2009); *see also Carter v. Exxon Co. USA*, 177 F.3d 197, 204 (3d Cir. 1999) ("[I]f, looking at the charge as a whole, the instructions were capable of confusing and thereby misleading the jury, we must reverse."); *Parks v. AlliedSignal, Inc.*, 113 F.3d 1327, 1336 (3d Cir. 1997). Where an error is found in the instructions, a new trial must be granted unless it is "highly probable that the error did not contribute to the judgment." *Pivirotto*, 191 F.3d at 350. Taken as a whole, the jury instructions were sufficiently confusing and misleading as to require a new trial.

First, this Court itself candidly recognized that it had made errors in the instructions to the jury. *See* 12/16 Tr. 115 ("See, now that's what happens when I have a written form, I mess it up."); *id.* 121 ("Now I've messed it up enough."); *id.* 122 ("One of the problems, members of the

jury, with charging you in installments is that I sometimes miss what I should have done or think I did it and I didn't."); *see also id.* at 119-20 (restarting twice the instruction on presumed damages). And while the Court made efforts to the correct the misstatements, the possibility of confusion – particularly given the somewhat complicated and interrelated nature of the two claims and the various types of damages, and given that the jury had no written instructions to refer to for clarification, the likelihood of jury confusion is apparent.[22]

Indeed, there was ample evidence of more than the mere possibility of confusion, as evidenced by the jury's questions. At one point, the jury asked for a re-explanation of "malice versus reckless disregard versus negligence" and for a written explanation. (12/16 Tr. 124.) The juror confusion about the issue is evident from the fact that they appeared to still be considering that negligence might have something to do with actual malice, when it clearly does not.

More alarmingly, the second set of questions from the jurors asked, "In #1 of the verdict form [i.e., *liability* for defamation], the word 'establish' is used. Are we determining whether proof was provided or are we still working under the idea of 'presuming' that at least one person could have thought less about either Prof. Rudovsky or Sosnov?" (*Id.* 130.) Here, the court's repeated attempts at instruction on presumed damages had clearly taken their toll, with the jurors apparently confusing the issue of presumed *damages* with the critical issue of whether plaintiffs had established, as required for liability, that any recipient had understood the 2008 Supplement as being defamatory of plaintiffs. (There is, obviously no *presumption* as to any element of the

[22] The Court also made a comment that could have added to the jury's confusion – or, worse, suggested to them that the Court was implying how they should find. After the second sidebar during the instructions, the Court once again instructed the jury on presumed damages and corrected its earlier failure to ensure that the jury understood that actual malice must be found before presumed damages could be awarded. The Court then said, "I hope that doesn't change your minds." (12/16 Tr. 123.) While West does not mean to suggest that the remark was not inadvertent or that the Court was, in fact, signaling anything to the jurors, to the extent that the Court had just corrected the previously incorrect instructions on presumed damages and the need for actual damages, this remark clearly could have, and probably did, undermine any correction.

plaintiffs' case on liability.) Moreover, unfortunately, the Court responded by once again instructing on the issue of presumed damages, which should have had no bearing on question #1 of the verdict form – and then compounding the confusion by stating that "there isn't much difference," apparently between presumed damages (where actual malice is established) and proven damages (where it is not). (*Id.* 131.) (As discussed below, this area is a particularly critical error in the charging instructions.)

In addition to the jurors' evident confusion, the instructions were specifically erroneous in at least six ways:

1. ***Allowing a finding of defamation based on slight inaccuracy.*** The Court's very last instruction to the jurors regarding defamation was, "And in order to have def – defamation of any kind, you would have to show that the intended reader would probably have concluded that – that the plaintiffs wrote the supplement and that the supplement was, *to some extent, less than adequate*. (12/16 Tr. 131 (emphasis added).) It cannot be that merely because the supplement was "to some extent less than adequate," that this would rise to the level of defamation. Every supplement has inadequacies of some kind, but this by itself would not "tend[] so to harm [the author's] reputation … as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Tucker*, 237 F.3d at 282. It would require substantial errors to rise to the level of being defamatory. Along the same lines, the Court instructed that the jury could find the publication defamatory merely on a showing that it was "not an adequate update," (12/16 Tr. 107) or "inaccurate and out-of-state [sic, in transcript]" (*Id.* 112). Again, neither of these formulations impresses upon the jury that

slight inaccuracies or inadequacies are not enough; such inadequacies have to be substantial enough to rise to the level of defamation.[23]

2. ***The charge did not clearly instruct the jury to consider the pocket part as a whole.*** Related to the previous point, the Court also instructed the jury, that "A -- a publication like this or a communication is defamatory if any part of it tends to harm the reputation of a person, so as to lower him or her in the estimation of the community, or to deter a third persons from associating or dealing with them." However, it is clear that under Pennsylvania law, the "proper test" for whether a communication is defamatory "requires that the allegedly libelous communication be read as a whole, in context." *Marcone*, 754 F.2d at 1078. The "any part" instruction was tantamount to an instruction that a single error in the publication would be sufficient to establish its defamatory nature. (The Court did subsequently instruct that the publication must be taken "as a whole," but did not bring the jurors' attention to the fact that it was correcting its earlier mistake.)

3. ***The jurors were not required to find that any recipient actually understood the supplement as defamatory***. As discussed supra Section III, it was plaintiffs' burden to show not only that the defamatory character of the publication, but also the "understanding by the recipients of its defamatory meaning." Pa. Cons. Stat. § 8343(a)(4). The Court's charge to the jury relieved plaintiffs of this burden by instructing that the jurors need only find that recipients "would understand" the defamatory meaning, not that any actually did

[23] The Court did, early in the charge, properly instruct the jury on the meaning of "defamatory," (12/16 Tr. 107), but this hardly can make up for the fact that the last instruction the jurors heard on the issue was the charge that they could find defamation if the pocket part were "to some extent, less than adequate." (In any case, as discussed in point 2, this instruction was itself erroneous in that it did not instruct the jurors to consider the pocket part as a whole.) Moreover, the Third Circuit has made clear that "instructions that contain some characterizations of the law that are accurate may nonetheless become unacceptably tainted by the presence of other, misleading comments." *Parks*, 113 F.3d at 1336-37 (reversing where district court correctly stated the law in early portion but then erred in its later summary).

so. (12/16 Tr. 107). Moreover, the Court's answer to their question on this point appeared to confirm that the jurors could presume such understanding – even though, as discussed *supra* at 21-22, such a presumption in this case is highly implausible**.**

4. ***The jurors were not instructed that the actual malice required West's knowledge of the defamatory nature of the publication***. As discussed supra Section II.B, the plaintiffs were required to show, in order to establish actual malice, that West actually intended, knew, or at least recklessly disregarded (in the constitutional sense) the defamatory implication of the 2008 Supplement, i.e., that West knew or had subjective doubts that the quality of the publication was sufficiently poor to be defamatory to the plaintiffs as named authors. The Court, however, only instructed that the jurors needed to find that West "acted with knowledge that the statement was false, or acted with reckless disregard whether the statement was false or not," (12/16 Tr. 111), without explaining to the jury what "the statement" was that had to be found false. *See also* Tr. 115. But this does not adequately convey to the jury that West had to understand it was defaming plaintiffs. Merely referring to the falsity of "the statement" seems to allow the jury to find malice based solely upon the purported falsity of the statement that the plaintiffs authored the supplement, which is insufficient.

Indeed, in answering the questions from the jury, the Court instructed that "if the defendant knew, number one, that the pocket part had not been prepared -- first of all, that they knew that the issuing of the pocket part constituted a representation to the readers that this was an update of Pennsylvania law and that it had been prepared by the plaintiffs, if they knew that was false or acted with reckless disregard as to whether it was false or not, they would be – they would be guilty of actual malice." (12/16 Tr. 125-26.) This appears to tell the jury that upon a finding of (1) that West understood that the pocket part constituted a representation that it was an

update and (2) that West knew (or recklessly disregarded) that it was false that it had been prepared by plaintiffs, then actual malice could be found. As discussed *supra*, however, this is not the law.

5. ***The jurors were not instructed that an extreme departure from professional standards is not sufficient for actual malice***. Actual malice cannot be predicated on anything short of actual, subjective doubts about the accuracy of the publication (and its defamatory nature), and as discussed, even "an extreme departure from professional standards," without more, will not support a finding of actual malice. *Harte-Hanks*, 491 U.S. at 665. Given the evidence in this case, from which a jury could reasonably find such a departure, it was critical to make sure the jury understood that this was not sufficient. Moreover, the Court's charge that "mere negligence" would not suffice (12/16 Tr. 111) potentially invited the conclusion that severe or gross negligence would – and, again, that is not the law.

6. ***The Court mischaracterized the evidence in ways prejudicial to West***. In at least two instances, the Court appeared to characterize the evidence to the jury in a way that was not compelled by the evidence and was prejudicial to West. First, the Court, in purporting to describe West's position, stated that "the pocket part had been prepared by the plaintiffs, whereas, actually, the plaintiffs had nothing to do with it and it was prepared entirely by staff of West Publishing." (12/16 Tr. 105-06.) In fact, West's attribution on the 2008 Supplement was that it was by the plaintiffs "and the Publisher's Staff," and it was undisputed that, while the plaintiffs had no part to play in the update itself, the vast majority of the 2008 Supplement – the vast majority of anything that would actually be read by recipients – was in fact prepared by the plaintiffs. Second, and more problematically, the Court described the "truth" as West "left out a lot of cases." (*Id*. 109.) While West has never disputed that the 2008 Supplement had

inadequacies and omissions, the severity and importance of those omissions was very much in dispute, and the Court's apparent characterization for the jury as "a lot of cases" invites the jury to find against West on that point**.**

In sum then, the Court's charge, taken as a whole, had significant potential not only to confuse the jury – and, indeed, evidently did so – but it (1) allowed the jury to find defamation based on slight or isolated inaccuracies; (2) relieved the plaintiffs of their burden to show that anyone actually understood the 2008 Supplement as defamatory of them (which, as discussed *supra* at 21-22, can hardly be presumed); and (3) allowed a finding of actual malice based solely on knowledge that plaintiffs had not authored the supplement and without any showing that West believed that it was defaming plaintiffs. These errors were highly prejudicial, moreover, because given the facts in this case, liability under the erroneous instructions was essentially a foregone conclusion: there was no dispute that there were inaccuracies in the supplement and no question that West knew that plaintiffs had not authored those parts constituting the updates within the supplement. It is certainly not "highly probable" that these errors did not affect the verdict, and thus at the very least a new trial must be ordered.

B. <u>The Verdict Is Against the Great Weight of the Evidence</u>

As discussed, the evidence presented at trial cannot support a finding, by clear and convincing evidence, that West acted with actual malice, because there was simply no such evidence in the record. But even if the Court discerns some such evidence, it is surely the case that the verdict was against the great weight of the evidence. The jury would not only have had to disbelieve all of the testimony of West's employees, but to further believe that West had motive to put out such a grossly inadequate 2008 Supplement that – if it defamed the plaintiffs –

certainly would have lowered West's reputation in the eyes of its customers as well.[24] And West's motive to do so was – what? The roughly $17,000 they stood to gain from the issuance of a new supplement (12/15 Tr. 79), or avoiding the $3500 they eventually spent to have a better supplement prepared (*id.* 73-74)?

The jury's verdict, in other words, is simply contrary to any reasonable view of the evidence. It strongly suggests that it was the product of some error or prejudice. As previously discussed, moreover, there were significant errors in the jury instructions, and based on the evidence it seems a far more likely explanation that the verdict was the product of these errors than any logical conclusion compelled by the evidence.

The error was further compounded by the jury's verdict, particularly with respect to punitive damages. Again, as previously discussed, this verdict is both unsupported by sufficient evidence and well beyond anything allowable under due process. But in addition, a $5 million award on these facts – facts that supported, at best, carelessness on the part of West – is, frankly, shocking. Certainly neither the Court, nor counsel for the parties, considered that such a verdict was in the range of reasonable possibilities. The size alone of the verdict suggests a deliberation infected either with error or, more likely, irrational prejudice against the defendants.[25]

In short, the verdict – both as to actual malice and as to the size of the award – "resulted in a miscarriage of justice" and, "on the record, cries out to be overturned or shocks [the] conscience." *Wilburn*, 139 F.3d at 364. At a minimum, therefore, the judgment should be vacated and remanded for a new trial.

---

[24] Even plaintiffs and their witnesses agreed that West generally has a strong reputation in the legal community. (12/13 Tr. 45-46; 12/14 Tr. 9.)

[25] As discussed above, it is West's position that, at a minimum, errors in the trial and the weight of the evidence require a new trial in its entirety. Should the Court, however, agree only to the extent that it considers the damages award to be excessive, then West requests the appropriate remittitur of damages.

CONCLUSION

As outlined above, the evidence at trial was insufficient either to support liability for defamation or false light, requiring judgment as a matter of law to be entered for West dismissing the case in its entirety. In addition, the evidence was insufficient to support a finding, by clear and convincing evidence, of the actual malice necessary to support punitive damages – thus requiring judgment for West on that claim – or presumed damages, thus requiring (at least) vacatur of the compensatory damage award for retrial. At a minimum, however, a new trial is required due to the serious errors in the jury instructions, and the fact that the verdict and the amount of the award are grossly contrary to the weight of the evidence.

Dated: January 13, 2011

Respectfully submitted,

/s/ James F. Rittinger
James F. Rittinger, Esq. (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