

3.11B PRIVATE DEFAMATION (03/2010; revised 06/2014)

NOTE TO JUDGE

The instructions set forth below apply only where plaintiff is a private person (as opposed to a public official or “public figure”) and the subject matter of the alleged defamatory statement is not a matter of legitimate public concern.¹ The Supreme Court in *Rocci v. Ecole Secondaire*, 165 N.J. 149 (2000), expanded free speech protection to private persons, if the reasons are deemed to be “in the public interest or of legitimate public concern”. A plaintiff in those circumstances must prove “actual malice”; see *Pitts v. Newark Bd. of Educ.*, 337 N.J. Super. 331 (2001); pecuniary loss (actual damage to reputation) damages will not be presumed. The rights of Plaintiffs in private defamation cases, distinguished from public defamation cases, came before the New Jersey Supreme Court in the cases of *Senna v. Floriment*, 196 N.J. 469 (2008) and *W.J.A. v. D.A.*, 210 N.J. 229 (2012).

1. General Elements

For [plaintiff] to recover damages from [defendant] for defamation, [plaintiff] must prove by a preponderance of the credible evidence that [defendant] communicated to someone other than [plaintiff] a false and defamatory statement² of fact concerning [plaintiff] and that [defendant] had actual knowledge that the statement was false, *or* acted in reckless disregard of

¹ See footnote 1 of the “Public Defamation” instructions (Model Civil Charge 3.11A), *supra*.

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).

its truth or falsity, *or* acted negligently in failing to ascertain the falsity of the statement.

So, for [plaintiff] to prevail, he/she must prove by a preponderance of the evidence³ the following elements: (1) that [defendant] made a defamatory statement of fact; (2) concerning [plaintiff]; (3) which was false; (4) which was communicated to at least one person other than [plaintiff]; and (5) with actual knowledge by [defendant] that the statement was false, or with reckless disregard by [defendant] of the statement's truth or falsity, or with negligence [defendant] in failing to determine the falsity of the statement.⁴

2. Specific Elements

- a. The statement must be a defamatory statement of fact.** [*Same as for Public Defamation.*]
- b. The plaintiff must prove that the defamatory statement concerned the plaintiff.** [*Same as for Public Defamation.*]
- c. The plaintiff must prove that the defamatory statement is false.** [*Same as for Public Defamation.*]
- d. The plaintiff must prove that the defamatory statement was communicated to a person or persons other than the plaintiff.** [*Same as for Public Defamation.*]

³ Except that when a qualified privilege exists, the plaintiff must prove the abuse of the qualified privilege by clear and convincing evidence. *Erickson v. Marsh & McLennan*, 117 N.J. 539, 565 (1990); *Kass v. Great Coastal Express, Inc.*, 291 N.J. Super. 10 (App. Div. 1996), *aff'd in part, rev'd in part*, 152 N.J. 353 (1998).

⁴ See *Restatement (Second) of Torts*, Section 580B; *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 31-34, 42 n. 13 (App. Div. 1987).

- e. **[Plaintiff] must prove that [defendant] actually knew the statement was false when he/she communicated it, or [defendant] communicated the statement with reckless disregard of its truth or falsity, or [defendant] acted negligently in failing to ascertain the falsity of the statement before communicating it.**

This last element deals with [defendant's] fault in communicating the defamatory statement. [Plaintiff] must prove one of the following: (a) that [defendant] communicated a defamatory statement which he/she actually knew to be false, or (b) that [defendant] communicated a defamatory statement with a high degree of awareness that it was probably false or with serious doubts as to the truth of the statement, or (c) that [defendant] acted negligently in failing to ascertain the falsity of the statement prior to communicating it.

In determining if [defendant] acted negligently in failing to ascertain the falsity of the statement, you must determine that [defendant] failed to act as a reasonably prudent person would have acted under like circumstances. Consider whether [defendant] had reasonable grounds to believe that the statement was true, and whether [defendant] acted reasonably in checking on the truth or falsity of the statement communicating it. Consider, also, [defendant's] investigation or lack of investigation of the accuracy of the statement, the thoroughness of that investigation, the nature and the interests of the persons to whom the statement was communicated, the extent of damage

that would be produced if the communication proved to be false, and whether [defendant] had an honest but nonetheless mistaken belief in the truth of the statement.⁵

3. Qualified Privilege

NOTE TO JUDGE

In certain circumstances, the communication of a defamatory statement to another will be conditionally privileged – for example, where there is a reasonable belief that the information affects a sufficiently important interest of the person making or receiving the statement and knowledge of the information will serve the lawful protection of that interest.⁶ The question of whether a defamatory statement is conditionally privileged is for the court.⁷ If the court determines that the communication of the defamatory statement is conditionally privileged, the question of whether the privilege has been abused is for the jury.⁸ The following must be given where the court has determined that the statement is conditionally privileged but the jury must decide whether the privilege has been abused.

⁵ See *Restatement (Second) of Torts*, Section 580B, comments g and h.

⁶ See, e.g., *Gallo v. Princeton Univ.*, 281 N.J. Super. 134, 143 (App. Div. 1995) (describing circumstances giving rise to qualified privilege), *certif. denied*, 142 N.J. 453 (1995); *Restatement (Second) of Torts*, Sections 594 to 598A (1977) (describing circumstances giving rise to a qualified or conditional privilege).

⁷ *Hawkins v. Harris*, 141 N.J. 207, 216 (1995) (whether a defendant is entitled to a privilege is a question of law); *Bainhauer v. Manoukian*, *supra* at 40.

⁸ *Erickson v. Marsh & McLennan Co.*, *supra* at 566 (abuse of privilege “is an issue normally reserved for the jury”); *Bainhauer v. Manoukian*, *supra* at 40; *Restatement (Second) of Torts*, Section 600.

Here, [defendant] has asserted a qualified privilege to make the statements which [plaintiff] claims are defamatory. In other words, [defendant] claims that, even if the communication was defamatory, [defendant] was entitled — privileged — to make the communication which he/she made. I have decided as a matter of law that such a privilege exists, because

[select the particular privilege(s) which the defendant has asserted and factually describe the interests which defendant claims were being protected (a) protecting his/her lawful interests,⁹ or (b) protecting the lawful interest of the person(s) to whom the allegedly defamatory statement was communicated,¹⁰ or (c) informing those persons sharing a common interest of information which they are entitled to know by reason of their common interest,¹¹ or (d) lawfully protecting the well-being of defendant's immediate family member(s) or an immediate family member of the person to whom the statement was communicated.]¹²

⁹ *Restatement (Second) of Torts*, Section 594. For example, an employee or supervisor is privileged to make a defamatory statement about a co-employee, so long as the person to whom the statement is made has a need to know the information in order to protect the employer's lawful interest. Thus, an employee or supervisor is privileged in reporting to management his/her reasonable belief concerning activity of an employee which is work-related.

¹⁰ For example, a personnel manager is privileged to make a defamatory statement about a former employee to a prospective employer so long as the statement directly relates to the employee's qualifications for the job. *See Restatement (Second) of Torts*, Section 595, cmt. i.

¹¹ It is not necessary to the existence of this privilege that the defamatory statement be communicated for the protection of the common interest. For example, in an employment setting a partner may be informed of the reasons why an employee of the partnership was discharged, even though the employment is at will and thus the information is not essential to justify the discharge. *See Restatement (Second) of Torts*, Section 596, cmt. c.

¹² This privilege would arise, for example, where the defendant reasonably believes that his brother-in-law has AIDS and informs his sister of this. *See Restatement (Second) of Torts*, Section 597, illus. 1.

This privilege is not absolute. It can be abused and lost. You must decide if the privilege was abused and lost. So, if you determine that the statements were defamatory, you must also consider whether [defendant] lost or abused the qualified privilege.¹³ If you find that [defendant] abused the qualified privilege, you may find in favor of plaintiff; if you find that [defendant] did not abuse the qualified privilege, you may not find for [plaintiff].¹⁴

[Plaintiff] must prove the first five elements of defamation by a preponderance of the evidence. On the issue of privilege, however, [plaintiff] bears a different and heavier burden of proof to prove that [defendant] has lost or abused the privilege to communicate the defamatory statement. Plaintiff must show by clear and convincing evidence, not merely by a preponderance of the evidence, that [defendant] abused the privilege.¹⁵

Clear and convincing evidence is evidence which produces in your minds a firm belief or conviction as to the truth of the allegations sought to be established.¹⁶ It must be “as clear, direct and weighty and convincing as to

¹³ *Restatement (Second) of Torts*, Section 599.

¹⁴ *See Kass v. Great Coastal Express, Inc.*, *supra*.

¹⁵ *Erickson v. Marsh & McLennan*, *supra* at 565-566: to defeat the qualified privilege, plaintiff must show abuse by clear and convincing evidence.

¹⁶ *In re Boardwalk Regency Casino License Application*, 180 N.J. Super. 324, 399 (App. Div.

enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.”¹⁷ The clear and convincing standard of proof requires more than a “mere balancing of doubts or probabilities.”¹⁸ It is evidence which causes you to be convinced that the allegations sought to be proved are true.¹⁹

Abuse of the privilege can be proved by [plaintiff] in one of three ways. To prove that [defendant] abused and thereby lost the privilege to communicate the defamatory statement, [plaintiff] must prove, by clear and convincing evidence: (1) that [defendant] knew the statement was false or [defendant] acted in reckless disregard of its truth or falsity; or (2) the statement served a purpose contrary to the interests served by the privilege; or (3) the defendant disseminated the statement excessively.²⁰ I will now explain each of these ways that the qualified privilege may be abused and thereby lost.²¹

1981), *modified on other grounds*, 90 N.J. 361 (1982).

¹⁷ *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).

¹⁸ *Aiello v. Knoll Golf Club*, *supra* at 162.

¹⁹ *See also* Model Civil Charge 1.19.

²⁰ *Kass v. Great Coastal Express, Inc.*, *supra* at 356 (setting forth three-part test and clear and convincing burden of proof); *Williams v. Bell. Tel. Lab. Inc.*, 132 N.J. 109, 121 (1993) (setting forth three-part test).

²¹ The Appellate Division in *Kass v. Great Coastal Express, Inc.*, *supra*, includes an in-depth discussion of qualified privilege and an analysis of the former Model Civil Charge 3.11B. One Appellate Judge has suggested Jury Questions in an appendix.

First, the privilege may be lost if [plaintiff] proves by clear and convincing evidence that [defendant] knew the statement was false or acted in reckless disregard of the statement's truth or falsity. I earlier told you that knowledge of falsity or recklessness must be proven by a preponderance of evidence for you to find that a statement was defamatory. However, for you to find that [defendant] lost the privilege, [plaintiff] must establish by the higher evidentiary standard of clear and convincing evidence that [defendant] knew the statement was false or acted in reckless disregard of the statement's truth or falsity.²²

Second, the privilege can be lost if [plaintiff] proves by clear and convincing evidence that the statement served a purpose contrary to the interests of the qualified privilege.²³

Third, the privilege can be lost if [plaintiff] shows that a contrary purpose was served by presenting evidence about [defendant's] motivation. The privilege is lost if it is not made primarily for the purpose of furthering the interest which is entitled to protection.²⁴

²² *Kass v. Great Coastal Express, Inc., supra.*

²³ *Id.* at 357; *Fees v. Trow*, 105 N.J. 330, 341 (1987).

²⁴ *Fees v. Trow, supra* at 341.

I have ruled that the interest which is entitled to protection here is
[choose appropriate interest]:

- (a) *protecting defendant’s lawful interests; or*
- (b) *protecting the lawful interest of the person(s) to whom the allegedly defamatory statement was communicated; or*
- (c) *informing those persons sharing a common interest of information which they are entitled to know by reason of their common interest; or*
- (d) *lawfully protecting the well-being of defendant’s immediate family member(s) or an immediate family member of the person to whom the statement was communicated.*

For example, if [plaintiff] proves by clear and convincing evidence that [defendant] was primarily or chiefly motivated by ill will or spite toward [plaintiff] in communicating the statement, the privilege is lost (even if [defendant] was partly motivated by the interests protected by the privilege).²⁵ If [plaintiff] proves by clear and convincing evidence that [defendant] was primarily or chiefly motivated by an intent even if legitimate, which does not serve the purpose of the privilege, the privilege is abused and lost.²⁶ However,

²⁵ *Kass v. Great Coastal Express, Inc.*, *supra* at 22, 23; *Restatement (Second) of Torts*, Section 603.

²⁶ *Fees v. Trow*, *supra* at 341 (qualified privilege lost if defendant motivated by ill motive or “wrong” motive); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 373 (1959). For example, if defendant reported defamatory information about a co-worker to a supervisor not out of ill will toward the co-worker, but chiefly out of a desire to enhance the defendant’s own changes for a promotion by removing a competitor, then the privilege would presumably be lost.

even if [defendant] harbored ill will against [plaintiff] or was motivated by objectives that did not serve the purpose of the privilege, if that ill will or objective was not the primary or chief motivating force behind the communication, the privilege will not be lost.²⁷

Proving that the communication was chiefly or primarily motivated by ill will or other wrongful purpose is not the only way to show abuse of the qualified privilege. The privilege may also be abused and lost if [plaintiff] proves by clear and convincing evidence that [defendant] did not reasonably believe the content of the statement to be necessary for the purpose for which the privilege was granted. Sometimes, this may involve a claim by a plaintiff that the defendant communicated more information than defendant could have believed reasonably necessary for the legitimate purposes of the privilege.²⁸

Third, the privilege can be lost if [plaintiff] proves by clear and convincing evidence that [defendant] could not reasonably believe that the way that [defendant] disseminated the statement was a proper means of communicating the information to the person who was privileged to receive it.

²⁷ See, e.g., *Lutz v. Royal Ins. Co. of Am.*, 245 N.J. Super. 480, 499-501 (App. Div. 1991).

²⁸ See *Gallo v. Princeton Univ.*, *supra* at 148-49 (stating that there was no abuse of privilege where university officials were circumspect in release of defamatory information, only releasing details as reasonably necessary). See, generally, *Bainhauer v. Manoukian*, *supra* at 43; *Restatement (Second) of Torts*, Section 605.

This is called “excessive publication.” Sometimes, a communication may reach persons who are not privileged to receive it, as well as those who do.²⁹ Whether that is excessive depends on the circumstances. For example, a letter may be typed and read by a secretary before transmittal to the privileged recipient; a general release of information may reach persons without a privileged interest where such a release is only reasonable way of reaching those with a privileged interest.³⁰ To find excessive publication, you must find by clear and convincing

²⁹ According to *Restatement (Second) of Torts*, Section 604, a plaintiff must establish two elements to prove abuse of the privilege by excessive publication: (1) the defendant *knew* that the communication would reach non-privileged recipients; and (2) the defendant did not have a reasonable belief that the method of communication was proper.

One who, upon an occasion giving rise to a conditional privilege for the publication of defamatory matter to a particular person or persons, knowingly publishes the matter to a person to whom its publication is not otherwise privileged, abuses the privilege unless he reasonably believes that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged. [*Id.*]

However, *Gallo v. Princeton Univ., supra, Bainhauer v. Manoukian, supra, and Feggans v. Billington*, 291 N.J. Super. 382, 399-400 (App. Div. 1996), focused only on the second aspect of the test - whether the defendant had a reasonable belief that the publication was a proper means of communicating. Conceivably, a case could arise in which the defendant did not know that his/her communication would reach non-privileged recipients - *e.g.*, a person shouts to police officer about a presumed purse-snatcher without seeing or knowing about a bystander. There, regardless of whether defendant had a reasonable belief that the publication was proper, there would be no excessive publication and consequent loss of the privilege under the Restatement.

³⁰ *Restatement (Second) of Torts*, Section 604, cmts. a and b (it is not excessive publication where publication to persons lacking an interest in the statement is reasonably incidental to publication to persons who do have an interest, such as publication to a secretary, publication to bystanders on a street when a person calls out to a police officer, and publication of a fraternal magazine which might be read by outsiders).

evidence that [defendant] could not reasonably believe the method of communication/publication was a proper means of communicating.³¹

³¹ See *Gallo v. Princeton Univ.*, *supra* at 143-146 (general release of report of staff misconduct was not excessive and that publication through general news media may in some cases be a reasonable means for a non-profit corporation to communicate to its pool of donors). See also, *Feggans v. Billington*, *supra* at 399-400 (it was not excessive for workers to communicate to supervisor and to plaintiff's union representative where they "would have had a reasonable belief that it was proper"). It is unclear whether plaintiff must show that the defendant in fact did not reasonably believe the communication was proper; or whether, regardless of what the defendant actually believed, the plaintiff must show, based on a more objective test, that the defendant could not have reasonably believed the communication proper under the circumstances. It appears, however, that the more objective test should be applied. See *Feggans v. Billington*, *supra* at 399 (a communication is excessive where defendants could have no reasonable belief that the publication was appropriate means of communicating.); *Gallo v. Princeton Univ.*, *supra* at 144 (quoting with approval a federal decision finding no excessive publication where "the publication ... was a reasonable means of communicating..."). But see *Restatement (Second) of Torts*, Section 604 (stating that the privilege is lost unless "he [defendant] reasonably believes that the publication is a proper means of communicating...").