

**2.16 DEFAMATION AND EMPLOYMENT** (Approved 6/95)

***NOTE TO JUDGE***

This charge is to be used only where defamation involves private figures claiming to have been defamed.<sup>1</sup>

**A. General Elements of Defamation**

In this lawsuit, the plaintiff *[insert name]* has sued the defendant *[insert name]*<sup>2</sup> for defamation. To find liability for defamation, you, the jury, must find by a preponderance of evidence the following five elements:

**First**, that defendant made a defamatory statement;

**Second**, that the defamatory statement concerned the plaintiff;

**Third**, that the defamatory statement was false;

**Fourth**, that the defamatory statement was communicated to someone other than the plaintiff; and

***NOTE TO JUDGE***

Charge any of the following that are appropriate in the particular case.

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<sup>1</sup>These charges are to be used only where the alleged defamation involves private, not public, figures. *Lutz v. Royal Ins. Co.*, 245 N.J. Super. 480 (App. Div. 1991). *Lutz* departs from traditional concepts of defamation in holding that expressions of opinion regarding the job performance of purely private figures are actionable.

<sup>2</sup>The Committee recommends that, where appropriate for clarity, the judge insert the names of the respective parties when plaintiff or defendant is mentioned in these instructions.

**Fifth**, that the defendant made the defamatory statement (1) with actual knowledge that the statement was false, or (2) with reckless disregard of the statement's truth or falsity, or (3) with negligence<sup>3</sup> in failing to determine the falsity of the statement.<sup>4</sup>

**B. Specific Elements of Defamation**

I shall now instruct you on each of these five elements of a defamation action.

1. The first element that the plaintiff must prove is that the statement was defamatory.

A defamatory statement is a statement of fact (or opinion)<sup>5</sup> that ***[CHOOSE THE APPROPRIATE ALTERNATIVE OR ALTERNATIVES THAT APPLY IN THE PARTICULAR CASE:]***

- injures the reputation of the plaintiff, or exposes him/her to hatred, contempt or ridicule;
- causes the plaintiff to lose the goodwill/confidence of others;

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<sup>3</sup>Where this portion of the instruction is appropriate, the trial judge should incorporate a brief definition of negligence either here or in the text accompanying note 12, *infra*.

<sup>4</sup>See *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 31-34, 42 n.13 (App. Div. 1987); *Restatement (Second) of Torts*, Section 580B (1977).

<sup>5</sup>The parenthetical should be inserted where expressions of opinion are at issue in addition to, or instead of, statements of fact (*see* note 1, *supra*).

- tends to injure the plaintiff in his/her trade or business.<sup>6</sup>

In this case, the plaintiff claims that the following statement was defamatory:

*[Identify the defamatory statement of fact or opinion.]*

**NOTE TO JUDGE**

The trial court must make a preliminary determination as to 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. *Romaine v. Kallinger*, 109 N.J. 282, 290-91 (1988).

You must determine if a reasonable person would understand the statement to be defamatory. In making this determination, consider the common and ordinary meaning of the words in the context of the entire statement. It does not matter what the plaintiff understood the words to mean. The test is, in light of all the evidence, what a reasonable person would understand the words to mean.<sup>7</sup>

2. The second element that the plaintiff must prove is that someone other than the plaintiff and defendant heard/read the defamatory statement and reasonably

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<sup>6</sup>*Lutz v. Royal Ins. Co.*, *supra*, at 492-493 (App. Div. 1991); *Restatement (Second) of Torts*, Section 559 (1977).

<sup>7</sup>*See Restatement (Second) of Torts*, Section 563 (1977).

understood that it referred to the plaintiff.<sup>8</sup> It does not matter whether the defendant intended the statement to refer to the plaintiff. The issue for you to decide is whether those persons hearing/reading the statement reasonably understood the statement to refer to the plaintiff.

3. The third element that the plaintiff must prove is that the defamatory statement was false.<sup>9</sup>

In determining whether the defamatory statement was true or false, you do not need to find that the statement was true or false in every detail. It is enough if the statement is substantially false, as long as the falsity goes to the defamatory “gist” or “sting” of the statement.<sup>10</sup>

On the other hand, if the statement made by the defendant was completely true, you must find for the defendant. However, if the statement was substantially true, you can only find for the defendant if the truth goes to the defamatory “gist” or “sting” of the statement.

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<sup>8</sup>See *Gnapinsky v. Goldyn*, 23 N.J. 243 (1957); *Dijkstra v. Westerink*, 168 N.J. Super. 128 (App. Div. 1978), *certif. denied*, 81 N.J. 329 (1979).

<sup>9</sup>See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986); *Sisler v. Gannet, Inc.*, 104 N.J. 256 (1986).

<sup>10</sup>*Lawrence v. Bauer Pub. & Print., Ltd.*, 89 N.J. 451, 460-461 (1982).

4. The fourth element that the plaintiff must prove is that the defamatory statement was communicated, either orally or in writing, to someone other than the plaintiff.<sup>11</sup> It is not necessary that the defamatory statement was communicated to a large or even a substantial group of persons. It is enough that the statement was communicated to someone other than the plaintiff.

5. The fifth and final element that the plaintiff must prove is that it was wrong for defendant to communicate the defamatory statement. Plaintiff can satisfy this element in one of the following ways.

- One way is to prove that the defendant communicated a defamatory statement which he/she actually knew was false.
- Another way is to prove that the 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.
- The final way is for the plaintiff to prove that defendant acted negligently<sup>12</sup> in failing to determine the falsity of the statement before he/she communicated it.<sup>13</sup>

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<sup>11</sup>See *Gnapinsky v. Goldyn*, *supra*, at 252-253; *Restatement (Second) of Torts*, Section 577 (1977).

<sup>12</sup>See note 3, *supra*.

<sup>13</sup>See *Bainhauer v. Manoukian*, *supra*, at 32-33; *Restatement (Second) of Torts*, Section 580B (1977).

**C. Qualified Privilege**

***NOTE TO JUDGE***

In certain circumstances, the communication of a defamatory statement which would otherwise be actionable is protected by a qualified privilege. The test of the existence of such a privilege is the circumstantial justification for the publication of the defamatory information. Specifically, the elements of this test include: the appropriateness of the occasion of which the defamatory statement is published, the legitimacy of the interest sought to be protected/promoted by making the statement, and the pertinence of the receipt of the information by the recipient.<sup>14</sup>

The question of whether a defamatory statement is conditionally privileged is a determination which the Judge rather than the jury must make.<sup>15</sup> If the court determines that the communication of the defamatory statement is protected by a qualified privilege, the question of whether there has been an abuse of such privilege entitling the plaintiff to prevail is for the jury.<sup>16</sup> The following instructions are to be given where the court has determined that the statement is protected by a qualified privilege but that there is an issue for the jury as to abuse of the privilege.

If you determine that plaintiff has proven all five elements, then you must make a further determination in order to find in favor of plaintiff.

You must determine if the defendant has exceeded the limits of his qualified privilege.

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<sup>14</sup>*Bainhauer v. Manoukian, supra*, at 36-37.

<sup>15</sup>*Lutz v. Royal Ins. Co., supra*,. at 496; *Bainhauer, supra*, at 40.

<sup>16</sup>*Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 569 (1990); *Lutz v. Royal Ins. Co., supra*, at 499.

A qualified privilege gives a person limited protection to make a statement that is defamatory.

**[Judge should explain the qualified privilege involved in the case, and provide a brief explanation of the rationale for allowing the privilege.]<sup>17</sup>**

Because of the existence of this (these) privilege(s), the plaintiff, in order to prevail, must overcome the privilege by proving that the defendant lost or abused the privilege(s).<sup>18</sup>

You will recall that I charged earlier that plaintiff must prove the first five elements of defamation by a preponderance of evidence. However, the plaintiff bears a different and heavier burden of proof in order to establish 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.<sup>19</sup>

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<sup>17</sup>For example, a qualified privilege extends to an employer who responds in good faith to the specific inquiries of a prospective employer regarding a former employee's qualifications for a job. See *Erickson v. Marsh & McLennan*, *supra*, at 562. See also *Restatement (Second) of Torts*, Section 596 (1977).

<sup>18</sup>*Restatement (Second) of Torts*, Section 599 (1977).

<sup>19</sup>*Erickson v. Marsh & McLennan*, *supra*, at 565-566, establishes that in order to defeat the qualified privilege, plaintiff must show abuse by clear and convincing evidence.

**[Here insert Model Civil Charge 1.19 for definition of clear and convincing evidence.<sup>20</sup>]**

The privilege may be lost in one of two ways.

- The first way the statement is lost is if the statement made by defendant was primarily motivated by a malicious intent. In other words, the plaintiff must prove by clear and convincing evidence that the defendant knew the statement to be false or that the defendant acted in reckless disregard of its truth or falsity.<sup>21</sup>
- The second way that the privilege is lost is if the plaintiff proves by clear and convincing evidence that defendant did not reasonably believe that people he or she wrote/spoke to had a proper interest in receiving the statement. The privilege is lost where the defamatory statement is communicated to persons who have no legitimate interest in receiving the information.<sup>22</sup> If you find that defendant did not reasonably believe that the person(s) to whom the defamatory statement was communicated had a proper and legitimate interest in receiving the information, the defendant has lost this privilege.<sup>23</sup>

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<sup>20</sup>*In re Boardwalk Regency Casino License Application*, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361, appeal dismissed, 459 U.S. 1081 (1982). *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162 (App. Div. 1960).

<sup>21</sup>*Lutz v. Royal Ins. Co.*, supra, at 501; *Bainhauer*, supra, at 42; *Restatement (Second of Torts)*, Section 600 (1977).

<sup>22</sup>*Sokolay v. Edlin*, 65 N.J. Super. 112, 125 (App. Div. 1961).

<sup>23</sup>*Bainhauer*, supra, at 42; *Restatement (Second) of Torts*, Section 604 (1977).

**D. Damages**

**1. General Instructions**

Plaintiff seeks to recover both compensatory and punitive damages. Compensatory damages are being sought to recover money for the injury done to plaintiff's reputation caused by the defamatory statement and for recovery of the money value of his/her loss(es). Punitive damages are being sought to punish the defendant for the wrongful act by the imposition of further award of damages to the plaintiff over and above the amount of plaintiff's loss(es). I shall first explain the law on compensatory damages and then explain the law on punitive damages.

**2. Compensatory Damages (Special Damages)<sup>24</sup>**

*[See Charge 8.46, Section 2 for instructions on Compensatory Damages (Actual Damages) in a defamation action.]*

**3. Compensatory Damages (General Damages)**

*[See Charge 8.46, Section 3 for instructions on Compensatory Damages (General Damages for Slander Per Se) in a defamation action.]*

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<sup>24</sup> In defamation law, compensatory damages are further divided into two classifications, general damages and actual damages. These instructions should only be given when the plaintiff has properly asserted special damages.

**4. Punitive Damages (Approved 1/97)**

*[The trial judge should charge either Model Civil Charge 8.46, Section 5 or Section 6 depending on when the cause of action was filed. Because the defamation and employment charge covers only private figures claiming to be defamed, the punitive damages Model Civil Charge in either 8.46, Section 5 or Section 6 should be given in the form appropriate for private figures.]*