DEFAMATION--SLANDER ACTIONABLE *PER QUOD*--PRIVATE FIGURE--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 not slanderous on its face, but is capable of a defamatory meaning when extrinsic evidence is considered;[3] (2) the plaintiff is a private figure and (3) the subject matter of the statement is of public concern.

The (*state number*) issue reads:

"Did the defendant slander the plaintiff?"

A slanderous[4] statement is one which (*select the appropriate alternative*):

[charges that a person has committed a crime or offense involving moral turpitude.[5] I instruct you[6] that [*state crime or offense involving moral turpitude, i.e.,*

[1]For an introduction to this category of defamation, *see* N.C.P.I. 806.40 ("Defamation—Preface"), n.6 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.'" (citation omitted); *see also* N.C.P.I.—Civil 806.40 ("Defamation—Preface), n.11.

[3]*See 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)).

[4]*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)).

[5]*See* Restatement (Second) of Torts § 571, cmt. g (defining moral turpitude "as inherent baseness or vileness of principle in the human heart; it means, in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good morals, justice, or ethics as to be shocking to the moral sense of the community."), and *Jones v. Brinkley,* 174 N.C. 23, 25, 93 S.E. 372, 373 (1917) (defining moral turpitude as "[a]n act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man" (citation omitted)).

[6]"The question of whether an offense involves moral turpitude is one particularly suitable for the trial court's judgment." 28 Am. Jur.2d, *Libel and Slander* § 161, p. 510 (citing *Freedlander v. Edens Broadcasting, Inc.*, 734 F. Supp. 221 (E.D. Va. 1990), *order aff'd.*, 823 F.2d 848 (4th Cir. 1991).

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child abuse,[7] *bestiality,*[8] *murder,*[9] *kidnapping,*[10] *rape*[11]] is a crime or offense involving moral turpitude.]

[impeaches[12] [or prejudices[13]] [or discredits[14]] [or reflects unfavorably upon[15]] a person in *his* trade or profession]

[imputes[16] to a person a loathsome disease[17]].

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[7] *See Dobson v. Harris*, 352 N.C. 77, 79, 530 S.E.2d 829, 833 (2000) (recognizing child abuse as "'involv[ing] an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.'" (citations omitted).

[8] *See Kroh v. Kroh*, 152 N.C. App. 347, 355-57, 567 S.E.2d 760, 765-67 (2002) (wife properly held liable for slander *per se* for a false accusation of an offense involving moral turpitude, based upon her statements to various individuals concerning her suspicions, *inter alia*, that husband was "having sex with the family dog").

[9] *See Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28-29 (1995) ("Murder and kidnapping are, beyond any rational argument to the contrary, crimes involving moral turpitude.").

[10] *See supra* n.9.

[11] *See Greer v. Broadcasting Co.*, 256 N.C. 382, 391, 124 S.E.2d 98, 104 (1962) (crimes of rape and robbery "involve moral turpitude").

[12] 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, 468 (1955) (noting that 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.").

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

[14] 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.").

[15] Maryland Pattern Jury Instruction—Civil 12:11 (a defamatory statement includes one which "reflects unfavorably on [a] person's business, reputation, business integrity or on [a] person's profession or business").

[16] If an alternative to "imputes" is desired, the phraseology "conveys that [a person] has a loathsome disease," may be used. *See Dobson v. Harris,* 134 N.C. App. 573, 579, 521 S.E.2d 710, 715-16 (1999), *rev'd on other grounds,* 352 N.C. 77, 530 S.E.2d 829 (2000); *see also* Restatement (Second) of Torts § 572, cmt. d ("To be actionable . . . , it is necessary that the words impute to the other person a present infection," *i.e.*, a current as opposed to a past infection); *cf. Prosser and Keeton on Torts* § 112, p. 790 ("it is well established that the imputation that the plaintiff has had even a venereal disease in the past is not sufficient without proof of damage.").

[17] *See* Restatement (Second) of Torts § 572, cmt. b ("An imputation that another is currently afflicted with syphilis, gonorrhea or any other infection ordinarily contracted through sexual intercourse, is included within . . . this Section . . . . So, too, an imputation of leprosy presently existing, is actionable

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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, seven things:

First, that the defendant made the following statement[18] about the plaintiff:

(*Quote the alleged statement*)

Second, that the defendant published[19] the statement. "Published" means that the defendant knowingly [communicated[20] the statement] [repeated[21] the statement] [caused the statement to be repeated] so that it reached one or more persons[22] other than the plaintiff. [Communicating the statement] [Repeating the

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per se."); *see also id.* at § 572, cmt. c ("The rule stated must . . . be limited to diseases that are held in some special repugnance, and that are lingering or chronic, so that they may be expected to last for a considerable period."); *Prosser and Keeton on Torts* § 112, p. 790 (the basis of the category "seems originally to have been the exclusion from society which would result. From the beginning it was limited to cases of venereal disease, with a few instances of leprosy, and it was not applied to more contagious and equally repugnant disorders such as smallpox. The basis of the distinction was in all probability the fact that syphilis and leprosy were regarded originally as permanent, lingering and incurable, while from smallpox one either recovered or died in short order. [Similarly,] with the advance of medical science . . . , today accusations of insanity or of tuberculosis . . . are not included [within the category]."); and *12th Street Gym, Inc. v. General Star Indem. Co.*, 93 F.3d 1158, 1164 (3d Cir. 1996) (observing in dicta that "AIDS can be transmitted in a number of ways, only one of which is sexual.").

[18] *Raymond* U, 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.—Civil 806.40 ("Defamation—Preface"), n.6.

[19] "[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).

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

[21] "The repeater of defamatory material is also a publisher and subject to liability for the publication." Dan B. Dobbs, *Law of Torts* § 402, p. 1123 (2001 ed.).

[22] *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)).

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statement] [Causing the statement to be repeated] to the plaintiff alone is not sufficient.[23]

Third, that the statement was false.[24]

Fourth, that the defendant intended the statement to [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in *his* trade or profession] [impute to the plaintiff a loathsome disease].[25]

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 a crime or offense involving moral turpitude] [impeach the plaintiff in *his* trade or profession] [impute to the plaintiff a loathsome disease].[26]

Sixth, that, at the time of the publication, the defendant either knew that the statement was false or failed to exercise ordinary care in order to determine

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[23] *See* South Carolina Jury Instructions—Civil 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 . . . ."

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

[25] *See Wright v. Commercial Credit Company, Inc.*, 212 N.C. 87, 88, 192 S.E. 844, 845 (1937) ("The jury must not only be satisfied that the defendant's [defamatory] meaning was as charged, but that he was so understood by the persons who heard him."), *Dameron v. Neal*, 49 N.C. 367, 367 (1857) ("If the words . . . used are such as to convey to the minds of the hearers the intent of the defendant to slander the plaintiff in particular, it is sufficient."), and *Studdard v. Linville*, 10 N.C. (3 Hawks) 474, 477 (1825) (approving jury instruction that if the jury "should believe that it was the intention of the defendant to charge the plaintiff with perjury, and the words he made use of were such as to convey such intention to the minds of the bystanders, . . . they would be slanderous"); *see also Raymond U. v. Duke University,* 91 N.C. App. at 181, 371 S.E.2d at 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.").

[26] *See* n.25 *supra.*

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whether the statement was false.[27] 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.

Seventh, that the plaintiff, as a result of the publication, suffered a monetary or economic loss.[28]

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, that the defendant intended the statement to [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in *his* trade or profession] [impute to the plaintiff a loathsome disease], that the person to whom the statement was published reasonably understood the statement to [charge the plaintiff with having committed a crime or offense involving moral turpitude] [impeach the plaintiff in *his* trade or profession] [impute to the plaintiff a loathsome disease], that the defendant, at the time of the publication, either knew the statement was false or failed to exercise ordinary care in order to determine whether the statement was false, and that the plaintiff, as a result of the publication, suffered a monetary or economic loss, then it would be your duty to answer this issue "Yes" in favor of the

[27] *See* N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.12.

[28] *See Badame,* 242 N.C. at 756, 89 S.E.2d at 467 (“Defamatory words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only upon allegation and proof of special damage.”), and *Gibson v. Mutual Life Ins. Co.*, 121 N.C. App. 284, 289, 465 S.E.2d 56, 59 (1996) (“Slander per quod arises where the defamation is ‘such as to sustain an action only when causing some special damage . . . in which case both the malice and the special damage must be alleged and proved.’” (citation omitted)); *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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plaintiff.[29]

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.

[29] A "Yes" answer on this question entitles a plaintiff to an instruction on actual damages. Punitive damages are allowed only upon a showing of actual malice. *See* N.C.P.I. Civil—806.85; *see, generally,* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.29 and 30 and accompanying text. Presumed damages are not available. *See* N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.34 and accompanying text.