

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

MICHAEL E. MANN, PH.D.,)	
)	
Plaintiff,)	Case No. 2012 CA 008263 B
)	Judge: Alfred S. Irving, Jr.
v.)	
)	
NATIONAL REVIEW, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	

**PLAINTIFF’S MOTION TO INSTRUCT
THE JURY ON PRESUMED DAMAGES**

Plaintiff, Michael E. Mann, Ph.D., through his counsel of record, respectfully requests that the Court conform the final jury instructions to controlling District of Columbia law and provide an instruction addressing presumed damages.

As this Court has stated, in order to recover damages, a plaintiff in a defamation case must show “either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.” July 22, 2021 Steyn Order at 5 (citing *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016), *as amended* (Dec. 16, 2018)). And as this Court ruled in the Steyn decision: “Mr. Steyn has failed to provide binding authority that presumptive damages should not be awarded in defamation cases if actual malice is shown. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 86 (D.C. 1980) (finding that presumed damages can be recovered ‘only if reckless or knowing falsehood is proved’); *see also Gertz v. Robert Welch*, 418 U.S. 323, 349-350 (1974); *Vereen v. Clayborne*, 623 A.2d 1190, 1195 n.5 (D.C. 1993); *Ingber v. Ross*, 479 A.2d 1256, 1264-65 (D.C. 1984).” July 22, 2021 Steyn Order at 30.

The Court was correct; assuming actual malice is shown in this case involving defamation per se, presumptive damages may be awarded.

As such, a jury in a case of libel per se is permitted to award damages even in the absence of special harm or actual damages. The requested instruction, attached, conforms to the jury verdict form, which does not require a showing of actual harm for an award of damages to be made. The proposed, additional language is as follows:

Even if the plaintiff has not proved any actual damages for harm to [(1) the plaintiff's good name and reputation, (2) mental anguish, distress, and humiliation, or (3) economic or monetary loss], the law nonetheless assumes that he has suffered this harm. Without presenting evidence of damage, the plaintiff is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum.¹

Because the District of Columbia Standardized Jury Instructions do not include an instruction in cases of libel *per se*, this instruction is taken from the Judicial Council of California Civil Jury Instructions, modified to conform to District of Columbia Standard Jury Instruction § 17.13. *See* 2017 CACI Archive 1700 (2018). This instruction should be given at the end of the existing instruction on compensatory damages.

We note that Defendants have argued previously that no further changes can be made to the proposed jury instructions. During the January 31, 2023 conference, Defendants argued that all further objections to jury instructions have been waived. This contention is incorrect. Requests for jury instructions may be made up until the time the jury is charged. D.C. Super. Ct. R. 51. *See also Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 340 (3d Cir. 2005) (finding

¹ This jury instruction was modified from the Judicial Council of California Civil Jury Instructions. *See* 2017 CACI Archive 1700 (2018). The bracketed items were modified from the California instruction to conform to the items stated in the District of Columbia Standardized Jury Instructions precisely.

that the trial court adhered to the identical Federal Rule of Civil Procedure 51 framework when requesting final on-the-record objections to the jury instructions “before the case went to the jury”); *see also Jarvis v. Ford Motor Co.*, 283 F.3d 33, 57 (2d Cir. 2002) (“[F]ailure to object to a jury instruction . . . prior to the jury retiring results in a waiver of that objection.” (emphasis added)).

ARGUMENT AND AUTHORITY

Dr. Mann has alleged, throughout this case, that Defendants’ defamatory statements are libel per se. “A statement is defamatory as a matter of law (‘defamatory per se’) if it is so likely to cause degrading injury to the subject’s reputation that proof of that harm is not required to recover compensation.” *Franklin v. Pepco Holdings, Inc.*, 875 F. Supp. 2d 66, 75 (D.D.C. 2012). Statements that constitute defamation per se are generally limited to “false statements that impute to the subject a crime, a repugnant disease, a matter adversely affecting the person’s ability to work in a profession, or gross sexual misconduct.” *Id.* “Defamation per se is actionable when the statement(s) at issue make a plaintiff unfit for their chosen profession” or when the defamatory statements “may reasonably be capable of calling a plaintiff’s professionalism into question or lowering him in the estimation of a of a substantial, respectable group.” *Meyer Group, Ltd. v. Rayborn*, ____ F. Supp. 3d ____, 2023 WL 7006791, at *20 (D.D.C. 2023).

When a statement is defamatory per se, it is “actionable without proof of special damages.” *Grossman v. Goemans*, 631 F. Supp. 972, 973–74 (D.D.C. 1986); *Szymkowicz v. Frisch*, Civ. A. No. 19-3329 (BAH), 2020 WL 4432240, at *7 (D.D.C. July 31, 2020) (“[I]n a case involving defamation per se, damages are presumed and no proof of actual harm to reputation is required for the recovery of damages.” (quoting *Prendeville v. Singer*, 155 Fed. App’x 303, 305 (9th Cir. 2005))).

“[A] plaintiff who is a public figure may only recover presumed [] damages upon a showing of actual malice.” *Jiggetts v. Cipullo*, Civ. A. No. 15-1951 (RBW), 2019 WL 1778147, at *15 (D.D.C. Apr. 23, 2019). Dr. Mann is a public figure. Actual malice is already a requirement of this cause of action. Actual malice is required for Dr. Mann to prove his claim in the first place. *See Tah v. Global Witness Publishing, Inc.*, 413 F. Supp. 3d 1, 12 (D.D.C. 2019). By virtue of his status as a public figure, Dr. Mann must “demonstrate by clear and convincing evidence that the defendant published the defamatory falsehood with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* (quoting *Liberty Lobby, Inc. v. Dow Jones & Co, Inc.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988)).

“The district court has considerable discretion when crafting instructions, which should be exercised with an aim toward guiding the jury toward an intelligent understanding of the legal and factual issues involved in its search for a proper resolution of the dispute.” *Williams v. District of Columbia*, 825 F. Supp. 2d 88, 91 (D.D.C. 2011). The jury should be made aware of the fundamental aspect of the law of damages explained above. It is necessary for the jury to be aware that Dr. Mann is not required to *show* proof of actual harm at trial, because rather it is *presumed* by the very nature of the defamatory statements that he has suffered harm. The jury will need to weigh this presumption in assigning a monetary value to a damages award.

Accordingly, Dr. Mann requests that the Court provide modify its final instructions as attached in Exhibit A and objects to reading the instruction on compensatory damages without the proposed language on presumed damages also included as part of the final instructions.

RULE 12-I CERTIFICATION

I hereby certify that counsel for Plaintiff emailed opposing counsel on February 4, 2024 that the instruction was not correct and advised that a request would be made on that issue. Defense

counsel has not responded, but Plaintiff presumes there is disagreement regarding the requested relief sought.

Respectfully submitted,

Dated: February 4, 2024

/s/ John B. Williams

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2024, I caused a copy of the foregoing Plaintiff's Motion to Instruct the Jury on Presumed Damages to be served via electronic filing on the following:

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EXHIBIT A

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COMPENSATORY DAMAGES (§ 17.13)

If the plaintiff has demonstrated that he sustained actual injury as a direct result of the publication of a defamatory statement, then you should award the plaintiff compensatory damages.

You should award a sum of money that compensates (1) for any injury to the plaintiff's good name and reputation, (2) for any mental anguish, distress, and humiliation, and (3) for any economic or monetary loss that the plaintiff suffered as a result.

You are not to return a separate sum for each element that I have mentioned. Rather, you should consider all of these elements to arrive at a single amount of compensatory damages.

Even if the plaintiff has not proved any actual damages for harm to [(1) the plaintiff's good name and reputation, (2) mental anguish, distress, and humiliation, or (3) economic or monetary loss], the law nonetheless assumes that he has suffered this harm. Without presenting evidence of damage, the plaintiff is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.²

²Judicial Council of California Civil Jury Instructions, 2017 CACI Archive 1700 (2018) (bracketed items modified to conform to preceding language in 1 Civil Jury Instructions for DC § 17.13).

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PROPOSED ORDER

AND NOW, upon consideration of Plaintiff’s Motion to Instruct the Jury on Presumed Damages, and all responses and replies thereto, it is hereby **ORDERED** that the motion is **GRANTED**.

SO ORDERED.

DATED: _____, 2024

Honorable Alfred S. Irving, Jr.
Associate Judge

Copies by electronic service to all counsel of record.