**16.04 DEFAMATION — ELEMENTS OF DEFAMATION PER QUOD 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 seven elements. The plaintiff must prove that each of the following six elements is more likely true than not true:

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

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

(3) the statement tended to harm the plaintiff’s reputation or to discourage others from associating with the plaintiff;

(4) the statement was false;

(5) the plaintiff suffered a specific monetary loss; and

(6) the statement was a substantial factor in causing that loss.

The seventh 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 seven 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 plaintiff alleges defamation per quod and the court has determined 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 it is undisputed that the defendant published the statement to one or more persons other than the plaintiff, Element 1 can be eliminated.

If the plaintiff alleges both defamation per quod and defamation per se, Instruction 16.01 should also be given, and the first sentence of this instruction should be revised to read:

In this case, the plaintiff claims that the defendant harmed the plaintiff’s reputation by making the following statements about the plaintiff: [list all claimed per quod defamatory statements].

This instruction should be followed by Instruction 3.07 (Substantial Factor) and Instruction 16.07 (Defamation – Damages).

Comment

According to the Alaska Supreme Court, the elements of defamation are:

‘(1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) the existence of either ‘per se’ actionability or special harm.’ It is also ‘necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff.’

*MacDonald v. Riggs,* 166 P.3d 12, 15 (Alaska 2007) quoting *French v. Jadon, Inc.*, 911 P.2d 20, 32 (Alaska 1996) and *Restatement (Second) of Torts* sec. 564 cmt. a (1977).

The Alaska Supreme Court has never defined “special harm.” But the Restatement defines it as “the loss of something having economic or pecuniary value.” *Restatement (Second) of Torts* sec. 575 cmt. b (1977).

The third element, which defines “defamatory,” was used in *Green v. Northern Pub. Co.,* 655 P.2d 736, 739 (Alaska 1982); *Olivit v. City & Borough of Juneau,* 171 P.3d 1137, 1142 (Alaska 2007); and *State v. Carpenter*, 171 P.3d 41, 51 (Alaska 2007).

The actual malice standard reflected in the seventh element of this instruction governs defamation claims involving public figures or matters of public concern. *Olivit*, 171 P.3d at 1143 (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).