

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

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 instruction, N.C.P.I.--Civil 810.98, 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

¹For private figure plaintiffs in cases not involving matters of public concern, the standard punitive damages instruction may be used without first submitting this instruction, but such plaintiffs must meet the requirements of N.C. Gen. Stat. § 1D-15. See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.31-33 and accompanying text. Moreover, because public figure or official plaintiffs must prove actual malice in order to establish liability and thus will have met the applicable standard for punitive damages by establishing liability under the actual malice standard, submission of this instruction prior to submission of the standard punitive damages instruction is likewise not required for public figure or official plaintiffs. See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.27 and 33 and accompanying text.

²See *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.").

³See N.C. Gen. Stat. § 1D-15 ("Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud[;] (2) *Malice*[; or] (3) Willful or wanton conduct." (emphasis added)). 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 *New York 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; *Varnier v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 299-300 (1994).

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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.

⁴See n.3 *supra*.

⁵See *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 89 (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.").