IN THE SUPREME COURT OF PENNSYLVANIA

No. 135 MAP 2014

THOMAS A. JOSEPH, THOMAS J. JOSEPH, ACUMARK, INC., and AIRPORT LIMOUSINE AND TAXI SERVICE, INC.,

Appellees

vs.

THE SCRANTON TIMES L.P., THE TIMES PARTNER, JAMES CONMY AND EDWARD LEWIS

Appellants

Appeal from the March 11, 2014 Judgment of the Superior Court, on Appeal from the April 23, 2012 Judgment Entered by the Court of Common Pleas of Luzerne County at Docket No. 3816 C of 2002

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA NEWSMEDIA ASSOCIATION AND PENNSYLVANIA FREEDOM OF INFORMATION COALITION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The Pennsylvania NewsMedia Association ("PNA") is a Pennsylvania non-profit member corporation with its headquarters located in Harrisburg, Pennsylvania. PNA represents the interests of more than three hundred (300) daily and weekly newspapers and other media organizations across the Commonwealth in ensuring that the press can gather information and report to the public. A significant part of PNA's mission is to advocate for its members' rights to publish – and for the citizens of Pennsylvania to receive – information on matters of public concern and interest.

The Pennsylvania Freedom of Information Coalition ("PaFOIC") is a nonprofit alliance of journalists, librarians, attorneys, educators and community group leaders formed to ensure that all Pennsylvanians have full and open access to their federal, state and local governments, their records and their proceedings. The PaFOIC is a member of the National Freedom of Information Coalition, an alliance of nonprofit, state FOI and First Amendment organizations and academic centers concentrating on First Amendment-related issues.

PNA and PaFOIC seek to participate pursuant to Pa.R.A.P. 531 to emphasize the dangers posed to freedom of speech where, as here, damages in a defamation action can be presumed rather than proven, and where ephemeral testimony, rather than evidence of reputational harm, suffices as proof to support a

judgment for plaintiff. PNA and PaFOIC seek to participate to highlight the importance of these damage issues in protecting First Amendment values and the right of the citizens of this Commonwealth to receive important and newsworthy information.

STATEMENT OF THE QUESTIONS INVOLVED

Amici Curiae submit this brief with an interest in the following questions accepted by the Court for review on behalf of Appellants[1]:

2. Whether a court may disregard the First Amendment constraints on defamation actions by concluding that the injury-in-fact liability element of a defamation claim is established without proof of reputational harm caused by defamatory statements?

3. Whether a court may disregard the First Amendment constraints on defamation actions by holding that proof of actual malice relieves plaintiffs of their burden to prove injury-in-fact?

STATEMENT OF JURISDICTION AND OTHER STATEMENTS

Amici Curiae adopts and incorporates by reference the Statement of Jurisdiction, the Statement of the Scope and Standard of Review, and the Statement of the Case from the Brief of Appellants.

[1] Amici Curiae do not address Questions 1 and 4 accepted by the Court for review, but nevertheless concur with Appellants in their arguments that the Superior Court erred in answering those questions as well.

SUMMARY OF ARGUMENT

> At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation.

West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994), *quoted in* R. Sack, Sack on Defamation at 2-3 (2013).

The brief addresses the nature of the tort of defamation and its constitutional relationship to permissible damages. At the heart of the tort is a plaintiff's reputation. The evidence in every defamation case must, accordingly, be analyzed to determine whether the statement at issue has the legal capacity to harm a plaintiff's reputation, whether it is false, whether the defendant is at fault and whether the plaintiff's reputation has, in fact, been harmed. The tort is now a mixture of old common law elements and new constitutional protections.

In *Gertz v. Welch*, 418 U.S. 323 (1974), the U.S. Supreme Court prohibited the imposition of presumed damages in cases involving negligence, but did not decide whether such damages could be permissible based on a showing of actual malice. The *Gertz* court left no hint that such damages would be permissible in that context and, in *Walker v. Grand Central Sanitation, Inc.*, 634 A.2d 237, 244 (Pa. Super. 1993), the Superior Court concluded that they were not. That rule has been followed for twenty years, until the decision by the panel of the Superior

Court below. That decision is flawed and should be reversed by this Court, which should confirm the rule in *Walker*.

In addition, it is beyond question that a plaintiff's evidence that he or she was offended by the speech at issue, angered by it, or even unable to sleep because of it, is not evidence of a damaged reputation. Such evidence is easily adduced but difficult to challenge and, as this Court determined long ago,

> It is not enough that the victim of the "slings and arrows of outrageous fortune", be embarrassed or annoyed, he must have suffered that kind of harm which has grieviously fractured his standing in the community of respectable society.

Scott-Taylor, Inc. v. Stokes, 229 A.2d 733, 734 (Pa. 1967)

Amici curiae request that the Court hold that such evidence does not, in and of itself, comprise competent evidence of a "grievous fracture" to reputation and cannot support recovery in a defamation action.

I. The Court Should Confirm That Pennsylvania Joins With Other States In Espousing The View In Defamation Cases That Rejects Awards Based On Presumed Damages

Until the Superior Court's decision here, Pennsylvania courts had consistently held, for over two decades, that a defamation plaintiff bears the burden in all cases to demonstrate that he or she has suffered a cognizable harm. In the wake of three pivotal U.S. Supreme Court rulings – *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz*, 418 U.S. 323; and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) – and their progeny, the Superior Court held that as a general rule, every defamation plaintiff must demonstrate actual harm and cannot rely on presumed damages to prevail in a defamation case. *Walker* , 634 A.2d at 244 . In *Gertz*, the U.S. Supreme Court held, among other things, that damages in defamation action were recoverable only for "actual injury" based on "competent evidence," 418 U.S. 349-50, and that no recovery for presumed damages was permitted based on negligence. That Court did not rule that presumed damages were appropriate upon a showing of actual malice; it simply did not reach that issue but left it to the states to decide. In *Walker*, the Superior Court subsequently determined that presumed damages were not recoverable regardless of the standard of fault at issue. 634 A.2d at 244. Thus, like other torts, in defamation cases, actual injury must be proved and may not be presumed.

A. Presumed Damages Have Not Been Accepted In General Tort Jurisprudence in Pennsylvania

> [D]amages are to be compensatory to the full extent of the injury sustained, but the award should be limited to compensation and compensation alone. Expressed more concisely by Chief Justice Gibbon, speaking for the Court . . . :
>
> "The rule is to give actual compensation, by graduating the amount of damages exactly to the extent of the loss."

Incollingo v. Ewing, 282 A.2d 206, 228-29 (1971) (internal citations omitted), *quoted in Walker*, 634 A.2d at 250-51.

As an initial matter, there are several universal principles regarding the relationship between damages and tort recovery. First, a tort plaintiff bears the burden of proof on damages, which are regarded as an essential element of the case. *E.g.*, *Morgan v. Phil. Elec. Co.*, 445 A.2d 1263, 1265 (Pa. Super. 1982). In addition, it is acknowledged that the function of damages under tort law is to "put an injured person in a position as nearly as possible equivalent to his position prior to the tort," *Denby v. N. Side Carpet Cleaning Co.*, 390 A.2d 252, 256 (Pa. Super. 1978) (quotation omitted), or, as Chief Justice Gibbon put it, to calibrate "the amount of the damages exactly to the extent of the loss." *Incollingo*, 282 A.2d at 229. And, finally, Pennsylvania law "requires that plaintiffs present a reasonable quantity of information from which the fact finder can fairly estimate the damages." *Cohen v. F.D.I.C.*, 2003 WL 21118673, at *6 (E.D. Pa. May 14, 2003) (citing *Ashcraft v. C.G. Hussey & Co.*, 58 A.2d 170, 172-73 (Pa. 1948));

Kaczkowski v. Bolubasz, 421 A.2d 1027, 1030 (Pa. 1980) ("[L]aw does not require that proof in support of claims for damages or in support of compensation must conform to the standard of mathematical exactness. *All that the law requires is that '(a) claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough*'") (citations omitted) (emphasis added)); *Molag, Inc. v. Climax Molybdenum Co.*, 637 A.2d 322, 324 (Pa. Super. 1994) (damages must be proven with reasonable certainty so that an intelligent estimate may be reached without conjecture).

Critically, "proof of damage is an essential element" of a tort claim. *E.g.*, *Troutman v. Tabb*, 427 A.2d 673, 677 (Pa. Super. 1981); *see Sisk v. Duffy*, 192 A.2d 251, 253 (Pa. 1963) ("When a plaintiff fails to establish damages in a tort action, the defendant is entitled to a verdict" in his favor). Thus, in the ordinary tort context, there is no judicially recognized exception for "presumed damages." The law demands evidence of some actual cognizable harm as an element of the claim itself, and a plaintiff who fails to meet his evidentiary burden simply has no cause of action. *See, e.g.*, W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) (a tort plaintiff bears burden of proving an "actual loss or damage" to his or her interests); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1144 (7th Cir. 1985) ("We have repeatedly emphasized – and take this opportunity to emphasize again – that we will not allow

plaintiffs to throw themselves on the generosity of the jury; if they want damages they must prove them.").

Thus, there is no reason for the Court to conclude that presumed damages should be permitted in any tort case.

B. Presumed Damages Lead To Problematic Verdicts

Indeed, as the *Gertz* Court recognized, the existence of presumed damages in the defamation landscape was a relic of ancient common law and "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." 418 U.S. at 349. Applying this outdated common law principle in the present day, by permitting a presumption of damages that effectively removes the requirement that a defamation plaintiff provide competent evidence of reputational injury, carries with it several obvious dangers. *See generally* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 747-56 (1984) (discussing damaging implications of awards based on presumed damages both to speech in general and to the judicial system).

To begin with, although a factfinder may be instructed that its award to a prevailing plaintiff under such a presumption should be commensurate with the injury, there can be no effective guidance as to the amount of the award absent tangible evidence of injury. Whatever "sound discretion" a jury or court is required to exercise is reduced to a pure fiction in such circumstances. *E.g.*,

United Ins. Co. of Am. v. Murphy, 961 S.W.2d 752, 756 (Ark. 1998) (recognizing that presumed damages permit an "absence of criteria given to juries to measure the amount the injured party ought to recover" while simultaneously ignoring "the lack of control on the part of trial judges over the size of jury verdicts"); Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. at 749-50 ("T]he process of fixing an amount of presumed damages is inherently irrational.").

In addition, in the absence of a presentation of measurable criteria, a jury may be tempted to consider impermissible factors, such as the defendant's wealth or unpopularity (which may be particularly relevant where, as here, the defendant is a member of the press). *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984); Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 613 (1983) (citing various studies indicating that "[i]n the real world . . . jurors are part of a public that is not very fond these days of the institutions that are usually libel defendants: big newspapers and magazines and broadcasters. They think those media giants can afford hefty damages and might as well pay"), *cited in Ollman v. Evans*, 750 F.2d 970, 995-97 (D.C. Cir. 1984) (Bork, J., concurring) (noting the remarkably high sums of money often sought, and imposed on media defendants and warning that "[t]he only solution to the problem libel actions pose would appear to be close judicial scrutiny."). Put simply, by writing out of the law a

fundamental element of a defamation claim, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Gertz*, 418 U.S. at 349.

It follows then that awards based only on presumed damages can and often will give rise to huge recoveries all out of proportion to the narrow, legitimate interests of defamation law, which is designed solely to "compensat[e] individuals for actual, measurable harm caused by the conduct of others." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 66 (1971) (Harlan, J., dissenting). *See, e.g.*, *Wynn v. Francis*, No. B245401, 2014 WL 2811692, at *3-4 (Cal. Ct. App. June 23, 2014) (affirming $2 million verdict in a presumed damages defamation case brought by casino mogul who submitted no evidence of any harm to his reputation from defendant's statements); Susan E. Seager, *Jackpot! Presumed Damages Gone Wild – And Unconstitutional*, 31 COMM. LAW 1, 1, 30 (Winter 2015) (noting $3 million verdict against media defendants in favor of Illinois Supreme Court Chief Justice Robert Thomas based on presumed damages, and other similar instances).

Thus, Pennsylvania courts, until the panel decision below, have properly prohibited the imposition of defamation liability without proof of actual damages.

C. Since *Walker*, The Award Of Presumed Damages Has Not Been Permissible In Defamation Cases In Pennsylvania

Walker was a slander per se case that addressed the question whether a private plaintiff in a private matter must prove general damages. In resolving this fundamental question in the affirmative, that court recognized that the First Amendment mandated balancing a state's interest in compensating a one injured by a defamatory communication with the public's interest in protecting the speech at issue, 634 A.2d at 242 (citing *Gertz*, 418 U.S. 323), and that First Amendment protections are at their apex when the allegedly defamatory publication involves a matter of public concern, *id*. at 242-43 (citing *Dun & Bradstreet*, 472 U.S. 749).[2]

After reviewing the history of the damage element of the tort of defamation in Pennsylvania, the court concluded that, although a plaintiff alleging slander per se was relieved of the burden of proving special – meaning economic – damages, "the burden is on the plaintiff to establish at least general damages." *Id*. at 243-44. It adopted the position outlined in the Restatement (Second) of Torts § 621, which provides that a defendant in a defamation action is only liable for the "proven, actual harm the publication causes." 643 A.2d at 244. The court found that this requirement of a demonstrable "actual harm" was necessary as a balance between

[2] Notably, the *Walker* court further recognized that under the First Amendment, it was still "conceivable that the state could follow the common law rule [of presumed damages] in cases of libel and slander where a matter of 'purely private concern' is at issue." *Id*. at 243.

providing a plaintiff with a remedy and guiding a jury as to how to fashion a damages award:

> Requiring the plaintiff to prove general damages in cases of slander *per se* accommodates the plaintiff's interest in recovering for damage to reputation without specifically identifying a pecuniary loss as well as the court's interest in maintaining some type of control over the amount a jury should be entitled to compensate an injured person. On one hand, a slander per se plaintiff is relieved of the burden to actually prove pecuniary loss as the result of the defamation; yet on the other hand, a jury will have some basis upon which to compensate her.

Id.

The court concluded that a plaintiff simply could not proceed successfully without proof of "any damages whatsoever," reasoning that the rule in Pennsylvania lifting the burden of proving "special" damages did not refer to all damages: "Why not hold that an alleged victim of a slander per se has no duty to plead 'damage' and leave it at that?" *Id*. The *Walker* court also observed that the legislature had already abrogated the common law rule of presumed damages when it included in the statutory prerequisites for recovering in a defamation action, the necessity of proving "[s]pecial harm resulting to the plaintiff" from the defamatory publication. *Id*. at 242 (quoting 42 Pa. C.S.A. § 8343). The court also reviewed the decision in *Agriss v. Roadway Express, Inc*. 483 A.2d 456 (Pa. Super. 1984), which eliminated the distinction between libel per se and libel per quod and held that no libel plaintiff need prove special damages in order to prevail in a libel

case, but must, based on *Gertz*, nevertheless prove actual damages. *Walker*, 634 A.2d at 244.

In holding that presumed damages were not available to defamation plaintiffs, *Walker* drew no distinctions between plaintiffs who are able to prove that a defendant acted with actual malice and those who cannot, nor any distinction between plaintiffs who are public figures or private persons, whether the published matters involved issues of public concern, as in this case, or of private concern, or whether the defendant is or is not a media defendant. The rule in *Walker* has been followed consistently by Pennsylvania courts in the two decades since.[3]

D. Presumed Damages Should Not Be Awarded in Defamation Cases, Even Where There Is A Finding Of Actual Malice

The decision by the Superior Court here marks a stark, and unwarranted, departure from the rule of *Walker*. The panel observed that "*Walker* seems to

[3] *See, e.g.*, *Brinich v. Jencka*, 757 A.2d 388, 397 (Pa. Super. 2000); *McGovern v. Chilson*, 47 Pa. D. & C. 4th 449, 452-53, 2000 WL 33222917 (Pa. Com. Pl. June 21, 2000) ("In an ordinary defamation matter, Pennsylvania does not recognize presumed damages" (citing *Walker*, 634 A.2d at 243); *Haltzman v. Brill*, 1995 WL 924475 (Pa. Com. Pl. Sept. 27, 1995) ("I conclude that the current rule is that a plaintiff cannot recover in a defamation action unless he can prove that the value of his good name is somehow diminished by the defamation."); *see Franklin Prescriptions, Inc. v. N. Y. Times Co.*, 2004 WL 1770296, at *4-7 (E.D. Pa. Aug. 5, 2004) ("Based upon its thorough review of the case law, the Court finds that the *Walker* court correctly predicted that the Supreme Court of Pennsylvania would adopt the Restatement's position that defamation plaintiffs must prove actual harm"); *Pennoyer v. Marriott Hotel Servs., Inc.*, 2004 WL 1468563, at *3 (E.D. Pa. June 24, 2004) ("Proof of general damages is required, since it accommodates the Court's interest in maintaining some type of control over the amount that a jury should be entitled to compensate an injured person."); *see also Mediaworks, Inc. v. Lasky*, 1999 WL 695585, at *9 (E.D. Pa. Aug. 26, 1999); *PPG Indus., Inc. v. Zurawin*, 52 F. App'x 570, 579 (3d Cir. 2002); *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 582 (E.D. Pa. 1999); *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999), *aff'd*, 259 F.3d 717 (3d Cir. 2001) (Table); *Pyle v. Meritor Sav. Bank*, 1996 WL 115048, at *3 (E.D. Pa. Mar. 13, 1996).

suggest that compensatory damages are unavailable to a plaintiff in a defamation *per se* action unless actual harm, *i.e*, general damages, are proven." *Joseph v. Scranton Times, L.P.*, 89 A.3d 251, 271 (Pa. Super. 2014). Thus, with the stroke of a key, the important holding in *Walker* was improperly relegated by the Superior Court to a mere suggestion, enabling the later panel to distance itself from the earlier panel's holding. *See*, *e.g.*, *Commonwealth v. Hull*, 705 A.2d 911, 912 (Pa. Super. 1998) (it is "beyond the power of a panel of the Superior Court to overrule a prior decision of the Superior Court" absent a legally relevant distinction of fact or law); *see also* Superior Court Int. Op. P. § 65.38 (permitting reargument "[w]here it appears that a decision of a panel of the Court may be inconsistent with a decision of a different panel of the Court"). Putting *Walker* to one side, the panel took this opportunity to answer what it considered to be an open question in Pennsylvania after *Gertz*: whether a plaintiff who has proven that a false statement was made with actual malice may recover presumed damages. It answered this question in the affirmative.

The panel's decision was based, first, on the fact that the Pennsylvania Suggested Standard Jury Instructions ("Instructions") "allow[] presumed damages upon a showing of actual malice." *Joseph*, 89 A.3d at 272. Those Instructions are, however, not conclusive and are published with the following proviso: "As indicated in the title of this volume, these instructions are only suggested." *Pa.*

Suggested Standard Jury Instructions at v (4th ed. 2011). Moreover, the Instructions are not submitted to the Supreme Court for approval. *Id*.

The panel next turned to the Restatement (Second) of Torts § 621, which had been relied upon by the court in *Walker*. *Joseph*, 89 A.3d at 272. Although that provision in the Restatement provides that "one who is liable for a defamatory communication is liable for the *proved*, actual harm caused to the reputation of the person defamed," the panel relied upon a caveat in this provision that "takes no position" on whether "allowing recovery in the absence of proof of actual harm . . . may be constitutionally applied" where the plaintiff proves actual malice. While it is true that the caveat, like the opinion in *Gertz*, does not expressly preclude the imposition of presumed damages where actual malice is demonstrated, it makes no affirmative suggestion that such damages would ever be warranted and thus provides dubious – or no– support for the proposition embraced by the panel. *See also* Restatement (Second) of Torts § 621 comment (c) (noting that the U.S. Supreme Court has "conspicuously abstained from indicating whether" such damages would be appropriate upon a showing of actual malice).

Finally, the Panel returned to the holding in *Gertz* and noted that it does not preclude an award of presumed damages upon a showing of actual malice. *Joseph*, 89 A.3d at 272. The panel viewed this case as an opportunity to rule that presumed damages are permissible under the circumstances in a defamation action, again

distancing itself quite measurably from the court in *Walker*, which had observed that "there is nothing in [*Gertz* or *Dun & Bradstreet*] that would indicate a state is ever required to award presumed damages," *Walker*, 634 A.2d at 243.

The panel then, in a short paragraph, held that a defamation award based on presumed damages is appropriate in Pennsylvania, where "reputational interests occupy an elevated position with our state Constitution's system of safeguards." *Joseph*, 89 A.3d at 273 (quoting *American Future Systems, Inc. v. Better Business Bureau of Eastern Pa.*, 923 A.2d 389, 395 (Pa. 2007)). However, this Court in *American Future Systems* relied on that premise only to hold that the protections provided to speech by the Pennsylvania Constitution "are no more extensive than those of the First Amendment." *Id.* at 395. This hardly qualifies as an endorsement of an award of presumed damages, and ultimately of a victory in a defamation action based on no proof at all.

In fact, there is every reason to resist the path taken by the panel in opening the door to the imposition of an award of presumed damages in defamation cases, even upon a showing of actual malice, particularly where, as here, the case involves a conceded matter of public concern.[4]

In *Gertz*, the Court warned the states against the application of presumed

[4] *Joseph v. Scranton Times, L.P.*, No. 3816-C OF 2002, Mem. Op. at 12 & n.9 (Pa. Ct. Comm. Pl. Luzerne Cnty. Dec. 8, 2011) ("The Plaintiffs here concede that the articles reported on matters of public concern.").

damages:

> [j]uries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.

418 U.S. at 349. This "uncontrolled discretion" is no more appropriate where actual malice is demonstrated than in any other trial involving any other tort claim. That is to say, it is not appropriate at all.

E. <u>Presumed Damages Offend Due Process</u>

The U.S. Supreme Court has also recognized that the "Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). In particular, as Justice Blackmun recognized, "[o]ne must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of . . . damages may invite extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Though there is no "mathematic bright line between constitutionally acceptable and the constitutionally unacceptable," *BMW of N. Am.*, 517 U.S. at 560 due process requires "reasonableness and adequate guidance from the court." *Pac. Mut. Life Ins. Co.,* 499 U.S. at 2; *BMW of N. Am.*, 517 U.S. at 587 (due process requires "the application of law, rather than a decisionmaker's caprice," and it

"does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself" (Breyer, J., concurring)). In concurring with the Court's ultimate holding that the punitive damages award at issue in *BMW* violated due process, Justice Breyer noted that the Alabama statute that permits a punitive damages award "does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards." *Id*. at 588.

The doctrine of presumed damages by its very nature eliminates all guidance that a jury might otherwise have in fashioning a compensatory damages award in a defamation case. Without requiring even a peppercorn of actual evidence of reputational harm, a jury has no basis from which to calculate the amount appropriate to compensate the plaintiff, but instead is guided solely by its own passion and prejudice. On this basis, the jury is more than likely led to stack conjecture upon inference in fashioning an award,. *See, e.g.*, *Pestco, Inc. v. Assoc. Prods., Inc.*, 880 A.2d 700, 710 (Pa. Super. 2005) (vacating punitive damages award "[g]iven the gross disparity between the nature of the harm suffered by appellees and the [$25,000 awarded]").

The rule announced by the Superior Court here invites this same gross disparity. By presuming compensatory damages without any benchmark, a jury is

fashioning an award out of whole cloth, and there is therefore "no legal measure of damages" and no mechanism by which reviewing courts can determine whether a particular award is excessive. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. at 752-53. Where there is no evidence on which to assess damages, how can the appellate court determine whether "the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption"? *Haines v. Raven Arms*, 640 A.2d 367, 369 (Pa. 1994).

By resurrecting the presumed damages doctrine, the panel below has left to the jury's unbridled discretion the calculation of an "appropriate" award, even where there is no record evidence of the plaintiff's actual harm. Under such circumstances, neither the trial court nor the appellate courts can conduct a meaningful analysis of whether a presumed damages award comports with due process, let alone whether an award is even warranted in the first instance. This uncertainty, especially in the sphere of speech on issues of public concern, is legally unsupportable.

F. Like Pennsylvania, Other States Have Rejected Or Severely Limited Presumed Damages In The Defamation Context

Put simply, "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*,

418 U.S. at 349. Indeed, *Walker* was at the forefront of the then-emerging trend to abolish presumed damages in defamation actions. *E.g.*, *Murphy*, 961 S.W.2d at 756 ("We believe that the better and more consistent rule . . . is to require plaintiffs to prove reputational injury in all cases." (citing Prosser & Keeton on the Law of Torts § 112, at p. 797 (5th ed. 1984) ("courts should require as a minimum for recovery in every case either evidence from which harm to reputation could reasonably be inferred or direct evidence of harm to reputation")); *Smith v. Durden*, 276 P.3d 943, 951-52 (N.M. 2012) ("New Mexico law requires plaintiffs to prove actual injury to reputation for recovery in all defamation cases"); *Gobin v. Globe Pub. Co.*, 649 P.2d 1239, 1242 (Kan. 1982) ("[d]amages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel"); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993) ("[P]laintiffs need not concern themselves with whether defamation was per se or per quod, nor with whether special damages exist, but must prove actual damages in all cases."); *Pate v. Serv. Merch. Co.*,959 S.W.2d 569, 574 (Tenn. App. 1996) (finding Tennessee Supreme Court had held that "damages must be shown in all defamation cases"); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1123 (Md. 1979) (reviewing *Gertz* and state common law and finding that for "pleading to be sufficient[, it] must show a basis for believing that the plaintiff has sustained actual injury"); *see also Schmalenberg v. Tacoma News,*

Inc., 943 P.2d 350, 363 (Wash. App. 1997) (a "defamation plaintiff can recover damages only if he or she proves harm factually caused by the defendant's wrongful conduct"). These courts are fully aware that "proof of actual damage will be impossible in a great many cases," but nevertheless have acknowledged that the only proper interest to be served by the defamation tort is in "compensating individuals for injury to reputation." *Durden*, 276 P.3d at 952 (quoting *Dun & Broadstreet*, 472 U.S. at 760); *Gobin*, 649 P.2d at 1243 ("The action is one for damages resulting from a tort. The protected interest is good reputation. The claimed invasion is publication of defamatory words. The invasion must cause damages."). To sanction a broader regime "inappropriately blends defamation, a tort properly limited by constitutional protections, with other causes of action." *Durden*, 276 P.3d at 952; *see also* section II, *infra*.

Other courts have limited presumed damages solely to private citizen cases that, unlike the situation here, do *not* touch upon a matter of public interest, *Bierman v. Weier*, 826 N.W.2d 436, 447 (Iowa 2013) (to prevail against a media defendant, plaintiff must prove a "demonstrable injury" and "plaintiffs no longer benefit from presumed fault or damages"), or, at most, only to permit "a plaintiff to survive summary judgment and to obtain nominal damages at trial." *W.J.A. v. D.A.*, 43 A.3d 1148, 1160 (N.J. 2012).

G. The Rationale Underlying Awards of Presumed Damages in Other Jurisdictions Is Not Persuasive

The rule that survives in some jurisdictions permitting the imposition of presumed damages is simply a vestige of the common law, which focused on the wrong, rather than the injury to be redressed. *See* Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. at 747. This outdated approach, which is in any event a distant ancestor of modern, constitutionalized defamation law, provided that any defamation must undoubtedly cause some sort of reputational harm, which may be difficult to prove, but must be redressed nonetheless. *See, e.g.*, *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 157 & n.90 (Tex. 2014) (noting that the Supreme Court jurisprudence may still permit presumed damages "when an injury is likely to have occurred but is difficult to establish" (quotations omitted)); *W.J.A.*, 43 A.3d at 1158 (citing cases and jurisdictions that retain the presumed damages doctrine based on the rationale "rooted in the belief that damage to reputation logically flows from defamation, even if difficult to prove").

But this argument does not survive in the modern legal environment in which it is being asserted, where most of the allegedly defamatory statements at issue in litigation are transmitted around the globe in fractions of a second. If a plaintiff is unable to prove the impact of a statement with such widespread distribution, then it is at least as likely as not that there is no material impact at all.

See also R. Sack, *supra*, , § 10:5-1, p. 10-40 ("[S]trict insistence on a genuine demonstration by the plaintiff of real injury, in accordance with the mandate of *Gertz*, should not seriously disadvantage a plaintiff's case, where serious injury has, in fact, been incurred.").

The argument that presumed damages are appropriate in these circumstances seems also to stem from a sense that it is unfair to allow defamatory speech to go unpunished. However, again, that is an analysis that fails to take into consideration the fact that damage is an element of the tort itself; without the damage, the tort does not exist. *See Durden*, 276 P.3d at 952("A system that restricts recovery to actual loss will be imperfect, but so is any system that attempts to compensate human injury with money." (citation omitted)).

II. The Court Should Clarify That A Defamation Award Cannot Be Based Solely On Offended Sensibilities

Closely related to the issue of presumed damages is the issue of what may constitute actual injury. To require proof of actual injury, but at the same time to permit evidence that is easily proffered and impossible to disprove to meet this requirement, is to effectively nullify the requirement itself. Thus, amici respectfully request that the Court take this opportunity to clarify that the tort of defamation is fundamentally concerned with concrete harm to *reputation* and that cases – especially those filed against the media on issues of public importance – cannot proceed successfully merely based on the impact of the publication on a

plaintiff's personal sensitivities. R. Sack, *supra*, § 10:5-1, p. 10-38 ("[S]omething beyond the plaintiff's own expressions of hurt or grief is – or should be – required."). Historically, this Court has recognized:

> It is not enough that the victim of the 'slings and arrows of outrageous fortune', be embarrassed or annoyed, he must have suffered that kind of harm which has grieviously fractured his standing in the community of respectable society.

Scott-Taylor, Inc. v. Stokes, 229 A.2d at 734. As another high court noted long ago:

> It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them.

Terwilliger v. Wands, 17 N.Y. 54, 60 (1858).

It is contradictory indeed to hold that speech that can result in hurt feelings is insufficient to sustain a defamation action while at the same time permitting a plaintiff to rely on hurt feelings as the sole proof of damages in a defamation claim, completely detached from proof of injury to reputation. *See also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515 (1991) ("[T]he tort action for defamation has existed to redress injury to the plaintiff's reputation").

Yet, the lower courts in Pennsylvania have counted as actual injury, permitting defamation claims to proceed and significant jury awards to stand,

based merely on a plaintiff's "anger" and a fleeting possibility that someone might have believed the allegedly defamatory statement. *See, e.g.*, *Brinich v. Jencka*, 757 A.2d 388, 398 (Pa. Super. 2000); *but see McNulty v. Citadel Broad. Co.*, 58 F. App'x 556, 567 (3d Cir. 2003) (affirming dismissal of defamation claim because "McNulty has not proven that his reputation was actually affected. . . . He has not shown that his reputation was actually damaged in anyone's eyes, or that Citadel's statements were responsible for his inability to find further employment as a broadcaster.'"). The courts allowing these defamation claims to rest on this thin reed to prove actual injury have failed twice, as they failed to impose any requirement that the plaintiff demonstrate that his or her reputation was in fact "grieviously fractured." *See, e.g,*, *Pilchesky v. Gatelli*, 12 A.3d 430, 444 (Pa. Super. 2011); *Walker*, 430 Pa. Super. 236, 634 A.2d 237, 242 (1993).

This permissive view of general damages conflates the reputational harm that defamation tort is intended to remedy with claims for bare emotional distress. Permitting juries to continue to consider and award damages on ephemeral "emotional distress" claims without any evidence of actual reputational harm ultimately weakens the tort, making it synonymous with torts based on infliction of emotional distress, which have very different elements. *See Durden*, 276 P.3d at 952 (noting that permitting recovery solely for mental distress "inappropriately

blends defamation, a tort properly limited by constitutional protections, with other causes of action").

Moreover, allowing these alleged emotional injuries to carry a defamation claim fundamentally changes the nature of the tort. Prosser, The Law of Torts, at 737 (4th ed. 1971) ("Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action."). Indeed, allowing recovery for defamation based on mental anguish alone renders the actual injury requirement a nullity. A defamation plaintiff always can claim that the publication at issue caused personal anguish or anger. Such averments, and even testimony, as is evident here, can be expected in almost every case. Such charges are also difficult, if not impossible to refute, and ultimately provide no guidance to a jury as to how to quantify, let alone constrain, damages, particularly where no evidence of reputational harm has been adduced.

Requiring evidence of harm to reputation, at *least* as the initial threshold for recovery, also provides a measure of protection for reporting on issues of public concern, such as alleged criminal conduct and corruption, lessening the likelihood that liability could ensue simply because individuals mentioned in the reports might be offended by it.

This standard has also found increasing favor in state courts across the country. *See Bierman* , 826 N.W2d at 447 (holding that defamation plaintiffs suing media can recover damages only if they establish "actual reputational harm" and "parasitic damages," for "personal humiliation or mental anguish" are permitted against media defendants only if reputational harm is proved first); *Durden*, 276 P.3d at 952 ("A showing of actual injury to reputation is not so high a barrier to surmount . . . ."); *Gobin*, 649 P.2d at 1243 ("Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law. It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander."); *Salomone v. MacMillan Publ'g Co*., 77 A.D.2d 501, 502 (N.Y. 1st Dep't 1980) ("As to the claim for mental anguish, it has long been held in this state that such damage is compensable only when it is concomitant with loss of reputation"); *see also Kenney v. Wal-Mart Stores, Inc*., 100 S.W.3d 809, 817-18 (Mo. 2003) (finding evidence of actual or emotional injury tenuous where there is "quantifiable professional or personal injury, such as interference with job performance, psychological or emotional distress, or depression"); *Murray v. Lineberry*, 69 S.W.3d 560, 564-65 (Tenn. Ct. App. 2001) (requiring evidence to rise above "anger, mere annoyance or loss of peace of mind").

CONCLUSION

As the final arbiter of the law in Pennsylvania, this Court has the power and the responsibility to prevent an unwarranted expansion by the Superior Court of liability for defamation in cases in which plaintiffs are unable to prove damages central to the tort, an outcome permitted in no other tort in this Commonwealth. Amici curiae therefore respectfully request that the Court vacate the Superior Court's opinion to the extent that it holds that an award of presumed damages may be permissible in this case and that testimony regarding the personal emotional impact of the published statements is sufficient to permit petitioners to succeed on their claims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gayle C. Sproul, hereby certify that on this 23rd day of January, 2015, I caused a copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS** to be served via electronic filing on counsel for the parties as follows:

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