

INVASION OF PRIVACY--APPROPRIATION OF NAME OR LIKENESS FOR COMMERCIAL
USE--DAMAGES.

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for appropriating the plaintiff's [name] [likeness] for the defendant's own commercial use and benefit without the plaintiff's consent?"

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

The plaintiff may also be entitled to recover actual damages. 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 amount of actual damages caused by the wrongful conduct of the defendant.

(Here give appropriate instruction as to type of damage claimed if supported by the evidence).

I instruct you that if you reach this issue,² your decision must be based on 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 amount of damages suggested by the parties or their attorneys. Your award must be

¹*Flake v. Greensboro News Co.*, 212 N.C. 780, 790, 195 S.E. 55, 64 (1938) ("We are of the opinion that ... the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages...").

²If counsel makes a *per diem* argument, modify this portion of the instruction in accordance with N.C.P.I.--Civil 810.22.

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USE-- DAMAGES. (Continued).

fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding 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 amount of actual damages proximately caused by 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.