

3.11A PUBLIC DEFAMATION (03/2010; revised 06/2014)

NOTE TO JUDGE

The instructions set forth below apply only where the plaintiff is a public official, public figure, or where the plaintiff is a private person but the defamatory statements involve a matter of legitimate public concern. See *Berkery v. Kinney*, 397 N.J. Super. 222 (App. Div. 2007), *certif. denied*, 194 N.J. 445 (2008) in which the court held that once a person becomes a public figure, even if he/she subsequently adopts a private lifestyle, he/she remains a public figure thereafter for purposes of later commentary or treatment of that commentary. See Footnote 1 below for the cases defining these terms.

1. General Element

For you to find that [plaintiff] is entitled to recover damages from [defendant] for defamation, you must find by clear and convincing evidence¹ that [defendant] communicated to a person other than [plaintiff] a false and

¹ The burden of proof imposed depends upon and is tied to the status of the plaintiff and the subject matter of the defamatory statement. Where the plaintiff is a public official or a “public figure” and the subject matter of the defamatory statement is a matter of legitimate public concern, the standard of proof is “clear and convincing” evidence. See *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 83 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 945 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *Lawrence v. Bauer Pub. Co.*, 89 N.J. 451 (1982); *Marchiano v. Sandman*, 178 N.J. Super. 171 (App. Div.), *certif. denied*, 87 N.J. 392 (1981); *Vassallo v. Bell*, 221 N.J. Super. 347 (App. Div. 1987) [involving a “limited purpose” public figure]. Where plaintiff is a private figure and the subject matter of the defamatory statement is a matter of legitimate public concern, the standard of proof is also clear and convincing. See *Pitts v. Newark Bd. of Educ.*, 337 N.J. Super. 331 (2001); *Burke v. Deiner*, 97 N.J. Super. 465 (1984); *Costello v. Ocean County Observer*, 136 N.J. 595 (1994). The trial judge must make the determination as to the status of the plaintiff and whether the statements complained of by a private person are a matter of legitimate public concern. See *Lawrence v. Bauer Pub. Co.*, *supra*; *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125 (1986); *Rocci v. Ecole Secondaire*, 165 N.J. 149 (2000) (The Supreme Court expands the definition of what is deemed to be “of public concern”). See also *Senna v Floriment*, 196 N.J. 469 (2008)

defamatory statement² of fact concerning [plaintiff] with actual knowledge that the statement was false or with reckless disregard of its truth or falsity, thereby causing [plaintiff] to incur actual damages.

[Plaintiff] must prove five elements by clear and convincing evidence to prevail here. These five elements are: (1) that [defendant] made a defamatory statement of fact; (2) concerning [plaintiff]; (3) which was false and (4) which was communicated to at least one person other than [plaintiff] (5) with [defendant's] actual knowledge that the statement was false or with [defendant's] reckless disregard of the statement's truth or falsity. I will now explain each of these five elements.

2. Elements

a. That [defendant] made a defamatory statement of fact.

A defamatory statement is a statement of fact which is injurious to the reputation of [plaintiff], or which exposes [plaintiff] to [*choose applicable category*] hatred, contempt or ridicule, or to a loss of the good will and confidence felt toward him/her by others, or which has a tendency to injure him/her in his/her trade or business.³

² A defamatory statement may consist of libel or slander. *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 133, 516 A.2d 220 (1986) (citing *Prosser and Keeton on Torts* § 111 at 771 (5th ed. 1984)); Rodney A. Smolla, *Law of Defamation* § 1:10 (2d ed. 2008).

³ See *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982), *certif. denied*, 459 U.S. 907, 103

To be defamatory, the statement must be a statement of fact. Statements of opinion are not actionable. You must not consider them in any way.⁴

Here, the statement of fact alleged to have been made by [defendant] is _____ . This may be interpreted in two ways: First, it may be understood to mean _____. This meaning is clearly defamatory to [plaintiff] if it exposed him/her to the contempt and ridicule of others; it is in this sense that [plaintiff] contends that it was generally understood. The second meaning, however, is _____. In this sense, of course, the statement is innocent and non-defamatory, and it is in this sense that [defendant] contends it was understood.⁵

S.Ct. 211, 74 *L.Ed.* 2d 169 (1982); *Dairy Stores, Inc. v. Sentinel Pub. Co.*, *supra*; *Restatement (Second) of Torts*, Section 559 (1977).

⁴ The trial court must preliminarily determine whether any of the statements complained of are statements of opinion. If there are any statements of opinion in the publication complained of, the jury must be instructed that these statements are privileged and are not to be considered in any way in their deliberations. See *Gertz v. Robert Welch, Inc.*, *supra*; *Kotlikoff v. The Community News*, 89 *N.J.* 62 (1983); *Maressa v. New Jersey Monthly*, *supra*; *Dunn v. Gannett New York Newspapers, Inc.*, 833 *F.* 2d 446 (3d Cir. 1987); *Karnell v. Campbell*, 206 *N.J. Super.* 81 (App. Div. 1985); *Restatement (Second) of Torts*, Section 566 (1977).

⁵ The trial court must preliminarily determine whether the statement is defamatory on its face. Only when the court finds that a statement is capable of both a defamatory and non-defamatory interpretation is the issue to be submitted to the jury. See *Lawrence v. Bauer Pub. Co.*, *supra*; *Romaine v. Kallinger*, 109 *N.J.* 282, 290-91 (1988); *State v. Browne*, 86 *N.J. Super.* 217 (App. Div. 1965); *Sokolary v. Edlin*, 65 *N.J. Super.* 542 (App. Div. 1961); *Mosler v. Whelan*, 48 *N.J. Super.* 491 (App. Div.), *rev'd*, 28 *N.J.* 397 (1958). When the statement is only capable of a defamatory interpretation, the plaintiff need not establish this element and it should be eliminated from the instruction.

You must determine, in light of all the evidence, if the words used by [defendant] were understood in their defamatory sense by the reasonable person who read [heard] them. In this regard, you are, of course, free to consider the common and ordinary meaning of the words used in the context of the statement, but bear in mind that your deliberations are not to be governed solely by what you yourselves believe to be the meaning of the language used nor, indeed, by what you personally believe [defendant] intended to be understood. The test is what you find from all the evidence the words were understood to mean by the reasonable person who read [heard] them.⁶

b. The plaintiff must prove that the defamatory statement concerned the plaintiff.

The second element that plaintiff must prove by a preponderance of the evidence is that the defamatory statement was read [heard] and understood by at least one other person to concern [plaintiff].⁷ The defamatory statement read [heard] by at least one person other than [plaintiff] was reasonably understood by them to refer to [plaintiff]. The actual naming of [plaintiff] is not necessary so long as those who read [heard] the statement understood that [plaintiff] was

⁶ See *Restatement (Second) of Torts*, Section 563 (1977).

⁷ See *Gnapinsky v. Goldyn*, 23 N.J. 243 (1957); *Scelfo v. Rutgers Univ.*, 116 N.J. Super. 403 (Law Div. 1971); *Dijkstra v. Westerink*, 168 N.J. Super. 128 (App. Div. 1978); *Restatement (Second) of Torts*, Sec. 564 (1977). Where the defamatory statement concerns a group or class of persons of which plaintiff is a member, the plaintiff must establish some reasonable application of the words to himself/herself. See *Mick v. American Dental Ass'n*, 49 N.J. Super. 262, 285-87 (App. Div. 1958); *Restatement (Second) of Torts*, Section 564A (1977).

the subject of the statement. You are not to decide whether [defendant] intended the statement to refer to [plaintiff]; the issue is whether those persons reading [*hearing*] the statement reasonably understood the statement to refer to [plaintiff].

c. Plaintiff must prove that the defamatory statement is false.

The third element that [plaintiff] must prove by a preponderance of the evidence is that the defamatory statement was false.⁸ Here, [plaintiff] contends the defamatory statement is false; [defendant] denies that the statement is false. You must determine if the statement is true or false. In this regard, it is not necessary for you to find the statement true or false in every detail. It is enough if the defamatory gist or sting of the statement is substantially true or substantially false. In determining the truth or falsity of the statement, you must consider the entire context of the statement; words or phrases must not be isolated or taken out of context.

⁸ See *Pitts v. Newark Bd. of Educ.*, *supra*; *Rocci v. Ecole Secondaire*, *supra* (where the Supreme Court stated that defamation exists where the defendant otherwise acted with reckless disregard of truth); *also see* footnote 10 concerning the fifth element as to definition in defamation law of the term “actual malice.” *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed. 2d 783 (1986); *Sisler v. Gannett Co. Inc.*, 104 N.J. 256 (1986); *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420 (App. Div. 1958), *aff’d on reh’g*, 49 N.J. Super. 551 (App. Div. 1958); *LaRocca v. New York News, Inc.*, 156 N.J. Super. 59 (App. Div. 1978); *Scelfo v. Rutgers Univ.*, *supra*; *Dorney v. Dairymen’s League Co-op. Ass’n*, 149 F. Supp. 615 (D. N.J. 1957); *Restatement (Second) of Torts*, Section 581A (1977).

d. Plaintiff must prove that the defamatory statement was communicated to a person or persons other than the plaintiff.

The fourth element [plaintiff] must prove by a preponderance of the evidence is that the defamatory statement was communicated, orally or in writing, to at least one person other than [plaintiff].⁹ Therefore, it is not necessary that the defamatory statement be communicated to a large or substantial group. It is enough that it is communicated to a single person other than [plaintiff], so long as that recipient understood the statement in its defamatory sense.¹⁰

e. Plaintiff must prove that defendant communicated the false statement to others with the actual knowledge that it was false or with a reckless disregard of whether it was true or false.

The fifth element plaintiff must prove by a preponderance of the evidence is that, when the statement was communicated to at least one other person by [defendant], [defendant] knew that the statement was false or acted in reckless disregard of whether it was true or false.¹¹ This means that [defendant] must

⁹ See *Gnapinsky v. Goldyn*, *supra* at 252-53; *Restatement (Second) of Torts*, Section 577 (1977). Note that the communication of a defamatory statement to a third person may be qualifiedly privileged. See text and footnotes on Qualified Privilege under “Private Defamation” (Charge 3.11B), *infra*.

¹⁰ See Comments b and c to *Restatement (Second) of Torts*, Sec. 577 (1977). See *Rocci v. Ecole Secondaire*, *supra*; *Pitts v. Newark Bd. of Educ.*, *supra*. (The courts have held that a plaintiff should not be able to recover for the harm flowing from republication of a defamatory statement when the plaintiff himself/herself knowingly causes the material to be distributed).

¹¹ The plaintiff must prove “actual malice” which exists when a defendant has actual knowledge that the statement he/she is making is false or when he/she entertains serious

have actually known that the defamatory statement regarding [plaintiff] was false when he/she communicated it, or that [defendant] communicated the defamatory statement with a high degree of awareness that it was probably false, or that [defendant] truly had serious doubts as to the truth of the defamatory statement when he/she communicated it.

3. Burden of Proof

[Plaintiff] must prove each of the five elements I have just explained to you by clear and convincing evidence. Clear and convincing evidence means that proofs should produce in your minds a firm belief or conviction as to the truth of the claims made by [plaintiff]. The evidence must be as clear, direct and weighty and convincing as to enable a jury to come to a clear conviction, without hesitancy, of the truth of precise facts in issue.¹² Clear and convincing is a standard of proof which requires more than a mere balancing of doubts or probabilities. It requires clear evidence which causes you to be convinced that the allegations sought to be proved are true.

doubts as to its truth. *See Pitts v. Newark Bd. of Educ., supra; Burke v. Deiner, supra; see New York Times v. Sullivan, supra; Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964); St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968); Lawrence v. Bauer Pub. Co., supra; Marchiano v. Sandman, supra; Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501 (App. Div.), certif. denied, 113 N.J. 378 (1988).*

¹² *Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960); see Matter of Jobes, 108 N.J. 394, 407 (1987); State v. Hodge, 95 N.J. 369, 376 (1984).*

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If [plaintiff] proved each of the five elements I have outlined by clear and convincing evidence, [plaintiff] has met his/her burden of proof and is entitled to your verdict. If, however, [plaintiff] has failed to prove by clear and convincing evidence any of these elements, you must return a verdict for [defendant].