

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 16, 2010
Defendants.)	9:58 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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1 MR. RITTINGER: Your Honor, may we -- may was be
2 heard on a special verdict form? (No audible response) As I
3 understand Your Honor's, it doesn't make any distinction
4 between the finding of per se libel or actual malice. And I
5 think the law is pretty clear, starting with New York Times v.
6 Solesman (phonetic), that there should be special verdicts and
7 -- given to juries in libel cases.

8 THE COURT: What's your position, Mr. Bazelon?

9 MR. BAZELON: Our -- our position, Your Honor, is
10 that that would be covered in the charge.

11 THE COURT: At least that's what I plan to do.

12 MR. RITTINGER: But I'm talking about a special
13 verdicts, Your Honor. The problem is at the -- at the -- when
14 the -- when the jury comes in, if all they have is a
15 compensatory damage award, you don't know what they did it on.
16 Here, you -- here, it's even more compounded because they have
17 to make a finding of libel per se based upon the instruction
18 having to do with the user concluding. And we also have Third
19 Circuit law on that as well, Your Honor.

20 THE COURT: Well, the problem with your form is the
21 questions don't make much sense. "Did the users of the 2008
22 pocket part conclude that it was inaccurate and out of date?"
23 Does that mean that everybody that subscribed had to conclude
24 that it was? It seems to me that it's --

25 MR. RITTINGER: Well, Your Honor --

1 THE COURT: -- it's libel as if only if one or two.

2 MR. RITTINGER: Your Honor, it can be modified, but
3 that's taken from your order.

4 THE COURT: Pardon?

5 MR. RITTINGER: I -- I believe that is taken from
6 your order. Your order uses intended users or intended
7 audience.

8 THE COURT: What order? I didn't -- I've never had
9 an order as to what --

10 MR. RITTINGER: No, your -- you -- your order of
11 December 10th, when you determined that on our motion to re-
12 argue -- we made a motion to re-argue, saying that the Court
13 was supposed to, as a matter of law, determine whether a
14 statement is libel as a per se or not. There is no dispute in
15 this case that if -- if it's not libel per se, the case is
16 over, because there's no special damages.

17 Your Honor has granted the motion to re-argue and --
18 but then issued an order that said that you were going to give
19 to the jury the question of whether the -- I think the words
20 were intended audience concluded that the supplement was
21 inaccurate or out of date, then you would determine that it was
22 libel per se. So we're just -- we're -- we're using what we
23 understand -- and by the way, that instruction is in -- in the
24 instructions submitted by the plaintiffs as well.

25 MR. BAZELON: It certainly is not. There's --

1 MR. RITTINGER: Well, but --

2 MR. BAZELON: There's a major difference between -- I
3 respectfully submit, Judge, between what Mr. Rittinger has just
4 told you and what your order of December the -- I think it's
5 December 8th said. Your order said, "It is for the jury to
6 determine whether the intended audience of the pocket part
7 would conclude," and -- and then it goes on, "would conclude
8 that the plaintiffs authored an inaccurate and out-of-date
9 supplement to the treatise.

10 What -- what that means, at least to me, and I don't
11 want to be presumptuous, but I would expect to Your Honor, was
12 that the jury looks at the facts as to what was published and
13 uses it -- its judgment to determine what a reader would
14 conclude, not -- it's much different than what Mr. Rittinger is
15 saying. He's asking that there's a factual finding as to what
16 readers actually did conclude as compared to what they would
17 naturally, in the normal course, conclude based on the
18 publication. That is a major difference. But in any event,
19 Judge, that is covered in the instructions. And presumably,
20 hopefully, the instructions will be so worded. Your Honor --

21 MR. RITTINGER: Your Honor, here's -- here's the
22 problem.

23 THE COURT: Pardon?

24 MR. RITTINGER: I said here is the problem that we --
25 that we face in terms of what we submit to -- I'm sorry.

1 Here's -- here's the problem in terms of what we -- we -- we
2 face with respect to what goes to the jury. Normally, libel
3 per se is going to be decided by the Court, and you're not
4 going to have something like that. But this is clear -- this
5 is not -- I mean, I know of no other case where you have
6 something like this that -- where -- where the -- where the --
7 it cannot be determined on its face that it's libel per se.
8 Therefore, it -- and if the jury -- there's got to be some
9 proof that somebody read it.

10 If this was -- if this -- if we had put in the back
11 of the supplement the plaintiffs are unskillful and do not
12 write -- they write outdated and inaccurate supplements, we
13 wouldn't have this problem. But as Your Honor pointed out in
14 connection with the motions for the directed verdict, they
15 haven't even proved that somebody read it, let alone that
16 somebody read it and used a part that was inaccurate and out of
17 date, let alone somebody read it, used the part that was
18 inaccurate and out of date, and concluded that it was false --
19 or that it was inaccurate and out of date. And if the jury
20 finds that that didn't -- that didn't happen, this case is over
21 and we don't have to go on any further.

22 THE COURT: No, I -- I disagree.

23 MR. BAZELON: Yes, that I -- I didn't waste Your
24 Honor's time. Those arguments have been made time and time
25 again and rejected.

1 THE COURT: I propose to let you -- can we make a
2 copy of this?

3 COURTROOM CLERK: Yes, Your Honor.

4 THE COURT: We'll have copies of the proposed
5 instructions made for you and you can --

6 MR. BAZELON: Your Honor -- I'm sorry.

7 THE COURT: -- read them and see whether you have
8 objection to them or not.

9 MR. RITTINGER: Well, Your Honor, what about the --
10 what about a specific instruction with respect to actual
11 malice?

12 THE COURT: Wait till you see the instructions.

13 MR. RITTINGER: And -- and a special verdict with
14 respect to actual malice.

15 THE COURT: What about it?

16 MR. RITTINGER: Well, I think we're entitled to it as
17 a matter of law, Your Honor.

18 THE COURT: We'll hear from you after you've reviewed
19 the proposed charge and see if you still have the argument.

20 (Recess)

21 COURTROOM CLERK: All rise.

22 THE COURT: Okay. How many screams -- be seated,
23 please. How many screams of anguish do we have after you've
24 reviewed the proposed instructions?

25 MR. BAZELON: Your Honor, we just have very few

1 suggestions that we would offer to Your Honor.

2 THE COURT: Let's hear them.

3 MR. BAZELON: The -- you have a bracket on page 1.

4 THE COURT: About 209, you mean?

5 MR. BAZELON: Yeah. Yes. Yes, Your Honor.

6 Plaintiffs will --

7 THE COURT: I propose to leave that out. You're --
8 you're not seeking damages for the 2009 supplement, are you?

9 MR. BAZELON: Well, we are, Your Honor. We are in
10 the sense that if it's -- it didn't remedy. But we can go
11 either way on how that's worded there.

12 THE COURT: Well, what do you want me to do?

13 MR. BAZELON: Our preference would be 2008 and 2009.

14 THE COURT: Any problem with that?

15 MR. RITTINGER: Well, yes, Your Honor. We don't
16 think 2009 should be in. But if his preference is to go either
17 way, let's just do 2008, and then we're -- we don't have to --
18 at least we -- we got that out of the way.

19 THE COURT: Okay. Let's just stick with 2008. And
20 you can argue that the effect of 2008 continued into 2009
21 because of various things but -- okay?

22 MR. BAZELON: Yes. We -- we -- it's -- that's
23 satisfactory. Your Honor, this is very small. You have some
24 may's here -- jury may find, where -- on page -- on the top of
25 page 4, for example, where the -- the May language follows

1 Supreme Court case. The -- I would say it's BMW, I think,
2 right --

3 UNIDENTIFIED COUNSEL: It's B -- yeah, BMW.

4 MR. RITTINGER: That's a Supreme Court. That there
5 has to be some reasonable relationship. And there's no --

6 THE COURT: So you -- you want to increase the amount
7 of compensatory damages so that the jury can award what they
8 want to award on punitive -- punitives, right?

9 MR. RITTINGER: No, that's not what I'm looking for,
10 Your Honor.

11 THE COURT: That's one thing --

12 MR. RITTINGER: I'm looking for that instruction,
13 because I think it's the law.

14 THE COURT: Yes. Okay.

15 MR. BAZELON: But -- but it's not the law for -- in
16 -- in at least one important respect. And that is that the
17 jury can award punitives without rewarding compensatories if it
18 finds liability. So that, that would not be appropriate and it
19 would be misleading. If we end up with a situation where the
20 defendants believe that a punitive damage award cannot be
21 entered as a judgment because of Constitutional concerns,
22 presumably, they would raise that in post-trial motions, and
23 Your Honor would rule.

24 THE COURT: I never heard of the notion that they had
25 to be related to the amount of compensatory damages.

1 MR. RITTINGER: Well, Your Honor, it's BMW North
2 America versus Gore. It's 517 US Supreme Court 559. The
3 principle of that exemplary damages must bear a reasonable
4 relationship to compensatory damages as a long pedigree.
5 That's the Supreme Court saying that.

6 THE COURT: As a long pedigree?

7 MR. RITTINGER: Yes. That -- so that means it had a
8 long pedigree going back as far as 1996.

9 THE COURT: Do they think it still is the law?

10 MR. RITTINGER: Oh, it's definitely still a law, Your
11 Honor. That case is still a law. It's --

12 THE COURT: What do I do with -- you want me to
13 overrule the Supreme Court or what?

14 MR. BAZELON: No, Your Honor, because it's not a
15 correct statement of the law. The -- what we have in our
16 standard -- what we have suggested, and -- and I -- it's
17 consistent with your jury charge, it is not necessary that you
18 award compensatory damages to the plaintiffs in order to assess
19 punitive damages against the defendants, as long as you find in
20 favor of plaintiffs and against defendants on the question of
21 liability. That is the law.

22 There is nothing in the Supreme Court that -- there's
23 -- there is nothing in the Supreme Court cases that is contrary
24 to that. And the Pennsylvania -- our authority on that that we
25 cite, the -- the standard Pennsylvania jury charges discuss the

1 Supreme Court law and conclude that it is unaffected by Supreme
2 Court law. So an instruction --

3 MR. RITTINGER: Well --

4 THE COURT: Pennsylvania --

5 MR. BAZELON: -- that they are requesting -- I'm
6 sorry?

7 THE COURT: The Pennsylvania Supreme Court doesn't
8 care what the United States Supreme Court says?

9 MR. BAZELON: No, but -- no, the law in Pennsylvania
10 is that you -- that you can -- that -- and it has been the law
11 for many years since the Supreme Court's judgments --

12 THE COURT: It has a long pedigree, yes.

13 MR. BAZELON: Yes, it has, right -- that you could --
14 that a jury finding of a liability can award punitive damages
15 even if they have not awarded compensatory damages. And there
16 is -- there is no authority to the contrary, Supreme Court or
17 otherwise. And it's clearly the law in Pennsylvania.

18 THE COURT: That's nice.

19 MR. RITTINGER: That doesn't mean he doesn't have to
20 bear some relationship, Your Honor. They can't overrule the
21 Supreme Court that says there's got to be some relationship.

22 THE COURT: Well, what --

23 MR. BAZELON: But the way the Courts deal with that
24 is to look at it after the jury comes back and after there's a
25 verdict, and determine whether there's a relation -- it's a

1 judicial question as to what the bounds of that are. It's not
2 a jury question.

3 THE COURT: I'm not going to do anything about.
4 We'll just take our chances with what the jury does. Okay.

5 MR. RITTINGER: Your Honor, we accept that. Just for
6 purposes of the record and Rule 51, it's our position that we
7 object to the instructions to the extent that they don't follow
8 the ones that we last set -- sent in. And we object to the
9 lack of a special verdict form, Your Honor, for the record.

10 THE COURT: What do you mean the lack of a special
11 verdict form?

12 UNIDENTIFIED COUNSEL: What we have there is a
13 special verdict.

14 MR. RITTINGER: No, for the -- for the -- to the
15 extent that it doesn't follow the -- the special verdict that
16 we last submitted to the Court. I want to -- I just want that
17 on the record, Your Honor, for Appellate purposes.

18 THE COURT: He just wants it on the record. (Pause)
19 In other words -- well, Your Honor, I -- I think what I'm being
20 asked now, or being told is that we wanted a -- a -- at least a
21 specific inquiry or question about actual malice in the -- in
22 your --

23 UNIDENTIFIED COUNSEL: In the special verdict form.

24 MR. RITTINGER: -- verdict -- in your special verdict
25 form.

1 THE COURT: That's going to be covered by the charge.
2 That will be covered by the charge. I don't think we need a
3 special question on that. Do we?

4 COURTROOM CLERK: Bring in the jury?

5 THE COURT: Pardon?

6 COURTROOM CLERK: Bring in the jury, Judge?

7 THE COURT: That's what we have them out there for,
8 yes.

9 MR. BAZELON: Judge, I take it that -- that we will
10 have a sidebar after the -- you instruct the jury, and that
11 they are -- and that they leave to deliberate?

12 THE COURT: You have -- yes; if you need one. But
13 you have all the exhibits ready to go out?

14 MR. BAZELON: We have all the exhibits ready to go
15 out. And Your Honor, just for the -- just so I don't forget, I
16 just want to remind Your Honor that we do have a request for
17 injunctive relief in this case, which, in our view doesn't go
18 to the jury. But I didn't want to be deemed to have waived it
19 by not reminding Your Honor.

20 THE COURT: Would you be inclined to agree that we
21 await the jury's finding on liability before we consider
22 injunctive relief?

23 MR. BAZELON: Yes, Your Honor, I do. Thank you.

24 THE COURT: Okay.

25 COURTROOM CLERK: All rise.

1 plaintiffs, however slightly, they would win.

2 As to certain other issues, which I will discuss with
3 you in a few minutes, they have the burden of proving their
4 case by clear and convincing evidence, which is a higher
5 burden. They must convince you that it's beyond any
6 significant doubt that -- that they're entitled to recover as
7 to those issues.

8 Now, the -- as you know, the -- the gist of this
9 action is that the plaintiffs are law professors who had
10 prepared a treatise on Pennsylvania criminal law and
11 procedures. And the treatise was put out by West Publishing
12 Company. And they had a -- a deal with West Publishing Company
13 that they would put a supply of annual updates, annual -- what
14 are called pamphlet parts. And this went on for some time.
15 The two professors were being paid \$5,000 each for their work
16 in preparing and submitting the pamphlet -- the pocket parts.

17 There came a time when the defendant West Publishing
18 Company decided that they didn't want to pay the professors as
19 much as they had been paying and only offered them \$2,500
20 apiece. And that was not satisfactory to the professors, and
21 so they declined to enter into any further -- further contract
22 for the 2008 pocket part.

23 It is the position of the defendants that,
24 notwithstanding the -- their refusal to prepare the pocket part
25 for 2008, that the defendant West Publishing Company went ahead

1 and put the 2008 pocket part out, published it, and asserted in
2 the pocket part that the pocket part had been prepared by the
3 plaintiffs, whereas, actually, the plaintiffs had nothing to do
4 with it and it was prepared entirely by staff of West
5 Publishing. And you heard the evidence as to what members of
6 the staff did the actual work.

7 It is the position of the plaintiffs that the pocket
8 part in question -- the 2008 pocket part was -- they call it a
9 sham, that it was totally inadequate. They did not update the
10 Pennsylvania Law, did not refer to a large number of
11 Pennsylvania Supreme Court decisions that had been rendered.
12 It did not, in other words, constitute a -- an annual update of
13 the law of Pennsylvania on the subjects in question. And there
14 is no question about the fact that the 2008 pocket part was put
15 out by West Publishing Company, and that it did say that the
16 plaintiffs were the authors of the pocket part.

17 It is the position of the defendant that where it's
18 true that the professors did not have anything to do with the
19 preparation of that pocket part, that since the pocket part for
20 2008 included a lot of stuff that had been in earlier pocket
21 parts for earlier years, that, in effect, the plaintiffs did
22 prepare a good bit of the content of the 2008 pocket parts, or
23 a supplement, as we call it. It is the plaintiff's position,
24 of course, that since they had nothing to do with the
25 preparation of the pocket part, they should not have been --

1 their names should not have been associated with it in any way.

2 The issue for you to decide is whether the -- in
3 total, these circumstances rendered the defendant guilty of
4 defamation in putting out the pocket part, and whether its
5 issuing was defamatory. A publication is defamatory -- well,
6 put it this way. In order to prove that the -- what the
7 defendant put out was defamatory as to the plaintiffs, the
8 plaintiff must prove that the communication in question was
9 published by the defendants. That's not in dispute. That it
10 does apply to the plaintiffs. That's not in dispute either,
11 since their names were on it. That the -- among the people who
12 received the publication -- the persons who received it would
13 understand or believe that the defendants -- that the
14 plaintiffs had -- had published it. And whether recipients of
15 the publication would understand its defamatory meaning. In
16 other words, that the average subscriber, upon receiving this
17 pocket part, would -- whenever he or she looked it over, would
18 conclude that the plaintiffs had prepared what was in it, and
19 would learn sooner or later that the update was not an adequate
20 update of Pennsylvania law.

21 A -- a publication like this or a communication is
22 defamatory if any part of it tends to harm the reputation of a
23 person, so as to lower him or her in the estimation of the
24 community, or to deter a third persons from associating or
25 dealing with them. It's not necessary that the defamatory

1 produced.

2 Now, if the West Publishing Company had stated that
3 this was -- the 2008 supplement was prepared by its internal
4 staff, and that the plaintiffs had nothing to do with it, and
5 that it was inadequate as an update -- they left out a lot of
6 cases -- would that have produced a different affect on the
7 minds of the reader from what the reader would have believed
8 after having seen the 2008 pamphlet part that was actually
9 produced.

10 Now, as I said, there are two theories on which
11 plaintiffs are seeking damages. One is this notion of
12 defamation that I've just been discussing. The other is, is
13 the statute in Pennsylvania which provides for liability for
14 somebody who issues a statement to the public about another
15 person which casts that person in a false light. And to make a
16 long story short, if you find that the communication in
17 question, the 2008 supplement as it was actually issued was
18 false, and that it would reasonably have been understood by
19 those other than the plaintiffs as defamatory of the
20 plaintiffs, then you may return a verdict in favor of the
21 plaintiffs and against the defendants.

22 If, on the other hand, you're not satisfied with that
23 by the fair weight of the evidence, then the plaintiffs would
24 lose, and you don't return a verdict in favor of the
25 plaintiffs.

1 damages, whether the defendants acted intentionally or
2 recklessly. In other words, whether the defendants acted with
3 actual malice.

4 Actual malice is a legal term used in defamation and
5 false light cases that is not quite the same as, and should not
6 be confused with, malice in criminal cases. For the purposes
7 of this case, actual malice means that at the time the
8 statement was made -- that is at the time the pocket part was
9 issued, the party making the statement, namely West Publishing
10 Company, acted with knowledge that the statement was false, or
11 acted with reckless disregard whether the statement was false
12 or not. In other words, the plaintiff must demonstrate that
13 the defendant, in fact, entertained serious doubts as to the
14 truth of the publication, or acted with a high degree of
15 awareness of probable falsity. Mere negligence does not
16 suffice.

17 Serious doubt or the possession of a high degree of
18 awareness of probable falsity may be inferred from relevant
19 circumstantial evidence of the state of mind of the person who
20 published the defamation. Testimony by that person denying a
21 serious doubt and/or high awareness of its probable falsity
22 does not necessarily defeat proof of recklessness, but is to be
23 weighed with all the other evidence to that person's state of
24 mind.

25 Now, in order to find actual malice, you must -- the

1 plaintiffs must prove their case by a clear and convincing
2 evidence, which is a higher standard, as I said, than
3 preponderance of the evidence. The clear and convincing
4 evidence standard requires evidence so clear, direct, weighty
5 and convincing as to enable the trier of fact to come to clear
6 conviction without hesitation as to the truth of the facts at
7 issue.

8 Now, at this point we'll discuss the subject of
9 damages. If -- you may find from the evidence, depending on
10 how you assess it, that the defendants defamed the plaintiffs
11 if the intended audience of the pocket part would reasonably
12 conclude that the plaintiffs authored an inaccurate and out-of-
13 state supplement to the treatise. If you find that the
14 publication defamed the plaintiffs in this way or placed them
15 in a false light, then the plaintiffs are entitled to be fairly
16 and adequately compensated for the harm they suffered as a
17 result.

18 And you may presume that they suffered this harm
19 because of the nature of the defamation. Therefore, you may
20 award damages for any actual harm the plaintiffs -- to the
21 plaintiffs' reputation that you find resulted from the
22 defendants' conduct. You may also award damages for any
23 emotional distress, mental anguish or humiliation that the
24 plaintiffs suffered as a result of defendants' conduct and any
25 other damages that you find plaintiffs sustained.

1 In -- in determining the amount of an award for
2 presumed injury to the plaintiffs' reputation and the emotional
3 distress and humiliation, you should take into account the
4 standing and reputation of the plaintiffs in their community,
5 the character of the defamatory communication, the extent and
6 duration of the publication, and the probable effect the
7 defendants' conduct had on the plaintiffs' trade, business or
8 profession, and the harm that may have been sustained by
9 plaintiffs as a result.

10 Now, so much for compensatory damages. Under certain
11 circumstances, you may also award punitive damages. If you
12 find that the conduct of the defendants was malicious, wanton,
13 willful or oppressive, or showed reckless indifference to the
14 interest of others, such as the plaintiffs, then you may award
15 punitive damages in addition to any compensatory damages. And
16 the purpose of punitive damages is to punish the defendants and
17 deter them and others from repeating that kind of conduct.

18 If you decide that the plaintiffs are entitled to an
19 award of punitive damages, you must decide on an amount of such
20 damages. In doing so, you may consider the character of the
21 defendant's act, nature and extent of the harm to the
22 plaintiffs; the wealth of the defendants insofar it is relevant
23 in fixing the amount -- an amount that will punish them and
24 deter others from similar conduct in the future. In reaching
25 your decision, you must keep in mind that both individuals and

1 their privacy by publish -- publicly placing them in a false
2 light?" You answer that question either yes or no. And if
3 your answer to questions numbers one or two is yes, then what
4 amount of compensatory damages, if any, do you award to each of
5 them, David Rudovsky and Leonard Sosnov?" And if you answered
6 yes to those questions, that is to say if you award -- find
7 there that defendants are libel for compensatory damages, the
8 next question is, "Do you award punitive damages against the
9 defendant?" And you answer that either yes or no. And if your
10 answer is yes, then you state the amount of punitive damages to
11 be awarded to each of the plaintiffs.

12 As I said, you can't award punitive damages unless
13 you find that there -- defendants acted with malice. Which
14 means that at the time the communication was issued by the
15 defendant, defendant acted with knowledge that the statement
16 was false, or acted with reckless disregard of whether the
17 statement was false or not. And in short, the defendant had
18 serious doubts as to the truth of the publication, or acted
19 with a high degree of awareness of probable falsity.

20 May I see counsel at sidebar, please.

21 (Sidebar begins)

22 THE COURT: See, now that's what happens when I have
23 a written form, I mess it up. What can you do? What can I do
24 for you to correct it?

25 MR. BAZELON: Well, Your Honor, we -- we are

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MR. RITTINGER: They're the five elements of -- of a libel.

MR. BAZELON: Thank you, Your Honor.

THE COURT: I think I've messed it up enough. I'll see you.

UNIDENTIFIED COUNSEL: Thank you, Judge.

(Sidebar ends)

THE COURT: I've been requested to clarify some matters. I'll do my best. In order to establish defamation, plaintiffs must establish that the communications, publication by the defendants -- that was not disputed, they did do that -- that the publication applied to the plaintiffs, then that the recipient would understand its defamatory meaning, and the recipient would understand it was intended to be applied to the plaintiffs.

And finally, the falsity of the publication -- I think I went over that before, but apparently somebody didn't hear it. If the plaintiffs establish by the fair weight of the evidence that the -- that the -- they were defamed by the plaintiff (sic) -- by the defendant, I'm sorry -- then they are automatically entitled to what are called presumed damages; namely, it would be presumed that -- withdraw that.

Let's start over again. The plaintiffs are entitled to recover damages for emotional distress if they were defamed. And it would be presumed that they suffered damage to their

1 reputations without further detailed proof of that. And I have
2 that covered somewhere here. (Pause) I'll re -- restate that
3 again. I think I -- I want to make sure I get it -- did it
4 correctly. That if you conclude that the plaintiffs have
5 established that they were defamed by the defendant, that is to
6 say that the defendant was libel for intentionally issuing a
7 publication which was, in fact, false, and applied to the
8 defendant (sic) -- to the plaintiffs, they're entitled to be
9 fairly and adequately compensated for the harm they suffered.

10 And you may presume that they suffered this harm
11 because of the nature of the defamation. In other words, the
12 law would presume that if they were defamed, they suffered some
13 harm to their reputations. And in addition, to the extent that
14 you find from the evidence that they suffered emotional
15 distress, mental anguish and humiliation and so forth, that
16 should also be included in your compensation of the package.

17 In determining the amount of an award for presumed
18 injury to the plaintiffs' reputation and the emotional distress
19 and humiliation, you should take into account the standing of
20 the repu -- of the plaintiffs in their community, the character
21 of the defamatory communication, the extent and duration of the
22 publication, and the probable effect defendant's conduct had on
23 the plaintiffs' trade, business or profession, and the harm
24 that may have been sustained by the plaintiffs as a result. I
25 think I covered that before.

1 I think that coupled with the verdict form, you must
2 by now understand what you're -- what you're deciding. I want
3 to make clear that I have not intended in these instructions or
4 at any time throughout the trial to express a personal opinion
5 as to what your verdict should be. And I hasten to add that
6 even if I had expressed a personal opinion as to what your
7 verdict should be, you should disregard it because you are the
8 people who decides the case.

9 I now commit the case to you for your careful
10 consideration. And when you fill out the verdict form, it gets
11 signed by the foreperson, and you will have concluded your
12 service. You want to give -- give this to the jury, please.

13 Oh, you have one. Okay. We'll give you two copies of the
14 form, in case you mess one up, you'll have an extra one.
15 Here's one. You'll get a chance in a minute.

16 MR. RITTINGER: Your Honor, I think we want a sidebar
17 before -- or maybe --

18 THE COURT: I'll give you one in a minute. Let's
19 take the -- oh, okay. Come on.

20 (Sidebar begins)

21 THE COURT: Now I've messed it up enough. Why do you
22 have to mess it up?

23 MR. RITTINGER: Well, I -- Your Honor, I don't agree
24 with -- at one point you said they were automatically entitled
25 upon a finding of defamation. I mean, that's -- that's --

1 that's devastating to us. They're not automatically --

2 THE COURT: Devastating?

3 MR. RITTINGER: Well, in -- in the overall context of
4 this case, I --

5 THE COURT: How about presumed damages?

6 MR. RITTINGER: Yes, but that has to do with -- that
7 has to -- that has to do -- I think what Rick had said was, and
8 I think he's correct, and it has to be made clear that they --
9 they have to -- they have to find actual malice for both
10 presumed damages and punitive damages. And I don't think
11 that's come across.

12 UNIDENTIFIED COUNSEL: Okay. Okay. Okay.

13 UNIDENTIFIED COUNSEL: But not for distress..

14 UNIDENTIFIED COUNSEL: Right.

15 MR. RITTINGER: And -- and the damages without that
16 are not automatic.

17 (Sidebar ends)

18 THE COURT: One of the problems, members of the jury,
19 with charging you in installments is that I sometimes miss what
20 I should have done or think I did it and I didn't. I just want
21 to make clear that to the extent that plaintiffs have
22 established by the fair weight of the evidence that they were
23 defamed, the law presumes that certain damages to their
24 reputation occurred if the -- if they establish that the
25 defendant acted with malice or reckless disregard, as I

1 discussed earlier.

2 The plaintiffs would still be entitled to recover
3 damages for emotional distress that they suffered, if you
4 accept their testimony. But they would not be entitled to
5 damages to their reputation or -- as I say, presumed damages --
6 or to punitive damages, unless they establish by fair and
7 convincing evidence that the defendant acted with malice.
8 Okay?

9 MR. RITTINGER: Thank you, Your Honor.

10 MR. BAZELON: Thank you, Your Honor.

11 THE COURT: I hope that doesn't change your minds.
12 You may take -- follow that young lady.

13 COURTROOM CLERK: All rise.

14 THE COURT: And we will eagerly await your response.

15 (Jury out for deliberations)

16 THE COURT: And the charge as given is accepted to by
17 every lawyer in the room --

18 MR. RITTINGER: Yes, Your Honor.

19 THE COURT: -- and so noted.

20 MR. BAZELON: Thank you.

21 THE COURT: Recess till we get a verdict.

22 (Recess)

23 COURTROOM CLERK: All rise.

24 THE COURT: Bring in the jury. The jury has
25 submitted a question, which I assume you've received, have you?

1 UNIDENTIFIED COUNSEL: Actually, two, I believe,
2 Judge.

3 THE COURT: Two of them, yes. I propose to answer
4 the questions. (Pause)

5 (Jury in)

6 COURTROOM CLERK: All rise.

7 THE COURT: Good afternoon. Be seated, please. I
8 will note for the record that the jury has entered a couple of
9 questions. The first question, which should have been made
10 clear by the Court before but wasn't, is, quote, does a
11 majority determine a yes or no response to one or two? Or must
12 it be unanimous? In order to answer any of these questions,
13 you must all agree on the answer. It's all things are
14 unanimous. There's not a majority vote.

15 Then you asked in the second question, "Could a --
16 could malice versus reckless disregard versus negligence be
17 clarified once more? Could a written explanation be provided?"
18 I don't think we can provide a written explanation today, but I
19 will try to make it a little more clearer than I did before.

20 JUROR: Is it possible for you to speak a little
21 louder? I -- I can't hear you back here in the second row, I'm
22 sorry.

23 THE COURT: I'll try very hard.

24 JUROR: Thank you.

25 THE COURT: Is that better? (No audible response)

1 The only kind of damages that you can award that do not require
2 a finding of actual malice are damages for humiliation,
3 emotional distress. All the other damages require a finding of
4 actual malice. That is to say for purpose of considering
5 whether to award presumed or punitive damages, you must find a
6 fact -- make a finding of actual malice. And that means that
7 at the time the statement was made, West Publishing Company
8 acted with knowledge that the statement was false, or acted
9 with reckless disregard of whether the statement was false or
10 not. The defendant (sic) -- the -- the plaintiff must
11 demonstrate that the defendant, in fact, entertained serious
12 doubts as to the truth of the publication, or acted with a high
13 degree of awareness of probable falsity. Does that answer your
14 question? Probable not.

15 If you find that the statement was false and that
16 plaintiffs were defamed, plaintiffs would be entitled to
17 recover damages for emotional distress. They've testified that
18 they were -- felt humiliated and embarrassed and so forth.
19 That kind of damage you can award without any showing that the
20 defendants acted with actual malice.

21 But if you find that the defendant acted with actual
22 knowledge that the communication was false -- in other words,
23 if the defendant knew, number one, that the pocket part had not
24 been prepared -- first of all, that they knew that the issuing
25 of the pocket part constituted a representation to the readers

1 that this was an update of Pennsylvania law and that it had
2 been prepared by the plaintiffs, if they knew that was false or
3 acted with reckless disregard as to whether it was false or
4 not, they would be -- they would be guilty of actual malice,
5 and that would enable you to award damages for any other
6 consequences that you find that plaintiffs may have suffered.

7 Does that -- have I cleared that up or made a -- a
8 mess of it?

9 MR. BAZELON: That's -- that's satisfactory, Your
10 Honor.

11 THE COURT: Pardon?

12 MR. BAZELON: That's satisfactory.

13 THE COURT: Fine. Thank you.

14 But you must be unanimous in order to enter any of
15 these questions. Okay? You may retire to the jury room and
16 quick reach a verdict.

17 COURTROOM CLERK: All rise.

18 (Jury out for deliberations)

19 THE COURT: I will assume for the record that all the
20 lawyers in the courtroom object to what I just said. And you
21 will be able to raise it on appeal. (Pause)

22 MR. RITTINGER: Yeah, Your Honor, I'm wondering if it
23 makes sense, since they wanted a written, we'd -- we'd just
24 agree on the definition of actual malice right here and give it
25 to them?

1 MR. CHARLSON: I can attest to the truth of that
2 statement, though.

3 UNIDENTIFIED COUNSEL: I made it back, Your Honor.

4 UNIDENTIFIED COUNSEL: Mr. Charlson is our good luck.

5 (Pause)

6 COURTROOM CLERK: All rise.

7 (Jury in)

8 THE COURT: Good afternoon. Be seated, please. I
9 will note for the record that we have two more questions you've
10 sent in. And I'll try to dispose of them. The first question
11 is, "In number one of the verdict form, the word 'establish' is
12 used. Are we determining whether proof was provided? Or are
13 we still working under the idea of presuming that at least one
14 person could have thought less about either Professor Rudovsky
15 or Professor Sosnov?"

16 As I've tried to make clear earlier -- first of all,
17 the word established means to prove. So in order to answer the
18 question yes, you must all agree that it is more likely than
19 not on the basis of the evidence that yes is the correct
20 answer. And that involves the analysis of the evidence, which
21 is the proof. But to answer your question specifically, as I
22 thought I made clear earlier, but maybe I didn't, if you find
23 that the plaintiffs were defamed, the defendant issued a
24 defamatory communication, then they are entitled to damages for
25 emotional distress that find esta -- they established by the

1 evidence.

2 But if they also show that the defamation occurred --
3 that the defendant West Publishing Company actually knew that
4 it was false or had -- or acted in reckless of disregard of
5 whether it was true or false, then they would be entitled to
6 presumed damages. And there isn't much difference, but it --
7 it would -- the law says that if the defendant acted with
8 actual malice, it's presumed that the defendants (sic) suffered
9 -- that the plaintiffs suffered some damage to their
10 reputation. And you don't get -- don't have to have any actual
11 proof that their reputations were -- that somebody else thought
12 less of them. It's presumed that that happened if there was
13 actual malice. And in order to have def -- defamation of any
14 kind, you would have to show that the intended reader would
15 probably have concluded that -- that the plaintiffs wrote the
16 supplement and that the supplement was, to some extent, less
17 than adequate.

18 Now, the second question is, "Are the determinings of
19 plaintiffs dictated by any guide -- of damages, I'm sorry --
20 dictated by any guidelines? Or are such determinations --
21 determinings arbitrary?" The answer is, there are no specific
22 guidelines. We leave that up to the common sense and good
23 judgment of the jury as to what would be a fair and reasonable
24 amount to award as damages. That does not make them arbitrary.
25 We leave them up to the good judgment and common sense of the

1 COURTROOM CLERK: Juror number seven, Lisa Driscoll?

2 JUROR #7: I agree.

3 COURTROOM CLERK: And juror number eight, Kevin

4 Grugan?

5 JUROR #8: Yes, I do agree.

6 COURTROOM CLERK: Thank you.

7 THE COURT: Thank you. They all answered that they

8 did agree with the answers. You're -- you're now excused.

9 Thank you very much. And have a safe trip home. And I'm

10 assuming there won't be any post-trial motions or anything.

11 We'll see you later.

12 MR. RITTINGER: Yeah, we'll do it on paper, Your

13 Honor.

14 THE COURT: Pardon?

15 MR. RITTINGER: We'll do the motions on paper.

16 THE COURT: Oh, yes, sure.

17 MR. RITTINGER: Well, I do want to move to set aside

18 the verdict, yes, Your Honor.

19 THE COURT: I thought maybe you might. I wasn't

20 sure, but I thought we'd better check. It might be of interest

21 to know the amount of the verdict which the Court had suggested

22 and the amount which the defendant was willing to pay. Did you

23 find -- find those out earlier?

24 UNIDENTIFIED COUNSEL: No, Your Honor.

25 THE COURT: Do you have any objection to our telling

1 them?

2 MR. RITTINGER: No. No, Your Honor.

3 THE COURT: I think the -- you

4 MR. BAZELON: Your Honor --

5 THE COURT: -- offered what, seventeen-five each?

6 MR. RITTINGER: Yes, Your Honor.

7 THE COURT: And my figure was 15,000. So
8 congratulations to somebody. I'm not sure who. We'll see you
9 later.

10 MR. RITTINGER: Your Honor, you'll -- you'll take
11 motions to set aside on paper then? Is that --

12 THE COURT: You don't have to, but if you want to
13 file such motions, you may do it.

14 MR. RITTINGER: Well, I think -- I think we probably
15 should under the circumstances.

16 THE COURT: You may do it any time you want within
17 the time limit specified.

18 MR. RITTINGER: Within the 28 days. Thank you, Your
19 Honor.

20 THE COURT: Okay. Good night, all.

21 UNIDENTIFIED COUNSEL: Thank you, Your Honor.

22 (Briefly off the record)

23 (Audio begins here)

24 MR. BAZELON: -- relief. The -- the request for
25 injunctive relief.