

Chapter 10.

APPENDIX 2. Defamation; Public Official v. Media.

Plaintiff is a candidate for a second term as United States senator from New Mexico. The Clovis Daily Rag prints a news story which states the following:

Senator Jehosaphatt may have received \$20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of \$20,000. When questioned about the deposit, the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates, and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

Senator Jehosaphatt was not reelected in his bid for a second term. Following a recount of the ballots which confirmed Senator Jehosaphatt's loss to his opponent in the general election, the senator sued the local newspaper for \$2,000,000 in damages, claiming loss of reputation, loss of standing in the community and loss of his salary as a United States senator for the term for which he was defeated.

A suggested set of the libel and slander instructions, in recommended sequence, in outline form, illustrates the format as follows:

Instructions

13-1001. Defamation: Defined.

Defamation is a wrongful injury to a person's reputation.

13-1002. Defamation action: Prima facie case; general statement of the elements.

- (A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages:

Senator Jehosaphatt may have received \$20,000 from the Excelsior National Bank in exchange for obtaining for the bank its charter as a national banking corporation. Senator Jehosaphatt's personal checking account in a Santa Fe bank reflects that six (6) months before the bank was awarded its charter, Senator Jehosaphatt's account showed a deposit of \$20,000. When questioned

about the deposit the senator stated that he often deposited large sums of money in his personal checking account from his private investments and that this must have been the proceeds from the sale of a private asset. Although no private asset could be found which Senator Jehosaphatt sold near the date of the deposit, it is known that Senator Jehosaphatt and George Jacobson, President of the Excelsior National Bank, have been longtime friends and political associates, and that Senator Jehosaphatt is the owner of 20,000 shares of the bank's capital stock.

- (B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:
 - (1) The communication contains a statement of fact; and
 - (2) The statement of fact was false; and
 - (3) The communication was defamatory; and
 - (4) The persons receiving the communication understood it to be defamatory; and
 - (5) The defendant acted with malice; and
 - (6) The communication caused actual injury to plaintiff's reputation.

- (C) The defendant denies the contentions of the plaintiff.

- (D) Related to the claims, plaintiff contends and has the burden of proving that he is entitled to punitive damages. To be entitled to punitive damages plaintiff must prove that the publication of the communication by defendant was made with knowledge of falsity or reckless disregard for whether it was false or not. This contention is denied by defendant.

- (E) After considering the evidence and these instructions as a whole, you are to determine the following questions:
 - (1) Did the communication contain a statement of fact?
 - (2) Was the communication false?
 - (3) Was the communication defamatory?
 - (4) Did the people receiving the communication understand it to be defamatory?
 - (5) Did the defendant act with malice?
 - (6) Did the communication cause actual injury to plaintiff's reputation?

If you decide that the answer to any of these questions is "No", you shall return a verdict for the defendant and against the plaintiff.

If you decide that the answer to each of the questions presented is "Yes", then you shall determine the amount of money that will compensate plaintiff for the injuries and damages in accordance with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

13-304. Burden of proof; greater weight of the evidence; clear and convincing evidence.

It is a general rule in civil cases that a party seeking a recovery has the burden of proving every essential element of the claim by the greater weight of the evidence.

To prove by the greater weight of the evidence means to establish that something is more likely true than not true. When I say, in these instructions, that the party has the burden of proof on a claim of defamation, I mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.

An exception to the general rule is that on the claims of malice and entitlement to punitive damages a higher degree of proof is required. On these claims plaintiff has the burden of proving his claims by clear and convincing evidence.

13-1004. Statement of fact: Fact defined; opinion contrasted.

To support a claim for defamation, the communication by defendant must contain a statement of fact.

In contrast, statements of opinion alone cannot give rise to a finding of defamation.

However, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact.

In deciding whether the communication is or contains a statement of fact, you should consider the following:

- (A) The entirety of the communication and the context in which the communication was made; and
- (B) Whether reasonable persons would be likely to understand the communication to be a statement of the defendant's opinion or a statement of fact.

13-1006. Falsity: defined.

To support a claim for defamation, the communication must be false.

One or more statements of fact in the communication must be false in a material way. Insignificant inaccuracies of expression are not sufficient.

13-1007. Defamatory communication: defined.

To support a claim for defamation, a communication must be defamatory.

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with him.

In deciding whether the communication was defamatory, you must consider its plain and obvious meaning.

In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.

13-1008. Defamatory meaning understood.

To support a claim for defamation, the defamatory meaning of the communication must be understood by the person to whom it was communicated.

The defamatory meaning of a communication is that which the recipient reasonably understands it was intended to express. It is what the recipient of the communication reasonably understood the meaning to be that controls, not what the defendant may have intended to convey.

13-1009. Wrongful act: defined.

To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

13-1801. Liability must be determined before damages.

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an

indication as to whether the court thinks damages should or should not be awarded.

13-1010. Actual injury and compensatory damages.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for the actual injury caused by the defamatory communication.

Plaintiff claims and has the burden of proving that the defamatory communication caused one or more of the following injuries:

- (1) Loss of salary; and
- (2) Out of pocket expenses for moving; and
- (3) Injury to plaintiff's good name and character among his friends, constituents, neighbors and acquaintances; and
- (4) Injury to plaintiff's good standing in the community; and
- (5) Personal humiliation; and
- (6) Mental anguish and suffering.

The cause of an injury is that which in a natural and continuous sequence unbroken by an independent intervening cause produces that injury, and without which the injury would not have occurred. It need not be the only cause, nor the last, nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which, in combination with it, causes the injury.

In determining the amount of damages, you may only award money to compensate for the above listed actual injuries proved by the plaintiff to have been suffered by him. It is not necessary for plaintiff to present evidence which assigns an actual dollar value to the injuries. In determining compensation for plaintiff's actual injuries, if any, you should follow your conscience as impartial jurors, using calm and reasonable judgment and being fair to all parties.

13-1011. Punitive damages.

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be

sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the actual damages and injury and not disproportionate to the circumstances.

13-307. Rules of evidence.

The evidence which you are to consider in this case consists of the testimony of the witnesses and the exhibits admitted into evidence by the court and any facts admitted or agreed to by counsel. The production of evidence in court is governed by the rules of law. From time to time it has been my duty, as judge, to rule on the evidence; you must not concern yourselves with the reasons for these rulings. You should not consider what would or would not have been the answers to the questions which the court ruled could not be answered.

13-2004. Witness impeached.

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

13-2001. Performance of your duties.

Faithful performance by you of your duties is vital to the administration of justice.

13-2002. Duty to follow instructions.

The law of this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction or parts thereof, and disregarding others.

13-2003. Jury sole judges of witnesses.

You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, memory, manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the testimony, considered in light of all the evidence in the case.

13-1903. Jury duty to consult.

In deliberating on this case, it is your duty, as the jurors, to consult with one another and to decide the case only after an impartial consideration of the evidence. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Remember that you are not partisans but judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

13-2005. Jury sole judges of facts.

You are the sole judges of all disputed questions of fact in this case. It is your duty to determine the true facts from the evidence produced here in open court. Your verdict should not be based on speculation, guess or conjecture.

You are to apply the law, as stated in these instructions, to the facts as you find them and, in this way, decide the case. Neither sympathy nor prejudice should influence your verdict.

13-2006. All jurors to participate.

The jury acts as a body. Therefore, on every question which the jury must answer it is necessary that all jurors participate regardless of the vote on another question. Before a question can be answered, at least five of you must agree upon the answer; however, the same five need not agree upon each answer.

13-2007. Closing arguments.

After these instructions on the law governing this case, the lawyers may make closing arguments, or statements, on the evidence and the law. These summaries can be of considerable assistance to you in arriving at your decision and you should listen carefully. You may give them such weight as you think proper. However, neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in these instructions.

13-2008. No damages unless liability.

You are not to discuss damages unless you have first determined that there is liability.

13-2009. Verdict of _____.

Upon retiring to the jury room, and before commencing your deliberations, you will select one of your members as foreperson.

When as many as five of you have agreed upon a verdict, your foreperson must sign the appropriate form and you will all then return to open court.

13-2201. Verdict for plaintiff; single parties.

We find for the plaintiff in the sum of \$_____.

13-2202. Verdict for defendant; single parties.

We find for the defendant.

Foreperson