DEFAMATION—LIBEL ACTIONABLE *PER SE* OR LIBEL ACTIONABLE *PER QUOD*—PRIVATE FIGURE—NOT MATTER OF PUBLIC CONCERN—TRUTH AS A DEFENSE[1]

NOTE WELL: This instruction should be given ONLY if either N.C.P.I.—Civil 806.50 or N.C.P.I.—Civil 806.60 has been submitted to the jury and the jury has answered that issue "Yes,", and ONLY if the third element, "falsity," has been deleted from such instruction.[2] If the jury has been instructed to find on the element of falsity in N.C.P.I.—Civil 806.50 or in N.C.P.I.—Civil 806.60, then submission of this instruction would not be appropriate.

The (*state number*) issue reads:

"Was the statement made by the defendant true?"

You will answer this issue only if you have answered Issue Number (*state issue number*) "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the statement made by the defendant, (*quote the alleged statement),* was true. The truth of the matter stated is a complete defense to a claim for libel and the plaintiff cannot recover if the defendant proves the statement was true.

It is not required that the defendant prove that the statement was literally true in every respect.[3] Slight inaccuracies of expression are immaterial provided that the defendant proves that the statement was substantially true.[4] This means that

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

[2] *See* N.C.P.I.—Civil 806.50 ("Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern"), n.11, and N.C.P.I.--Civil 806.60 ("Defamation--Libel Actionable *Per Quod*--Private Figure—Not Matter of Public Concern"), n.18.

[3] *See* Restatement (Second) of Torts § 581A, p. 237; *see also International Galleries, Inc. v. La Raza Chicago, Inc.*, 2007 WL 3334204 (N.D. Ill. Nov. 2, 2007) (noting that the "substantial truth of a statement is normally a jury question, but where no reasonable jury could find that substantial truth had not been established, the question is one of law.").

[4] *See* Restatement (Second) of Torts § 581A, p. 237; *see also id.* at 236-37 ("[it is not enough that the accused person is found to have engaged in some other substantially different kind of misconduct even though it is equally or more reprehensible. Thus a charge of burglary . . . is not justified by the finding that he has committed a murder. [But] many charges are made in terms that are accepted by their recipients in a popular rather than a technical sense. Thus a charge of theft may be reasonably interpreted as charging any form of criminally punishable misappropriation, and its truth may be

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the gist or sting of the statement must be true even if minor details are not.[5] The gist of a statement is the main point or heart of the matter in question.[6] The sting of such a statement is the hurtful effect or the element of the statement that wounds, pains or irritates.[7] The gist or sting of a statement is true if it produces the same effect on the mind of the recipient which the precise truth would have produced.[8]

Finally as to this issue, on which the defendant has the burden of proof, if you find by the greater weight of the evidence, that the statement made by the defendant was true, then it would be your duty to answer this issue "Yes" in favor of

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established by proving the commission of any act of larceny or embezzlement."); and *Aids Counseling and Testing Center v. Group W*, 903 F.2d 1000, 1004 (4th Cir. 1990) (if the gist or "sting" of a statement is substantially true, "minor inaccuracies will not give rise to a defamation claim." (citation omitted)).

[5]Although "[o]lder cases required exact truth . . . , this . . . attitude no longer represents the substantive law." Dan B. Dobbs, *Law of Torts* § 410, p. 1149 (2001). "The[] cases suggest that if (a) the publication states facts similar to the truth and (b) the sting of the publication is substantially equivalent to the sting of the truth, the truth defense should ordinarily apply. To say that the plaintiff robbed the A Bank when in fact he robbed the B Bank is substantially true because the sting is similar in both cases." *Id.* at 1148; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 115 L. Ed.2d 447, 472-73 (1991) ("Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" (citation omitted)), and Prosser and Keeton on Torts § 116, pp. 840-42 ("The defense that the defamatory statement is true has been given the technical name of justification . . . . [I]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the 'gist,' the 'sting,' or the 'substantial truth' of the defamation." (citations omitted)).

[6]*See Vachet v. Central Newspapers, Inc.*, 815 F.2d 313, 316 (7th Cir. 1987) ("The 'gist' or 'sting' of the alleged defamation means the heart of the matter in question—the hurtfulness of the utterance." (citation omitted)). *See also Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305, 1306 (11th Cir. 2001) ("The gist of any statement within a publication or broadcast is found only by reference to the entire context.").

[7]*See id.; see also Lawrence v. Bauer Pub. & Printing,* 446 A.2d 469, 473 (1982) (defining "sting" as "the defamatory imputation").

[8]*See Yohe v. Nugent*, 321 F.3d 35, 43 (1st Cir. 2003) (the "gist" or "sting" of a statement is "true . . . if it produces the same effect on the mind of the recipient which the precise truth would have produced" (citation omitted)); *Masson*, 501 U.S. at 517, 11 L. Ed.2d. at 472 ("the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced'" (citation omitted)); and *Wehling v. Columbia Broadcasting System*, 721 F.2d 506, 509 (5th Cir. 1983) ("The critical test should be whether the defamation, as published, would affect the mind of the reader or listener in a different manner then (*sic*) would the misconduct proved. If the effect on the mind of the recipient would be the same, any variance between the misconduct charged and the misconduct proved should be disregarded" (citation omitted).).

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the defendant. 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 plaintiff.