N.C.P.I.—Civil—806.50
DEFAMATION—LIBEL ACTIONABLE PER SE—PRIVATE FIGURE—NOT MATTER OF PUBLIC CONCERN
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806.50 DEFAMATION—LIBEL ACTIONABLE *PER SE*—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 libelous[3] on its face[4]; (2) the plaintiff is a private figure and (3) the subject matter of the statement is not of public concern.

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:

First, that the defendant [wrote][5] [printed] [caused to be printed]

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1 For an introduction to this category of defamation, *see* N.C.P.I.—Civil 806.40 ("Defamation—Preface") nn.4-6, 8-10 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 (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 the [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 and internal quotations marks omitted).

5 *See Renwick*, 310 N.C. at 317, 312 S.E.2d 298, 303 (2006) ("Under the well established common law of North Carolina, a libel per se is a publication by writing, printing, signs or pictures."); *see also* 3 Dan B. Dobbs, *The Law of Torts* (2d ed. 2011), § 408, p. 1141 ("Libel today includes not only writing but all forms of communication embodied in some

[possessed in [written] [printed] form] the following statement about the plaintiff:

(Quote the alleged statement)

Second, that the defendant published[6] the statement. "Published" means that the defendant knowingly [communicated[7] the statement] [distributed[8] the statement] [caused the statement to be distributed] so that it

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physical form such as movie film or video tapes . . . . Most communications by computer are no doubt in the category of libel." (citations omitted)); *Hedgepeth v. Coleman*, 183 N.C. 330, 332, 111 S.E. 517, 519 (1922) (finding from 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.").

6 "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. *Id.* at 573-74.

7 *See* Restatement (2d) of Torts § 559 cmt. A (2012) ("The word 'communication' is used to denote the fact that one person has brought an idea to the perception of another.").

8 *See* Dobbs, *supra* note 5, at § 522

> 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 called transmitters, distributors, or secondary publishers rather than primary 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, the federal Communications Decency Act (CDA) provides that internet service providers and users are not counted as "publishers" or "speakers" for defamation purposes. *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.").

reached one or more persons[9] other than the plaintiff. [Communicating the statement] [Distributing the statement] [Causing the statement to be distributed] to the plaintiff alone is not sufficient.[10]

Third, that the statement was false.[11]

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9 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."); *see also White v. Trew*, __ N.C. __, 736 S.E.2d 166 (2013) (holding that, where general statutes and regulations mandate that public universities create evaluations of employees and make such evaluations accessible to supervisors and department heads, neither communications consistent with these rights and obligations nor review of the performance evaluation with legal counsel in preparation for performance reviews constitutes publication for purposes of a libel suit).

10 *Taylor*, 234 N.C. at 662, 68 S.E.2d at 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."); *Donovan v. Flumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 573 (1994) ("To be actionable, defamatory statement must be false, and must be communicated (published) to some person or persons other than the individual defamed."); *see also Hedgepeth v. Coleman*, 183 N.C. 330, 335, 111 S.E. 517, 519–20 (1922) (finding the defendant liable for libel even though he sent the defamatory statement directly to the plaintiff, who then divulged its contents, because "the defendant must have foreseen the plaintiff's necessary exposure of the letter as the natural and probable result of the libel").

11 *NOTE WELL: See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.2. The element of "falsity" has previously been included in every pattern instruction on libel and slander except this instruction, N.C.P.I.—Civil 806.50, and N.C.P.I.—Civil 806.60 ("Defamation—Libel: Libel Actionable Per Quod—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.2) has concluded that the element of falsity should likewise be included in these two instructions.*

If, however, after carefully reviewing n.2, 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, the third element should be deleted from this pattern charge and not submitted to the jury. However, N.C.P.I.—Civil 806.79 ("Defamation—Libel Actionable Per Se or Libel Per Quod—Private Figure—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.

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.[12] 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.[13]

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

13 *NOTE WELL: A "Yes" answer to this issue entitles the plaintiff to instructions on presumed damages and, if proof is offered, actual damages as well. The plaintiff may also be able to receive an instruction on punitive damages under the general statutory standards enunciated in N.C. Gen. Stat. § 1D-15.*