

806.67 DEFAMATION - SLANDER ACTIONABLE *PER SE* - PUBLIC FIGURE
OR OFFICIAL.¹

NOTE WELL: This instruction applies when the trial judge has determined as a matter of law² that: (1) the slanderous³ character of the statement appears on the face of the words alone;⁴ and (2) the plaintiff is a public figure or public official, as to whom actual malice must be shown.

NOTE WELL: A "Yes" answer to this issue entitles the plaintiff to instructions on presumed damages (N.C.P.I.—Civil 806.81 ("Defamation—Actionable Per Se—Private Figure—Not Matter of Public Concern—Presumed Damages")) and, if proof is offered, actual damages (N.C.P.I.—Civil 806.84 ("Defamation—Actual Damages")) as well. If the plaintiff seeks an award of punitive damages and the evidence supports instruction on punitive damages, the jury should be instructed using N.C.P.I.—Civil 810.96 ("Punitive Damages—Liability of Defendant") and 810.98 ("Punitive Damages—Issue of Whether to Make Award and Amount"). Showing of the statutory criteria set out in Chapter 1D-15(a) is required as well. See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), nn.14 and 25 and accompanying text.

The (state number) issue reads:

"Did the defendant slander the plaintiff?"

On this issue the burden of proof is on the plaintiff to prove four things. The plaintiff must prove the first three 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 three things the plaintiff must prove by the greater weight of the evidence are:

First, that the defendant made the following statement⁵ about the plaintiff:

(Quote the alleged statement)

Second, that the defendant published⁶ the statement. "Published" means that the defendant knowingly [communicated⁷ the statement] [repeated⁸ the statement] [caused the statement to be repeated] so that it reached one or more persons⁹ other than the plaintiff. [Communicating the statement] [Repeating the statement] [Causing the statement to be repeated] to the plaintiff alone is not sufficient.¹⁰

Third, that the statement was false.¹¹

Members of the jury, the plaintiff's burden of proof as to the first three things is by the greater weight of the evidence. However, as to the fourth 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.

Fourth, 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.¹² Reckless disregard means that, at the time of the publication, the defendant had serious doubts about whether the statement was true.¹³

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, and that the statement was false; 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.

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.

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

2. 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.

3. 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)).

4. 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)).

5. *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.

6. "[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).

7. "The form of a communication matters not in determining whether it is defamatory. Words or conduct or the combination of words and conduct can communicate defamation." 50 Am. Jur. 2d, *Libel and Slander* § 151 (citations omitted). In the context of claims based upon communications via radio or television, the word "communication" includes "publishing, speaking, uttering, or conveying by words, acts, or in any other manner' and idea to another person." N.C. Gen. Stat. § 99-1(b).

8. "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.).

9. *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)).

10. *Friel v. Angell Care Inc.*, 113 N.C. App. 505, 508, 440 S.E.2d. 111, 113 (1994) (citing *Pressley v. Continental Can Co., Inc.*, 39 N.C. App. 467, 469, 250 S.E.2d. 676, 678 (1979)) ("A communication to the plaintiff, or to a person acting at the plaintiff's request, cannot form the basis for a libel or slander claim.").

11. See N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.3.

12. This element incorporates the "actual malice" requirement mandated by *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). See also N.C.P.I.—Civil 806.40 ("Defamation—Preface"), n.14.

13. See *Dellinger v. Belk*, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977) (noting the U.S. Supreme Court in *St. 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.").