

2505 DEFAMATION: TRUTH AS A DEFENSE (NONMEDIA DEFENDANT)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

It is not necessary for (defendant) to establish the exact truth of the statement (made) (published). Slight inaccuracies of expression are immaterial provided that the statement is true in substance.

The burden of proof is upon (defendant) to establish the truth (substantial truth) of the statement.

COMMENT

This instruction was originally approved in 1986 and revised in 1988. The comment was revised in 1987, 2011, and 2014. This instruction should be used in defamation cases where no constitutional conditional privilege exists.

Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982); DiMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973); Restatement, Second Torts § 581A (1965). See also Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

In Lathan v. Journal Co., 30 Wis.2d 146, 151, 140 N.W.2d 417 (1966), the court established the decision-making format for a defamation action. It stated:

In an action for libel the court must first determine whether the writing complained of is defamatory. If it is not, that ends the matter. In the event of defamation, the court must consider the defenses alleged. A matter, though defamatory, is still not actionable if it is true, since truth is a complete defense. Williams v. Journal Co. (1933), 211 Wis. 362, 370, 247 N.W. 435.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). This holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, *supra*. Philadelphia Newspapers, Inc. v. Hepps involved a constitutional conditional privilege. It is uncertain whether the holding by the U.S. Supreme Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. In fact, the Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision

and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

In Denny v. Mertz, *supra* at 660-61 n.35, a 1982 decision, the Wisconsin Supreme Court reaffirmed earlier decisions which held that the defendant has the burden of proving as a defense the truthfulness of the alleged defamatory statement. The court strongly disagreed with cases from other jurisdictions that had put the burden of proving the falsity of the statement on the plaintiff. Following the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), other jurisdictions held that the Gertz constitutional protections apply to both media and nonmedia defendants. Because the plaintiff, under Gertz, must establish "fault" on the part of the defendant, jurisdictions applying the constitutional protections to all defendants do not require the defendant to prove truthfulness as a defense and instead require the plaintiff to prove falsity. This major shift in evidentiary burden was strongly rejected by the Wisconsin Supreme Court in Denny v. Mertz, *supra* at 660-61, when it noted:

The decision in Jacron (350 A.2d 688) also stated that "truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff." 350 A.2d at 698. We strongly disagree with this allocation of the burden of proving the truth of a statement and reaffirm the law of this state that if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false. See, *e.g.*, Schaefer, 77 Wis.2d at 125.