

**2511 DEFAMATION: PUBLIC FIGURE VERSUS MEDIA DEFENDANT OR PRIVATE FIGURE WITH CONSTITUTIONAL PRIVILEGE (ACTUAL MALICE)**

(As to question 1, give the definition of “Defamation,” from Wis JI-Civil 2501.)

Because of protections afforded a defendant such as (defendant) under the First Amendment of the Constitution, (plaintiff) must prove that any defamatory statements made (published) by (defendant) were made (published) with actual malice.

Your answers to questions 2 and 3 of the verdict will determine whether (defendant) acted with actual malice in making (publishing) the alleged defamatory statements.

A person acts with actual malice when such person (makes) (publishes) a defamatory statement knowing that the statement is false<sup>1</sup> or with reckless disregard of whether it is false or not.<sup>2</sup> If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.<sup>3</sup>

Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it.<sup>4</sup> It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff).<sup>5</sup> There must be

sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.<sup>6</sup>

In the course of your deliberations, you need not accept as conclusive (defendant)'s testimony that (he) (she) believed the statement to be true or had no serious doubt as to the truth of the statement. You may consider such factors as whether there were obvious reasons for (defendant) to doubt the veracity of (his) (her) information or whether the statement is so inherently improbable that only a reckless person would have made (published) it.<sup>7</sup>

(Plaintiff) has the burden of proof to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant) made (published) the statement knowing it was false or with reckless disregard of whether it was false or not.<sup>8</sup>

(As to question 4, the damage question, give Wis JI-Civil 2516.)

(As to question 5, express malice, give Wis JI-Civil 2513.)

(As to question 6, punitive damages, give Wis JI-Civil 2520.)

(As to questions 4, 5, and 6, give Wis JI-Civil 205.)

**SPECIAL VERDICT**

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., that John Jones took a bribe) defamatory?

Answer: \_\_\_\_\_

Yes or No

Question 2: If you answered “yes” to question 1, answer this question:  
Did (defendant) make (publish) such statement knowing that it was false?

Answer: \_\_\_\_\_

Yes or No

Question 3: If you answered “no” to question 2, answer this question:  
Did (defendant) make (publish) such statement with reckless disregard of its truth or falsity?

Answer: \_\_\_\_\_

Yes or No

Question 4: If you answered “yes” to either of questions 2 or 3, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: \$\_\_\_\_\_

Question 5: If you answered “yes” to either of questions 2 or 3, answer this question:

Did (defendant) act with express malice in making (publishing) such statement?

Answer: \_\_\_\_\_

Yes or No

Question 6: If you answered “yes” to question 5, answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: \$

### NOTES

1. “By definition, a defamatory statement must be false.” Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not “be true in every particular. All that is required is that the statement be substantially true.” Id. It is the defendant’s burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

2. The term “actual malice” was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and cited by Wisconsin in Polzin v. Helmbrecht, 54 Wis.2d 578 (1972), and Calero v. Del Chemical Corp., 68 Wis.2d 487 (1975). See also Wis JI-Civil 2500, Law Note.

3. Restatement, Second, Torts § 580A, Comment d (1977); Garrison v. State of Louisiana, 379 U.S. 64 (1964).

4. Restatement, Second, Torts § 580A, Comment d (1977); St. Amant v. Thompson, 390 U.S. 727 (1968).

5. Restatement, Second, Torts § 580A, Comment d (1977).

6. St. Amant, 88 S. Ct. 1325.

7. St. Amant, 88 S. Ct. 1326.

8. Calero, supra note 1, at 500.

### COMMENT

This instruction and comment were approved in 1986. Nonsubstantive editorial changes were made to the instruction in 1993. The comment was updated in 1997. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee’s 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. This revision was approved

by the Committee in September 2022; it added to the notes.

The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995).

There is an obvious problem of proof when the case is based upon reckless disregard of whether the defamatory statement is false or not. This problem was recognized by the U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 88 St. Ct. 1323 (1968):

“Reckless disregard,” it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law. 88 S. Ct. 1325.