

DEFAMATION--SLANDER ACTIONABLE *PER QUOD*--PUBLIC FIGURE OR OFFICIAL.<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 statement is not slanderous on its face, but is capable of a defamatory meaning when extrinsic evidence is considered<sup>3</sup> and (2) the plaintiff is a public figure or official.*

The (*state number*) issue reads:

"Did the defendant slander the plaintiff?"

A slanderous<sup>4</sup> statement is one which (*select the appropriate alternative*):

[charges that a person has committed a crime or offense involving moral turpitude.<sup>5</sup>

I instruct you<sup>6</sup> that [*state crime or offense involving moral turpitude, i.e., child abuse,*<sup>7</sup>

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<sup>1</sup>For an introduction to this category of defamation, see N.C.P.I. 806.40 ("Defamation—Preface") nn.6, 9-10 and accompanying text.

<sup>2</sup>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.

<sup>3</sup>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)).

<sup>4</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>5</sup>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)).

<sup>6</sup>"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).

<sup>7</sup>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)).

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*bestiality*,<sup>8</sup> *murder*,<sup>9</sup> *kidnapping*,<sup>10</sup> *rape*<sup>11</sup>] is a crime or offense involving moral turpitude.]  
[impeaches<sup>12</sup> [or prejudices<sup>13</sup>] [or discredits<sup>14</sup>] [or reflects unfavorably upon<sup>15</sup>] a  
person in *his* trade or profession]  
[imputes<sup>16</sup> to a person a loathsome disease<sup>17</sup>].

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<sup>8</sup> 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").

<sup>9</sup> 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.").

<sup>10</sup> See *supra* n.9.

<sup>11</sup> 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").

<sup>12</sup> 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.").

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

<sup>14</sup> 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.").

<sup>15</sup> 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").

<sup>16</sup> 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.").

<sup>17</sup> See Restatement (Second) of Torts § 572, cmt. b ("An imputation that another is currently afflicted with syphilis, gonorrhoea or any other infection ordinarily contracted through sexual intercourse, is included within . . . this Section . . . . So, too, an imputation of leprosy presently existing, is actionable *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 § 12, 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 (3d Cir. 1996) (observing *in dicta* that "AIDS can be

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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 made the following statement<sup>18</sup> about the plaintiff:

*(Quote the alleged statement)*

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

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transmitted in a number of ways, only one of which is sexual.").

<sup>18</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.—Civil 806.40 ("Defamation—Preface"), n.6.

<sup>19</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).

<sup>20</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—Civil 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern").

<sup>21</sup> "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.).

<sup>22</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)).

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statement to be repeated] to the plaintiff alone is not sufficient.<sup>23</sup>

Third, that the statement was false.<sup>24</sup>

Fourth, that the defendant intended the statement [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].<sup>25</sup>

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].

Sixth, that the plaintiff, as a result of the publication, suffered a monetary or economic loss.<sup>26</sup>

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<sup>23</sup> See South Carolina Jury Instructions—Civil 14-6 (“Defamation—Elements”). The 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>24</sup> See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.2

<sup>25</sup> 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.”).

<sup>26</sup> See *Badame v. Lampke*, 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.”); *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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Members of the jury, the plaintiff's burden of proof as to the first 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 to whether it was false.<sup>27</sup> Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.<sup>28</sup>

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

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<sup>27</sup> This element incorporates the "actual malice" requirement mandated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 20 L. Ed.2d 262, 267 (1964); see N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.14.

<sup>28</sup> See *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977) (noting 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. App. 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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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], 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 the defendant, at the time of the publication, 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.<sup>29</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>29</sup> 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 for liability and thus will necessarily be present if the jury answers "Yes" on liability. Presumed damages are not available.