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IN THE SUPREME COURT OF THE REPUBLIC OF PALAU APPELLATE DIVISION

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SUPREME COURT OF THE REPUBLIC OF PALAU

JACKSON NGIRAINGAS, Appellant, v. TEMMY SHMULL, Appellee.

Cite as: 2018 Palau 19 Civil Appeal No. 17-019 Appeal from Civil Action No. 15-077

Decided: October 17, 2018

Counsel for Appellant ..... Salvador Remoket Counsel for Appellee ..... Siegfried B. Nakamura

BEFORE: JOHN K. RECHUCHER, Associate Justice KATHERINE A. MARAMAN, Associate Justice KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] This appeal concerns statements made by Jackson Ngiraingas (Appellant), a former Peleliu government official, regarding Temmy Shmull (Appellee), the current governor of Peleliu. The Trial Division found the statements to be defamatory and granted Appellee punitive damages. Appellant appeals the Trial Division's determination that the statements were defamatory. For the reasons set forth below, we AFFIRM the Trial Division's findings.

## FACTS

[¶ 2] In May 2015, Appellant wrote multiple letters to Appellee and copied members of the Peleliu State Legislature, Peleliu State Government, and the Senate and House of Delegates of the Olbiil Era Kelulau. These letters contained multiple allegations regarding the Appellant's behavior as Peleliu's Governor.

[¶ 3] The first letter stated:

Mr. Governor, it is not hard to imagine that you and some other persons in the national government may have intentionally diverted the funds for the PIF building in Peleliu to your political and business associate Haruo Esang and his construction company without public bidding . . . [S]ome people in Peleliu have informed me that Haruo Esang company was the contractor, with the assistance of the national government Public Works personnel.

Compl. Ex. 1 at 1.

[¶ 4] This quote became known as the "PIF Statement." *See* Decision and Order 2. Before making this statement, Appellant had a conversation with Augustine Meseral, who told Appellant that he had heard that Haruo Esang's employees were working on a building at the Kambek Dock and that the building was to be used for the Pacific Islands Forum. *Id.* at 3.

[¶ 5] The next day, Appellant wrote another letter, containing two statements, later referred to as the "Loretta Statement" and the "Kambek Statement," respectively. *Id.* at 2. These statements read as follows:

Mr. Governor Shmull, rumors have been circulating in Peleliu for months that you have already leased or is [sic] contemplating on leasing [a] portion of or the whole of Kambek Dock to your sister Legislator[-]at[-]Large Loretta Shmull. Or that you are planning on leasing Kambek Dock to your political or business associates, or to friends or person(s) whose name(s) will be used as lessee to hold the lease until the dust clears then the lease would be transferred to you and your political and business associates,

Compl. Ex. 2 at 1, and

Mr. Governor Shmull, I am told you have developed a master plan for Kambek Dock and it is secretly posted in your office. Any master plan to develop Kambek Dock must be discussed and approved by the people of Peleliu as this is the only commercial port that will support future development of the entire state of Peleliu. And it must be controlled by a future Peleliu Port Authority and not by any private entity including yourself,

*id.* at 2.

[¶ 6] Before making the Loretta Statement, Appellant spoke with Monica Ichiro. Decision and Order 3. Ichiro testified that Appellant asked her whether she had heard that Appellee had leased Kambek Dock to Loretta Shmull, Appellee's sister. *Id.* Ichiro stated that she had overheard Loretta asking Yokoi Myuki the following question: "Who told you that Governor Kambek to my name?" Tr. 162:18-19.

[¶ 7] Before making the Kambek statement, Appellant communicated with a Peleliu State employee, Eriko Malone, about development plans at Kambek. *Id.* at 4. Malone told Appellant that she had overheard people discussing plans to develop Kambek. *Id.* She testified at trial that "[s]he never told [Appellant] that [Appellee] had plans to develop Kambek; that [Appellee] had secretly posted a master plan of the project in his office; or that the plan for Kambek was a master plan." *Id.*

[¶ 8] In June 2015, Appellee wrote a response to Appellant and copied the recipients of Appellant's letters. *See* Compl. Ex. 3. Appellee explained that the content of Appellant's statements was "patently false," asked Appellant to retract his statements, and advised him that Appellee planned to take legal action if Appellant did not retract his statements. *Id.* Appellant wrote back the next day, refusing to retract his statements and stating that he stood by them. Compl. Ex. 4. Thereafter, Appellee filed suit.

[¶ 9] The Trial Division found that Appellant's statements were false and defamatory and had harmed Appellee's reputation because the statements concerned self-dealing, nepotism, and misconduct in public office. Decision and Order 6. The Trial Division further ruled that Appellant "knew that the[] statements were false, or, at the very least, that his statements were made

recklessly.” *Id.* at 7. The Trial Division based its decision on the fact that “[a]ll defense witnesses who testified regarding their statements to [Appellant] testified that they did not make the statements [Appellant] attributed to them.” *Id.* The Trial Division explained that punitive damages can be awarded “where actual malice or recklessness is shown,” *id.* at 9 (quoting 50 Am. Jur. 2d *Libel and Slander* § 350 (2017)), and awarded punitive damages in the amount of \$10,000, reasoning that “[Appellant]’s exaggeration[s] of the information he received from third parties, without thought to verification, are not only false and defamatory, but were made with reckless disregard,” *id.* at 8–9. Appellant timely appealed the Trial Division’s decision.

### STANDARD OF REVIEW

[¶ 10] Whether an allegedly defamatory statement is true or false is a question of fact. *Ngiraingas v. Nakamura*, 18 ROP 225, 233 (2011). Whether the evidence in the record is sufficient to support a finding of actual malice or reckless disregard is a question of law. *Id.* at 234. The Trial Division’s findings of fact will be reviewed for clear error, and its conclusions of law are reviewed *de novo*. *Minor v. Rechucher*, 22 ROP 102, 105 (2015).

### ANALYSIS

[¶ 11] As Palau has no civil statute concerning tortious defamation, the Court turns to the Restatements of Law for guidance. *See* 1 PNC § 303 (“The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decisions in the courts of the Republic in applicable cases, in the absence of written law applicable . . . to the contrary.”). To create liability for defamation, the following are necessary:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting to at least negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977).

[¶ 12] As Appellee is not a private citizen, but a public official, the requisite culpability for defamation is raised beyond the level of mere negligence as referenced in subsection (c) above: The publisher of the false and defamatory statements is subject to liability only if he knows that the statement is false and defames the other person or acts recklessly in publishing his statements. *Id.*

[¶ 13] Appellant argues that the Trial Division committed reversible error when it issued an injunction against Appellant and found that his statements were defamatory.<sup>1</sup> Appellant believes his statements were not false or defamatory. He claims that, because Appellee is a public official, the standard of fault on behalf of Appellant is malice or recklessness, which, he argues, was not met. Appellant's Opening Br. 4. Appellant also argues that the subject matter of his statements were of public concern and that he was "speaking for himself and the people of Peleliu," making it "important to protect [the] right of speech of citizens." *Id.* at 9. He further contends that, because his statements were a matter of public concern, he "should be granted a conditional privilege in making the statements to his Governor." *Id.*

### I. False and Defamatory Statements

[¶ 14] A statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation in the community or to deter third persons from associating or dealing with him." *Ridep v. Uchau*, 2017 Palau 1 ¶ 13 (citing *Ngiraingas v. Soalablai*, 7 ROP Intrm. 208, 209 (1999)). Appellee won the gubernatorial election against Appellant after Appellant disseminated the three statements. Election results, however, are not an absolute marker of ill effects to one's reputation. Appellant's statements indicate that Appellee engaged in behavior unbecoming a public official. The

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<sup>1</sup> Although the Appellant states that he challenges the issuance of an injunction, he provides absolutely no argument regarding this challenge. As such, challenge to any injunction is waived. See *Etpison v. ROP*, 2017 Palau 32 ¶ 13 ("Undeveloped arguments are waived.").

statements were widely shared in newspapers and on the internet, and Appellee was required to field phone calls from individuals seeking explanation regarding the content of Appellant's statements.

[¶ 15] In a previous case concerning defamatory statements made by Appellant, the Court adopted the view that the "falsity of a statement in a defamation action must be proved by clear and convincing error." *Ngiraingas*, 18 ROP at 235. At trial, Appellant's witnesses testified that they did not make the statements that Appellant attributed to them.

[¶ 16] Specifically, in regard to the Kambek Statement, Malone testified that she had heard in the Peleliu State Office that there were plans to develop Kambek Dock. Decision and Order 4. However, she did not hear any specific plan or about a master plan that Governor Shmull had with respect to the dock.<sup>2</sup> *Id.* Rebecca Ngirous, Treasurer for Peleliu State, also testified that, to her knowledge, there was no master plan for the dock, either by the Appellee or the State in general. *Id.* at 5.

[¶ 17] The Kambek Statement is different from the Loretta Statement. In the Loretta Statement, Appellant accused Appellee of nepotism and of using his sister as a placeholder for his acquisition of the title to Kambek on behalf of himself and his business and political associates. Witness testimony, however, shows that none of the witnesses provided such information to Appellant. Ichiro stated that she had overheard Loretta Shmull ask Myuki, "Who told you that Governor leased Kambek to my name?" and "If the Governor leased Kambek to my name then he needs to be sued." Tr. 162:18–21. Myuki then testified that he had not heard any discussion regarding Kambek Dock other than Loretta questioning him directly. *See* Tr. 270:3–23. He told Loretta "I don't know anything about that so don't talk to me again about it because I don't know." Tr. 270:17–19. In addition, Loretta Shmull testified that she had not leased Kambek Dock and further testified that she has no leases at all in Peleliu State. Decision and Order 4. Shari Nicholas,

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<sup>2</sup> We need not find whether the Kambek Statement, standing alone, would constitute defamation. Because it was made in the same communication as the Loretta Statement, the two statements must be read in combination. When read as an extension of the Loretta Statement, the Kambek Statement's defamatory character is clear.

Peleliu State Financial Officer, also testified that there was no lease of Kambek Dock on record for Loretta Shmull. *Id.*

[¶ 18] With respect to the PIF statement, Meseral testified that he had one discussion with the Appellant regarding Haruo Esang and his employees. He “told [Appellant] he heard that Haruo Esang’s workers were working on the building at Kambek Dock that was to be used for the Pacific Islands Forum.” *Id.* at 3. He testified that he did not mention public works money or anything else regarding the workers. *Id.* Peleliu State Treasurer Rebecca Ngiruos also testified that the PIF building was not a state-level project, so no state funds were disbursed for its construction. *Id.* at 4–5.

[¶ 19] On the whole, the witnesses testified that they did not provide Appellant with the information he used to accuse Appellee. The Trial Division weighs and evaluates the credibility of witnesses. *See Eklbai Clan v. Koror State Pub. Lands Auth.*, 22 ROP 139, 145 (2015) (“[T]he weighing and evaluating of testimony is precisely the job of the trial judge, who is best situated to make such credibility determinations.”). The Trial Division chose to credit Appellee’s witnesses over Appellant’s evidence, and the Appellant has not shown that it was clear error for the Trial Division to determine that the statements were defamatory.

## II. Recklessness

[¶ 20] During the pendency of this case, Appellee has been the Governor of Peleliu. He is a public official rather than a private citizen. Therefore, liability for defamatory statements occurs when the publisher acts with “reckless disregard” of the truth and defamatory nature of his statements. *Ngiraingas*, 18 ROP at 237 (citing Restatement (Second) of Torts § 580A cmt. f). “Reckless disregard exists when there is a high degree of awareness of probable falseness of the statement or there are serious doubts as to its truth.” *Id.* (citing Restatement (Second) of Torts § 580A cmt. d). As previously stated, whether the evidence in the record is sufficient to support a finding of reckless disregard is a question of law reviewed *de novo*. *See id.* at 234 (question of law); *see also Minor*, 22 ROP at 105 (*de novo* review).

[¶ 21] Appellant maintains that all of the statements involved in this case originated from conversations he had with third parties. He claims that the

witnesses informed him of rumors they had heard, and he had no reason to disbelieve them.<sup>3</sup> Appellant's failure to investigate the veracity of the rumors he heard "does not itself establish bad faith, unless [Appellant] has a high degree of awareness of probable falsity." *See Ngiraingas*, 18 ROP at 237. Appellant was informed by Appellee that Appellee challenged the truth of the statements and believed they were defamatory. "[R]epublication of a statement after the [Appellant] has been notified that [Appellee] contends that it is false and defamatory may be treated as evidence of reckless disregard." Restatement (Second) of Torts § 580A cmt. d. Additionally, "failure to investigate will not alone support a finding of actual malice, [but] the purposeful avoidance of the truth is in a different category." *Ngiraingas*, 18 ROP at 239.

[¶ 22] When asked at trial, "You didn't do anything to investigate the truthfulness of these statements? Is that correct or not?," Appellant replied, "I think that's correct." Tr. 259:8-12. Appellant knew that Appellee challenged the truth of his statements, and as the Trial Division noted, Appellant is a former public official and thus "should know that [Appellee] does not have the unilateral power to take any of the actions [Appellant] alleged." Decision and Order 8. Such circumstances should have served to forewarn Appellant of his need to investigate the truthfulness of his statements. The sheer number of public employee witnesses who testified that the allegations were not true shows that it would have been very easy for Appellant to inquire about any rumors he had heard and verify their truthfulness. Nonetheless, in the face of these circumstances, Appellant chose to stand by his allegations rather than investigate or retract them.

[¶ 23] Having reviewed the evidence in the record, we agree with the Trial Division's finding. Appellant's willful ignorance when faced with a high degree of awareness of the probable falseness of his statements and his

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<sup>3</sup> The statements Appellant made in his letters were not mere reiterations of his conversations with third parties. There is no evidence the Appellant's witnesses discussed anything along the lines of self-dealing, nepotism, or misconduct in public office. Those accusations were solely Appellant's. He, thus, cannot hide behind his sources or suggest that the statements in his letter were merely speculative. *See* Appellant's Opening Br. 5 ("The phrase 'it is not hard to imagine' is speculative in nature. Any reader would know that the publisher may or may not be sure of the truth of the statement.").



willingness to stand by his allegations in spite of Appellee's explicit protests serve as evidence of Appellant's reckless disregard.

### **III. Harm**

[¶ 24] Appellant attempts to make an argument regarding harm. The Appellant's full discussion of the issue follows:

Liability may only be imposed where special harm is proven or where actionability is permitted in the absence of special harm. Appellee won the election even with the letters circulating in Peleliu and Palau. And Appellee's health has not worsened. He has had high blood pressure and diabetes before the statement[s] were made. Dr. Emais Robert testified that Appellee's result [sic] medical results were fair and no strokes or heart attack occurred. (Tr., at 1519-11) [sic]. There should be no liability imposed on the Appellant.

Appellant's Opening Br. 8.

[¶ 25] Appellant's argument is "sorely lacking in substance and citation to legal authority." *Soaladaob v. Remeliik*, 17 ROP 283, 291 (2010) (refusing to consider undeveloped argument). Despite referencing two routes to imposing liability, Appellant has not articulated the legal standard applicable to either, nor has he addressed how, in particular, the Trial Division erred. His argument is too undeveloped and unsupported by legal authority to be considered. Accordingly, the Trial Division's determination on harm stands.

### **IV. Free Speech and Privileged Communications**


[¶ 26] Lastly, Appellant claims that the statements were a matter of public concern and that his communications should be protected in furtherance of free speech. Appellant's Opening Br. 9-10. He testified both that he was speaking for Peleliu citizens who may have been too afraid to speak out against the Governor, but also that he was not their voice. Tr. 216:7-9; 24-25 (Q: "So they are sort of using you to speak for them or on their behalf?" A: "That's correct.;" Q: "So, in a way you are their voice?" A: "In a way, I don't think I am.").


[¶ 27] Appellant received the protection he was due—the Trial Division elevated the standard of fault from negligence to reckless disregard or knowledge of falsity. There is no separate, absolute privilege to defame others regarding matters of public concern. As discussed above, we agree with the Trial Division’s finding of reckless disregard.


**CONCLUSION**

[¶ 28] Because the Trial Division’s findings of fact were not clearly erroneous and the record evidence supports its conclusions of law, we **AFFIRM** the Trial Division’s findings and judgment.

**SO ORDERED**, this 17th day of October, 2018.

  
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JOHN K. RECHUCHER  
Associate Justice

  
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KATHERINE A. MARAMAN  
Associate Justice

  
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KEVIN BENNARDO  
Associate Justice