# CHAPTER 22

# DEFAMATION (LIBEL AND SLANDER)

## Introductory Note

1. In **New York Times Co. v. Sullivan**, 376 U.S. 254, 279-80 (1964), the Supreme Court held that the guarantees of freedom of speech and press of the First Amendment, made applicable to the states by the Fourteenth Amendment, prohibit a public official "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This constitutional privilege was premised on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," and on recognition that erroneous statements are "inevitable" in the discussion of public affairs. *Id.* at 270. In **St. Amant v. Thompson**, 390 U.S. 727, 731 (1968), the Court explained that the term "reckless disregard," like "actual malice," is a term of art, and requires evidence that the defendant "in fact entertained serious doubts as to the truth of his publication." In **Curtis Publishing Co. v. Butts**, 388 U.S. 130 (1967), the Supreme Court extended the rule to cases brought by persons who, although not public officials, are deemed "public figures."

2. In **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 347 (1974), the Supreme Court held that although the First Amendment privilege extends to a defamation of a private individual when the defamation relates to a matter of public interest or general concern, "[s]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability." *Accord* **Time, Inc. v. Firestone**, 424 U.S. 448 (1976). After the **Gertz** decision, the Colorado Supreme Court decided **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975). **Walker** was a case brought by a private plaintiff concerning a publication that involved a matter of public interest. The court rejected the negligence standard of liability and adopted the liability standard of **New York Times**, 376 U.S. 254, except that it declined to adopt the **St. Amant** requirement for public officials or public persons, that reckless disregard requires the defendant to have "entertained serious doubts as to the truth." Subsequently, in **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982), the court overruled this exception in **Walker** and held that the **St. Amant** definition of "reckless disregard" should be used "in cases involving matters of public interest or general concern, as well as in cases involving public officials and public figures." *Id.* at 1110; *see also* **Shoen v. Shoen**, 2012 COA 207, ¶ 24, 292 P.3d 1224; **Lockett v. Garrett**, 1 P.3d 206 (Colo. App. 1999); **Fink v. Combined Commc'ns Corp.**, 679 P.2d 1108 (Colo. App. 1984); **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983).

3. The "constitutionalization" of the law of libel under **New York Times** and its progeny also reallocated the traditional roles of a court as an arbiter of law and a court or jury as factfinder in resolving factual issues that involve drawing "line[s] 'between speech unconditionally guaranteed and speech which may legitimately be regulated.'" **N.Y. Times**, 376 U.S. at 285 (quoting **Speiser v. Randall**, 357 U.S. 513, 525 (1958)). In such cases, a reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment … protect." *Id.* (quoting **Pennekamp v. Florida**, 328 U.S. 331, 335 (1946)). The Colorado Supreme Court has embraced the responsibility doctrine of "independent review," which it characterizes as "de novo" review in cases involving speech arguably protected by the Colorado Constitution. **Walker**, 188 Colo. at 101, 538 P.2d at 459; *see also* **NBC Subsidiary (KCNC-**

**TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994). When performing the function of independent review, courts require that the plaintiff's factual proof on a factual issue of constitutional significance be supported by "convincing clarity," or, as alternatively stated, by "clear and convincing evidence." **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980). The "clear and convincing" burden of proof is to be applied by the factfinder and the court when determining the issues of falsity and knowledge of falsity or reckless disregard for the truth. **New York Times**, 376 U.S. at 284-85; **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008); **Barnett v. Denver Publ'g Co.**, 36 P.3d 145 (Colo. App. 2001); **Lockett**, 1 P.3d at 210; **Smiley's Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996). The clear and convincing burden of proof also applies in cases brought by a public officials or public figures or that involve a matter of public or general concern when a factual issue is presented as to whether the publication is "of and concerning" the plaintiff. **New York Times**, 376 U.S. at 288-89.

4. In **Rowe v. Metz**, 195 Colo. 424, 579 P.2d 83 (1978), the court held the **Gertz** rule (that presumed damages were unconstitutional without proof of actual malice as defined in **New York Times**) did not apply to a case of a private plaintiff and a non-media defendant in a purely private context. In effect, the court in **Rowe** followed the common-law rules of presumed damages in such cases where the defamation is per se. In **Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.**, 472 U.S. 749 (1985), five justices concurred that a state, without violating the First Amendment, may permit a private plaintiff to recover presumed or punitive damages for defamatory statements not involving a matter of public concern without a showing of "actual malice." Eight justices also specifically agreed that the scope of the First Amendment privilege does not depend on whether the defendant is a news medium.

5. Thus, in Colorado, the **New York Times-St. Amant** rule applies when the plaintiff is a public official or a public person, *see, e.g.*, **DiLeo**, 200 Colo. at 123, 613 P.2d at 321, or when the plaintiff is a private person involved in a matter of public interest or general concern. *See* Instruction 22:3. The pre-**New York Times** common-law rule of presumed damages applies, *see* Instruction 22:4, only when the claimed defamation involves a private matter and the plaintiff is a private person. *See* **Dun & Bradstreet**, 472 U.S. at 751; **Rowe**, 195 Colo. at 426, 579 P.2d at 85.

6. In **Philadelphia Newspapers, Inc. v. Hepps**, 475 U.S. 767, 768-69 (1986), the Court held that "at least where a newspaper publishes speech of public concern, a private figure-plaintiff cannot recover damages without also showing that the statements at issue are false." Neither the United States Supreme Court nor any Colorado appellate court has determined whether a private person suing over a private matter is subject to the same requirement. However, the Colorado Supreme Court has rendered decisions suggesting that, even in a purely private defamation action, the federal and/or state constitutions require the plaintiff to prove falsity. In **Bucher v. Roberts**, 198 Colo. 1, 595 P.2d 239 (1979), the court held that the **Gertz** requirement that the statement must be provably false applies to defamation of a private person uttered in a private context. *See also* **Williams v. Dist. Court**, 866 P.2d 908 (Colo. 1993) (holding that the requirement of **Gertz** that the plaintiff prove fault is applicable in an action by a private person suing over a private communication); **McIntyre**, 194 P.3d at 528 (assuming that private plaintiff suing over private matter must prove falsity); RESTATEMENT (SECOND) OF TORTS § 580B cmt. j (1977); Instruction 22:4.

7. Under the common law, an expression of pure opinion could be defamatory and actionable, RESTATEMENT § 566 cmt. a, but under the state and federal constitutions, "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact." **Old Dominion Branch No. 496 v. Austin**, 418 U.S. 264, 284 (1974). The First Amendment protects statements of opinion, "rhetorical hyperbole," and statements that are either not "verifiable" (i.e., capable of being proven true or false), or cannot reasonably be interpreted as stating actual facts. **Milkovich v. Lorain J. Co.**, 497 U.S. 1 (1990); **Hepps**, 475 U.S. at 777-78; **Gertz**, 418 U.S. at 340-41. Thus, speech that is pure opinion, mere rhetorical hyperbole, or for other reasons is not susceptible of being proven true or false, cannot provide the basis for defamation liability. *See, e.g.*, **Old Dominion Branch No. 496**, 418 U.S. at 284; **Greenbelt Coop. Publ'g Ass'n v. Bresler**, 398 U.S. 6 (1970); *see also* **Hustler Magazine, Inc. v. Falwell**, 485 U.S. 46 (1988).

8. The Colorado Supreme Court also has recognized the crucial distinction between statements of fact and ideas or opinions that, by definition, can never be false and are unprotected. *See* **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994); **NBC Subsidiary (KCNC-TV)**, 879 P.2d at 10-11; **Bucher**, 198 Colo. at 3, 595 P.2d at 241; *see also* **Burns v. McGraw-Hill Broad. Co.**, 659 P.2d 1351 (Colo. 1983) (opinions that imply the existence of defamatory factual assertions may support a cause of action in defamation); **Sall v. Barber**, 782 P.2d 1216 (Colo. App. 1989) (opinions that reasonably imply undisclosed defamatory facts as their premise are actionable whereas pure opinion is not); **Brooks v. Paige**, 773 P.2d 1098 (Colo. App. 1988) (rhetorical hyperbole is constitutionally protected speech); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986) (statements were actionable assertions of fact, not opinion); **Reddick v. Craig**, 719 P.2d 340 (Colo. App. 1985) (statement of opinion based upon fully disclosed facts, if true, is not actionable); **Lane v. Ark. Valley Publ'g Co.**, 675 P.2d 747 (Colo. App. 1983) (article implying illegal activity not actionable where it was apparent that article was not meant to be taken literally, but as rhetorical hyperbole expressing an opinion); **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App. 1983) (statements of opinion are actionable if they give rise to an inference that there are undisclosed facts that justify the opinion).

9. In **Burns**, 659 P.2d at 1360, the Colorado Supreme Court adopted a three-part analysis for determining whether an utterance is a statement of opinion: first, the allegedly defamatory statement itself must be examined and the court should consider whether it is "phrased in terms of apparency" (e.g., "in my opinion"); second, the statement must be examined in the context of the entire publication; and third, all of the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to which it is directed, should be considered.

10. In **Milkovich**, 497 U.S. at 18-21, the Supreme Court declined to recognize a separate privilege for protection of speech under the rubric of "opinion," but instead reaffirmed broad protection for statements, including statements of opinion, that do not convey a factual assertion. To qualify as a "statement of fact," the defendant's utterance must convey a factual connotation that is (1) capable of being proven true or false, and (2) reasonably interpreted as stating actual facts about an individual.

11. In **NBC Subsidiary (KCNC-TV)**, 879 P.2d at 10-11, the Colorado Supreme Court recognized the **Milkovich** test that factual assertions must be (1) verifiable, and (2) reasonably understood as an assertion of actual fact. However, the court held that Colorado would continue

to utilize the three contextual factors adopted and applied in cases decided before **Milkovich** to determine whether a statement could be reasonably understood to convey a factual proposition: the phrasing, context, and surrounding circumstances of the statement, including medium and audience. In applying these factors, the courts should also consider whether the statement implies the existence of undisclosed facts that support it. The three contextual factors were also applied in **Keohane**, 882 P.2d at 1299, and **Lawson v. Stow**, 2014 COA 26, ¶¶ 33-36, 327 P.3d 340 (defendant's statement to police officer that he felt personally threatened by Facebook post contained a provably false factual connotation that, if false, is actionable as slander). In **Keohane**, the court observed, with respect to a "letter to the editor" that appeared in the editorial section of the newspaper, that the editorial department was a "traditional forum for debate, where intemperate and highly biased opinions are frequently presented and, absent credentials which make the author particularly credible, often times should not be taken at face value." 882 P.2d at 1301; *see also* **Giduck v. Niblett**, 2014 COA 86, ¶¶ 38-39, 408 P.3d 856, 868 (statement that plaintiff is a "charlatan" who "exaggerate[d] his resume" is protected opinion when stated "in an online community where anonymous individuals can express highly biased opinions"); **Sky Fun 1, Inc. v. Schuttloffel**, 8 P.3d 570 (Colo. App. 2000) (oral statements that pilot was "not a good pilot" and that he was a "threat to passengers" were sufficiently factual to be susceptible of being proven true or false), *aff'd in part, rev'd in part on other grounds*, 27 P.3d 361 (Colo. 2001); **Lockett**, 1 P.3d at 210-11 (recall petitions charging plaintiff town trustees with "failing to properly represent" and "refusing to be accountable" to citizens by "specifically, violations of the Open Meetings Law," may be provable as true or false, but purported to be "political opinion as opposed to assertions of fact"); **Arrington v. Palmer**, 971 P.2d 669 (Colo. App. 1998) (statements that plaintiff "physically threatened" people who disagreed with him could not, in context, be reasonably interpreted as stating actual facts about an individual).

12. When a statement is based on disclosed facts, with no suggestion that it is based on undisclosed information, the statement is "pure opinion" and not a statement of fact. **NBC Subsid. (KCNC-TV)**, 879 P.2d at 9.

13. "[T]he mere use of foul, abusive or vituperative language . . . does not constitute a defamation" when it does not satisfy the "statement of fact" requirement. **Bucher**, 198 Colo. at 4, 595 P.2d at 241; *see* **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963). "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." **Linn v. United Plant Guard Workers**, 383 U.S. 53, 63 (1966); *see also* RESTATEMENT § 566 cmt. e.

14. Whether allegedly defamatory language is constitutionally privileged as nonfactual in nature "is a question of law and a reviewing court must review the record de novo." **NBC Subsid. (KCNC-TV)**, 879 P.2d at 11; *see also* **Keohane**, 882 P.2d at 1299 n.8; **Sky Fun 1**, 8 P.3d at 574; **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989).

## 22:1 LIBEL OR SLANDER PER SE — WHERE THE PLAINTIFF IS A PUBLIC OFFICIAL OR PUBLIC PERSON OR, IF A PRIVATE PERSON, THE STATEMENT PERTAINED TO A MATTER OF PUBLIC INTEREST OR GENERAL CONCERN — ELEMENTS OF LIABILITY

**The plaintiff,** *(name)***, claims that the defendant,** *(name)***, (published) (or) (caused to be published) the following statement(s):**

*(Insert the text of the statement[s] determined by the court to be defamatory.)*

**For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find that the following elements have been proved by a preponderance of the evidence:**

**1. The defendant (published) (or) (caused to be published) the above statement(s) in the same or substantially similar words; and**

**2. The statement(s) caused the plaintiff actual damage.**

**You must further find that the following elements have been proved by clear and convincing evidence:**

**3. The substance or gist of the (statement was) (statements were) false at the time (it was) (they were) published; and**

**4. At the time of publication, the defendant knew that the (statement was) (statements were) false or the defendant made the statement(s) with reckless disregard as to whether (it was) (they were) false.**

**If you find that the first or second element has not been proved by a preponderance of the evidence or that the third or fourth element has not been proved by clear and convincing evidence, then your verdict must be for the defendant.**

**On the other hand, if you find that the first and second elements have been proved by a preponderance of the evidence and that the third and fourth elements have been proved by clear and convincing evidence, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]***).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

**Notes on Use**

1. See the Introductory Note to this Chapter.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. Omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support such a defense.

5. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other instructions defining the terms used in this instruction must be given. *See, e.g.*, Instruction 3:2 (clear and convincing evidence), Instruction 22:3 (reckless disregard), Instruction 22:7 (published), Instruction 22:13 (false). Even if the court has determined that the publication is libelous per se, Instructions 22:10 (how understood by others) and 22:11 (publication to be considered as a whole) should be given if there remains a factual issue concerning the meaning conveyed by the publication for purposes of determining falsity or damages.

7. If the publication contains an opinion based on disclosed facts, and if the court finds that the supporting factual statements are libelous or slanderous per se, it is those factual statements, and not the opinion, that should be submitted to the jury in this instruction. **NBC Subsid. (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994); RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977); *see* Introductory Note, ¶¶ 7-14.

8. If the statements in issue are part of a larger publication that contains other potentially damaging statements that are not in issue, or if the publication contains more than one defamatory allegation, this instruction should be modified by adding to the third numbered paragraph the following language: "and the false (statement was) (statements were) such that the (publication) (article) (broadcast) as a whole was false." This clause should not be added when the statement or statements in issue relate to a character trait that is clearly distinct from that referred to in other potentially damaging statements within the publication. *See* **Masson v. New Yorker Mag., Inc.**, 501 U.S. 496 (1991); **Smiley's Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996); *see also* **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000) (applying the "incremental harm doctrine," and holding that when harmful but unchallenged or nonactionable statements accompany actionable statements and the "incremental harm" done by the actionable statements is de minimis or nonexistent, recovery is not permitted).

9. Instruction 22:15, defining "actual damage," should be given with this instruction. In a case of libel per se, it is not necessary to show actual injury to reputation, and emotional injury is

sufficient to comply with the "actual damage" requirement. **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994).

10. This instruction should be given only when the court has determined (a) that the statement was libelous or slanderous per se, and (b) that at the time of the alleged publication the plaintiff was a public official or public person or, if a private person, that the statement pertained to a matter of public interest or general concern. Otherwise, see Instruction 22:2 (same situation as in this instruction except libel or slander per quod), Instruction 22:4 (libel or slander per se by and concerning private persons in a private matter), or Instruction 22:5 (same situation as 22:4 except libel or slander per quod).

11. Whether a statement is libelous or slanderous per se is to be determined as a matter of law by the court. **Walker v. Associated Press**, 160 Colo. 361, 417 P.2d 486 (1966); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); **Knapp v. Post Printing & Publ'g Co.**, 111 Colo. 492, 144 P.2d 981 (1943); **Sky Fun 1, Inc. v. Schuttloffel**, 8 P.3d 570 (Colo. App. 2000), *aff'd in part, rev'd in part on other grounds*, 27 P.3d 361 (Colo. 2001); **Inter-State Detective Bureau, Inc. v. Denver Post, Inc.**, 29 Colo. App. 313, 484 P.2d 131 (1971).

12. The burden of proving that the substance or gist of the statement was false is on the plaintiff, at least when the plaintiff is a public official, public figure, or a private person and the statement relates to a matter of public interest. **Phila. Newspapers, Inc. v. Hepps**, 475 U.S. 767 (1986); *see* Introductory Note, ¶ 6. For the definition of "false," see Instruction 22:13. As to the burden of proof applicable to a private person suing over statements that relate to private matters, see paragraph 6 of the Introductory Note.

13. The term "actual malice" as used in defamation cases covered by this instruction and by Instruction 22:2 denotes the constitutional standard defined in **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964), and its progeny. The term is entirely different from the common-law concept of malice, in the sense of personal spite, hatred, ill will, or desire to injure. Because the term engenders confusion, "actual malice" is not to be used in jury instructions. **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by* **Diversified Mgmt., Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982). When the **New York Times-St. Amant** rule is applicable, see the Introductory Note, paragraphs 3 and 4. As long as the defendant did not publish the words knowing them to be false or in reckless disregard of their truth, the protection of the rule cannot be lost through other forms of abuse such as (a) excessive publication, (b) publication of other irrelevant defamatory matters, or (c) publication for reasons that, in whole or in part, are extraneous to protecting the public interest. For example, "a charge of criminal conduct against [a candidate or official for public office], no matter how remote in time or place, is always 'relevant to his fitness for office . . . .'" **Ocala Star-Banner Co. v. Damron**, 401 U.S. 295, 300 (1971); *see* **Monitor Patriot Co. v. Roy**, 401 U.S. 265 (1971). The fact that the defendant may have published the defamation out of "spite, hostility or deliberate intention to harm" does not constitute malice under the First Amendment privilege. **Greenbelt Coop. Publ'g Ass'n v. Bresler**, 398 U.S. 6, 10 (1970); *see also* **Time, Inc. v. Pape**, 401 U.S. 279 (1971); Notes on Use to Instruction 22:3.

14. Just as the Free Speech Clause of the First Amendment does not create an absolute immunity from liability for defamation of public officials, public figures, or private persons

involved in a matter of public concern, neither does the Right of Petition Clause. One exercising a right of petition is not entitled to any greater protection under the First Amendment from liability for defamation than is one exercising the right of free speech. **McDonald v. Smith**, 472 U.S. 479 (1985). However, where the claimed defamation is made as part of an exercise of the defendant's right to petition government "for a redress of grievances," for example, filing a judicial complaint under C.R.C.P. 106, the court should grant a summary judgment motion against the plaintiff, unless the plaintiff has made a sufficient showing to permit the court to conclude that the alleged defamation was made with actual malice, as defined in Instruction 22:3, and numbered paragraph 4 of this instruction. **Concerned Members of Intermountain Rural Elec. Ass'n v. Dist. Court**, 713 P.2d 923 (Colo. 1986) (applying the standards set out in **Protect Our Mountain Env't, Inc. v. Dist. Court**, 677 P.2d 1361 (Colo. 1984)); *see also* **In re Green**, 11 P.3d 1078 (Colo. 2000) (attorney could not be disciplined for speech criticizing judge because it was protected by the First Amendment).

15. The question whether the person defamed was a "public official," a "public figure," or, as to private individuals, the event involved was a "matter of public interest or general concern," is one of law for the court. **Walker**, 188 Colo. at 102, 538 P.2d at 459; *see also* **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992).

16. Each publication of a libel or slander is a separate cause of action. **Spears Free Clinic & Hosp. v. Maier**, 128 Colo. 263, 261 P.2d 489 (1953); **Lininger**, 123 Colo. at 220, 226 P.2d at 812; **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986). Therefore, if the case involves separate statements made on different occasions, such as more than one article about the plaintiff, each article constitutes a separate claim and should be treated separately in the instructions. It is also advisable, in such cases, to submit special verdict forms for the jury to identify which publication(s) give rise to liability. *See* **Zueger v. Goss,** 2014 COA 61, ¶¶ 23, 24, 343 P.3d 1028; *See, e.g.*, Instructions 4:15 and 4:16. Also, where there are multiple defendants, it may be that not all were involved in the publication of all statements, or that one defendant may be responsible for part, but not all, of an article, such as a headline.

17. Under sections 24-10-105, -106, and -108, C.R.S. (Governmental Immunity Act), a public entity is immune from liability for defamation. **Gray v. City of Manitou Springs**, 43 Colo. App. 60, 598 P.2d 527 (1979).

## Source and Authority

1. This instruction is supported by **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); and **Walker**, 188 Colo. at 98-100, 538 P.2d at 457-58. *See also* **Rosenbloom v. Metromedia, Inc.**, 403 U.S. 29 (1971); RESTATEMENT (SECOND) OF TORTS §§ 558-581 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 111-13 (5th ed. 1984).

2. A defamatory statement is libel as opposed to slander if it is written, broadcast, or communicated in some other form having a permanent nature, for example, a picture. RESTATEMENT (SECOND) OF TORTS § 568A (1977). Such a statement is libelous per se if no extrinsic evidence or innuendo is necessary to show either its defamatory nature or that it was about the plaintiff. **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002); **Keohane**, 882

P.2d at 1297 n.3; **Bernstein v. Dun & Bradstreet, Inc.**, 149 Colo. 150, 368 P.2d 780 (1962); **Knapp**, 111 Colo. at 497, 144 P.2d at 984; **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005); **McCammon & Assocs., Inc. v. McGraw-Hill Broad. Co.**, 716 P.2d 490 (Colo. App. 1986); **Lind v. O'Reilly**, 636 P.2d 1319 (Colo. App. 1981); **Inter-State Detective Bureau**, 29 Colo. App. at 317, 484 P.2d at 133. Where a publication is reasonably capable of being construed as defamatory or not defamatory, it is libel per quod and not libel per se. **Morley v. Post Printing & Publ'g Co.**, 84 Colo. 41, 268 P. 540 (1928). In **Bueno**, 54 P.3d at 899, the Colorado Supreme Court examined the elements of the torts of libel and slander in Colorado and declined to recognize the analogous tort of false light invasion of privacy. The court declared that, to sustain a claim for libel per se, a statement also must fall into one of the four categories of slander per se set forth in Paragraph 4 below. Defamatory statements spoken to a reporter and subsequently republished in print constitute libel rather than slander. **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983).

3. As to the criterion, "public interest or general concern," see **Burns v. McGraw-Hill Broadcasting Co.**, 659 P.2d 1351 (Colo. 1983) (although not an issue on appeal, the newscast of a story detailing the life of a bomb squad officer who was seriously injured in an explosion was analyzed as a matter of public concern); **Diversified Management, Inc.**, 653 P.2d at 1108 (because potential buyers were members of the general public, an article reporting widespread and ongoing real estate development schemes of questionable propriety was a matter of public concern); **Walker**, 188 Colo. at 97, 538 P.2d at 456 (dispute between property owner and antique dealer, when relevant to public interest in failure of legal system to intervene in such disputes, was matter of public concern); **Lawson v. Stow**, 2014 COA 26, ¶¶ 23-26, 327 P.3d 340 (statements made to public employees charged with investigating child abuse relate to a matter of public concern); **Shoen v. Shoen**, 2012 COA 207, ¶¶ 25-27, 292 P.3d 1224 (husband's statements addressing inadequacy of police investigation into his wife's murder, fourteen years earlier, related to matter of public concern); **Smiley's Too**, 935 P.2d at 42 (article about retailer's business practices that affected many consumers and involved a consumer affairs agency was a matter of public concern); **Lewis**, 832 P.2d at 1121 (newscast involving public controversy of racially discriminatory policies and implying plaintiff had been previously arrested was matter of public concern); **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989) (defendants did not dispute on appeal that allegations of attempts to evade handicapped accessibility requirements of city building code involved a matter of public concern); **Bowers v. Loveland Publ'g Co.**, 773 P.2d 595 (Colo. App. 1988) (news items relaying contents of police report is matter of public concern). On the other hand, the criterion "public interest or general concern" was not met in **Zueger**, 2014 COA 61, ¶ 28 (business dispute between two private parties discussed on Internet); **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008) (statement concerning qualifications of applicant for bookkeeper of small homeowners association); and **Williams v. Continental Airlines, Inc**., 943 P.2d 10 (Colo. App. 1996) (statements by flight attendant that pilot attempted to rape her were not matters of public concern).

4. To be slanderous per se the statement must be oral and have imputed to the plaintiff the commission of a crime, the affliction of a loathsome disease, unchastity, or have defamed the plaintiff in the plaintiff's trade, business, profession, or office. **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963); **Bernstein**, 149 Colo. at 156, 368 P.2d at 783; **Biggerstaff v. Zimmerman**, 108 Colo. 194, 114 P.2d 1098 (1941); **Kendall v. Lively**, 94 Colo. 483, 31 P.2d 343 (1934); **Sky Fun 1**, 8 P.3d at 574; **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App.

1983). The statement also must be such as to require no extrinsic evidence to show how it might be understood as being about the plaintiff or to show how it might be understood as defaming the plaintiff in one or more of the four categories noted above. **Brown v. Barnes**, 133 Colo. 411, 296 P.2d 739 (1956); **Pittman v. Larson Distrib**. **Co.**, 724 P.2d 1379 (Colo. App. 1986). Further, for a statement to be slanderous per se, it must unequivocally expose the person defamed to public hatred or contempt. **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991) (false accusations of homosexuality are not slander per se).

5. In **Lininger**, 123 Colo. at 214, 226 P.2d at 810, an owner and licensee of a club sued over a citizen's petition to cancel her liquor license (which named the establishment, but not the licensee) because the club was allegedly "a hide-out for people who want to drink and carry on in a manner objectionable to the established morals of this community." The court, applying the rule that "[t]o be libelous per se, the [publication] must contain defamatory words specifically directed at the person claiming injury," held that the petition did not fulfill that requirement, because "[i]t is not ascertainable from the petition who is defamed, and that could be ascertained only by innuendo." *Id.* at 221, 226 P.2d at 813; *see also* **Wilson**, 126 P.3d at 279 (to be actionable without proof of special damages, a statement "must be, on its face and without extrinsic proof, unmistakably recognized as injurious and specifically directed at the plaintiff"); **Inter-State Detective Bureau**, 29 Colo. App. at 317, 484 P.2d at 133 ("To show that the article was defamatory to the plaintiff, it was necessary for plaintiff to allege, by way of innuendo, that the words were published 'of and concerning the plaintiff' . . . . The office of an innuendo in pleading is to explain the defendant's meaning in the language employed, and also to show how it relates to the plaintiff when that is not clear on its face. Words which require an innuendo are not libelous per se." (citation omitted)). In **Lind**, 636 P.2d at 1320, another division of the court of appeals relied upon **Lininger** and **Inter-State Detective Bureau** in holding that a television news report that showed a picture of plaintiff's home and described it as the home of a "big time drug dealer" was not libelous per se, because "[t]he person referred to can be ascertained only by pleading an innuendo and by extrinsic proof." In **Bueno**, 54 P.3d at 900, the Colorado Supreme Court acknowledged its previous holding in **Lininger** that statements not specifically referencing the plaintiff are not libelous per se, but took no position as to whether the trial court properly determined that a publication that did not name the plaintiff was not libelous per se. *But see* **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009) (evidence may be used to prove a publication refers to the plaintiff without rendering the statement defamatory per quod); **Gordon v. Boyles**, 99 P.3d 75, 80 (Colo. App. 2004) (interpreting **Lininger** and **Inter-State Detective Bureau** to require that "[a]lthough defamatory meaning must be apparent from the statement itself for a statement to be defamatory per se, whether the statement is directed at the plaintiff can be established by extrinsic proof without rendering the publication defamatory per quod," and declining to follow **Lind**). *See generally* 1 SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 2:8.3 (5th ed. 2018).

6. Statements that are literally true may still be actionable if they omit crucial facts and, as a result, convey a factually false defamatory meaning. 1 SACK ON DEFAMATION § 3:8. However, when a claim is based upon an inference that could be drawn from accurately stated facts, the First Amendment may bar or limit the claim. **NBC Subsid. (KCNC-TV)**, 879 P.2d at 14; **Pietrafeso v. D.P.I., Inc.**, 757 P.2d 1113 (Colo. App. 1988). The omission of facts from a publication is not actionable unless "the omitted facts created any material falsity by their omission." **Fry v. Lee**, 2013 COA 100, ¶ 55, 408 P.3d 843, 854. The claimed false implication

can be argued based on the definition of "false" contained in Instruction 22:13 or Instruction 22:16 on "substantial truth."

7. As stated in **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 342 (1974), the First Amendment requires that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." For additional definitions of "public figure" or "public official," see the various opinions cited in the **Gertz** case. *See also* **Wolston v. Reader's Digest Ass'n**, 443 U.S. 157 (1979); **Hutchinson v. Proxmire**, 443 U.S. 111 (1979); **Time, Inc. v. Firestone**, 424 U.S. 448 (1976); **Curtis Publ'g Co. v. Butts**, 388 U.S. 130 (1967); **Diversified Mgmt., Inc.**, 653 P.2d 1107-08; **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980); **Wilson**, 126 P.3d at 283 (candidate for county hospital board seat is public figure); **Hayes**, 832 P.2d at 1024 (public high school teacher is a public official); **Willis**, 677 P.2d at 963 (a police officer is a public official). In **Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.**, 472 U.S. 749 (1985), the Supreme Court declined to determine whether different protections apply to the news media, but held that the **Gertz** rule on presumed or punitive damages does not apply to defamatory publications that are not of public interest.

8. In general, only persons who are defamed and have resulting injuries, damages, or losses have standing to bring a claim for defamation. **Winter Park Real Estate & Invs., Inc. v. Anderson**, 160 P.3d 399 (Colo. App. 2007).

## 22:2 LIBEL OR SLANDER PER QUOD — WHERE THE PLAINTIFF IS A PUBLIC OFFICIAL OR PUBLIC PERSON OR, IF A PRIVATE PERSON, THE STATEMENT PERTAINED TO A MATTER OF PUBLIC INTEREST OR GENERAL CONCERN — ELEMENTS OF LIABILITY

**The plaintiff,** *(name)***, claims that the defendant,** *(name)***, (published) (or) (caused to be published) the following statement(s):**

*(Insert the text of the statement[s] claimed to be defamatory of the plaintiff.)*

**For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find by a preponderance of the evidence that:**

**1. The defendant (published) (or) (caused to be published) the statement(s) set forth above in the same or substantially similar words; and**

**2. (The) (One or more) (reader[s]) (listener[s]) (viewer[s]) (recipient[s]) of the publication understood the statement to be defamatory; and**

**3. The publication of the statement(s) caused special damages to the plaintiff.**

**You must further find by clear and convincing evidence that:**

**4. The (statement was) (statements were) about the plaintiff;**

**5. The substance or gist of the (statement was) (statements were) false at the time it was published; and**

**6. At the time of publication, the defendant knew that the (statement was) (statements were) false or the defendant made the statement(s) with reckless disregard as to whether (it was) (they were) false or not.**

**If you find that any one or more of the first, second, or third elements has not been proved by a preponderance of the evidence or that any one or more of the fourth, fifth, or sixth elements has not been proved by clear and convincing evidence, then your verdict must be for the defendant.**

**On the other hand, if you find that the first, second, and third elements have been proved by a preponderance of the evidence and that the fourth, fifth, and sixth elements have been proved by clear and convincing evidence, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff**.

**Notes on Use**

1. The Notes on Use to Instruction 22:1 are generally applicable to this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. This instruction should be given only when the court has determined that: (a) the statement was not libelous or slanderous per se (because extrinsic evidence or innuendo was required either to show how the statement could be understood as being about the plaintiff or how it could be understood as defaming the plaintiff, or is an oral statement not within the per se categories); (b) the statement is capable of bearing a defamatory meaning; and (c) at the time of the alleged publication, the plaintiff was a public official or public person or, if a private person, that the statement pertained to a matter of public interest or general concern. Otherwise, see Instructions 22:1 (same situation as this instruction except libel or slander per se), 22:4 (libel or slander per se by and concerning private persons in a private matter), or 22:5 (same situation as 22:4 except libel or slander per quod).

4. Where the court has determined that the statement is not libelous or slanderous per se, it is also for the court to determine whether the statement is capable of bearing a particular meaning, and whether that meaning is defamatory. **Fry v. Lee**, 2013 COA 100, ¶ 34, 408 P.3d 843. In making that determination, the court must assess the plain and ordinary meanings of the words considered in the context of the publication as a whole, and in so doing may properly rely on lay dictionary definitions. *Id.* That determination is a question of law in which the court is free to disregard allegations of what the published words mean or how they were understood. *Id.* If the statement is not capable of bearing a defamatory meaning, the claim should be dismissed. If the statement is capable of bearing a defamatory meaning, then it is for the jury to determine whether the statement was so understood by its recipient. RESTATEMENT (SECOND) OF TORTS § 614 (1977); *see* Notes on Use to Instruction 22:10.

5. If the publication contains an opinion based on disclosed facts, it is those factual statements, and not the opinion, that should be submitted to the jury in this instruction, if the court finds that the supporting factual statements are reasonably capable of bearing a defamatory meaning and are arguably about the plaintiff. *See* **NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994); RESTATEMENT § 566 cmt. c.

6. If the defamation is per quod and not per se, plaintiff must also plead and prove special damages to establish a claim. *See* **Bernstein v. Dun & Bradstreet, Inc.**, 149 Colo. 150, 368 P.2d 780 (1962) (libel); **Brown v. Barnes**, 133 Colo. 411, 296 P.2d 739 (1956) (slander); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951) (libel); **Knapp v. Post Printing & Publ'g Co.**, 111 Colo. 492, 144 P.2d 981 (1943) (libel); **Lind v. O'Reilly**, 636 P.2d 1319 (Colo. App. 1981) (libel); **Inter-State Detective Bureau, Inc. v. Denver Post, Inc.**, 29 Colo. App. 313, 484 P.2d 131 (1971) (libel).

7. Instruction 22:14 (defining special damages) should be used with this instruction. For determination of the meaning of the statement, see Instructions 22:10 (how understood by others) and 22:11 (publication to be considered as a whole).

8. Proof by a public official or public figure that the defamation caused "special damages" will also constitute proof of the "actual damage" such a plaintiff is required to prove in any defamation case under the rule of **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964). *Compare* Instruction 22:14, *with* Instruction 22:15.

9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. *See* Note 16 of Notes on Use to Instruction 22:1.

**Source and Authority**

This instruction is supported by **Denver Publishing Co. v. Bueno**, 54 P.3d 893 (Colo. 2002). *See also* **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991); Source and Authority to Instruction 22:1.

## 22:3 RECKLESS DISREGARD DEFINED — WHERE THE PLAINTIFF IS A PUBLIC OFFICIAL OR PUBLIC PERSON OR, IF A PRIVATE PERSON, THE STATEMENT PERTAINED TO A MATTER OF PUBLIC INTEREST OR GENERAL CONCERN

**(A statement is) (Statements are) published with reckless disregard when, at the time of publication, the person publishing (it) (them) believes that the (statement is) (statements are) probably false or has serious doubts as to (its) (their) truth.**

### Notes on Use

This instruction must be given whenever Instruction 22:1 or 22:2 is given.

### Source and Authority

1. This instruction is supported by **Harte-Hanks Communications, Inc. v. Connaughton**, 491 U.S. 657 (1989); **Herbert v. Lando**, 441 U.S. 153 (1979); **Gertz v. Robert Welch, Inc.**, 418 U.S. 323 (1974); **Rosenbloom v. Metromedia, Inc.**, 403 U.S. 29 (1971); **St. Amant v. Thompson**, 390 U.S. 727 (1968); **Garrison v. Louisiana**, 379 U.S. 64 (1964); **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by* **Diversified Management., Inc.**, 653 P.2d at 1106.

2. "[T]he knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection. . . . [However], even where the utterance is false, . . . the Constitution . . . preclude[s] attaching adverse consequences to any except the knowing or reckless falsehood." **Garrison**, 379 U.S. at 73-75. This standard is subjective, narrowly keyed to the defendant's state of mind at the time of publication rather than to the general propriety of his conduct in publishing. *See* **Gertz**, 418 U.S. at 327-28; *see also* **Herbert**, 441 U.S. at 156; **St. Amant v. Thompson**, 390 U.S. 727 (1968).

3. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." **St. Amant**, 390 U.S. at 731. Failure to investigate, *see* **Beckley Newspapers Corp. v. Hanks**, 389 U.S. 81 (1967); **Curtis Publ'g Co. v. Butts**, 388 U.S. 130 (1967), or mere negligence on the part of the reporter or publisher are "constitutionally insufficient to show the recklessness that is required." **N.Y. Times Co. v. Sullivan**, 376 U.S. 254, 287 (1964); *see* **Garrison**, 379 U.S. at 79; **Walker**, 188 Colo. at 99, 538 P.2d at 458; **Kuhn v. Tribune-Republican Publ'g Co.**, 637 P.2d 315 (Colo. 1981).

4. In the situations covered by this instruction, so long as the defendant at the time of publication did not publish the statement knowing it was false or with reckless disregard as to whether it was false or not, the plaintiff cannot recover even if there was excessive publication, or publication of other irrelevant defamatory matters, or publication for reasons which are, in whole or in part, extraneous to protecting the public interest. The fact that the defendant may have published the defamation out of "spite, hostility or deliberate intention to harm" does not constitute "actual malice" as interpreted in the First Amendment cases. **Greenbelt Coop. Publ'g**

**Ass'n v. Bresler**, 398 U.S. 6, 10 (1970); *see also* **Time, Inc. v. Pape**, 401 U.S. 279 (1971); **Garrison**, 379 U.S. at 73; **Lewis v. McGraw-Hill Broad. Co.**, 832 P.2d 1118 (Colo. App. 1992).

5. For cases where sufficient evidence supported the jury's verdict under the "clear and convincing" burden of proof, see **Air Wis. Airlines Corp. v. Hoeper**, 2012 CO 19 (airline employee's statements to TSA presented a jury question on the issue of reckless disregard) *rev'd, on other grounds*, 134 S. Ct. 652 (2014); **Burns v. McGraw-Hill Broadcasting Co.**, 659 P.2d 1351 (Colo. 1983) (reporter admitted no basis for allegation that wife "deserted" husband, and lacked credibility in denying awareness of obvious pejorative connotation of the word "deserted"); and **Kuhn**, 637 P.2d at 319 (defendant failed to contact and question obvious available sources of corroboration, admitted that he had no basis for most of erroneous allegations, fabricated specific facts appearing in story, and wrote story in manner calculated to create a false factual inference that publisher had uncovered governmental corruption and bribery). The evidence was found insufficient as a matter of law in **DiLeo v. Koltnow**, 200 Colo. 119, 613 P.2d 318 (1980); **Wilson v. Meyer**, 126 P.3d 276, 284 (Colo. App. 2005) (availability of legal defense to charge of criminal eavesdropping did not establish actual malice because record contained no evidence that defendant "was aware of this when he made his statements"); **Lockett v. Garrett**, 1 P.3d 206 (Colo. App. 1999) (no reasonable person could conclude that defendants' petitioning activities were anything more than political opinion); **Pierce v. St. Vrain Valley School District**, 944 P.2d 646 (Colo. App. 1997) (assertion that defendant "should have had serious doubts" about the truth insufficient), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); **Lewis**, 832 P.2d at 1123 ("[t]hat a reasonably prudent person would not have published the defamatory statement or would have investigated before reporting does not suffice" to show actual malice); and **Seible v. Denver Post Corp.**, 782 P.2d 805 (Colo. App. 1989) (reporters conducted adequate investigation, verified information, and never doubted truth of article). *See also* **Bowers v. Loveland Publ'g Co.**, 773 P.2d 595, 596 (Colo. App. 1988) (finding "no proof that defendant doubted the truth of its publication"); **Meuser v. Rocky Mountain Hosp.**, 685 P.2d 776 (Colo. App. 1984) (applying same test of "malice" to determine whether state claim for relief for defamation arising out of labor dispute has or has not been preempted by National Labor Relations Act); **Fink v. Combined Commc'ns Corp.**, 679 P.2d 1108, 1111 (Colo. App. 1984) ("Although a complete failure to investigate sources of corroboration of published statements may be evidence of actual malice, where an adequate investigation is conducted it is unnecessary that the truth of each and every statement be supported by the evidence." (citation omitted)); **Willis v. Perry**, 677 P.2d 961 (Colo. App. 1983); **Lane v. Ark. Valley Publ'g Co.**, 675 P.2d 747, 752-53 (Colo. App. 1983) (to survive summary judgment, plaintiff must present clear and convincing evidence "that the defendant published defamatory falsehoods with actual malice"); **Manuel v. Ft. Collins Newspapers, Inc.**, 661 P.2d 289 (Colo. App. 1982).

6. On the other hand, the defendant "cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true . . . . Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." **St. Amant**, 390 U.S. at 732; *see also* **Herbert**, 441

U.S. at 156-57. Admissible evidence to establish reckless disregard included the fact that the investigation was "grossly inadequate" because the reporter "failed to pursue obvious available sources of possible corroboration or refutation." **Burns**, 659 P.2d at 1361.

## 22:4 LIBEL OR SLANDER PER SE — IN A PRIVATE MATTER WHERE PLAINTIFF IS A PRIVATE PERSON — ELEMENTS OF LIABILITY

**The plaintiff,** *(name)***, claims that the defendant,** *(name)***, (published) (or) (caused to be published) the following statement(s):**

*(Insert the text of the statement[s] determined by the court to be defamatory.)*

**For the plaintiff to recover from the defendant on (his) (her) claim for (libel) (slander), you must find by a preponderance of the evidence that the defendant (published) (or) (caused to be published) the statement(s) set forth above in the same or substantially similar words.**

**If you find that this has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that this has been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]***).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**(In determining whether the affirmative defense of privilege** *[describe privilege]* **has been proved, you must also determine whether the defendant abused that privilege as explained in Instruction No.** *[insert instruction number that corresponds to 22:18]***.)**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff**.

### Notes on Use

1. See the Introductory Note to this Chapter.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. This instruction should be given only when the court has determined that (a) the statement was libelous or slanderous per se (defamatory on its face and about the plaintiff), and (b) at the time of the alleged publication, the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. Otherwise, see Instruction 22:1 (libel or slander per se where the plaintiff is a public official or public official or public person, or, if a private person, the statement pertained to a matter of public interest or general concern), Instruction 22:2 (same situation as 22:1 except libel or slander per quod), or Instruction 22:5 (same situation as this 22:4 except libel or slander per

quod). Notes 6 and 7 of the Notes on Use for Instruction 22:1 are also applicable to this instruction.

4. As to when a statement is libelous or slanderous per se, see the Notes on Use to Instruction 22:1.

5. Use the next to last paragraph only if a qualified privilege is a potential defense. *See* Instruction 22:18.

6. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. Other appropriate instructions, for example, Instruction 22:7, defining "published," should be given with this instruction.

8. As to the burden when the statement relates to a private matter, see the Introductory Note, paragraph 6.

9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. *See* Note 16 of Notes on Use to Instruction 22:1.

**Source and Authority**

This instruction is supported by **Williams v. District Court**, 866 P.2d 908 (Colo. 1993); and **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008). *See also* Source and Authority to Instruction 22:1.

## 22:5 LIBEL OR SLANDER PER QUOD — IN A PRIVATE MATTER WHERE PLAINTIFF IS A PRIVATE PERSON — ELEMENTS OF LIABILITY

**The plaintiff,** *(name)***, claims that the defendant,** *(name)***, (published) (or) (caused to be published) the following statement(s):**

*(Insert the text of the statement[s] claimed to be defamatory of the plaintiff)*

**For the plaintiff to recover from the defendant on (his) (her) claim of (libel) (slander), you must find that the following elements have been proved by a preponderance of the evidence:**

**1. The defendant (published) (or) (caused to be published) the statement(s) set forth above in the same or substantially similar words;**

**2. The (statement was) (statements were) defamatory;**

**3. The (statement was) (statements were) about the plaintiff; and**

**4. The publication of the statement(s) caused special damages to the plaintiff.**

**If you find any one or more of these** *(number)* **elements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these elements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]***).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**(In determining whether the affirmative defense of privilege** *[describe privilege]* **has been proved, you must also determine whether the plaintiff proved by a preponderance of the evidence that the defendant abused that privilege as explained in Instruction No.** *[insert instruction number that corresponds to 22:18]***.)**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. This instruction should be given only when the court has determined (a) that the statement was not libelous or slanderous per se (because extrinsic evidence was required to show either how the statement could be taken as being "of and concerning" the plaintiff or how it could be defamatory of the plaintiff, or is an oral statement not within the per se categories), (b)

that the statement is capable of bearing a defamatory meaning, and (c) that at the time of the alleged publication the plaintiff was a private person and the statement pertained to a private matter as distinguished from a matter of public interest or general concern. Otherwise, see Instruction 22:1 (libel or slander per se where the plaintiff is a public official or public person or, if a private person, the statement pertained to a matter of public interest or general concern), Instruction 22:2 (same situation as 22:1 except libel or slander per quod), or Instruction 22:4 (same situation as this 22:5 except libel or slander per se).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. As to when a statement is libelous or slanderous per se, rather than being per quod, see the Notes on Use to Instruction 22:1.

4. Omit any numbered paragraph, the facts of which are not in dispute. In the first two paragraphs of the instruction, use whichever parenthesized words are appropriate.

5. Note 8 of the Notes on Use to Instruction 22:1 and Note 5 of the Notes on Use to Instruction 22:2 also apply to this instruction.

6. Other instructions defining the terms used in this instruction must be given. *See, e.g.*, Instructions 22:7 (defining "published"), 22:9 (defining "about the plaintiff"), 22:10 (how understood by others), 22:11 (publication to be considered as a whole), 22:12 (publication to be considered in light of circumstances), 22:14 (defining "special damages").

7. If the defense of privilege is raised, use the next to last parenthesized paragraph.

8. If other defenses are raised, appropriate modifications must be made in the instruction. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

9. For cases that involve separate statements made on different occasions, such as more than one article about the plaintiff, it is advisable to use a special verdict form. *See* Note 16 of Notes on Use to Instruction 22:1.

**Source and Authority**

This instruction is supported by **Gordon v. Boyles**, 99 P.3d 75 (Colo. App. 2004). *See also* Source and Authority to Instruction 22:1.

## 22:6 INCREMENTAL HARM

**No instruction provided at this time.**

### Note

1. An instruction should be given in cases in which the publication containing the statements in issue contains other statements which the jury could reasonably determine to be as harmful as those for which liability has been found.

2. An instruction should be used in all cases, including those relating to private matters.

3. In **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000), the court adopted the common law defamation damage rule known as the "incremental harm doctrine." Incremental harm measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be "nominal or non-existent," the plaintiff may not recover. *Id.* at 965.

4. **Tonnessen** and other cases applying the doctrine recognize no distinction between libel or slander that is actionable per se, and for which damages are presumed, and cases of libel per quod. The **Tonnessen** court applied the doctrine to hold a charge of rape, which the court held was defamatory per se, was non-actionable. *Id.* at 964.

## 22:7 PUBLISHED — DEFINED

**A statement is "published" when it is communicated (orally) (in writing) to and is understood by some person other than the plaintiff.**

### Notes on Use

1. "Published" applies to all means of communication including words, pictures, and gestures. Consequently, if the alleged defamation was published in some other form than by written or spoken words, this instruction should be appropriately modified.

2. This instruction is applicable to persons who originally published the statement and also (except as to those who only deliver or transmit the statement) to persons who repeat or otherwise republish the statement. *See* Instruction 22:24; *see also* RESTATEMENT (SECOND) OF TORTS § 578 (1977).

3. In cases involving "self-publications," that is, publications made by the person defamed to third persons, rather than by the defendant or another to such third persons, this instruction must be appropriately modified. Section 13-25-125.5, C.R.S., provides that "[n]o action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement."

### Source and Authority

1. This instruction is supported by **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 577 (1977)).

2. Publication requires a written or verbal statement; silent adoption of another person's defamatory statement does not constitute publication. **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005).

## 22:8 DEFAMATORY — DEFINED

**A statement is defamatory of a person if it tends to harm the person's reputation by lowering the person in the estimation of at least a substantial and respectable minority of the community.**

### Notes on Use

1. This instruction must be given whenever there is a jury question as to whether the statement (or picture, etc.) was defamatory. *See* Instructions 22:2 and 22:5. It is for the court to determine whether a statement is libelous or slanderous per se. **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); *see* Notes on Use to Instruction 22:1. If the statement is determined to be defamatory per se, there is no jury question and this instruction need not be given. If it is determined not to be defamatory per se, then the court must determine whether the statement was reasonably capable of bearing a defamatory meaning. *See* Note 4 of Notes on Use to Instruction 22:2. If the court determines the statement was neither defamatory per se nor reasonably capable of bearing a defamatory meaning, the claim should be dismissed. If the court determined the statement reasonably capable of bearing a defamatory meaning, then the jury must determine whether the statement was understood as defamatory by one or more recipients. RESTATEMENT (SECOND) OF TORTS § 614(2) (1977); *see* Notes on Use to Instruction 22:1.

2. This instruction applies only to statements of fact or to expressions of opinion that imply the allegation of undisclosed defamatory facts as the basis for the opinion, because there is no such thing as a false opinion. *See* Introductory Note, ¶¶ 7-14.

### Source and Authority

1. This instruction is supported by **Tonnessen v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000). *See also* **Burns v. McGraw-Hill Broad. Co.**, 659 P.2d 1351 (Colo. 1983); RESTATEMENT (SECOND) OF TORTS § 559 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984). Though the cases frequently use more specific language, such as "hatred, contempt and ridicule," they generally support this instruction. *See, e.g.*, **Knapp v. Post Printing & Publ'g Co.**, 111 Colo. 492, 144 P.2d 981 (1943); **Morley v. Post Printing & Publ'g Co.**, 84 Colo. 41, 268 P. 540 (1928); **Republican Publ'g Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890).

2. For examples of application of this definition under varying circumstances, see **Burns**, 659 P.2d at 1360 (statement that wife "deserted" disabled police officer found defamatory in context); **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963) ("crook" or "deadbeat" in context of dispute over a single transaction is not libelous per se); **Knowlton v. Cervi**, 142 Colo. 394, 350 P.2d 1066 (1960) (citizen's charge that police officer used abusive language not defamatory); **Wertz v. Lawrence**, 69 Colo. 540, 195 P. 647 (1921) (assertion that plaintiff was insane is libelous per se); **Fry v. Lee**, 2013 COA 100, ¶¶ 35-45, 408 P.3d 843 (considering dictionary definitions and the article as a whole, the term "plagiarism" does not necessarily mean that one acted with intent to pass off another's works as one's own and the term "caught up in plagiarism charge" did not convey the defamatory implication that criminal charges had been

filed); **Tonnessen**, 5 P.3d at 963 (to be defamatory, statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community); **Arrington v. Palmer**, 971 P.2d 669 (Colo. App. 1998) (statement that plaintiff has physically threatened people who disagreed with him was defamatory per se because it imputed the commission of a criminal offense but constitutionally protected because it could not be reasonably interpreted as stating actual facts); and **Hayes v. Smith**, 832 P.2d 1022 (Colo. App. 1991) (accusation that public schoolteacher was homosexual not slanderous per se).

## 22:9 ABOUT THE PLAINTIFF — DEFINED

**A defamatory communication is made about the plaintiff if (the) (one or more) (reader[s]) (viewer[s]) (listener[s]) (recipient[s]) correctly understands, or mistakenly but reasonably understands, that it was intended to refer to the plaintiff.**

### Notes on Use

This instruction should be used when the court has determined that the libel or slander is per quod and not per se.

### Source and Authority

This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994); and RESTATEMENT (SECOND) OF TORTS § 564 (1977).

## 22:10 DETERMINATION OF MEANING OF STATEMENT — HOW UNDERSTOOD BY OTHERS

**In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider what the statement meant to the person(s) who (read) (heard) it. You must give the statement its plain and usual meaning. You must make this decision without regard to how the defendant intended the statement to be understood.**

### Notes on Use

1. This instruction should be given in conjunction with Instructions 22:9 and 22:2 or 22:5 when the question whether the published statement was defamatory or was "of or concerning," or "about," the plaintiff is in issue.

2. If there is a dispute as to whether the defendant made or caused a publication to be made at all, or what the published words were, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by **Farmers' Life Ins. Co. v. Wehrle**, 63 Colo. 279, 165 P. 763 (1917) (regardless of his intent, defendant cannot avoid what would naturally be inferred to be the meaning of his words); and **Fry v. Lee**, 2013 COA 100, ¶¶ 29-30, 408 P.3d 843. *See also* **Morley v. Post Printing & Publ'g Co.**, 84 Colo. 41, 268 P. 540 (1928) (insinuation); **Rocky Mtn. News Printing Co. v. Fridborn**, 46 Colo. 440, 104 P. 956 (1909) (words that ordinarily imply defamatory meaning may not be defamatory if used and understood in a nondefamatory sense); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.4 (3rd ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 780-83, and § 113, at 808-10 (5th ed. 1984).

## 22:11 DETERMINATION OF MEANING OF STATEMENT — PUBLICATION TO BE CONSIDERED AS A WHOLE

**In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the (statement) (publication) (article) (broadcast) (communication) as a whole. You must not dwell upon specific parts of the (statement) (publication) (article) (broadcast) (communication). You must give each part its proper weight and give the entire (statement) (publication) (article) (broadcast) (communication) the meaning that people of average intelligence and understanding would give it.**

### Notes on Use

1. This instruction should be given with Instructions 22:9 and 22:10 and with Instruction 22:2 or 22:5 when the issue is whether the published statement, publication, article, broadcast, or communication was defamatory or was "of or concerning" or "about" the plaintiff.

2. If there is a dispute as to whether the defendant made or caused a publication at all, or what the published words were, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). *See also* **Burns v. McGraw-Hill Broad. Co.**, 659 P.2d 1351 (Colo. 1983); **Fry v. Lee**, 2013 COA 100, ¶ 34, 408 P.3d 843; **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005); **Tonnessen v. Denver Publ'g Co.**, 5 P.3d 959 (Colo. App. 2000); RESTATEMENT (SECOND) OF TORTS § 564 (1977).

## 22:12 DETERMINATION OF MEANING OF STATEMENT — PUBLICATION TO BE CONSIDERED IN LIGHT OF SURROUNDING CIRCUMSTANCES

**In determining the meaning of a statement and whether the statement defamed the plaintiff, you must consider the (statement) (publication) (article) (broadcast) (communication) in light of the surrounding circumstances. The circumstances that may affect the manner in which words are understood include (the section of the newspaper or other publication in which they appear) (the type of program or production in which they occur) (the nature of the discussion in which they occur) (***insert other description of surrounding circumstances established by the evidence***) and the likely expectations of readers, listeners, or viewers of the statement(s) as a result of those circumstances.**

### Notes on Use

1. Omit material in parentheses that does not correspond to the evidence and add descriptions of other relevant circumstances established by the evidence.

2. This instruction should be given with Instructions 22:9, 22:10, and 22:11, and with Instruction 22:2 or 22:5 when the issue is whether the published statement, publication, article, broadcast, or communication was defamatory or was "of and concerning" or "about" the plaintiff.

3. If there is a dispute as whether the defendant made or caused a publication at all, or what the published words were, this instruction should be modified to focus the jury upon the words and statements(s) they have found were made by the defendant.

### Source and Authority

This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994); **NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center**, 879 P.2d 6 (Colo. 1994); **Cinquanta v. Burdett**, 154 Colo. 37, 388 P.2d 779 (1963); **Seefried v. Hummel**, 148 P.3d 184 (Colo. App. 2005); and RESTATEMENT (SECOND) OF TORTS § 563 cmt. b.

## 22:13 FALSE — DEFINED

**A statement is false if its substance or gist is contrary to the true facts, and reasonable people (hearing) (reading) (or) (learning of) the statement would be likely to think significantly less favorably about the person referred to than they would if they knew the true facts. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false.**

### Notes on Use

1. When the truth of the statement is in issue and the plaintiff is a public official or public figure, or is a private person and the statement relates to a matter of public concern, the burden of proving falsity is on the plaintiff. **Phila. Newspapers, Inc. v. Hepps**, 475 U.S. 767 (1986). As to the burden when the statement relates to a private matter, see the Introductory Note, paragraph 6.

2. This instruction should be used in conjunction with Instruction 22:1 or 22:2.

### Source and Authority

1. This instruction is supported by **Masson v. New Yorker Magazine, Inc.**, 501 U.S. 496, 518 (1991) (falsity under the Constitution requires substantial departure from truth "bearing upon [the] defamatory character" of the words in issue). *Cf.* **Smiley's Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996); *see also* Source and Authority to Instruction 22:16.

2. In **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646, 648 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999), the parties entered a confidential settlement agreement and the plaintiff resigned from the school district following sexual harassment allegations. Several weeks later, a newspaper article quoted "a source close to the deal" and indicated that there had been a basis for the allegations. *Id.* The court held that "the truthfulness of the harassment allegations themselves is not at issue . . . . Rather, plaintiff's defamation claim concerns only the truth of the factual statements in the newspaper article that 'allegations of sexual harassment were made.'" *Id.* at 651.

3. To be actionable, an allegedly defamatory statement must contain a material falsehood. **Fry v. Lee**, 2013 COA 100, ¶ 50, 408 P.3d 843. The court applies the plain and ordinary meaning of the challenged statements to determine whether the complaint has demonstrated a material falsity in the communication as a whole, including whether the omission of facts creates a material falsity. *Id.* at ¶¶ 51-56. *See also* Note 4 of Notes on Use to Instruction 22:2. In **Barnett v. Denver Publishing Co.**, 36 P.3d 145, 147-48 (Colo. App. 2001), the court of appeals held that a published statement that the plaintiff had been "convicted in a stalking incident" was substantially true, when the court record showed that the plaintiff had been convicted for the misdemeanor of harassment, and that the judge said during the sentencing hearing that plaintiff's conduct directed at his paramour was "almost stalking."

4. When the plaintiff is a public official or public figure, or is a private person and the statement relates to a matter of public concern, the plaintiff's burden of proving falsity is

required by the First Amendment. **Hepps**, 475 U.S. at 775-76. The Colorado Supreme Court has held that constitutionally imposed elements of a defamation claim must meet the standard of "clear and convincing evidence," and are subject to de novo review by the court. *See* **NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.**, 879 P.2d 6 (Colo. 1994) (applying those standards to the question of whether defendant's omission of facts from its publication gave rise to false factual meaning); *see also* **Fry v. Lee**, 2013 COA 100, ¶ 21, 408 P.3d 843 ("Where, as here, a defamation claim involves a public figure or a matter of public concern . . . the plaintiff is required to prove the publication's falsity by clear and convincing evidence."); **Shoen v. Shoen**, 2012 COA 207, ¶ 24, 292 P.3d 1224 (same); **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008) (same); **Barnett**, 36 P.3d at 147-48 (applying de novo review standard to a complaint and determining as a matter of law that defendant's publication was substantially true); **Smiley's Too**, 935 P.2d at 41 (heightened constitutional burden requires plaintiff to prove falsity by clear and convincing evidence).

## 22:14 SPECIAL DAMAGES — DEFINED

**"Special damages" are limited to specific monetary losses, if any, which plaintiff had as a result of defendant's statement(s). Special damages do not include injuries to plaintiff's reputation or feelings which do not result in specific monetary loss.**

### Notes on Use

1. This instruction should be given in conjunction with Instruction 22:2 or 22:5 whenever the existence of special damages is in issue. It should not be used with Instruction 22:1 or 22:4, dealing with libel or slander per se, where special damages are not required for recovery.

2. If there is a dispute as to whether the defendant made or caused a publication at all, this instruction must be appropriately modified.

3. If the plaintiff establishes his or her case by proving special damages, the plaintiff may also recover nonpecuniary damages included under general damages. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 794 (5th ed. 1984); *see* Instruction 22:25.

4. This instruction is also applicable to the tort of product disparagement. **Teilhaber Mfg. Co. v. Unarco Materials Storage, Inc.**, 791 P.2d 1164 (Colo. App. 1989).

### Source and Authority

1. This instruction is supported by **Brown v. Barnes**, 133 Colo. 411, 296 P.2d 739 (1956) (in a per quod action the plaintiff must establish the causal connection between the defamatory words and any special damages); and **Lind v. O'Reilly**, 636 P.2d 1319 (Colo. App. 1981) (citing this instruction). *See also* RESTATEMENT (SECOND) OF TORTS § 575 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 793-94 (5th ed. 1984); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.14 (3d ed. 2006).

2. For additional cases on the general subject of pleading and proving special damages in defamation actions, see **Bernstein v. Dun & Bradstreet, Inc.**, 149 Colo. 150, 368 P.2d 780 (1962); **Knapp v. Post Printing & Publishing Co.**, 111 Colo. 492, 144 P.2d 981 (1943); **Coulter v. Barnes**, 71 Colo. 243, 205 P. 943 (1922); and **Inter-State Detective Bureau, Inc. v. Denver Post, Inc.**, 29 Colo. App. 313, 484 P.2d 131 (1971). *See also* C.R.C.P. 9(g).

## 22:15 ACTUAL DAMAGE — DEFINED

**"Actual damage" includes any (impairment of the plaintiff's reputation) (personal humiliation) (mental anguish and suffering) (physical suffering) (injury to the plaintiff's credit standing) (loss of income)** *(insert any other elements of compensable actual damage of which there is sufficient evidence)***.**

### Notes on Use

1. This instruction must be given as an element of the plaintiff's claim for relief when Instruction 22:1 is given and the plaintiff is a public official or public person. It is not, however, an element of a private person's claim for relief under Instruction 22:1. *See* Note 9 of the Notes on Use to Instruction 22:1.

2. For the damage instruction generally applicable in defamation cases, see Instruction 22:25.

### Source and Authority

This instruction is supported by **New York Times Co. v. Sullivan**, 376 U.S. 254 (1964); **Gertz v. Robert Welch, Inc.**, 418 U.S. 323 (1974); and **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by* **Diversified Mgmt., Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982). *See also* RESTATEMENT (SECOND) OF TORTS §§ 621-23 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 794; § 116A, at 842-45 (5th ed. 1984); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.30 (3d ed. 2006).

## 22:16 AFFIRMATIVE DEFENSE — SUBSTANTIAL TRUTH

**The defendant,** *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of (libel) (slander), if the affirmative defense of substantial truth is proved. This defense is proved if you find the statement(s) published by the defendant (was) (were) substantially true. A statement is substantially true if its substance or gist is true. Substantial truth does not require every word to be true.**

### Notes on Use

1. Use whichever parenthesized words are appropriate.

2. If there is a dispute as to whether the defendant published the statement, this instruction must be appropriately modified.

3. This instruction should be given only in conjunction with Instruction 22:4 or 22:5, when the question of truth has been put in issue, either (1) because the defendant in the answer pleaded truth in justification and presented some evidence in support of the plea, or (2) because the plaintiff alleged that the words were untrue and the defendant in the answer denied the allegations and then presented some evidence to prove truth. *See* **Hadden v. Gateway W. Publ'g Co.**, 130 Colo. 73, 273 P.2d 733 (1954) (giving instructions on truth as a defense not error where plaintiff alleged publication was "untrue" and defendants denied the allegation); **Republican Publ'g Co. v. Miner**, 12 Colo. 77, 20 P. 345 (1888) (instruction on defense of truth not to be given where defendant neither pleaded nor attempted to prove truth).

4. This instruction should be given only if the court determines that a private plaintiff suing over a private matter is not required to prove falsity. *See* Introductory Note, ¶ 5. This instruction should not be given in conjunction with Instruction 22:1 or 22:2, because in those cases, the burden of proving falsity is on the plaintiff.

5. This instruction embodies the Colorado rule requiring that the defense of truth requires the defendant to establish only that the "gist" or "sting" of the matter is true. *See* Note 8 of the Notes on Use to Instruction 22:1 and Instruction 22:13.

### Source and Authority

This instruction is supported by Colo. Const. art. II, § 10; section 13-25-125, C.R.S.; and **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988). *See also* **Gomba v. McLaughlin**, 180 Colo. 232, 504 P.2d 337 (1972); **Coulter v. Barnes**, 71 Colo. 243, 205 P. 943 (1922); **SG Interests I, Ltd. v. Kolbenschlag**, 2019 COA 115, ¶¶ 21-22, 452 P.3d 1, 6 ("[T]he alleged misstatement must be likely to cause reasonable people to think 'significantly less favorably' about the plaintiff than they would if they knew the truth; a misstatement is not actionable if the comparative harm to the plaintiff's reputation is real but only modest." (citation omitted)); **Barnett v. Denver Publ'g Co.**, 36 P.3d 145 (Colo. App. 2001); **Pierce v. St. Vrain Valley Sch. Dist.**, 944 P.2d 646 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); **Smiley's Too, Inc. v. Denver Post Corp.**, 935 P.2d 39 (Colo. App. 1996); **Lindemuth v.**

**Jefferson Cnty. Sch. Dist. R-1**, 765 P.2d 1057 (Colo. App. 1988); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986); RESTATEMENT (SECOND) OF TORTS § 581A (1977); 2 F. HARPER, ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.20 (3d ed. 2006); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116 (5th ed. 1984).

## 22:17 AFFIRMATIVE DEFENSE — ABSOLUTE PRIVILEGE

**No instruction prepared.**

### Note

1. No instruction has been prepared because it is unlikely that there will be any fact question for determination by a jury as distinguished from questions of law to be decided by the court.

2. Certain classes of persons, by virtue of their position or status, are absolutely privileged to publish defamatory matter and are not liable even if the statements are false or defamatory. An absolute privilege is not conditioned on any knowledge or belief as to the truth of the statements or upon an absence of ill will on the part of the actor. Those absolutely privileged include: (a) a judge or other officers performing a judicial function if the publication has some relation to the matter before that person; (b) an attorney, party, witness, or juror, if the defamatory matter communicated has some relation to a judicial proceeding in which that person participates; (c) legislators in the performance of their legislative functions; (d) witnesses testifying at or persons providing communication preliminary to a legislative proceeding if the matter has some relation to the proceeding; (e) certain executive and administrative officers in communications made in the performance of their official duties; (f) one who is required by law to publish the defamatory matter; and (g) persons in a statutory confidential relationship. RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1977); *see* **Hoffler v. Colo. Dep't of Corr.**, 27 P.3d 371 (Colo. 2001) (recognized common-law privilege protecting statements made in course of judicial or quasi-judicial proceedings, but privilege not applicable to employee who made conflicting statements during investigation of supervisor); **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (recognizing privilege of prosecutor to make defamatory statement in open court when pertinent to case being tried); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951) (petition to county commissioners held privileged as relating to legislative and judicial proceedings); **Glasson v. Bowen**, 84 Colo. 57, 267 P. 1066 (1928) (affidavit incident to change of venue motion); **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998) (statements in reports to police are protected by a qualified but not an absolute privilege); **Club Valencia Homeowners Ass'n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985) (absolute privilege of attorney to publish defamatory statements in course of judicial proceeding is not limited to statements made during trial, but includes statements made in conferences and other communications preliminary to official proceedings); **Dep't of Admin. v. State Personnel Bd.**, 703 P.2d 595 (Colo. App. 1985) (rule that defamatory statements made in judicial or quasi-judicial proceedings are absolutely privileged, if relevant to the subject of the inquiry, also applies to hearings before administrative agencies); **Dorr v. C.B. Johnson, Inc.**, 660 P.2d 517 (Colo. App. 1983) (statements concerning employee in required state agency report are privileged, but privilege does not extend to repetition of statements made to third persons not involved in matter before agency).

3. This defense is applicable regardless of whether the plaintiff is a public official, public figure, or private person.

## 22:18 AFFIRMATIVE DEFENSE — QUALIFIED PRIVILEGE — WHEN LOST

**(When the defendant published the statement[s] in question [he] [she] was privileged to do so, because** *[describe the basic purpose of the privilege, including what and whose interest the privilege is intended to protect, e.g., "an employee is allowed to inform his or her employer of wrongdoing of a fellow employee for the purpose of protecting the employer's business"]***.)**

**(The defendant has the burden of proving the affirmative defense of privilege. If you find that** *[describe the facts which, if proved, would give rise to the privilege as a matter of law]***, then you must find that when the defendant published the statement[s] in question, [he] [she] was privileged to do so because** *[describe the purpose of the privilege, including what and whose interest the privilege is intended to protect]***.)**

**(Because) (If) the defendant was privileged to publish the statement(s), then the defendant is not legally responsible to the plaintiff and your verdict must be for the defendant (unless the defendant abused the privilege. The existence of a privilege does not protect the defendant if [he] [she] abused the privilege).**

**(The affirmative defense of privilege is lost if the plaintiff proves the defendant abused the privilege. The defendant abused the privilege if you find that when [he] [she] published the statement[s] in question:**

**1. [He] [She] knew the statement[s] to be false, or acted with reckless disregard for whether the statement[s] [was] [were] false; or**

**2. [He] [She] acted primarily for purposes other than the protection of the interest for which the privilege was given; or**

**3. [He] [She] knowingly published the statement[s] to [a person] [persons] to whom its publication was not otherwise privileged, unless [he] [she] reasonably believed that the publication was a proper means of communicating such matter to the person[s] to whom its publication was privileged; or**

**4. [He] [She] did not reasonably believe the publication of the statement[s] to be necessary to accomplish the purpose for which the privilege was given.)**

### Notes on Use

1. This instruction should be given only in conjunction with Instruction 22:4 or 22:5 when the question of a qualified privilege has been properly put in issue. It should not be used in conjunction with Instruction 22:1 or 22:2.

2. Use whichever parenthesized or bracketed words or phrases are appropriate.

3. There are certain occasions making a publication conditionally or qualifiedly privileged, and on these occasions the publisher is not liable even for false or defamatory

statements unless the privilege is abused. Examples of qualified privileged occasions include: (1) protection of the publisher's interest; (2) protection of the interest of the recipient or a third person; (3) common interest; (4) family relationships; (5) communication to one who may act in the public interest; (6) communication by an inferior state officer required or permitted in the performance of his official duties. *See* RESTATEMENT (SECOND) OF TORTS §§ 593, 598A (1977).

4. It is a question of law for the court to determine what circumstances will give rise to a privilege, but if there is a dispute as to whether those circumstances in fact existed in the particular case, or whether a privilege, if established, was abused, these questions are for the jury. *See* **Abrahamsen v. Mountain States Tel. & Tel. Co.**, 177 Colo. 422, 494 P.2d 1287 (1972); **Ling v. Whittemore**, 140 Colo. 247, 343 P.2d 1048 (1959); **McIntyre v. Jones**, 194 P.3d 519 (Colo. App. 2008); 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.29 (3d ed. 2006). If the circumstances surrounding defendant's claimed privilege are sufficient as a matter of law, and the existence of those circumstances is not in dispute, then the first parenthesized paragraph of this instruction should be used and the second omitted; if the circumstances would be sufficient for a privilege, but their existence is in dispute, then, assuming there is sufficient evidence from which the jury might find such circumstances to have existed, the second parenthesized paragraph should be used and the first omitted.

5. None of the remaining portions of this instruction relating to abuse should be given unless there is sufficient evidence to support such portions and the privilege is a conditional one which is subject to being lost if abused. For a discussion of what circumstances will give rise to a privilege, whether absolute or conditional, see HARPER, JAMES, AND GRAY ON TORTS, *supra*, §§ 5.21-5.26 and 5.28 (referring to § 5.8); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 114-115 (5th ed. 1984). *See also* § 18-4-407, C.R.S. (detention of theft suspect); § 25-1-122(3), C.R.S. (persons reporting various diseases).

6. The burden of proving an occasion was privileged, if the facts are in dispute, is on the defendant, but the burden of proving a privilege was abused is on the plaintiff. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 115, at 835; *see also* **Churchey v. Adolph Coors Co.**, 759 P.2d 1336, 1346 (Colo. 1988) (burden of proving abuse is on the plaintiff); **Price v. Conoco, Inc.**, 748 P.2d 349 (Colo. App. 1987) (citing this instruction and stating that plaintiff bears burden of proving the privilege has been abused); **Patane v. Broadmoor Hotel, Inc.**, 708 P.2d 473 (Colo. App. 1985) (burden of proving abuse on plaintiff, citing this instruction); **Dominguez v. Babcock**, 696 P.2d 338 (Colo. App. 1984) (burden on plaintiff to prove abuse of qualified privilege; failure to investigate or negligence alone not sufficient to establish abuse), *aff'd*, 727 P.2d 362 (Colo. 1986).

7. The conditions set out in this instruction as to how a conditional privilege may be lost are those which are generally applicable to conditional privileges. *See* RESTATEMENT (SECOND) OF TORTS §§ 599-605A (1977); HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 5.27; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 115, at 832-35. If such conditions are not applicable or other circumstances which may constitute abuse under the applicable law are in issue, this portion of the instruction should be appropriately modified.

8. Usually an employee's state law defamation claim against his or her employer for statements made in the course of disciplinary or grievance proceedings under a collective

bargaining agreement will not be preempted by federal labor laws or by any national labor policy. However, the employer's statements are protected by a qualified privilege which requires the employee, in order to recover, to prove "malice" as defined in Instruction 22:3. In such cases, this instruction must be appropriately modified. *See, e.g.*, **Thompson v. Pub. Serv. Co.**, 800 P.2d 1299 (Colo. 1990).

9. When a statement is subject to a qualified privilege, plaintiff has the burden of proving that the statement was false. **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003) (also holding that physician's diagnosis entered in medical records is subject to qualified, but not absolute, privilege); *see also* Introductory Note, ¶ 6; Instruction 22:13.

**Source and Authority**

1. This instruction is supported by **Churchey v. Adolph Coors Co.**, 759 P.2d 1336 (Colo. 1988) (qualified privilege of employer to communicate to employee reasons for discharging that employee); and **Dominguez v. Babcock**, 727 P.2d 362 (Colo. 1986) (privilege based on common interest; abused if made with "malice" as defined in numbered paragraph 1 of instruction). *See also* **Abrahamsen v. Mountain States Tel. & Tel. Co.**, 177 Colo. 422, 494 P.2d 1287 (1972) (interoffice communications); **Coopersmith v. Williams**, 468 P.2d 739, 741 (Colo. 1970) (In analyzing letter from Boy Scout father to Scout committee, court stated, "a qualified privilege is extended to a communication upon any subject in which the communicating party has a legitimate interest to persons having a corresponding interest. In such a situation the burden of proving the existence of malice passes to the person claiming to be defamed."); **Ling v. Whittemore**, 140 Colo. 247, 343 P.2d 1048 (1959) (reporting theft of car to landlady); **Bereman v. Power Publ'g Co.**, 93 Colo. 581, 27 P.2d 749 (1933) (recognizing qualified privilege of newspaper devoted to particular organization; burden on plaintiff to prove abuse; privilege abused if defendant deliberately adopts a method of communication that gives unnecessary publicity to the defamatory statements or uses defamatory language not warranted by the occasion); **Walker v. Hunter**, 86 Colo. 483, 283 P. 48 (1929) (petition to county commissioners regarding denial of dance hall license); **La Plant v. Hyman**, 66 Colo. 128, 180 P. 83 (1919) (letter from stockholder to other stockholders privileged; directed verdict for defendant proper where plaintiff failed to produce evidence of abuse); **Wertz v. Lawrence**, 66 Colo. 55, 179 P. 813 (1919) (oral statement about teacher made by one parent to another parent, rather than to school board, held not privileged); **Melcher v. Beeler**, 48 Colo. 233, 110 P. 181 (1910) (letter of reference privileged unless privilege abused because defendant lacked belief in truth of his defamatory statements; unless circumstances of privilege in dispute, it is entirely a question for the court whether a privilege exists); **Denver Pub. Warehouse Co. v. Holloway**, 34 Colo. 432, 83 P. 131 (1905) (letter from one corporate officer to another privileged; not abused if defendant has honest belief in truth and does not include defamatory language not appropriate to the occasion); **McIntyre**, 194 P.3d at 529-30 (defendant abused and lost qualified common interest privilege to publish statements because he acted with reckless disregard for the truth by failing to check with knowledgeable sources regarding the facts); **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998) (statements made to law enforcement officials are entitled to qualified privilege that can be overcome by showing actual malice); **Wigger v. McKee**, 809 P.2d 999 (Colo. App. 1990) (in absence of bad faith, social worker's statements to therapist regarding possible sexual assault on child by plaintiff were privileged); **Price v. Conoco, Inc.**, 748 P.2d 349 (Colo. App. 1987) (recognizing qualified privilege based on common interest of employers and employees in

information concerning work performance and status of personnel); **Pittman v. Larson Distrib. Co.**, 724 P.2d 1379 (Colo. App. 1986) (former employer privileged to respond to inquiries about former employee, but privilege abused if response made with "malice"); **Patane v. Broadmoor Hotel, Inc.**, 708 P.2d 473 (Colo. App. 1985) (communication to employees relating to their common interest in turnover or status of personnel); **MacLarty v. Whiteford**, 30 Colo. App. 378, 496 P.2d 1071 (1972) (recognizing privilege of one asked to provide character reference to officials in proceedings for application of liquor license); **Hoover v. Jordan**, 27 Colo. App. 515, 150 P. 333 (1915) (petition to school board regarding teacher; qualified privilege abused if publication is excessive); **Daniels v. Stock**, 21 Colo. App. 651, 126 P. 281 (1912) (qualified privilege abused where publication excessive and publication was partly for a purpose other than that of protecting interest on which privilege was based).

2. The statutory privilege of a radio or television broadcaster, *see* § 13-21-106, C.R.S., is now supplanted in most cases by the law governing the "public interest" First Amendment privilege. *See* Notes on Use and Source and Authority to Instruction 22:1.

3. For the statutory privilege — that is, immunity from any "civil liability" — an employer may have for providing information about a current or former employee to a prospective employer of that employee, see section 8-2-114, C.R.S. If the provisions of that section are applicable, this instruction, appropriately modified, may be used.

4. Section 16-3-203, C.R.S., provides that any person "who is made the defendant in any civil action as a result of having sought to prevent a crime being committed against any other person, and who has judgment entered in his favor, shall be entitled to all his court costs and to reasonable attorney fees incurred in such action." The statute was applied in **Schwankl v. Davis**, 85 P.3d 512 (Colo. 2004) (to be entitled to recover under statute, successful defendant in defamation action need not prove elements of the crime, and reasonable attorney fees and costs may be recovered when trial court finds that defendant acted in good faith to report what she thought was a current or future crime).

## 22:19 AFFIRMATIVE DEFENSE — PRIVILEGE TO REPORT OFFICIAL OR PUBLIC MEETING PROCEEDINGS

**The defendant,** *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of (libel) (slander), if the affirmative defense of a privilege to report (an official action) (or) (a[n official] [public] proceeding) is proved. This defense is proved if you find both of the following:**

**1. The defendant was reporting** *(insert an appropriate description of the official action or proceeding, or meeting open to the public and dealing with a matter of public concern which defendant claims and which under the law would give rise to the privilege)***; and**

**2. The report was substantially accurate and complete as to the matter being reported or it was a fair summary of the matter.**

**If this privilege has been proved, it does not matter that statements contained in the report may have been false and defamatory or that the defendant may have known or believed them to be false.**

### Notes on Use

1. When otherwise applicable in light of the evidence in the case, this instruction applies whether the plaintiff is a public official, a public person, or a private person. It also applies to defendants who are private citizens, as well as communications media defendants and others. The privilege applies even if the publisher does not believe the statements to be true or the publisher knows them to be false.

2. If there is no dispute as to the facts covered by numbered paragraph 1, the paragraph should be omitted and an appropriate reference describing the report should be added in numbered paragraph 2. The report should also be referred to in an appropriate manner in the instruction setting forth the "statement of the case to be determined." *See* Chapter 2.

### Source and Authority

1. This instruction is supported by **Tonnesson v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000), and RESTATEMENT (SECOND) OF TORTS § 611 (1977).

2. In **Wilson v. Meyer**, 126 P.3d 276 (Colo. App. 2005), the court of appeals expanded the fair report doctrine in Colorado to apply to reports concerning public proceedings generally, instead of only to reports of judicial proceedings. The holding extends the privilege to "media reports of defamatory statements made in other public proceedings." *Id.* at 279-80 (applying RESTATEMENT § 611).

## 22:20 AFFIRMATIVE DEFENSE — PRIVILEGE TO PROVIDER OF MEANS OF COMMUNICATION

**No instruction prepared.**

### Note

1. One who provides a means of publication of defamatory matter published by another is privileged to do so if (a) the other is privileged to publish it, or (b) the person providing the means of publication reasonably believes that the other is privileged to publish it. A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless (a) the sender of the message is not privileged to send it, and (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it. RESTATEMENT (SECOND) OF TORTS § 612 (1977).

2. Most of the issues that may be involved will be questions for the court. If there are fact issues, such as whether the communicator reasonably believed, or knew, or had reason to know, that the originator was privileged to publish the statements, an instruction similar to 22:19 should be given.

3. The Communications Decency Act of 1996 provides that no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2018). An "information content provider" is one "responsible, in whole or in part, for the creation and development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The Joint Conference Committee Report indicates that this was intended to limit tort liability of online distributors of information, but the legislative history does not otherwise illuminate the scope of this provision. However, federal courts have interpreted this provision to eliminate all state law tort liability for internet speakers who do not originate the defamatory material. *See* 1 R. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 7.3.2 (5th ed. 2018).

## 22:21 AFFIRMATIVE DEFENSE — FAIR COMMENT

**No instruction to be given.**

### Note

The common-law defense of fair comment has been incorporated into the "statement of fact" requirement of the law of defamation. **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). Therefore, no instruction on this defense is to be given. *See* Introductory Note, ¶¶ 7-14.

## 22:22 AFFIRMATIVE DEFENSE — CONSENT

**The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of (libel) (slander), if the affirmative defense of consent is proved. This defense is proved if you find both of the following:**

**1. The plaintiff by words or conduct, or both, expressly or impliedly (authorized) (or) (consented to) the publication of the statement(s) by the defendant; and**

**2. The publication by the defendant was done in the manner and for the purposes which the plaintiff consented to (or which the defendant, as a reasonable person, reasonably believed the plaintiff had consented to).**

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate in light of the evidence in the case.

2. Omit either numbered paragraph, the facts of which are not in dispute.

3. If there is any dispute as to whether the defendant published the statement, this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by **Dominguez v. Babcock**, 727 P.2d 362 (Colo. 1986); **Costa v. Smith**, 601 P.2d 661 (Colo. App. 1979) (a person's consent to publication of defamatory matter concerning that person is a complete defense). *See also* RESTATEMENT (SECOND) OF TORTS § 583 (1977).

2. A person who authorizes, requests, induces or otherwise consents to the publication of matter about him or herself takes the risk that it is or may be defamatory, and that person cannot recover damages for any resulting injuries or harm sustained. The terms of the consent control. Frequently the consent is conditioned upon a certain contingency or limited to a particular time or for a particular purpose. The defense of consent is lost where the publication goes beyond the scope of those conditions or limitations. RESTATEMENT (SECOND) OF TORTS § 583 cmts. c and d (1977). Also, a person may consent to the publication of an original report which defames that person without necessarily consenting to any republication of it.

3. Consent may be express, either by oral or written authorization, or it may be implied from words or other conduct which, in light of the surrounding circumstances, may be reasonably interpreted as assent. A denial alone of, refusal to answer, or silence concerning a matter does not constitute consent. *See generally* **Dominguez**, 727 P.2d at 365 ("[c]onsent is a defense to an action for defamation only to the extent of that consent" (applying RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, § 584 (1977))); RESTATEMENT (SECOND) OF TORTS § 583 cmt. c (1977).

## 22:23 AFFIRMATIVE DEFENSE — STATUTE OF LIMITATIONS

**The defendant,** *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) (its) claim of (libel) (slander), if the affirmative defense of the expiration of the statute of limitations is proved.**

**The affirmative defense of expiration of the statute of limitations is proved if you find that the plaintiff knew or with the exercise of reasonable diligence should have known before** *(insert applicable date of exactly one year prior to commencement of action)* **that (he) (she) (it) had (injuries) (damages) (losses) and that such (injuries) (damages) (losses) were caused in whole or in part by the publication of the statement(s) by the defendant.**

**If you find that the affirmative defense of expiration of the statute of limitations is proved, then your verdict must be for the defendant,** *(name)***.**

### Notes on Use

1. This instruction should be given only if the statute was pled as a defense and there is a disputed question of fact which would be proper to submit to the jury.

2. In computing when the statute of limitations begins to run, the date of the accruing event should be excluded. **Cade v. Regensberger**, 804 P.2d 238 (Colo. App. 1990). This instruction permits the jury to determine whether the accruing event happened before the last day on which the action could accrue and still be timely.

### Source and Authority

1. This instruction is supported by **Burke v. Greene**, 963 P.2d 1119 (Colo. App. 1998); and **Taylor v. Goldsmith**, 870 P.2d 1264 (Colo. App. 1994).

2. Each publication of a libel or slander is a separate claim for relief. **Spears Free Clinic & Hosp. v. Maier**, 128 Colo. 253, 261 P.2d 489 (1953); **Lininger v. Knight**, 123 Colo. 213, 226 P.2d 809 (1951); **Russell v. McMillen**, 685 P.2d 255 (Colo. App. 1984). Because each claim for relief accrues separately as to each publication, some claims may be barred and others not. **Corporon v. Safeway Stores, Inc.**, 708 P.2d 1385 (Colo. App. 1985). Also, as separate claims for relief, additional claims raised in an amended complaint which are based on other publications do not relate back to the commencement of the original action. C.R.C.P. 15(c); **Walker v. Associated Press**, 160 Colo. 361, 417 P.2d 486 (1966). *But see* **Dillingham v. Greeley Publ'g Co.**, 701 P.2d 27 (Colo. 1985) (relation back under C.R.C.P. 15(c) allowed on unique facts).

3. To prevent a multiplicity of lawsuits, it is generally recognized that a single newspaper issue or a single broadcast, although widely disseminated, constitutes only one publication and one claim for relief. RESTATEMENT (SECOND) OF TORTS § 577A (1977). The statute of limitations of one year, § 13-80-103(1)(a), C.R.S., begins to run on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. § 13-80-108(1), C.R.S.

## 22:24 REPETITION BY THIRD PERSONS AS AN ELEMENT OF DAMAGES

**In awarding the plaintiff, *(name)*, damages, if any, you must take into account not only the damages to the plaintiff which occurred as a result of the defendant's, *(name)*, original publication of the defamatory statement(s), but also any damages which may have occurred as a result of any repetition of the defamatory statement(s) by third persons. However, you must also find that such repetition was the natural consequence of the defendant's original publication, or that the defendant expressly or impliedly authorized its repetition.**

### Notes on Use

1. When appropriate, this instruction should be given in conjunction with Instruction 22:3.

2. If there is a dispute as to whether or not the defendant in fact published the words or caused them to be published, this instruction should be appropriately modified. Similarly, the same should be done if the action is a libel or slander per quod action, *see* Instructions 22:2 and 22:5, and there is a dispute as to whether the statement was defamatory.

3. This instruction should be given when the plaintiff has claimed and there is sufficient evidence supporting such claim that the statement was repeated by third persons as a result of the defendant's original publication. This is not the same as a republication of the statement by, or caused by, a further voluntary act of the defendant. Such a republication is a separate claim which should be set out as a separate claim for relief in the complaint, be separately proved by the evidence, and be subject to the same requirements and defenses as any other separate defamation claim. *See* **Spears Free Clinic & Hosp. v. Maier**, 128 Colo. 263, 261 P.2d 489 (1953).

### Source and Authority

This instruction is supported by **Taylor v. Goldsmith**, 870 P.2d 1264 (Colo. App. 1994).

## 22:25 DAMAGES — RECOVERY OF

**Plaintiff,** *(name)***, has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the publication of the statement(s) by the defendant(s),** *(name[s])***, (and the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**1. Any noneconomic losses or injuries plaintiff has had to the present time or which plaintiff will probably have in the future, including: damage to the plaintiff's reputation, physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of quality of life, and** *[insert any other recoverable noneconomic losses for which there is sufficient evidence]***.**

**2. Any economic losses plaintiff has had to the present time or will probably have in the future, including: loss of earnings or income; ability to earn money in the future; (reasonable and necessary) medical, hospital and other expenses, loss of or injury to (his) (her) credit standing, and** *[insert any other recoverable economic losses for which there is sufficient evidence]***.**

**(If you find in favor of the plaintiff, but do not find any actual damages, you shall award [him] [her] nominal damages of one dollar.)**

### Notes on Use

1. The damage instruction should not state the amount of damages sought. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).

2. In cases involving per se defamations of private persons, though involving a matter of public interest or general concern (Instruction 22:1, especially Note 9 of the Notes on Use to that instruction), the last unnumbered parenthesized paragraph relating to nominal damages should be given. In all other cases, that is, cases in which the plaintiff must prove actual or special damages as an element of his or her claim (Instructions 22:1, 22:2 and 22:5), this last parenthesized paragraph should be omitted.

3. In **Tonnesson v. Denver Publishing Co.**, 5 P.3d 959 (Colo. App. 2000), the court held that when harmful but unchallenged or nonactionable statements accompany actionable statements, the plaintiff must establish that the damages in issue were due to "incremental harm" caused by the actionable statements. When the existence of such "incremental" damages presents a jury question, the court should instruct that the plaintiff must prove that any damages were caused by the actionable statements as distinct from those unchallenged or found to be nonactionable.

4. As to the second numbered paragraph, omit any enumerated element of damages of which there is not sufficient evidence, and as to the compensable damages a plaintiff may be

entitled to recover, see RESTATEMENT (SECOND) OF TORTS §§ 621-623 (1977); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 842-45 (5th ed.1984).

5. The court determines what items of harm suffered by the plaintiff as a result of the publication may be considered by the jury in assessing damages. RESTATEMENT (SECOND) OF TORTS § 616 (1977).

**Source and Authority**

1. This instruction is supported by **Keohane v. Stewart**, 882 P.2d 1293 (Colo. 1994). *See also* Source and Authority to Instruction 22:14.

2. In addition, as to the noneconomic damages set out in numbered paragraph 1, such damages include injury to reputation and to the feelings of the plaintiff, which are "presumed" and need not be established by evidence. *See* **Kendall v. Lively**, 94 Colo. 483, 31 P.2d 343 (1934); **Republican Publ'g Co. v. Conroy**, 5 Colo. App. 262, 38 P. 423 (1894); *see also* **Republican Publ'g Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890) (injury to feelings are includable in the plaintiff's general damages); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 116A, at 844-45; 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 5.30 (3d ed. 2006). The jury is entitled to consider any evidence of actual injury to reputation and to the feelings of the plaintiff and evidence tending to show mitigation of such injuries. **Williams v. Dist. Court**, 866 P.2d 908 (Colo. 1993).

## 22:26 CIRCUMSTANCES THAT MITIGATE DAMAGES

**If you find that the plaintiff, *(name)*, is entitled to recover damages from the defendant, *(name)*, then in determining those damages you must take into account any of the following factors that have been proved by a preponderance of the evidence. You should consider these factors only to the extent that they justify a reduction in the amount of damages to be awarded.**

**(1. Whether the defendant reasonably relied on the source of information on which the [statement was] [statements were] based;)**

**(2. Whether the plaintiff's damages were caused, in part, by third persons who published on the same subject, before or about the same time as the defendant published;)**

**(3. Whether the defendant did not intend to injure the plaintiff's reputation, good name or feelings;)**

**(4. Whether the defendant acted in good faith, believing the statement[s] to be true;) (or)**

**(5. Whether the defendant [clarified,] [corrected,] [apologized for,] [or] [retracted] the statement[s] with reasonable promptness and fairness.)**

### Notes on Use

1. Omit any numbered paragraphs if the matters have not been properly pleaded or there is insufficient evidence from which the jury might reasonably find the facts to be true. Numbered paragraphs 1, 2, and 4 are inapplicable when knowledge of falsity or reckless disregard is an element of liability, as in Instructions 22:1 and 22:2.

2. Add any other matters that may be proved as a mitigating circumstance.

3. When appropriate, this instruction should be given in conjunction with Instruction 22:25.

4. The burdens of pleading and proving mitigation are on the defendant. C.R.C.P. 8(c); § 13-25-125, C.R.S. (whether the defendant successfully proves the defense of truth, the defendant is entitled to give evidence in mitigation); **Gomba v. McLaughlin**, 180 Colo. 232, 504 P.2d 337 (1972).

5. The jury may consider a retraction when calculating damages. The jury should consider whether the retraction was full and complete, the timing and placement of the retraction, whether defendants admitted a mistake, whether defendants apologized, the audience the retraction reached, and the effect the retraction had on lessening the harm to the plaintiff. **Lee v. Colo. Times, Inc.**, 222 P.3d 957 (Colo. App. 2009) (discussing circumstances of retractions as mitigating factors in out-of-state defamation cases, and holding that the same circumstances may be considered in outrageous conduct case).

## Source and Authority

This instruction is supported by **Walker v. Colorado Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975) (paragraph 5), *overruled on other grounds by* **Diversified Mgmt., Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); **Wertz v. Lawrence**, 66 Colo. 55, 179 P. 813 (1919) (paragraph 4); **Rocky Mountain News Printing Co. v. Fridborn**, 46 Colo. 440, 104 P. 956 (1909) (paragraphs 2, 4, and, by implication, 3); **Republican Publishing Co. v. Mosman**, 15 Colo. 399, 24 P. 1051 (1890) (paragraphs 2 and 4); and **Republican Publishing Co. v. Miner**, 20 P. 345 (Colo. 1888) (paragraph 5; also proof that plaintiff already had a bad reputation). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 845-48 (5th ed. 1984).

## 22:27 EXEMPLARY OR PUNITIVE DAMAGES

**Use Instruction 5:4.**

### Notes on Use

When otherwise applicable to the evidence in the case, Instruction 5:4 should be used for instructing on punitive damages.

### Source and Authority

1. Punitive damages focus on the defendant's attitude toward the plaintiff, and not necessarily on the truth or falsity of the material published. **Cantrell v. Forest City Publ'g Co.**, 419 U.S. 245 (1974). Therefore, it does not always follow, as stated in **Curtis Publishing Co. v. Butts**, 388 U.S. 130, 161 (1967), that "misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award." *See also* **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by* **Diversified Mgmt., Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982).

2. In cases involving private persons involved in a matter of public interest or general concern, "[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 349 (1974). For such cases, however, Colorado, in **Walker**, 188 Colo. at 98-99, 538 P.2d at 457, and **Diversified Management, Inc.**, 653 P.2d at 1106, adopted the knowledge or reckless disregard standard for liability.

3. "Actual malice," as defined in **New York Times Co. v. Sullivan**, 376 U.S. 254, 280 (1964), and its progeny, means "with knowledge that [a defamatory statement] was false or with reckless disregard of whether it was false or not." As so defined, "actual malice" is a "term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, it is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." **Cantrell**, 419 U.S. at 251-252.

4. In cases involving defamations of private persons about private matters, the usual rules relating to presumed damages and punitive damages are applicable. **Rowe v. Metz**, 195 Colo. 424, 579 P.2d 83 (1978). The usual punitive damage rules also apply to a public official, public figure, or private person involved in a matter of public concern once such a plaintiff has established a valid claim under Instruction 22:1 or 22:2.

5. Except as otherwise provided in section 24-10-118(5), C.R.S., punitive damages are not recoverable against a public entity. § 24-10-114(4), C.R.S.; **Martin v. Weld Cty.**, 43 Colo. App. 49, 598 P.2d 532 (1979).