

DEFAMATION--SLANDER ACTIONABLE *PER SE*--PRIVATE FIGURE--NOT MATTER OF PUBLIC CONCERN.<sup>1</sup>

*Note Well: This instruction applies when the trial judge has determined as a matter of law<sup>2</sup> that: (1) the slanderous<sup>3</sup> character of the statement appears on the face of the words alone;<sup>4</sup> (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 slander 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 made the following statement<sup>5</sup> about the plaintiff:

*(Quote the alleged statement)*

Second, that the defendant published<sup>6</sup> the statement. "Published" means that

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<sup>1</sup> For an introduction to this category of defamation, see N.C.P.I.--Civil 806.40 ("Defamation—Preface") nn.6 and accompanying text.

<sup>2</sup> See *Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E.2d 383, 388 (1958) ("The court determines whether a communication is capable of a defamatory meaning." (citation omitted)); see also N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.11.

<sup>3</sup> 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)).

<sup>4</sup> See *Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 388, 179 S.E.2d 319, 322 (1971) ("Where the injurious character of the words appear on their face as a matter of general acceptance they are actionable *per se.*"); see also *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)).

<sup>5</sup> *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.--806.40 ("Defamation—Preface"), n.6.

<sup>6</sup> "[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).

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the defendant knowingly [communicated<sup>7</sup> the statement] [repeated the statement<sup>8</sup>] [caused the statement to be repeated] so that it reached one or more persons<sup>9</sup> other than the plaintiff. [Communicating the statement] [Repeating the statement] [Causing the statement to be repeated] to the plaintiff alone is not sufficient.<sup>10</sup>

Third, that the statement was false.<sup>11</sup>

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.<sup>12</sup> 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.

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<sup>7</sup>“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”).

<sup>8</sup>“The repeater of defamatory material is also a publisher and subject to liability for the publication.” Dan B. Dobbs, *The Law of Torts* (2001 ed.) § 402, p. 1123.

<sup>9</sup>*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)).

<sup>10</sup>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 . . . .”

<sup>11</sup>See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.2.

<sup>12</sup>See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.12.

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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, 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.<sup>13</sup>

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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<sup>13</sup>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.

