806.51 DEFAMATION—LIBEL ACTIONABLE *PER SE*—PRIVATE FIGURE—MATTER OF PUBLIC CONCERN.

NOTE WELL: This instruction[1] applies when the trial judge has determined as a matter of law[2] that: (1) the statement is libelous[3] on its face;[4] (2) the plaintiff is a private figure and (3) the subject matter of the statement is of public concern.[5]

NOTE WELL: See N.C.P.I—Civil 806.40 ("Defamation—Preface"), nn.12, 14, 29, 30 and accompanying text for a discussion of the proof requirements for this type of plaintiff. A "Yes" answer to this issue entitles the plaintiff to an instruction on actual damages if proof is offered. See N.C.P.I—Civil 806.84 ("Defamation—Actual Damages"). Presumed damages are only allowed upon a showing of actual malice. See N.C.P.I—Civil 806.82 ("Defamation—Actionable Per Se—Private Figure—Matter of Public Concern—Presumed Damages"). Punitive damages are permissible if actual malice is shown and the Chapter 1D requirements for punitive damages met. See N.C.P.I—Civil 806.85 ("Defamation—Private Figure—Matter of Public Concern—Issue of Actual Malice").

The (*state number*) issue reads:

"Did the defendant libel the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:

<u>First</u>, that the defendant [wrote] [printed] [caused to be printed][6] [possessed in [written] [printed] form] the following statement about the plaintiff:

(Quote the alleged statement)

<u>Second</u>, that the defendant published[7] the statement. "Published" means that the defendant knowingly [communicated[8] the statement] [distributed[9] the statement] [caused the statement to be distributed] so that it reached one or more persons[10] other than the plaintiff. [Communicating the

statement] [Distributing the statement] [Causing the statement to be distributed] to the plaintiff alone is not sufficient.[11]

Third, that the statement was false.[12]

Fourth, that, at the time of the publication, the defendant either knew the statement was false or failed to exercise ordinary care in order to determine whether the statement was false.[13] Ordinary care is that degree of care that a reasonable and prudent person in the same or similar circumstances would have used in order to determine whether the statement was false.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant [wrote] [printed] [caused to be printed] [possessed in [written] [printed] form] the following statement about the plaintiff: (*Quote the alleged statement*), that the defendant published the statement, that the statement was false, and that, at the time of the publication, the defendant either knew the statement was false or failed to exercise ordinary care in order to determine whether the statement was false, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. For an introduction to this category of defamation, *see* N.C.P.I—Civil 806.40 ("Defamation—Preface") nn.4, 9-10 and accompanying text.

2. *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 26 (2003) ("Whether a publication is deemed libelous *per se* is a question of law to be determined by the court."); *see also* N.C.P.I—Civil 806.40 ("Defamation—Preface"), n.11.

3. "Under the well established common law of North Carolina, a libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one

to ridicule, contempt or disgrace." *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408-09 (1984) (citing *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1937)).

4. *See Griffin v. Holden*, 180 N.C. App. 129, 134, 636 S.E.2d 298, 303 (2006) ("In determining whether [a statement] is libelous *per se* the [statement] alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The [statement] must be defamatory on its face 'within the four corners thereof.' To be libelous *per se*, defamatory words must generally 'be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.'" (citations omitted)).

5. *See Mathis v. Daly*, 205 N.C. App. 200, 205, 695 S.E.2d 807, 811 (2010) (stating that whether speech addresses a matter of public concern will be determined by its context, form and content as evidenced by a reading of the whole record; and that factors tending to show a matter is of public concern include, but are not limited to, national news coverage of the matter and discussion of the matter at government and academic meetings).

6. *See Renwick*, 310 N.C. at 317, 312 S.E.2d at 408-09 ("Under the well established common law of North Carolina, a libel *per se* is a publication by writing, printing, signs or pictures."); *see also Dailey v. Popma*, 191 N.C. App. 64, 66, 662 S.E.2d. 12, 14 (2008) (describing allegedly libelous information on the internet as "internet postings"); Dan B. Dobbs, *The Law of Torts* (2001 ed.), § 408, p. 1141 ("[L]ibel today includes not only writing but all forms of communications embodied in some physical form such as movie film or video tapes . . . Most communications by computer are no doubt in the category of libel." (citations omitted)), and *Hedgepeth v. Coleman*, 183 N.C. 309, 312, 111 S.E. 517, 519 (1922) (Expert testimony that an unsigned typewritten defamatory paper and a letter, "the authenticity of which the defendant did not dispute, were written by the same person on an Oliver typewriter. This was evidence of a character sufficiently substantial to warrant the jury in finding . . . the defendant . . . responsible for [the] typewritten paper of unavowed authorship.").

7. "A written dissemination, as suggested by the common meaning of the term 'published,' is not required; the mode of publication of [defamatory matter] is immaterial, and . . . any act by which the defamatory matter is communicated to a third party constitutes publication." 50 Am. Jur.2d, *Libel and Slander* § 235, pp. 568-69 (citations omitted). Communication by means of e-mail or through use of a website are included among "other methods of communication" by which defamatory matter may be published. 50 Am. Jur. 2d., *Libel and Slander*, § 235, pp. 573-74.

8. "The form of a communication matters not in determining whether it is defamatory. Words or conduct or the combination of words and conduct can communicate defamation." 50 Am. Jur. 2d, *Libel and Slander* § 151 (citations omitted). In the context of claims based upon communications via radio or television, the word "communication" includes "'publishing, speaking, uttering, or conveying by words, acts, or in any other manner' and idea to another person." N.C. Gen. Stat. § 99-1(b).

9. *See* Dobbs at § 402, p. 1123-24 ("Many persons who deliver, transmit, or facilitate defamation have only the most attenuated or mechanical connection with the defamatory content. Some primary publishers like newspapers are responsible as publishers even for materials prepared by others . . . [M]any others such as telegraph and telephone companies, libraries and news vendors are regarded as mere transmitters or disseminators rather than publishers. As to these, it seems clear that liability cannot be imposed unless the distributor

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knows or should know of the defamatory content in the materials he distributes." [In addition,] "[a] federal statute . . . immunizes the Internet users and providers so that they are not responsible for material posted by others"; *see* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

10. "[T]o make out a *prima facie* case for defamation, 'plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.'" *Griffin v. Holden*, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006) (citation omitted); *Taylor v. Jones Bros. Bakery, Inc.*, 234 N.C. 660, 662, 68 S.E.2d 313, 314 (1951), *overruled on other grounds*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956) ("While it is not necessary that the defamatory words be communicated to the public generally, it is necessary that they be communicated to some person or persons other than the person defamed.").

11. *Friel v. Angell Care Inc.*, 113 N.C. App. 505, 508, 440 S.E.2d. 111, 113 (1994) (citing *Pressley v. Continental Can Co., Inc.,* 39 N.C. App. 467, 469, 250 S.E.2d. 676, 678 (1979)) ("A communication to the plaintiff, or to a person acting at the plaintiff's request, cannot form the basis for a libel or slander claim.").

12. *See* N.C.P.I—Civil 806.40 ("Defamation—Preface"), n.3.

13. *See Neill Grading & Constr. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 47, 606 S.E.2d 734, 741 (2005) (holding that "North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence.").