DEFAMATION—LIBEL 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 subject to two interpretations, one of which is defamatory and one of which is not; or the statement is not libelous*[3] *on its face, but is capable of a defamatory meaning when extrinsic evidence is considered*[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?"

A libelous statement is one which (*select the appropriate alternative*):

[charges that a person has committed an infamous crime.[5] I instruct you that (*state*

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[1] For an introduction to this category of defamation, *see* N.C.P.I. 806.40 ("Defamation—Preface"), nn.5 and 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.'" (quoting *Restatement of the Law of Torts,* § 614)); *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] 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 v. Greensboro News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1937)).

North Carolina also recognizes a "middle-tier libel" when a statement is "susceptible of two reasonable interpretations, one of which is defamatory and the other is not." *Id.* Although middle-tier libel may differ technically from libel actionable *per quod* the instructions for libel actionable *per quod* are appropriate for jury instruction purposes in a middle-tier libel claim.

[5] N.C. Gen. Stat. § 14-3(b) permits punishment of misdemeanors constituting "infamous crimes." However, "[t]he applicable statute . . . and the reported cases leave some lack of certainty as to what crimes may be designated and punished as 'infamous.'" *State v. Keen*, 25 N.C. App. 567, 571, 214 S.E.2d 242, 244 (1975). In addition to those specified in cases decided under the statute, all felonies and certain other crimes qualify as "infamous crimes" for defamation purposes. *See, e.g., State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986) ("A crime is 'infamous' within the meaning of the statute if it is an act of depravity, involves moral turpitude, and reveals a heart devoid of social duties and a mind fatally bent on mischief." (citation omitted)), and *Jones v. Brinkley*, 174 N.C. 23, 25, 93 S.E. 372, 374 (1917) (Under an earlier version of N.C. Gen. Stat. § 14-3, "the test is not the nature of the punishment, but the nature of the offense charged. A charge of larceny is actionable *per se*, and 'there is no distinction between grand and petty larceny in this respect.'" (citation omitted)); *see also State v. Surles,* 230 N.C. 272, 283-84, 52 S.E.2d 880, 888 (1949) (Ervin, J., dissenting) ("'At common law, . . . an infamous crime is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi.* This latter term means any offense involving corrupt deceit, or falsehood by which the public administration of justice may be

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infamous crime[6]) is an infamous crime.]

[charges a person with having an infectious disease. I instruct you that [state infectious disease, *i.e.*, HIV/AIDS, syphilis] is an infectious disease.]

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

[tends to subject a person to ridicule, contempt or disgrace.[11]]

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. These six things are:

First, that the defendant [wrote] [printed] [caused to be printed][12] [possessed in

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impeded, such as perjury, subornation of perjury, forgery, bribery of witnesses, conspiracy in procuring non-attendance of witnesses, barratry, counterfeiting, cheating by false weights or measures, and conspiring to accuse an innocent person of crime.'" (quoting Burdick, *Law of Crimes,* § 87)).

[6] *See* n.5 *supra.*

[7] If it is felt necessary to include an explanatory term for "impeach," one or more of the suggested alternatives may be given. *See, generally, Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E. 2d 466 (1955) (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.")

[8] *See Shreve v. Duke Power Co.*, 97 N.C. App. 648, 650, 389 S.E.2d 444, 446 (1990).

[9] New York Pattern Jury Instruction—Civil 3:34 ("A statement is also defamatory if it tends to discredit the plaintiff in the conduct of (his, her, its) occupation, trade or office.").

[10] Maryland Pattern Jury Instruction—Cv 12:11 ("Injurious Falsehood Amounting to Defamation") (defamatory statement includes one which "reflects unfavorably on [a] person's business, reputation, business integrity or on [a] person's profession or business").

[11] *Renwick*, 310 N.C. at 317, 312 S.E.2d at 408-09.

[12] *Id.* ("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 at 1141 ("[L]ibel today includes not only writing but all forms of communications embodied in some physical form such as movie film or

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

(*Quote the alleged statement*)

Second, that the defendant published[13] the statement. "Published" means that the defendant knowingly [communicated[14] the statement] [distributed[15] the statement] [caused the statement to be distributed] so that it reached one or more persons[16] other than the plaintiff. [Communicating the statement] [Distributing the statement] [Causing the statement to be distributed] to the plaintiff alone is not sufficient.[17]

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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 which the defendant did not dispute, were written by the same person on an Oliver typewriter . . . . was evidence of a character sufficiently substantial to warrant the jury in finding . . . the defendant . . . responsible for [the] typewritten paper of unavowed authorship.").

[13]"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 web site are included among "other methods of communication" by which defamatory matter may be published. *Id.* at 573-74.

[14]"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—JICIV 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern").

[15]*See* Dobbs § 402 at 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.").

[16]*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)).

[17]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

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Third, that the statement was false.[18]

Fourth, that the defendant intended the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in *his* trade or profession] [subject the plaintiff to ridicule, contempt or disgrace].[19]

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 an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in *his* trade or profession] [subject the plaintiff to ridicule, contempt or disgrace].[20]

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

Members of the jury, you will note that the plaintiff's burden of proof as to the first

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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 . . . ."

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

[19] *See Raymond U v. Duke University,* 91 N.C. App. 171, 181, 371 S.E.2d 701, 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."); *Renwick*, 310 N.C. at 316-17, 312 S.E.2d at 408 ("The plaintiff's complaints in these cases failed to bring the editorial complained of within the second class of libel, since it was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made."); and *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 394, 159 S.E.2d 896, 899 (1968) ("Where the words alleged to have been written and published by the defendant concerning the plaintiff are not, upon their face, susceptible only to a defamatory interpretation, the complaint states no cause of action unless it also alleges that a defamatory meaning was intended by the defendant and understood by those to whom the statement is alleged to have been published."); *see also Cathy's Boutique v. Winston-Salem Joint Venture,* 72 N.C. App. 641, 643, 325 S.E.2d 283, 285 (1985) ("a complaint does not state a cause of action [for 'middle-tier' libel] unless it alleges that the defamatory meaning was intended and was so understood by those to whom the publication was made.").

[20] *See* n.19 *supra.*

[21] *Renwick,* 310 N.C. at 317, 312 S.E.2d at 408 ("The complaints failed to bring the editorial within the third class -- libel per quod -- since it was not alleged that the plaintiff suffered special damages; *Raymond U*, 91 N.C. App. at 181, 371 S.E.2d at 708 (for publications which are libelous *per quod*, "special damages must be proven"); *Griffin*, 180 N.C. App. at 135, 636 S.E.2d at 303 ("[W]hen a publication is libelous per quod, the injurious character of the words and some special damage must be pleaded and proved."); *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 . . . .").

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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 of whether the statement 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 [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, that the defendant intended the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in *his* trade or profession] [subject the plaintiff to ridicule,

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[22]This element incorporates the "actual malice" requirement mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (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 that the U.S. Supreme Court in *Amant v. Thompson,* 390 U.S. 727, 731 (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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contempt or disgrace], that the person to whom the statement was published reasonably understood the statement to [charge the plaintiff with having committed an infamous crime] [charge the plaintiff with having an infectious disease] [impeach the plaintiff in *his* trade or profession] [subject the plaintiff to ridicule, contempt or disgrace], 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, 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.[24]

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.

[24] A "Yes" answer to this issue entitles a plaintiff to an instruction on actual damages and punitive damages (assuming actual damages are awarded). Even though a public figure or public official has to prove actual malice to obtain punitive damages, that standard is incorporated above in the liability consideration and thus, will necessarily be present if the jury answers "Yes" on liability. Presumed damages are not available. *See* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.14, 27, 29, 31, 33 and 34 and accompanying text.