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

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL

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MISCELLANEOUS

Plaintiffs David Rudovsky, Esquire ("Rudovsky") and Leonard Sosnov, Esquire ("Sosnov"), by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to defendants' renewed motion for judgment as a matter of law or, alternatively, for a new trial.

INTRODUCTION

Defendants begin their brief by arguing that this is "not a typical defamation case," and that "[i]t is difficult to imagine a case further afield from the typical defamation claim." Def. Mem., p. 1. It is a bit ironic, then, that defendants wrap their motion in the cloak of the First Amendment, arguing that they were deprived of Constitutional free speech protections. Defendants' primary argument is that that plaintiffs failed to prove "actual malice" – *i.e.*, that defendants either knew that their statements were false, or acted with reckless disregard as to whether their statements were false or not. Def. Mem., pp. 9-18.

The United States Supreme Court announced the actual malice standard in *New York Times v. Sullivan*, 376 U.S. 254 (1964), a case involving the civil rights struggle. In recognition of this country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (*id.* at 270), the Court held that actual malice must be proven in "a libel action brought by a public official against critics of his official conduct." *Id.* at 264.

Defendants are correct in one sense: it is indeed "difficult to imagine a case further afield" from *New York Times*. Plaintiffs are private citizens, not public officials. And, this case has nothing to do with "debate on public issues." The defamatory statements at issue here accomplished nothing except injuring the plaintiffs and misleading users of the Treatise. They

are not the types of statements recognized by the Supreme Court to be "inevitable in free debate, and that . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

Libelous statements such as the ones at issue here "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The jury considered the evidence, and determined that the defendants had committed the torts of defamation and false light invasion of privacy. The jury found that the defendants had acted with actual malice. And, the jury found that the defendants' conduct was so reprehensible that it warranted a substantial punitive damages award.

STATEMENT OF FACTS

The evidence presented at trial, viewed in the light most favorable to the plaintiffs as the non-movants, established the following facts:

A. The Plaintiffs

The plaintiffs in this case, David Rudovsky and Leonard Sosnov, are distinguished and long-standing members of the Bar of the Commonwealth of Pennsylvania. Their careers have each encompassed the practice of law, particularly, criminal law and constitutional law; teaching as faculty at law schools; and authoring legal books and articles. Mr. Rudovsky has also practiced actively in civil rights law. Mr. Rudovsky and Mr. Sosnov both enjoy excellent reputations in the legal and academic communities. Tr. 12/13/10 (Frenkel) at 43:12-44-6; Tr.

12/13/10 (Rudovsky) at 48:22-52:1; Tr. 12/14/10 (George) at 59:24 – 60:3); Tr. 12/14/10 (Sosnov) at 73:20-77:5; 77:20 – 78:8.

B. Plaintiffs Author the Treatise for West

In 1988 Plaintiffs authored a book entitled "CRIMINAL PROCEDURE Law Commentary and Forms." The book was published by West as part of West's "Pennsylvania Practice" Series.[1] A second edition was prepared by Plaintiffs and published by West in 2001. From 1988 to 2007, except for the year of the second edition, Plaintiffs prepared a pocket part for this book which was published by West. (The book, including the second edition and pocket parts for use through 2007-2008, is hereafter referred to as "the Treatise").

Subscribers to the Treatise had individual written agreements with West under which they automatically received, and were invoiced for, each year's pocket part unless the contract was cancelled by the subscriber. The Treatise has averaged approximately 500 subscribers. Because many of these subscribers are law firms and law libraries, and because the Treatise is also on Westlaw, the actual readership of the Treatise is much greater. Tr. 12/13/10 (Rudovsky) at 64:15-65:13.

In their preparation of the pocket part for the book each year, Plaintiffs reviewed all of the Pennsylvania appellate opinions on criminal law and procedure in the Pennsylvania courts, and all changes to the Pennsylvania Rules of Criminal Procedure, Rules of Appellate Procedure, and Juvenile Court Rules. In addition, plaintiffs reviewed all U.S. Supreme Court cases, and some selected Federal Circuit Court cases on criminal procedure. Plaintiffs included in each pocket part approximately 100 to 150 new cases decided in the year following the previous pocket part, as well as rule changes and other legal developments. Plaintiffs ***each*** expended at

[1] Plaintiffs' use of the term "West" in this Memorandum refers individually and collectively to the defendants in this case.

least 150 hours over the course of the year in the preparation of the pocket parts, in order to assure that their treatment of the topics in the Treatise was up-to-date and current, and could be relied upon as such by the Bar and by the Courts. Tr. 12/13/10 (Rudovsky) at 66:1-68:21; Tr. 12/14/10 (Sosnov) at 79:11 – 81:13. Their manuscripts for the pocket parts were accepted each year without substantive change. Tr. 12/13/10 (Rudovsky) at 69:6-23. West's long-time editor of the Treatise, Doug Booth, had promised plaintiffs that they would each be paid $5,000 for annual supplements. Trial Ex. 13.

In early 2008, the individuals responsible for the Treatise at West - Karen Earley, Sarah Redzic, and Catherine Smith - held a series of meetings about the future of the Treatise. Ms. Earley, who was West's Attorney Editor for the Treatise, and Ms. Smith, who was the Team Coordinator for West's State Practice Group (and Ms. Earley's boss), recommended terminating publication of the Treatise. *See* Ex. A (Smith Dep.) at 31:13-32:2; Trial Ex. 22 (2/11/08 Email from C. Smith to T. Kruk).[2] Rather than terminate the publication, West offered one-half compensation, $2,500, for the 2008-09 Supplement. Tr. 12/14/10 (Sosnov) at 82:14-22. Plaintiffs declined this offer.

C. Rather than Terminate Publication of the Treatise in West Assigns an Inexperienced and Unqualified Employee to Prepare the Supplement

West took no action with respect to the Treatise for almost the entire year. Then, in early November 2008, a number of West employees, met to discuss the future of the Treatise. Ex. A (Smith Dep.) at 20:2-16. Sarah Redzic, a May 2007 law school graduate who had been

[2] The official transcribed record of the trial proceedings does not include a transcription of the portions of videotaped depositions that were played to the jury. Although plaintiffs' counsel will work with the Official Court Reporter to correct this omission, for the purposes of this brief, plaintiffs have attached the transcripts of three depositions that were played to the jury: the depositions of Catherine Smith, Sarah Redzic, and Teri Kruk, as Exhibits A, B, and C, respectively.

employed at West since only October 2007, was now the Attorney Editor assigned to the Treatise. Ex. B (Redzic Dep.) at 8:12-14. Ms. Redzic suggested terminating publication of the Treatise, and Ms. Smith, as well as West's Director of Print Strategy John Levine, agreed with her recommendation. *Id.* The decision to terminate was not executed during 2008 because "it was close to the end of the year" and West did not have enough time to obtain all the necessary formal approvals to terminate the publication. *Id.* at 21:17-22:18; 25:6-17.

Publishing – and selling – a supplement to the Treatise was part of the 2008 "Publishing Plan" for Ms. Smith's business unit, which meant that the revenue from the sale of the Treatise to the its subscribers was included within her unit's revenue goals for 2008. Ex. A (Smith Dep.) at 26:8-16 and 47:1-48:24. By the time the decision was made to defer termination into 2009, the deadline for producing a manuscript had already passed, and the manuscript was therefore "overdue." Ex. B (Redzic Dep.) at 29:14-23. Nonetheless, if Ms. Smith and Ms. Redzic failed to produce a "2009 Supplement" to be sent to paying subscribers, Ms. Smith's State Practice Unit could not meet its revenue target.

Ms. Redzic initially attempted to locate a third-party contract author to prepare the supplement, and made several phone calls to contract authors, but no one called her back. Ex. B (Redzic Dep.) at 34:7-35:11. Instead, Ms. Redzic agreed to prepare a manuscript for the Supplement herself. *Id.* at 35:12-24; 38:5-10.

At this time, Ms. Redzic had been employed by West for a little more than a year as an Attorney Editor. She testified that she was trained for that position primarily by "shadowing" Karen Earley. Ex. B (Redzic Dep.) at 16:10-17:6. Ms. Earley, however, testified that Ms. Redzic ***did not*** shadow her, and that she was not responsible for training Ms. Redzic. Tr. 12/14/10 (Earley) at 69:21-25. Although Ms. Earley believed that a woman named Andrea

Nadel, who was technically assigned as Ms. Redzic's "mentor," had trained her, (*Id.* at 30:1-2), Ms. Redzic testified that Ms. Earley had "more of a role in her training than Ms. Nadel did," and that she could not remember any training provided by Ms. Nadel. Ex. B (Redzic Dep.) at 20:10-21:4. Given the directly contradictory testimony of the two West witnesses, the jury could reasonably have concluded that Redzic was insufficiently trained, if she was even trained at all, in the job of being an Attorney Editor.

Despite her obvious inexperience and lack of training, Catherine Smith nevertheless assigned Ms. Redzic the task of preparing the Supplement, although she had never prepared a supplement before. Ex. A (Smith Dep.) at 42:4-15. At the time she started the assignment, Ms. Redzic had less than a month to prepare the manuscript, in addition to all of her other tasks as an Attorney Editor responsible for between 60-70 West publications. Ex. A (Smith Dep.) at 42:16-43:1; Ex. B (Redzic Dep.) at 70:18-73:9. Moreover, the end of the year was "crunch time" at West, due to all of the year-end pocket parts and supplements that were required to be produced (including most of Ms. Redzic's 60-70 titles). Ex. A (Smith Dep.) at 38:22-24; Ex. B (Redzic Dep.) at 70:18-73:9. Ms. Redzic's time records indicate that she spent no more than 10.5 hours over the course of nine days working on the 2008-09 Supplement.[3] See West Time Records, (Trial Ex. 55); see also Ex. B (Redzic Dep.) at 100:14 - 109:14. Professors Rudovsky and Sosnov, by contract, typically spent over hundreds of hours ***each*** working on each year's supplement. Tr. 12/13/10 (Rudovsky) at 67:2-15; Tr. 12/14/10 (Sosnov) at 82:4-13.

Amazingly, despite the fact Ms. Redzic had never before authored any manuscript for West, and had no background in or knowledge of criminal law (much less Pennsylvania criminal

[3] The great majority of this time was apparently used to change the phrasing of West's ministerial "instruction lines" within the Supplement, rather than to update any substantive content. *Id.* at 79:10-83:18.

law or procedure), Ex. B (Redzic Dep.) at 66:19-67:13, no one at West -- not Ms. Smith, not Ms. Earley, not Ms. Nadel nor anyone else -- provided her with ***any*** input on how to update a supplement on her own. *Id*. at 66:1-18; Ex. A (Smith Dep.) at 43:2-44:15. Adding insult to injury, once Ms. Redzic completed her manuscript, ***no one at West ever reviewed it to determine whether it was worthy of publication.*** Ex. A (Smith Dep.) at 49:16-51:4; Ex. B (Redzic Dep.) at 74:1-8. Instead, Redzic's manuscript went directly to West's production department, where it was packaged as the 2008-2009 Supplement to the Treatise, and was sent to each of approximately 400 subscribers to the Treatise, each of whom was charged $46.50. Ex. B (Redzic Dep.) at 74:1-8.

D. West's Publishing Guidelines Codify West's Corporate Greed by Instructing Instruct Editors to Spend Less Time Reviewing Smaller Publications, Including the Treatise

The reason for West's complete absence of care or effort concerning the accuracy, veracity and quality of 2008-2009 Supplement, and thus for the reputations of the Plaintiffs, became clear: corporate greed. This profit motive was explained at trial by West's Vice President of Legal Editorial Operations and only trial witness, Jean Maess, who conceded that the Treatise was a "low margin" product that was not considered to be profitable for West. Tr. 12/15/10 (Maess) at 79:1-20; 81:15-17. Ms. Maess then explained what West's "Publishability Guidelines" mean when they instructed West's Attorney Editors to use their "best business judgment" in determining the appropriate level of review of a submission for a product with a "low margin":

> Q. And so was it West's advice, the guidelines, to its attorney editors in 2008 that you must use your best business judgment in determining the appropriate level of review of a submission on a product with a low margin?

* * * *

A. I think it's -- I think -- yes. We spend more time on large high revenue products than on a lower, smaller product. That's true.

Q. So this language -- well, what's meant by, "You must use your best business judgment," in determining the appropriate level of review of a submission on a product with a low margin?

* * * *

A. I believe the intent behind this paragraph is to say, "If you have two products and you're going to spend a lot of time on one and less time on the other, you're going to take the product that's more important to the customer and has more customers."

Q. Based on which product has a higher margin, correct?

A. Well, the margin would be dictated by the number of customers.

Tr. 12/15/10 (Maess) at 81:18-82:20. *See also* Trial Ex. 57 at West-R 06003. Thus, the jury had more than sufficient basis to conclude that West defamed plaintiffs, and hoodwinked and misled its subscribers, simply to make about $17,000.[4]

[4] Although Maess claimed that West has since changed its policy regarding editorial review of internally-produced manuscripts, she conceded on cross-examination that this policy was not in writing. Tr. 12/15/10 (Maess) at 56:11-17; 90:1-10. In addition, the testimony of Teri Kruk, West's Director of Content Operations, by deposition, 15 months after the publication by West of the 2008-2009 sham pocket part, showed that there had been no communications of any such policy change to persons who reported to Ms. Maess (*see* p. 12, *infra*, and Ex. C (Kruk Dep.) at 7). Likewise, although Maess testified that West had procedures for handling customer complaints, her subordinate John Wierzbicki submitted a sworn affidavit that West had no written policies and procedures for handling and processing and/or addressing user complaints specific to books and pocket parts. Tr. 12/15/10 (Maess) at 59:8-11; 61:1-19. The jury was entitled to reject her credibility and testimony, and to conclude that West had taken no remedial actions.

E. The 2008-09 Supplement Was Virtually Unchanged from the Prior Supplement Prepared by Plaintiffs and Failed to Include Any Relevant Changes in the Law of Pennsylvania Criminal Procedure

West's 2008-09 Supplement to the Treatise (hereafter the "Redzic Supplement") was not a bona fide revision or update; it contained only three previously uncited cases, none of which was of any consequence, it failed to address negative history in cases, it failed to identify relevant rule changes, and generally failed to update or account for changes in law. Tr. 12/13/10 (Rudovsky) at 73:23-74:10; 78:3-16. West itself largely gave up trying to defend the quality 2008-2009 Pocket Part at trial. *See* Tr. 12/15/10 (Maess) at 50:11-18.[5] In sum, the "2008-2009 Pocket Part," in being represented as an update to the Treatise, was a sham, which West falsely attributed to Rudovsky and Sosnov.

Indeed, the only revisions that West made to the 2008-2009 Supplement were to change the phrasing of the "instruction lines" (the italicized instructions to the reader that explain the logistics of how the material in the Supplement modifies the text of the main treatise). The revised instruction lines the 2008-09 Pocket Part appear to conform to West's internal guidelines for instruction lines. *See* Trial Ex. 56. Although Ms. Redzic could not recall if she changed all of the instruction lines during her approximately 10.5 hours working on the Pocket Part, she clearly testified that no one else would have done it. *See* Ex. B (Redzic Dep.) at 83:1-18. Since even a cursory comparison of the 2007-08 Supplement with the 2008-09 Supplement shows that the instruction lines were changed throughout the 218 pages of text in the Supplement, the jury could justifiably have concluded that the bulk of Ms. Redzic's 10.5 hours spent revising the manuscript for the 2008-09 Supplement was devoted to changing the instruction lines, rather than updating the law of criminal procedure.

[5] Maess then proceeded, in her next breath, to try to backtrack from these comments and minimize the extent of the admitted deficiencies. Tr. 12/15/10 (Maess) at 50:19-51:12.

F. West Falsely Represented that Rudovsky and Sosnov Authored the Sham 2008-2009 Pocket Part

Despite the fact that Rudovsky and Sosnov did not have any involvement in preparing the 2008-2009 Supplement, however, the cover page continued to identify the Supplement as being authored "By DAVID RUDOVSKY [and] LEONARD SOSNOV", modified only by the innocuous, small-print qualifier "and THE PUBLISHER'S STAFF". *See* Trial Ex. 3. Nothing on the Supplement, or mailed with it to the subscribers, informed subscribers or readers that Rudovsky and Sosnov had not prepared the Supplement. Accordingly, subscribers and recipients were led to believe Rudovsky and Sosnov were responsible for the entirely inadequate, sham Supplement. Tr. 12/14/10 (Sosnov) at 88:7-23; Tr. 12/13/10 (Rudovsky) at 79:2-19.

The "2008-2009 Pocket Part" was automatically sent by West to all of the subscribers for the Treatise, along with an invoice for payment in the amount of $46.50. Prior to submitting payment for the "2008-09 Pocket Part," subscribers had an opportunity to view its cover, including the prominent misrepresentation that Rudovsky and Sosnov were authors of the document. Upon seeing the "2008-09 Pocket Part," subscribers were likely to believe that it was an update of the Treatise authored and prepared by Rudovsky and Sosnov, and purchased it on that basis. West did not disclose that Rudovsky and Sosnov had nothing to do with the preparation of the document (beyond their work on prior pocket parts), and West did not disclose that the pocket part was not a revision or an update, that it was not current, that it could not be relied upon, or that it added essentially nothing to the prior year's pocket part.[6]

[6] The same deficiencies identified above also appeared in West's popular "Westlaw" electronic database version of the Treatise. Tr. 12/15/10 (Maess) at 66:23-67:17.

G. West Was Aware of the Falsity and General Incompetence of the 2008-09 Pocket Part

Although West attempted to convince the jury that it was not aware of the falsity and inadequacy of the 2008-09 Pocket Part, the evidence at trial provided more than sufficient basis for the jury to conclude that West knowingly defamed plaintiffs and swindled its subscribers. First, the obvious: Sarah Redzic was an employee of West, and was specifically tasked with the job of preparing the 2008-09 Pocket Part by her superior, Ms. Smith, who was aware of her general lack of experience. West Vice President Jean Maess conceded on cross-examination that she was responsible for the actions of both Redzic and Smith, and that she (Maess) was West itself:

> Q. So you would agree you were responsible for [Redzic's and Smith's] actions, were you not?
>
> A. Yes.
>
> Q. And you are West, are you not?
>
> A. Yes.

Tr. 12/15/10 (Maess) at 59:3-7.

Moreover, at the same time that West was publishing the sham 2008-09 Pocket Part, it also published, ***and Sarah Redzic edited,*** an annual update to a competing publication, *West's Pennsylvania Criminal Practice* by Wasserbly and Moore (*West's Pennsylvania Practice*, Vols. 16 – 16C), which covered overlapping subject matter as the Treatise. Tr. 12/15/10 (Maess) at 70:19-72:2; Tr. 12/15/10 (Rudovsky) at 92:6-13. The Wasserbly Treatise included numerous cases decided in 2007 and 2008 that should have been included in the 2008-09 Pocket Part. Tr. 12/15/10 (Rudovsky) at 92:14:-93:3. Thus, the jury could have reasonably concluded that while Redzic and West were publishing the sham 2008-09 Pocket Part, they had contemporaneous

access ***and actual knowledge*** of a competent, professionally-prepared pocket part, updated by its competent and qualified authors, ***and edited by Redzic herself***, which brought current the very same subject matter. *Id.* Under these circumstances, West cannot disavow knowledge of the 2008-09 Pocket Part's falsity.

Finally, the jury heard from Teri Kruk, West's Director of Content Operations. Ms. Kruk was unapologetic about the editorial process that led to the sham 2008-09 pocket part, and explained that it was just business as usual at West:

> Q. . . . Are you comfortable, as a Director at West, with the idea of a law school graduate a year out of law school, less than a year in her tenure – roughly a year into her tenure as an Attorney Editor, on her own preparing a supplement to an analytical treatise on Pennsylvania Criminal Procedure with no supervision and no review? . . . Is that something you're comfortable with?
>
> A. Yes, I am.
>
> Q. . . . [D]o you believe that that's a way to provide a high quality publishable product for West's customers?
>
> A. Yes, it is.

Ex. C (Kruk Dep.) at 23:20-24:13.

H. Rudovsky and Sosnov Were Stunned and Upset Because the 2008-09 Supplement Was Harmful to their Reputations

When Rudovsky received the Redzic Supplement in the mail sometime after the New Year in January 2009, he was "stunned, "upset," "angry" and "humiliated" by the fact that it was a virtual copy of the prior version. Tr. 12/13/10 (Rudovsky) at 74:14; 78:17-79:19. Sosnov was likewise "upset," "shocked and incredibly angry" and found the 2008-2009 Pocket Part "incredibly offensive." Tr. 12/14/10 (Sosnov) at 76:16-87:19.

The reason for their anger and concern was plain: the Redzic Supplement was an utter sham, yet West took no steps whatsoever to inform subscribers and readers that Rudovsky and

Sosnov had no role in the preparation of the sham Redzic Supplement. Thus, any person who used the Redzic Supplement would recognize that it failed to include even the most basic changes in the law, and was virtually certain to believe that Rudovsky and Sosnov had authored the useless Redzic Supplement.

I. West Scrambled to Replace the 2008-2009 Pocket Part After this Litigation Was Filed

Plaintiffs filed the Complaint in this case on February 19, 2009, along with a motion for preliminary injunction on March 24, 2009. After this action was filed, West sent a letter to subscribers informing them that the 2008-09 Supplement was deficient. *See* Trial Ex. 30. The letter was grossly misleading, insofar as it claimed that the 2008-09 Supplement did not reflect "all changes" in the law, and, because it was addressed only to subscribers, was most likely not even seen by the actual readership of the Treatise. Tr. 12/13/10 (Rudovsky) at 82:11-19.

At about the same time, West began the process of preparing a new version of the Supplement, which it rushed to complete literally on the eve of the preliminary injunction hearing. West engaged a former West employee, Chris Gimeno, who now works as a contract author for West, to update the Supplement. See Ex. A (Smith Dep.) at 58:2-23. The evidence demonstrated that West was "rushing" Ms. Gimeno to prepare the 2009 Supplement as quickly as possible. Tr. 12/15/10 (Maess) at 74:5. Moreover, despite professing to the jury that it worked hard to produce a quality product, West paid Ms. Gimeno just $3,500 to prepare the 2009 Supplement – less than the $5,000 that they had collectively offered to Rudovsky and Sosnov to prepare the 2008-09 Supplement. *Id.* at 74:1-3. The April 2009 Supplement was mailed only days before the preliminary injunction hearing in this case.

The April 2009 Supplement provided some new case law and rules, but it failed to include numerous significant changes in the law, including ***37 Pennsylvania Supreme Court***

cases. Tr. 12/14/10 (Sosnov) at 91:10-22; Tr. 12/15/10 (Rudovsky) at 91:9-95:14; and Tr. Ex. 92. Of those 37 Supreme Court cases, 30 were included in the supplement to the competing Wasserbly treatise, which was already published at this point. Tr. 12/15/10 (Rudovsky) at 92:14-93:3. The jury could also have concluded that Ms. Gimeno, the author of the April 2009 Supplement, had access to the Wasserbly treatise at the time she prepared that supplement. Tr. 12/15/10 (Maess) at 74:15-24.

Incredibly, the April 2009 Supplement even failed to include several cases that were specifically identified by plaintiffs at the preliminary injunction hearing. Tr. 12/15/10 (Rudovsky) at 94:22-24. The 2009 Supplement also failed to include any expert commentary, analysis, practice tips, insight and guidance, which was the hallmark of the Treatise. Tr. 12/14/10 (Sosnov) at 90:21-24. Yet West continued to advertise that the Treatise contained such expert commentary, guidance and analysis:

> "**Description:** Includes expert commentary and guidance. Provides analysis of Pennsylvania state law . . . Contains advice about alternative dispute resolution, practice tips, and a client interview checklist . . .
>
> **Features:**
>
> - Contains analysis of state law, statutes, rules and court decisions with full citations for additional research
>
> * * *
>
> - Includes expert commentary and practice tips to guide you

Tr. Ex. 79. These features were absent from the April 2009 Supplement.

J. West Continued to Advertise the Treatise as Being Authored by Rudovsky and Sosnov Without Disclosing That They are No Longer Updating It

Finally, the evidence at trial showed that even during the trial, West was advertising the Treatise for sale to the public, without disclosing that Plaintiffs are no longer preparing the updates. See Tr. Ex. 79. Any customer who ordered the Treatise, at a cost of over $200, would have no idea that Rudovsky and Sosnov were no longer involved. Even upon receipt, customers would have no inkling of their lack of continued involvement unless they happened to examine the cover page of the Supplement which, the evidence showed, is not a likely scenario given how most users use pocket parts. Tr. 12/14/10 (George) at 58:25-59:23.

Furthermore, the 2010 advertisement for the Treatise represented that an update was being published in January 2011. Thus, any prospective customer was being actively misled to conclude that Rudovsky and Sosnov were preparing an update that would be published shortly. Tr. Ex. 79. This misimpression would not be corrected before purchase.

SUMMARY OF ARGUMENT

Defendants make three arguments in support of their renewed motion for judgment as a matter of law.

First, defendants argue that there was "no evidence" to support the jury's finding of actual malice. As an initial matter, however, plaintiffs were not required to prove actual malice to recover actual damages for defamation. And, there was abundant, clear and convincing evidence of actual malice – including evidence that defendants (1) actually knew that their

statements were false, (2) purposefully avoided the truth, (3) failed to train or supervise Ms. Redzic, or to review her work, (4) engaged in a reckless lack of care for the accuracy of the supplement, (5) republished their defamatory statements, and (6) engaged in all of these wrongful acts for only one reason: greed. Defendants have simply buried their heads in the sand and ignored that evidence.

While defendants also make a "defamation by implication" argument, defendants waived that argument by failing to make it in their pre-verdict, Rule 50(a) motion for judgment as a matter of law. Moreover, the authorities relied upon by the defendants are both legally and factually inapposite, and based upon a standard that applies only to public official and public figure defamation plaintiffs.

Second, defendants argue that there was no evidence that anyone understood the supplement as defamatory of the plaintiffs. However, Pennsylvania law provides that plaintiffs satisfy their burden of proof on this issue where, as plaintiffs did in this case, they prove the circulation and content of defamatory statements.

Third, defendants argue that the jury's damages awards cannot stand because (a) Pennsylvania law does not allow recovery of presumed damages, (b) there was insufficient evidence of common law malice to support an award of punitive damages, and (c) the jury's punitive damage award does not comport with due process. Again, defendants' arguments fail as a matter of law.

Defendants have waived their argument about presumed damages as, once again, defendants failed to make the argument in their Rule 50(a) motion. And, defendants' argument also fails on the merits, as Pennsylvania does allow awards of presumed damages in cases of defamation *per se*. Defendants' common law malice argument fails because (a) Pennsylvania

law only requires proof of common law malice in defamation actions brought by plaintiffs who are public officials or public figures, and (b) the record contains more than sufficient evidence of common law malice, in the form of reckless disregard of the plaintiffs' rights. Finally, the punitive damages award comports with due process given the reprehensibility of the defendants' conduct, the harm inflicted on plaintiffs and users of the Treatise, and the wealth of the defendants.

Defendants make two arguments in support of their motion for a new trial: (1) the jury instructions confused the jury and misstated the law, and (2) the jury's verdict is against the great weight of the evidence.

West waived most of its complaints about the jury instructions by failing to object at trial. Indeed, West actually ***requested*** some of the very instructions that it now claims require a new trial. Moreover, West has failed to show that the jury instructions, taken as a whole, either confused or misled the jury.

Finally, West's argument that the verdict is against the great weight of the evidence merely rehashes the same flawed "insufficiency of the evidence" arguments that West makes in its motion for judgment as a matter of law. Plaintiffs presented more than sufficient evidence to support their claims, whereas West produced the testimony of only one witness – a witness whose testimony was inherently incredible, and which the jury was free to disbelieve. The great weight of the evidence – indeed, the overwhelming weight of the evidence – supported the jury's verdict.

West's motions for judgment as a matter of law and/or a new trial should be denied.

ARGUMENT

I. LEGAL STANDARDS

A. Rule 50(b) Motion for Judgment as a Matter of Law

"[J]udgment as a matter of law should be granted sparingly." *Goodman v. Pennsylvania Turnpike Commission*, 293 F.3d 655, 665 (3d Cir. 2002). "When, as here, a defendant makes such a motion, a court should grant it only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *LePage's Inc. v. 3M*, 324 F.3d 141, 145-46 (3d Cir. 2003) (en banc) (quotation omitted). *See also Williamson v. Conrail*, 926 F.2d 1344, 1348 (3d Cir. 1991) (Court must give the plaintiff, as the verdict-winner, "the benefit of all logical inferences that could be drawn from the evidence presented, resolve all conflicts in the evidence in his favor, and in general, view the record in the light most favorable to him.").

"In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). *See also Marra v. Philadelphia Housing Authority*, 497 F.3d 286, 300 (3d Cir. 2007) (court "must refrain from weighing the evidence, determining the credibility of witnesses, or substituting [its] own version of the facts for that of the jury.").

While the Court in a defamation case must make an "independent review" of the record with respect to Constitutional issues, this review "is not equivalent to de novo review of the entire record. For instance, purely factual determinations, particularly those involving the credibility of witnesses, remain best addressed by the factfinder, and are subject to the usual,

more deferential standard of review." *Howard v. Antilla*, 294 F.3d 249 n.8 (1st Cir. 2002) (quotation omitted).

B. Rule 59 Motion for New Trial

Where a motion for a new trial is based on an assertion of legal error, the Court conducts a two-step analysis. First, the Court determines whether it erred at trial. Second, the Court determines whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice. *Salas v. Wang*, 846 F.2d 897, 907 (3d Cir. 1988) ("No error . . . is grounds for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice.") (quoting Fed. R. Civ. P. 61).

Where the asserted ground for a new trial is that the verdict is against the weight of the evidence, the Court has less discretion, and "[a] new trial should be granted only where the great weight of the evidence cuts against the verdict and where a miscarriage of justice would result if the verdict were to stand. *Springer v. Henry*, 435 F.3d 268, 274 (3d Cir. 2006). *See also Grazier v. City of Philadelphia*, 328 F.3d 120, 128 (3d Cir. 2003) (motions for a new trial arguing that the verdict is against the weight of the evidence "are proper only when 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.").

This "stringent standard" is established

> to ensure that a district court does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts.

Sheridan v. E.I. du Pont de Nemours & Co., 100 F.3d 1061, 1076 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).

Where, as in this case, "the subject matter of the litigation is simple and within a layman's understanding, the district court is given less freedom to scrutinize the jury's verdict than in a case that deals with complex factual determinations." *Williamson*, 926 F.2d at 1352.

II. THE COURT SHOULD DENY DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants make three arguments in support of their renewed motion for judgment as a matter of law: (1) there was no evidence to support the jury's finding of actual malice; (2) there was no evidence that anyone understood the supplement as defamatory of the plaintiffs; and (3) the jury's damages award cannot be sustained, even if there was sufficient evidence to establish liability. Each of the defendants' arguments fails as a matter of law.

A. There Is Abundant Evidence Supporting the Jury's Finding of Actual Malice

1. As an Initial Matter, Plaintiffs Were Not Required to Prove Actual Malice to Recover Actual Damages

Defendants do ***not*** argue that plaintiffs were required to prove actual malice to recover actual damages for defamation. Indeed, Pennsylvania law clearly allows private figures, such as the plaintiffs, to recover actual damages for defamation based on a finding of negligence.[7] *See American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 592 Pa. 66, 84, 923 A.2d 389, 400 (2007) (adopting negligence standard for private figure defamation plaintiffs); *Joseph v. Scranton Times*, 959 A.2d 322, 342 (Pa. Super. 2008) ("As Appellees were found to be private figures, Appellees needed to prove that the defamatory material was

[7] Defendants have conceded that plaintiffs are private figures. *See* Tr 12/15/10 at 34 ("MR. RITTINGER: Your Honor, we do not contend they are public figures.").

published in a negligent manner in order to recover"), *appeal dismissed as moot*, 603 Pa. 146, 982 A.2d 1223 (1999).

"A negligent manner is publication with want of reasonable care to ascertain the truth." *Joseph*, 959 A.2d at 342. "In every negligence case, the jury determines 'what the reasonable man would have done under the circumstances.'" *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 414 (E.D. Pa. 1978), quoting W. Prosser, *Torts* § 37 at 207 (4th ed. 1971).

Defense counsel conceded at trial that there was abundant evidence of negligence in the record. *See, e.g.*, Tr. 12/15/10 at 19 ("Your Honor, there's no question that they put in evidence that we were negligent"); *id.* at 19-20 ("she was too young, she shouldn't have done it. There's no question about that. . . . . she should have been supervised"); *id.* at 27 ("they did a great job of proving that we could have done a better job, that we were negligent") ("There's proof of negligence"). And, defendants' only witness, Ms. Maess, conceded this point as well. *See id.* at 47 ("[w]e determined that the pocket part was deficient"); *id.* at 50 ("The claims of deficiency were valid. It was an incomplete pocket part. There was some work that was done in the court rules, but there were many cases that were missed. In hindsight, we used too junior of an attorney editor without enough support or supervision.").

Furthermore, plaintiffs produced evidence of actual damages for humiliation and emotional pain and suffering. Tr. 12/13/10 (Rudovsky) at 74:14; 78:17-79:19; Tr. 12/14/10 (Sosnov) at 76:16-87:19. Actual damages for defamation include damages for emotional harm. *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1080 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Sprague v. American Bar Association*, 276 F. Supp. 2d 365, 370-72 (E.D. Pa. 2003).

2. Plaintiffs Presented Clear and Convincing Evidence of Actual Malice

Actual malice is relevant in this case only to presumed damages for defamation, damages for false light invasion of privacy, and punitive damages. Actual malice means that publication of an allegedly defamatory statement was made ***either*** with knowledge that the statement was false, ***or*** with reckless disregard for its truth or falsity. *New York Times*, 376 U.S. at 279-80.

Defendants argue that "no evidence" of actual malice was adduced at trial. Nothing could be further from the truth, as there is overwhelming evidence of actual malice in the record.

Plaintiffs proved what the Court already has found: that "although plaintiffs had no role in authoring the pocket part, defendant West made it appear that they had indeed authored the pocket part, with aid from members of the publisher's staff." April 23, 2009 Memorandum, p. 2.

When defendants expressly attributed authorship of the pocket part to the plaintiffs, they knew that their statement was false. That knowledge equates to actual malice. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court considered a statutory "false light" invasion of privacy claim in which the plaintiff alleged that defendants had falsely reported that a new Broadway play "re-enact[ed]" the plaintiff's family's experience in being held hostage by three escaped convicts. Based on the defendant's awareness of the true facts surrounding the plaintiff's experience, the Court ruled that the jury reasonably could have concluded that the defendants had engaged in knowing falsehood or recklessly disregarded the truth. *Id.* at 544.

In *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), the court affirmed a jury verdict in favor of actor Clint Eastwood, finding that the defendant tabloid had acted with actual malice when it conveyed the false impression that Eastwood had agreed to an interview. *Id.* at 1256. "The fact that we can't look inside the editors' minds doesn't stop us from reaching

conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions)." *Id.* at 1256 n.20.

Defendants also knew that the pocket part was woefully inadequate and incompetent. At trial, defendants repeatedly argued that the Treatise was ***their*** book. *See* Tr. 12/16/10 at 75 ("It's our baby. We own the book.") ("It's not their book anymore."); *id.* at 75-76 ("we certainly have the right to use this book in the way that we deem appropriate, and not to be second guessed by those professors or their lawyer."). Defendants cannot now claim that they did not know what was in the pocket part, or that they did not know how bad it was. As a matter of law, defendants are charged with knowledge of what they created and published.

Actual malice may be proven in many different ways:

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights . . . .

Herbert v. Lando, 441 U.S. 153, 164 n.12 (1979). Actual malice can be shown "[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstances." *Moore v. Visloskly*, 240 Fed. Appx. 457, 468 (3d Cir. 2007) (quotation omitted).

Actual malice may be found where the defendant acts with "purposeful avoidance" of the truth. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the defendant newspaper relied on a single source for a story accusing a candidate for judicial office of bribery. The author of the article deliberately refused to listen to tape recordings that clearly

exonerated the plaintiff of the accused wrongdoing. *Id.* at 692. Based on these facts, the Supreme Court upheld the jury's finding of actual malice:

> Accepting the jury's determination that petitioner's explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, see St. Amant, 390 U.S. at 731,733, 88 S.Ct., at 1325, 1326, the purposeful avoidance of the truth is in a different category.

Id.

In this case, plaintiffs adduced clear and convincing evidence of actual malice by showing, *inter alia*, defendants' knowledge and/or purposeful avoidance of the truth, defendants' profit motive, Ms. Redzic's inexperience and lack of training and supervision, defendants' reckless lack of care, and defendants' republication of the defamatory statements.

Defendants' conceded profit motive in publishing is relevant to actual malice. *See Harte-Hanks*, 491 U.S. at 668 ("a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry") (internal citations omitted).

Ms. Redzic's inexperience and lack of training and supervision also are probative of actual malice. The Supreme Judicial Court of Massachusetts has found that "the fact that the article was written by an inexperienced reporter, of whose minimal training [the editor] was fully aware" was one of the factors from which "a jury might draw the inference that the news editor had in fact entertained doubts as to the story's accuracy." *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 869, 330 N.E.2d 161, 174 (1975).

A reckless lack of care is also evidence of actual malice. *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 68-69, 865 N.E.2d 746, 766 (2007) ("A plaintiff is entitled to prove the

defendants' subjective state of mind through circumstantial evidence, however, and evident concerning a reporter's apparent reckless lack of care may be one factor in the actual malice inquiry."). *See also Harte-Hanks*, 491 U.S. at 668 ("it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry").

The advertisements that defendants continue to run for the Treatise provide further evidence of actual malice. The plaintiff in *Corabi v. Curtis Pub. Co.*, 441 Pa. 432, 273 A.2d 899 (1971), alleged that she was defamed by an article in the *Saturday Evening Post*. Defendant had run advertisements about the article in Philadelphia newspapers. The Supreme Court of Pennsylvania held that the advertisements constituted evidence of actual malice:

> Although the advertisements about the Post article are not part of the libel alleged, they do constitute some additional evidence that the Post published the article with 'actual malice.'

441 Pa. at 466, 273 A.2d at 916 (footnote omitted).

In *Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 926 A.2d 899 (2007), the Supreme Court of Pennsylvania held that a defendant's republication of defamatory statements, after being made aware of their potential falsity, can in and of itself be sufficient evidence of actual malice. 592 Pa. at 470-72, 926 A.2d at 906-07, quoting Restatement (Second) of Torts § 580A, cmt. d (2006).

Defendants argue that there can be no finding of actual malice unless they confess that they either knew that their statements were false, or acted with reckless disregard as to whether their statements were false or not. The courts have unanimously rejected this argument. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court held that:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good

> faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732.

Both the Supreme Court of Pennsylvania and the Court of Appeals have made the same point. In *Weaver*, the court wrote that "it is important to note that immunity from defamation liability is not guaranteed merely because a defendant protests that he published in good faith." 592 Pa. at 466, 926 A.2d at 903. And, in *Marcone v. Penthouse Intern. Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), the court stated "[a] mere assertion by the publisher that he thought the statement published to be true does not automatically defeat actual malice."). 754 F.2d at 1089.

Objective evidence is probative of the defendants' subjective state of mind:

> As the Supreme Court strongly emphasized in St. Amant v. Thompson, the fact that the actual malice standard requires an inquiry into the defendant's state of mind does not mean that the trier of fact is limited to the defendant's own version of what was in his or her mind at the time of publication – mere "[p]rotestations of good faith" will not insulate a defendant from liability.

R. Smolla, *Law of Defamation* § 3:44, at 3-62.2, quoting *St. Amant*, 390 U.S. at 732.

Defendants also rely on the Supreme Court's decision in *Bose* for the proposition that a discredited defense witness' testimony does not, in and of itself, constitute clear and convincing evidence of actual malice. Def. Mem., p. 15. However, in *Bose*, the discredited defense witness' testimony was "the ***only*** evidence of actual malice on which the District Court relied." 466 U.S. at 512 (emphasis added). By contrast, the record in this case contains abundant evidence of

defendants' (1) actual knowledge; (2) purposeful avoidance of the truth; (3) profit motive; (4) failure to train or supervise Ms. Redzic, or to review her work; (5) reckless lack of care; and (6) republication of the defamatory statements – evidence which is more than sufficient to support the jury's finding of actual malice.

3. Defendants' "Defamation by Implication" Argument Lacks Merit

Defendants argue that this is a "defamation by implication" case, and that the plaintiffs therefore were required to show that defendants "intended, or at least knew of, the allegedly defamatory implications of the publication." Def. Mem., p. 12. Defendants' argument fails for four reasons. First, defendants have waived the argument by failing to make a pre-verdict, Rule 50(a) motion for judgment as a matter of law on this issue. Second, the Court has already properly rejected defendants' argument that Pennsylvania law distinguishes between statements that are "defamatory on their face" and those that are defamatory only by reference to "extrinsic evidence." Third, the authorities upon which defendants rely are inapposite here because they are all from other jurisdictions, applying other states' laws, and expressly limit their holdings to "public figure" cases. Fourth, and in any event, the evidence at trial was more than sufficient to meet this standard, even if it did apply.

a. Defendants Have Waived Any Such Argument

Defendants' post-trial motion is the first time that defendants have ever argued that plaintiffs had to prove that defendants intended or knew of the defamatory implications of their statements:

- In their motion to dismiss the Amended Complaint, defendants' sole argument about defamation was that the 2000 Agreement barred plaintiffs' claims.[8]
- In their opposition to plaintiffs' motion for a preliminary injunction, defendants' sole argument about defamation was, again, that the 2000 Agreement barred plaintiffs' claims.[9]
- In their motion for summary judgment, defendants' only arguments about defamation were that (1) plaintiffs had not suffered any special damages; (2) plaintiffs had not suffered any general damages; (3) the 2000 Agreement barred plaintiffs' claims; and (4) the defendants' defamatory statements were "true or substantially true."[10]

Likewise, defendants made no mention of this argument or these cases when they moved for judgment as a matter of law at trial. *See* Tr. 12/15/10 at 9-30, 105. Having failed to include this argument in their pre-verdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), defendants have waived the argument.

Rule 50(a)(2) requires that a pre-verdict motion for judgment as a matter of law "must specify the judgment sought ***and the law and facts that entitle the movant to the judgment***." (Emphasis added). "[A] post-trial motion for judgment as a matter of law made pursuant to Rule 50(b) must be preceded by a Rule 50(a) motion sufficiently specific to afford the party against

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[8] *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint, filed 4/3/09, pp. 16-17.

[9] *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed 4/10/99, pp. 21-22.

[10] *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment, filed 4/21/10, pp. 8-20.

whom the motion is directed with an opportunity to cure possible defects in proof which otherwise might make its case legally insufficient." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998) (quotation omitted).

Defendants did not argue in their Rule 50(a) motion either that (1) plaintiffs needed to prove that defendants intended or were aware of the defamatory implications of their statements, or (2) there was insufficient evidence of such intent or awareness in the record.

b. Defendants' Argument Would Have No Merit, Even if It Had Not Been Waived

(1) The Court Already Has Rejected Defendants' Argument

The Court already has rejected defendants' argument that Pennsylvania law distinguishes between statements that are "defamatory on their face" and those that are defamatory only by reference to "extrinsic evidence." Defendants raised this issue in their motion for reconsideration of the Court's summary judgment ruling[11] – and, in so doing, misrepresented Pennsylvania law and the authorities upon which they relied. Specifically, defendants argued that "a statement only constitutes libel *per se* when its defamatory meaning is apparent on its face; if extrinsic facts are required to understand the libel, it is not per se defamatory."[12] Defendants further argued that they were entitled to summary judgment on plaintiffs' defamation claim because the statements at issue were not defamatory on their face.

Pennsylvania law has rejected the distinction between libels that are defamatory on their face and libels that are not defamatory on their face. *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 327, 483 A.2d 456, 473 (1984) ("there is no longer any sound reason to distinguish for purposes of actionability between libels which are 'defamatory on their face' and libels which are defamatory through extrinsic facts and circumstances. . . . No Pennsylvania case in this century has stated a rationale for why libels not defamatory on their face should be any less actionable than libels defamatory on their face."); *id.*, 334 Pa. Super. at 328, 483 A.2d at 474 ("to make that recovery contingent on whether the damage was done by words 'defamatory on their

[11] *See* West's Memorandum of Law in Support of Their Motion for Reconsideration of that Portion of the Court's July 15, 2010 Memorandum and Order Addressing Defamation Per Se, filed 7/29/10, p. 4.

[12] *Id.*

face' merely adds another irrelevant factor to the equation."); *Walker v. Grand Central Sanitation, Inc.*, 430 Pa. Super. 236, 248, 634 A.2d 237, 243 (1993), *appeal denied*, 539 Pa. 652, 651 A.2d 539 (1994).[13]

In its December 8, 2010 Order, the Court granted defendants' motion for reconsideration on only one point – namely, by clarifying that the question of whether the defendants' statements were defamatory *per se* was a question of law for the Court. *See* December 8, 2010 Order, p. 10.[14] The Court denied defendants' motion in all other respects, including defendants' argument that they were entitled to summary judgment because the statements at issue were not defamatory on their face.

(2) The Authorities Relied on by Defendants Are Both Legally and Factually Inapposite

Defendants cite six cases in support of their argument that plaintiffs were required to prove that defendants intended or knew of the defamatory implications of their statements: *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309 (7th Cir. 1988); *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002); *Dodds v. American Broadcasting Co.*, 145 F.3d 1053 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Corporate Training Unlimited, Inc. v. National Broadcasting Co. Inc.*, 981 F. Supp. 112 (E.D.N.Y. 1997); *Masson v. New Yorker Magazine Inc.*, 832 F. Supp. 1350 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996); and *Battaglieri v. Mackinac Ctr. for Public Policy*, 680 N.W.2d 915 (Mich. App. 2004).

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[13] This issue is discussed at length in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration, filed 8/12/10, pp. 8-9.

[14] Plaintiffs did not oppose this aspect of defendants' motion for reconsideration. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration, filed 8/12/10, p. 2 ("In its motion for reconsideration, West posits that the Court erred because the issue of whether a statement is defamatory *per se* is a question of law for the Court. Plaintiffs agree that this is a question of law for the Court.").

None of these cases involve Pennsylvania law. Indeed, *Saenz*, the primary case relied upon by defendants, involved New Mexico law, which is the exact opposite of Pennsylvania law on the point in question. As the *Saenz* Court made clear, New Mexico law distinguishes between statements that are defamatory on their face (libel *per se*), and those that are defamatory only by reference to extrinsic facts (libel *per quod*). As detailed in the preceding section, Pennsylvania law does not recognize any such distinction.

Furthermore, the requirement that defendants knew of or intended the defamatory implications of their statements applies only to defamation suits involving public officials or public figures:

> For the plaintiff to prevail in a public official or public figure case, constitutional principles require that he or she establish that the defendant either knew or seriously suspected at the time of publication that the statement carried the alleged defamatory meaning; the defendant must be at least negligent in conveying that meaning in a private plaintiff case.

R. Sack, *Sack on Defamation* § 3.8 (2010)**.**

Plaintiffs in all six of the cases cited by defendants were ***public officials or public figures*** -- and, the courts expressly limited their holdings to the public official/public figure context.

To make matters even worse, defendants have tried to conceal these facts. Thus, defendants purport to quote *Saenz* for the following proposition:

> If a plaintiff … must establish by clear and convincing evidence that the defendants acted with actual knowledge 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.

Def. Mem., p. 12, quoting *Saenz*, 841 F.2d at 1318.

The defendants' ellipsis replaces one word – the word "official." Thus, what the *Saenz* court actually said is:

> If a plaintiff ***official*** must establish by clear and convincing evidence that the defendants acted with actual knowledge 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.

841 F.2d at 1318 (emphasis added). *See also id.* at 1317 ("Saenz concedes that he is a public official for purposes of the *New York Times* rule.").[15]

The cases cited by the defendants are factually inapposite to this case as well. The courts in each of those cases found that there was no evidence that the defendants intended or knew of the allegedly defamatory implications of their statements. Here, defendants ***expressly attributed authorship of the pocket part to the plaintiffs***. Thus, there is no question in this case that defendants both intended and knew that readers of the pocket part would assume that plaintiffs were the authors.

(3) The Evidence Was Sufficient to Support a Presumption that Defendants Knew of or Intended the Defamatory Nature of Their Statements

Even if plaintiffs were required to prove that defendants knew of or intended the defamatory nature of their statements, and even if defendants had not waived this argument, the

[15] The Court may recall that this is not the first time that defendants have tried to mislead the Court through a strategically-placed ellipsis. In their motion for reconsideration, defendants purported to quote the Sack defamation treatise for the proposition that only statements that are defamatory on their face are actionable without proof of special damages. However, by means of an ellipsis, defendants omitted the part of the quoted section which expressly stated that Pennsylvania did ***not*** follow this rule. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration, filed 8/12/10, p. 10.

evidence at trial was more than sufficient to meet this standard. Defendants expressly attributed authorship of the pocket part to the plaintiffs. Defendants knew of, or recklessly disregarded, that the pocket part was a sham. It defies logic and common sense for defendants to argue now that they did not know or intend that readers of the pocket part would understand that it had been prepared by plaintiffs, and that plaintiffs were responsible for its deficiencies. Surely, a reasonable jury could have found that defendants knew of or intended the defamatory nature of their statements.

B. Plaintiffs Were Not Required to Prove that Any Particular Reader Actually Understood the Statements to Be Defamatory

Defendants argue that they are entitled to judgment as a matter of law because there is no evidence that anyone understood the pocket part as defamatory to the plaintiffs. Def. Mem., pp. 18-23. Defendants' argument is premised on the false notion that a defamation plaintiff cannot prevail unless an actual recipient of the statement testifies that he understood the statement to be defamatory.

Defendants' argument is utterly contrary to Pennsylvania law. In *Joseph*, *supra*, the Superior Court made it clear that plaintiffs satisfy their burden of proving that the statements were "understood as defamatory" by introducing evidence concerning the circulation and contents of defamatory material:

> Where damage of reputation is claimed, evidence concerning the circulation and contents of the defamatory publication may support an inference that it was read by its intended recipients and caused damage to the plaintiff's reputation.

959 A.2d at 344.

Once a court determines that a statement is capable of a defamatory meaning, it is for the jury to determine whether the statements were understood as defamatory by those who heard or read them. *Tucker*, 237 F.3d at 281-82; *Corabi*, 441 Pa. at 441, 273 A.2d at 904. An ***objective*** standard applies – namely, would an ***average member*** of the intended audience have understood the statement to be defamatory? As the Pennsylvania Supreme Court has explained:

> The test is the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the ***average persons*** among whom it is intended to circulate. The words must be given by judges and juries the same significance that other people are ***likely*** to attribute to them.

Corabi, 441 Pa. at 447, 273 A.2d at 907 (emphasis added).[16]

Here, there was proof that many persons actually accessed the pocket part via Westlaw, and it cannot be doubted that the hundreds of subscribers to the print version did so as well.

Defendants' reliance on *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570 (E.D. Pa. 1999), *aff'd*, 229 F.3d 1139 (3d Cir. 2000), is also misplaced. The defendant in that case showed a slide with a dictionary definition of the word "simulate" to its clients at a conference. Although plaintiff's corporate name at the time was "Simulate," defendant did not expressly refer to plaintiff at the conference. The court found that there was insufficient evidence to conclude that any attendee at the conference understood the slide as defamatory to the plaintiff.

In *Synygy*, no attempt was made to link the plaintiff to the allegedly defamatory statement – indeed, the defendant did not expressly refer to the plaintiff at all. In this case, by contrast, defendants expressly attributed authorship of the pocket part to the plaintiffs; thus, there is no

[16] Defendants cite two cases, *Tucker* and *Capozzi v. Lucas*, 2004 WL 5572908 (M.D. Pa. Aug. 25, 2004), in which defamation plaintiffs did in fact introduce evidence of how certain individuals reacted upon hearing the defamatory statements. Certainly, a defamation plaintiff is ***permitted*** to introduce such evidence. However, neither case holds that plaintiffs are ***required*** to introduce such evidence to prove that the statements were understood to be defamatory.

doubt that recipients of the pocket part associated it with the plaintiffs and, indeed, assumed that plaintiffs were responsible for its preparation.[17]

Defendants' argument is based on the proposition that no reader of the pocket part would realize its deficiencies, and therefore that no reader would think less of the plaintiffs. However, the evidence showed that there were approximately 500 subscribers to the Treatise, and many more readers of the hard copy and on the internet, and that the deficiencies in the pocket part were so blatant and obvious that readers were bound to discover those deficiencies in short order.

C. The Jury's Damages Award Was Entirely Proper

1. Defendants' Arguments About Presumed Damages Fail as a Matter of Law

The defendants argue that Pennsylvania law does not allow for presumed damages, even in cases of defamation *per se*. Def. Mem., p. 23. Defendants have waived this argument by failing to make it in their Rule 50(a), pre-verdict motion for judgment as a matter of law, and by failing to object to the Court's instructions to the jury about presumed damages. Defendants' argument also fails on the merits, as Pennsylvania law allows recovery of presumed damages in cases of defamation *per se*.

[17] The other two cases cited by defendants in this section of their brief are even less helpful to the defendants. *Rockwell v. Allegheny Health, Education & Research Foundation*, 19 F. Supp. 2d 401 (E.D. Pa. 1998), was a decision denying a motion to dismiss a defamation claim. In its opinion, the court merely noted that the plaintiff had alleged that two recipients of the statements at issue had understood them to be defamatory. *Mediaworks, Inc. v. Lasky*, 1999 WL 695585 (E.D. Pa. Aug. 26, 1999), meanwhile, was an appeal from a Bankruptcy Court decision awarding a debtor damages on a defamation claim. The Bankruptcy Court had found that the statements at issue were capable of a defamatory meaning, but "made no determination whatsoever" as to whether the recipients understood the statements to be defamatory. *Id.* at * 8. The District Court remanded to the Bankruptcy Court, directing it to make a finding on that issue. *Id.* at ** 8-9. In our case, by contrast, the Court instructed the jury to make a finding as to whether the statements "would reasonably have been understood by those other than the plaintiffs as defamatory of the plaintiffs." Tr. 12/16/10 at 109. It must be presumed that the jury in fact did so.

a. Defendants Have Waived the Argument that Pennsylvania Law Does Not Allow Recovery of Presumed Damages

In their pre-verdict, Rule 50(a) motion for judgment as a matter of law, defendants did not argue that Pennsylvania law does not allow recovery of presumed damages. The ***only*** argument that defendants made about presumed damages was that they are not recoverable absent a finding of actual malice, and that there was insufficient evidence of actual malice in the record. *See* Tr. 12/15/10 at 17-20. The defendants requested that the Court instruct the jury on presumed damages,[18] and defendants' proposed jury verdict forms asked the jury to specify what amount, if any, of presumed damages the jury chose to award.[19] And, in his closing argument, defense counsel told the jury that "if he can prove actual malice and he's proved the first part of it, what we talked about, then he's entitled to his presumed damages." Tr. 12/16/10 at 70.

As detailed in Section A.3.a., above, a litigant that fails to make an argument in its Rule 50(a) motion for judgment as a matter of law waives that argument for purposes of post-trial motions.

b. In Any Event, Pennsylvania Law *Does* Allow Recovery of Presumed Damages in Cases of Defamation *Per Se*

Pennsylvania has a long history of allowing presumed damages in cases of defamation *per se*. In *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971), the Pennsylvania Supreme Court expressly adopted several provisions of the Restatement, including one that approved presumed damages. 441 Pa. at 473, 273 A.2d at 919-20; Restatement (First) of Torts §

[18] *See* West's Proposed Jury Instructions, filed 12/14/10, p. 14; West's Supplemental Proposed Jury Instructions, filed 12/15/10, p. 3; West's Revised Proposed Jury Instructions, filed 12/16/10, pp. 9-11.

[19] *See* West's Proposed Special Verdict Form, filed 12/14/10, Question 23; West's proposed Special Verdict Form, filed 12/16/10, Questions 9 and 10.

621 (1938) ("One who is liable for a libel or for a slander actionable per se is liable for harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation.").

In *Frisk v. News Co.*, 361 Pa. Super. 536, 523 A.2d 347 (1986), *appeal denied*, 515 Pa. 614, 530 A.2d 867 (1987), the Superior Court approved of a jury instruction which mirrored the Pennsylvania Suggested Standard Civil Jury Instructions on presumed damages in defamation cases:

> If you find that the defendant acted either intentionally or recklessly in publishing the false and defamatory communication ***you may presume that the plaintiff suffered both injury to his reputation and the emotional distress, mental anguish and humiliation such as would result from such a communication***. This means you need not have proof that the plaintiff suffered emotional distress, mental anguish and humiliation in order to award him damages for ***such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that is false or in reckless disregard of whether it is true or false***.

361 Pa. Super. at 550, 523 A.2d at 354, quoting Pa. S.S.J.I. (Civ) 13.10(B) (emphasis added).

> [T]he doctrine [of presumed damages] has been defended on the grounds that those forms of defamation that are actionable per se are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove. Moreover, statements that are defamatory per se by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either.

Carey v. Piphus, 435 U.S. 247, 262 (1978) (internal citations and quotation omitted). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) ("proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact"), quoting W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971).

Likewise, West's ***own*** treatise on Pennsylvania law, *Standard Pennsylvania Practice, 2d,* recognizes that "***[g]eneralized damage to reputation and business is presumed as a natural result of slander per se*** [and] may include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 4 *Standard Pennsylvania Practice, 2d* § 23:132 (emphasis added).[20]

In the face of this authority, defendants argue that a single Pennsylvania case, *Walker v. Grand Central Sanitation, Inc.*, 430 Pa. Super. 236, 634 A.2d 237, *appeal denied*, 539 Pa. 652, 651 A.2d 539 (1994), should control. *See* Def. Mem., p. 23. However, *Walker* did not discuss the availability of presumed damages in a case involving actual malice. And, in any event, the Pennsylvania Superior Court did not and could not have reversed the Pennsylvania Supreme Court's decision in *Corabi*. *See, e.g., Commonwealth v. Shaffer*, 557 Pa. 453, 460 n.6, 734 A.2d 840, 844 n.6 (1999) ("we feel it necessary to, once again, remind the Superior Court of its duty and obligation to follow the decisional law of this Court"); *Commonwealth v. Randolph*, 553 Pa. 224, 230-31, 718 A.2d 1242, 1245 (1998) ("It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court").

A federal court applying state law is bound by the pronouncements of the highest court in the state. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Accordingly, *Corabi* controls in this case, and plaintiffs therefore may recover presumed damages in cases of defamation *per se*.

Defendants also cite five Pennsylvania federal District Court decisions. *See* Def. Mem., p. 23. However, those decisions are all contrary to *Corabi* and to the Court of Appeals' decisions in *Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183, 188 n.2 (3d Cir. 1999), *cert.*

[20] On its website, West lists *Standard Pennsylvania Practice, 2d* at a $5,349.00 price, and touts it as a "'how to' comprehensive discussion of criminal and civil practice and procedures." *See* http://west.thomson.com/productdetail/1647/14100972/productdetail.aspx.

denied, 528 U.S. 1078 (2000), and *Moore v. Vislosky*, 240 Fed. Appx. 457 (3d Cir. 2007),[21] both of which make it clear that presumed damages *are* recoverable in defamation actions.[22]

In *Beverly*, the Third Circuit stated that "[u]nder Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages." 182 F.3d at 188 n.2.[23] In *Moore*, the Court quoted and reaffirmed that language from *Beverly*. The defendant in *Moore* appealed a jury verdict in favor of a defamation plaintiff, arguing that the District Court had erred in instructing the jury on presumed damages. The Court of Appeals flatly rejected the defendant's argument, holding that:

> Following *Beverly Enterprises, Inc. v. Trump*, we conclude that the District Court was correct to instruct the jury that, under Pennsylvania law, it may presume damages upon a finding that Moore had proven actual malice. 182 F.3d at 188 n. 2.

Id. at 472-73. *See also Sprague v. American Bar Ass'n*, 2001 WL 1450606, at * 2 n.6 (E.D. Pa. Nov. 14, 2001) ("Damages are assumed where there is injury to one's professional reputation").

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[21] While *Moore* is an unpublished opinion, Federal Rule of Appellate Procedure 32.1 permits citations to opinions designated "not for publication" if the opinions were (like *Moore*) issued on or after January 1, 2007.

[22] Defendants also cite two Court of Appeals decisions, *PPG Indus., Inc. v. Zurawin*, 52 Fed. Appx. 570 (3d Cir. 2002), and *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336 (3d Cir. 2005). *See* Def. Mem., p. 23 n.15. However, neither case holds that presumed damages are not available under Pennsylvania law. *PPG* does not even discuss either defamation *per se* or presumed damages. The *Franklin Prescriptions* court merely stated that "it is not entirely clear whether presumed damages remain available where the plaintiff proves actual malice" (424 F.3d at 342), and that "Pennsylvania law is unsettled on the availability of presumed damages." *Id.* at 343. The court also noted that "*Walker* did not explicitly address the availability of presumed damages in a case of actual malice." *Id.* at 342 n.1.

[23] While *Dun & Bradstreet* states that there is no Constitutional requirement that actual malice be proven to support an award of presumed damages, *Beverly* states that Pennsylvania law does impose such a requirement. *See also* 2 Pennsylvania Suggested Standard Civil Jury Instructions § 13.10 (Civ.) (2d ed. 2003) ("If you find that defendant acted (with actual malice), you may presume that the plaintiff suffered" damages).

Finally, defendants argue that a new trial is required because the jury's verdict sheet did not separate presumed damages from actual damages. First, as detailed above, Pennsylvania law ***does*** allow recovery of presumed damages in cases of defamation *per se*. In addition, it is undisputed that plaintiffs introduced evidence of emotional harm, and that "actual damages" under Pennsylvania defamation law include damages for emotional harm. Thus, the jury properly could have awarded either presumed or actual damages, or both.

Second, defendants failed to object to the Court's jury verdict sheet, and therefore have waived any argument based on the absence of separate awards for presumed damages and actual damages. *See Montgomery County v. Microvote Corp.*, 2001 WL 722150, at * 4 (E.D. Pa. June 25, 2001) (defendant that fails to object to the absence of a jury interrogatory waives the issue for post-trial motions and appeal).

2. Defendants' Common Law Malice Argument Fails as a Matter of Law

Defendants next argue that they are entitled to judgment as a matter of law with respect to punitive damages because plaintiffs failed to prove common law malice. Def. Mem., pp. 24-26.[24]

On the law, "[i]t is unclear whether a private figure plaintiff in a case concerning a matter of public concern is required to go beyond a showing of actual malice and show common law malice before a jury may award punitive damages." *Paul v. Hearst Corp.*, 261 F. Supp. 2d 303, 306 (M.D. Pa. 2002).

[24] "Common law malice involves conduct that is outrageous (because of the defendant's evil motive or his reckless indifference to the rights of others), and is malicious, wanton, reckless, willful, or oppressive." *Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d 890 (1995) (quotation omitted).

Pennsylvania cases suggest that the common law malice requirement may be limited to cases involving public officials and public figures. Thus, in *DiSalle v. P.G. Publishing Co*, 375 Pa. Super. 510, 544 A.2d 1345 (1988), the Superior Court posed the question before it as "what is to be the standard for allowing punitive damages in a defamation action where the plaintiff is a ***public official***." 375 Pa. Super. at 556, 544 A.2d at 1369 (emphasis added). And, the court's holding was that "a ***public official***, who must prove actual malice to establish liability in a defamation action, may not also recover punitive damages absent an additional finding that the defendant acted with common law malice in publishing the defamatory statement." *Id.*, 375 Pa. Super. at 559, 544 A.2d at 1370 (emphasis added). The court would not have had any reason to specify "public official" if the common law malice requirement applied to private figure defamation plaintiffs as well.

Likewise, in *Sprague v. Walter*, *supra*, the Superior Court stated: "in the context of a ***public official*** defamation action, punitive damages must be limited to only those cases where common law malice is shown." 441 Pa. Super. at 66, 656 A.2d at 922 (emphasis added); *see also id.*, 441 Pa. Super. at 68, 656 A.2d at 923 ("we endorse the trial court's determination that the evidence was sufficient to establish 'common law malice,' the necessary predicate to any award of punitive damages in a Pennsylvania ***public official*** defamation case.") (emphasis added). Again, the court would not have had any reason to specify "public official" if the common law malice requirement applied to private figure defamation plaintiffs as well.

On the facts, even if plaintiffs were required to prove common law malice, there clearly was sufficient evidence from which a reasonable jury could have found common law malice. Common law malice, like actual malice, may be proven by evidence of recklessness. *Sprague*, 276 F. Supp. 2d at 376 n.17. "The distinction is the object of defendants' recklessness; a

defendant who acts with common law malice acts with recklessness toward the plaintiff himself, whereas one acting with actual malice acts with recklessness toward the truth of the publication." *Id.*

Given the fact that both actual malice and common law malice may be proven by evidence of recklessness, courts have

> held that the evidence needed to show actual malice and that required to establish common law malice overlap significantly. *Geyer v. Steinbronn*, 351 Pa.Super. 536, 506 A.2d 901, 916 n. 12 (1986). In fact, it is often the case that the two types of malice are difficult to distinguish. *DiSalle v. P.G. Publishing Co.*, 375 Pa.Super. 510, 544 A.2d 1345, 1370 (1988); *Schiavone Construction Co. v. Time, Inc.*, 646 F.Supp. 1511, 1518 (D.N.J.1986). Pennsylvania courts maintain a distinction between the two types of malice, but leave it for a jury to decide whether common law malice has been established. *DiSalle*, 544 A.2d at 1370.

Paul v. Hearst Corp., *supra*, 261 F. Supp. 2d at 306-07.

"[S]ome acts, by themselves, provide adequate evidence of reckless indifference to others' interests." *Sprague*, 276 F. Supp. 2d at 377. The fact that defendants falsely and expressly attributed authorship of the sham pocket part to the plaintiffs is more than sufficient to show that defendants acted "with recklessness toward the plaintiff[s]."

Defendants' insistence that they bore no ill will or hostility toward the plaintiffs is beside the point. As the *Sprague* court stated:

> Defendants argue that there is no evidence that they acted with hostility, ill will, or evil motive toward plaintiff, with an intent to harm him. They assert that they never had any contact with plaintiff and, in fact, had only heard of him in a very minor way. This position, however, wholly ignores a central inquiry in determining the common law malice issue: whether they acted with a reckless indifference to plaintiffs' rights and interests.

276 F. Supp. 2d at 378.

3. The Jury's Punitive Damages Award Does Not Violate the Due Process Clause

In BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court held that "[o]nly when an award can fairly be categorized as 'grossly excessive' . . . does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 568. The Court established three "guideposts" for reviewing punitive damages awards: (1) the degree of reprehensibility of defendant's conduct, (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and (3) a comparison of civil and criminal sanctions for comparable conduct. *Id.* at 575-84.

The *Gore* court instructed that the first guidepost, the degree of reprehensibility of the defendant's conduct, is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575.

With respect to the second guidepost, the Court stated:

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach.

Id. at 582 (citation omitted). "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.* at 583.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court again noted that "we have been reluctant to identify concrete constitutional limits on the ratio

between harm, or potential harm, to the plaintiff and the punitive damage award," and "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 424-25. However, the Court indicated 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. "Single-digit multipliers are more likely to comport with due process." *Id.*

The *Campbell* Court also reiterated that:

> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.

Id. (quotation omitted).

In *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Supreme Court provided further guidance on the *Gore* guideposts. First, "[a]ction taken or omitted in order to augment profit represents an enhanced degree of punishable culpability." *Id.* at 494. Second, "[r]egardless of culpability, however, heavier punitive awards have been thought to be justifiable . . . when the value of injury and the corresponding compensatory award are small." *Id.*

Pennsylvania law mandates consideration of an additional factor, namely, the wealth of the defendant. "The standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant." *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 102, 555 A.2d 800, 803 (1989). *See also Sprague v. Walter*, 441 Pa. Super. at 61, 656 A.2d at 920 ("It is well-settled that when punitive damages are at issue in a case, the jury must consider not only the character of the act underlying the claim and the harm suffered by the plaintiff, but also the wealth of the defendant.").

In considering the nature of Defendants' actions in the context of the reprehensibility factor, the jury was entitled to consider, *inter alia*, all of the following facts:

- The 2008-2009 pocket part was a sham – it provided essentially no information which was not included in the prior pocket part, and was highly inaccurate because it did not include subsequent history of cases cited in earlier pocket parts.

- West falsely attributed the preparation of this pocket part to Professors Rudovsky and Sosnov.

- The sham nature of the 2008-2009 pocket part was the predictable result of decisions made by West concerning the arrangements for the preparation of the pocket part. These decisions, in turn, were the result of the policies and practices in place at West.

- The motive of West in preparing the pocket part for 2008-2009 was to show revenue and profit for the Treatise before year-end 2008.

- The absence of time and care in the preparation of the 2008-2009 pocket part was the result of a written policy by West to allocate time for such preparation based on the profitability of the book being updated. West contended that the Treatise was barely profitable. Tr. 12/16/10 at 75.

- West took no action to remedy the sham pocket part until it received communication from counsel for Professors Rudovsky and West.

- The letter which West sent to subscribers in March 2009 did not reach the great majority of users of the Treatise, since there was no suggestion that it be made part of the Treatise or pocket part. The letter did not suggest that there was an absence of new information in the pocket part, or that the pocket part was incomplete and misleading in material aspects.

- The subsequent 2009 pocket part published by West was done in great haste, in order to publish before the preliminary injunction hearing in April 2009, and was not a competent or professional product; *e.g.,* it failed to cite many new, relevant Supreme Court of Pennsylvania opinions and did not even correct certain errors which plaintiffs had expressly brought to West's attention.

- West took no further action concerning updating of the Treatise from April 2009 to the time of trial, although it advertised the Treatise during at least some portion of this time period.

- West took no action after its publication of the 2008-2009 pocket part to correct the policies and practices that led to this sham pocket part, and attempted to mislead the jury in this regard. *See* footnote 4, above.

- West's own testimony (*e.g.*, testimony by Teri Kruk referenced at pp. 12 and 47 herein) showed that West was determined not to change its policies and practices, thereby demonstrating to the jury that the punitive damages they awarded were necessary to deter West, with its vast business of providing legal information, from continuing to follow the policies and practices which caused the results in this case.

- West advertised the Treatise by Professors Rudovsky and Sosnov after April 2009, without disclosing that Professors Rudovsky and Sosnov had not prepared the current pocket part. The advertising at the time of trial included a representation that there would be a new pocket in January 2011, but West did not disclose that the pocket part was not being prepared by Rudovsky and Sosnov, whose names were prominently featured in the advertisement.

- Rather than accept responsibility for its actions, West attacked Professors Rudovsky and Sosnov at trial. West told the jury that Rudovsky and Sosnov inappropriately sought legal advice, caused an inconsequential matter to become a lawsuit, and were motivated solely by the desire to obtain money. *See* Tr. 12/16/10 at 73, 83-84. West's attorney, in his closing, even referred to Professors Rudovsky and Sosnov as "two professors that have nothing else to do." (*Id.* at 77-78).

In determining whether the punitive damage awards comport with due process requirements, the Court should consider the impact of defendants' actions not only on Professors Rudovsky and Sosnov, but on the many people who used and relied on the Treatise, including attorneys, clients of attorneys, judges, students, prisoners, and others. All of these people were using and relying on inaccurate and very incomplete information as a result of West's actions. In addition, the Court should consider that West's actions constituted a fraud on its subscribers. West invoiced and collected payment from hundreds of subscribers based on misrepresentations as to authorship and substance of pocket parts. In addition, based on its advertising at the time of trial, West presumably sold the Treatise in hardback form based on these same misrepresentations.

The Supreme Court of the United States, on at least three occasions, has endorsed the following principle:

> Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has occurred.

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996). The U.S. Court of Appeals for the Third Circuit has further explained:

> punitive damage amounts need not be tethered to the small actual harm frauds visited on their victims. Rather, just as the criminal justice system punishes attempts to commit crime with roughly the same severity as it does substantive offenses, punitive damages awards can match the scale of the attempted swindle.

Willow Inn, Inc. v. Public Service Mut. Ins. Inc., 399 F.3d 224, 234 (3d Cir. 2005).

In this case, plaintiffs were not the only persons damaged by the actions of West. Subscribers were induced to pay for a useless, misleading and inaccurate product, and many persons were injured, or subject to injury, as a result of the misinformation given to them by West. Moreover, the evidence showed that West's actions were not accidental or incidental; instead, West's actions were taken pursuant to its established policies and practices, so that the threat of repetition involving other authors and treatises was real. Indeed, Teri Kruk, the West official directly involved with the Treatise, and who reported directly to Jean Maess, adamantly supported and defended these policies and practices at her deposition in this case. Deterrence was therefore an important basis for the punitive damage awards. *See Cortez v. Trans Union, LLC*, 617 F.3d 688, 718 n.37 (3d Cir. 2010). Moreover, given West's unique status as a publisher of information to the legal community, West is necessarily aware of the extent to which the legal community relies on it for current and accurate information.

The jury's award was also supported by the wealth of defendants. In *Cortez*, the Court observed that "[c]ommon sense suggests that a corner "mom and pop" store should not be subjected to the same punitive level of damages as a company worth close to a billion dollars." 617 F.3d at 718 n.37. In *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993), the Court reviewed case law on punitive damages as a percentage of the defendants' assets:

> In *Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n. 3 (7th Cir. 1990), the court, after reviewing several punitive damage awards cases, concluded that "a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." In this case, the jury's $25 million award (approximately 1% of OCT's $2.2 billion net worth) certainly fell within this range. *See also Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1477 (11th Cir. 1989) (approving $2 million punitive damages award which represented ".4% of [defendant's] net worth of $520 million") . . . .

Id. at 1383.

In this case, defendants' assets at January 1, 2008 were approximately $22.5 billion, and their operating profit for 2008 was approximately $1,668,000. Retained earnings at December 31, 2008 were $10.65 million. (Trial Exhibit 49, at 74 and 76). To say the least, the jury was justified in believing that its punitive damage awards were necessary in order for West to finally understand that its actions in this case, and the policies and practices on which they were based, are not acceptable – and to deter West and others from engaging in such conduct in the future.

In considering whether the punitive damage awards in this case are within the limits of the due process clause, plaintiffs believe that this Court can consider the total relief which plaintiffs obtained (other than punitive damages). Plaintiffs have always sought injunctive relief in this case, and obtained injunctive relief through the Stipulation and Order Concerning Plaintiffs' Request for Injunctive Relief, which was signed by this Court on February 7, 2011. The Stipulation and Order provides that defendants will not advertise the Treatise in a manner

which does not disclose that (1) plaintiffs are no longer involved in the supplementation or updating of the Treatise; and (2) the supplementation is being done by West's staff and/or other authors.

There is no question that plaintiffs would not have obtained this injunctive relief unless they had prevailed at the jury trial. Defendants did not agree to plaintiffs' demands for injunctive relief until after the jury's verdict. Indeed, defendants insisted that the Stipulation and Order contain language nullifying the injunction if either this Court, the Court of Appeals, or the Supreme Court strikes or reverses the jury verdict.

Accordingly, the relief obtained by plaintiffs, not including punitive damages, significantly exceeds the monetary damages. In applying any limiting multiplier which this Court might consider necessary under the due process clause, this Court should consider that the value of the relief obtained by plaintiffs significantly exceeds the monetary recovery of $90,000 for each plaintiff.

In view of the reprehensiveness of West's actions, the extent of injury and potential injury to plaintiffs and many others caused by West, the failure of West to change its policies and practices which gave rise to the defamation and injury to third parties, the need for deterrence, the profit motive of West which underlay its actions, the wealth of West, and the modest amount of compensatory damages, plaintiffs believe that the jury's punitive damages award comports with due process. However, if the Court determines otherwise, plaintiffs respectfully submit that any limitation on punitive damages should be a multiplier at the top end of single digits (in view

of the factors set forth above), applied to the compensatory damages increased by a factor of at least one-third in order to recognize the injunctive relief obtained in this case.[25]

III. THE COURT SHOULD DENY DEFENDANTS' MOTION FOR A NEW TRIAL

Defendants make two arguments in support of their motion for a new trial: (1) the jury instructions confused the jury and misstated the law; and (2) the jury's verdict is against the weight of the evidence. Again, defendants' arguments fail as a matter of law.

A. Defendants' Arguments About the Jury Instructions Lack Merit

1. Legal Standards

When a party claims that a jury instruction was erroneous as a matter of law, the question for the Court is "whether the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submit[ted] the issues in the case to the jury." *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 922 (3d Cir. 1986). The Court should focus on the instructions in their entirety, and "not a particular sentence or paragraph in isolation." *In re Braen*, 900 F.2d 621, 626, *cert. denied*, 498 U.S. 1066 (1991). *See also Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 78 (3d Cir. 2009).

Furthermore, the party claiming error must show that the error had a prejudicial effect. *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000). Prejudicial legal error exists when "it 'appears to the court [that the error is] inconsistent with substantial justice." *Id.*, citing Fed. R. Civ. P. 61. *See also Tigg Corp. v. Dow Corning Corp.*, 926 F.2d 1119, 1127 (3d Cir. 1997) ("an erroneous instruction provides a basis for reversal only

[25] Given the extreme misconduct by West and other factors that support a high award of punitive e damages, West's argument that the ratio should be 1:1 is frivolous. See, *Cortez v, Tans Union, LLC*, 617 F.3d at 723.

if it was 'inconsistent with substantial justice' (Fed.R.Civ.P. 61) or affects a 'substantial right of [a] party' (Fed.R.Evid. 103(a)).''); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 122 (3d Cir. 1999).

A litigant has no right to a jury instruction "of its choice, or precisely in the manner and words of its own preference." *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir. 1995). Instead, jury instructions are proper if they accurately and fairly set forth the current state of the law. *McPhee v. Reichel*, 461 F.2d 947, 950 (3d Cir. 1972).

If a litigant fails to request a particular jury instruction, it waives any argument that the jury should have been so instructed. *See Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, (3d Cir. 1995). As stated by the Court of Appeals:

> We have repeatedly stressed "the important policy objectives served by Rule 51[,]" which "affords the trial judge an opportunity to correct any error that may have been made in the charge before the jury begins its deliberations." *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269, 1288 (3d Cir.1995) (internal quotations and citations omitted).

Moore v. Vislosky, *supra*, 240 Fed. Appx. at 471.

In *Moore*, the Court of Appeals held that it would not order a new trial, even though the District Court had failed to give the jury proper instructions on actual malice:

> we decline to exercise our discretion to reverse the District Court because we believe the error was not fundamental or highly prejudicial to Vislosky's rights. Vislosky's trial counsel had ample opportunity to request a clear and convincing evidence instruction before the jury began its deliberations, either at the charge conference or immediately after the deficient jury charge was given. At this time, the error could have been easily corrected by the District Court before a verdict was reached. Instead, Vislosky chose not to raise the objection until after a verdict had been entered against her and the District Court had denied one round of post-trial motions. In declining to reverse, we continue to strictly follow the proposition, embodied in Rule 51, that "an appellate court will not predicate error on an issue upon which the district court was not provided with an opportunity to rule."

240 Fed. Appx. at 471-72, quoting *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269, 1288 (3d Cir. 1995).

2. Defendants Have Failed to Establish that Any Aspect of the Jury Instructions Entitles Them to a New Trial

a. The Jury Instructions Did Not Confuse the Jury or Misstate the Law

Defendants base their argument that the jury was confused or misled by two questions posed by the jury during deliberations. First, the jurors asked "could malice versus reckless disregard versus negligence be clarified once more?" Tr. 12/16/10 at 124. Second, the jurors asked "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.* at 130. Contrary to defendants' argument, neither question indicates (much less proves) that the jury was confused or misled about the law.

Moreover, no court overturns a jury verdict merely because the jury asked questions. Rather, the critical issue is the ***response*** provided by the Court. *See*, *e.g.*, *McKenna v. City of Philadelphia*, 582 F.3d 447, 462 (3d Cir. 2009). And, here, since the Court's responses were entirely accurate (and were not objected to by the defendants), any further inquiry is moot.

With respect to the first question, defendants argue that "juror confusion 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." Def. Mem., p. 31. However, as detailed in Section II.A.1., above, negligence is the standard of fault with respect to actual damages in private figure defamation cases in Pennsylvania.

Moreover, the defendants repeatedly argued the issue of whether "negligence might have something to do with actual malice." In their proposed jury instructions, in the first paragraph under "Actual Malice," defendants asked that the jury be charged that "[m]ere negligence does not suffice." West's Proposed Jury Instructions, filed 12/14/10, p. 12. The Court gave the exact instruction that defendants requested: "Mere negligence does not suffice." Tr. 12/16/10 at 111.

As noted, however, the crucial question is whether the Court's response to the jury's question was accurate. And, defendants do not contend that the Court's response was in any way inaccurate or inadequate. Nor did defendants object to the Court's response at trial. The Court properly instructed the jury on the actual malice standard, and it must be presumed that the jurors understood and followed the Court's instructions.

With respect to the second question posed by the jurors, defendants argue that:

> 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 plaintiffs' case on liability.)

Def. Mem., pp. 31-32 (emphasis in original).

Once again, defendants ignore the ***only*** relevant question: did the Court properly re-instruct the jury? The Court's re-instruction was correct, and the defendants posed no objections to it.

Furthermore, defendants' argument is directly contrary to Pennsylvania law, which provides that "evidence concerning the circulation and contents of the defamatory publication may support an inference that it was read by its intended recipients and caused damage to the plaintiff's reputation." *Joseph*, 959 A.2d at 344.

b. Defendants' Six Specific Challenges to the Jury Instructions All Lack Merit

Defendants argue that the Court's instructions to the jury were improper in the following respects:

(1) Defamation Based on Slight Inaccuracy

Defendants first argue that they are entitled to a new trial because the Court's instructions "allow[ed] a finding of defamation based on slight inaccuracy." Def. Mem., p. 32. Defendants base this argument on the following portions of the Court's jury charge:

- "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." Tr. 12/16/10 at 131.
- "In other words, that the average subscriber, upon receiving this pocket part, would -- whenever he or she looked it over, would conclude that the plaintiffs had prepared what was in it, and would learn sooner or later that the update was not an adequate update of Pennsylvania law." *Id.* at 107.
- "you may find from the evidence, depending on how you assess it, that the defendants defamed the plaintiffs if the intended audience of the pocket part would reasonably conclude that the plaintiffs authored an inaccurate and out-of-state [sic] supplement to the treatise." *Id.* at 112.

Defendants failed to object to ***any*** of these instructions. Indeed, far from objecting to the Court's instructions, the defendants specifically ***requested*** them:

> If you find that the intended audience of the 2008 Pocket Part concluded that it was inaccurate and out-of-date, and that Plaintiffs authored it, I will hold that the pocket part constitutes libel *per se* because it would damage the Plaintiffs as legal authors and authorities on Pennsylvania criminal law.
>
> If, however, you find that the intended audience of the 2008 Pocket Part did not conclude that it was inaccurate and out-of-date, and/or that Plaintiffs had authored it, then you must find in favor of

> West because there is no libel *per se* and Plaintiffs have stipulated that they suffered no economic damages.

West's Proposed Jury Instructions, filed 12/14/10, p. 8 (footnote omitted).[26]

The Court used the language requested by the defendants, and merely added the words "to some extent." Those words must be considered in the context of the entire charge. It is clear that they did not change the meaning of the instruction, and fall far short of creating the sort of substantial and prejudicial error that mandates a new trial. *See Donlin*, 581 F.3d at 79 (rejecting claim of error based on "one word in a 23 page jury charge"). This is particularly true given the uncontested, gross inadequacies of the pocket part.

(2) Considering the Pocket Part as a Whole

Defendants next argue that "the charge did not clearly instruct the jury to consider the pocket part as a whole." Def. Mem., p. 33. Defendants base this argument on a portion of the charge in which the Court stated that "a publication like this or a communication is defamatory if any part of it tends to harm the reputation of a person." Tr. 12/16/10 at 107**.** Defendants claim that "[t]he 'any part' instruction was tantamount to an instruction that a single error in the publication would be sufficient to establish its defamatory nature." Def. Mem., p. 23.

Once again, defendants' claim is waived, as defendants did not object to this portion of the Court's instructions.

Moreover, defendants concede that the Court did instruct the jury that the publication must be taken as a whole: "a communication is defamatory if, taken as a whole, it's [sic]

[26] Likewise, defendants' proposed jury verdict form asked "Did the intended audience of the 2008 Pocket Part conclude that the 2008 Pocket Part was inaccurate and out-of-date?" West's Proposed Special Verdict Form, filed 12/14/10, Question 10.

implication is defamatory." Tr. 12/16/10 at 108. Defendants attempt to negate this fact by complaining that the Court "did not bring the jurors' attention to the fact that it was correcting its earlier mistake." Def. Mem., p. 33. But there was no "earlier mistake" to correct – and certainly no mistake to which defendants ever objected.

(3) Whether any Recipient Actually Understood the Supplement as Defamatory

Defendants next complain that "[t]he jurors were not required to find that any recipient actually understood the supplement as defamatory." Def. Mem., p. 33. Defendants argue that the Court erred "by instructing that the jurors need only find that recipients 'would understand' the defamatory meaning, not that any actually did so." *Id.*, pp. 33-34.

Again, the claim is waived, as defendants acceded to the Court's instruction. The following colloquy took place during the charging conference:

> MR. RITTINGER: Well, Your Honor, if you look at -- if you -- if you look at the instruction on -- that is given, which really takes the language -- it's really just using the statute, which appears on page 1 and 2. It says, "The falsity of the publication." And that's -- that's what the statute requires, to -- the statute doesn't require it was not substantially true. It requires falsity. That's what a libel is. And I -- there's no citation for this. I don't know where it came from. I don't know if it came from -- I -- but if it -- if it says false and it says was understood, then it's consistent with the statute.

> THE COURT: How about we split the difference, that it was false and would reasonably have been understood by those other than the plaintiffs as defamatory? (No audible response) Okay. What else do you got?
>
> MR. RITTINGER: Well, Your Honor –
>
> MR. BAZELON: Your Honor, so what -- what's the resolution that you were suggesting, Your Honor? Sorry, I don't mean to interrupt.
>
> THE COURT: I'm agreeing with him that instead of saying it was not substantially true, it would -- that it was false. And instead of it might reasonably have been understood, that it would reasonably have been understood.
>
> MR. RITTINGER: Yes, Your Honor.

Tr. 12/16/10 at 18-19.

Furthermore, as detailed in Section II.B.**,** above, Pennsylvania law does not require plaintiffs to prove that any particular recipient understood statements to be defamatory. Instead, where plaintiffs show the circulation and contents of defamatory statements, the jury is permitted to infer that the recipients understood the statements to be defamatory. *Joseph*, 959 A.2d at 344. Defendants' proposed instruction – which would have required the jury to conclude that the intended audience *in fact* concluded that the pocket part was defamatory[27] – was, therefore, contrary to Pennsylvania law.

(4) West's Knowledge of the Defamatory Nature of the Publication

Defendants assert that "[t]he jurors were not instructed that the actual malice [sic] required West's knowledge of the defamatory nature of the publication." Def. Mem., p. 34.

[27] *See* West's Proposed Jury Instructions, filed 12/14/10, p. 8.

West did not request a jury instruction on this issue – and, thus, has waived any argument. In any event, the standard urged by West applies only to defamation cases involving plaintiffs who are public officials or public figures. *See* Section II.A.3.a., above. Since defendants concede that plaintiffs in this case are private figures, the standard does not apply to this case.

(5) "Extreme Departure from Professional Standards"

Defendants next complain that "the jurors were not instructed that an extreme departure from professional standards is not sufficient for actual malice." Def. Mem., p. 35.

In *Harte-Hanks*, the Supreme Court stated:

> Petitioner is plainly correct in recognizing that ***a public figure plaintiff*** must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story-whether to promote an opponent's candidacy or to increase its circulation-cannot provide a sufficient basis for finding actual malice.

491 U.S. at 665 (emphasis added).

The Court declined to give the defendants' requested instruction on "extreme departure from professional standards," noting that this language from *Harte-Hanks* applies to cases involving newspaper and other reporting – a factual scenario that has nothing to do with this case. *See* Tr. 12/16/10 at 30. Furthermore, Harte-Hanks involved a public figure and thus is not controlling. Courts interpreting *Harte-Hanks* have acknowledged this limitation. *See, e.g.*, *Levesque v. Doocy*, 557 F. Supp. 2d 157, 169 (D. Me. 2008) ("[A] ***public figure*** plaintiff must prove more than an extreme departure from professional standards") (emphasis added) (quoting *Harte-Hanks*), *aff'd*, 560 F.3d 82 (1st Cir. 2009); *Meisler v. Gannett Co., Inc.*, 1992 WL 475765. at * 3 (S.D. Ala. Oct. 27, 1992) ("A ***public figure*** plaintiff must prove more than an extreme

departure from professional standards in order to establish actual malice") (emphasis added) (citing *Harte-Hanks*).

(6) The Court Did Not "Mischaracterize[] the Evidence in Ways Prejudicial to West"

Defendants' final complaint about the jury instructions is that "[t]he Court mischaracterized the evidence in ways prejudicial to West." Def. Mem., p. 35. Specifically, defendants point to two statements made by the Court:

- "the pocket part had been prepared by the plaintiffs, whereas, actually, the plaintiffs had nothing to do with it;" and
- "they left out a lot of cases"

Tr. 12/16/10 at 105-06, 109.

Defendants' motion for a new trial fails because both of the Court's statements were true and supported by undisputed evidence in the record. Defendants expressly attributed authorship of the pocket part to the plaintiffs, and it is undisputed that plaintiffs in fact had nothing to do with preparing it. The defendants admit this in their brief: "plaintiffs had no part to play in the update itself." Def. Mem., p. 35.

Likewise, it is undisputed that the pocket part left out "a lot of cases." Defendants admit in their brief that "West has never disputed that the 2008 Supplement had inadequacies and omissions." Def. Mem., pp. 35-36. While defendants argue that "the severity and importance of those omissions was very much in dispute" (*id.* at 36), defendants do not and cannot dispute that those omissions included "a lot of cases." Indeed, defendants' only witness, Ms. Maess, testified on direct examination that "there were many cases that were missed." Tr. 12/15/10 (Maess) at 50.

"The trial judge is permitted considerable latitude to summarize and comment upon the evidence, provided that the jury is neither confused nor misled." *Donlin*, 581 F.3d at 79.

B. The Jury's Verdict Was Not Against the Great Weight of the Evidence

West's final argument is that "the verdict is against the great weight of the evidence." Def. Mem., p. 36. Here, West recycles the same argument that it makes in support of its motion for judgment as a matter of law, namely, that there is "no evidence" of actual malice in the record. To the contrary, the record is full of evidence of actual malice, as detailed in the fact section and Section II.A.2., above. West, meanwhile, called only one witness, whose testimony was decidedly unhelpful to West. To say the least, the jury was free to find her not credible and to discredit her testimony. Given the paucity of evidence introduced by West, there is no basis for concluding that the "great weight" of the evidence favored West's position.

West also argues that "[t]he size alone of the verdict suggests a deliberation either infected with error or, more likely, irrational prejudice against the defendants." Def. Mem., p. 37. However, it is well established that the size of a jury's damages award is not enough, in and of itself, to prove that the jury's verdict was the result of passion or prejudice, or to warrant a new trial. *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 114 (3d Cir. 1999); *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993).

CONCLUSION

For the foregoing reasons, defendants' renewed motion for judgment as a matter of law or, alternatively, for a new trial should be denied.

Respectfully submitted,

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Dated: February 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2011, I served a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial upon the following counsel for defendants, as follows:

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