**16.10 DEFAMATION – PRIVILEGE AND ABUSE OF PRIVILEGE**

In certain circumstances, the law protects a defendant from liability for making a false statement. The defendant is entitled to protection if the defendant proves that each of the following elements is more likely true than not true:

[Insert elements of applicable privilege. For example, in a case involving the conditional privilege for those with a common business interest in sharing information:

[1] the defendant’s false statement about the plaintiff was made to another person who shared a common business interest with the defendant; and

[2] when the defendant made the false statement, the defendant reasonably believed that the other person was entitled to know the information in the statement.]

If the defendant proves these elements, [you must find for the defendant on this claim] [you must then decide whether the defendant lost [his][her] protection from liability by abusing the right to make this statement. The defendant abused the right to make the statement if the plaintiff proves it is more likely true than not true that [insert description of applicable abuse of privilege. For example, if the plaintiff alleges the defendant acted with malice: the defendant either knew that the statement was false or had serious doubts about the truth of the statement.] If the plaintiff fails to prove that the defendant abused the right to make the statement, you must find for the defendant on this claim.

Use Note

As drafted, this instruction addresses the conditional privilege for those with a common interest in sharing business information. If a different privilege is at issue, the bracketed language must be changed to include all elements of the relevant privilege. Similarly, this instruction refers to abuse of the privilege through malice. If a different kind of abuse is at issue, the bracketed language for abuse of the privilege must be changed.

Comment

The Alaska Supreme Court has recognized eight categories of conditional privileges. The first three listed below (public official, public figure, and matter of public concern) are subsumed in the elements of the claims described in Instructions 16.02 and 16.04 and therefore do not need to be separately presented as defenses.

(1) the plaintiff who was the subject of the false statement was a public official holding a position of sufficient importance to cause the public to have an interest beyond its general interest in all public employees (*Green v. Northern Publishing Co.*, 655 P.2d 736, 740 (Alaska 1982));

(2) the plaintiff who was the subject of the false statement was a public figure (*Lowell v. Hayes*, 117 P.3d 745, 751 (Alaska 2005); *Mt. Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829, 835-37 (Alaska 1995); *Moffatt v. Brown*, 751 P.2d 939, 941 (Alaska 1988));

(3) the false statement related to a matter of public interest or concern (*Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711, 713 (Alaska 1966); *Taranto v. North Slope Borough*, 992 P.2d 1111, 1115 (Alaska 1999); *Olivit v. City and Borough of Juneau*, 171 P.3d 1137, 1142 (Alaska 2007));

(4) the false statement was made by an inferior government administrative officer and concerned the officer’s duties (*Urethane Specialities, Inc. v. City of Valdez*, 620 P.2d 683, 689 (Alaska 1980); *Taranto v. North Slope Borough*, 992 P.2d at 1115)*;*

(5) the false statement was a republication by a newspaper of a statement either privileged as made by its original maker or the newspaper reasonably believed that to be the case (*Urethane Specialities, Inc.*, 620 P.2d at 690 n.6);

(6) the false statement was contained in a government report republished by a newspaper (*Fairbanks Publishing Co. v. Francisco*, 390 P.2d 784, 793 (Alaska 1964));

(7) the false statement was made to a government official concerning matters affecting discharge of the official’s duties (*Doe v. Alaska Superior Ct.*, 721 P.2d 617, 628 (Alaska 1986); *Maddox v. Hardy*, 187 P.3d 486, 497 (Alaska 2008)); and

(8) the maker and the intended recipient of the false statement shared a common interest in knowledge of the information in the false statement (*Lull v. Wick Constr. Co.*, 614 P.2d 321, 324 (Alaska 1980); *Schneider v. Pay’N Save Corp.*, 723 P.2d 619, 623 (Alaska 1980); *Briggs v. Newton*, 984 P.2d 1113, 1121 (Alaska 1999); *DeNardo v. Bax*, 147 P.3d 672, 678 (Alaska 2006)).

Alaska case law has discussed the following four ways in which a conditional privilege may be abused:

(1) the publisher acted with malice (knowledge or reckless disregard as to the falsity of the defamatory matter);

(2) the defamatory matter is published for some purpose other than that for which the particular privilege is given;

(3) the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege; or

(4) the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

*Schneider v. Pay’N Save Corp.*, 723 P.2d 619, 623-24 (Alaska 1986), followed in *DeNardo v. Bax*, 147 P.3d 672, 679-80 (Alaska 2006).