DEFAMATION--LIBEL ACTIONABLE PER SE--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 libelous[3] on its face[4] and (2) the plaintiff is a public figure or public official, as to whom actual malice must be shown.

The (*state number*) issue reads:

"Did the defendant libel the plaintiff?"

On this issue the burden of proof is on the plaintiff to prove four things. The plaintiff must prove the first three 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 three things are:

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

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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, 9-10 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" (citations omitted). 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 omitted)).

[5] *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, p. 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

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[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 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]

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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]"A communication is any act by which a person brings an idea to another's attention. A communication may be made by speaking or by writing words or by any other act or combination of actions that result in bringing an idea to another's attention." Pennsylvania Suggested Standard Civil Jury Instructions, Pa. SSJI (CIV) 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern").

[8]*See* Dobbs at § 402, pp. 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.").

[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." (citations omitted)).

[10]South Carolina—Jury Instructions Civil, SC-JICIV 14-6 ("Defamation-Elements"). This instruction continues, "as a general rule, where a person communicates a defamatory statement only to the person defamed and the defamed person then repeats the statement to others, publication of the statement by the person defamed, or 'self-publication,' will not support a defamation action against the originator of the statements . . . . Where the plaintiff himself [published] or, by his acts, caused the [publication] of a defamatory statement to a third person, the plaintiff cannot recover because there is not publication for which [the] defendant can be [responsible]. If the plaintiff consented to or authorized the [publication] of the defamatory statement, he cannot recover . . . ."

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Third, that the statement was false.[11]

Members of the jury, you will note that the plaintiff's burden of proof as to the first three things is by the greater weight of the evidence. However, as to the fourth 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.

Fourth, 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 of whether the statement was false.[12] Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.[13]

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, and that the statement was false; and if you further find by clear, strong and convincing evidence that,

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[11] *See* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.2

[12] This element incorporates the "actual malice" requirement mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed.2d 686, 706 (1964). *See* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.14.

[13] *See Dellinger v. Belk,* 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977) (noting that 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.").

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at the time of the publication, the defendant 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.[14]

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.

[14] A “Yes” answer to this issue entitles the plaintiff to instructions on presumed damages, actual damages if proof is offered and punitive damages (assuming presumed or actual damages are awarded). Even though a public figure or public official has to prove actual malice to obtain presumed or punitive damages, that standard is incorporated above for the liability consideration and thus will necessarily be met if the jury answers “Yes” on liability. *See* N.C.P.I--Civil 806.40 (“Defamation—Preface”), nn.14 and 24 and accompanying text.