

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.]

USE NOTES

The traditional rule in New Mexico, both at common law and by statute, is that truth is an affirmative defense to an action for defamation and as such, the defendant has the burden of pleading and proof on the issue. *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969); see *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 936, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); N.M. Stat. Ann. § 38-2-9 (1978).

The United States Supreme Court has made significant inroads into this common law rule. Where the plaintiff is a public official, the plaintiff must now prove that the alleged defamatory statement is false. *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783 (1986). A "public-figure plaintiff" must also show the falsity of the statements at issue in order to prevail on a suit for defamation. *Id.*

In *Hepps*, the supreme court also ruled that "at least where a newspaper published speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false". *Id.* at 1559. Thus, in only one type of case can New Mexico's common law rule that truth is an affirmative defense possibly continue to apply. The supreme court has not barred the treatment of truth as an affirmative defense rather than falsity as part of the plaintiff's case where the plaintiff is a private figure and the subject matter of the alleged defamation is solely a matter of private concern. See *Dun & Bradstreet Inc. v. Greenmoss Bldrs. Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (recognizing separate category of private plaintiff/subject matter not of public concern).

Until and unless the United States Supreme Court extends the ruling in *Hepps* to private plaintiffs asserting defamation concerning a matter not of public concern, the New Mexico common law rule that truth is a defense presumably continues to apply in defamation actions of that type. Therefore, this bracketed instruction should be given in all defamation cases except where private plaintiffs seek damages for defamatory statements that are not matters of public concern. In "private plaintiff/private concern" cases, the trial judge should omit this instruction and instead give UJI 13-1013 until the United States Supreme Court mandates otherwise, or until the New Mexico Supreme Court modifies the common law rule.

This instruction informs the jury that proof of insignificant errors in the published statement are not sufficient to prove the requisite falsity. The burden is on the plaintiff to demonstrate that the communication was false in a material aspect. The language chosen is a modification of the language of *Franklin v. Blank*, 86 N.M. 585, 588, 525 P.2d 945, 948 (1974), in which the court explained the requirement in the context of an instruction describing what was then the defense of truth:

It is not necessary to prove the literal truth of statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance and it is sufficient to show that the imputation is substantially true.