806.72 DEFAMATION—SLANDER ACTIONABLE *PER QUOD*—PUBLIC FIGURE OR OFFICIAL.[1]

NOTE WELL: This instruction applies when the trial judge has determined as a matter of law[2] that: (1) the statement is not slanderous on its face, but is capable of a defamatory meaning when extrinsic evidence is considered[3] and (2) the plaintiff is a public figure or official.

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"). A public figure or public official has to prove actual malice to permit an award of punitive damages under the N.Y. Times *standard, and this is incorporated below in the liability consideration. Showing of the statutory criteria set out in Chapter 1D-15(a) is required as well, see N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn. 14, 27, 30 and 31 and accompanying text, and the standard punitive damages instructions, 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 if punitive damages are sought.*

The (*state number*) issue reads:

"Did the defendant slander the plaintiff?"

A slanderous[4] statement is one which (*select the appropriate alternative*):

[charges that a person has committed a crime or offense involving moral turpitude.[5] I instruct you (*state crime or offense*) is a crime or offense involving moral turpitude.][6]

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

[imputes[11] to a person a loathsome disease.[12]]

On this issue the burden of proof is on the plaintiff to prove seven things. The plaintiff must prove the first six things by the greater weight of the evidence. The greater weight of the evidence does not refer to the quantity

of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist. The six things the plaintiff must prove by the greater weight of the evidence are:

First, that the defendant made the following statement[13] about the plaintiff:

(Quote the alleged statement)

Second, that the defendant published[14] the statement. "Published" means that the defendant knowingly [communicated[15] the statement] [repeated[16] the statement] [caused the statement to be repeated] so that it reached one or more persons other than the plaintiff.[17] [Communicating the statement] [Repeating the statement] [Causing the statement to be repeated] to the plaintiff alone is not sufficient.[18]

Third, that the statement was false.[19]

Fourth, that the defendant intended the statement [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in that person's trade or profession] [impute to the plaintiff a loathsome disease].[20]

Fifth, that the person other than the plaintiff to whom the statement was published reasonably understood the statement to [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in that person's trade or profession] [impute to the plaintiff a loathsome disease].

Sixth, that the plaintiff, as a result of the publication, suffered a monetary or economic loss.[21]

Members of the jury, the plaintiff's burden of proof as to the first six things is by the greater weight of the evidence. However, as to the seventh

thing, the plaintiff's burden of proof is by clear, strong and convincing evidence. Clear, strong and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear, strong and convincing fashion. You shall interpret and apply the words "clear," "strong" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.

Seventh, the plaintiff must prove by clear, strong and convincing evidence, that at the time of the publication, the defendant either knew the statement was false or acted with reckless disregard to whether it was false.[22] Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.[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 made 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 a crime or offense involving moral turpitude] [impeach the plaintiff in that person's trade or profession] [impute to the plaintiff a loathsome disease], that the person to whom the statement was published reasonably understood the statement to [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in that person's trade or profession] [impute to the plaintiff a loathsome disease], and that the plaintiff, as a result of the publication, suffered a monetary or economic loss; and if you further find by clear, strong and convincing evidence that the defendant, at the time of the publication, either knew the statement was false or acted with reckless disregard of 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") nn.6, 9-10 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.'" (citation omitted)); *see also* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.11.

3. *See 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)).

4. *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)).

5. *See Restatement (Second) of Torts* § 571, cmt. g (defining moral turpitude "as inherent baseness or vileness of principle in the human heart; it means, in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good morals, justice, or ethics as to be shocking to the moral sense of the community."), and *Jones v. Brinkley*, 174 N.C. 23, 25, 93 S.E. 372, 373 (1917) (defining moral turpitude as "[a]n act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man" (citation omitted)).

6. "The question of whether an offense involves moral turpitude is one particularly suitable for the trial court's judgment." 28 Am. Jur.2d, *Libel and Slander* § 161, p. 510 (citing *Freedlander v. Edens Broadcasting, Inc.*, 734 F. Supp. 221 (E.D. Va. 1990), *order aff'd*., 923 F.2d 848 (4th Cir. 1990). *See also Jones v. Brinkley*, 174 N.C. 23, 25, 93 S.E. 372, 373 (1917) (deciding as a matter of law that accusation of larceny, even if not at a felony level, was sufficient grounds for a defamation action).

7. If further definition of the phrase "impeach the plaintiff in the 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." *See Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E. 2d 466 (1955).

8. *See Shreve v. Duke Power Co.*, 97 N.C. App. 648, 650, 389 S.E.2d 444, 446 (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. If an alternative to "imputes" is desired, the phraseology "conveys that [a person] has a loathsome disease," may be used. *See Dobson v. Harris*, 134 N.C. App. 573, 579, 521 S.E.2d 710, 715-16 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000); *see also Restatement (Second) of Torts* § 572, cmt. d ("To be actionable . . . , it is necessary that the words impute to the other person a present infection," *i.e.*, a current as opposed to

a past infection); *cf. Prosser and Keeton on Torts* § 112, p. 790 ("it is well established that the imputation that the plaintiff has had even a venereal disease in the past is not sufficient without proof of damage.").

12. *See Restatement (Second) of Torts* § 572, cmt. b ("An imputation that another is currently afflicted with syphilis, gonorrhea or any other infection ordinarily contracted through sexual intercourse, is included within . . . this Section . . . . So, too, an imputation of leprosy presently existing, is actionable *per se.*); *see also id.* at § 572, cmt. c ("The rule stated must . . . be limited to diseases that are held in some special repugnance, and that are lingering or chronic, so that they may be expected to last for a considerable period."); *Prosser and Keeton on Torts* § 12, p. 790 (the basis of the category "seems originally to have been the exclusion from society which would result. From the beginning it was limited to cases of venereal disease, with a few instances of leprosy, and it was not applied to more contagious and equally repugnant disorders such as smallpox. The basis of the distinction was in all probability the fact that syphilis and leprosy were regarded originally as permanent, lingering and incurable, while from smallpox one either recovered or died in short order. [Similarly,] with the advance of medical science . . . , today accusations of insanity or of tuberculosis . . . are not included [within the category].").

13. *Raymond U*, 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.

14. "[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).

15. "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).

16. "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.).

17. *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)).

18. *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.")

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

20. *See Wright v. Commercial Credit Company, Inc.*, 212 N.C. 87, 88, 192 S.E. 844, 845 (1937) ("The jury must not only be satisfied that the defendant's [defamatory] meaning was as charged, but that he was so understood by the persons who heard him."), *Dameron*

v. Neal, 49 N.C. 367, 367 (1857) ("If the words . . . used are such as to convey to the minds of the hearers the intent of the defendant to slander the plaintiff in particular, it is sufficient."), and *Studdard v. Linville*, 10 N.C. (3 Hawks) 474, 477 (1825) (approving jury instruction that if the jury "should believe that it was the intention of the defendant to charge the plaintiff with perjury, and the words he made use of were such as to convey such intention to the minds of the bystanders, . . . they would be slanderous"); *see also Raymond U v. Duke University*, 91 N.C. App. at 181, 371 S.E.2d at 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.").

21. *See Badame v. Lampke*, 242 N.C. at 756, 89 S.E.2d at 467 ("Defamatory words may be actionable *per se*, that is, in themselves, or they may be actionable *per quod*, that is, only upon allegation and proof of special damage."); *Gibson v. Mutual Life Ins. Co.*, 121 N.C. App. 284, 289, 465 S.E.2d 56, 59 (1996) ("Slander *per quod* arises where the defamation is 'such as to sustain an action only when causing some special damage . . . in which case both the malice and the special damage must be alleged and proved.'" (citation omitted)); *see also Iadanza v. Harper*, 169 N.C. App. 766, 779, 611 S.E.2d 217, 221 (2005) ("[S]pecial damages are usually synonymous with pecuniary loss . . . as well as loss of earnings . . . .").

22. This element incorporates the "actual malice" requirement mandated by *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 20 L. Ed.2d 262, 267 (1964); *see* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.14.

23. *See Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977) (noting the U.S. Supreme Court in *Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed.2d 262, 267 (1968), "refined the definition of 'reckless disregard' to require 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."); *see also Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 461, 524 S.E.2d 821, 825 (2000) (actual malice may be shown, *inter alia*, by publication of a defamatory statement "with a high degree of awareness of its probable falsity."), and *Ward v. Turcotte*, 79 N.C. Ap. 458, 461, 339 S.E.2d 444, 446-7 (1986) (citation omitted) ("Actual malice may be found in a reckless disregard for the truth and may be proven by a showing that the defamatory statement was made in bad faith, without probable cause or without checking for truth by the means at hand.").