

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

DANIEL MOORE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-cv-4563
	:	
DOROTHY VISLOSKY,	:	
	:	
Defendant.	:	
	:	

**MEMORANDUM ORDER**

Presently pending is Defendant’s “*Nunc Pro Tunc* Motion For a New Trial, or Judgment as a Matter of Law, and to Extend Deadline to File Appeal” (Dkt. No. 50) and Plaintiff’s reply thereto. A trial commenced in this matter on November 14, 2005, and on November 17, 2005, the jury returned a verdict in favor of Plaintiff and against Defendant, in the amount of \$100,000.00, and judgment was duly entered. Shortly thereafter, both parties filed post-trial motions and this Court denied both parties’ post-trial motions in an Order filed December 12, 2005. On December 22, 2005, Mr. David P. Heim, Esq. filed a Notice of Appearance on behalf of Defendant and filed the pending Motion.

In her untimely Motion, Defendant argues that: 1) lack of a clear and convincing standard of proof concerning Defendant’s alleged actual malice in the jury instruction was plain and reversible error; 2) instructing the jury on the availability of presumed damages was plain and reversible error; and 3) the evidence presented at trial was insufficient as a matter of law to establish that Defendant acted with actual malice.<sup>1</sup>

This Court finds that Defendant’s clear and convincing standard of proof argument fails because the omission in the instruction, when considered in the context of the

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<sup>1</sup>The objections now raised are untimely pursuant to Fed. R. Civ. P. 51.

entire instruction, did not result in either fundamental error or prejudice resulting in a miscarriage of justice.<sup>2</sup> This Court finds that Defendant's presumed damages argument fails because whether presumed damages are available in Pennsylvania in a case of actual malice has not been explicitly addressed by the Pennsylvania Supreme Court.<sup>3</sup> Additionally, this Court used the Pennsylvania Suggested Standard Civil Jury Instructions to prepare its charge to the jury, counsel for both parties submitted suggested points of charge to this Court prior to trial, and the issue of damages was discussed by counsel for both parties at a charge conference held by this Court during the course of trial. Defendant's final argument for judgment in her favor as a matter of law must also fail because a review of the record demonstrates that the evidence presented at trial was sufficient to support a finding of actual malice and Defendant does not provide sufficient evidence to support her argument to the contrary.

**AND NOW**, this        day of January 2006, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED** in part as to Defendant's request to extend the deadline to file an appeal and **DENIED** in part as to Defendant's request in the alternative for a new trial or for judgment as a matter of law. Accordingly, **IT IS FURTHER ORDERED** that Defendant is

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<sup>2</sup>Franklin Prescriptions, Inc. v. New York Times Co., 424 F.3d 336, 340-41 (2005).

<sup>3</sup>In her Motion, Defendant argues that presumed damages in a defamation case are not available under Pennsylvania law, even where actual malice is proven. To support her argument, Defendant relies on the Pennsylvania Superior Court case, Walker v. Grand Central Sanitation Inc., 634 A.2d 237 (Pa. Super. Ct. 1993), *appeal denied*, 539 Pa. 652, 651 A.2d 539 (1994). However, in Franklin Prescriptions, Inc. v. New York Times Co., 424 F.3d 336 (2005), the Third Circuit Court of Appeals determined that "[a]llthough Walker appears generally to foreclose presumed damages under Pennsylvania law, it is not entirely clear whether presumed damages remain available where the plaintiff proves actual malice." *Id.* at 342. Furthermore, in an opinion decided after but not citing to Walker, the Third Circuit Court of Appeals noted that under Pennsylvania law of defamation, a plaintiff need not prove actual damages where a defendant acted with actual malice. Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 188 n. 2 (3d Cir. 1999). Therefore, this Court's decision is consistent with the interpretations of Walker as set forth by the Third Circuit Court of Appeals. Furthermore, I predict that, from the record established in this case, the Supreme Court of Pennsylvania would permit the damages awarded by the jury in this case.

**GRANTED** an extension up to and including January 18, 2006 to file an appeal pursuant to Fed. R. App. P. 4(a)(5).

**BY THE COURT:**

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**CLIFFORD SCOTT GREEN, S.J.**