

806.84 DEFAMATION—ACTUAL DAMAGES¹.

The (*state number*) issue reads:

"What amount of actual damages is the plaintiff entitled to recover?"

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

The burden of proof on this issue is on the plaintiff to prove by the greater weight of the evidence that, as a result of the defendant's publication of the [libelous] [slandorous] statement, the plaintiff suffered actual damages. Actual damages means fair compensation for any actual loss, hurt, or harm resulting from the defamation, including pecuniary damages and actual harm damages.²

Pecuniary damages are tangible monetary losses, such as [lost income] [medical expenses] [or] [other direct financial harm].³ You may award pecuniary damages to the extent you find the plaintiff has suffered such tangible monetary losses. Emotional distress and mental suffering alone do not prove monetary loss.⁴

Actual harm damages include such things as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.⁵ You may award actual harm damages to the extent you find the plaintiff has suffered such actual injury.

[You may compensate the plaintiff only once for any injury.⁶ Thus, if you award presumed damages to the plaintiff, you may not award additional amounts to the plaintiff as actual harm damages to the extent you have already awarded the plaintiff presumed damages for the same injury. You may award as actual damages only such amount as compensates the plaintiff for injuries the plaintiff proved were suffered and for which the plaintiff has not otherwise been compensated by your verdict on other damages.⁷]

As to this issue, I instruct you that you are to base your decision on the rules of law with respect to actual damages that I have given you and that you are not required to 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.

Finally as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff suffered actual damages as a result of the defendant's publication of the [libelous] [slanderous] statement, then it would be your duty to answer this issue in favor of the plaintiff and to write in the blank space provided the monetary amount of such actual damages you find the plaintiff has suffered.

If, on the other hand, you do not find that the plaintiff has suffered actual damages, then it would be your duty to answer this issue in favor of the defendant and write a "Zero" in the blank space provided.⁸

1. This instruction may be used for all types of defamation involving all types of plaintiffs when the issue of actual damage is to be presented. Because the fault standards for an award of actual damages are, for each type of plaintiff, no more stringent than the fault liability standards for each type of plaintiff, a plaintiff obtaining a "Yes" answer on liability should have established the fault standard necessary for actual damage recovery to the extent that such plaintiff has proved actual damages. See, generally, N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn. 10-14 and accompanying text.

2. See *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 473-75 (1991) (Actual damage defined as "some actual loss, hurt or harm resulting from the illegal invasion of a legal right.").

3. See *Iadanza v. Harper*, 169 N.C. App. 776, 779-80, 611 S.E.2d 217, 221 (2005) ("pecuniary loss" damages include "medical expenses, lost wages, or other direct financial injury.").

4. *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 575 (1994).

5. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 350, 41 L.Ed.2d 789, 810 (1974).

6. This portion of the instruction should only be given if the jury is also being instructed on presumed damages. See N.C.P.I.—Civil 806.81, 806.82 and 806.83.

7. Although some actual harm damages may duplicate categories available as

presumed damages, a plaintiff entitled to recover presumed damages might also be able to prove certain harm at a level that the jury might not otherwise presume. *Compare Iadanza v. Harper*, 169 N.C. App. 766, 779-80, 611 S.E.2d 217, 221 (2005) (citing 22 Am. Jur.2d, *Damages* § 42), with *Gertz*, 418 U.S. at 350, 41 L. Ed.2d at 810. In addition, such a plaintiff might be able to prove losses, such as lost wages not available as presumed damages. To the extent a jury is instructed on both presumed and actual damages, there is a danger of improper duplication of damages by the jury that the trial court must take care to avoid.

Note that the plaintiff must prove actual harm in order to prove liability for middle-tier libel and defamation actionable *per quod*.