| **West v Lo Duca** |
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| 2021 NY Slip Op 31186(U) |
| April 9, 2021 |
| Supreme Court, New York County |
| Docket Number: 160250/2019 |
| Judge: John J. Kelley |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JOHN J. KELLEY** **PART** **IAS PART 56**

***Justice***

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**INDEX NO.** 160250/2019

JOSEPH H. WEST,

Plaintiff,

- v -

**DECISION AND ORDER AFTER INQUEST**

PAUL LO DUCA,

Defendant.

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## I. INTRODUCTION

This is an action by a currently active and well-known Major League Baseball umpire to recover damages for defamation against a former Major League Baseball player. The plaintiff umpire, Joseph H. West, alleged that the defendant, Paul Lo Duca, made defamatory statements about him on a podcast carried on a popular sports podcast provider. The plaintiff contended that, during the podcast, Lo Duca, a retired catcher, described an alleged conversation with teammate Billy Wagner, a retired relief pitcher, in which Wagner purportedly claimed that the plaintiff gave him favorable ball-and-strike calls during the game because Wagner gave the plaintiff access to one of his vintage automobiles. By order dated July 8, 2020, the court, upon concluding that the plaintiff set forth sufficient proof of the facts underlying his cause of action to recover for defamation, including defamation per se, granted the plaintiff's motion for leave to enter a default judgment against Lo Duca on the issue of liability, and set the matter down for an inquest on the issue of damages

## II. FINDINGS OF FACT

The facts underlying the issue of liability for defamation are set forth at length in this court's July 8, 2020 order.

At the December 9, 2020 inquest on the issue of damages, the plaintiff testified on his own behalf, submitted the affidavit of former Major League Baseball relief pitcher William "Billy" Wagner, and adduced the testimony of Matthew Considine, an expert in digital forensics, Nicholas Carroll, an expert in "reputation management" and the effects of defamatory statements made on social media, and Pat Crowley, a journalist and expert in public relations. Inasmuch as the court had already ruled on the issue of liability, and declined to take testimony by way of affidavit, it ruled at the inquest that it need not consider Wagner's affidavit, in which he essentially denied that the conversation described by Lo Duca had ever occurred.

At the time of the inquest, the plaintiff was 68 years of age, and was an active Major League Baseball umpire. He commenced umpiring school in 1974, and umpired in Minor League Baseball over parts of the next four years, with a few call-ups to the Major Leagues during 1976 and 1977. He became a Major League umpire in 1978, and umpired continuously in the Major Leagues for all or part of the next 23 seasons, including the abbreviated 2020 season. As of the end of the 2020 season, the plaintiff had umpired in 5,345 Major League Baseball games, surpassed only by the legendary umpire Bill Klem, who had umpired in 5,375 games, and was the first umpire to be inducted into the Baseball Hall of Fame in Cooperstown, New York. At the time of the inquest, the plaintiff was on track to break Klem's record during the 2021 season. The plaintiff evinced a strong desire to be inducted into the National Baseball Hall of Fame, an honor previously bestowed upon only 10 umpires.

The court credits the plaintiff's testimony that one's integrity and character are primary measures that are applied to the assessment of an umpire's or player's quality and, thus, the consideration that he will be given for election to, and induction into, the Hall of Fame. The plaintiff expressed a legitimate concern that, if Hall of Fame voters credited Lo Duca's false assertion regarding his integrity and character, he might not be elected for induction into the Hall of Fame for the same reasons as otherwise excellent players "Shoeless" Joe Jackson, Pete Rose, and Barry Bonds had or have not been elected. He also expressed concern that it would

be difficult to completely repair his reputation, particularly because a special committee of baseball executives and former players chosen by the directors of the Hall of Fame is responsible for selecting umpires for induction into the Hall of Fame. No member of this committee had told the plaintiff that Lo Duca's statement would or would not have an effect on his chances for election. According to the plaintiff, at least one former player and an agent of a former player did express their belief to the plaintiff that the false statement would hurt his chances for election, but those witnesses did not testify at the inquest.

The plaintiff also credibly testified that he became very upset when he first learned of Lo Duca's statements from the Office of the Commissioner of Baseball. He thereupon checked the record books to ascertain if he had ever called three straight strikes in any game in which Wagner pitched to Lo Duca, as Lo Duca had claimed, or whether he had ejected Lo Duca from eight of nine games, as Lo Duca had claimed. He learned that Lo Duca's story was untrue even as to those matters. In addition to categorically denying the truth of Lo Duca's story, the plaintiff credibly asserted that he never gave preferential treatment to any team or player in all of his years of umpiring, and that his duty of responsibility as a "gatekeeper" to the game of baseball, along with his sense of duty to his profession, his union, and himself forbade him from ever doing so.

The plaintiff intends to retire at the end of the 2021 season. The plaintiff intended, after retirement, to participate in speaking engagements that would generate income every other weekend for the first seven or eight years after his retirement. He credibly testified that most speakers at such events earn in the range of $2,500 to $7,000 per appearance, but that Hall of Famers would likely earn between $15,000 and $20,000 per appearance. He also intended to participate in baseball card shows on the average of 15 to 20 occasion per year that would generate $15,000 to $25,000 per appearance for a Hall of Famer. During the regular season, while he remains employed as an active umpire, the plaintiff has far fewer opportunities to engage in charitable events, baseball card shows, and speaking engagements than he does

during the offseason because of the vagaries of the Major League Baseball schedule and his travel requirements. During 2020, even though many such events were cancelled due to the COVID-19 pandemic, the plaintiff was interviewed for a Sirius Radio program on the Elvis Channel, and the plaintiff, also an accomplished singer, intended to remain involved in the country music scene, as he had been for many years. The plaintiff did not intend to pursue any other employment or remunerative activities after his retirement. He was not aware of any charity or paying events during the 2019 baseball season or the 2019-2020 offseason, to which he was not invited as a consequence of Lo Duca's statement.

The plaintiff also assisted in developing an umpire's chest protector that all but one Major League umpire now wears during games, and is marketed by Wilson Sporting Goods under the trade name "West Vest." He credibly testified that sales of his signature model protector would increase if he were elected into the Hall of Fame.

The plaintiff intended to mitigate the negative effects of Lo Duca's statement by generating positive publicity, and had started to engage in such a public relations campaign at the time of the inquest.

Considine, the plaintiff's digital forensics expert, credibly testified that he performed acquisition, preservation, processing, analysis, and reporting functions with respect to digital evidence. He had experience in recovering data from cell phones, email accounts, computers, and computer servers. He was retained to preserve and authenticate data from 75 specific, publicly available, active digital websites on which the Lo Duca statement or the underlying story appeared as of August 2020. Considine identified those websites, and provided them to the plaintiff's legal team.

Carroll, an expert in the field of reputation management, credibly testified that there is a general belief that, once something is on the internet, it is there forever, but that, in reality, more than 50% of content that had been uploaded to the internet is now inaccessible. Of the 75 website links that Considine was asked to preserve and authenticate, Carroll credibly testified

that 5 of them were no longer active as of the date of the inquest, but that the Lo Duca story was promulgated by mainstream media, and ended up on approximately 65 different newspaper or news sharing sites. He further credibly asserted that the remaining links would continue to stay live and active unless the particular newspaper that managed the site failed or the plaintiff took action to have the manager of each site remove the story.

Carroll credibly concluded that there would be a differential between the plaintiff's income in the future with, on the one hand, a "tarnished" reputation and Hall of Fame induction delayed or uncertain and, on the other, a "cleared" reputation with most online defamation removed and a successful Hall of Fame induction. He further credibly opined that Hall of Fame induction would not, with any certainty, quash all credence given by the public to Lo Duca's story. Carroll credibly concluded that, even if Hall of Fame induction were not a relevant factor, there would be a lesser, albeit still proportional, differential between the plaintiff's post-retirement earnings with his reputation "tarnished," as opposed to "cleared," but he did not testify to any particular amount of the differential.

Carroll also credibly asserted that hiring a reputation management company to "push down" negative or defamatory news stories would cost in the range of $50,000 to $100,000.

Crowley, the plaintiff's public relations expert, credibly asserted that, in order to minimize the harm caused by a defamatory statement, the best tack would be to overwhelm it with positive stories, particularly in mainstream media outlets such as the major televisions networks, the New York Times, Washington Post, Wall Street Journal, and Chicago Tribune, as their stories tend to be picked up by smaller and less mainstream media outlets. He credibly opined that, to accomplish this goal, the victim of defamation, particularly a public figure like the plaintiff, should retain a public relations firm, which should also reach out to local sports reporters in television, radio, print, podcast, and like media with press releases, talking points, and story memoranda, and create a personal website for the victim in which positive stories could be broadcast. Crowley created a multi-year public relations "plan" for the plaintiff that "flooded the

zone" by reaching out to and placing paid advertising content in U.S. Today, podcasts, and other social media, including so-called "influencers," including star athletes like LeBron James, in which the effort was ramped up at various times, such as when the plaintiff breaks the record for most games as an umpire and when he retires

Crowley also credibly asserted that, notwithstanding the Lo Duca story, it is more probable than not that the plaintiff would have retained a public relations firm after his retirement in any event, so that he might be considered as a baseball analyst on television and reap the reward of other opportunities presented to well-known sports figures. The court also accepts his testimony that, if the plaintiff did not intend to pursue a media career after retirement, but limited his activities to speaking engagements and baseball card shows, very little of the expense and effort that Crowley described would be necessary.

## III. CONCLUSIONS OF LAW

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205 [2d Dept 2015]). The defaulting defendant is, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003] [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104 [2d Dept 2014]; *Toure v Harrison*, 6 AD3d 270 [1st Dept 2004]). Lo Duca elected not to present such testimony or cross-examine witnesses at the inquest here, despite being provided with notice of the inquest.

This court already has determined that the plaintiff has a cause of action to recover for defamation per se, inasmuch as false allegations that a person has committed a crime or that tend to injure another in his or her trade, business, or profession, constitute defamation per se, which relieves the plaintiff of the requirement that he or she demonstrate special damages, in

other words, proof of economic loss (*see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). In such actions, a successful plaintiff may recover reasonable compensation for mental anguish, loss of reputation, and humiliation (*see Nolan v State of New York*, 158 AD3d 186, 193-194 [1st Dept 2018]).

"The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *see Garcia v CPS 1 Realty, L.P.,* 164 AD3d at 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). What constitutes "reasonable compensation" must be assessed with due regard to the "circumstances presented" (*Luna v New York City Tr. Auth*., 116 AD3d 438, 438 [1st Dept 2014]).

Given the widespread dissemination of the defamatory statement at issue here, the nature of the statement, and the legitimate anxiety that the plaintiff suffered in connection with the possibility that he will not be elected to the Hall of Fame because of the statement, the court concludes that the plaintiff is entitled to an award of $250,000 for past mental anguish and emotional distress, from the date of the publication until the date of the inquest (*see Yammine v DeVita*, 43 AD3d 520, 522 [3d Dept 2007] [affirming emotional distress award of $200,000 to each plaintiff restaurant owner based on false statements that the plaintiffs, who were naturalized citizens of Lebanese descent, were terrorists, drug dealers and drug runners associated with Osama Bin Laden]; *Dobies v Brefka*, 45 AD3d 999, 1000 [3d Dept 2007] [affirming jury verdict of $225,000 where plaintiff doctor left his job, moved to another community and had to undergo supervised visitation with his daughter after his daughter's maternal

grandmother wrongfully accused him of sexually abusing his daughter]; *Morsette v The Final Call*, 309 AD2d 249 [1st Dept 2003] [affirming award of $100,000 for past emotional distress, but reducing award for future emotional distress to $300,000 based on medical evidence, where the defendant newspaper randomly selected the plaintiff's photograph and altered it to depict her as a convicted criminal in connection with an article concerning the growing female prisoner population];.*Nolan v State of New York*, 2018 NY Slip Op 51789[U], 61 Misc 3d 1225[A] [Ct Claims, Nov. 8, 2018] [on remittal from Appellate Division, awarding $125,000 in emotional distress damages based on the publication, by the State Division of Human Rights, of an advertisement falsely depicting claimant as HIV positive]). The court makes no award for future emotional distress, as the plaintiff did not expressly adduce any evidence in this regard.

Although not obligated to do so, the plaintiff also established that he will sustain some degree of economic loss as a proximate result of the publication of Lo Duca's defamatory statement. The plaintiff may be compensated for special damages, i.e., "the loss of something having economic or pecuniary value" (*Liberman v Gelstein*, 80 NY2d at 435-436 [internal quotation marks omitted]), as long as that loss "flow[s] directly from the injury to reputation caused by the defamation" (*Celle v Filipino Reporter Enters.*, 209 F3d 163, 179 [2d Cir 2000] [internal quotation marks omitted]; *see Matherson v Marchello*, 100 AD2d 233, 235 [2d Dept 1984]). As the plaintiff correctly argues, damages based on expenses related to advertising and public relations that are meant to repair the reputation of a defamed individual are recoverable in an action alleging defamation.

> "[T[he injured party [in a defamation action], at the risk of the wrongdoer, should be allowed, although not compelled, to attempt by a reasonable and proper effort to prevent damages liable to result from the wrongful act which has been committed against him. The alternative proposition is that the wrongdoer has the right to insist that the suffering party must sit still and allow damages to accumulate on the possibility that some time he may recover them. If the attempt is successful it is for the benefit of the wrongdoer and it is obvious that in securing the benefit of the effort he should pay the reasonable cost of it."

(*Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Assn.*, 226 NY 1, 9 [1919]; *see Brown v Petrolite Corp*., 965 F2d 38, 45-46 [5th Cir 1992]; *Comdyne I, Inc. v Corbin*, 908 F2d 1142, 1150 [3d Cir 1990]; *Maytag Co. v Meadows Mfg. Co*., 45 F2d 299, 302 [7th Cir 1930]; *Robertson v Doe*, No. 05 CIV 7046 [LAP], 2010 US Dist LEXIS 151305, *8 [SD NY, May 11, 2010]; *Houston v New York Post Co*., No. 93 CIV 4408 [KTD], 1997 WL 10034, *6 [SD NY, Jan. 10, 1997]; *Bolduc v Bailey*, 586 F Supp 896, 901-902 [D Colo 1984]; *Wachs v Winter*, 569 F Supp 1438, 1446, 1448 [ED NY 1983]; *Big O Tire Dealers, Inc. v Goodyear Tire & Rubber Co*., 408 F Supp 1219, 1234-1235 [D Colo 1976]; *cf. Electric Furnace Corp. v Deering Milliken Research Corp*., 383 F2d 352 [6th Cir 1967] [where defamed plaintiff would have incurred certain expenses regardless of the defamation, it cannot recover those expenses as special damages even if they were incurred, among other reasons, for the purpose of ameliorating the negative effects of the defamation]).

The court concludes, however, that the reputation management plan that Crowley created for the plaintiff, estimated to cost $11,898,000.00, vastly overstates the expenses necessary to remove the Lo Duca story from internet web sites or “push down” the story by emphasizing positive stories about the plaintiff. What Crowley described as “flooding the zone” concededly would be necessary only if the plaintiff elected to pursue a public media career after his retirement as an umpire. The plaintiff, however, testified unambiguously that he did not intend to pursue such a career, but only intended to participate in speaking engagements, charity events, baseball card shows, and country music events for the first seven to eight years after his retirement as an umpire. The court concludes that, based on both Carroll’s and Crowley’s testimony, an award in the sum of $250,000 is a reasonable sum to compensate the plaintiff for expenses he will need to incur in retaining a public relations firm to formulate and operationalize a sufficient reputation remediation plan.

The court further concludes that the plaintiff failed to establish that he will be caused to forego income, including income from appearances and endorsement agreements and

opportunities, because Lo Duca's defamatory statements will prevent or delay him from being elected to the Hall of Fame. While the court might be inclined to credit the plaintiff's and Carroll's testimony as to the differential between the plaintiff's post-retirement earning capacity as a Hall of Famer and that as a non-Hall of Famer, there is simply no proof that the plaintiff will not be elected to the Hall of Fame or that his election will be delayed because of the defamation. The only evidence that he presented in this regard were the inadmissible hearsay declarations of a sports agent and a former player, who merely expressed their opinion that the plaintiff should be concerned about election. It is purely speculative as to whether the plaintiff will or will not be elected to the Hall of Fame and, if so, when. Baseball fans notoriously speculate all the time about which players will and will not be elected, or should or should not be elected, to the Hall of Fame. A foritori, it is not proper for a court to base its award of damages on similar speculation as to whether the plaintiff will be elected to the Hall of Fame at the earliest possible date subsequent to his retirement as an umpire. The court thus declines to make an award for diminution of future income based on the presumption that the plaintiff will not be elected to the Hall of Fame because of Lo Duca's defamatory statement, or that such election will be delayed as a consequence of the defamation.

"The language of CPLR 5002 measures interest from 'verdict … report or decision' to the date of the entry of a final judgment. The terms 'verdict,' 'report' or 'decision' generally refer to the date that liability is established, even though the damages verdict is reached at a later time" (*Van Nostrand v Froehlich*, 44 AD3d 54, 57 [2d Dept 2007]; *see Rohring v City of Niagara Falls*, 84 NY2d 60, 68 [1994]; *Love v State of New York*, 78 NY2d 540, 542 [1991]; *Gyabaah v Rivlab Transp. Corp.*, 170 AD3d 616, 617 [1st Dept 2019]; *Gibbs v State Farm Fire & Cas. Co.*, 169 AD3d 1483, 1484-1485 [1st Dept 2019]). Statutory prejudgment interest is thus awarded from July 8, 2020, the date that Lo Duca was found liable upon his default, until the date that judgment is entered.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Joseph H. West, 13439 Fountainbleu Drive, Clermont, Florida 34711, and against the defendant, Paul Lo Duca, current address unknown, in the sum of $500,000, plus statutory prejudgment interest from July 8, 2020

This constitutes the Decision and Order After Inquest of the court.

**4/9/2021**
**DATE**

**JOHN J. KELLEY, J.S.C.**

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| **APPLICATION:** | [ ] | **SETTLE ORDER** | | [ ] | **SUBMIT ORDER** | | |
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