

806.85 DEFAMATION—PRIVATE FIGURE—MATTER OF PUBLIC CONCERN—
ISSUE OF ACTUAL MALICE.¹

NOTE WELL: If a private figure plaintiff in a matter of public concern seeks to recover punitive damages, the following issue must first be answered in the affirmative.² If, and only if, this issue is answered "Yes," then the standard punitive damages instructions, N.C.P.I.—Civil 810.96 ("Punitive Damages—Liability of Defendant") and 810.98 ("Punitive Damages—Issue of Whether to Make Award and Amount"), should be given.

The (*state number*) issue reads:

"Did the defendant publish the [libelous] [slanderous] statement with actual malice?"

You will answer this issue only if you have answered the (*state issue number*) "Yes") in favor of the plaintiff.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by clear, strong and convincing evidence, that the defendant published the [libelous] [slanderous] statement with actual malice.³

Clear, strong and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear, strong and convincing fashion. You shall interpret and apply the words "clear," "strong" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.

Actual malice means that, at the time of the publication of the [libelous] [slanderous] statement, the defendant either knew that the statement was false or acted with reckless disregard of whether the statement was false.⁴ Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.⁵

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by clear, strong and convincing evidence that the defendant published

the [libelous] [slanderous] statement with actual malice, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1 . See N.C.P.I—Civil 806.40 ("Defamation—Preface"), nn. 27, 30-32 and accompanying text. Note that for private figure plaintiffs in cases *not* involving matters of public concern, the standard punitive damages instruction may be used and the *N.Y. Times* standard for actual malice is not needed.

2. See *Gibby v. Murphy*, 73 N.C. App. 128, 133, 325 S.E.2d 673, 676-77 (1985) (To recover punitive damages a private figure/matter of public concern plaintiff "must prove 'actual malice' on the part of the defendants. Actual malice may be proven by showing that the defendants published the defamatory material with knowledge that it was false, with reckless disregard to the truth, or with a high degree of awareness of its probable falsity."). Note that for private figure plaintiffs in cases *not* involving matters of public concern, the standard punitive damages instruction may be used and the *N.Y. Times* standard for actual malice is not needed.

3. As it relates to constitutional limits on defamation claims, "actual malice" has been defined as publication of a defamatory statement "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 115 L. Ed. 2d 447, 468 (1991) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 11 L. Ed.2d 686, 706 (1964) (emphasis added)). The actual malice standard developed by the U.S. Supreme Court cannot be established by a showing of personal hostility and thus should be distinguished from state common law malice. *Masson*, 501 U.S. at 509-12, 115 L. Ed.2d at 468-69; *Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 299-300 (1994).

4. See n.3 *supra*.

5. See *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 89 (1977) (noting that the U.S. Supreme Court in *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed.2d 262, 267 (1968), "refined the definition of 'reckless disregard' to require 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'"); see also *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 461, 524 S.E.2d 821, 825 (2000) (actual malice may be shown, *inter alia*, by publication of a defamatory statement "with a high degree of awareness of its probable falsity."), and *Ward v. Turcotte*, 79 N.C. Ap. 458, 461, 339 S.E.2d 444, 446-7 (1986) (citation omitted) ("Actual malice may be found in a reckless disregard for the truth and may be proven by a showing that the defamatory statement was made in bad faith, without probable cause or without checking for truth by the means at hand.").