

EXHIBIT A

MUJI 10.4**DEFINITION: FALSE STATEMENT OF FACT**

The first essential element of the plaintiff's case requires the plaintiff to prove that the publication contained a materially false statement of fact. "False" means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time the defendant made the statement.

A true statement cannot be the basis of a defamation claim, even if it is annoying, embarrassing, or reflects upon the plaintiff's reputation or uses inflammatory, caustic and irritating terms.

The statement, to be true, need not be absolutely, totally or literally true, but must be substantially true. A statement is considered to be true if it is substantially true or that the gist of the statement is true. When a statement is so near the truth that fine distinctions must be drawn on words pressed out of their ordinary usage to sustain any claim of falsity, you are to consider the statement as being true.

References:

- Direct Import Buyer's Ass'n v. KSL, Inc.*, 572 P.2d 692 (Utah 1977)
- Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222 (Utah 1976)
- Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (1952)
- Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956 (1949)
- Williams v. Standard-Examiner Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933)
- Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990)
- Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986)
- Herbert v. Lando*, 441 U.S. 153 (1979)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)
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MUJI 10.7

**DEFINITION: KNOWING FALSEHOOD OR RECKLESS
DISREGARD AS TO TRUTH OR FALSITY**

Because the plaintiff is a public official or a public figure, the plaintiff must prove that the defamatory statement was published with: (1) knowledge that it was false; or (2) reckless disregard of whether it was true or false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was transmitted, the defendant had serious doubts that the statement was true.

In determining whether the defendant published the statement knowing the statement to be false or with reckless disregard for the truth, you should take into account all the facts and circumstances. You may consider whether the statement was fabricated or the product of the defendant's imagination. You may also consider what the defendant knew about the source of the information and whether there were reasons for the defendant to doubt the informant's veracity, whether the information was inherently improbable, or if there were other reasons for the defendant to doubt the accuracy of the information.

[In determining whether there was knowing falsehood or reckless disregard for the truth, however, it is not enough for you to find that the defendant acted negligently, carelessly, sloppily or did not exercise good judgment in researching, writing, editing or publishing the statement.] [An extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers does not, standing alone, constitute knowledge of falsity or reckless disregard for the truth.] [Failure to investigate does not, in itself, establish knowing falsehood or reckless disregard for the truth.] [The reliance on one source standing alone does not constitute knowing falsehood or reckless disregard for the truth, even if other sources would be readily available, and even if, in applying reasonable reporting care, you believe those other sources should have been contacted.]

[Knowing falsehood or reckless disregard as to the truth or falsity does not require a finding of spite, ill will, hatred, bad faith, evil purpose or intent to harm.]

The mere fact that a mistake may occur does not evidence knowing falsehood or reckless disregard for the truth. Reckless disregard for the truth or falsity requires a finding that the defendant had a high degree of awareness that the statement was

probably false, but went ahead and published the statement anyway. The test is not whether the defendant acted as a responsible publisher would have acted under the circumstances. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a standard of conduct in this matter.

[Unless you find by clear and convincing evidence, under all the circumstances, that the defendant acted knowing the statement to be false or with a high degree of awareness of its probable falsity, there can be no liability.]

Comments

The weight of authority supports affording the protections of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to media and non-media defendants alike in public official/public figure cases, and nothing in the foregoing instruction should be construed as suggesting the contrary.

Further, there may be other factors to be considered in determining knowing falsehood or reckless disregard for the truth that may be appropriately grafted into this instruction depending upon the particular facts of any case. In particular, inasmuch as the law is unsettled, the user of this instruction should consider whether evidence of motive and intent (any one of which standing alone may not evidence knowing falsehood or reckless disregard for the truth) may be used, by cumulation with other factors (i.e. negligence) and appropriate inferences, to establish knowing falsehood or reckless disregard for the truth and how that should be reflected in the instruction.

References:

- West v. Thomson Newspapers*, 188 Utah Adv. Rep. 31 (Ct. App. 1992)
- Masson v. New Yorker Magazine, Inc.*, 59 U.S.L.W. 4726, 473 (June 20, 1991)
- Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983)
- Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980)
- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)
- St. Amant v. Thompson*, 390 U.S. 727 (1968)
- Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
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MUJI 10.11**DAMAGES**

If you find that the plaintiff has established all the elements of the plaintiff's case, as those elements have been defined for you, then you should consider the issue of damages.

In considering damages, if any, you should consider those pecuniary losses and general damages which the plaintiff has shown by the preponderance of the evidence to have sustained that were proximately caused by the publication of the false statements.

Pecuniary loss is that loss which is actual, such as a loss of income, or those damages of a readily and easily quantifiable amount that [are attributed to] [were incurred because of] the actions of other persons. Loss of income created by feelings of grief, sadness, anger or otherwise that may have inhibited the plaintiff's capability or desire to work are not, as such, pecuniary losses for these purposes.

General damages are those that are the natural and necessary result of an act, and as such, do not include specific pecuniary loss such as an award for loss of salary, income, employment, opportunity for employment, or anything else in the area of actual monetary loss.

In considering general damages, you may consider the plaintiffs injured feelings, humiliation and tarnished reputation, impairment of standing in the community, anxiety, shame, mortification, and mental anguish and suffering, taking into account the nature of the statements, the extent of their publicity, and the character, station in life, and influence of the respective parties to the lawsuit. You may also take into account whether there will, with reasonable certainty, be any such injuries in the future to the plaintiff. Considering all of such matters, it is for you to determine such amount as in your judgment will be just and reasonable compensation for the plaintiff for any injury and damage sustained.

If you award the plaintiff general damages, you may award those damages which flow from the false and defamatory statements of the defendant but not those which may have occurred as a result of any other actions of the defendant, including any other statements referring to the plaintiff that are not false, defamatory, or not made with actual malice. You may not award damages that are the result of the plaintiff's own activities or any other person's

activities. In determining what amount of damages, if any, to be awarded, you may also consider the plaintiff's own reputation.

Comments

There may be some circumstances under which damages may be presumed. Under those circumstances, this instruction must be modified to reflect that the jury may presume some damages.

References:

- Phillips v. JCM Dev. Corp.*, 666 P.2d 876 (Utah 1983)
- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969)
- Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850 (S.D. Cal. 1954)
- Pridonoff v. Balokovich*, 228 P.2d 6 (Cal. 1951)

MUJI 10.12**DAMAGES: PUNITIVE DAMAGES**

Before any award of punitive damages can be considered, the plaintiff must prove by clear and convincing evidence that the defendant published a defamatory falsehood about the plaintiff, knowing it was false or in reckless disregard of whether it was true or false, and that the defendant acted with "personal malice" toward the plaintiff. Personal malice means that the defendant acted with hatred or ill will towards the plaintiff, or with an intent to injure the plaintiff, or acted willfully or maliciously towards the plaintiff.

If you find that the defendant published a defamatory falsehood about the plaintiff, knowing it was false or with reckless disregard of whether it was true or false, and acted with personal malice, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage.

Comments

There may be circumstances where personal malice may not be inferred from the communication or publication (i.e. certain privileged matters) that should be reflected in this Instruction if applicable. See Utah Code Ann § 45-2-4 (1953).

There may be circumstances where a finding of knowing falsehood or reckless disregard for the truth is not a necessary element of liability (i.e., private figure plaintiff). In such cases, an instruction on the meaning of knowing falsehood or reckless disregard would be necessary.

References:

- Utah Code Ann. §§ 45-2-3 to 4 (1988)
- Prince v. Peterson*, 538 P.2d 1325 (Utah 1975)
- Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958)
- Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956 (1949)
- Fausett v. American Resources Management Corp.*, 542 F. Supp. 1234 (D. Utah 1982)

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Time Inc. v. Pape, 401 U.S. 279 (1971)
Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)
St. Amant v. Thompson, 390 U.S. 727 (1968)
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Kapellas v. Kofman, 459 P.2d 912 (Cal. 1969)
Field Research Corp. v. Patrick, 106 Cal. Rptr. 473 (Ct. App.), *cert. denied*, 414 U.S. 922 (1973)
Peisner v. Detroit Free Press, Inc., 364 N.W.2d 600 (Mich. 1984)