

806.66 DEFAMATION—SLANDER ACTIONABLE *PER SE*—PRIVATE FIGURE—MATTER OF PUBLIC CONCERN.

NOTE WELL: This instruction¹ applies when the trial judge has determined as a matter of law² that: (1) the slanderous³ character of the statement appears on the face of the words alone;⁴ (2) the plaintiff is a private figure and (3) the subject matter of the statement is of public concern. ⁵

NOTE WELL: 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"); N.C.P.I.—Civil 806.40 ("Defamation—Preface") nn.14, 27, 30 and 31 and accompanying text.

The (*state number*) issue reads:

"Did the defendant slander 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:

First, that the defendant made the following statement⁶ about the plaintiff:

(Quote the alleged statement)

Second, that the defendant published⁷ the statement. "Published" means that the defendant knowingly [communicated⁸ the statement] [repeated⁹ the statement] [caused the statement to be repeated] so that it reached one or more persons¹⁰ other than the plaintiff. [Communicating the

statement] [Repeating the statement] [Causing the statement to be repeated]
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 made 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.

1. For an introduction to this category of defamation, see N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.6 and accompanying text.

2. See *Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E.2d 383, 388 (1958) (“The court determines whether a communication is capable of a defamatory meaning.” (citation omitted)); see also N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.11.

3. See *Raymond U v. Duke Univ.*, 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988) (“Slander *per se* involves an oral communication to a third person which amounts to: (1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession; or (3) imputations that the plaintiff has a loathsome disease.” (citations omitted)).

4. “Where the injurious character of the words appear on their face as a matter of

general acceptance they are actionable *per se*." *Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 388, 179 S.E.2d 319, 322 (1971). *See also Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 278, 168 S.E.2d 236, 237-38 (1969) ("Where the injurious character of the words does not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod*." (citation 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, discussion of the matter at government and academic meetings).

6. *Raymond U v. Duke Univ.*, 91 N.C. App. at 182, 371 S.E.2d at 709 ("Slander is a tort distinct from libel in that slander involves an oral communication." (citations omitted)); *see also* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.6.

7. "[T]he 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).

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. "The repeater of defamatory material is also a publisher and subject to liability for the publication." Dan B. Dobbs, *Law of Torts* § 402, p. 1123 (2001 ed.).

10. *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)).

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. *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.").

