

DEFAMATION ACTIONABLE *PER SE*—PRIVATE FIGURE—MATTER OF PUBLIC CONCERN—PRESUMED DAMAGES¹

The (*state number*) issue reads:

Part One: “Did the defendant publish the [libelous] [slanderous] statement with actual malice?”

Part Two: “If so, what amount of presumed damages 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.

On Part One of this issue, the burden of proof is on the plaintiff to prove by clear, strong and convincing evidence that the defendant published the [libelous] [slanderous] statement with actual malice.²

Clear, strong and convincing evidence is evidence that, 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.

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.

²This paragraph incorporates the “actual malice” standard mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed.2d 686, 706 (1964). See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.14.

A private figure plaintiff in a matter of public concern must first establish “actual malice” in order to recover presumed damages under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-40, 41 L. Ed.2d 789, 810 (1974) (“[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of falsity or reckless disregard for the truth . . .”), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 86 L. Ed.2d 593, 604 (1985) (“[T]he state interest in awarding presumed and punitive damages . . . is ‘substantial’ relative to the incidental effect these remedies may have on speech [not at the core of First Amendment concern . . .] 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.’”).

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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. Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.³

As to Part One of 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 write “Yes” in the first blank space provided and then proceed to consider Part Two of this issue. On the other hand, if you fail to 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 write “No” in the first blank space provided and you would not consider this issue further.

If you find by clear, strong and convincing evidence that the defendant published the [libelous] [slanderous] statement with actual malice, then the plaintiff under Part Two of this issue is entitled to be awarded compensation for presumed damages⁴ even without proof of actual damages. Presumed damages are damages

³See *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977) (noting that the U.S. Supreme Court in *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. App. 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.”).

⁴See n.2 *supra*.

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that are assumed, without proof, to have occurred to the plaintiff as a result of the publication by the defendant of the [libelous] [slanderous] statement.⁵ 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.⁶

Presumed damages arise by inference of law and are not required to be specifically proved by evidence.⁷ 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. The law presumes such harm when a defendant publishes a [libelous] [slanderous] statement with the knowledge that it is false or with reckless disregard of whether it is false.⁸

The determination of the amount of presumed damages is not a task which can be completed with mathematical precision.⁹ The amount of presumed damages

⁵See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.23.

⁶*Iadanza v. Harper*, 169 N.C. App. 766, 779-80, 611 S.E.2d 217, 221 (2005) (citing 22 Am. Jur.2d, *Damages* § 42).

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

⁸Pennsylvania Suggested Standard Civil Jury Instructions—Civil 13.10 (“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.”).

⁹New York Pattern Jury Instructions—Civil 3:29 (“1. Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required”) (stating that presumed “damages cannot be proved with mathematical accuracy.”); *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

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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] [slandering] statement.¹⁰ 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,¹¹ 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 consequence¹² of the [libel] [slander] of the plaintiff by the defendant.

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

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, 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.).

¹⁰*Brown & Williamson*, 827 F.2d at 1138 (quoting Prosser & Keeton on Torts, § 116A, p. 843).

¹¹See n.9 *supra*.

¹²See *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.” (citations omitted)).

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accept the amount of damages suggested by the parties or their 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.

As to Part Two of this issue, if in Part One you have found by clear, strong and convincing evidence that the defendant published the statement with actual malice, then you shall answer Part Two by writing in the second blank space provided that amount of presumed damages which you have determined to award the plaintiff under the instructions I have given you. However, if in Part One you have failed to find by clear, strong and convincing evidence that the defendant published the statement with actual malice, then you will not consider in Part Two whether to award the plaintiff presumed damages and will leave the second space blank.

