**16.02 DEFAMATION — ELEMENTS OF DEFAMATION PER SE WHERE PLAINTIFF IS PUBLIC FIGURE OR STATEMENT RELATES TO ISSUE OF PUBLIC INTEREST OR CONCERN**

In this case, the plaintiff claims that the defendant harmed the plaintiff's reputation by making a false statement about the plaintiff. To establish this claim, the plaintiff must prove five elements. The plaintiff must prove that each of the following four elements is more likely true than not true:

(1) the defendant made the following statement: [insert statement determined by the court to be defamatory per se];

(2) the defendant communicated the statement to a person other than the plaintiff;

(3) the statement was reasonably understood by this person to be about the plaintiff; and

(4) the statement was false.

The fifth element of this claim requires the plaintiff to prove by clear and convincing evidence that the defendant either knew that the statement was false or had serious doubts about the truth of the statement.

An alleged fact is established by clear and convincing evidence if the evidence leads you to believe that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true, or true beyond a reasonable doubt, or conclusively true. However, it is not enough to show that the alleged fact is more likely true than not true.

If the plaintiff fails to prove any one of these elements, you must find for the defendant on this claim.

If the plaintiff proves all five elements, [you must find for the plaintiff on this claim] [you must then decide whether the law allows the defendant to make the statement].

Use Note

This instruction should only be used when the court determines 1) that a statement allegedly made by the defendant falls within a category recognized as defamatory per se; and 2) that the plaintiff is a public figure or the statement related to a matter of public concern.

If the defendant claims that the statement was privileged, the second bracketed phrase in the last paragraph should be used and Instruction 16.10 (Privileges and Abuse of Privilege) should be given.

In a case where there it is undisputed that the defendant made the statement and the content of the statement is not in dispute, Element 1 can be eliminated. In a case where it is undisputed that the defendant published the statement to one or more persons other than the plaintiff, Element 2 can be eliminated.

If the plaintiff alleges both defamation per quod and defamation per se, Instruction 16.04 should also be given. The liability instructions on defamation per se should be followed by the damages instruction specific to this claim. See Instruction 16.07 (Defamation – Damages).

Comment

This instruction is intended for use in cases where the law allows the plaintiff to recover for defamation without proving damages. Alaska law allows such recovery under some circumstances.

With respect to requiring proof of damages, the common law distinguished between oral statements (slander) and written statements (libel).

**Slander**. The common law recognized four categories of slander for which the plaintiff was not required to prove damages. These categories are designated as “slander per se.” For all other slander claims, the plaintiff was required to prove special damages. These slander claims are designated as “slander per quod.”

The four traditional categories of slander per se are statements involving crime, a loathsome disease, or sexual misconduct, and statements injurious to a plaintiff’s trade or business. Restatement (Second) of Torts §§ 570-74. Alaska decisions have addressed three of the four categories. *See MacDonald* *v. Riggs*, 166 P.3d 12, 18 (Alaska 2007) (criminal conduct); *French v. Jadon, Inc.*, 911 P.2d 20, 33-34 (Alaska 1996) (criminal conduct); *City of Fairbanks v. Rice*, 20 P.3d 1097 (Alaska 2000) (sexual misconduct); *Alaska Statebank v. Fairco*, 674 P.2d 288, 295 (Alaska 1983) (injury to trade or business). Proof of damages is not required if the defendant’s statement constitutes slander per se. *MacDonald*, 166 P.3d at 18-19.

**Libel.** At common law, all defamatory statements made in writing were actionable without proof of damages. *See* Restatement § 569; D. Dobbs, Law of Torts § 409 (2000). Some courts have departed from the common law and require proof of damages for libel, at least in some instances. Under one approach, a written statement is deemed “libel per se” if the statement is defamatory on its face. In that event, the plaintiff may recover for libel without proving damages. If the statement is not defamatory on its face, the statement is “libel per quod” and plaintiff is required to prove special damages. Restatement § 569, comment b; Dobbs § 409. Alaska case law is not conclusive, but it may support this approach in libel cases. In *Fairbanks Publishing Co. v. Pitka*, 376 P.2d 190 (Alaska 1962), the court considered whether the trial court erred by instructing the jury that newspaper headlines were defamatory as a matter of law. The court found no error in this instruction. In doing so, the court said that “for a publication to be libelous per se, the words used must be so unambiguous as to be reasonably susceptible of only one interpretation—that is, one which has a natural tendency to injure another’s reputation. . .” *Id.* at 194. Although *Fairbanks Publishing* defined the term “libel per se”, the decision did not discuss whether characterizing a written statement as “libelous per se” under this definition meant that the plaintiff was not required to prove damages. Subsequent Alaska cases have repeated *Fairbanks Publishing*’s definition of “libel per se”, but these cases did not directly address whether or when a plaintiff in a libel action must prove damages. *See Alaska Statebank*, 674 P.2d at 295 n. 15 (referring to *Fairbanks Publishing*’s definition of libel per se in support of holding that plaintiff was not required to prove actual damages in a case that involved defamation by conduct); *Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 130 (Alaska 2000] (repeating *Fairbanks Publishing*’s definition of libel per se).

The actual malice standard reflected in the fifth element of this instruction governs defamation claims involving public figures or matters of public concern. *Olivit v. City & Borough of Juneau*, 171 P.3d 1137 (Alaska 2007) (matters of public interest); *Lowell v. Hayes*, 117 P.3d 745 (Alaska 2005) (public figure); *Mt. Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829, 837-38 (Alaska 1995) (“[P]laintiff in a defamation case must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 838).

In cases that involve public figures or matters of public concern, constitutional considerations prevent the award of presumed damages unless the plaintiff proves fault or malice. In public figure/public concern cases, Alaska law requires proof of actual malice. Consequently, it appears that if the plaintiff proves the elements necessary to establish liability for defamation per se in a public figure/public concern case, the plaintiff may recover for this defamation without proving damages, as provided by this instruction.