

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUDOVSKY and)	09-CV-0727
LEONARD SOSNOV,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
)	
WEST PUBLISHING)	
CORPORATION, WEST SERVICES,)	
INC., and THOMPSON LEGAL)	
AND REGULATORY, INC., t/a)	
THOMPSON WEST,)	Philadelphia, PA
)	December 15, 2010
Defendants.)	10:19 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN P. FULLAM
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: RICHARD L. BAZELON, ESQUIRE
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For the Defendants: AARON M. ZEISLER, ESQUIRE
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Audio Operator: DENNIS TAYLOR

1 And I would also move into evidence the annual
2 report from Thomson Reuters for the year 2009 which is marked
3 as Plaintiffs' Exhibit 49.

4 MR. RITTINGER: We've objected, Your Honor.

5 THE COURT: Same ruling.

6 MR. BAZELON: Your Honor, plaintiffs rest.

7 THE COURT: Anything from the other side?

8 MR. RITTINGER: Your Honor, we have motions.

9 THE COURT: Right. We'll excuse the jury briefly.
10 Members of the jury, if you'd retire to the jury
11 room, we have some legal issues.

12 (The jury leaves the courtroom at 10:43 a.m.)

13 THE COURT: Somebody said they had a motion.

14 MR. RITTINGER: Your Honor, we move for a directed
15 verdict, dismissing all four claims in the complaint for a
16 failure of proof. I think it's probably easiest to do it in
17 the reverse order of the letter that we sent to Your Honor
18 yesterday morning. And what I'd like to do is start with the
19 -- the two privacy claims, Your Honor, although the privacy
20 claims are more analogous to the publicity claims.

21 Your Honor, both the statute and the common law
22 claim make it absolutely clear that there could be no claim
23 under -- for privacy when there is written consent for the use
24 of the names.

25 Now, Your Honor may recall that in this case, there

1 was a substantial disagreement at one time between the
2 defendants' position that the 2008 agreement applied and the
3 plaintiffs' position that it was superseded by the 2007
4 agreement. No evidence was put in whatsoever by the plaintiff
5 in his case with respect to the 2007 agreement. But more
6 significantly, Your Honor, both plaintiffs admitted under oath
7 that West had the right to publish the supplement without the
8 plaintiffs' consent and with the plaintiffs' names.

9 Now, it is true, and we don't disagree --

10 THE COURT: Which supplement are you talking about?

11 MR. RITTINGER: I'm sorry?

12 THE COURT: Which supplement are you talking about,
13 which year?

14 MR. RITTINGER: I'm talking about the 2008
15 supplement, Your Honor, and the 2009 supplement for that
16 matter.

17 THE COURT: Go ahead.

18 MR. RITTINGER: Either -- both supplements, the
19 plaintiff has -- that both plaintiffs conceded under oath that
20 West had the right to use their names and publish it. They
21 didn't use their names in the 2009 one, Your Honor. Their
22 sole complaint about that, and it came out very loud and clear
23 in Mr. Sosnov's testimony, was that they couldn't publish a
24 sham publication, and that's true, Your Honor.

25 And that moves us over to the libel claim. Mr.

1 Sosnov at one point in time during his testimony said, well,
2 it's a breach of contract. Well, they haven't sued for breach
3 of contract, Your Honor, and the reason they didn't sue for
4 breach of contract is because if they sued for breach of
5 contract, we wouldn't be here today, Your Honor. We'd be in
6 Minnesota. So, clearly -- well, because there's a -- because
7 there's a -- Your Honor, we moved to transfer this case to
8 Minnesota based upon the Minnesota venue provision in the
9 contract, and Your Honor held that these were torts, not a
10 contract claim, so it stayed here.

11 But the bottom line for purposes of this motion is,
12 Your Honor, both the common law and the statute say written
13 consent. We have written consent. It's even better than
14 that, Your Honor, for purposes of dismissing these claims,
15 because the statute goes on to say that you have to prove that
16 the publisher had actual knowledge. Those quote -- again,
17 that's -- Your Honor, it's in the -- it's in our letter and
18 it's in the statute itself.

19 There's absolutely no evidence at all -- the
20 evidence is absolutely to the contrary that West had any --
21 any doubts whatsoever it thought it had the right to do what
22 it did. On that basis, Your Honor, both of these claims
23 should come out.

24 Finally, Your Honor, although it's hardly necessary
25 to get there, there is no provision and there's no law in

1 Pennsylvania under either of those statutes that would permit
2 them under this -- under these claims to recover for simply
3 humiliation or the type of damages that they're asking for.
4 There are no Pennsylvania cases specifically on point, Your
5 Honor, but the Pennsylvania statute is very analogous to the
6 Lanham Act.

7 And the Lanham Act clearly does not permit for the
8 type of damages that have been offered here. Absolutely no
9 damage -- no special damages, out-of-pocket losses have been
10 -- in fact, they have not -- not even been offered, they've
11 conceded they don't exist.

12 So for that -- for those -- all of those reasons,
13 Your Honor, there's been failure of proof, and we respectfully
14 request dismissal of the two common -- the common law and the
15 statutory claim for right of privacy.

16 THE COURT: Any other argument as to any other
17 claims?

18 MR. RITTINGER: Your Honor, I can go to defamation
19 or we can address this. Maybe it's better to --

20 THE COURT: Address whatever you want me to dismiss,
21 and then we'll hear from the other side.

22 MR. RITTINGER: Well, Your Honor, that moves us to
23 defamation, and the defamation count must be dismissed for a
24 number of reasons. While we respectfully disagree that under
25 any circumstances, that this -- that the claimed libel here

1 could be libelous per se, we understand that Your Honor has
2 issued an order.

3 I think both parties read that order as requiring
4 the jury to -- requiring the jury to find that a reader -- or
5 readers, the intended audience of the supplement, and in this
6 case, I guess it's both supplements. Because as far as -- as
7 far as I could determine, the 2009 supplement is in this case
8 now, too -- that readers read it and concluded it was
9 inaccurate and out of date, using Your Honor's term in the
10 order.

11 There is not one scintilla of evidence -- in fact,
12 the evidence is to the contrary -- that anybody would have
13 read this and made that conclusion. They certainly were not
14 able to identify one person who read it and concluded that it
15 was inaccurate and out of date. And all the evidence put on
16 by the plaintiffs was --

17 THE COURT: Well, there's -- is there any dispute
18 about the fact that it was inaccurate and out of date?

19 MR. RITTINGER: The mere fact that it was inaccurate
20 and out of date?

21 THE COURT: Yes.

22 MR. RITTINGER: Well, there's -- there's clearly
23 evidence that -- they clearly offered evidence sufficient to
24 get by this type of motion, that it was inaccurate and out of
25 date.

1 THE COURT: Right.

2 MR. RITTINGER: But that -- that doesn't make it
3 libelous per se. Your Honor, that's the problem with this.
4 If we had published a statement of the back of the -- that the
5 professors are bad writers and they don't properly research
6 the law, and someone read it, then that's libelous per se. If
7 someone read that -- the supplement and made that conclusion,
8 under Your Honor's order, that's libelous per se. But there's
9 no evidence that anybody did that.

10 THE COURT: Do you think I'm -- the jury's supposed
11 to draw the conclusion that nobody read the supplement?

12 MR. RITTINGER: No. I think the jury is -- I think
13 there's a burden of proof here in a public concern libel
14 action to prove that at least one person -- one -- for all
15 this exaggeration and hyperbole about how bad this thing was,
16 they couldn't find one person -- they couldn't find -- they
17 couldn't introduce one iota of evidence that there was a
18 complaint about it.

19 And, in fact, Your Honor, if you think about it,
20 it's really kind of the exact opposite, and I don't -- I don't
21 think you have to go this far. But they put the librarian on
22 from the University of Pennsylvania. Now, they told the
23 librarian in his very short testimony that -- they described
24 to him how bad it was.

25 And he's up there, he's responsible for teaching the

1 students at the University of Pennsylvania Law School how to
2 use a supplement, and he didn't even take the supplement out
3 or do anything with it. His testimony was incredible when
4 you -- when you think about it in the context of the
5 testimony.

6 THE COURT: So, therefore, we shouldn't believe it.

7 MR. RITTINGER: Pardon me?

8 THE COURT: If his testimony is incredible, we
9 shouldn't believe it, and, therefore, you can't rely on it in
10 support of your motion.

11 MR. RITTINGER: No. I think, Your Honor, his
12 testimony is incredible in light of what the proof is in this
13 case. This is a constitutional libel case. That's what it
14 is. There's a public concern. There's absolutely no issue in
15 this case. They've put in a ton of evidence about how this is
16 a public concern. And there are constitutional standards that
17 have to be met here.

18 Your Honor, again, we respectfully disagree that
19 under any circumstances this is -- this is libel per se. But
20 at a minimum, you can't just -- if all they have to do is
21 conclude that it's inaccurate and out of date, that's not
22 libel per se. There's got to be somebody who read it,
23 somebody who understands, and that's really what your -- what
24 your order says as we read it and as the plaintiffs read it
25 according to the -- the jury instruction that they put in. So

1 for that reason alone, Your Honor, we respectfully submit that
2 this case is not worthy of going to the jury.

3 Now, that brings us to the next point, Your Honor,
4 because it's -- it is more than that. If it's not libel per
5 se, I don't think -- I don't think anybody disagrees and I
6 think Your Honor's decision, the first decision, at least
7 implicitly -- I'm sorry, I thought you were going to ask a
8 question.

9 THE COURT: The notion that I have decided something
10 finally is idiotic. I resolved some motions, that's all, and
11 said it should be thrashed out at trial basically.

12 MR. RITTINGER: Well, I'm not sure if that -- I try
13 not to be idiotic, Your Honor. I've been -- I've been doing
14 this for about 35, 40 years --

15 THE COURT: Do you always --

16 MR. RITTINGER: -- so I try not to be idiotic. I
17 try to -- I try to present reasonable based -- based arguments
18 to the Courts, so I'm not trying to be idiotic.

19 THE COURT: Good. Continue.

20 MR. RITTINGER: Your Honor, if there's a complete
21 failure in that regard -- if there's a complete failure of
22 proof in that regard, whether Your Honor decided it or not --

23 THE COURT: In what regard?

24 MR. RITTINGER: In regard to being able to offer any
25 evidence that any reader of the supplement, that anybody out

1 there read that supplement and concluded that it was
2 inaccurate and out of date, and, therefore, thought less of
3 the plaintiff or thought that it in any way damaged their
4 reputation, there's no evidence about that -- none. If it's
5 not libelous per se, then the case is over.

6 And I thought -- what I started to say, Your Honor,
7 is that that's implicit in Your Honor's decision. But even if
8 it's not implicit in Your Honor's decision, the law is clear.
9 If it's not libelous per se, they have to have some proof of
10 actual damages, and they don't have any. So that ends the
11 case there.

12 You then move to the subject of, even under -- even
13 if somehow you get by those -- those obstacles, you then move
14 to the fact that they're asking for presumed damages and --
15 and punitive damages, Your Honor, as well.

16 THE COURT: Right.

17 MR. RITTINGER: In order to recover either under
18 Gertz and the progeny -- this is the Supreme Court of the
19 United States that we're talking about now, Your Honor. And
20 they have to prove knowledge of falsity and reckless disregard
21 for the truth as Your Honor knows.

22 There is absolutely no evidence in this case that
23 West knew that what it was doing was inaccurate and out of
24 date.

25 THE COURT: Well, did West or did it -- did West or

1 did it not know that the plaintiffs had not prepared the
2 supplement?

3 MR. RITTINGER: Yes, they knew that the defendants
4 (sic) had not prepared the supplement.

5 THE COURT: Then why did they put their name on it?

6 MR. RITTINGER: Because they had a contractual right
7 to do it, and that's been conceded.

8 THE COURT: Contractual right to put their name on
9 something that they didn't do -- that they didn't contribute
10 to?

11 MR. RITTINGER: Your Honor, the plaintiffs testified
12 that they had a contractual right. The only problem -- they
13 didn't have a contractual right to put their name on something
14 that -- and I'll use their term -- a sham. That they didn't
15 have.

16 THE COURT: Right.

17 MR. RITTINGER: But there's no evidence that they
18 knew it was a sham.

19 THE COURT: Well, what -- what about the last two
20 witnesses? They certainly -- their testimony is subject to
21 the interpretation that they submitted it without knowing
22 whether it was any good or not.

23 MR. RITTINGER: I'm -- Your Honor, if I understood
24 what you just said --

25 THE COURT: The last two videotaped witnesses --

1 MR. RITTINGER: Yes.

2 THE COURT: -- the incompetence, the total
3 incompetence.

4 MR. RITTINGER: Your Honor, they -- the Supreme
5 Court has held, and we've cited cases to you that a high
6 departure from normal editorial standards is not sufficient.

7 THE COURT: A what kind of departure?

8 MR. RITTINGER: A high departure, a strong
9 departure. I forget the language, Your Honor, but I think
10 we've quoted in the -- I'm sorry.

11 "Highly unreasonable conduct constituting an extreme
12 departure from the standards of investigation and reporting
13 adhered to by responsible publishers is not sufficient."

14 Your Honor, there's no question that they put in
15 evidence that we were negligent, but they didn't put in
16 evidence that we were trying to do anything or that we -- even
17 if you want to interpret that as a high departure or an
18 extreme departure, it is not sufficient to constitute actual
19 malice as a matter of law.

20 And it's especially not sufficient to constitute
21 actual malice when you take the testimony of these people who,
22 she did do something, she may have -- she was too young, she
23 shouldn't have done it. There's no question about that. But
24 she certainly didn't intend to do anything wrong. She thought
25 she was doing her best, and she should -- and she should have

1 been supervised.

2 Of course, this shouldn't have happened, but that
3 does not mean, as a matter of law, it comes close to
4 approaching the actual malice standard. If it doesn't
5 approach the actual malice standard, then no presumed damages,
6 and we're back again. So for all of those various reasons,
7 Your Honor, this case should not go to the jury and it should
8 end right now.

9 THE COURT: Wow. Okay. Let's hear from the other
10 side.

11 MR. BAZELON: Your Honor, let me start with
12 defamation. With respect to defamation, as Your Honor knows,
13 there's been a lot of briefing, and Your Honor issued an order
14 on December the 8th of this year.

15 And Your Honor read -- Your Honor stated that,
16 "Where the publication" -- and now I'm quoting -- "can be
17 interpreted in both a defamatory and a non-defamatory manner,
18 the jury, on proper instruction, must decide what the
19 statement means."

20 The operative language here in the context of Mr.
21 Rittinger's argument is, "can be interpreted." It's not that
22 you have to bring in members of the public and say they
23 interpret it that way.

24 And Your Honor went on in the next sentence and
25 said, "It's for the jury to determine whether the intended

1 audience of the pocket part would conclude that the plaintiffs
2 authored an inaccurate and out of date supplement to the
3 treatise."

4 Now, Your Honor, I can't imagine a case where that
5 has been more clearly made out. Certainly, this publication
6 can be interpreted as a statement -- it is a statement that
7 Professors Rudovsky and Sosnov prepared and authored a pocket
8 part which was a sham. And the -- so -- and the intended
9 audience which was lawyers, Judges who expect at least a
10 minimal quality of product as opposed to a complete failure to
11 provide an update would so find and would so interpret what
12 West has done.

13 As to West's knowledge, it's sort of -- it's such an
14 illogical argument for West to be making. West publishes a
15 park-it pot -- a park-it pot -- part, excuse me -- and then --

16 THE COURT: Park-it pot.

17 MR. BAZELON: Right. And -- and then tells the
18 Court we didn't know it. Now, I mean, how can you not -- if
19 this were a case, Your Honor, where you had a truck driver and
20 the question was, when the accident occurred, was he within
21 the framework of his employment? You might expect to have
22 that kind of argument. But in a case where the company itself
23 is the publisher and is responsible for the publication, puts
24 out a publication which it advertises as an update by Rudovsky
25 and Sosnov, which --

1 THE COURT: But -- but they didn't know it.

2 MR. BAZELON: What can I say, Your Honor? I mean,
3 it's -- it's hard to believe that the argument can be made
4 seriously.

5 THE COURT: But you haven't presented any argument
6 or any evidence that anybody ever read this supplement.

7 MR. BAZELON: That's just not true, Your Honor. The
8 -- we have --

9 THE COURT: Other than the --

10 MR. BAZELON: -- we have hundreds and hundreds of
11 subscribers. We have -- we have --

12 THE COURT: Is it to be assumed that every
13 subscriber read it?

14 MR. BAZELON: It's to be assumed that if -- that if
15 a volume, Your Honor, is in libraries all over the State and
16 beyond the State --

17 THE COURT: Do you think that gives rise to the
18 presumption that somebody read it?

19 MR. BAZELON: I -- Your Honor, I respectfully submit
20 that it does. And, obviously, Your Honor, it's a matter of
21 public record that this treatise is often cited, it is used,
22 it's used by members of the Bar. It's used by the Court.

23 And, indeed, that's -- West's whole argument is that when
24 they go and market the product, that it's a valuable product.
25 It's intended to be read. They sell it on the basis that it's

1 read. They advertise it because it's so important that you
2 read it.

3 THE COURT: But the argument is, there is no
4 evidence in this case that anybody read it.

5 MR. BAZELON: Well, Your Honor, I just don't think
6 it's true. I mean, it's just -- the argument is just totally
7 illogical. It defies common sense. The -- well, Your Honor,
8 I suppose if -- if the question Your Honor is asking is there
9 any physical evidence, the physical evidence -- certainly, the
10 physical evidence would be the fact that there is testimony in
11 the case that people went to the Westlaw website and accessed
12 the treatise, and that was testimony in the case. That's the
13 treatise.

14 THE COURT: Okay.

15 MR. BAZELON: Now, as to the requirement of malice,
16 Your Honor, the requirement of malice is a standard of either
17 intentional, actually knowing, or reckless. The plaintiffs
18 believe that we satisfy all of those standards. But, clearly,
19 Your Honor, as you have pointed out in connection with the
20 testimony that we've heard from West witnesses, the reckless
21 standard is more than satisfied.

22 Your Honor, turning to the first part of Mr.
23 Rittinger's argument about written consent, I think Mr.
24 Rittinger defeats his own argument because he acknowledges
25 that West is not maintaining that the plaintiffs by any

1 agreement consented to West publishing a sham product in their
2 name, and the evidence is overwhelming that that's exactly
3 what happened. So -- and, indeed, with or without that
4 concession, it's just not conceivable that the contract could
5 be interpreted in that manner.

6 If it were interpreted in that manner, it would be
7 like, you know, virtually holding that you can enter into a
8 contract which authorizes defamation, authorizes deception and
9 dishonesty in dealing with the public. And, indeed, the
10 contract itself, Your Honor, has language in it about the
11 product having to be acceptable. So the notion that somehow
12 the right to use name would cover this situation is just
13 wrong.

14 The plaintiffs have said that they acknowledge that
15 West could make normal use of their name. They wouldn't be in
16 court, in fact, if the pocket part had not been what it was,
17 in the nature of what it was. Nobody is disputing West's
18 right to use the author's name in a situation in which a
19 publisher would normally have that right.

20 THE COURT: Well, I think they were talking about
21 the -- your claim for misappropriation of name.

22 MR. BAZELON: That's right, Your Honor, they were,
23 and -- and it is a misappropriation of name because there has
24 to be -- because there is no written consent to the use of the
25 name. The misappropriation of name requires written consent.

1 THE COURT: Right.

2 MR. BAZELON: There is no written consent to the way
3 in which the authors' names were used with respect to the 2008
4 pocket part. And we would also submit that that applies,
5 given the circumstances in this case, to the use of their name
6 subsequently without a disclosure, without an appropriate
7 disclosure that they are not the authors and preparers of the
8 supplements and without a prominent notice that they are not
9 if the pocket part continues to be incompetent.

10 And, you know, part of the privacy argument that
11 West is making is that there has to be actual knowledge.
12 Again, I think, you know, that's been addressed. It's just
13 clear that a company can't publish a document, a book, a
14 pocket part, and say we didn't know about it.

15 Thank you, Your Honor.

16 I don't know -- I didn't hear Mr. Ritterger make a
17 separate argument on punitive, so I'm not --

18 THE COURT: I think he's about to.

19 MR. BAZELON: All right. So I'll wait until he does
20 then. Thank you.

21 MR. RITTINGER: Your Honor, first let me address the
22 statute first of all. The statute says, "Any natural person
23 whose name or likeness has commercial value and is used in any
24 commercial advertising purpose without their written consent."
25 We had written consent.

1 THE COURT: Right.

2 MR. RITTINGER: Your Honor, it may be a libel, it
3 may be a breach of contract, but it cannot stand under the --
4 and the common law says the same thing.

5 THE COURT: Okay. Let's talk about punitive
6 damages.

7 MR. RITTINGER: Well, punitive damages, Your Honor,
8 require actual malice and intent to harm, both -- both common
9 law malice and actual malice. There's -- Your Honor, did
10 those people intend to harm these people? They may have
11 screwed up, there's no question that -- that we -- we wouldn't
12 be here today. We should have paid the \$2,500 obviously and
13 we wouldn't be here.

14 But there's -- it is just beyond -- no reasonable
15 juror could conclude, based upon anything that's been put on
16 in this record, that West, who has absolutely no motivation to
17 do anything intentional to these plaintiffs, did something to
18 intentionally harm them. So there's a complete lack -- I
19 don't even know where the -- other than -- other than the
20 self-serving exaggerations of how bad this thing was and how
21 bad it harmed them, without any proof of course that there was
22 any harm, there hasn't been anything -- and that's by the
23 plaintiffs themselves, of course -- there hasn't been any
24 evidence whatsoever about intentional -- intentional malice,
25 intent to harm, that type of thing.

1 And constitutional malice, Your Honor, I come back
2 to the same thing, it's -- they did a great job of proving
3 that we could have done a better job, that we were negligent.
4 Maybe -- maybe even -- I don't -- I don't think you can get to
5 gross negligence, but maybe you could, but you don't get to
6 the standard that the Supreme Court said, a high degree of
7 awareness of probable falsity, serious doubts. Why in the
8 world would West ever publish anything that it thought was
9 inaccurate and out of date? It makes no sense, and there's no
10 evidence about it. It's the last thing that they would do.

11 Instead, what do they do by coming in here and
12 defending themselves from these claims for money, what they do
13 is, they -- they subject themselves to criticism in the press,
14 but they did -- to any way -- to say that they would have done
15 that intentionally or with actual malice, there's simply isn't
16 sufficient proof, Your Honor. There's proof of negligence,
17 nothing beyond that. That ends the case for the reasons that
18 we talked about, not just as to -- Mr. Bazelon has not said a
19 word and cannot say a word that this is not -- about a public
20 concern. It's a constitutional libel case. It is not -- and,
21 Your Honor, which I -- which I suppose is also -- when --

22 THE COURT: You lost me there. What -- you've used
23 that expression before. What is a constitutional libel?

24 MR. RITTINGER: I'm sorry.

25 THE COURT: What is a constitutional libel? You've

1 used that expression.

2 MR. RITTINGER: Well, it's a constitutional -- it's
3 protected by the Constitution. It's a matter of public
4 concern. So it's subject to the protections of the United
5 States Constitution, in the -- and the cases starting with New
6 York Times vs. Sullivan and Gertz and all the progeny that
7 have followed that, that had put up obstacles in the way of
8 being -- for libel cases that are of public concern. And that
9 -- and one of those -- one of those obstacles is you have to
10 prove actual malice.

11 And it started off by saying actual malice was
12 knowledge of falsity or reckless disregard, and people started
13 saying reckless disregard is what they proved. And the
14 Supreme Court said, oh, no, that's not reckless disregard.
15 You've got to show that they had serious doubts about it.

16 Mr. Bazelon says well, you know, how could they put
17 this out without knowing -- knowing it was false? We couldn't
18 put out a statement --

19 THE COURT: Has it occurred to you that your
20 argument might be much more persuasive if it were delivered in
21 a reasonable fashion? Did you set out to antagonize everybody
22 in the jury and everybody in the courtroom? That's what
23 you're doing -- the manner in which you are presenting your
24 argument.

25 MR. RITTINGER: Well, I apologize that -- I

1 apologize for that, Your Honor. What I'm trying to do is get
2 across the point that it's actual malice. I'm trying to --

3 THE COURT: Right.

4 MR. RITTINGER: -- represent my client in the best
5 way that I know how.

6 THE COURT: Right.

7 MR. RITTINGER: And I -- I am not trying to
8 antagonize and I'm not trying to be idiotic, but I am trying
9 to -- to express to you, Your Honor, that I do not believe, as
10 a matter of law, actual malice has been -- has been shown.

11 THE COURT: I somehow got that impression.

12 MR. RITTINGER: And also what has not been shown, as
13 Your Honor pointed out, that there's any proof that anyone let
14 alone read it -- maybe you can infer that somebody read it
15 someplace.

16 But as Your Honor knows and common sense, nobody
17 gets a -- gets a supplement in the back and goes and reads it
18 from cover to cover. We have 400 subscribers. There's some
19 -- in a libel case, there is no proof that anybody --
20 certainly there's no proof at all that anybody read anything
21 that was false and inaccurate in that -- in that supplement.

22 Remember, they acknowledge that 90 percent of that
23 supplement was from the 2000 supplement that they wrote
24 themselves. So there's that absence of -- of proof at that
25 level. But when you come down to the next level that somebody

1 had to read it and conclude that it was false and inaccurate,
2 there's a complete lack of any evidence in that regard, Your
3 Honor. So, again, that takes -- that means that it's not
4 libelous per se under Your Honor's order, and, therefore,
5 there is no special damages. And the libel case and the false
6 light claim have to be dismissed as well.

7 THE COURT: Okay. Anything else?

8 MR. RITTINGER: Unless Your Honor has any questions.

9 THE COURT: I probably do but I can't think of them.
10 Let's hear from the other side.

11 MR. BAZELON: On the question, Your Honor, of
12 punitive damages, many of the arguments that go to liability
13 apply, the standard of malice, which is recklessness, and
14 there's no support in the law for the way in which West wants
15 to interpret recklessness. The reckless standard is exactly
16 what it says. It is a -- it is knowledge of the truth or
17 falsity of what is published or disregard and non-concern for
18 the truth of what is published. And, clearly, that standard
19 is more than satisfied.

20 In addition, Your Honor, there are some other
21 aspects of the case which are very relevant we submit to
22 punitive damages. First of all, we have very strong evidence
23 that West acted for a profit motive here. We have the fact
24 that West was going to -- apparently intended, at least some
25 people with responsibility, intended to terminate the treatise

1 in 2008. For some reason that wasn't done, and it ended up on
2 a budget for producing income for the year 2008.

3 And that profit motivation caused West to engage in
4 the actions which we've heard in the video depositions which I
5 need not further describe to Your Honor. But it wasn't done,
6 you know -- enough of it was done just in complete
7 recklessness, but it was done for the motivation of putting
8 extra dollars in West's pocket by creating a sham on the
9 marketplace, on the subscribers, and a defamation on the
10 plaintiffs in this case.

11 Furthermore, Your Honor, we have the fact that there
12 is strong evidence that it continued, that West -- you know,
13 West refused to acknowledge when it sent out a letter that any
14 -- all it said is, we didn't get every new development in the
15 law. That they used to describe a situation in which they
16 didn't get any development in the law, they did nothing. They
17 never owned up in any way.

18 Then they come out with a 2009 pocket part, and you
19 have a repetition of the same thing all over again. This time
20 you may recall, Your Honor, it came -- they announced to you
21 at the preliminary injunction hearing that the night before
22 the preliminary injunction hearing they've come out with a new
23 pocket part. Well, I mean, it's the same conduct all over.
24 They rush helter-skelter to get out an extremely inferior
25 product, and you've heard the testimony about it.

1 And then, Your Honor, 20 months go by. They do
2 nothing. And then they come out with an advertisement in
3 which they invite the public to purchase the treatise,
4 advertising that these authors are Rudovsky and Sosnov, saying
5 nothing about the fact that the updates in the book for the
6 last several years have not been done by Rudovsky and Sosnov,
7 advertising that there's going to be a new pocket part, saying
8 nothing about the fact that that's not going to be done by
9 Rudovsky and Sosnov.

10 And with that, selling it to the public, you know,
11 if a person who buys it looks at the pocket part and finds out
12 that, you know, Rudovsky and Sosnov haven't been involved,
13 it's too late for them, Judge. They've already paid their
14 money, and it's several hundred dollars. So they not only --

15 THE COURT: I thought it was \$50.

16 MR. BAZELON: \$50 is the supplement --

17 THE COURT: Oh.

18 MR. BAZELON: -- but if you buy the hardback, then
19 you're -- so, I mean, it's not -- it's not enough for West
20 that they put out a sham product, but they continue in the
21 same kind of deception, the same use of the authors' names to
22 put money in their money when it is a deceptive way of
23 referring to the authors. And it just -- you know, it
24 continues to today, Your Honor. We went on the website last
25 night, and it's still there.

1 And they come in front of you and said, but, you
2 know, there's no motive. We're -- you know, we -- Your Honor,
3 I just -- you know, in summary, I respectfully submit that
4 this is a very strong case for punitive damages, and it
5 certainly -- plaintiffs should be able to present their claim
6 to the jury.

7 THE COURT: Okay. I'm going to recess for a little
8 -- for a few minutes at least. It's now a quarter after
9 11:00. Will there be more evidence if -- if your motion --

10 MR. RITTINGER: We have -- yes, Your Honor.

11 THE COURT: Pardon?

12 MR. RITTINGER: Well, if you -- there will be more
13 evidence if you don't grant the motions, Your Honor.

14 THE COURT: Well, that's what I want to know.
15 Should I hear that first and withhold judgment on the motion
16 till I've had a chance to do some research?

17 MR. RITTINGER: Well, Your Honor, I would prefer
18 that the motion -- that you do the research on the motions
19 before we --

20 THE COURT: Okay.

21 MR. RITTINGER: -- before we go forward with our
22 case.

23 THE COURT: Suppose we recess till after lunch, will
24 that be okay?

25 MR. RITTINGER: Yes, Your Honor.

1 MR. BAZELON: Your Honor, we have -- we have no
2 position on that, but I do want -- there's one thing I forgot
3 to say in the argument, and that is that Professors Rudovsky
4 and Sosnov are not public figures under the law --

5 MR. RITTINGER: Your Honor, we don't --

6 MR. BAZELON: -- and under the cases.

7 MR. RITTINGER: Your Honor, we do not contend they
8 are public figures.

9 MR. BAZELON: They are private citizens.

10 MR. RITTINGER: We contend they -- they could be,
11 but we're not making that contention. We're making the
12 contention that it's a matter of public concern. Under Gertz,
13 clearly as a matter of public concern, in order to be entitled
14 to presume damages, they have to prove actual malice. We have
15 all this law cited in our jury instructions --

16 THE COURT: Yes.

17 MR. RITTINGER: -- our briefing and our letter.

18 THE COURT: You do agree this is a matter of public
19 concern or do you not?

20 MR. BAZELON: Your Honor, it's -- you know, it is
21 what it is. It's a book, and -- and it's sold to the public.
22 And, yes, I mean, part of the reason why it's so important and
23 crucial and why there are --

24 THE COURT: Oh, okay.

25 MR. BAZELON: -- is that the public does have an

1 interest, Your Honor.

2 THE COURT: All right.

3 MR. BAZELON: But that standard is what's set forth
4 in the -- in the definition of recklessness.

5 THE COURT: Okay. I want to get my thoughts
6 together a little more clearly. We'll recess till 1:30 this
7 afternoon.

8 (Luncheon recess, 11:19 a.m.)

9 AFTERNOON SESSION

10 (1:34 p.m.)

11 THE COURT: Good afternoon.

12 MR. RITTINGER: Good afternoon.

13 THE COURT: Be seated, please.

14 After further consideration, I reached the following
15 conclusions with respect to the motion for directed verdict.
16 I think that the motion for directed verdict should be granted
17 as to Count 1 and 2 and 3 and 5. I deny the motion as to
18 Count 4 and Count 6, and I believe that takes care of
19 everything.

20 One further question I have with respect to what
21 will be coming up in the future, the verdict form and so
22 forth. Up until now, it's my understanding that the named
23 defendants are all referred to simply as West. Is that still
24 okay?

25 MR. RITTINGER: Your Honor, the publisher is West

1 Publishing Corporation. West, that's the publisher of the
2 work.

3 THE COURT: But in other words, we can talk about
4 the defendants as -- without differentiating among them?

5 MR. RITTINGER: Well, I don't think there's been any
6 proof put in about any of the other defendants except --

7 THE COURT: Pardon?

8 MR. RITTINGER: I don't believe any proof has been
9 put in about any of the other defendants except West
10 Publishing Corporation.

11 THE COURT: That's what I want to get clear. Any
12 problem with that, Mr. Bazelon?

13 MR. BAZELON: Your Honor, please forgive me.

14 THE COURT: What --

15 MR. BAZELON: I was trying to get the counts
16 straight.

17 THE COURT: Oh. What is left is defamation and
18 invasion of privacy, false light.

19 MR. BAZELON: Thank you. I'm sorry, Your Honor.

20 THE COURT: Now, with respect to this question of do
21 we have to differentiate among the defendants or can we simply
22 refer to West Publishing Company in all respects?

23 MR. BAZELON: As long as part of the stipulation --
24 I'm satisfied with that, Your Honor, as part of the
25 stipulation is that the West defendants acknowledge that that

1 covers all of the defendants.

2 MR. RITTINGER: Right, but I -- you had the --

3 MR. BAZELON: Well, the -- yeah, you can have a
4 single reference as long -- Your Honor, if I may explain. In
5 our proposed verdict form, we break them down separately on
6 punitive damages, because there's a requirement under the
7 law --

8 THE COURT: Right.

9 MR. BAZELON: -- that punitive damages be separately
10 stated. It can't be joint and several. So what I hear Mr.
11 Rittinger saying is that we will proceed as though there is
12 one defendant -- I'd like to talk to my clients before -- but
13 I just want to make sure I understand what it --

14 THE COURT: What I mean.

15 MR. BAZELON: -- proposes. One defendant being
16 named, but it covers all three?

17 MR. RITTINGER: Yeah. And there would be one --
18 assuming there's a verdict, it would be against that
19 defendant, that defendant is financially responsible to meet
20 any -- you know, I'll represent that that defendant is able --

21 THE COURT: And that it's satisfactory in the --
22 when they award millions of dollars in punitive damages, that
23 it be awarded against the West Publishing Company?

24 MR. BAZELON: May I consult with my clients, Your
25 Honor, before --

1 THE COURT: Yes, of course.

2 MR. BAZELON: Thank you.

3 MR. RITTINGER: Your Honor, I'm -- I'm unclear.

4 THE COURT: Wait -- wait till he -- he's busy
5 talking or listening or something.

6 MR. BAZELON: Your Honor, that's acceptable to the
7 plaintiffs.

8 THE COURT: Okay. Fine. Now, what's your problem?

9 MR. RITTINGER: Your Honor, Counts 1 and 2, they
10 were dismissed a while ago.

11 THE COURT: No doubt. Yes, I'm sure they were.

12 MR. RITTINGER: Okay.

13 THE COURT: I'm just reiterating so that we know
14 who's left -- what counts are left. The two counts that are
15 left are defamation under Count 4 and invasion of privacy,
16 false light under Count 6, and everything else is out.

17 Now, I understand we have some further evidence to
18 hear. Let's bring in the jury so they can hear it.

19 (Pause in proceedings.)

20 THE COURT: Mr. Bazelon, your opposing counsel are
21 trying to make Brownie points by rising when the jury comes
22 in.

23 MR. BAZELON: Oh, I'm sorry, Your Honor. Thank you.

24 I need all I can get, Your Honor. Thank you.

25 (Pause in proceedings.)

1 Q What was your reaction, if any, to plaintiff's allegation
2 that you falsely attributed authorship to them on the December
3 2008 pocket part?

4 A Well, it's -- it's just not true. I mean we have --
5 under the contract we have the right to use their name, and I
6 think as Professor Rudovsky mentioned, most of the product
7 actually had been written by the two professors. I would say
8 80, 90 percent of the supplement was actually written by those
9 two people, and to leave their names off would -- would be a
10 bigger problem.

11 Q What was West's response to plaintiffs' lawyer letter?

12 A When we got the letter, we did a couple of things. The
13 first thing we did is -- obviously, we read the letter, and we
14 thought, okay, this is -- this looks pretty serious. We
15 better -- we better take a look and see what's happening in
16 the marketplace.

17 So we called our customer service center and said, "What
18 have you heard about this product? Has anyone complained?
19 Have we heard anything from our market," and they said no.
20 And we said, "Okay. Well, let's put an alert out on it and
21 make sure you're paying attention to this because if anyone
22 says anything, you know, we need to know right away."

23 So the first thing we did is we wanted to make sure that
24 our customers were not feeling the same way as our authors.

1 Q So with respect to customer service and complaints that
2 you investigated, West has a procedure for taking in those
3 complaints, if any?

4 A Yes. We have a large customer service group. It's
5 actually called Customer Experience now, and they have a --
6 they track everything that comes in.

7 Q And with respect to the December 2008, 2009 pocket part
8 have there been any complaints?

9 A No.

10 Q Other than this dispute, have plaintiffs had any disputes
11 with West in the past during their relationship with you as
12 publishers?

13 A No, not that I know of.

14 Q Are you aware of anybody at West that held any ill will
15 toward the plaintiffs?

16 A No.

17 Q Is there -- are there any documents or are there anything
18 you've seen at West that would indicate that anybody at West
19 in your group had any personal animus toward the plaintiffs?

20 A No.

21 Q You mentioned that you looked into plaintiff's complaints
22 with respect to the pocket part. What, if anything, did you
23 find or determine?

24 A When we -- when we read the letter, it had several things

1 pointed out, and we -- we looked at the supplement to see if
2 some of the things that were stated in the letter were -- were
3 actually true. So we went through the supplement at that
4 point to try to find out if -- if it actually had the kind of
5 deficiencies that were mentioned in the letter.

6 Q Okay. I'll get to that in a moment.

7 Are you aware of anybody at West believing that the
8 December 2008, 2009 pocket part was inaccurate before it was
9 mailed out to subscribers?

10 A Before it was mailed out, no.

11 Q Did there come a time when West sent a letter to
12 subscribers?

13 A Yes.

14 Q And when was --

15 A The letter went out in March.

16 Q And that's Plaintiffs' Exhibit -- I'm sorry, Joint
17 Exhibit 30 that's been marked into evidence. Is this the
18 letter that you're referring to?

19 A Yes, it is.

20 Q Why did West send out this letter to its subscribers?

21 A We determined that the pocket part was deficient, and we
22 wanted to give notice to our customers. Mr. Bazelon also
23 asked us to do this.

24 MR. CHARLSON: Objection.

1 BY MR. ZEISLER:

2 Q Now, in the customer letter it says that you can, among
3 other things, contact customer service at a particular number.
4 Did West receive any complaints from customers with respect to
5 the pocket part?

6 A We received no complaints, nor did anyone ask for credit.

7 Q And did West indeed send a new pocket part to
8 subscribers?

9 A We did, within a month of that letter.

10 Q Okay. That is the April 2009 pocket part that is in
11 evidence, Exhibit 4?

12 A Right. Yes.

13 Q And that's April 2009?

14 A Yes.

15 Q Who wrote the replacement pocket part?

16 A The April 2009 --

17 Q Yes.

18 A -- replacement pocket part was written by Chris Gimeno.

19 Q Why did you choose Ms. Gimeno?

20 A Ms. Gimeno is a former attorney editor licensed in
21 Pennsylvania who has done some writing for us in the past,
22 certainly as an employee and also as a -- an outside author.
23 She used to be responsible for the Pennsylvania product line
24 when she worked for us so we thought she would be a good fit

1 Customer Experience Department?

2 A None.

3 Q What was your reaction to plaintiffs' stated concerns
4 about the 2008 pocket part, the December 2008 pocket part that
5 you had testified about a few minutes ago? You said that
6 you -- you had a reaction. What --

7 THE COURT: What's your question? You're making a
8 speech.

9 MR. ZEISLER: Sorry.

10 BY MR. ZEISLER:

11 Q What was your reaction to the December 2008 pocket part
12 and the claims of deficiencies by plaintiffs?

13 A The claims of deficiency were valid. It was an
14 incomplete pocket part. There was some work that was done in
15 the court rules, but there were many cases that were missed.
16 In hindsight, we used too junior of an attorney editor without
17 enough support or supervision. So to that extent it was
18 correct.

19 The amount of deficiencies and the harm it caused I think
20 is greatly exaggerated.

21 Q Okay. Let me turn to the amount of deficiencies. Why do
22 you believe that the amount of deficiencies were overstated?

23 A The deficiencies cited had to do with, for the most part,
24 later case history, and I think it was Professor Rudovsky who

1 replacement in -- in April of 2009?

2 A And our customers didn't have a problem with this
3 product.

4 Q You were in the courtroom this morning when Ms. Kruk
5 testified by deposition?

6 A I was.

7 Q And she reports to you?

8 A Yes.

9 Q And she reported to you at the time?

10 A Yes.

11 Q What is your reaction to her testimony that a way to
12 provide a quality product to customers could be use a recent
13 graduate with approximately a year of experience to supplement
14 or do a revision to a pocket part?

15 A That's -- that's just wrong, and we've changed our policy
16 since that time to accommodate that and make sure everyone
17 understands it.

18 MR. CHARLSON: Objection, Your Honor.

19 THE COURT: Objection overruled.

20 BY MR. ZEISLER:

21 Q What is your current -- what is West's current procedure
22 with respect to review of pocket parts that are being
23 published?

24 A The guidelines -- the publishing guidelines were always

1 product, as well?

2 A No. I think she was responsible for the title. I
3 think -- I'm guessing. I have to look.

4 Q So by being responsible she would have edited the pocket
5 part at the end of 2008 to "Pennsylvania Criminal Practice?"

6 A I don't know for sure.

7 Q But that would -- you would expect that, correct?

8 A It's possible.

9 Q If that was her area of responsibility.

10 A It's possible.

11 Q Well, I'm --

12 THE COURT: She doesn't know.

13 MR. ZEISLER: Fair enough.

14 BY MR. CHARLSON:

15 Q And Chris Gimeno, whom you represented had prepared the
16 April 2009 pocket part, she also would have had access, would
17 she not, to the Wasserbly and Moore treatise published by
18 West?

19 A I don't know what she had access to at the time she was
20 writing.

21 Q Well, would West have made any of its products available
22 to her for the purpose of updating this?

23 A Authors can have complementary Westlaw and some print
24 products if they're interested. Most of them have Westlaw.

1 Q By the way, do you know how much Chris Gimeno was paid to
2 prepare the April 2009 supplement?

3 A \$3,500.

4 Q And do you know how long it took her?

5 A Well, we asked her to rush because we were -- we wanted
6 to get the product out and replace the incomplete so I'm
7 guessing four to six weeks. That's a guess.

8 Q Was West also concerned to get that pocket part published
9 before a legal proceeding in this case?

10 A No.

11 Q Were you aware that the April 2009 pocket part was mailed
12 on a Friday afternoon immediately prior to a hearing in this
13 case the beginning of the following week?

14 A No. I know there were a lot of motions going on at that
15 time.

16 Q So that was just a coincidence?

17 A No. We wanted to get rid of --

18 MR. CHARLSON: Objection.

19 THE WITNESS: -- the deficient pocket part.

20 BY MR. CHARLSON:

21 Q Is it West's position that David Rudovsky and Leonard
22 Sosnov were contractually obligated to prepare a supplement
23 each year?

24 A There was a contract that said those -- those words.

1 THE WITNESS: Okay. Thank you. The majority of our
2 authors are on a 15 percent royalty. So a 15 percent royalty
3 in this case would have been something, I think, under \$3,000
4 because it's a -- by royalty, 15 percent of the revenue. So,
5 for example, I don't think it's unfair to say that Mr.
6 Rudovsky gets 15 percent on "Police Misconduct." I mean it's
7 fairly typical in the business. I would say virtually all of
8 our authors who have royalties fall into that category.

9 So when you're pricing a product and you're trying
10 to figure out how to invest in a product, you want to keep the
11 authoring costs around that amount, but 15 percent on a -- on
12 a very small list, it's just not -- it's not going to work.

13 And so in this in this case 15 percent on a \$17,000
14 product would have been something less than \$3,000, and we
15 knew we couldn't do that. On the other hand, it could no
16 longer sustain the \$10,000 that we were spending on it up to
17 this point, and I think this has to do probably more with a
18 declining list and as people migrate away from the print.

19 But in any case, we thought that \$5,000, while
20 significantly more than the 15 percent but significantly less
21 than the 10,000 that we were -- started with would be an
22 appropriate number.

23 BY MR. CHARLSON:

24 Q Well, is it your position -- is it West's position in