

DEFAMATION ACTIONABLE *PER SE*—PRIVATE FIGURE—NOT MATTER OF PUBLIC CONCERN—PRESUMED DAMAGES¹

The (*state number*) issue reads:

“What amount of presumed damages² is the plaintiff entitled to recover?”

You will consider this issue only if you have answered Issue Number (*state issue number*) “Yes” in favor of the plaintiff.

If you have answered Issue Number (*state issue number*) “Yes,” the plaintiff is entitled to be awarded compensation for presumed damages even without proof of actual damages. Presumed damages are damages that are assumed, without proof, to have occurred to the plaintiff as a result of the publication by the defendant of the

¹For an introduction to the category of presumed damages in defamation cases, see N.C.P.I.—Civil 806.40 (“Defamation—Preface”), nn.20-21, 26, 29-30, 32 and accompanying text.

Note that presumed damages are available only in defamation cases actionable *per se*. Plaintiffs in middle-tier libel cases or defamation cases actionable *per quod* must prove actual damages in order to recover. See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), nn.22 and 34 and accompanying text.

²*NOTE WELL:* To date, North Carolina’s appellate courts have not addressed the current viability of the common law rule of presumed damages. The Pattern Jury Civil Sub-Committee, upon careful consideration, believes the common law rule applies in North Carolina and that, in the absence of a directive from our appellate courts to the contrary, this instruction should be given when appropriate.

The Committee takes this position particularly in light of the gloss placed by many courts upon the U.S. Supreme Court holdings in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 41 L.Ed.2d 789, 810 (1974) (“[W]e hold that the States may not permit recovery of presumed or punitive damages . . . when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”); and *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761, 86 L.Ed.2d 593, 604 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”); see, e.g., Kansas Pattern Instructions—Civil 127.50 (“A majority of state courts have held ‘where only a private plaintiff and non-media defendant are involved, the common law standard [of damages presumed upon establishment of libel *per se* . . .] does not threaten the free and robust debate of public issues or a meaningful dialogue about self-government, or freedom of the press,’ and have refused ‘to extend the *Gertz* holding to actions between a private individual and a non-media defendant.” (citations omitted); see, generally, N.C.P.I.—Civil 806.40 (“Defamation—Preface”), nn.20, 23, 26-27, 29-30 and accompanying text; 28 Am. Jur.2d *Libel and Slander* § 362, p. 758-59 (“[M]any courts have held or recognized that, in actions for libel or slander . . . *per se*, proof of the libel or slander creates a presumption that some actual damage was sustained, even though it may be incapable of being accurately measured On the other hand, some courts have taken the position that the doctrine of presumed damages is no longer applicable in libel and slander cases These courts take the view that such a result is required by decisions of the United States Supreme Court limiting the circumstances under which a plaintiff may recover for defamation.”); and Dan B. Dobbs, *Law of Torts* § 422, p. 253 (2007 Supp.) (“The common law rule, which still governs many cases, allows juries to presume that a defamatory publication has caused harm to reputation and then to award substantial sums of money even in the absence of evidence as to any particular amount of damages. However, an award of presumed damages may still be deemed excessive if the defamation is not serious or widespread, and if it appears to cause neither serious reputational nor emotional harm. On the other hand, the presumed damages rule may be headed for extinction. Commentators have attacked it and some states have abandoned it even when the Constitution does not require them to do so.” (citations omitted)).

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[libelous] [slanderous] statement.³ Presumed damages include matters such as loss of reputation or standing in the community, mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms.⁴

Presumed damages arise by inference of law and are not required to be specifically proved by evidence.⁵ This means you need not have proof that the plaintiff suffered loss of reputation or standing in the community, mental or physical pain and suffering, inconvenience or loss of enjoyment in order to award *him* damages for such harm because such harm is presumed by the law when a defendant publishes a [libelous] [slanderous] statement with the knowledge that it is false or with reckless disregard of whether it is false.⁶

The determination of the amount of presumed damages is not a task which can be completed with mathematical precision⁷ and is one which unavoidably

³See *Dun & Bradstreet*, 472 U.S. 749, 760-61, 86 L. Ed.2d at 604 (1985)

⁴*Jadanza v. Harper*, 169 N.C. App. 766, 779-80, 611 S.E.2d 217, 221 (2005) (citing 22 Am. Jur.2d *Damages* § 42).

⁵*Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1139 (7th Cir. 1987).

⁶See Pennsylvania Suggested Standard Civil Jury Instructions—Civil 13.08 (“Damages—Defamation”) (“If you find that the defendant acted either intentionally or recklessly in publishing the false and defamatory communication, you may presume that the plaintiff suffered both injury to [his] [her] reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the plaintiff suffered emotional distress, mental anguish, and humiliation in order to award [him] [her] damages for such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.”).

⁷New York Pattern Jury Instructions—Civil 3:29 (“Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required”) (stating that presumed “damages cannot be proved with mathematical accuracy.”); see also *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 588 (10th Cir. 1987) (“Ascertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation.”); cf. *Republic Tobacco v. North Atlantic Trading*, 381 F.3d 717, 734 (7th Cir. 2004) (“While we are mindful that under the doctrine of presumed damages a party is not required to show specific loss, there must be some meaningful limit on the magnitude of a jury award when it is arrived at by pure speculation. Presumed damages serve a compensatory function—when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss,

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includes an element of speculation. The amount of presumed damages is an estimate, however rough, of the probable extent of actual harm, in the form of loss of reputation or standing in the community, mental or physical pain and suffering, and inconvenience or loss of enjoyment which the plaintiff has suffered or will suffer in the future as a result of the defendant's publication of the [libelous] [slanderous] statement.⁸ However, any amount you allow as future damages must be reduced to its present value, because a sum received now is equal to a larger sum received in the future.

You may award the plaintiff presumed damages, for example, in a nominal amount, which is a trivial amount such as one dollar, that shows that the plaintiff is entitled to recover from the defendant. You may also, in the exercise of your good judgment and common sense,⁹ award the plaintiff presumed damages in an amount that will compensate the plaintiff, as far as money can do, for injury that you find is a direct and natural consequence¹⁰ of the [libel] [slander] of the plaintiff by the defendant.

As to this issue, I instruct you that you are to base your decision on the rules of law with respect to presumed damages that I have given you and that you are not required to accept the amount of damages suggested by the parties or their

it becomes questionable whether the award is serving a different purpose." The court thereupon reduced the trial court's award of \$3.36 million in presumed damages to \$1 million.).

⁸*Brown & Williamson*, 827 F.2d at 1138 (quoting Prosser & Keeton on Torts, § 116A, p. 843).

⁹See n.7 *supra*.

¹⁰See *Fields v. Bynum*, 156 N.C. 413, 418, 72 S.E. 449, 451 (1911) ("General damages . . . embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se* Such damages include injury to the feelings and mental suffering endured in consequence. General damages need not be pleaded or proved."); see also 50 Am. Jur.2d, *Libel and Slander* § 478 ("Under the common law, . . . general damages are presumed to result from a defamation that is actionable *per se*, so that recovery may be had of damages naturally and proximately resulting from the defamation even though they are not proved.").

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attorneys. 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 issue, if you have answered Issue Number (*state issue number*) "Yes" in favor of the plaintiff, then you will answer this issue by writing in the blank space provided that amount of presumed damages which you have determined to award the plaintiff under the instructions I have given you.