Nett District Court appellate division. We note that a writ of prohibition directed to the Nett District Court trial division must first be sought in the Nett District Court appellate division since that is the tribunal with immediate supervisory power over the Nett District Court trial division. *See* GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014) (extraordinary writs generally must be sought from the next highest tribunal and not the FSM Supreme Court appellate division even when the FSM Supreme Court appellate division may have concurrent jurisdiction).

Accordingly, we may exercise jurisdiction over this appeal to the extent that it is an appeal from the Nett District Court appellate division and we consider this petition for a writ of prohibition if a writ of prohibition has already been sought and denied in the Nett District Court appellate division or to the extent that it is a petition for a writ of prohibition directed to the Nett District Court appellate division.

NOW THEREFORE IT IS HEREBY ORDERED that the clerk of the Nett District Court appellate division shall certify the record below and transmit it to the FSM Supreme Court appellate clerk, FSM App. R. 10(c), so that the FSM Supreme Court appellate clerk may issue a notice to the parties that the record is ready and set the briefing schedule, FSM App. R. 12(b), for the part of this case that is an appeal from the Nett District Court appellate division.

Loyola also seeks a writ of prohibition directed to the Chief Justice of the Nett District Court. Since the Nett Chief Justice was acting as a Nett District Court trial division judge, that writ must first be sought from the Nett District Court appellate division. Accordingly, the part of this case that is a petition for a writ of prohibition directed to the Nett District Court trial division or to its chief justice is dismissed without prejudice. That petition must first be sought in and ruled on by the Nett District Court appellate division.

* * * *

FSM SUPREME COURT TRIAL DIVISION

PATRICK ZACCHINI, Plaintiff, vs. FSM PUBLIC AUDITOR HASER HAINRICK, on his own and in his official capacity, FSM PUBLIC AUDITOR'S OFFICE, and FSM GOVERNMENT, Defendants.	)	CIVIL ACTION NO.2012-018

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Beauleen Carl-Worswick
Associate Justice

Hearing: November 15, 2013
Decided: May 19, 2014

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
P.O. Box 163
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For the Defendants: Erick B. Divinigracia, Esq.
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* * * *

HEADNOTES

Civil Procedure – Summary Judgment – Grounds

FSM Civil Rule 56(c) requires that summary judgment be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court must view facts and inferences in a light that is most favorable to the party opposing the judgment. A fact is material only if it might affect the outcome of the suit and the failure to prove an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Zacchini v. Hainrick, 19 FSM R. 403, 410 (Pon. 2014).

Civil Procedure – Summary Judgment – Grounds

When the party moving for summary judgment makes out a prima facie case which, if uncontroverted at trial, would entitle it to a directed verdict on the issue, then the burden shifts to the nonmoving party to offer some competent evidence that could be admitted at trial showing that there is a genuine issue of material fact. Unsupported statements of counsel at oral arguments do not qualify as competent evidence on which a court could find a genuine issue for trial. Unauthenticated evidence is not competent. Zacchini v. Hainrick, 19 FSM R. 403, 410 (Pon. 2014).

Contracts – Formation

A contract is a promise between two parties for the future performance of mutual obligations, which the law will enforce in some way. For the promise to be enforceable, there must be an offer and an acceptance, definite terms, and consideration for the promise. Zacchini v. Hainrick, 19 FSM R. 403, 410 (Pon. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Contracts – Breach

Summary judgment cannot be granted on a breach of contract claim when whether the plaintiff's termination was "reasonable" is a material issue of fact in dispute since the employment contract required the plaintiff to perform to the government's reasonable satisfaction. Zacchini v. Hainrick, 19 FSM R. 403, 410-11 (Pon. 2014).

Torts – Defamation

The tort of defamation includes libel and slander and generally embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks. Zacchini v. Hainrick, 19 FSM R. 403, 411 (Pon. 2014).

Torts – Defamation

The tort of libel may be defined as a false and unprivileged publication by writing or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation. Libel is a smaller subset of defamation – libel is written or visual defamation; slander is oral or aural defamation. Zacchini v. Hainrick, 19 FSM R. 403, 411 n.1 (Pon. 2014).

Torts – Defamation

Defamation causes of action arise under state law. Pohnpei generally follows the Restatement approach in its law concerning tort issues. Zacchini v. Hainrick, 19 FSM R. 403, 411 (Pon. 2014).

Choice of Law

When national law merely provides the forum, the national courts must strive to apply the law in the same way the highest state court would. Zacchini v. Hainrick, 19 FSM R. 403, 411 n.2 (Pon. 2014).

Torts – Defamation

A communication is defamatory if it tends so to harm the reputation of another so to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Zacchini v. Hainrick, 19 FSM R. 403, 411 (Pon. 2014).

Torts – Defamation

A threshold issue is whether a statement is objectively defamatory or merely subjectively offensive. The gravamen or gist of an action for defamation is it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his reputation and good name. It is not based on any physical or emotional distress to the plaintiff that may result. Zacchini v. Hainrick, 19 FSM R. 403, 411-12 n.3 (Pon. 2014).

Torts – Defamation

Four elements must be proven in a defamation claim: 1) false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. The plaintiff thus has the burden to show falsity, publication, fault, and injury. Zacchini v. Hainrick, 19 FSM R. 403, 412 (Pon. 2014).

Torts – Defamation

Since truth is an affirmative defense to a defamation action, the court must distinguish between statements of fact and assertions of opinion, because opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth. Zacchini v. Hainrick, 19 FSM R. 403, 412 (Pon. 2014).

Torts – Defamation

Opinions, even if objectionable, are not actionable as defamation. An opinion is a personal comment about another's conduct, qualifications, or character that has some basis in fact, and whether a statement is an opinion, must be determined by the totality of the circumstances, including the forum in which the statement is made, the medium in which the statement was disseminated, and the audience to which it is published. Zacchini v. Hainrick, 19 FSM R. 403, 412 (Pon. 2014).

Torts – Defamation

When, from the totality of the circumstances, it is clear that the nature of a job reference is to ask for an opinion about the employee's characteristics and conduct and the nature of the numerical

scale for the opinion is not objective; when the defendant's oral answers were either true or non-verifiable opinions; when any undisclosed imputation was not necessarily and unequivocally false and therefore could not be the subject of an implied defamation claim; and when it is clear that the interview question is asking for an employer's opinion about what his previous employee's weaknesses were, those weaknesses are not verifiable as either right or wrong, and thus cannot be the subject of a defamation claim. Zacchini v. Hainrick, 19 FSM R. 403, 412-13 (Pon. 2014).

Torts – Defamation

Truth is an absolute bar to a defamation claim. Zacchini v. Hainrick, 19 FSM R. 403, 413 (Pon. 2014).

Torts – Defamation

An inference of falsity cannot be extended to non-verifiable opinions. Zacchini v. Hainrick, 19 FSM R. 403, 413 (Pon. 2014).

Torts – Defamation

Publication is a term of art, meaning that there was a communication to a third party person other than the person defamed. Zacchini v. Hainrick, 19 FSM R. 403, 413 (Pon. 2014).

Torts – Defamation

Without communication to another person a statement is of no consequence, but a statement is published even if made only to one other person. Furthermore, the publication must also be "unprivileged." When the publication is invited, procured, or consented to by the plaintiff, the publication is generally not deemed sufficient. Zacchini v. Hainrick, 19 FSM R. 403, 413 (Pon. 2014).

Torts – Defamation

Generally, establishing that the alleged defamatory statements were made to just one other person is enough, but when the statements were made to an employee of a reporting service that the plaintiff had hired, the plaintiff both invited and consented to the publication of the job references by signing up for the reporting service, and in doing so, requested that an agent procure the statements on his behalf, and legally, therefore, it cannot be said that the job reference was published to a third party under this term of art. Zacchini v. Hainrick, 19 FSM R. 403, 413-14 (Pon. 2014).

Torts – Defamation

In the employment context, references are protected by a qualified privilege, also known as the "merchant's" privilege. Responses by past employers to inquiries from prospective employers raise a conditional privilege based on the performance of a private duty. Zacchini v. Hainrick, 19 FSM R. 403, 414 (Pon. 2014).

Torts – Defamation

A communication derogatory of an employee's character or attributes, or concerning the reasons for his discharge or circumstances surrounding the termination of his employment generally, may be qualified, or conditionally privileged if made in good faith, in a reasonable manner and for a proper purpose. To overcome the merchant's privilege the plaintiff must demonstrate "express malice," or in modern terms, actual malice. Actual malice means that statements were made with knowledge of its falsity or a reckless disregard for the truth by clear and convincing evidence. Zacchini v. Hainrick, 19 FSM R. 403, 414 (Pon. 2014).

Torts – Damages; Torts – Defamation

Damages in defamation cases generally consider whether the allegedly defamatory statement: exposes the plaintiff to (public) hatred, contempt, ridicule or obloquy (shame or disgrace); causes people

to shun or avoid the plaintiff; or has a tendency to injure the plaintiff in his occupation or adversely affect the plaintiff's trade or business. Zacchini v. Hainrick, 19 FSM R. 403, 414 (Pon. 2014).

Torts – Damages; Torts – Defamation

Damages for defamation are divided into three categories, 1) punitive damages or exemplary damages, where actual malice or recklessness is shown; 2) special damages such as the loss of business which are recoverable only on proof of loss of specific economic benefits; and 3) general damages which follow inevitably from the defamatory imputation. General damages can include loss of reputation, shame, mortification, and hurt feelings. Zacchini v. Hainrick, 19 FSM R. 403, 414 (Pon. 2014).

Torts – Damages – Punitive; Torts – Defamation

Punitive damages resulting from the alleged defamatory statement cannot, under the express malice standard, be shown by inferences. Inferences are not enough. Zacchini v. Hainrick, 19 FSM R. 403, 414 (Pon. 2014).

Torts – Damages; Torts – Defamation

Speculative injury is not enough, with regard to special injury, it must be demonstrably shown. Zacchini v. Hainrick, 19 FSM R. 403, 415 (Pon. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Defamation

When, even considered in the light most favorable to the plaintiff, only one of the elements of defamation can be met, the inability to prove the other elements of the claim, necessarily requires that summary judgment be granted for the defendants with regard to the defamation claim. Zacchini v. Hainrick, 19 FSM R. 403, 415 (Pon. 2014).

Torts – Defamation

Defamation per se is words which on their face and without the aid of extrinsic proof are recognized as injurious. It is words that are obviously harmful without innuendo, colloquium, or explanation. The words must be susceptible of but one meaning, and that an opprobrious one. When the defamatory character of the statements is apparent on its face – that is when the words used are so obviously and materially harmful to the plaintiff that the injury to his or her reputation may be presumed. Zacchini v. Hainrick, 19 FSM R. 403, 415 (Pon. 2014).

Torts – Damages; Torts – Defamation

Defamation per se follows the ordinary defamation analysis, except the requirement to show special injury is waived when the disparaging statements impute a 1) criminal offense; 2) a loathsome disease; 3) a matter incompatible with his business, trade, profession or office; 4) or sexual misconduct. Zacchini v. Hainrick, 19 FSM R. 403, 415 (Pon. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Defamation

Summary judgment must be granted for the defendants on the plaintiff's defamation per se claim when, although the alleged defamatory remarks relate to the plaintiff's professional reputation, the business imputation is not apparent on the face of the words and the disparagement is only made by reference to the context and to innuendo to explain why those words are opprobrious. Zacchini v. Hainrick, 19 FSM R. 403, 415 (Pon. 2014).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Torts – Defamation

the defendants must be granted summary judgment on the plaintiff's defamation per se claim when the plaintiff cannot meet the legal standards necessary to prove the four elements of defamation at trial. The inability to prove even one element bars the claim. Zacchini v. Hainrick, 19 FSM R. 403,

415 (Pon. 2014).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On February 18, 2013, Plaintiff Patrick Zacchini (Zacchini) filed a Motion for Summary Judgment in this matter. On March 14, 2013, the Defendants filed an Opposition to Plaintiff's Motion for Summary Judgment and a Cross Motion for Summary Judgment. On April 9, 2013, Plaintiff filed an Opposition to FSM Government's Motion for Summary Judgment. On November 15, 2013, the court held a summary judgment hearing regarding two claims, but based on the arguments, must be analyzed as three separate causes of action: breach of contract, defamation, and defamation per se. Both parties were present at this hearing, and the court heard arguments from both sides. Attorney Mary Berman represented Zacchini and attorney Erick Divinigracia represented the Defendants.

Upon CONSIDERATION of the representations of the parties, and of the record and file contained herein, the court finds that there is a material issue of fact in dispute in the breach of contract claim; and, therefore, summary judgment is DENIED on the claim of breach of contract; conversely, summary judgment is GRANTED for the defendants on the claims of defamation and defamation per se. The court's decision is based on the following conclusions of fact and law:

I. FACTS

On November 13, 2010, Zacchini was offered and orally accepted a position as an Audit Supervisor with the FSM Office of the National Public Auditor (ONPA). On November 15, 2010, Zacchini commenced work pursuant to that agreement. On November 23, 2010, Zacchini formally signed and entered into a Special Services Contract (Employment Contract) for two years at a salary of $45,000.00 per annum. The Public Auditor, Haser Hainrick (Hainrick), of the ONPA signed the Employment Contract on behalf of the Government. On February 9, 2011, Zacchini took over the supervision of the ongoing Executive Branch Budget Overrun Audit (Audit).

On February 15, 2011, the ONPA was summoned to report before the FSM Congressional Special Committee (Committee) regarding perceived delays of the ongoing Audit. Zacchini was asked by Hainrick to attend the hearing to testify and answer to the Committee's questions regarding the ongoing Audit. At the hearing, Zacchini testified and guaranteed that on "his word of honor" he would complete the Audit in thirty (30) days. On March 21, 2011, the ONPA was again called to testify before the Committee regarding the progress of the Audit and to explain why the Audit was still not finished. Again, Zacchini was present at the hearing and he testified at that hearing. On March 25, 2011, Hainrick submitted a 15 page preliminary audit report to Congress titled: "Audit of Budget Over-Runs in Salaries and Benefits, Report No. 2011-04." On March 28, 2011, the Committee released a report entitled "Special committee Report No. 16-14."

On April 5, 2011, Zacchini sent a letter (Audit Letter) addressed to then Speaker Isaac V. Figir and copied to Fredrico O. Primo, Chairman of the Committee. This Audit Letter was supported by two attachments. One was an incomplete draft of the ongoing Audit. The other attachment was a five month old draft report that was given to him at the time that he took over the audit. On April 13, 2011, approximately one week later, Zacchini was terminated by written letter (Termination Letter) from Hainrick. The body of the Termination Letter is reproduced in full:

> Because you released confidential information of an on-going audit, I have decided to terminate your contract immediately under section 13 of the Special Services Contract. Per section 13, the Office of the National Public Auditor will pay you only for the reasonable value of the work that you have completed and no travel benefits.

The official reason stated for termination was the release of "confidential information" regarding the Audit. The Termination Letter further stated that pursuant to § 13 of the Employment Contract, Zacchini was to receive only the "reasonable value of the work you have completed" and Repatriation benefits under § 6 of the Employment Contract were therefore denied.

On May 1, 2011, Zacchini was hired by the Yap State Public Auditor's Office and he subsequently relocated to that state. Thereafter, Zacchini hired Allison & Taylor, through its internet website. Allison Taylor is a company that solicits job references from previous employers and then sends them to the recruiting employee so that the employee can see what is being written about him or her. On January 26, 2012, Sue Kallgren, a consultant for Allison & Taylor, completed a job reference interview in which Hainrick was asked to respond to a series of questions. Those questions and answers, are quoted below:

1. Are you able to enthusiastically recommend this person?
   Technically doing financial audits he's good. It's his interpersonal relationships with people he has problems with.

2. Is this person eligible for re-hire within your organization?
   No Way. He said he had to fire you.

3. Could you fully describe the circumstances and reason for the separation?
   I signed him up for a two year contract but something wrong happened. I had to fire him." I asked if it was something you did and he said yes but couldn't go into detail.

4. Could you describe any strengths and/or weaknesses of this individual?
   STRENGTHS
   financial audits
   WEAKNESSES
   Oh boy, a lot.
   Again he wouldn't go into detail.

5. Could you suggest anyone else that I should speak to regarding this individual?
   He didn't have anyone to suggest.

Additionally, Hainrick was asked to respond to a Performance Evaluation Questionnaire (PEQ) in which the employer was asked to rate the previous employee with a score from 1-5 across 15 different categories of employment ability. According to the instructions: 1 = Inadequate 2 = Poor 3 = Satisfactory 4 = Good 5 = Outstanding. Based on the results of this job reference review, and the recent termination, Zacchini alleges that he suffered from anxiety and depression, experiencing chest pains, stomach pains, and loss of sleep. Furthermore, Zacchini feared that he would be unemployable and would have to change professional careers.

On July 13, 2012, Zacchini filed the complaint in this matter.

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On July 13, 2012, Zacchini filed the complaint in this matter.

II. Standard of Review

FSM Civil Rule 56(c) requires that summary judgment to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court "must view facts and inferences in a light that is most favorable to the party opposing the judgment." FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 72 (Pon. 2001). A fact is material only if it might affect the outcome of the suit and the failure to prove "an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578 (Pon. 2002). "Where the party moving for summary judgment makes out a prima facie case which, if uncontroverted at trial, would entitle it to a directed verdict on the issue, then the burden shifts to the nonmoving party to offer some competent evidence that could be admitted at trial showing that there is a genuine issue of material fact." Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM Intrm. 3, 11 (Pon. 1989). "Unsupported statements of counsel at oral arguments do not qualify as competent evidence upon which a court could find a genuine issue for trial." Urban v. Salvador, 7 FSM Intrm. 29, 32 (Pon. 1995). Likewise, "Unauthenticated evidence is not competent, and cannot support a summary judgment motion." Fredrick v. Smith, 12 FSM Intrm: 150, 153 (Pon. 2003).

III. First Cause of Action: Breach of Contract

A contract is "a promise between two parties for the future performance of mutual obligations, which the law will enforce in some way. For the promise to be enforceable, there must be an offer and an acceptance, definite terms, and consideration for the promise." Goyo Corp. v. Christian, 12 FSM Intrm. 140, 146 (Pon. 2003). The terms of Zacchini's Employment Contract are stated, in pertinent part, under § 13:

> In the event the employee fails to commence employment on or about the date indicated above, or, if having commenced work the employee abandons the work, or fails to perform to the *reasonable satisfaction* of the Government, then the Government reserves the right to immediately cancel the contract and the Government will be liable only for the reasonable value of the completed work, if any, and shall not be liable for any of the travel benefits specified in Paragraph 6 of this Contract.

(emphasis added).

In this case, the reasonable satisfaction clause is in dispute by the parties. Zacchini contends that the termination was not reasonable under the circumstances. Specifically, Zacchini argues that he was required to testify before the congressional committee, and as a result of attending two congressional hearings, and after listening to congress' concerns and repeated requests for information and follow-up, he was compelled to report back, and did so in the Audit Letter. Reasonably, Zacchini argues, he cannot be fired for doing something he was required to do. The Defendants counter that Hainrick was not satisfied with Zacchini's work performance because he had missed deadlines he promised to congress, he had interpersonal problems with his work colleagues, and he was neither authorized, nor required, to send the Audit Letter. The Audit Letter was delivered to then Speaker Figir several days after his congressional testimony and at the time he was not under oath, subpoena, or direct order. In fact, Defendants argue that according to Zacchini's Deposition, the delivery of the Audit Letter was done intentionally outside of the knowledge of Hainrick and Zacchini knew that Hainrick did not approve it. Thus the Defendants argue that the manner in which it was executed was not only inappropriate, but by attaching the unfinished drafts of the Audit, Zacchini created a breach of confidentiality in the ONPA. Furthermore, Defendants argue that by sending the letter, Zacchini was

knowingly and intentionally trying to get fired. As evidence of this claim the Defendants cite the final paragraph of the Audit Letter:

> So I end this letter with the understanding of the consequences of writing to you, but would rather end it here and now than be put the blame without having any chance of defending myself. So that may mean two supervisors terminated back to back, which might say something or at least raise a question about what is going on at the ONPA.

Additionally, Defendants refer to the affidavit of Melvin Poll, the IT specialist at ONPA, who was told, "I'm going to try my best to get fired from work because I'm really tired of the management here" and later shook his hand and said, "this is an expression of an early goodbye from me to you. Be prepared, there will be fireworks soon." As well as an e-mail to Elina Paul, one of the auditors at ONPA, "My time here is coming to an end. Wow, I feel almost biblical. I just need a last supper. 'On the night he was betrayed . . . take this audit report and . . . do this in remembrance of me' . . . But I do not crash and burn alone."

Ultimately, whether the termination was "reasonable" in this case is a material issue of fact, in dispute. At the core of this dispute is the scope and contours of a duty to report to congress, if any existed at all. In turn, that duty determines whether Zacchini was obligated to send the letter and if the contents therein were protected. If understood in the light most favorable to Zacchini, this requires that Motion for Summary Judgment be denied on the Breach of Contract claim and the issue resolved by a full trial on the merits.

IV. Second Cause of Action: Defamation

Zacchini's second cause of action is a defamation claim. "The history of the law of defamation defies brief restatement. . . . and the cause of action is not well defined." Smith v. Nimea, 18 FSM Intrm. 36, 45 (Pon. 2011). "The tort of defamation includes libel and slander." 50 Am. Jur. 2d *Libel and Slander* § 1 (1995).[1] Generally, the "law of defamation embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks." *Id.* §§ 2. Tort claims, including defamation "are causes of action which arise under state law." Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 203 (Pon. 2001). The State of Pohnpei, however, does not have a civil code directly governing the tort of defamation, but "generally follows the Restatement approach in its law concerning tort issues." Peniknos v. Nakasone, 18 FSM Intrm. 470, 485 (Pon. 2012) (citing Koike v. Ponape Rock Products, 3 FSM Intrm. 57, 64 (Pon. S. Ct. Tr. 1998).[2] "A communication is defamatory if it tends so to harm the reputation of another so to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[3] *Id.* at

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[1] The FSM national courts have articulated a common law definition for the tort of libel which "may be defined as a false and unprivileged publication by writing or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which cause him to be shunned or avoided or which has a tendency to injure him in his occupation." Pohl v. Chuuk Public Utility Corp., 13 FSM Intrm. 550, 557 (Chk. 2005). Libel is a smaller subset of defamation, "libel is written or visual defamation; slander is oral or aural defamation." Black's Law Dictionary 934 (8th Ed. 2004).

[2] When national law merely provides the forum, the national courts must strive to "apply the law in the same way the highest state court would." Island Dev. Co. v. Yap, 9 FSM Intrm. 18, 22 (Yap 1999).

[3] This can be considered the threshold issue of whether a statement is objectively defamatory or merely subjectively offensive. "The gravamen or gist of an action for defamation is . . . it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his reputation and good name.

484 n.7 (citing the RESTATEMENT (SECOND) OF TORTS § 559 (1977)). The restatement identifies the four elements that must be proven in a defamation claim:

1. false and defamatory statement concerning another;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on part of the publisher; and
4. 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). In other words, to establish a cause of action for defamation, the plaintiff has the burden to show falsity, publication, fault, and injury. See 50 AM. JUR. 2D *Libel and Slander* § 21 (1995); *see* Peniknos v. Nakasone, 18 FSM Intrm. 470, 485 n.9 (Pon. 2012) (citing RESTATEMENT (SECOND) OF TORTS § 613 (1977)) ("Burden of Proof"). Like many modern definitions of defamation, this restatement incorporates the affirmative defenses into the "traditional element[s] of the plaintiff's prima facie case." Smith v. Nimea, 18 FSM Intrm. 36, 46 (Pon. 2011).

A. *Falsity*

First, "[t]ruth is an affirmative defense." Smith v. Nimea, 18 FSM Intrm. 36, 46 (Pon. 2011). Second, the court "must distinguish between statements of fact and assertions of opinion, because opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth." Smith, 18 FSM Intrm. at 46. Thus "opinions, even if objectionable, are not actionable as defamation." *Id.* "An opinion is a personal comment about another's conduct, qualifications, or character that has some basis in fact." 53 C.J.S. *Libel and Slander* § 12 (1987). Furthermore, whether a statement is an opinion, must be determined by the totality of the circumstances, "including the forum in which the statement is made, the medium in which the statement was disseminated, and the audience to which it is published." *Id.*

In this case, the court finds that the answers given in the PEQ were either truthful, or unverifiable opinions. The PEQ contained 15 categories and the employer was asked to grade the employee in each from 1-5. Hainrick answered each category giving Zacchini very high marks in some categories and low marks in others. Zacchini proffers many positive statements made in e-mails sent by Hainrick regarding his professional ability and achievements during his time at ONPA. Zacchini uses these e-mails to make the inference that Hainrick knowingly made a false statement later when responding to the PEQ. These e-mails, however, do not constitute competent evidence sufficient to survive a motion for summary judgment for two reasons. First, Hainrick's professional opinion of Zacchini changed during the course of the relationship. Second, while Zacchini demonstrated high professional ability in some aspects of his work performance, in others areas he failed to perform professionally. The depositions and affidavits suggest that Zacchini's interpersonal and management skills were lacking and his treatment of colleagues and employees who worked with him was at times demeaning and unreasonable. Thus, the answers to the PEQ are not necessarily contradicted by the e-mails of praise, and can be understood to merely reflect a more nuanced truth about Zacchini. Notably, some of the responses Hainrick gave in the PEQ attribute very high marks to Zacchini.

More importantly, from the totality of the circumstances, it is clear that the nature of a job reference is to ask for an opinion about the characteristics and conduct of the employee. In this case,

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It is not based "on any physical or emotional distress to the plaintiff that may result." 50 AM. JUR. 2D *Libel and Slander* § 4 (1995).

the PEQ requests opinions about 15 different character traits and skills using a number scale from 1-5. The nature of this scale is not objective. A one (1), a two (2), or even a four (4) with regard to an employee's oral communication skill cannot be demonstrated to be a false statement. It is an opinion. It may be objectionable, but by definition, it is not subject to falsification. It cannot be said that the Public Auditor's opinion giving a one (1) on "leadership skills" rather than a two (2) is wrong. While it is true that these numbers refer to "inadequate" or "poor" and "good" and have a relative value, the PEQ asks for his personal assessment of the employee in each category, to which Hainrick gave an answer.

Likewise, in the interview section that follows the PEQ Hainrick gave oral answers to several questions, and the court finds that the statements were true or non-verifiable opinions. When asked about the weaknesses of Zacchini, Hainrick answered, "Oh Boy a lot" but declined to articulate specifically what all of those weaknesses were. Zacchini argues that expression implies that there are undisclosed facts on which this opinion is based, and if those unstated facts had been disclosed, they would have been defamatory. The court, however, agrees with Hainrick, finding that the undisclosed imputation was not necessarily and unequivocally false and therefore cannot be the subject of an implied defamation claim. The evidence suggests that Zacchini had weaknesses as an employee, including, but not limited to, poor interpersonal relations, communication problems, and low managerial skills. If Hainrick revealed these weaknesses during the interview, they would have been truthful rather than defamatory. It is possible that Hainrick could have misrepresented Zacchini's weaknesses, had he spoken, but this speculation is not sufficient to establish legal success on an imputed defamatory statement; the implication must lead to definitely false conclusion. Second, from the totality of the circumstances, and the nature of an employment reference itself, is clear that the interview question is asking for an employer's opinion about what the weakness of his previous employee were. Again, what those weaknesses are is not verifiable as either right or wrong, and thus cannot be the subject of a defamation claim.

In conclusion, truth is an absolute bar and the inference of falsity cannot be extended to non-verifiable opinions. Thus Zacchini cannot legally prevail with regard to demonstrating the falsity of those statements if brought forth at trial.

B. *Publication*

Publication is a term of art, meaning that there was a communication to a third party person "other than the person defamed." Peniknos, 18 FSM Intrm. at 485 (citing RESTATEMENT (SECOND) OF TORTS § 577 (1977)). Without communication to another person the statement is of "no consequence." 50 AM. JUR. 2D *Libel and Slander* § 235 (1995). The statement is published, however, "even if made only to one other person." *Id.* § 243. Furthermore, the publication must also be "unprivileged." *Id.* § 21. When the publication is "invited, procured, or consented to by the plaintiff" the publication is generally not deemed sufficient. *Id.* § 238.

The court finds that the alleged defamatory statements were made to another person other than the one defamed. Specifically, the alleged defamatory statements were made to an employee of the Allison & Taylor reporting service, Sue Kallgren, when she performed the interview. Generally, establishing that the alleged defamatory statements were made to just one other person is enough. In this case, however, the court finds that Zacchini both invited and consented to the publication of the job references when he signed up for the Allison & Taylor reporting service. In doing so, Zacchini requested that an agent from Allison & Taylor procure the statements from Hainrick on his behalf. Thus, the responses to the questions can be understood as having been made to Zacchini himself, albeit through an agent, and those statements were privileged by his own consent. No other credible

evidence of publication to any other person was submitted to the court.[4] Legally, therefore, it cannot be said that the job reference was published to a third party under this term of art.

C. *Fault*

In the employment context, references are protected by a qualified privilege, also known as the "merchant's" privilege. 50 AM. JUR. 2D *Libel and Slander* § 331 (1995). "Responses by past employers to inquiries from prospective employers raise a conditional privilege based on the performance of a private duty." *Id.* "A communication derogatory of the character or attributes of an employee, or concerning the reasons for his discharge or circumstances surrounding the termination of his employment generally, may be qualified, or conditionally privileged if made . . . in good faith, in a reasonable manner and for a proper purpose." 53 C.J.S. *Libel and Slander* § 77 (1987). To overcome the merchant's privilege the Plaintiff must demonstrate "express malice," or in modern terms, actual malice. *Id.* § 77; *see* 50 AM. JUR. 2D *Libel and Slander* § 4-5 (1995). Actual malice means that statements were made with "knowledge of its falsity or a reckless disregard for the truth by clear and convincing evidence." *Id.* §§ 32-36.

In this case, the allegedly defamatory remarks were made in the employment context by Hainrick responding to a job reference verification from Allison & Taylor. Thus the court finds that the statements made should be protected under the merchant's privilege, and that the requisite level of wrongdoing is actual malice made by clear and convincing evidence. Although Zacchini suggests that possible animosity existed with Hainrick, by comparing his termination with that of Brian Nancekivell, Zacchini produced no evidence of actual knowledge of the falsity of any statements; no corroborating statements to other employees; or e-mails that articulate a malicious plan to harm Zacchini thereby. Innuendo and inferences of implied knowledge are not sufficient to establish a defamation claim under the merchant's privilege. Thus, Zacchini's evidence is not competent to prevail under this standard at trial.

D. *Injury*

Damages in defamation cases generally "consider whether the allegedly defamatory statement: exposes the plaintiff to (public) hatred, contempt, ridicule or obloquy (shame or disgrace); causes people to shun or avoid the plaintiff; or has a tendency to injure the plaintiff in his occupation or adversely affect the plaintiff's trade or business." Smith v. Nimea, 18 FSM Intrm. 36, 47 (Pon. 2011). Stated in more modern terms, "Damages are divided into three categories, 1) punitive damages or exemplary damages, where actual malice or recklessness is shown; 2) special damages such as the loss of business which are recoverable only on proof of loss of specific economic benefits; and 3) General damages which follow inevitably from the defamatory imputation . . . ." 50 AM. JUR. 2D *Libel and Slander* § 374 (1995). General damages can include "loss of reputation, shame, mortification, and hurt feelings." *Id.* § 375.

Punitive damages resulting from the alleged defamatory statement were not, and cannot, be shown by the evidence presented in this case. Under the express malice standard, inferences are not enough. Likewise, special damages cannot be shown. Zacchini was hired approximately two weeks after being fired, to fill a position at the Yap Public Auditor's office. This gap in employment, however,

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[4] A statement that is not known to the community, cannot affect the reputation of a person in that community. The lack of publication inherently defeats the gravamen of a defamation claim. The statements made by Hainrick were treated as "confidential" by Allison & Taylor and indicate that they were not disseminated in the community.

cannot be attributed to the defamatory statements because the allegedly defamatory statements were made after Zacchini relocated to Yap. Nor did Zacchini demonstrate that he actually lost any job opportunities as a result of a negative employment recommendation. Zacchini presents evidence of being rejected after one application was sent out, but the explicit reason for his failure to get the position was that it was filled internally, with no indication that a job reference had any negative impact. Zacchini suggests that other applications were also sent out, but Zacchini offers no letters of rejection, phone calls, e-mails, or other feedback indicating proof of an injury as a result of the alleged defamatory statements. Zacchini speculates, but this is not sufficient. Speculative injury is not enough, with regard to special injury, it must be demonstrably shown. Finally, general damages were shown. Through his own affidavit, Zacchini alleges that he experienced chest pains, stomach pains, and loss of sleep. Zacchini further alleges that he suffered from depression and marital problems. Finally, Zacchini alleges that he felt feelings of shame and hurt feelings. While documentation and attribution of these feelings to the defamatory statements would be difficult to establish at trial, Zacchini has presented sufficient evidence to survive a summary judgment motion on this element of the claim.

E. *Conclusion*

In short, only one of the elements of defamation can be met, even when considered in the light most favorable to Zacchini. The inability to prove the other elements of the claim, necessarily requires that summary judgment be granted for the Defendants with regard to the defamation claim.

V. Third Cause of Action: Defamation per se

The third claim raised by Zacchini is defamation per se. Defamation per se are "words which on their face and without the aid of extrinsic proof are recognized as injurious."[5] 53 C.J.S. *Libel and Slander* § 11 (1987). They are words that are obviously harmful "without innuendo, colloquium, or explanation." *Id.* They "must be susceptible of but one meaning, and that an opprobrious one." *Id.* "When the defamatory character of the statements is apparent on its face – that is when the words used are so obviously and materially harmful to the plaintiff that the injury to his or her reputation may be presumed." 50 Am. Jur. 2d *Libel and Slander* § 136 (1995). Thus, defamation per se follows the ordinary defamation analysis, except the requirement to show special injury is waived when the disparaging statements impute a 1) criminal offense; 2) a loathsome disease; 3) a matter incompatible with his business, trade, profession or office; 4) or sexual misconduct. *See* Restatement (Second) of Torts §§ 570-74 (1977).

It is not in dispute that the alleged defamatory remarks relate Zacchini's professional reputation; they are statements made while responding to questions regarding Zacchini's employment skills. The business imputation, however, is not apparent on the face of the words, "Oh boy a lot." The disparagement is only made by reference to the context and to innuendo to explain why those words are opprobrious. Additionally, the analysis of the four elements of defamation still apply, to a per se claim, with the exception of the need to show special damages, and Zacchini cannot meet the legal standards necessary to prove them at trial. The inability to prove even one element bars the claim. Therefore, summary judgment must be granted for the Defendants with regard to the defamation per se claim.

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[5] In contrast with ordinary defamation, historically called defamation per quod, the "injurious character of the words appears, not from their face in their usual and natural signification, but only in consequence of extrinsic facts showing the circumstances under which they were said." 53 C.J.S. *Libel and Slander* § 11 (1987).

VI. CONCLUSION

THEREFORE the Plaintiff's Motion for Summary Judgment is DENIED for all three claims including breach of contract, defamation, and defamation per se. Contrawise, Defendant's Motion for Summary Judgment is GRANTED in part, for two claims, including defamation and defamation per se. Ultimately, however, the court finds that there is a material issue of fact with regard the breach of contract claim that must be resolved through a full trial on the merits.

ACCORDINGLY, the parties are directed to confer and submit a joint submission on three possible trial dates and deadline dates for filing of pretrial statements no later than Friday, June 6, 2014. Upon receipt of the joint submission, an order will be issued setting the trial date and deadline date for filing of pretrial statements.

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FSM SUPREME COURT TRIAL DIVISION

EMANUEL "MANNY" MORI, Appellant, vs. MYRON HASIGUCHI and TRUK TRANSPORTATION CO., INC., Appellees.	APPEAL CASE NO. C1-2011 Civil Action No. 2008-1111

OPINION

Argued: February, 14, 2014
Decided: June 3, 2014

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, State Court of Yap

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