

Agenda

Advisory Committee on Model Civil Jury Instructions

March 14, 2016
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, announcements, and approval of minutes	Tab 1	Juli Blanch - Chair
Subcommittees and subject area timelines	Tab 2	Juli Blanch
Defamation/Slander/Libel Instructions	Tab 3	Committee

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

April 11, 2016
May 16, 2016
June 13, 2016
September 12, 2016
October 11, 2016
November 14, 2016
December 12, 2016

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 22, 2016

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Patricia C. Kuendig, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Joel Ferre, Christopher M. Von Maack

1. *Minutes.* On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the minutes of the January 11, 2016 meeting.

2. *Schedule.* The committee will return to the punitive damage instructions once it finishes with the defamation instructions. It will then address the civil rights instructions.

3. *Defamation Instructions.* The committee continued its review of the defamation instructions. Mr. Reymann noted that the defamation subcommittee had not proposed instructions on injurious falsehood (slander of title and business disparagement). He noted that the two areas protect different interests. Defamation law protects a person's interest in his reputation, whereas injurious falsehood protects one's interest in the quality of a product. But he thought there was enough overlap between the two areas of law that it made sense to have the defamation subcommittee propose instructions for injurious falsehood as well. He asked, however, to be given additional time to address the latter set of instructions.

a. *CV1608. Conditional Privilege.* The committee had previously approved the substance of the instruction. At Mr. Simmons's suggestion, the last sentence of the second paragraph was revised to read: "[Name of defendant] can abuse the privilege by [common law malice,] [actual malice,] [and/or] [excessive publication]." The three types of abuse were also bracketed in the last paragraph. Mr. Reymann had revised the committee note. At Mr. Simmons's suggestion, the examples of conditional privileges in the third paragraph of the committee note were broken out into separate bullet points.

Dr. Di Paolo joined the meeting.

On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the instruction as modified.

b. *CV1612. Group defamation rule.* Mr. Reymann explained that the group defamation rule is related to the "of and concerning" requirement, but fit better here. If the rule is satisfied, all group members have a defamation claim.

Ms. Blanch suggested breaking out the numbered requirements. Dr. Di Paolo suggested setting off “or” between elements (1) and (2) in a separate paragraph, but the committee noted that they had not done that in other instructions. Ms. Kuendig suggested combining the second and third sentences: “[Name of plaintiff] can maintain a defamation claim based on a statement that refers only to a group or class of people if and only if . . . ,” but her suggestion wasn’t adopted. The committee revised the last sentence to read, “The fact that a referenced group is large does not by itself preclude [name of plaintiff] from satisfying this requirement.” On motion of Mr. Fowler, seconded by Mr. Johnson and Dr. Di Paolo, the committee approved the instruction as revised.

c. *CV1613. Damages–In General.* Messrs. Johnson and Summerill questioned whether an introductory instruction setting out the types of damages recoverable was necessary. All types wouldn’t necessarily apply in a given case. Mr. Reymann noted that there may be different damages for each statement and thought it would be more confusing not to have an introductory damage instruction. He added that if the committee decided to do away with the instruction, it should still include a committee note on damages. He noted that there is a split of authority on whether Supreme Court decisions prohibit presumed damages in all cases, and there is no Utah Supreme Court decision on point. There is a Utah Court of Appeals decision that suggests that presumed damages are recoverable, but if there is no actual injury, they are limited to nominal damages. Mr. Reymann thought that presumed damages are not a separate category of damages, that a plaintiff may recover special damages, general damages, and/or nominal damages. Mr. Simmons thought that there should be a causation instruction. Several committee members noted that the committee had done away with the term “proximate” or “proximately” in the causation instructions. The committee changed the title of the instruction to “Causation” and revised the first paragraph of the instruction to read:

In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the allegedly defamatory statement[s] caused damage to [name of plaintiff].

Judge Harris joined the meeting.

The committee also deleted the third paragraph of CV1613 and incorporated the committee note to CV1613 into the committee note to the next instruction. On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the instruction as revised.

Judge Stone joined the meeting.

d. *CV1614. Damages–Defamation Per Se.* Mr. Reymann explained that there are two issues with defamation per se—(1) whether it applies to written defamation (libel), and (2) whether presumed damages are allowable at all. Dr. Di Paolo thought the instruction had too many negatives to be easily understood. Mr. Reymann explained that the concept is that if the plaintiff seeks more than nominal damages, he or she must prove actual damage. He said that defamation per se is just a damage concept. It is an anachronism. It just means that the plaintiff must prove special damages if the statement is not considered defamatory per se. Mr. Reymann explained that a statement can be defamatory per se but not defamatory, for example, if it accuses someone of criminal conduct or having a loathsome disease but was said as a joke or insult, under circumstances where the hearer would not understand it to be a statement of fact. The committee asked what “loathsome disease” meant. Mr. Reymann explained that it generally means a venereal disease or leprosy. He further explained that it is for the court to decide whether a statement is defamatory per se, but it is for the jury to decide whether the statement was actually made. Dr. Di Paolo asked whether we needed another sentence telling the jury, “You must determine whether [name of defendant] said the statement.” Judge Stone asked whether an instruction on defamation per se was even necessary, since the jury doesn’t have to decide the issue. He suggested that the concept could be handled through the special verdict form. Judge Stone noted that he does not want to have to tell the jury what defamatory per se means and that he has determined that a particular statement is defamatory per se because he doesn’t want the jury second-guessing the court’s ruling. Dr. Di Paolo suggested deleting “I have determined that” in the third paragraph. Mr. Fowler suggested simply telling the jury, “The statement entitles [name of plaintiff] to at least nominal damages.” The committee changed the name of the instruction to “Presumed Damages.” The committee discussed whether the first two paragraphs were necessary. Dr. Di Paolo thought they were necessary for context, but the committee decided to delete them. The committee changed the first sentence of the third paragraph to read:

I have determined that the following statements are statements that the law presumes caused at least some type of damage to [name of plaintiff].

Mr. Summerill was excused.

The committee revised the committee note to say that the committee is using the term “presumed damages” to capture the concept of defamation per se. It also added the four categories of defamation per se to the note and incorporated the note from CV1613. The committee added a definition of “nominal damages,”

taken from CV1615, before the last sentence of the instruction: “Nominal damages mean an insignificant amount.” At Mr. Simmons’s suggestion the committee added “such as \$1,” since what may be insignificant to one person may not be to another person. On motion of Dr. Di Paolo, seconded by Mr. Johnson, the committee approved the instruction as revised.

e. *CV1615. Damages–Nominal Damages.* The committee deleted CV1615. With the changes to CV1614, the committee thought it was no longer necessary.

f. *CV1616. Damages–Special Damages.* Mr. Simmons noted that the general tort damage instructions use the terms “economic” and “non-economic” rather than “special” and “general” when referring to damages. The committee decided to follow the same convention. The committee also deleted the term “proximately,” consistent with prior instructions.

Judge Stone thought that the general causation instruction should be given as part of the defamation instructions. At Judge Harris’s suggestion, the committee revisited CV1613 and added a committee note saying that the instruction is not intended to capture the concept of proximate cause and should be given along with some version of CV209, the causation instruction from the negligence instructions. On motion of Judge Stone, seconded by Mr. Johnson, the committee approved this change to the committee note to CV1613.

Mr. Reymann noted that there is a tendency for double recovery in defamation cases because damages to reputation can have both economic and non-economic consequences. Judge Harris suggested adding examples of special or economic damages to the instruction. Mr. Reymann noted that medical expenses are treated differently in defamation cases from other tort cases. The committee revised the instruction to read:

Economic damages are awarded to compensate a plaintiff for actual and specific monetary losses that are caused by the publication of a defamatory statement. Economic damages are out-of-pocket losses and can include such things as loss of salary, employment, income, business, and other similar economic losses. [Name of plaintiff] must prove each item of economic damages with specific evidence.

On motion of Judge Stone, seconded by Mr. Johnson, the committee approved CV1616 as revised.

4. *Next meeting.* The next meeting will be Monday, March 14, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

<u>Priority</u>	<u>Subject</u>	<u>Sub-C in place?</u>	<u>Sub-C Members</u>	<u>Projected Starting Month</u>	<u>Projected Finalizing Month</u>	<u>Comments Back?</u>
1	Punitive Damages	Yes	Hoffman, Jeremy; Horvat, Steven; Humpherys, L. Rich; McGarry, Shawn; Schultz, Stuart; Slaugh, Leslie; Summerill, Peter	N/A	May-15	Yes: sub-c currently reviewing. Full committee review @ April 2016 mtg
2	Defamation	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	September-15	March-16	
3	Civil Rights	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	May-16	June-16	
4	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	September-16	November-16	
5	Injurious Falsehood	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	December-16	February-17	
4	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica; Gurmankin, Jay (chair)	March-17	May-17	
5	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	June-17	September-17	
6	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	October-17	November-17	
7	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	December-17	January-18	
8	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	February-18	May-18	
10	Insurance	No (more members needed)	Johnson, Gary (chair); Pritchett, Bruce	June-18	October-18	
11	Wills/Probate	No	Barneck, Matthew (chair)	November-18	January-18	

Tab 3



Nancy Sylvester <nancyjs@utcourts.gov>

Next MUJI Meeting

David C. Reymann <dreymann@parrbrown.com>

Sun, Mar 6, 2016 at 12:52 PM

To: Nancy Sylvester <nancyjs@utcourts.gov>, Juli Blanch <JBlanch@parsonsbehle.com>

Nancy and Juli,

Attached is a redline with edits to the last six instructions on defamation. Because I won't be there next Monday, I've explained the changes below. I'm generally around this week if anyone has questions and wants to talk in advance.

CV1616 (Noneconomic Damages). I've modified this instruction to use "noneconomic" damages instead of "general" to be consistent with what we did in earlier instructions, and also to substitute "presumed damages" for "defamation per se". I've also structured the requirements for noneconomic damages to be more consistent with the broken out style of elements in earlier instructions. In the notes, I've added an explanatory paragraph about the need to prove special damages in non-per se cases. This is one of the less intuitive rules in defamation law, but it is clearly the law: even if a plaintiff's reputation is destroyed by a statement, he cannot recover anything if the statement is not defamatory per se unless he also pleads and proves special damages. As the notes say at the end, the instruction can be modified if the court finds the statements at issue are not defamatory per se to simply require proof of special damages.

CV1617 (Punitive Damages). I've rewritten this instruction entirely to track the language of the general instruction you've already approved for punitive damages (CV2026). A specific instruction is needed here for defamation cases involving public officials, public figures, and speech relating to matters of public concern because of the constitutional requirement under *Gertz* of also proving actual malice. As the notes indicate, it is an open question whether actual malice is also required in private figure, private speech cases. I've stricken entirely the subsequent instruction on punitive damages in such cases because it's duplicative of 2026, and if the court decides the open question to require actual malice, you can use 1617.

CV1618 (Retraction). Nothing really complicated here; it's largely driven by the statute. But please tell Professor Di Paolo that I replaced the word "misapprehension" because I knew she would hate it.

CV1619 (Affirmative Defense – Consent). You don't necessarily need this instruction, or the following one, if you decide not to have instructions on affirmative defenses. As a committee, we decided to include these two because they're specific to defamation (and we already have an instruction on conditional privilege, which is also an affirmative defense). This consent instruction comes directly from *Cox*.

CV1620 (Affirmative Defense – Statute of Limitations). This defense is included to capture the specific concept of discoverability upon publication in a widely available medium.

I hope this explanation helps. Please feel free to contact me ahead of time if there are any advance questions. In addition, there is a good chance I could call in for the first 30 minutes of your meeting if that would help (I'll be on the road to Wyoming). Let me know.

I expect you'll be able to get through all of these during the meeting. I've greatly enjoyed working with you all on this and am sorry to miss the last one.

Best,

David

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From: Nancy Sylvester [mailto:nancyjs@utcourts.gov]

Sent: Friday, March 04, 2016 5:24 PM

To: Juli Blanch <JBlanch@parsonsbehle.com>

Cc: David C. Reymann <dreymann@parrbrown.com>

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MUJI Defamation Instructions - Redline for 3.14.16 Meeting - 1.docx

62K

1 **Defamation Instructions**

2 CV1601 Defamation—Introductory Notes to Practitioners (not to be read to the jury). Approved

3 9/14/15. 2

4 CV1602 Elements of a Defamation Claim. Approved 10/19/15. 3

5 CV1603 Definition: Publication. Approved 9/14/15. 4

6 CV1604A Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to

7 Plaintiff is Reasonable. Approved 10/19/15. 5

8 CV1604B Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern –

9 Connection to Plaintiff is Reasonable. Approved 10/19/15. 7

10 CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern –

11 Connection to Plaintiff is Reasonable – Negligence. Approved 10/19/15. 8

12 CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern –

13 Connection to Plaintiff is Reasonable – Strict Liability. Approved 10/19/15. 9

14 CV1604E Definition: About the Plaintiff – Connection to Plaintiff is Unreasonable. Approved

15 10/19/15. 10

16 CV1605 Definition: False Statement. Approved 11/9/15. 10

17 CV1606 Definition: Opinion. Approved 1/11/16. 12

18 CV1607 Definition: Defamatory. Approved 1/11/16. 13

19 CV1608 Conditional Privilege. Approved 2/22/16. 14

20 CV1609 Non-actionable Statements. Approved 1/11/16. 17

21 CV1610 Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern.

22 Approved 1/11/16. 18

23 CV1611 Definition: Requisite Degree of Fault – Public Official or Public Figure. Approved 1/11/16.

24 18

25 CV1612 Group Defamation Rule. Approved 2/22/16. 19

26 CV1613 Causation. Approved 2/22/16. 20

27 CV1614 Presumed Damages. Approved 2/22/16. 20

28 CV1615 Damages – Economic Damages. Approved 2/22/16. 22

29 **CV1616 Damages – General Damages.** 23

30 CV1617 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern. 24

31 CV1618 Damages – Punitive Damages – Private Figure and No Issue of Public Concern. 26

32 CV1619 Damages – Effect of Retraction. 27

33 CV1620 Affirmative Defense – Consent. 28

34 CV1621 Affirmative Defense – Statute of Limitations. 28

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Defamation

40 **CV1601 Defamation—Introductory Notes to Practitioners (not to be read to the jury).**
41 **Approved 9/14/15.**

42
43 The law of defamation is unique. Although defamation is a common law tort, it is bounded by
44 protections for free speech embodied in the First Amendment to the United States Constitution
45 and Article I, sections 1 and 15 of the Utah Constitution. These instructions are based on the law
46 of defamation as interpreted by the Utah courts and, in certain areas, by governing precedent of
47 the United States Supreme Court.

48
49 In some areas of the law, open questions remain. One of those areas is the standard of fault in
50 cases involving a private plaintiff and speech that does not relate to a matter of public concern.
51 The United States Supreme Court has held that the First Amendment requires the standard of
52 fault to be actual malice for claims involving public officials, *see New York Times Co. v.*
53 *Sullivan*, 376 U.S. 254 (1964), and public figures, *see Curtis Publ'g Co. v. Butts*, 389 U.S. 889
54 (1967). It has also held that the standard of fault in cases involving speech relating to a matter of
55 public concern must be at least negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323
56 (1974). But a majority of the Court has never resolved whether the same constitutional
57 limitations require a standard of fault above strict liability for private plaintiff, non-public
58 concern cases. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell,
59 J.) (in plurality opinion, declining to extend actual malice rule). The Utah Supreme Court has
60 likewise not resolved this issue. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221
61 P.3d 205. As a result, the committee has not included an instruction on the standard of fault for
62 knowledge of falsity in such cases, leaving to the parties the task of arguing for a resolution of
63 that question.

64
65 This is not to suggest there is no constitutional protection in private figure, non-public concern
66 cases. The Utah Supreme Court has, in other contexts, stated that defamation claims always
67 implicate the First Amendment. *See Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325
68 (“Defamation claims always reside in the shadow of the First Amendment.”); *O’Connor v.*
69 *Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214 (“Defamation requires a departure from the
70 standard treatment, however, primarily because it never arrives at court without its companion
71 and antagonist, the First Amendment, in tow.”). And though it declined to extend the actual
72 malice fault standard to private figure, non-public concern cases, the plurality in *Greenmoss*
73 *Builders* likewise recognized that such “speech is not totally unprotected by the First
74 Amendment.” 472 U.S. at 760. The Utah Supreme Court has also recognized that “[t]he First
75 Amendment creates a broad, uniform ‘floor’ or minimum level of protection that state law must
76 respect,” *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994), but that Article I,
77 section 15 of the Utah Constitution “is somewhat broader than the federal clause.” *Provo City*
78 *Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989); *cf. West*, 872 P.2d at 1004 n.4 (“The scope
79 of the state constitutional protection for expression may be broader or narrower than the federal,
80 depending on the state constitution’s language, history, and interpretation. In any event, state
81 tort law may not impair state constitutional guarantees and is properly confined to

Comment [A1]: Add reference to 1604 alternatives and the fact that one or more could be used.

82 constitutionally permissible limits.”). It is thus possible that the standard of fault question in
83 private figure, non-public concern cases would implicate the Utah Constitution even if strict
84 liability is not precluded by the First Amendment.

85
86 Similarly, the United States Supreme Court has held that punitive and presumed damages may
87 not be awarded in cases involving speech relating to matters of public concern absent a showing
88 of actual malice. *Gertz*, 418 U.S. at 350. But other than addressing the issue in the plurality
89 decision in *Greenmoss Builders* and declining to extend the rule, the Court has not resolved
90 whether the same constitutional limitation applies in private figure, non-public concern cases.
91 The committee has nonetheless included an instruction for punitive damages in that context
92 stating the statutory requirements for punitive damages under Utah law, but notes that an
93 argument could be made for applying the heightened actual malice standard for punitive
94 damages in all defamation cases.

95
96 Finally, these instructions use the term “defamation” throughout, which refers to the claim
97 regardless of the medium of expression. Historically, defamation claims were separated into
98 “slander,” which referred to oral communications, and “libel,” which referred to written
99 publications. That distinction has become increasingly anachronistic given certain forms of
100 electronic communication (e.g., SMS (text messages), IM (instant messaging), MMS (multi-
101 media messaging services), and online video) that could arguably fall into either category, and it
102 also fails to account for other non-verbal forms of communication that can, in some
103 circumstances, form the basis of a defamation claim. In addition, the distinction between libel
104 and slander is conceivably relevant only to one narrow legal issue—the test for whether a
105 statement is defamatory *per se* for purposes of presumed damages. Because, as explained in the
106 Committee Notes for CV1617 (Damages – Defamation *Per Se*), it appears the Utah Supreme
107 Court has merged the historical tests for slander *per se* and libel *per se*, these instructions refer
108 simply to defamation and do not draw any distinction between the medium or form of
109 expression.

110
111

112 **CV1602 Elements of a Defamation Claim. Approved 10/19/15.**

113 [Name of plaintiff] claims that [name of defendant] defamed [him/her]. To succeed on this
114 claim, [name of plaintiff] must prove the following elements:

- 115
116 (1) [name of defendant] published statement(s) about [name of plaintiff];
117 (2) the statements were false;
118 (3) the statements were defamatory;
119 [(4) the statements were not privileged;]¹
120 (5) the statements were published with the required degree of fault; and
121 (6) the statements caused damages to [name of plaintiff].

122
123 Some of these words have special meanings and they will be explained in the following
124 instructions.

125

¹ The committee needs to ensure that the definition of privilege is adequately addressed.

126 **References**

127 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
128 *Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956
129 *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)

131 **MUJI 1st Instruction**

132 10.2, 10.3

134 **Committee Notes**

135 There has been some confusion in reported decisions regarding whether a defamation plaintiff
136 bears the burden of proving falsity or whether truth is an affirmative defense for which the
137 defendant bears the burden of proof. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767
138 (1985), the United States Supreme Court held that the First Amendment required a plaintiff to
139 prove falsity in cases involving speech published by a media defendant relating to a matter of
140 public concern. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“Allowing the media
141 to avoid liability only by proving the truth of all injurious statements does not accord adequate
142 protection to First Amendment liberties.”). And although there are Utah decisions referring to
143 truth as a “defense,” see, e.g., *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991) (“[T]ruth
144 is an absolute defense to an action for defamation.”), the Utah Supreme Court has consistently
145 listed falsity as an essential element of a defamation claim. See, e.g., *Jacob v. Bezzant*, 2009 UT
146 37, ¶ 21, 212 P.3d 535 (“A prima facie case for defamation must demonstrate that ... ‘the
147 statements were false....’”) (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 68, 194 P.3d 956);
148 *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) (“To state a claim for
149 defamation, [the plaintiff] must show that ... the statements were false....”). The committee
150 accordingly included falsity as an element of the claim and did not distinguish between
151 defendants or public concern and non-public concern cases.

152
153 The Utah legislature has defined “libel” and “slander” in Utah Code § 45-2-2 for purposes of the
154 statutory provisions in that chapter, which include several statutory privileges, retraction
155 requirements, and matters relating to broadcasts. The definitions in that section, however, are
156 inconsistent with the elements of a defamation claim consistently articulated by the Utah
157 Supreme Court, see, e.g., *Jacob v. Bezzant*, 2009 UT 37, ¶¶ 21, 212 P.3d 535; *West v. Thomson*
158 *Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994), and may suffer from constitutional infirmities
159 for failure to require falsity, see *I.M.L. v. State*, 2002 UT 110, ¶¶ 19, 23, 61 P.3d 1038; *Garrison*
160 *v. Louisiana*, 379 U.S. 64, 70-73 (1964). For this reason, the committee has used the elements
161 articulated in the caselaw rather than the statutory definitions in Utah Code § 45-2-2.

162
163 Element (4) is bracketed because it need not be given in a case where either no privilege has
164 been asserted or the court has determined that the privilege is inapplicable.

167 **CV1603 Definition: Publication. Approved 9/14/15.**

168 [Name of plaintiff] must prove [name of defendant] “published” the allegedly defamatory
169 statements. Publication means [name of defendant] communicated the statements to a person
170 other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person’s non-

171 verbal conduct or actions specifically communicate facts about the plaintiff. “Written”
172 statements include statements that are communicated electronically or digitally.

173

174 **References**

175 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535

176 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325

177

178 **MUJI 1st Instruction**

179 No analogue

180

181 **Committee Notes**

182 None

183

184

185 **CV1604A Definition: About the Plaintiff – Public Figure or Public Official Plaintiff –**
186 **Connection to Plaintiff is Reasonable. Approved 10/19/15.**

187 [Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

188

189 To do so, [name of plaintiff] must prove that one or more recipients of the statements actually
190 understood the statements to be referring to [him/her], and either:

- 191 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
192 2) [name of defendant] knew or was intentionally blind to the facts or circumstances that
193 would cause the recipient(s) to reasonably understand the statement(s) to refer to [name
194 of plaintiff].

195

196 **References**

197 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

198 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

199 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366

200 Restatement (Second) of Torts § 564 (1977)

201

202 **MUJI 1st Instruction**

203 10.6

204

205 **Committee Notes**

206 This instruction should be used where the plaintiff is a public figure or public official, and the
207 court has determined that it is reasonable to understand the statement(s) at issue to be referring to
208 the plaintiff.

209

210 Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the requirement that a defamatory
211 statement be about the plaintiff, often referred to as the “of and concerning” requirement, has
212 been one of constitutional magnitude. *See* Restatement (Second) of Torts § 564 cmt. f (1977).
213 *Sullivan* itself involved statements made generally about “police” in Alabama that did not name
214 Mr. Sullivan specifically. 376 U.S. at 258. The Court found the evidence supporting the “of and
215 concerning” requirement to be “constitutionally defective,” explaining that the presumption
216 employed by the Alabama Supreme Court struck “at the very center of the constitutionally

217 protected area of free expression.” *Id.* at 288, 292. This holding and the constitutional
218 defamation cases that followed, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974),
219 displaced the common law rule that imposed a form of strict liability on a defamer who did not
220 intend a statement to refer to a plaintiff, but the statement was nonetheless reasonably understood
221 to do so. See 1 Rodney A. Smolla, *Law of Defamation* § 4:42 (2d ed. 2013) (“[T]he consensus
222 appears to be that in cases governed by *Gertz*, fault is required not merely on the truth or falsity
223 issue, but for all aspects of the cause of action, including reference to the plaintiff.”); see also *id.*
224 § 4:40.50; 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9.1
225 (4th ed. 2013).

226
227 As a result of the constitutional overlay on the “of and concerning” requirement, the
228 requirements of this element will vary depending on whether the case involves a public
229 figure/public official plaintiff, a statement relating to a matter of public concern, or a private
230 plaintiff alleging speech unrelated to any matter of public concern. This is similar to the varying
231 level of fault on truth/falsity discussed in later instructions. In public official/public figure cases,
232 mere negligence is not sufficient; therefore, this instruction requires, in cases where the reference
233 was unintended by the defamer, knowledge of or intentional blindness to the facts or
234 circumstances that may lead a recipient to reasonably conclude the statement at issue refers to
235 the plaintiff. The term “intentional blindness” is used here as a counterpart to the “reckless
236 disregard” component of the actual malice standard in the truth/falsity context. Although there is
237 little authority interpreting the contours of the actual malice test in the “of and concerning”
238 context, the Committee determined that “reckless disregard” was imprecise in this context
239 because the facts and circumstances the defamer would be disregarding are facts and
240 circumstances of which he or she is purportedly *unaware*. Using “reckless disregard” in this
241 context therefore risks collapsing that subjective test into an objective negligence test, which
242 would be constitutionally problematic under *Sullivan*. “Intentional blindness” is a better fit for
243 *unknown* facts and captures situations where a defamer intentionally avoids acquiring
244 information that would reveal the reasonable connection between the statements at issue and the
245 plaintiff—conduct that would go beyond mere negligence.

246
247 The “of and concerning” test will also vary depending on whether it is reasonable to understand a
248 statement as referring to the plaintiff. Like the related threshold inquiry of defamatory meaning,
249 this determination is a question of law for the court, not the jury. See, e.g., *Gilman v. Spitzer*,
250 902 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2012) (“Whether a challenged statement reasonably can
251 be understood as of and concerning the plaintiff is a question of law for the Court, which ‘should
252 ordinarily be resolved at the pleading stage.’” (quoting *Church of Scientology Int’l v. Behar*, 238
253 F.3d 168, 173 (2d Cir. 2001))). In cases where the defamer intended the statement to refer to the
254 plaintiff, there is no requirement that the recipient’s actual understanding of that reference be
255 reasonable. The element is satisfied “if [the communication] is so understood by the recipient of
256 the communication, no matter how bizarre or extraordinary it is that the communication was in
257 fact so understood.” *Law of Defamation* § 4:41; see also Restatement (Second) of Torts § 564
258 cmt. a (“If it is in fact intended to refer to him, it is enough that it is so understood even though
259 he is so inaccurately described that it is extraordinary that the communication is correctly
260 understood.”). If there was no such intent, an unreasonable connection cannot sustain a
261 defamation claim. Restatement (Second) of Torts § 564 cmts. b and f. For this reason, there are
262 five possible scenarios, and thus five instructions, for the “of and concerning” element: if the

263 reference is reasonable, three varying levels of fault (with the open question of the standard of
264 fault for purely private cases divided into two possible instructions); and if the reference is
265 unreasonable, a requirement that the plaintiff show the reference was intended. Only one of
266 these instructions should ordinarily be used, unless a case involves multiple statements or
267 multiple plaintiffs that fall into different categories. In the unusual case where different standards
268 apply to different statements, the court will have to instruct as to which instructions on standards
269 accompany which statements.

270
271 The relevant inquiry for the “of and concerning” requirement is not whether any member of the
272 “public” would understand a statement as referring to the plaintiff, as the MUJI 1st instruction on
273 this element suggested. The issue is whether any of the *actual* recipients of the statement
274 understood the statement to refer to the plaintiff (and, if the reference was unintended, did so
275 reasonably). The actual recipients of a statement may have a basis for connecting a statement to
276 the plaintiff that is not widely known or shared with the general public. *See* Restatement
277 (Second) of Torts § 564 cmt. b (“It is not necessary that everyone recognize the other as the
278 person intended; it is enough that any recipient of the communication reasonably so understands
279 it. However, the fact that only one person believes that the plaintiff was referred to is an
280 important factor in determining the reasonableness of his belief.”).

281
282 When allegedly defamatory statements refer to a group rather than a specific individual, they are
283 subject to the group defamation rule, which is addressed in a separate instruction. *See* CV1618
284 (Group Defamation Rule).

285
286
287

288 **CV1604B Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern –**
289 **Connection to Plaintiff is Reasonable. Approved 10/19/15.**

290 [Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].
291 To do so, [name of plaintiff] must prove that one or more recipients of the statements actually
292 understood the statements to be referring to [him/her], and either:

- 293 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
294 2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances
295 that would cause the recipient(s) to reasonably understand the statement(s) as referring to
296 [name of plaintiff].

297

298 **References**

299 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
300 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
301 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
302 Restatement (Second) of Torts § 564 (1977)

303

304 **MUJI 1st Instruction**

305 10.6

306

307 **Committee Notes**

308 This instruction should be used where the plaintiff is not a public official or public figure, the
309 statement(s) relate to a matter of public concern, and the court has determined that it is
310 reasonable to understand the statement(s) at issue to be referring to the plaintiff.

311
312 Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the minimum level of fault required to
313 impose liability for statements relating to a matter of public concern is negligence. *See also*
314 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶¶ 22-23, 221 P.3d 205. “It is therefore
315 necessary for the plaintiff to prove that a reasonable understanding on the part of the recipient
316 that the communication referred to the plaintiff was one that the defamer was negligent in failing
317 to anticipate. This is particularly important when the recipient knew of extrinsic facts that make
318 the communication defamatory of the plaintiff but these facts were not known to the defamer.”
319 Restatement (Second) of Torts § 564 cmt. f (1977).

320
321 For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes
322 for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff –
323 Connection to Plaintiff is Reasonable).

324
325

326 **CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern**
327 **– Connection to Plaintiff is Reasonable – Negligence. Approved 10/19/15.**

328 [Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

329

330 To do so, [name of plaintiff] must prove that one or more recipients of the statements actually
331 understood the statements to be referring to [him/her], and either:

- 332 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
333 2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances
334 that would cause the recipient(s) to reasonably understand the statement(s) as referring to
335 [name of plaintiff].

336

337 **References**

338 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
339 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
340 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
341 Restatement (Second) of Torts § 564 (1977)

342

343 **MUJI 1st Instruction**

344 10.6

345

346 **Committee Notes**

347 This instruction should be used where the plaintiff is not a public official or public figure, the
348 statement(s) do not relate to a matter of public concern, the court has determined that it is
349 reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court
350 has determined that the plaintiff must show at least negligence to hold the defendant liable.

351

352 As discussed in CV1601, whether strict liability may be constitutionally imposed in cases
353 involving a private plaintiff and speech that does not relate to a matter of public concern has not

354 been resolved by either the United States Supreme Court or the Utah Supreme Court. *See*
355 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines
356 negligence is required, this instruction should be used. If the court determines strict liability is
357 the standard of fault, the subsequent instruction (CV1607 Definition: About the Plaintiff –
358 Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict
359 Liability Allowed) should be used. Until this open question is resolved by binding appellate
360 authority, parties will need to argue this particular issue in their individual cases.
361

362 For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes
363 for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff –
364 Connection to Plaintiff is Reasonable).
365

366
367 **CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern**
368 **– Connection to Plaintiff is Reasonable – Strict Liability. Approved 10/19/15.**

369 [Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].
370 To do so, [name of plaintiff] must prove that one or more of the recipients of the statement(s)
371 actually understood the statements(s) to be referring to [name of plaintiff].
372

373 **References**

374 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
375 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
376 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
377 Restatement (Second) of Torts § 564 (1977)
378

379 **MUJI 1st Instruction**

380 10.6
381

382 **Committee Notes**

383 This instruction should be used where the plaintiff is not a public official or public figure, the
384 statement(s) do not relate to a matter of public concern, the court has determined that it is
385 reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court
386 has determined that the relevant standard of fault is strict liability.
387

388 As discussed in CV1601, whether strict liability may be constitutionally imposed in cases
389 involving a private plaintiff and speech that does not relate to a matter of public concern has not
390 been resolved by either the United States Supreme Court or the Utah Supreme Court. *See*
391 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines
392 strict liability is the standard of fault, this instruction should be used. If the court determines
393 negligence is required, the previous instruction (CV1606 Definition: About the Plaintiff – Private
394 Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence
395 Required) should be used. Until this open question is resolved by binding appellate authority,
396 parties will need to argue this particular issue in their individual cases.
397

398 For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes
399 for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff –
400 Connection to Plaintiff is Reasonable).

401
402

403 **CV1604E Definition: About the Plaintiff – Connection to Plaintiff is Unreasonable.**
404 **Approved 10/19/15.**

405 [Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].
406 To do so, [name of plaintiff] must prove that
407 (1)[name of defendant] intended the defamatory statement(s) to refer to [name of plaintiff], and
408 (2) one or more of the recipients of the statement(s) actually understood the statements(s) to be
409 referring to [name of plaintiff].

410

411 **References**

412 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
413 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
414 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
415 Restatement (Second) of Torts § 564 (1977)

416

417 **MUJI 1st Instruction**

418 10.6

419

420 **Committee Notes**

421 This instruction should be used where the court has determined that it is not reasonable to
422 understand the statement(s) at issue to be referring to the plaintiff, regardless of whether the
423 plaintiff is a public figure or public official, or whether the statement(s) relate to a matter of
424 public concern.

425

426 Because the varying standard of fault only arises when the reference to the plaintiff is
427 unintended, and because reasonableness is an essential element of liability for an unintended
428 reference, the varying standard of fault is not relevant where the court has determined the
429 statements cannot reasonably be understood as referring to the plaintiff. This instruction
430 therefore applies where the connection is unreasonable regardless of the status of the plaintiff or
431 the subject matter of the speech.

432

433 For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes
434 for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff –
435 Connection to Plaintiff is Reasonable).

436

437

438 **CV1605 Definition: False Statement. Approved 11/9/15.**

439 | The allegedly defamatory statement must state or imply facts which can be proven to be false,
440 and [name of plaintiff] must show the statement to be false.

441

442 “False” means that the statement is either directly untrue or that it implies a fact that is untrue. In
443 addition, a defamatory statement must be materially false. A statement is “materially false” if it
444 is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

445
446 A true statement cannot be the basis of a defamation claim, no matter how annoying,
447 embarrassing, damaging, or insulting it may be. “Truth” does not require that the statement be
448 absolutely, totally, or literally true. The statement need only be substantially true, which means
449 the gist of the statement is true.

450
451 You should determine the truth or falsity of the statement according to the facts as they existed at
452 the time [name of defendant] published the statement.

453

454 **References**

455 *Air Wis. Airlines Corp. v. Hooper*, __ U.S. __, 134 S. Ct. 852 (2014)

456 *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)

457 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535

458 *Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956

459 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325

460 *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)

461 *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991)

462

463 *Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984)

464

465 **MUJI 1st Instruction**

466 10.4

467

468 **Committee Notes**

469 Although material falsity is usually a question of fact for the jury, where “the underlying facts as
470 to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a
471 matter of law.” *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations
472 omitted). See also *Air Wis. Airlines Corp. v. Hooper*, __ U.S. __, 134 S. Ct. 852, 868 (2014)
473 (“[U]nder the First Amendment, a court’s role is to determine whether ‘[a] reasonable jury could
474 find a material difference between’ the defendant’s statement and the truth.”) (Scalia, J.,
475 concurring and dissenting) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522
476 (1991)) (second alteration in original).

477

478 In addition to explaining that “[m]inor inaccuracies” do not make a statement materially false,
479 *Masson*, 501 U.S. at 517, the United States Supreme Court has further explained the concept of
480 whether an inaccuracy is “material” as follows: “[A] materially false statement is one that
481 “‘would have a different effect on the mind of the reader [or listener] from that which the ...
482 truth would have produced.’” *Air Wis.*, 134 S. Ct. at 863 (quoting *Masson*, 501 U.S. at 517)
483 (further citation omitted) (second alteration and ellipses in original).

484

485 There is a potentially open question regarding the standard of proof for falsity in some types of
486 defamation cases. In *Hart-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 661 n.2
487 (1989), the United States Supreme Court took note of a split of authority as to whether, in a

488 | public figure or public official plaintiff case (where actual malice must be proven~~ed~~ by clear and
489 | convincing evidence), material falsity must also be proven~~ed~~ by clear and convincing evidence.
490 | At that time, the Court “express[ed] no view on this issue.” *Id.* Since that time, however, the
491 | Supreme Court has twice emphasized that the issues of material falsity and actual malice are
492 | inextricably related, such that the definition of the latter requires a finding of the former. See
493 | *Masson*, 501 U.S. at 512; *Air Wis.*, 134 S. Ct. at 861 (“[W]e have long held ... that actual malice
494 | entails falsity.”). As a result, many courts have concluded that in public figure and public
495 | official cases, material falsity must also be proven~~ed~~ by clear and convincing evidence. See, e.g.,
496 | *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014) (“If
497 | the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff
498 | has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by
499 | ‘clear and convincing proof.’” (citation omitted) (applying Colorado law)); *DiBella v. Hopkins*,
500 | 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only “a minority of
501 | jurisdictions require a public figure to prove falsity only by a preponderance of the evidence”);
502 | Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 3:4 (4th ed. 2013)
503 | (collecting cases).

504 |
505 | If a case involves a public figure or public official plaintiff, and the court determines that the
506 | higher standard of proof applies to material falsity, the first paragraph of the instruction should
507 | be amended to state: “The allegedly defamatory statement must state or imply facts which can be
508 | proven to be false, and [name of plaintiff] must show the statement to be false by clear and
509 | convincing evidence.”

510 |

511 | **CV1606 Definition: Opinion. Approved 1/11/16.**

512 | A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is
513 | protected by the Utah Constitution and cannot support a defamation claim. A statement of
514 | opinion can be the basis of a defamation claim only when it implies facts which can be proven~~ed~~
515 | to be false, and [name of plaintiff] shows the statement is false and defamatory. ~~The court has~~
516 | have determined that the following statement(s) are statements of opinion: [insert specific
517 | statement(s).]

518 |

519 | **References**

520 | *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
521 | *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)
522 | Utah Const. art. 1, §§ 1, 15
523 | Restatement (Second) of Torts § 566 cmt. c (1977)

524 |

525 | **MUJI 1st Instruction**

526 | No analogue

527 |

528 | **Committee Notes**

529 | The question of whether a statement is one of fact or opinion is a question of law for the court,
530 | not the jury. *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994); Restatement
531 | (Second) of Torts § 566 cmt. c (1977). Likewise, the questions of whether a statement of
532 | opinion reasonably implies verifiable facts, and whether those facts are capable of sustaining
533 | defamatory meaning, are also questions for the court. *Id.* at 1019. Only if the court determines

534 that a statement of opinion can reasonably imply facts capable of sustaining defamatory meaning
535 is there a question for the jury as to whether the statement did, in fact, convey that defamatory
536 meaning. *Id.* This instruction should be used in the event the court determines as a matter of law
537 that one or more statements are opinion, but the statement(s) may nonetheless be actionable
538 because they reasonably imply verifiable facts capable of sustaining defamatory meaning. The
539 question for the jury is whether those facts were, in fact, implied, and whether the defamatory
540 meaning was, in fact, conveyed.

541
542 The test for whether a statement is “defamatory” is explained in instruction 1607, entitled
543 “Defamatory.”
544

545

546 **CV1607 Definition: Defamatory. Approved 1/11/16.**

547 To support a defamation claim, [name of plaintiff] must prove the statement at issue is
548 defamatory. A statement may be false but not necessarily defamatory.

549
550 A statement is defamatory if it calls into question a person’s honesty, integrity, virtue, or
551 reputation and thereby exposes that person to public hatred, contempt, or ridicule in the eyes of
552 the person to whom it is published or, if published to more than one person, to at least a
553 substantial and respectable minority of its audience. A statement is not necessarily defamatory if
554 it reports only that a person did things that you would not have done, or things of which you or
555 other people might disapprove. A publication that is merely unpleasant, embarrassing, or
556 uncomplimentary is not necessarily defamatory.

557

558 | ~~The court~~ I already determined that the following statement(s) is/are capable of conveying a
559 meaning that is defamatory: [insert statements].

560

561 Some statements may convey more than one meaning. For example, a statement may have one
562 meaning that is defamatory and another meaning that is not. To support a defamation claim,
563 [name of plaintiff] must prove, for each of these statements, that one or more of the recipients of
564 the statement actually understood it in its defamatory sense—the sense that would expose [name
565 of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a
566 particular statement in its defamatory sense, then that statement cannot support a defamation
567 claim.

568

569 You must determine whether the recipient actually understood the statement(s) in [its/their]
570 defamatory sense.

571

572 **References**

573 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
574 *O’Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
575 *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)
576 *Allred v. Cook*, 590 P.2d 318 (Utah 1979)
577 *Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998)
578 *Hogan v. Winder*, 762 F.3d 1096 (10th Cir. 2014)
579 Restatement (Second) of Torts §§ 559, 614 (1977)

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MUJI 1st Instruction
10.5

Committee Notes

The jury has a very limited role in the determination of whether a plaintiff has satisfied the “defamatory” element of a defamation claim, often referred to as “defamatory meaning.” It is the court’s role to decide, as a matter of law, whether a statement is capable of bearing a particular meaning and, if so, if that meaning is defamatory. See *Jacob v. Bezzant*, 2009 UT 37, ¶ 26, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994); Restatement (Second) of Torts § 614 (1977). “If the court decides against the plaintiff upon either of these questions, there is no further question for the jury to determine and the case is ended.” Restatement (Second) of Torts § 614 cmt. b (1977). Thus, even though this instruction includes a description of what it means to be defamatory—i.e., that a statement exposes the plaintiff to public hatred, contempt, or ridicule—the determination of whether a statement satisfies that standard is for the court. The description is included in the instruction so the jury can differentiate between a defamatory meaning and a non-defamatory one if a statement is capable of more than one meaning.

The only role for the jury, assuming the court decides for the plaintiff on both threshold questions, is “whether a communication, capable of a defamatory meaning, was so understood by its recipient.” Restatement (Second) of Torts § 614 (1977). This issue would generally arise only “[i]f the court determines that the statement is capable of two or more meanings, of which at least one is capable of a defamatory meaning[.]” 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:4.16 (4th ed. 2013). In that circumstance, it is for the jury to decide which meaning was in fact understood by the recipients of the communication.” *Id.*; see also Restatement (Second) of Torts § 614 cmt. b (1977) (jury must decide “whether the communication was in fact understood by its recipient in the defamatory sense”).

CV1608 Conditional Privilege. Approved 2/22/16.

An otherwise defamatory statement cannot support a defamation claim if the statement is privileged. I have already determined that the statements [insert privileged statements] are covered by the [insert] privilege recognized under Utah law. The purpose of the [insert] privilege is [insert]. This privilege protects allegedly defamatory statements [insert applicable description].

Because the [insert] privilege applies to [name of defendant]’s statements, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] abused the privilege. The defendant can abuse a conditional privilege by [common law malice,] [actual malice,] [and/or excessive publication].

623 [To prove abuse by common law malice, [name of plaintiff] must prove that in making the
624 allegedly defamatory statements, [name of defendant] was motivated primarily by ill will and
625 spite towards [name of plaintiff], rather than some other reason.]
626

627 [To prove abuse by actual malice, [name of plaintiff] must prove that at the time [name of
628 defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge
629 the statements were false or actually entertained serious doubts as to whether the statements were
630 true. The question is not whether a reasonable person would have known that the statements
631 were false or entertained serious doubts about their truth, but whether [name of defendant]
632 actually had such knowledge or doubts at the time of publication.]
633

634 [To prove abuse by excessive publication, [name of plaintiff] must prove that [name of
635 defendant] published the statements to more persons than needed to serve the purpose of the
636 privilege described above.]
637

638 If you find that [name of plaintiff] has failed to prove [common law malice,] [actual malice,] [or
639 excessive publication,] then [name of plaintiff] cannot base [his/her/its] defamation claim on
640 [insert privileged statement].
641

642 **References**

643 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
644 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
645 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
646 *O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
647 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
648 *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, 116 P.3d 271
649 *Krouse v. Bower*, 2001 UT 28, 20 P.3d 895
650 *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992)
651 *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991)
652 *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)
653 *Combes v. Montgomery Ward & Co.*, 228 P.2d 272 (Utah 1951)
654

655 **MUJI 1st Instruction**

656 No analogue
657

658 **Committee Notes**

659 A party claiming that a statement is subject to a privilege bears the burden of proving the
660 existence and application of the privilege, which determination is a question of law for the court.
661

662 Because applicability of a privilege is a matter of law for the court, *Russell v. Thomson*
663 *Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992), this instruction assumes, and should be used
664 only if, the court has already made that determination and will instruct the jury as to its effect.
665 The instruction should be adapted to describe whatever particular privilege is at issue. Likewise
666 the instruction should be adapted to reflect the particular types of abuse the plaintiff is alleging,
667 if he/she/it is not alleging all three.
668

669 Examples of conditional privileges recognized under Utah law include, but are not limited to:
670 • the public interest privilege, *see Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, Utah Code
671 § 45-2-3(5);
672 • publisher’s interest privilege, *see Brehany v. Nordstrom*, 812 P.2d 49 (Utah 1991);
673 • police report privilege, *Murphree v. U.S. Bank of Utah, N.A.*, 293 F.3d 1220, 1223 (10th
674 Cir. 2002);
675 • common interest privilege, *see Lind v. Lynch*, 665 P.2d 1276 (Utah 1983), Utah Code §
676 45-2-3(3);
677 • family relationships privilege, *see O’Connor v. Burningham*, 2007 UT 58, 165 P.3d
678 1214;
679 • fair report privilege, *see Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992),
680 Utah Code § 45-2-3(4) and (5); and
681 • neutral reportage privilege, *see Schwarz v. Salt Lake Tribune*, No. 20030981, 2005 WL
682 1037843 (Utah Ct. App. May 5, 2005) (unpublished).
683

684 The court’s determination of whether a privilege applies to a particular statement is based on the
685 circumstances surrounding its publication, such as what was said, to whom, and in what context.
686 In most cases, the relevant aspects of those circumstances are not in dispute, allowing the court
687 to make the applicability determination without the aid of the jury. Importantly, dispute as to the
688 circumstances of publication is not the same as dispute as to the applicability of the privilege.
689 For instance, the parties may dispute whether a particular statement has sufficient connection to a
690 legal proceeding to be covered by the judicial proceedings privilege, or whether a speaker had a
691 legitimate interest to protect for purposes of the publisher’s interest privilege, or whether a
692 statement implicates a sufficiently important interest for purposes of the public interest privilege,
693 or whether two parties share a sufficient interest for purposes of the common interest privilege,
694 or whether a statement was a fair and true report of public proceedings for purposes of the fair
695 report privilege. But all of those issues are not factual questions for the jury; they are
696 applicability determinations for the court.
697

698 In the event the circumstances of publication are in legitimate dispute in a way that matters to
699 applicability of the privilege, however, such as where the parties dispute what was said in a way
700 that matters to the privilege, or dispute the identity of the speaker (i.e., whether he or she was a
701 litigant for purposes of the judicial proceedings privilege), those disputes may need to be
702 resolved by the jury before the court can determine whether the privilege applies. See, e.g., 1
703 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 9:5 (4th ed. 2013).
704 In such circumstances, a different instruction may need to be given, tailored to that situation, in
705 which the jury is asked to make that specific factual determination. Because those instances are
706 not common, the Committee opted not to include a standard instruction for such circumstances.
707

708 With regard to the test for actual malice, the requirement of subjective knowledge is based on the
709 discussion in *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 30, 221 P.3d 205, which held
710 that “[t]o prove knowledge of falsity, a plaintiff must present evidence that shows the defendant
711 knows the defamatory statement is untrue. Likewise, acting with reckless disregard as to falsity
712 involves a showing of subjective intent or state of mind.” Nonetheless, *Ferguson* did recognize
713 certain rare circumstances in which the reckless disregard test could have an objective element:
714 “But while reckless disregard is substantially subjective, certain facts may show, regardless of

715 the publisher's bald assertions of belief, that 'the publisher's allegations are so inherently
716 improbable that only a reckless man would have put them in circulation' or that 'there are
717 obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' Therefore,
718 reckless disregard as to the falsity of a statement that a defendant honestly believed to be true is
719 determined by a subjective inquiry as to the defendant's belief and an objective inquiry as to the
720 inherent improbability of or obvious doubt created by the facts." *Id.* (quoting *St. Amant v.*
721 *Thompson*, 390 U.S. 727, 732 (1968)). Because not all defamation claims involve allegations of
722 inherent improbability, the committee opted not to include the objective test in the standard
723 instruction, leaving to parties to adapt that portion depending on the facts of their cases.
724

725 In addition to conditional privileges, Utah law also recognizes certain absolute privileges that
726 cannot be overcome by a showing of abuse. Examples of absolute privileges include, but are not
727 limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979,
728 and legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. Because,
729 like a conditional privilege, application of an absolute privilege is a question of law for the court,
730 and because there is no subsequent issue for the jury regarding abuse of an absolute privilege, the
731 committee has not included an instruction regarding absolute privileges. In the event that the
732 court decides certain statements are absolutely privileged, but those statements have come into
733 evidence for some other purpose, they should be listed as part of the curative instruction set forth
734 in CV1609 (Non-actionable Statements).
735

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737 **CV1609 Non-actionable Statements. Approved 1/11/16.**

738 During trial, you may have heard evidence about certain statements made by [name of
739 defendant] that may be considered insulting or damaging to [name of plaintiff]. Just because you
740 heard evidence of those statements does not necessarily mean that those statements can legally
741 be the basis of a defamation claim. I may have admitted evidence of those statements for some
742 purpose other than proof of defamation. I have determined that certain statements cannot be the
743 basis of a defamation claim. Even though you heard evidence of them, you are instructed that
744 the following statements cannot be the basis of [name of plaintiff]'s defamation claim: [insert
745 specific non-actionable statements].
746

747 **References**

748 *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
749 *O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
750

751 **MUJI 1st Instruction**

752 No analogue
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754 **Committee Notes**

755 This instruction recognizes that even where the court makes a determination that certain
756 statements are non-actionable defamation as a matter of law, those statements may still be
757 presented to jury for some other purpose or may have been presented prior to the court's legal
758 determination. For that reason, and to effectuate the court's gatekeeping function in defamation
759 cases, this instruction is designed to cure any prejudicial implication that non-actionable but
760 otherwise admitted statements can support a defamation claim.

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763 **CV1610 Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern.**
764 **Approved 1/11/16.**

765 I have already determined that [name of plaintiff] is a private figure and that the subject matter of
766 the allegedly defamatory statements pertains to a matter of public concern. As a result, [name of
767 plaintiff] cannot recover on [his/her/its] defamation claim unless you find [he/she/it] has proved
768 by a preponderance of the evidence that [name of defendant] made the allegedly defamatory
769 statements with negligence. To prove negligence, [name of plaintiff] must prove that at the time
770 [name of defendant] made the allegedly defamatory statements, [name of defendant] did not take
771 reasonable care to avoid the publication of statements that are substantially false. Reasonable
772 care is the degree of care and caution or attention that a reasonable person would use under
773 similar circumstances.

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775 **References**

776 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
777 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
778 *Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956
779 *Wayment v. Clear Channel Broad. Inc.*, 2005 UT 25, 116 P.3d 271
780 *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992)
781 *Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
782 *Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983)
783 *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)

784

785 **MUJI 1st Instruction**

786 No analogue

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788 **Committee Notes**

789 Because the public/private figure and public concern determinations are questions for the court,
790 *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271; *Dun & Bradstreet v.*
791 *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (Powell, J.) (in plurality opinion, applying
792 test as a matter of law); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Arndt v. Koby*, 309 F.3d
793 1247, 1252 (10th Cir. 2002), this instruction assumes, and should be used only if, the court has
794 already made those determinations. As explained in CV1601 (Defamation – Introduction), no
795 instruction is included on the standard of fault for private figure cases where the speech does not
796 relate to a matter of public concern because that question has not yet been answered by the Utah
797 Supreme Court. See *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205.

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800 **CV1611 Definition: Requisite Degree of Fault –Public Official or Public Figure. Approved**
801 **1/11/16.**

802 I have already determined that [name of plaintiff] is a [public official, general purpose public
803 figure, or limited purpose public figure]. As a result, [name of plaintiff] cannot recover on
804 [his/her/its] defamation claim unless you find that [he/she/it] has proved by clear and convincing
805 evidence that [name of defendant] made the allegedly defamatory statements with actual malice.

806 To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made
807 the allegedly defamatory statements, [name of defendant] had actual knowledge the statements
808 were false or actually entertained serious doubts as to whether the statements were true. The
809 question is not whether a reasonable person would have known that the statements were false or
810 entertained serious doubts about their truth, but whether [name of defendant] actually had such
811 knowledge or doubts at the time of publication.
812

813 **References**

814 *St. Amant v. Thompson*, 390 U.S. 727 (1968)
815 *Curtis Publ'g Co v. Butts*, 388 U.S. 130 (1967)
816 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
817 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
818 *O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
819 *Wayment v. Clear Channel Broad. Inc.*, 2005 UT 25, 116 P.3d 271
820 *Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
821 *Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983)
822 *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)
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824 **MUJI 1st Instruction**

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827 **Committee Notes**

828 Because the public official/public figure determination is one for the court, *Wayment v. Clear*
829 *Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271, this instruction assumes, and should be
830 used only if, the court has already made that determination. For a discussion of the subjective
831 nature of the actual malice standard, see CV1611 (Conditional Privilege), Committee Notes.
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834 **CV1612 Group Defamation Rule. Approved 2/22/16.**

835 To be actionable, a defamatory statement must refer to [name of plaintiff]. In general, statements
836 that refer only to a group or class of people are not actionable. [Name of plaintiff] can maintain a
837 defamation claim based on such a statement if and only if [he/she/it] shows either:

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839 (1) the referenced group or class is so small that a reasonable person would understand the
840 statement as specifically referring to [name of plaintiff]; or

841
842 (2) given the circumstances of publication, a reasonable person would understand the statement
843 as specifically referring to [name of plaintiff]. The fact that a referenced group is large does not
844 by itself preclude [name of plaintiff] from satisfying this requirement.
845

846 **References**

847 *Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
848 Restatement (Second) of Torts § 564A (1977)
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850 **MUJI 1st Instruction**

851 No analogue

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Committee Notes

The Restatement provides the following illustrative examples of this rule: “A newspaper publishes the statement that the officials of a labor organization are engaged in subversive activities. There are 162 officials. Neither the entire group nor any one of them can recover for defamation.... A newspaper publishes a statement that the officers of a corporation have embezzled its funds. There are only four officers. Each of them can be found to be defamed.” Restatement (Second) of Torts § 564A cmt. a (1977).

CV1613 Causation. Approved 2/22/16.

In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the allegedly defamatory statement[s] caused damage to [name of plaintiff].

You should only award [name of plaintiff] damages that were caused by the defamation. You may not award damages which were the result of other acts of [name of the defendant], such as publication of statements that are true, non-defamatory, privileged, or otherwise fail to satisfy the elements of a defamation claim. You also may not award damages that were caused by [name of plaintiff’s] own activities.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391

MUJI 1st Instruction

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Committee Notes

This instruction is not intended to capture the concept of proximate causation. This instruction should be given along with some version of CV209.

CV1614 Presumed Damages. Approved 2/22/16.

I have determined that the following statement[s] [is a/are] statement[s] that the law presumes will cause some type of damages to the plaintiff: [text of statement]. If you find that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] published that statement, you may presume that [name of plaintiff] has been damaged and thus is entitled at least to nominal damages. The term “nominal damages” means an insignificant amount, such as one dollar. If [name of plaintiff] seeks more than nominal damages, [he/she/it] must prove the amount of damage.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535

897 *Larson v. SYSCO Corp.*, 767 P.2d 557 (Utah 1989)
898 *Baum v. Gillman*, 667 P.2d 41 (Utah 1983)
899 *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ___ P.3d ___

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MUJI 1st Instruction

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Committee Notes

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This instruction uses the term “presumed damages” to capture the concept of defamation *per se*. As explained in CV1601 (Defamation – Introduction), there was a historical distinction between the tests for defamation *per se* depending on whether the statements were slander or libel. At least one older case in Utah suggests in dicta that the four-category test requiring (1) criminal conduct, (2) having contracted a loathsome disease, (3) unchaste behavior (but only if the plaintiff is a woman), or (4) conduct incongruous with the exercise of a lawful business, trade, profession, or office applies only to slander, while the test for libel *per se* is whether the “words must, on their face, and without the aid of [extrinsic] proof, be unmistakably recognized as injurious.” *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 n.7 (Utah 1981) (dicta) (quoting *Lininger v. Knight*, 226 P.2d 809, 813 (Colo. 1951)). (The actual quote in *Seegmiller* uses the phrase “intrinsic proof,” rather than “extrinsic proof.” *Id.* But that phrase appears to be either an error or an anachronism that actually means “extrinsic proof,” consistent with what it means to be defamatory *per se*. See, e.g., *Gordon v. Boyles*, 99 P.3d 75, 78-79 (Colo. Ct. App. 2004) (citing *Lininger* for the proposition that “[t]o be actionable without proof of special damages, a libelous statement must be ... on its face and without extrinsic proof, unmistakably recognized as injurious.... (emphasis added)); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:8.3 (4th ed. 2013) (statement is libelous *per se* if it is defamatory without the aid of “extrinsic facts”).

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Subsequent to *Seegmiller*, however, Utah courts have applied the four-category test to written statements, rather than the more amorphous test for libel *per se*. See, e.g., *Larson v. SYSCO Corp.*, 767 P.2d 557, 560 (Utah 1989); *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 2, ___ P.3d ___. In *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, the Utah Supreme Court addressed this issue and explained that the tests for libel and slander *per se* were not distinct, but that “the *Larson* categories merely define injurious words as mentioned in *Seegmiller*.” *Id.* at ¶ 26. Accordingly, and due to the increasingly anachronistic nature of a distinction between oral and written communication, this instruction employs the *Larson* categories and does not distinguish between libel *per se* and slander *per se*.

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There is no clear Utah authority on what “presumed damages” encompass in defamation cases. Although the Utah Supreme Court has not addressed the issue, the Utah Court of Appeals has suggested that a plaintiff who proves defamation *per se* but presents no proof of actual injury is not entitled to recovery beyond nominal damages. See *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 5, ___ P.3d ___. This instruction reflects that principle. Although the non-binding plurality in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) construed the holding of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as applying only to statements relating to matters of public concern, other authorities, including the Restatement, have more broadly interpreted *Gertz* to constitutionally prohibit presumed damages in all

943 defamation contexts, requiring proof of actual injury. *See* Restatement (Second) of Torts § 621
944 & cmt. b (1977) (“Though the action in the *Gertz* case was one of libel and the defendant would
945 be classified within the term, news media, and the defamatory statement involved a matter of
946 public concern, there is little reason to conclude that the constitutional limitation on recoverable
947 damages will be confined to these circumstances.”). Because nominal damages likely do not
948 offend the constitutional protections against presumed and punitive damages established in
949 *Gertz*, limiting presumed damages absent proof of actual injury to nominal damages avoids this
950 potential constitutional problem and makes it unnecessary in this instruction to distinguish
951 between purely private cases and cases involving public officials, public figures, or speech
952 relating to matters of public concern.
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955 **CV1615 Damages – Economic Damages. Approved 2/22/16.**

956 Economic damages are awarded to compensate a plaintiff for actual and specific monetary losses
957 that are caused by the publication of a defamatory statement. Economic damages are out-of-
958 pocket losses and can include such things as loss of salary, employment, income, business, and
959 other similar economic losses. [Name of plaintiff] must prove each item of economic damages
960 with specific evidence.

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962 **References**

963 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
964 *Baum v. Gillman*, 667 P.2d 41 (Utah 1983)
965 *Allred v. Cook*, 590 P.2d 318 (Utah 1979)
966 *Prince v. Peterson*, 538 P.2d 1325 (Utah 1975)
967 *Cohn v. J.C. Penney Co., Inc.*, 537 P.2d 306 (Utah 1975)
968 *Nichols v. Daily Reporter Co.*, 83 P. 573 (Utah 1905)
969 Utah R. Civ. P. 9(g)
970 Restatement (Second) of Torts § 575 cmt. b (1977)

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972 **MUJI 1st Instruction**

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975 **Committee Notes**

976 This instruction uses the term “economic damages” to capture the concept of special damages.
977 Utah courts have not addressed whether medical expenses incurred as a proximate result of
978 defamation are recoverable as special damages, and courts in other jurisdictions are split on that
979 issue. With regard to attorneys’ fees, it is important to distinguish between a claim for
980 defamation and a claim for “slander of title.” Although the two claims share some nomenclature,
981 they are distinct claims. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988).
982 While attorneys’ fees incurred in clearing a cloud placed on a title are recoverable as special
983 damages in a slander of title claim, *see id.*, Utah courts have not recognized attorneys’ fees as
984 special damages in a defamation claim. *See Computerized Thermal Imaging, Inc. v. Bloomberg,*
985 *L.P.*, 312 F.3d 1292, 1299-1300 & n.15 (10th Cir. 2002) (distinguishing slander of title and
986 holding attorneys’ fees on defamation claim are “an element of special damages not recognized
987 by Utah law”).

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CV1616 Damages – General Noneconomic Damages.

You may award general damages to [name of plaintiff] if you find [name of plaintiff] was actually injured by a statement published by [name of defendant] that is defamatory *per se*. If the statement at issue is defamatory, but not defamatory *per se*, you may award general damages only if [name of plaintiff] also proves and you choose to award special damages.

~~General Noneconomic~~ damages are awarded to compensate a plaintiff for actual injury to [his/her] reputation that is ~~proximately~~ caused by publication of a defamatory statement, but that have not been compensated for by ~~special economic~~ damages. ~~General Noneconomic~~ damages do not include specific monetary losses covered by ~~special economic~~ damages. ~~Some F~~ factors you may consider in calculating ~~general economic~~ damages are ~~impairment of harm to~~ reputation, ~~impaired~~ standing in the community, humiliation, shame, mental anguish and suffering, emotional distress and related physical injury, and other similar types of injuries. In making this determination, you may consider the state of [name of plaintiff's] reputation prior to the alleged defamation.

- To award noneconomic damages to [name of plaintiff], you must find:
- (1) [name of plaintiff] has proven by a preponderance of the evidence that [he/she] has actually been injured by the allegedly defamatory statement[s]; and
 - (2) either:
 - (a) the statement[s] at issue [is][are] the type for which damages are presumed; or
 - (b) [name of plaintiff] has proven by a preponderance of the evidence that [he/she] has suffered economic damages.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Prince v. Peterson, 538 P.2d 1325 (Utah 1975)
Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391
Restatement (Second) of Torts § 621 (1977)

MUJI 1st Instruction

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Committee Notes

This instruction uses the term “noneconomic damages” to capture the concept of general damages. The term “actual injury” in this context refers to a determination that the plaintiff has actually suffered damages, as opposed to merely relying on the *presumption* of injury for statements that are defamatory *per se*, which entitles a plaintiff only to nominal damages. “Actual injury” can refer either to general or special damages, the former concerned with harm to reputation, standing in the community, and the other factors listed in this instruction, and the

1034 latter concerned with pecuniary, out-of-pocket losses. Actual injury in the context of general
1035 damages typically requires the plaintiff to put on evidence that his or her reputation has been
1036 diminished, that he or she has suffered humiliation, shame, mental anguish, suffering, and other
1037 similar types of injuries.

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1039 The requirements for an award of general damages in this instruction reflect the longstanding
1040 common law rule that a plaintiff who does not prove defamation *per se* is entitled to general
1041 damages only if he or she also pleads and proves special damages. In cases of defamation *per se*,
1042 the jury may award general damages without special damages. See, e.g., *Baum v. Gillman*, 667
1043 P.2d 41, 42 (Utah 1983) (“Inasmuch as the complaint contains no allegation of special damages,
1044 in order to state a claim upon which relief can be granted the statements attributed to Gillman
1045 must constitute defamation *per se*.”); *Allred v. Cook*, 590 P.2d 318, 320-21 (Utah 1979) (“The
1046 general rule is that if special damages are not alleged, the slander must amount to slander *per se*
1047 before recovery is allowed.”). Because the court determines whether the statements at issue are
1048 defamatory *per se*, see CV1614 (Presumed Damages), if the case does not involve defamation
1049 *per se*, this instruction may be modified to remove the disjunctive (2)(a) and require both actual
1050 injury and special damages.

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1052
CV1617 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern

1053 In addition to compensatory damages, [name of plaintiff] also seeks to recover punitive damages
1054 against [name of defendant]. Punitive damages are intended to punish a wrongdoer for
1055 extraordinary misconduct and to discourage others from similar conduct. They are not intended
1056 to compensate [name of plaintiff] for [his] [her] [its] loss.

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1058 Punitive damages may only be awarded if [name of plaintiff] has proven both of the following by
1059 clear and convincing evidence:

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1063 (1) [name of defendant] acted with actual malice in defaming [name of plaintiff]. To prove
1064 actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the
1065 allegedly defamatory statement[s], [name of defendant] had actual knowledge the statements
1066 were false or actually entertained serious doubts as to whether the statements were true. The
1067 question is not whether a reasonable person would have known that the statements were false or
1068 entertained serious doubts about their truth, but whether [name of defendant] actually had such
1069 knowledge or doubts at the time of publication; and

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1071 (2) [name of defendant]’s conduct:

1072 (a) was [willful and malicious]; or

1073 (b) was [intentionally fraudulent]; or

1074 (c) manifested a knowing and reckless indifference toward, and a disregard of, the rights
1075 of others, including [name of plaintiff].

1076
1077 “Knowing and reckless indifference” means that (a) [name of defendant] knew that such conduct
1078 would, in a high degree of probability, result in substantial harm to another; and (b) the conduct

1079 must be highly unreasonable conduct, or an extreme departure from ordinary care, in a situation
1080 where a high degree of danger or harm would be apparent to a reasonable person.

1081
1082 Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the
1083 like, which constitute ordinary negligence.

1084
1085 ~~Punitive damages are awarded only to punish a defendant and as a warning to others not to~~
1086 ~~engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for~~
1087 ~~actual injuries suffered. Punitive damages should be awarded with caution and may only be~~
1088 ~~awarded if three conditions are met.~~

1089
1090 ~~First, you must have awarded either special or general damages (or both) on [name of plaintiff]'s~~
1091 ~~defamation claim.~~

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1093 ~~Second, [name of plaintiff] must have provedn by clear and convincing evidence that [name of~~
1094 ~~defendant] acted with actual malice in defaming [name of plaintiff]. To prove actual malice,~~
1095 ~~[name of plaintiff] must prove that at the time [name of defendant] made the allegedly~~
1096 ~~defamatory statements, [name of defendant] had actual knowledge the statements were false or~~
1097 ~~actually entertained serious doubts as to whether the statements were true. The question is not~~
1098 ~~whether a reasonable person would have known that the statements were false, but whether~~
1099 ~~[name of defendant] actually had such knowledge at the time of publication.~~

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1101 ~~Third, [name of plaintiff] must have provedn by clear and convincing evidence that [name of~~
1102 ~~defendant]'s defamation of [name of plaintiff] was the result of willful and malicious or~~
1103 ~~intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference~~
1104 ~~toward, and a disregard of, the rights of [name of plaintiff].~~

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1106 ~~All three of these conditions must be met for you to consider an award of punitive damages. If~~
1107 ~~you choose to award punitive damages, the amount of that award should bear some relation to~~
1108 ~~the amount of special and/or general damages awarded on the defamation claim. Punitive~~
1109 ~~damages that are many multiples of the amount awarded in special and/or general damages may~~
1110 ~~be held unreasonable.~~

1111
1112 **References**

1113 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
1114 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
1115 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
1116 *Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
1117 Utah Code § 78B-8-201(1)(a)

1118
1119 **MUJI 1st Instruction**

1120 10.12

1121
1122 **Committee Notes**

1123 This instruction is a modified version of the general instruction for punitive damages (CV2026).
1124 The primary modification is the addition of the constitutional requirement of proving actual

1125 malice in cases involving public officials, public figures, and/or speech relating to matters of
1126 public concern. This instruction also removes from the general instruction the possibility of
1127 harm “to property” in the definition of knowing and reckless indifference because defamation
1128 claims are always for personal harm to reputation; property damage caused by speech is covered
1129 by other torts, such as injurious falsehood. The other modification to this instruction is the
1130 removal of the optional brackets around the last paragraph in the instruction regarding
1131 negligence. For a discussion of the subjective nature of the actual malice standard, see CV1608
1132 (Conditional Privilege), Committee Notes.

1133
1134 ~~The Model Utah Jury Instructions 2d contains a general instruction for punitive damages~~
1135 ~~(CV2026). Due to the unique nature of defamation claims and the constitutional interests at~~
1136 ~~stake, this instruction should be used for defamation claims, rather than the general instruction.~~
1137 ~~For a discussion of the subjective nature of the actual malice standard, see CV1611 (Conditional~~
1138 ~~Privilege), Committee Notes.~~

1139 Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the
1140 Gertz actual malice requirement for punitive damages in cases involving public officials, public
1141 figures, and/or speech relating to a matter of public concern also applies in cases involving
1142 private figures and speech that does not relate to a matter of public concern. Cf. Dun &
1143 Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion,
1144 declining to extend actual malice rule). Because it is an unresolved question, the parties could
1145 argue that this instruction should also be used in cases involving private figures and speech
1146 unrelated to a matter of public concern instead of the general punitive damages instruction set
1147 forth in CV2026.

1148
1149
1150 **CV1618 Damages—Punitive Damages—Private Figure and No Issue of Public Concern**

1151 ~~Punitive damages are awarded only to punish a defendant and as a warning to others not to~~
1152 ~~engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for~~
1153 ~~actual injuries suffered. Punitive damages should be awarded with caution and may only be~~
1154 ~~awarded if two conditions are met.~~

1155
1156 ~~First, you must have awarded either special or general damages (or both) on [name of plaintiff]’s~~
1157 ~~defamation claim.~~

1158
1159 ~~Second, [name of plaintiff] must have proved by clear and convincing evidence that [name of~~
1160 ~~defendant]’s defamation of [name of plaintiff] was the result of willful and malicious or~~
1161 ~~intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference~~
1162 ~~toward, and a disregard of, the rights of [name of plaintiff].~~

1163
1164 ~~Both of these conditions must be met for you to consider an award of punitive damages. If you~~
1165 ~~choose to award punitive damages, the amount of that award should bear some relation to the~~
1166 ~~amount of special and/or general damages awarded on the defamation claim. Punitive damages~~
1167 ~~that are many multiples of the amount awarded in special and/or general damages may be held~~
1168 ~~unreasonable.~~

1169
1170 **References**

1171 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
1172 *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
1173 *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
1174 *Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
1175 Utah Code § 78B-8-201(1)(a)

1176
1177 **MUJI 1st Instruction**
1178 10.12

1179
1180 **Committee Notes**

1181 Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the
1182 *Gertz* actual malice requirement for punitive damages in cases involving public officials, public
1183 figures, and/or speech relating to a matter of public concern also applies in cases involving
1184 private figures and speech that does not relate to a matter of public concern. *Cf. Dun &*
1185 *Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion,
1186 declining to extend actual malice rule). Because the rule has not been extended, the committee
1187 has included this instruction, which incorporates only the statutory requirements for punitive
1188 damages. Because it is an unresolved question, however, an argument could be made that the
1189 law should be extended to require a showing of actual malice to obtain punitive damages in this
1190 context.

1191
1192
1193 **CV16189 Damages – Effect of Retraction.**

1194 If you find the allegedly defamatory statement[s] were [published in the newspaper] [broadcast
1195 on the radio or television] by [name of defendant] in good faith due to a mistake or
1196 ~~misapprehension~~ misunderstanding of the facts, and that [name of defendant] made a full and fair
1197 retraction of the statements within [the time prescribed by statute] of [name of plaintiff]'s
1198 demand for a retraction or filing of this lawsuit by [the method prescribed by statute], then [name
1199 of plaintiff] may recover only those actual damages incurred by [name of plaintiff] as a direct
1200 result of the [publication] [broadcast] of the allegedly defamatory statements and no punitive
1201 damages may be awarded. A retraction is full and fair if it sufficiently retracts the previously
1202 [published] [broadcasted] ~~falsity~~ false statement[s] so that a reasonable person under the
1203 circumstances [reading] [hearing] the retraction would understand that the ~~falsity~~ statement[s]
1204 had been retracted, without any untrue reservation.

1205
1206 **References**

1207 Utah Code §§ 45-2-1 to 1.5

1208
1209 **MUJI 1st Instruction**

1210 10.13

1211
1212 **Committee Notes**

1213 Several different retraction methods are prescribed by statute, Utah Code §§ 45-2-1 to 1.5,
1214 depending on the circumstances of the newspaper publication or radio or television broadcast.
1215 This instruction should be modified to reflect those methods. This instruction is necessary only
1216 if there was a retraction made or issued by the defendant.

1217

1218

1219 **CV162019 Affirmative Defense – Consent.**

1220 Consent is an absolute defense to a claim for defamation. If [name of defendant] proves by a
1221 preponderance of the evidence that [name of plaintiff] consented, by words or conduct, to [name
1222 of defendant]’s communication of the statement(s) at issue to others, there is no liability for
1223 defamation.

1224

1225 **References**

1226 *Cox v. Hatch*, 761 P.2d 556 (Utah 1988)

1227 Restatement (Second) of Torts § 583 (1977)

1228

1229 **MUJI 1st Instruction**

1230 No analogue.

1231

1232 **Committee Notes**

1233 None

1234

1235

1236 **CV16201 Affirmative Defense – Statute of Limitations.**

1237 An action for defamation must be ~~commenced~~filed within one year of the time that [name of
1238 plaintiff] could have reasonably discovered publication of the statement. An alleged defamation
1239 is reasonably discoverable, as a matter of law, at the time it is first published and disseminated in
1240 a publication that is widely available to the public.

1241

1242 **References**

1243 *Russell v. The Standard Corp.*, 898 P.2d 263 (Utah 1995)

1244 *Allen v. Ortez*, 802 P.2d 1307 (Utah 1990)

1245 Utah Code § 78B-2-302(4)

1246

1247 **MUJI 1st Instruction**

1248 No analogue.

1249

1250 **Committee Notes**

1251 Application of a statute of limitations ~~is normally~~can be a question of law for the court,
1252 particularly when the statements at issue are published in a widely-available publication, but in
1253 certain ~~limited~~ circumstances a court may determine that a question of fact exists as to when a
1254 plaintiff should have reasonably discovered the allegedly defamatory statement. This instruction
1255 is intended for such ~~limited~~ circumstances.

1256

1257