

Exhibit A

3.11A PUBLIC DEFAMATION (Approved 2/92; Revised 3/02)

NOTE TO JUDGE

The instructions set forth below apply only where the plaintiff is a public official, public figure, or where the plaintiff is a private person but the defamatory statements involve a matter of legitimate public concern. See Footnote 1 below for the cases defining these terms.

1. General Elements of Defamation

In order for you to find that the plaintiff is entitled to recover damages from the defendant for defamation, you must find by clear and convincing evidence¹ the defendant communicated to a person other than the plaintiff a false and defamatory statement of fact concerning the plaintiff with actual knowledge that the statement

¹The burden of proof imposed depends upon and is tied to the status of the plaintiff and the subject matter of the defamatory statement. Where the plaintiff is a public official or a “public figure” and the subject matter of the defamatory statement is a matter of legitimate public concern, the standard of proof is “clear and convincing” evidence. *See New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Lawrence v. Bauer Pub. Co.*, 89 N.J. 451 (1982); *Marchiano v. Sandman*, 178 N.J. Super. 171 (App. Div. 1981); *Vassallo v. Bell*, 221 N.J. Super. 347 (App. Div. 1987) [involving a “limited purpose” public figure]. Where plaintiff is a private figure and the subject matter of the defamatory statement is a matter of legitimate public concern, the standard of proof is also clear and convincing. *See Pitts v. Newark Bd. of Educ.*, 337 N.J. Super. 331 (2001); *Burke v. Deiner*, 97 N.J. Super. 465 (1984); *Costello v. Ocean County Observer*, 136 N.J. 595 (1994). The trial judge must make the determination as to the status of the plaintiff and whether the statements complained of by a private person are a matter of legitimate public concern. *See Lawrence v. Bauer Pub. Co.*, *supra*; *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125 (1986); *Rocci v. Ecole Secondaire*, 165 N.J. 149 (2000) (The Supreme Court expands the definition of what is deemed to be “of public concern”).

was false or with reckless disregard of its truth or falsity, thereby causing the plaintiff to incur actual damages.

There are five elements in addition to damages which plaintiff must prove by clear and convincing evidence in order to prevail in this case. These five elements are: (1) a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false and (4) which was communicated to a person or persons other than the plaintiff (5) with actual knowledge by the defendant that the statement was false or with reckless disregard by the defendant of the statement's truth or falsity.

I will now explain to you each of these five individual elements.

2. Specific Elements

a. The statement must be a defamatory statement of fact.

A defamatory statement is a statement of fact which is injurious to the reputation of the plaintiff, or which exposes him/her to hatred, contempt or ridicule, or to a loss of the good will and confidence felt toward him/her by others, or which has a tendency to injure him/her in his/her trade or business.²

²See *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982); *Dairy Stores, Inc. v. Sentinel Pub. Co.*, *supra*; *Restatement (Second) of Torts*, Section 559 (1977).

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To be defamatory, the statement must be a statement of fact. Statements of opinion are not actionable and you are not to consider them in any way.³

I call your attention to the statement of fact which it is alleged that defendant made. This statement may be interpreted as having two meanings. On the one hand it may be understood to mean _____. Such a meaning, I charge you, is clearly defamatory to the plaintiff if it exposed him/her to the contempt and ridicule of others, and it is in this sense that the plaintiff contends that it was generally understood. On the other hand, the statement may be construed to mean nothing more than _____. In this sense, of course, the statement is innocent and non-defamatory, and it is in this sense that defendant contends it was understood.⁴

³The trial court must make a preliminary determination as to whether any of the statements complained of are statements of opinion. If there are any statements of opinion in the publication complained of, the jury must be instructed that these statements are privileged and are not to be considered in any way in their deliberations. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Kotlikoff v. The Community News*, 89 N.J. 62 (1983); *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982), cert. den., 459 U.S. 907 (1982); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F. 2d 446 (3d Cir. 1987); *Karnell v. Campbell*, 206 N.J. Super. 81 (App. Div. 1985); *Restatement (Second) of Torts*, Section 566 (1977).

⁴The trial court must make a preliminary determination as to whether the statement is defamatory on its face. Only when the court finds that a statement is capable of both a defamatory and non-defamatory interpretation is the issue to be submitted to the jury. See *Lawrence v. Bauer Pub. Co.*, 89 N.J. 451 (1982); *Romaine v. Kallinger*, 109 N.J. 282, 290-91 (1988); *State v. Browne*, 86 N.J. Super. 217 (App. Div. 1965); *Sokolary v. Edlin*, 65 N.J. Super. 542 (App. Div. 1961); *Mosler v. Whelan*, 48 N.J. Super. 491 (App. Div. 1958). When the statement is only capable of a defamatory interpretation, the plaintiff need not establish this element and it should be eliminated from the instruction.

It is up to you to determine, in light of all the evidence, if the words used by the defendant were understood in their defamatory sense by the reasonable person who read [heard] them.

In resolving this dispute, you are, of course, free to take into consideration the common and ordinary meaning of the words used in the context of the statement, but bear in mind that your deliberations are not to be governed solely by what you yourselves believe to be the meaning of the language used nor, indeed, by what you personally believe the defendant intended to be understood. The test, as I say, is what you find from all the evidence the words were understood to mean by the reasonable person who read [heard] them.⁵

b. The plaintiff must prove that the defamatory statement concerned the plaintiff.

The second element that plaintiff must prove is that the defamatory statement was read [heard] and understood by third persons to concern the plaintiff.⁶ This requirement means that the defamatory statement read [heard] by persons other than the plaintiff was reasonably understood by them to refer to the

⁵See *Restatement (Second) of Torts*, Section 563 (1977).

⁶See *Gnapinsky v. Goldyn*, 23 N.J. 243 (1957); *Scelfo v. Rutgers Univ.*, 116 N.J. Super. 403 (Law Div. 1971); *Dijkstra v. Westerink*, 168 N.J. Super. 128 (App. Div. 1978); *Restatement (Second) of Torts*, Sec. 564 (1977). Where the defamatory statement concerns a group or class of persons of which plaintiff is a member, the plaintiff must establish some reasonable application of the words to himself/herself. See *Mick v. American Dental Ass'n*, 49 N.J. Super. 262, 285-87 (App. Div. 1958); *Restatement (Second) of Torts*, Section 564A (1977).

plaintiff. The actual naming of the plaintiff is not necessary so long as those who read [heard] the statement understood the plaintiff was the subject of the statement.

The issue to be decided by you is not whether defendant intended the statement to refer to plaintiff; the issue is whether those persons reading [hearing] the statement reasonably understood the statement to refer to plaintiff.

c. Plaintiff must prove that the defamatory statement is false.

The third element that the plaintiff must prove is that the defamatory statement was false.⁷

The plaintiff contends the defamatory statement made by defendant concerning him/her is false. The defendant denies that the statement is false. It is up to you to determine if the statement is true or false.

⁷See *Pitts v. Newark Bd. of Educ.*, *supra*; *Rocci v. Ecole Secondaire*, *supra* (where the Supreme Court stated that defamation exists where the defendant otherwise acted with reckless disregard of truth); *also see* footnote 10 concerning the fifth element as to definition in defamation law of the term “actual malice.” *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986); *Sisler v. Gannett Co. Inc.*, 104 N.J. 256 (1986); *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420 (App. Div. 1958), *aff’d on reh’g*, 49 N.J. Super. 551 (App. Div. 1958); *LaRocca v. New York News, Inc.*, 156 N.J. Super. 59 (App. Div. 1978); *Scelfo v. Rutgers Univ.*, 116 N.J. Super. 403 (Law Div. 1977); *Dorney v. Dairymen’s League Co-op. Ass’n*, 149 F. Supp. 615 (D. N.J. 1957); *Restatement (Second) of Torts*, Section 581A (1977).

In determining whether the statement is true or false it is not necessary for you to find the statement to be true or false in every detail. It is enough if the statement is substantially true or substantially false, and the truth or falsity goes to the defamatory gist or sting of the statement.

In determining the truth or falsity of the statement, you are to consider the entire context in which the statement was made, and words or phrases must not be isolated or taken out of context.

d. Plaintiff must prove that the defamatory statement was communicated to a person or persons other than the plaintiff.

The fourth element the plaintiff must prove is that the defamatory statement was communicated, either orally or in writing, to a person or persons other than the plaintiff.⁸

It is not necessary that the defamatory statement be communicated to a large or even a substantial group of persons. It is enough that it is communicated to a single individual other than the plaintiff. However, if the defamatory statement is

⁸See *Gnapinsky v. Goldyn*, 23 N.J. 243, 252-53 (1957); *Restatement (Second) of Torts*, Section 577 (1977). Note that the communication of a defamatory statement to a third person may be qualifiedly privileged. See text and footnotes on Qualified Privilege under “Private Defamation” (Charge 3.11B), *infra*.

communicated only to a small group or a single person, it is necessary that at least one of the recipients understood the statement in its defamatory sense.⁹

- e. **Plaintiff must prove that defendant communicated the false statement to others with the actual knowledge that it was false or with a reckless disregard of whether it was true or false.**

The fifth element plaintiff must prove is that when the statement was communicated to others by the defendant, the defendant knew that the statement was false or acted in reckless disregard of whether it was true or false.¹⁰

This means that the defendant must have actually known that the defamatory statement regarding the plaintiff was false when he/she communicated it, or that the defendant communicated the defamatory statement with a high degree of awareness that it was probably false, or that the defendant truly had serious doubts as to the truth of the defamatory statement when he/she communicated it.

⁹See Comments b and c to *Restatement (Second) of Torts*, Sec. 577 (1977). See *Rocci v. Ecole Secondaire*, *supra*; *Pitts v. Newark Bd. of Educ.*, *supra*. (The courts have held that a plaintiff should not be able to recover for the harm flowing from republication of a defamatory statement when the plaintiff himself/herself knowingly causes the material to be distributed).

¹⁰The plaintiff must prove “actual malice” which exists when a defendant has actual knowledge that the statement he/she is making is false or when he/she entertains serious doubts as to its truth. See *Pitts v. Newark Bd. of Educ.*, *supra*; *Burke v. Deiner*, 97 N.J. 465 (1984); see *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Lawrence v. Bauer Pub. Co.*, 89 N.J. 451 (1982); *Marchiano v. Sandman*, 178 N.J. Super. 171 (App. Div. 1981); *Binkewitz v. Allstate Ins. Co.*, 222 N.J. Super. 501 (App. Div. 1988).

3. Burden of Proof

The plaintiff must prove each of the five elements I have just explained to you by clear and convincing evidence.

Clear and convincing evidence means that proofs should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established by the plaintiff. The evidence must be so clear, direct and weighty and convincing as to enable a jury to come to a clear conviction, without hesitancy, of the truth of precise facts in issue.¹¹ The clear and convincing standard of proof requires more than a mere balancing of doubts or probabilities. It requires clear evidence which causes you to be convinced that the allegations sought to be proved are true.

If the plaintiff has proven each and every one of the five elements as I have explained them to you by [clear and convincing] evidence, then plaintiff has met his/her burden of proof and is entitled to recover damages from the defendant. If, however, plaintiff has failed to prove by clear and convincing evidence any one of the elements as I have explained them to you, then you must return a verdict in favor of defendant.

¹¹*Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162 (App. Div. 1960); see *Matter of Jobes*, 108 N.J. 394, 407 (1987); *State v. Hodge*, 95 N.J. 369, 376 (1984).