

ALIENATION OF AFFECTIONS--DAMAGES.

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover?"

If you have answered the (*state number*) issue "Yes" [and the (*state number*)¹ issue "Yes"] in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical injury incurred by the plaintiff.

The plaintiff may also be entitled to recover actual damages.² On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the present value in money of actual damages to the plaintiff resulting from the wrongful conduct of the defendant.³ In determining this amount of money, if any, you may consider

[the plaintiff's loss of the [love] [affection] [society] [assistance] [companionship] [comfort] [sexual relationship] [favorable mental attitude] which previously existed between the plaintiff and *his* spouse]⁴

¹This parenthetical references the potential submission of N.C.P.I. Civil 800.23 (Alienation of Affections--Statute of Limitations); if that issue has not been submitted, this parenthetical should not be used.

²Punitive damages may also be recoverable "where the defendant's conduct was willful, aggravated, malicious, or of a wanton character." *Hutelmyer v. Cox*, 133 N.C. App. 364, 371, 514 S.E.2d 544, 559, *disc. rev. denied*, 351 N.C. 104, 351 S.E.2d 146 (1999) (citation omitted); *see also Oddo v. Presser*, 158 N.C. App. 360, 367, 581 S.E.2d 123, 128-29 (2003), *aff'd as to punitive damages issue*, 358 N.C. 128, 592 S.E.2d 195 (2004); *Ward v. Beaton*, 141 N.C. App. 44, 50, 539 S.E.2d 30, 34 (2000), *cert. denied*, 353 N.C. 398, 547 S.E.2d 43 (2001). "To establish entitlement to punitive damages . . . the plaintiff must present 'evidence of circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages.'" *Hutelmyer*, 133 N.C. App. at 371, 514 S.E.2d at 559. (citation omitted). "[P]unitive damages . . . may be awarded only when there are some features of aggravation, as when the act is done willfully and evidences a reckless and wanton disregard of plaintiff's rights." *Scott v. Kiker*, 59 N.C. App. 458, 462, 297 S.E.2d 142, 146 (1982). "Evidence of 'sexual relations' will allow a plaintiff to get to the jury on the issues of punitive damages in a claim for alienation of affections." *Ward*, 141 N.C. App. at 50, 539 S.E.2d at 34. *See generally* N.C.G.S. § 1D-35 ("Punitive damages awards").

³*Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969) ("[T]he measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by the [plaintiff] through the defendant's wrong.").

⁴*Hutelmyer*, 133 N.C. App. at 373, 514 S.E.2d at 561 ("[I]n awarding [] damages, 'the jury may consider the loss of consortium' which is defined as the '[c]onjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection and aid of the other in every conjugal relation'" (citation omitted); *see also Sebastian*, 6 N.C. App. at 217-20, 170 S.E.2d at 114-16.

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[any mental anguish, shame, humiliation or disgrace suffered by the plaintiff]⁵

[any injury to the plaintiff's [health] [feelings] or [reputation]]⁶

[any loss of support].⁷

If you determine that any damages incurred by the plaintiff will continue into the future, the amount you allow as future damages must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future.

(If a per diem argument is made, adapt and use N.C.P.I.--General Civil 810.51 in place of the following.)

I instruct you that if you reach this issue, your decision must be based upon the evidence and the rules of law I have given you with respect to the measure of damages. You are not required to accept the measure of damages suggested by the parties or their attorneys. Your award must be fair and just. You should not award or withhold anything on the basis of sympathy or pity.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the present value in money of actual damages to the plaintiff resulting from the wrongful conduct of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as one dollar in the blank space provided.

⁵*Scott*, 59 N.C. App. at 462, 297 S.E.2d at 146; see *Hutelmyer*, 133 N.C. App. at 373, 514 S.E.2d at 561 ("[T]he gravamen of damages in [this] tort is mental distress, a fact that gives juries considerable freedom in their determinations." (citation omitted)).

⁶*Sebastian*, 6 N.C. App. at 219, 170 S.E.2d at 115; *Hutelmyer*, 133 N.C. App. at 373, 514 S.E.2d at 561.

⁷*Gray v. Hoover*, 94 N.C. App. 724, 730, 381 S.E.2d 472, 475, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 498 (1989).