

N.C.P.I.—Civil 806.40
 DEFAMATION—PREFACE.
 GENERAL CIVIL VOLUME
 DECEMBER 2016

806.40 DEFAMATION—PREFACE.¹

(*This document has attachments. See Instruction References.*)

NOTE WELL: Libel, which generally involves written statements, and slander, which generally involves spoken statements, are complex torts. The elements vary depending upon how the claim is classified for common law and for constitutional purposes. The following brief summary of this complicated topic is recommended reading prior to commencing the trial of any defamation claim.

A defamatory statement² is one which is false³ and which is communicated to a person or persons other than the person defamed, thereby causing injury to the person defamed. Libel actionable *per se*⁴, libel actionable *per quod*⁵, slander actionable *per se*⁶ and slander actionable *per quod* are all distinct varieties of defamation under the common law.

In the landmark decision of *New York Times v. Sullivan*⁷, the United States Supreme Court began to alter the common law rule by providing First Amendment protection to certain speech. Subsequent cases established three general types of defamation claims- those involving private figures in matters not of public concern,⁸ those involving private figures in matters of public concern,⁹ and those involving public figures or public officials.¹⁰

The trial judge must, as a matter of law¹¹, determine the classification of a particular defamation claim for both common law and constitutional purposes. Once such classification has been determined, differing fault levels for both liability and damages apply.

In the first category of cases, those involving private figures in matters not of public concern, the fault level to establish liability is negligence.¹² Similarly, in cases involving private figures in matters of public concern, the fault level for liability is also negligence.¹³ However, for cases involving public figures or public officials, the liability fault level is actual malice.¹⁴

The question of damages adds further layers of complexity to defamation cases. Cases actionable *per se*, for example, may involve three different kinds of "compensatory"¹⁵ damages:

1. *Pecuniary/Special Damages.* If a plaintiff seeks recovery for an actual monetary loss (such as lost income), such damages are described as pecuniary or special damages.¹⁶ These damages are subject to specific pleading¹⁷ and proof requirements and are one form of "actual damage."¹⁸

2. *Actual Harm Damages.* As defined by the U.S. Supreme Court, actual harm damages include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."¹⁹ These damages must be proved by competent evidence and are also a form of "actual damage."

3. *Nonproven/Presumed Damages.* Presumed damages may include "mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms."²⁰ At common law and in certain circumstances dependent upon the type of plaintiff and the subject of the case, these damages may be presumed without particularized proof and may be nominal or in a substantial amount if so determined by the trier of fact.²¹

For defamation cases that are not actionable *per se*, that is middle-tier libel and defamation actionable *per quod*, only the first two categories of damages (pecuniary/special damages and actual harm) are available. Plaintiffs in these cases cannot recover nonproven/ presumed damages, but rather must prove actual damages as an element of the claim.²²

4. *Punitive Damages.* In addition to the foregoing categories of damages, a plaintiff may seek punitive damages if *he* can satisfy the proof requirements for the type of plaintiff and speech involved in the case.

As with the issue of liability, the standards for awarding particular types of damages may implicate constitutional principles and vary according to the type of plaintiff and whether or not the speech at issue involves a matter of public concern.

In cases of defamation actionable *per se*, the common law historically allowed a presumption of malice and reputational damages, at least nominally, without specific proof of actual injury.²³ Further, with reference to punitive damages, the North Carolina rule has been that such damages are allowed only upon a showing that the plaintiff sustained actual damages and that the defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and the plaintiff's rights.²⁴

Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability,²⁵ but also to recover presumed and punitive damages.²⁶ Thus, in a defamation case actionable *per se*, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard²⁷ and, if proof of actual damage in the form of pecuniary damages or actual harm damages is presented, may seek such damages as well.

In contrast, a private figure plaintiff in a case actionable *per se* involving either a matter of private or public concern may establish liability based upon a negligence standard.²⁸ In both instances, an actual damage award is available upon the presentation of evidence supporting such an award.

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However, in a public matter claim, the private figure plaintiff must establish actual malice in order to receive presumed and punitive damages,²⁹ but in a private matter claim may receive presumed and punitive damages absent a showing of actual malice.³⁰ Notwithstanding, with regard to punitive damages, a private figure/private matter plaintiff seeking such damages currently must also satisfy the following statutory provisions:

N.C. Gen. Stat. § 1D-15. Standards for recovery of punitive damages.

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

- (1) Fraud.
- (2) Malice.
- (3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.³¹

In cases actionable *per se* involving a public figure or official or in private plaintiff/not matter of public concern cases,³² the presumption of actual damages upon the appropriate fault showing suffices for the showing of actual damages required to seek punitive damages.³³

In matters actionable *per quod*, punitive damages are available to public figure plaintiffs without an additional showing, to private plaintiffs in a public matter on a showing of actual malice, and to private plaintiffs in a private matter on a showing which satisfies the statutory criteria.³⁴

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Finally, media defendants receive certain statutory protection from punitive damages awards.³⁵

NOTE WELL: The charts that follow are incorporated into this preface, but are printed on single pages for convenience of use.

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The first two charts summarize the foregoing recitation of the differing fault levels for both liability and damages in defamation cases:

	Matter Actionable Per Se: Private Figure/Not Matter of Public Concern (<i>Libel-806.50</i> <i>Slander-806.65</i>)	Matter Actionable Per Se: Private Figure / Matter of Public Concern (<i>Libel-806.51</i> <i>Slander-806.66</i>)	Matter Actionable Per Se: Public Official or Figure (<i>Libel-806.53</i> <i>Slander-806.67</i>)
Liability	Negligence	Negligence	Actual Malice
Presumed Damages	No additional proof needed—presumed damage available upon liability showing of negligence	Actual Malice	No additional proof needed—showing of actual malice suffices
Actual Harm/Special Damages	Available if proved by the greater weight of the evidence	Available if proved by the greater weight of the evidence	Available if proved by the greater weight of the evidence
Punitive Damages	Available upon showing of statutory criteria set out in N.C. Gen. Stat. § 1D-15.	Available only upon showing of actual malice	No additional proof needed—liability showing of actual malice suffices

	Matter Actionable Per Quod: Private Figure/Not Matter of Public Concern (<i>Libel-806.60</i> <i>Slander-806.70</i>)	Matter Actionable Per Quod: Private Figure/Matter of Public Concern (<i>Libel-806.61</i> <i>Slander-806.71</i>)	Matter Actionable Per Quod: Public Official or Figure (<i>Libel-806.62</i> <i>Slander-806.72</i>)
Liability	Negligence	Negligence	Actual Malice
Presumed Damages	Not Available	Not Available	Not Available
Actual/Special Damages	Available-However, proof of special damages required in order to establish liability	Available-However, proof of special damages required in order to establish liability	Available-However, proof of special damages required in order to establish liability
Punitive Damages	Available upon showing of statutory criteria set out in N.C. Gen. Stat. § 1D-15.	Available only upon a showing of actual malice	No additional proof needed—liability showing of actual malice suffices

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The last chart shows instruction combinations in various types of defamation cases:

	Nonproven/ Presumed Damages	Pecuniary/ Special Damages	Actual Harm	Punitive Damages
Private Figure/Not Matter of Public Concern				
Defamation Actionable Per Se	806.81	806.84	806.84	810.96 & 810.98-- standard punitive damage PJIs (including statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	810.96 & 810.98—standard punitive damage PJIs (including statutory fault standards)
Private Figure/Matter of Public Concern				
Defamation Actionable Per Se	806.82	806.84	806.84	806.85, followed by 810.98-- standard punitive damages PJI (excluding statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	806.85, followed by 810.98--standard punitive damages PJI (excluding statutory fault standards)
Public Figure or Public Official				
Defamation Actionable Per Se	806.83	806.84	806.84	810.98--Standard punitive damages PJI (excluding statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	810.98--Standard punitive damages PJI (excluding statutory fault standards)

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1 For commentary on certain aspects of North Carolina defamation law, see Allison Van Laningham, *Damages in Defamation Per Se Actions: Presumptions Are Not What They Used to Be, The Constitutionalist* (Official Publication of the North Carolina Bar Association, Constitutional Rights and Responsibilities Section), Vol. II, No. 4 (April 2006).

2 *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)); see also *Andrews v. Elliot*, 109 N.C. App. at 274, 426 S.E.2d at 432 ("To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed."); *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987); and *Taylor v. Jones Bros. Bakery, Inc.*, 234 N.C. 660, 662, 68 S.E.2d 313, 314 (1951) ("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." *overruled on other grounds by, Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956)).

Note that the defamatory statement "must be a statement of fact, not opinion, but 'an individual cannot preface an otherwise defamatory statement with *in my opinion* and claim immunity from liability.'" *Desmond v. The News and Observer Publishing Co., et al.*, 241 N.C. App. 10, 772 S.E.2d 128, 135 (2015) (citing *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted in citing source)). The question of whether a statement constitutes fact or opinion is a question of law. When "determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically. . . [courts] consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor . . ." of the statement. *Id.*

3 The element of "falsity" has previously been included in every pattern jury instruction on libel and slander except N.C.P.I.—Civil 806.50 ("Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern") and N.C.P.I.—Civil 806.60 ("Defamation—Libel Actionable *Per Quod*—Private Figure—Not a Matter of Public Concern").

Although the issue is not a settled one and notwithstanding that neither the United States Supreme Court nor North Carolina's appellate courts have spoken definitively in this regard, for the reasons that follow and upon careful consideration, the Pattern Jury Civil Sub-Committee has concluded that the element of falsity should likewise be included in these two instructions.

At common law, defamatory statements were presumed to be false and truth thus was an affirmative defense to a libel claim. However, the First Amendment subsequently has been interpreted to place the burden of proving falsity upon the plaintiff in many types of defamation cases. See *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767, 775, 89 L.Ed.2d 783, 792 (1986) ("[A] public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.") and *id.* at 775, 793 ("[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant."); see also Rodney A. Smolla, *Law of Defamation*, § 5:13 (2d. ed. 2004) (Although *Hepps* did not definitively address all types of defamation cases, the "wisest choice . . . is to place the burden of proof [of falsity] on the plaintiff" in all defamation cases.), and *Herbert v. Lando*, 441 U.S. 153, 176, 60 L. Ed.2d 115, 133 (1979) ("In every or almost every [defamation] case, the plaintiff . . . must prove a false publication . . ."); cf. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 111 L.Ed.2d 1, 20 (1990), n.6 ("In *Hepps* the

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Court reserved judgment [as to whether falsity must be proved by a private defamation plaintiff] on cases involving nonmedia defendants . . . and accordingly we do the same."); Dan B. Dobbs, *The Law of Torts* (2001 ed.), § 420, p. 1184 ("[Certain] features of *Hepps* may suggest that, as a practical matter, the states will remain free to presume falsehood when a private person sues on a publication that is not about issues of public concern."); *Restatement (Second) of Torts* § 613 (1)(g) (The plaintiff has the burden of proving "the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication.") and 613 Caveat ("The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication.").

Moreover, in numerous cases the North Carolina appellate courts have repeatedly included "falsity" as an element of defamation. See *Renwick v. News & Observer*, 310 N.C. 312, 319, 312 S.E.2d 405, 410 (1984) ("Although every defamation must be false, not every falsehood is defamatory."); *Brown v. Boney*, 41 N.C. App. 636, 648, 255 S.E.2d 784, 791 (1979) ("If the plaintiff's [libel] case is to succeed, he must show the factual statements made concerning him were false."); *Morrow v. Kings Dept. Stores, Inc.*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (1982) ("A defamatory statement, to be actionable, must be false"); *Williams v. State Farm Mutual Automobile Ins. Co.*, 67 N.C. App. 271, 274, 312 S.E.2d 905, 907 (1984) ("To be actionable, the statement must be false."); *Boston v. Webb*, 73 N.C. App. 459-60, 326 S.E.2d 104, 106 (1985) ("These statements, if found false by a jury, constituted libel *per se*"); *Gibby v. Murphy*, 73 N.C. App. 128, 132, 325 S.E.2d 673, 676 (1985) ("The allegations . . . were libel *per se*, if a jury found them to be false."); *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 58, 338 S.E.2d 918, 922 (1986) ("Falsity is an essential element of libel."); *Clark v. Brown*, 99 N.C. App. 255, 260-61, 393 S.E.2d 134, 137 (1990) (discussing what "false words" constitute libel *per se*); *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (equating a "statement . . . libel *per se*" with "a false written statement which on its face is defamatory" (quoting *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 393, 159 S.E.2d 896, 899 (1968))); *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993) ("[D]efamatory statements [in a libel action] must be false in order to be actionable." (citation omitted)); *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 420, 432 (1993) ("To be actionable, a defamatory statement must be false"); *Hanton v. Gilbert*, 126 N.C. App. 561, 569, 486 S.E.2d 432, 437 (1997) ("In order to be actionable, a defamatory statement must be false."); *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) ("In order to recover for defamation, a plaintiff must allege, [*inter alia*, that the defendant] ma[de] false, defamatory statements.").

Finally, inclusion of the falsity element in N.C.P.I.—Civil 806.50 and 806.60 achieves uniformity between the standards for libel and slander. Falsity is the third element in a claim for slander *per se* brought by a private plaintiff in a matter not of public concern (N.C.P.I.—Civil 806.65) and the sixth element in a private plaintiff's claim for slander *per quod* in a matter not of public concern (N.C.P.I.—Civil 806.70). The N.C. Court of Appeals has stated, in certain contexts, that it see[s] "no reason to distinguish libel *per se* from slander *per se*." *Ausley v. Bishop*, 133 N.C. App. 210, 216, 515 S.E.2d 72, 77 (1999). There appears to be no basis upon which to include the falsity requirement in the instructions for private figure/not matter of public concern slander *per se* and slander *per quod* cases (as well as every other category of both libel and slander), but to exclude falsity from the instructions for private figure/not matter of public concern libel *per se* and libel *per quod* cases.

Notwithstanding, the Committee has included a suggested instruction, N.C.P.I.—Civil

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806.79 ("Defamation—Libel Actionable *Per Se* or Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Truth as a Defense"), for use by those judges who feel North Carolina will continue to adhere to the common law rule in the limited instances covered by N.C.P.I.—Civil 806.50 and 806.60. See, e.g., Pennsylvania Suggested Standard Civil Jury Instructions, Pa. SSJI (Civil) 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern"), citing *Hepps*, 475 U.S. at 776, 89 L. Ed.2d at 791-92 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."). In such an instance, the judge should delete the element of falsity from N.C.P.I.—Civil 806.50 and 806.60 and thereafter submit N.C.P.I.—Civil 806.79. See N.C.P.I.—Civil 806.50, n.11 ("NOTE WELL") and N.C.P.I.—Civil 806.60, n.18 ("NOTE WELL").

4 "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. at 317, 312 S.E.2d at 408-09 (citing *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1937)).

5 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*, 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 meanings—one of which is defamatory and one of which is not. See *Renwick*, 310 N.C. at 316, 312 S.E.2d at 408 (citation omitted). For jury instruction purposes, however, the instructions for libel actionable *per quod* will suffice in a middle-tier libel claim.

6 "Slander is a tort distinct from libel in that slander involves an oral communication. Like libel, slander may be *per se* or *per quod*, but it cannot fall into the intermediate category where it would be susceptible to two meanings. 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." *Raymond U v. Duke Univ.*, 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988) (citations omitted); see also *Donovan v. Fiumara*, 114 N.C. App. 524, 527-36, 442 S.E.2d 572, 575-80 (1994) (rejecting the argument that *dicta* in *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624-25 (1988) created a fourth classification of slander *per se*, i.e., "to hold [the plaintiff] up to disgrace, ridicule or contempt").

7 *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964).

8 See *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759, 86 L.Ed.2d 593, 604 (1985) ("[S]peech on matters of purely private concern is of less First Amendment concern. As a number of state courts . . . have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.").

9 *Id.* at 758-59, 86 L. Ed.2d at 602 ("[The Supreme Court has] long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern'

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that is 'at the heart of the First Amendment's protection.'"(citations omitted)); *see also Rosenbloom v. Metromedia*, 403 U.S. 29, 44, 29 L.Ed.2d 296, 312 (1971) ("[T]he determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

Whether "speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 761, 86 L.Ed.2d at 604 (citation omitted).

10 "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L.Ed.2d 597, 605 (1966).

The *New York Times* rule was extended from public officials to all public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L.Ed.2d 1094, 1111 (1967).

"[T]he Supreme Court . . . divided [public official and public figure plaintiffs] into three categories[:] . . . involuntary public figures, all purpose public figures, and limited purpose public figures." *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664-65 (2000) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 41 L.Ed.2d 789, 810 (1974)).

"[Although] it may be possible for someone to become a public figure through no purposeful action of his own, . . . the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz*, 418 U.S. at 345, 41 L.Ed.2d at 810. Public figures "assume special prominence in the resolution of public questions . . ." *Id.* at 351, 41 L. Ed.2d at 812.

"In . . . three . . . cases, the Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular 'public controversy' that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Gaunt v. Pittaway*, 139 N.C. App. at 186, 534 S.E.2d at 665.

The United States Court of Appeals for the Fourth Circuit has set forth five requirements for establishing that the plaintiff is a limited purpose public figure: "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation." *Foretich v. Capital Cities/ABC*, 37 F.3rd 1541, 1553 (4th Cir. 1994).

"Under North Carolina law, an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.'" *Gaunt*, 139 N.C. App. at 786, 534 S.E.2d at 665 (citations omitted).

The heightened burden for public officials and public figures is justified by two considerations. First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344, 41 L.Ed.2d at 807-08. Second, "[t]here is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that

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involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case Those classed as public figures stand in a similar position [Because of their] roles of special prominence in the affairs of society [or] positions of . . . persuasive power and influence . . . [or because they] have thrust themselves to the forefront of particular public controversies . . . [public figures] invite attention and comment." *Gertz*, 418 U.S. at 344-45, 41 L.Ed.2d at 808.

11 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."); *Renwick*, 310 N.C. at 317-18, 312 S.E.2d at 409 ("[D]efamatory words to be libelous *per se* must 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." (quoting *Flake*, 212 N.C. at 786, 195 S.E. at 60) (emphasis added)); and *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*, Sec. 614)); see also 50 Am. Jur.2d, *Libel and Slander* § 488 at 871 ("Examples of questions . . . to be decided by the court as a matter of law include: whether a person is a public official, whether a person is a public figure, and if so, for what purposes, whether a statement is defamatory *per se* or *per quod*, . . . [and] whether the statements complained of are capable of the meaning ascribed to them by the plaintiff . . .").

12 See *Cochran v. Piedmont Publishing Co., Inc.*, 62 N.C. App. 548, 549, 302 S.E.2d 903, 904 (1983) ("In order to recover compensatory damages for libel, [a private figure] plaintiff must establish . . . that the false information was published through the fault or negligence of the defendant." (citations omitted)); *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 531, 393 S.E.2d 295, 296 (1990) ("[I]n the case of 'private' individuals . . . a lesser showing of fault rather than actual malice is required to recover damages."); see also *Gertz*, 418 U.S. at 353, 41 L.Ed.2d at 813 (Blackmun, J., concurring) ("[The Court] now conditions a libel action by a private person upon a showing of negligence.").

13 See *Neill Grading & Constr. Co., Inc. v. Lingafelt*, 168 N.C. App 36, 46, 106 S.E.2d 734, 741 (2005) ("[W]e now hold that North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence.").

14 See *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 11 L. Ed.2d at 706 (Where the plaintiff is a "public official" and the alleged defamatory statement concerns his official conduct, he must prove that the statement was "made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."); see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L. Ed.2d 1094, 1011 (1967), and *Varner v. Bryant*, 113 N.C. App. 697, 702-03, 440 S.E.2d 295, 299 (1994).

"The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Dobson v. Harris*, 134 N.C. App. 573, 581, 521 S.E.2d 710, 717 (1999) (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 657, 105 L. Ed.2d 587, 587 (1989)), overruled on other grounds by, *Dobson v. Harris*, 352 N.C. 77, 530 S.E.2d 829 (2000). "Actual malice" may be proved by circumstantial evidence. *Id.*

Note that "actual malice" as employed here in the constitutional sense should be differentiated from "malice" as used elsewhere in the North Carolina Pattern Instructions. See *Masson v. New Yorker Magazine*, 501 U.S. 496, 510, 115 L. Ed.2d 447, 468 (1991) (The

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New York Times "actual malice" standard may not be established by a showing of personal hostility and thus should be distinguished from state common law malice). For example, in N.C.P.I.-Civil 810.96 ("Punitive Damages-Liability of Defendant"), "malice" is defined as "a sense of personal ill will toward the plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff." (citing N.C. Gen. Stat. § 1D-5(5)). "Actual malice," on the other hand, appears to be close to the concept of "willful or wanton conduct." See N.C.P.I.-Civil 810.96 ("Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage or other harm." (citing N.C. Gen. Stat. § 1D-5(7))).

15 This term is used to distinguish the damages discussed from punitive or other types of exemplary damages. See *Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005) ("Compensatory damages include both general and special damages '[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' (citations omitted). '[G]eneral damages . . . include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.] . . . [S]pecial damages are usually synonymous with pecuniary loss [such as] [m]edical and hospital expenses, as well as loss of earnings'" (citation omitted).

16 See *Donovan*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 575 ("In the context of an action for defamation, special damage means 'pecuniary loss'; 'emotional distress and mental suffering are not alone sufficient'" (citation omitted)).

17 See N.C. Gen. Stat. § 1A-1, Rule 9(g) (2001) ("When items of special damage are claimed each shall be averred.")

18 See *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 473-75 (1991) (actual damage defined as some actual loss, hurt or harm resulting from the illegal invasion of a legal right.").

19 *Gertz*, 418 U.S. at 350, 41 L.Ed.2d at 811.

20 See *Iadanza*, 169 N.C. App. at 779-80, 611 S.E.2d at 221.

Note that the descriptions of actual harm and nonproven/presumed damages are similar and indeed are exactly the same type of damages. It is the level of proof that is assigned to these two categories that makes them distinct from one another. Whether a plaintiff must seek damages based upon actual harm (which requires specific proof) or can seek nonproven/presumed damages (which do not require specific proof) is determined by the classification of the plaintiff and whether the speech at issue involved a matter of public concern.

Nonproven/presumed damages were often called "general" damages at common law. Due to constitutional requirements, the U.S. Supreme Court determined that such "general" damages in some cases would have to be proven as actual harm. The label of "general" damages is now somewhat imprecise because it can be used to describe either actual harm or nonproven/presumed damages.

21 See n.23 *infra*; see also *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987) ("Ascertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation.") and *Prosser and Keeton on Torts*, § 116A at 843 (presumed damages are "an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not

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be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.").

22 See *Renwick*, 310 N.C. at 317, 312 S.E.2d at 408 ("The complaints failed to bring the editorial within the [category of] . . . libel *per quod* . . . since it was not alleged that the plaintiff suffered special damages." (citing *Flake*, 212 N.C. at 785, 195 S.E. at 59)), and *Raymond U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 707 (1988) ("Under a libel *per quod* theory . . . special damages must be proven.").

23 See *Dun & Bradstreet v. Greenmoss Builders*, 478 U.S. at 760, 86 L. Ed.2d at 603 ("The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" (quoting Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)); see also *Stewart v. Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971) ("Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages.").

24 See *Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 385 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.") and *Woody v. Catawba Valley Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E.2d 578, 581-82 (1968) ("While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, willful, and in reckless disregard of a plaintiff's rights.").

25 See n.14 *supra*.

26 *Gertz*, 418 U.S. at 349, 41 L. Ed.2d at 810-11 ("we hold that the States may not permit recovery of presumed or punitive damages . . . when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

27 As noted in the text, in matters actionable *per se*, "the law presumes that actual damages were sustained." *Harris*, 99 N.C. App. at 183, 392 S.E.2d at 754. Accordingly, in a public figure or public official matter actionable *per se*, once the plaintiff establishes the required showing for liability required under *New York Times* (actual malice), presumed damages are allowed. Such presumed damages thus, in effect, take the place of the actual damage requirement for punitive damages. See *id.* Moreover, because actual malice has already been established, no additional showing that the "defendant's conduct was malicious, wanton, or reckless indifferent to the truth and plaintiff's rights," is necessary in order to award punitive damages. *Id.*

28 See nn.12 and 13 *supra*.

29 *Gertz*, 418 U.S. at 349-50 ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."); see also *Gibby v. Murphy*, 73 N.C. App. 128, 133, 325 S.E.2d 673, 676-77 (1985) (To recover punitive damages a private figure/matter of public concern plaintiff "must prove 'actual malice' on the part of the defendants. Actual malice may be proven by showing that the defendants published the defamatory material with knowledge that it was false, with reckless disregard to

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the truth, or with a high degree of awareness of its probable falsity.").

30 *Dun & Bradstreet, Inc.*, 472 U.S. at 761, 86 L. Ed.2d at 603 ("[T]he state interest in awarding presumed and punitive damages . . . is 'substantial' relative to the incidental effect these remedies may have on speech [not at the core of First Amendment concern . . .] In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'").

NOTE WELL: The Pattern Jury Instruction Civil Subcommittee, after careful consideration, suggests that certain language used by the North Carolina Supreme Court in Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405 (1984), should be relied upon with caution. Although Renwick was issued in 1984 after the U.S. Supreme Court decisions in N.Y. Times and Gertz, the N.C. Supreme Court in Renwick deemed it unnecessary under the facts to categorize the claim before it under the private/public categories established by the U.S. Supreme Court. See Renwick, 310 N.C. at 318, 312 S.E.2d at 409, n.1. However, the Court quoted with approval the following language from Flake, a N.C. Supreme Court decision, issued well before establishment of the private/public categories by the U.S. Supreme Court:

"When an unauthorized publication is libelous per se, malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous per se and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."

Renwick, 310 N.C. at 316, 312 S.E.2d at 408 (quoting Flake, 212 N.C. at 785, 195 S.E. at 59).

As noted in the text of this Preface, the U.S. Supreme Court has altered the law of defamation based upon the nature of the plaintiff and the nature of subject matter of the alleged defamation. In the context of a public figure or official presenting a claim for defamation actionable per se, for example, presumed damages are allowed- but only upon a showing of actual malice. See New York Times v. Sullivan, 376 U.S. at 279-80, 11 L. Ed.2d at 706; see also n.14 supra. In the context of a private plaintiff and a matter of public concern in a claim for defamation actionable per se, liability is predicated upon a showing of negligence, but presumed damages are not allowed unless the plaintiff can establish actual malice. See Gertz, 418 U.S. at 349-50, 41 L. Ed. 2d at 810; see also n.29 supra. Finally, in the context of a private plaintiff/not matter of public concern claim for defamation actionable per se, liability and presumed damages are allowed- but only upon a showing of negligence. See Dun & Bradstreet, 418 U.S. at 761, 86 L. Ed.2d at 604; Gertz, 418 U.S. at 347, 41 L. Ed.2d at 809 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."), and Walters, 31 N.C. App. 233, 235, 228 S.E.2d 766, 767 ("[U]nder the Gertz decision, a plaintiff in a civil action for libel, if he is a private citizen and not a public official or a public figure, can recover only if he alleges and proves fault, or at least negligence, on the part of the defendant . . . in publishing false and defamatory statements."). Thus, it appears the N.C. Supreme Court's use in Renwick of the broad language from Flake must be tempered in light of subsequent U.S. Supreme Court jurisprudence. See Walters, 31 N.C. App. at 235-36, 228 S.E.2d at 767 (Prior to Gertz, "this

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jurisdiction . . . clearly established that a publication charging that someone had committed a crime constituted libel per se and both malice and actual damages were presumed (citation omitted). Under Gertz, there is no presumption of malice and damages, and fault must be alleged and established by a private citizen who seeks to recover for a defamatory falsehood.").

31 N.C. Gen. Stat. § 1D-15 (2001). As opposed to constitutional "actual malice" (publication with knowledge of falsity or reckless disregard of falsity, *see* n.14 *supra*), "malice" as used in the statute is common law malice defined as a "sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7). *Cf. Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 395 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.").

32 In a private plaintiff/not matter of public concern claim, a showing of negligence suffices to establish negligence and also allows an award of presumed damages. *See* n.12 *supra*.

33 Thus, in the case of a public figure, punitive damages are available without any further showing, *see* n.27 *supra*. In the case of a private plaintiff in a matter not of public concern, the plaintiff must still satisfy the requirements of N.C. Gen. Stat. § 1D-15 (a)(1)-(3) and N.C. Gen. Stat. § 1D-15(b).

34 Presumed damages are not available in middle-tier libel or libel *per quod* cases. *See* n.22 *supra*; *see also Morris v. Bruney*, 78 N.C. App. 668, 675, 338 S.E.2d 561, 566 (1978) ("[I]f extrinsic facts are needed to show the slander, special damages also must be alleged and proven . . ."); *Arnold v. Sharp*, 37 N.C. App. 506, 509, 246 S.E.2d 556, 558 (1978) ("Unless a publication is actionable *per se*, the plaintiff must prove special damages."), *rev'd on other grounds*, 296 N.C. 533, 251 S.E.2d 452 (1979).

35 *See* N.C. Gen. Stat. § 99-2.