806.60 DEFAMATION—LIBEL ACTIONABLE *PER QUOD*—PRIVATE FIGURE—NOT MATTER OF PUBLIC CONCERN.[1]

NOTE WELL: This instruction applies when the trial judge has determined as a matter of law[2] that: (1) the statement is subject to two interpretations, one of which is defamatory and one of which is not; or the statement is not libelous[3] on its face, but is capable of a defamatory meaning when extrinsic evidence is considered;[4] (2) the plaintiff is a private figure and (3) the subject matter of the statement is not of public concern.

NOTE WELL: A "Yes" answer to this issue entitles a plaintiff to an instruction on actual damages. See N.C.P.I.—Civil 806.84 ("Defamation—Actual Damages"). Presumed damages are not available. See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n. 32. If the plaintiff seeks an award of punitive damages and the evidence supports instruction on punitive damages, the plaintiff may receive an instruction on punitive damages under the general statutory standards enunciated in N.C. Gen. Stat. § 1D-15. See N.C.P.I.—Civil 806.40 ("Defamation—Preface), n. 23. N.C.P.I.—Civil 810.96 ("Punitive Damages—Liability of Defendant") and 810.98 ("Punitive Damages—Issue of Whether to Make Award and Amount") should be utilized.

The (*state number*) issue reads:

"Did the defendant libel the plaintiff?"

A libelous statement is one which (*select the appropriate alternative*):

[charges that a person has committed an infamous crime.[5] I instruct you that (*state infamous crime*)[6] is an infamous crime.]

[charges a person with having an infectious disease. I instruct you that [*state infectious disease, i.e., HIV/AIDS, syphilis*] is an infectious disease.]

[tends to [impeach[7]] [prejudice[8]] [discredit[9]] [reflect unfavorably upon][10] a person in that person's trade or profession.]

[tends to subject a person to ridicule, contempt or disgrace.][11]

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, seven things:

First, that the defendant [wrote][12] [printed] [caused to be printed] [possessed in [written] [printed] form] the following statement about the plaintiff:

(*Quote the alleged statement*)

Second, that the defendant published[13] the statement. "Published" means that the defendant knowingly [communicated[14] the statement] [distributed[15] the statement] [caused the statement to be distributed] so that it reached one or more persons[16] other than the plaintiff. [Communicating the statement] [Distributing the statement] [Causing the statement to be distributed] to the plaintiff alone is not sufficient.[17]

Third, that the statement was false.[18]

Fourth, that the defendant intended[19] the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in the plaintiff's trade or profession] [subject the plaintiff to ridicule, contempt or disgrace].

Fifth, that the person other than the plaintiff to whom the statement was published reasonably understood[20] the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in the plaintiff's trade or profession][21] [subject the plaintiff to ridicule, contempt or disgrace].

Sixth, 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.[22] 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.

Seventh, that the plaintiff, as a result of the publication, suffered a monetary or economic loss.[23]

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, that the defendant intended the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in the plaintiff's trade or profession] [subject the plaintiff to ridicule, contempt or disgrace], that the person to whom the statement was published reasonably understood the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in the plaintiff's trade or profession] [subject the plaintiff to ridicule, contempt or disgrace], 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, and that the plaintiff, as a result of the publication, suffered a monetary or economic loss, 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.4-5 and accompanying text.

2. *See Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E.2d 383, 388 (1958) ("It is noted:

'(1) The court determines whether a communication is capable of a defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient'" (quoting *Restatement of the Law of Torts*, § 614).); *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. Libel actionable *per quod* is comprised of those publications "'which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances.'" *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990) (quoting *Flake v. Greensboro News Co.*, 212 N.C. at 785, 195 S.E. at 59).

North Carolina also recognizes a "middle-tier libel" when a statement is "susceptible of two reasonable interpretations, one of which is defamatory and the other is not." *Ellis*, 326 N.C. at 223, 388 S.E.2d at 130 (quoting *Flake*, 212 N.C. at 785, 195 S.E.2d. at 59). Although middle-tier libel may differ technically from libel actionable *per quod* the instructions for libel actionable *per quod* are appropriate for jury instruction purposes in a middle-tier libel claim.

5. N.C. Gen. Stat. § 14-3(b) permits punishment as felonies of misdemeanors constituting "infamous crimes." However, "[t]he applicable statute . . . and the reported cases leave some lack of certainty as to what crimes may be designated and punished as 'infamous.'" *State v. Keen*, 25 N.C. App. 567, 571, 214 S.E.2d 242, 244 (1975). In addition to those crimes specified, all felonies are also "infamous crimes" for defamation purposes. *See, e.g.*, *State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986) ("A crime is 'infamous' within the meaning of the statute if it is an act of depravity, involves moral turpitude, and reveals a heart devoid of social duties and a mind fatally bent on mischief" (citation omitted).), and *Jones v. Brinkley*, 174 N.C. 23, 25, 93 S.E. 372, 374 (1917) (Under an earlier version of N.C. Gen. Stat. § 14-3, "the test is not the nature of the punishment, but the nature of the offense charged. A charge of larceny is actionable *per se*, and 'there is no distinction between grand and petty larceny in this respect.'" (citation omitted)); *see also State v. Surles*, 230 N.C. 272, 283-84, 52 S.E.2d 880, 888 (1949) (Ervin, J., dissenting) ("'At common law, . . . an infamous crime is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi*. This latter term means any offense involving corrupt deceit, or falsehood by which the public administration of justice may be impeded, such as perjury, subornation of perjury, forgery, bribery of witnesses, conspiracy in procuring non-attendance of witnesses, barratry, counterfeiting, cheating by false weights or measures, and conspiring to accuse an innocent person of crime.'" (quoting Burdick, *Law of Crimes*, § 87)).

6. *See* n.5.

7. If further definition of the phrase "impeach the plaintiff in plaintiff's trade or profession" is required, consider: The statement "(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E. 2d 466, 468 (1955).

8. *See Shreve v. Duke Power Co.*, 97 N.C. App. 646, 389 S.E.2d 444 (1990).

9. *Nguyen v. Taylor*, 219 N.C. App 1, 8, 723 S.E.2d. 551, 557-58 (2012) (quoting *Cohen v. McLawhorn*, 208 N.C. App. 492, 503, 704 S.E.2d. 519, 527 (2010)) ("North Carolina has long recognized the harm that can result from false statements that impeach a person in that person's trade or profession – such statements are deemed defamation per se. The mere saying or writing of the words is presumed to cause injury to the subject; there is no need to prove any actual injury.").

10. *See* n.9 *supra*.

11. *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408-09 (1984).

12. *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* Dan B. Dobbs, *The Law of Torts* (2001 ed.) § 408 at 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 . . . was evidence of a character sufficiently substantial to warrant the jury in finding . . . the defendant . . . responsible for [the] typewritten paper of unavowed authorship.").

13. "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 email or through use of a web site 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.

14. "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" an idea to another person. N.C. Gen. Stat. § 99-1(b).

15. *See* Dobbs, § 402 at 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 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.").

16. *Griffin v. Holden*, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006) ("[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.'" (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." (citations omitted)).

17. *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.").

18. *NOTE WELL: See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.2-3. The element of "falsity" has previously been included in every pattern instruction on libel and slander except this instruction, N.C.P.I.—Civil 806.60 ("Defamation—Libel Actionable Per Quod—Private Figure—Not Matter of Public Concern"), and N.C.P.I.—Civil 806.50 ("Defamation—Libel: Libel Actionable Per Se—Private Figure—Not a Matter of Public Concern"). The Pattern Jury Civil Sub-Committee, upon careful consideration (set out at length in N.C.P.I.—Civil, 806.40 ("Defamation—Preface"), n.3), has concluded that the element of falsity should likewise be included in these two instructions.*

If, however, after carefully reviewing 806.40 ("Defamation—Preface"), n.3, it is felt that the burden of proving the truth of the statement as a defense should be placed upon the defendant in the private figure/not matter of public concern circumstance covered by this instruction, then the third element should be deleted from this pattern charge and not submitted to the jury. N.C.P.I.—Civil 806.79 ("Defamation—Libel Actionable Per Se or Libel Actionable Per Quod—Not Matter of Public Concern—Truth as a Defense") should thereafter be submitted to the jury in the event this issue is answered in favor of the plaintiff.

19 *See Raymond U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 708 (1988) (Under libel actionable *per quod*, "the publication must have been intended by defendant to be defamatory and had to be understood as such by those to whom it was published."); *Renwick*, 310 N.C. at 316-17, 312 S.E.2d at 408 ("The plaintiff's complaints in these cases failed to bring the editorial complained of within the second class of libel, since it was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made."); and *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 394, 159 S.E.2d 896, 899 (1968) ("Where the words alleged to have been written and published by the defendant concerning the plaintiff are not, upon their face, susceptible only to a defamatory interpretation, the complaint states no cause of action unless it also alleges that a defamatory meaning was intended by the defendant and understood by those to whom the statement is alleged to have been published."); *see also Cathy's Boutique v. Winston-Salem Joint Venture*, 72 N.C. App. 641, 643, 325 S.E.2d 283, 285 (1985) ("a complaint does not state a cause of action [for 'middle-tier' libel] unless it alleges that the defamatory meaning was intended and was so understood by those to whom the publication was made.").

20 *See* n.19.

21 *See* n.7.

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

23 *Renwick*, 310 N.C. at 317, 312 S.E.2d at 408 ("The complaints failed to bring the

editorial within the third class - libel *per quod* - since it was not alleged that the plaintiff suffered special damages."); *Raymond U*, 91 N.C. App. at 181, 371 S.E.2d at 708 (holding that for publications which are libelous *per quod*, "special damages must be proven."); *Griffin v. Holden*, 180 N.C. App. 129, 135, 636 S.E.2d 298, 303 (2006) ("[W]hen a publication is libelous *per quod*, the injurious character of the words and some special damage must be pleaded and proved."); *see also Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005) ("[S]pecial damages are usually synonymous with pecuniary loss . . . as well as loss of earnings . . . .").