

JACKSON HENRY
v.
MORRIS DAVIDSON ET AL.

Civil Action No. 10-049

Supreme Court, Trial Division
 Republic of Palau

Decided: November 25, 2015

Counsel for Plaintiff William L. Ridpath

Counsel for Defendants Tim Roberts

[1] **Torts: Defamation**

To create liability for defamation there must be: (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.

[2] **Torts: Defamation**

When the subject of a defamatory statement is not a private person but a public official or a public figure, the requisite culpability is raised beyond the level of mere negligence. In such cases, liability will only be imposed if the publisher (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.

DECISION AND ORDER

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

This is a suit for defamation. Plaintiff, Mr. Jackson Henry, is a professional real estate broker and was, at all relevant times, Palau’s Ambassador to the Republic of China, Taiwan. Defendant Mr. Morris Davidson was the chairman of the board of directors of Defendant UK Investment Holdings Limited (“UKIHL”). In October 2005, Henry, representing a number of clans in Angaur, entered into an agreement (“the Agreement”) to lease clan lands to UKIHL, which would then develop the lands into a resort and tourist destination. After developments stalled, the professional relationship between Henry and Defendants deteriorated. In March 2010, Henry commenced this action, alleging that Defendants’ had caused two libelous advertisements to be published in the *Island Times*. Following a trial and the

submission of closing arguments having been submitted, the case is now ripe for judgment.

BACKGROUND

Before turning to the publications that are the subject of this action, it is first necessary to review the business transactions that provide a context for the publications' content.

I. The Agreement

The Agreement between the Angaur clans and UKIHL called for the development of the lands into a major international tourist destination, which included establishing and operating a new airline based in Angaur; upgrading existing runways and constructing and operating a new international airport; and building and operating a resort consisting of hotels and the development of real estate, commercial and office spaces, a shopping mall, a golf course, and a marina complex.

Under the terms of the Agreement, the clans agreed to lease the lands to UKIHL for 50 years, with the provision that, should Palauan law change to allow for 99-year leases, the lease term would automatically extend to 99 years. In exchange for the 50-year lease, UKIHL agreed to transfer to the clans 75 million shares of UKIHL and an additional transfer of shares should the 99-year term provision be triggered. Upon certain conditions being met, UKIHL agreed that it would purchase back 100,000 of the shares. Aside from these transfers of shares, no other payment for the leasehold appears in the Agreement.

The Agreement contained a sublease provision, granting UKIHL the right to sublease the lands, provided that the sub-lessee agreed to undertake the developments to which UKIHL had agreed. UKIHL agreed to immediately inform the clans of any sublease, and any proceeds from a sublease would be duly apportioned to the clans in the same manner it would be apportioned to shareholders of equal stature. The Agreement also specified that UKIHL would accept one nominee from the clans to sit on UKIHL's board of directors.

The clans agreed that they would assist UKIHL in obtaining the necessary planning and construction approvals for projects described in the Agreement and the Master Proposal Document ("MPD"), but the Agreement specified that the costs of obtaining the approvals would be borne by UKIHL. UKIHL agreed to engage professionals to develop a Master Plan for the development. Once the Master Plan was completed, the clans were to assist UKIHL in obtaining all the planning and building approvals required, but, once again, UKHIL was to bear the cost of obtaining these approvals.¹

¹ Henry claims that, under the terms of the Agreement, the clans had no obligation to assist UKIHL in obtaining approvals until after the Master Plan had been completed. This is true enough under ¶ 12 of the Agreement, which specifies that the clans'

Finally, UKIHL warranted that it would commence construction within three years' of the Master Plan's completion, and, subject to certain conditions, the clans could void the lease if construction did not commence in the three-year period.

II. Post-Agreement relationship

The relationship between the Angaur clans and UKIHL, as well as between Henry and Davidson, began to deteriorate in 2009 for several reasons. First, the clans learned that, in July 2006, a mere nine months after the UKIHL and the clans entered into the Agreement, Defendants, without informing the clans, subleased 10 acres of the lands to Pacific Investments Properties Limited ("PIPL"), a United Kingdom corporation, for roughly \$4 million. The clans believed that, under the terms of the Agreement, they were entitled to notification and were also owed a distribution of the proceeds from the sublease, which they never received. Second, the clans became increasingly dissatisfied with progress on the project as very little had been accomplished in nearly four years. In fact, as late as 2009, the Master Plan had yet to be completed. They complained that UKIHL's assurances of revenues from the development envisioned by the Agreement were not materializing. Third, the clans were frustrated that their designation of a UKIHL board member had not occurred as the Agreement required. In June 2012, the clans notified UKIHL of their intent to terminate the Agreement.

During the years after the Agreement was executed, Henry traveled to Malaysia and Singapore several times to meet with Defendants regarding the progress of developments in Angaur. UKIHL, through Davidson and Peter Moran, a UKIHL employee largely responsible for liaising with Henry, paid Henry, in cash or by check, monies for Henry's brokerage fees or to reimburse Henry for the travel expenses occasioned by these trips. UKIHL also gave Henry monies to give to the clans. The parties dispute the amount of money Henry received, the amount earmarked for the clans, and the amount over which Henry could exercise discretion in determining how much, if any, he must give to the clans. Defendants claim that any monies not earmarked for Henry's fees or travel reimbursement, were earmarked for the clans as payments required under the Agreement. Henry claims that such monies were given to him to distribute at his discretion in his efforts to placate the clans—which, as discussed in the preceding paragraph, were frustrated by the lack of progress on the development—or to persuade more clans and clan chiefs to support the development.

Having received reports, in late 2009, that the clans were dissatisfied by the lack of money they were receiving, Defendants began to investigate the payments they had

obligation kicked in "upon the commencement of the Master Plan." Pl.'s Ex. 1 at ¶ 12. Under ¶ 9, however, the clans' obligation to assist in obtaining the required approvals was conditioned on the projects' being described in the Clause C of the Agreement or in the MPD, both of which had been completed by the time the parties executed the Agreement. *See id.* at 4, ¶ 9.

made to Henry. At roughly the same time, Defendants discovered that Moran, without giving a reason and without notifying Defendants, had abandoned his office and residence and, in Defendants' counsel's own words, had "absconded to Perth," Australia. Defendants only discovered Moran's disappearance when, after Moran had failed to pay rent and utility bills for his office and residence, the landlord sealed the building and contacted UKIHL. Davidson testified that Moran "left the accounts and left the receipts and left everything in quite a shamble[s]" and stated that Moran would often neglect to properly document transactions. Davidson Dep. at 23, 25. UKIHL began examining the records in Moran's abandoned office immediately, but even after years of sifting through the documents, files, personal belongings, and other flotsam that Moran left in his wake, Davidson testified that Defendants were still investigating the records as late as August 2013.²

III. Publications

In March 2010, *Tia Belau* printed an article criticizing UKIHL's activities regarding the Angaur development. Among other accusations, the article stated that UKIHL had been circulating a letter claiming it had paid the clans over \$200,000; that Moran had told *Tia Belau* that the \$200,000 figure was inaccurate and that the receipts supporting the figure had been forged; and that UKIHL had not given the clans more than \$20,000 in goodwill payments.

In response, on March 12, 2015, UKIHL published a paid press release in the *Island Times*, subtitled "*Tia Belau* Attempts to Cover-up a Breach of Fiduciary Duty by Angaur Landowner's Power of Attorney, Palau Ambassador to Taiwan, Jackson M. Henry." In it, UKIHL denied the allegations of the *Tia Belau* article, criticizing it as "biased[,] one-sided report[ing]." Pl.'s Ex. 6 at 1. Regarding Henry, the press-release stated the following:

Ambassador Jackson Henry has received more than USD \$200,000.00 on behalf of the Angaur Clans for their land leased to UK-IHL but denies the receipts he signed as being bona fide. UK-IHL challenges Tia Belau and Jackson Henry to prove that the receipts are false.

Id.

In the March 26, 2010 edition of the *Island Times*, UKIHL published a paid advertisement attributed to Davidson, with the subtitle "Jackson Henry pulls bankrupt

² At that time, Davidson also testified that the investigation would be completed in within several weeks. Over two years later, the results of the investigation have not been exhibited to the Court.

Terry Griffiths out of a hat in a bid to aid and abet in covering up breach of fiduciary duty by Jackson M. Henry.” Pl.’s Ex. 7 at 13. The advertisement asked,

What did Jackson Henry do with the money UKIHL paid him? The money intended for the Clan Chiefs was misappropriated and not paid to the Chiefs!

....

... [W]hy did [Henry] make public and lie about only receiving US\$20,000.

... The answer is simple: Jackson Henry is a sneaky lying coward.

Id. (emphasis in original). The advertisement alleged that Henry lied by claiming that UKIHL had given monies to Henry to give to the Angaur clans and that Henry had failed to remit the monies to the clans. Relying on this allegation, the advertisement accused Henry of breaching his fiduciary duties to the clans by committing “theft” and “misappropriation of funds intended for the Angaur clans.” *Id.* at 13-14. The advertisement went on to label Henry “crooked,” a “[t]rickster illusionist,” and “a liar and con-artist of the worst kind.” *Id.* at 13.

Henry commenced this suit five days later, claiming that, based on the two publications described above, Defendants are liable to him for defamation.

ELEMENTS OF DEFAMATION

With one exception regarding evidentiary burdens, “Palau has no civil statute regarding tortious defamation.” *Ngiraingas v. Nakamura*, 18 ROP 225, 234 (2011); *see* 14 PNC § 4201. However, the Appellate Division, relying on the Restatements of the Law and U.S. case law, has set forth the standard for proving defamation:

- [1] To create liability for defamation there must be:
- (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.
- [2] However, when the subject of the statement is not a private person but a “public official” or a “public figure,” the requisite culpability is raised beyond the level of mere negligence as referenced in subsection (c) above:
- One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the

statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.

Ngiraingas, 18 ROP at 234-35. (quoting Restatement (Second) of Torts §§ 558, 580A).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. False and Defamatory Statements

In order to succeed on his defamation claims, Henry must identify statements made by Defendants that are both false and defamatory. *Id.* at 234.

A. Defamatory Statements

“A statement is defamatory ‘if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’” *Remengesau v. Diaz*, 18 ROP 170, 173 (2011) (quoting Restatement (Second) of Torts § 559). Such disparagement need not influence the entire community:

[a] communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all his associates, nor even in the eyes of the majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them

Restatement (Second) of Torts § 559, cmt. e. A statement may be defamatory though it “be made by innuendo, by figure of speech, by expressions of belief, by allusion . . . [,] by irony or satire . . . [, or by a] conditional or alternative statement It is enough that the language used is reasonably capable of a defamatory interpretation” *Id.* § 652, cmt. c. A defamatory statement may consist of a statement of fact, *id.* § 565, or of opinion, so long as the opinion “implies the allegation of undisclosed defamatory facts as the basis for the opinion,” *id.* § 566. “The plaintiff has the burden of proving that the communication of which he complains is defamatory.” *Id.* § 613, cmt. c.

Here, Henry has failed to prove that, standing alone, the statements that he received \$200,000 and that some or all of those funds were earmarked to the Angaur clans is defamatory. Although the parties presented copious evidence and argument regarding the precise amount Henry received from Defendants, none of the evidence presented by Henry suggests that publication of the amount of money he received, in isolation, would constitute defamatory content. The total amount is only relevant in the context of other statements the Defendants made within the publications at issue: if Henry received \$200,000, some or all of it earmarked for the clans, then the Defendants’ statements regarding the portion of the \$200,000 that Henry remitted to the clans, might be defamatory, assuming Defendants accused Henry of remitting a portion less than that owed to the clans. Because the statements that Henry received \$200,000 and

that a portion of it was earmarked for the clans are not independently defamatory, the Court need only determine the total amount Henry received if doing so is necessary to determine whether Defendants are liable for the other statements in the publications. *See id.* § 614, cmt. b (“The court determines whether the communication is . . . defamatory in character. If the court decides against the plaintiff upon . . . th[is] question[], there is no further question . . . and the case is ended.”). Since, as demonstrated below, the other statements may be evaluated without referencing the total amount Henry received, the Court makes no finding on the issue.

On its face, Defendants’ statement that Henry failed to remit to the Angaur clans funds given to him by UKHIL to forward to the clans is defamatory.³ So too are the statements that Henry breached a fiduciary duty owed the clans by keeping for himself funds intended for the clans, that he misappropriated funds given him by Defendants, and that he thieved from the clans. The Court finds that these accusations tended to harm Henry’s reputation in the community and to deter others from associating and dealing with him. *See Remengesau*, 18 ROP at 173; Restatement (Second) of Torts § 559. Likewise, the imputations directed at Henry based on these accusations—that he was “crooked,” a “[t]rickster illusionist,” and “a liar and con-artist of the worst kind,” Pl.’s Ex. 7 at 13—constitute opinions that imply allegations of defamatory facts as a basis, *see* Restatement (Second) of Torts § 566, and that are, in themselves, defamatory.

B. False Statements

Because Henry has alleged that the defamatory statements made by Defendants are false, the burden shifts to Defendants to prove that their statements are true. 14 PNC § 4201 (“The plaintiff in a defamation action shall be required to allege that the offending publication is false. Once this allegation is raised, the burden of proof shall

³ The Court finds that UKIHL’s statement in its March 12, 2010 paid press-release that Henry received \$200,000 on behalf of the clans and denied receiving it, coupled with UKIHL’s challenge in the very next sentence for Henry to prove that UKIHL’s receipts were false, was intended to express the factual assertion that Henry had been given funds to remit to the Angaur clans and had failed to forward the funds to the clans. *See* Restatement (Second) of Torts § 563 (“The meaning of a communication is that which the recipient . . . understands that it was intended to express.”); *id.*, cmt. c (explaining that “[t]he defamatory imputation may be made by innuendo[or] by figure of speech”). This finding is supported by the subtitle of the press-release which accused Henry of breaching his fiduciary duties to the clans, an assertion the Court finds could only arise from an implied allegation that Henry kept for himself funds intended for the clans. *See id.*, cmt. d (explaining that newspaper article’s text and headline may be read together to “explain or qualify a defamatory imputation”).

shift to the defendant to show that the publication is true.”).⁴ No published opinions address the standard of proof under which a defendant must labor to prove that his statement is true. This Court declines to delineate the standard because, even under the standard most favorable to the Defendants—preponderance—the Court concludes that they have failed to prove the truth of their statements, all of which essentially assert that Henry kept for himself funds that UKIHL gave to him to remit to the Angaur clans.

At trial, Defendants relied heavily on evidence that UKIHL funds were given to Peter Moran, who was supposed to furnish the monies to Henry, who, in turn, was supposed to furnish some of the funds to the clans. Defendants offered evidence that Moran received over \$200,000 intended to be given Henry in relation to the Agreement, and the Court finds by preponderance that Moran, in fact, received these funds. Defendants have failed, however, to prove that all \$200,000 was given by Moran to Henry. In a series of self-signed, mostly undated receipts, Moran declared that he forwarded the funds to Henry. However, Moran did not appear at trial to substantiate these receipts, and, as discussed further below, receipts bearing only Moran’s attestation are of doubtful validity. The Court finds Moran’s attestations not credible and his receipts of limited evidentiary value. Henry, on the other hand, testified at trial and denied receiving a considerable portion of these payments. He admitted receiving payments from UKIHL that totaled substantially less than \$200,000, and his account is substantiated by a separate series of dated receipts bearing his signature. The Court credits Henry’s testimony and finds that he, in fact, received substantially less than the amounts UKIHL gave to Moran.

Moreover, Defendants failed to demonstrate, to any degree of certainty, exactly what portion of the funds forwarded to Henry were intended to be given by Henry to the Angaur clans. The Agreement, although it alludes to UKIHL’s responsibility to pay for the clans’ efforts to secure permitting for the development, never specifies what amount such payments would be. Nonetheless, it is undisputed that some monies were furnished to Henry for him to deliver to the clans. It is also undisputed that some payments were earmarked to defray Henry’s expenses or to pay Henry for his services. What is hotly disputed, however, is how much of the payments were intended for Henry personally and, more to the point, how much of these payments instead were intended to be delivered by Henry to the clans. A review of the series of receipts

⁴ Appellate Division opinions decided after the enactment of § 4201 state that a plaintiff in a defamation suit retains the burden to prove a statement’s falsity and to do so by clear and convincing evidence. *See Ngiraingas*, 18 ROP at 234-35 (citing *DiBella v. Hopkins*, 403 F.3d 102, 115 (2d Cir. 2005)). These opinions appear not to have considered § 4201, and this Court will apply the statute.

bearing Henry's signature demonstrates a total of \$72,921.34 and RM⁵ 48,000 transferred to Henry from UKIHL. Of this, the receipts specified that \$24,000 and RM 36,000 was intended for the clans and that \$4336.02 and RM 10,000 was intended for Henry. The receipts do not clearly specify to whom the remaining USD \$44,585.32 and RM \$2000 was to be paid. Henry testified that most of the funds for which receipts designate the clans as recipients and funds for which receipts do not specify any purpose were given to him to use, at his own discretion, to placate the clans that were angry about not receiving any revenues from the Agreement and to obtain further support from other clans. Thus, the evidence regarding how much money was intended for the clans is not conclusive. In the end, it is unnecessary to determine what amounts were earmarked for the clans; all that need be said here is that Defendants failed to prove that amount.

Most importantly, whatever the amount given to Henry by UKIHL to give to the Angaur clans, Defendants have not proved that Henry failed to remit that amount to the clans. There is little evidence regarding what amounts the clan received. Again, the Agreement alludes to the fact that UKIHL would pay the clans for preliminary efforts at obtaining approvals, but it does not specify the amount of those payments or how the amount would be determined. The only other evidence regarding Henry's payment to the clans comes from Henry, who furnished receipts, signed by clan chiefs, for payments to the clans totaling \$10,000 in early 2009. Henry claims, without any contradictory evidence, that he also forwarded \$3000 to the clans in early 2006 and an unspecified amount in early 2007. The Court finds no reason not to credit Henry's accounts.

In short, Defendants have failed to demonstrate what amounts Henry was supposed to deliver to the clans and what amounts he, in fact, did deliver to the clans. Without these figures, the Defendants have not proved that Henry failed to deliver monies intended to be paid to the clans. Accordingly, Henry has proved the first element of his defamation claim: the Defendants' statements—all premised on the assertion that Henry kept for himself monies intended for the clans—are defamatory and false.

II. Unprivileged communication to a third party

Henry is required to prove that Defendants communicated the statements at issue to a third party. *Ngiraingas*, 18 ROP at 234; Restatement (Second) of Torts § 558. Defendants have not contested this element, and the Court finds that the Defendants' publications in the *Island Times* amount to communication to third parties.

⁵ "RM" refers to Malaysian Ringgit, a currency not easily converted into United States dollars over the relevant period.

III. Fault: knowledge of falsity or reckless disregard for the truth

Henry concedes that he was a public official at all relevant times and, thus, that he must prove heightened culpability on the part of Defendants. Specifically, he must prove either that Defendants knew the statements were false and defamatory or that Defendants acted with reckless disregard for the false and defamatory nature of the statements. See *Ngiraingas*, 18 ROP at 234-35; Restatement (Second) of Torts § 580A.

Henry does not attempt to prove that Defendants acted with knowledge of their statements' falsity; rather, he relies solely on the Restatement's "reckless disregard" provision. "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." *Ngiraingas*, 18 ROP at 237 (citing Restatement (Second) of Torts § 580A, cmt. d). In *Ngiraingas*, the Appellate Division explained that a defendant's "belief that the statements were true will not insulate him from liability if the statements were not made in good faith [because] one may act with reckless disregard for the truth or falsity of a statement by publishing the statement despite an actual, but irrational, belief that the statement is true." *Id.* at 238). For support, the Appellate Division relied heavily on *St. Amant v. Thompson*, 88 S. Ct. 1323 (1968):

"The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, *recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*"

Ngiraingas, 18 ROP at 238 (emphasis added) (quoting *St. Amant*, 88 S. Ct. at 1326). Thus, under the "reckless disregard" provision, at a minimum, Henry must prove that Defendants had serious doubts as to their statements' truth or obvious reasons to doubt the veracity of the informant on whose word their statements were based or the accuracy of the informant's reports. Henry has the burden to prove reckless disregard by clear and convincing evidence. *Id.* at 237 (citing Restatement (Second) of Torts at § 580A, cmt. f.).

Defendants' basis for publishing that Henry had misappropriated funds intended for the Angaur clans were the two series of receipts described above. One series of receipts, all of which were undated and signed by Moran, documented transfers made from UKIHL to Moran and declared that Moran had forwarded the funds described therein to Henry. The other series, dated and signed by Henry, documented transfers

made from Moran to Henry. Defendants claimed that, based on these series of receipts, they believed that Henry received some amount of money and that, because the clans had become frustrated at receiving no revenue from the Agreement, Henry had failed to deliver the money to clans as he was obligated to do.

Comparison of the two series of receipts would show, at the very least, that there was a discrepancy between what Moran declared he had forwarded to Henry and what Henry said he received from Moran. This should have aroused doubt that Henry, in fact, received the full amount that Moran declared in his receipts.

Even more doubt should have been provoked by Defendants' knowledge that Moran, without giving a reason and without notifying Defendants, had abandoned his office and residence and fled to Australia. Moran's sudden and inexplicable disappearance should alone have been reason to cast doubt on his account of the transfers between him and Henry. Yet Defendants had even more reason to distrust Moran's records: Davidson testified that Moran's accounts, receipts, and, indeed, his entire office was "a shamble[s]." Furthermore, Davidson's own testimony demonstrated that he was aware that Moran often failed to properly document transactions with timely receipts. Indeed, with little beyond Moran's receipts to go on, Defendants' counsel candidly acknowledged at the end of trial that Defendants could not prove the amounts that Moran gave to Henry.

Confronted with Moran's dubious records, Defendants maintain that they "had no reason to believe . . . Moran was not giving the money represented by the receipts to . . . Henry." Def.'s Closing Argument at 7. On the contrary, the Court find that Defendants had multiple reasons to seriously doubt the accuracy of Moran's self-attested receipts, and the Court does not credit any of Davidson's deposition testimony suggesting the opposite. Consequently, the Court finds by clear and convincing evidence that Defendants had serious doubts as to the statements' truth because they had obvious reasons to doubt Moran's veracity and the accuracy of his reports, which provided the primary basis for the statements published in the *Island Times*. Accordingly, Henry has met his burden to prove that Defendants acted with reckless disregard of the falsity and defamatory nature of their statements.

IV. Actionability or special harm

Defendants argue at length that Henry failed to prove special harm at trial; however, Henry abandoned any case bottomed on proving the element of special harm by requesting only nominal and punitive damages and damages based on mental anguish.⁶ See Pl.'s Closing Argument at 10-11.

⁶ Mental anguish, which amounts to emotional distress, although it constitutes a special harm, is not, alone, one that is sufficient to meet the special harm prong of the final element of a defamation suit. See Restatement (Second) of Torts § 623, cmt. a. Instead,

The Restatement is clear that Henry need not prove special harm as an element of his defamation suit. First, the publications at issue constitute libel, which subjects the publisher to liability even though no special harm occurs. *See* Restatement (Second) of Torts § 568(a) (defining libel); *id.* § 569 (requiring no special harm for libelous publications). Second, the publications, even if not libel, would subject the publisher to liability regardless of special harm because the publisher imputed to Henry a criminal offense and a matter incompatible with his trade and public office. *See id.* § 570(a), (c) (requiring no special harm for slander amounting to imputation of criminal offense or matter incompatible with subject's trade or public office); *id.* § 571 (defining criminal offense under § 570(a)); *id.* § 573 (defining matter incompatible with trade or public office under § 570(c)). Although Henry has pled some special harm based on mental anguish, proof of special harm is not necessary to meet the elements of his defamation suit.

V. Defenses

Defendants raised two affirmative defenses to Henry's suit for defamation: (1) that the statements they published were true and thus not actionable, *see id.* § 581A ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."), and (2) that the statements were conditionally privileged because they were made in response to Henry's statements defaming Defendants, *see id.* § 594 (privileging defamatory statements made in the protection of publisher's sufficiently important interest).

These defenses are non-starters. First, Defendants have the burden of proving the truth of the published statements in order to find protection under the affirmative defense of truth. *See id.* § 581A, cmt. b. As the discussion in Part I demonstrates, Defendants have not met this burden. Second, Defendants are not entitled to the protection of a conditional privilege to publish a defamatory matter, when that privilege is abused by publishing despite knowledge of, or reckless disregard for, the falsity of the matter published. *See id.* §§ 594, cmt. a, 599, 600, 602.

VI. Remedies

Having proved his case-in-chief, Henry is entitled to certain remedies. First, because the statements published by Defendants constituted libel and, even if not libel, would still be actionable slander per se, Henry is entitled to at least nominal damages. *See id.* § 620 ("One who is liable for a slander actionable per se or for a libel is liable for at least nominal damages.").

once a plaintiff has proved his case-in-chief, he may then prove injury from mental anguish or emotional distress as an element of his damages recovery. *Id.*

Second, the Court finds that Henry is entitled to damages from the mental anguish caused by Defendants' defamatory publication. Under the common law in the United States, proof of emotional distress sustained by reason of the publication was not necessary so long as the publication was one that would normally produce emotional distress. *Id.* § 623, cmt. b. This rule changed when the United States Supreme Court concluded that proof of actual injury was necessary in a suit for defamation based on negligent publication. *Id.* §§ 621, cmts. b-c, 623, cmt. b; *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Both the Supreme Court and the Restatement, however, declined to conclusively determine whether proof of injury was necessary in a case, such as this one, in which the defendant knew the publication was false or published with reckless disregard for its falsity. Restatement (Second) of Torts §§ 621, cmts. b-c, 623, cmt. b. Despite the uncertainty, in the end, the black letter rule from the Restatement is that “[o]ne who is liable to another for a libel or slander is liable also for emotional distress . . . that is proved to have been caused by the defamatory publication. *Id.* § 623 (emphasis added). Thus, Henry is entitled to damages for mental anguish if he proves that Defendants' publications caused him emotional distress.

Henry testified to the negative impacts these defamatory publications had on him as a person. He testified that the publications that he had stolen monies from the Angaur clans made him a pariah in Taiwan and Palau:

When these things go[] to the media, like every issue in the newspaper, you know, really, every Palauan in Palau could not miss this very, very, very bad ad. It was just tearing me apart I was not getting a single phone call in my office And so I kind of realized that the community was, you know, was staying away from me for all those months [O]n the other personal side . . . , I couldn't really concentrate on my work because . . . I'm a very sensitive person. And when you see an ad like this in the newspaper . . . telling you you've stolen \$200,000.00, it's really a traumatic experience. . . . You can't concentrate on your work.

. . . .

. . . [W]hen this thing happened, I go to a restaurant, people don't even look at you. It's like you have a bad case of the mange or . . . bubonic plague. It was terrible.

Henry Dep. at 24-25, 27.

Henry further testified that, after the statements were published, he hosted a function in his capacity as Palau's Ambassador to the Republic of China, Taiwan. The Taiwanese officials who would normally attend such a function purposefully declined to appear. They did not want to associate with a man branded a thief, and they awaited Henry's resignation. Soon Henry decided he was no longer able to represent Palau as an ambassador and, indeed, voluntarily resigned his post.

The Court credits Henry's testimony and finds that Defendants' publications caused Henry mental anguish and emotional distress within the meaning of Restatement (Second) of Torts § 623. In a nation with a small populace, statements in one of the only two regularly published newspapers claiming that a well-known public official has thieved from his friends and peers is precisely the type of publication that would normally cause emotional distress. And, in this case, the statements did, in fact, cause emotional distress. Accordingly, Henry is entitled to damages based on his mental anguish caused by Defendants' publications.

Third, the Court finds that Henry is entitled to punitive damages. The Restatement notes that, in the United States, the *Gertz* decision disallows punitive damages in cases where a defendant acts with negligence regarding the falsity of his statement. Restatement (Second) of Torts § 621, cmt. d. In a case, such as this one, where a defendant acts with knowledge of, or reckless disregard for, the falsity of the statement, the Restatement does not take a position on whether punitive damages are permitted. *Id.* The Court concludes that punitive damages are permitted in defamation cases, such as this one, that are bottomed on a defendant's knowledge of the publication's falsity or with reckless disregard for its falsity because the deterrence and punishment of such conduct fits within the purposes of punitive damages. *See id.* § 908, cmt. a (defining purposes of punitive damages).

“Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.” *Robert v. Ikesakes*, 6 ROP Intrm. 234, 242 (1997) (quoting Restatement (Second) of Torts § 908(2)). “Factors to be considered in assessing punitive damages include ‘the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.’” *W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2008) (quoting Restatement (Second) of Torts § 908(2)). Moreover, a court may consider the expense the plaintiff has incurred in protecting his interests. *Robert*, 6 ROP Intrm. at 242-43; Restatement (Second) of Torts §§ 908, cmt. e, 914, cmt. a.

The Court finds that Defendants' conduct in publishing the statements was outrageous within the meaning Restatement (Second) of Torts § 908(2). Outrageousness, in that provision, consists of acts done either out of a wrongful motive or with reckless disregard for another's rights. Restatement (Second) of Torts § 908, cmt. b. Here, we are not left to guess at Defendants' motive for publishing the defamatory statements. In the March 26, 2010, paid advertisement, Defendants, speaking directly to Henry, stated that they desired to “prove to Palau that you are an opportunist, liar and a con-artist of the worst kind” and promised that Henry would “pay dearly.” Pl.'s Ex. 7 at 13-14. These statements, open to the entire community of Palau, clearly demonstrate a purpose to deliberately harm Henry's reputation as a means of reprisal for perceived wrongs he had done. The Court finds this purpose sufficiently wrongful to support the imposition of punitive damages. *See* Restatement

(Second) of Torts § 908, cmt. b. Moreover, even if Defendants lacked the requisite wrongful intent, the Court finds that Defendants acted with reckless disregard to Henry's rights by publishing defamatory statements when, as discussed in Part III, there existed obvious reasons to seriously doubt the veracity of the reports on which the statements were based.

The Court also finds that the extent and nature of the harm to Henry further supports, to a limited degree, the imposition of punitive damages. The fact that Defendants' publications succeeded in achieving their intended wrongful purpose is all the more reason to punish and to deter conduct of this nature on the part of others. *See id.* § 908(1) & cmt. a. Moreover, the Court notes that Henry has spent over five years litigating his defamation suit, presumably at great expense, in order to protect his reputational interests.

The Court likewise finds that Defendants' wealth, to a limited degree, supports the imposition of punitive damages. Defendants have nowhere asserted that they are unable to pay a judgment for damages entered by this Court, and throughout their filings, they asserted that the Lease Agreement, which they intended to effectuate, was worth nearly \$2 billion and that the \$200,000 they claimed to have paid to Henry was a trifling amount.

For the foregoing reasons, the Court finds Defendants jointly liable for defamation based on their two publications in the *Island Times*. The Court awards Henry nominal damages of \$5,000.00 for each of the two publications for a total of \$10,000.000. *See* Restatement (Second) of Torts §§ 577A, 907, cmt. c. The Court also awards Henry the requested amount of \$7,500.00 in damages for mental anguish. The Court finally awards Henry \$70,000.00 in punitive damages.