FOR PUBLICATION

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

WILLIE TAN and BENIGNO R. FITIAL,
Plaintiffs-Appellants,

v.

YOUNIS ART STUDIO, INC., dba MARIANA'S VARIETY,
Defendant/Third Party Plaintiff-Appellee,

v.

STANLEY T. TORRES,
Third Party Defendant-Appellee

SUPREME COURT NO. CV-04-0004-GA
SUPERIOR COURT NOS. 01-0624 & 03-0116

OPINION

Cite as: *Tan v. Younis*, 2007 MP 11

Argued November 18, 2004
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, F. PHILIP CARBULLIDO, Justice *Pro Tem*, and ROBERT J. TORRES, Justice *Pro Tem.*

DEMAPAN, Chief Justice:

¶ 1 Appellants Willie Tan and Benigno R. Fitial challenge an order for summary judgment in favor of Younis Art Studio, Inc. Because we find Tan is a public figure, Fitial is a public official, and since Tan and Fitial have not demonstrated Younis Art Studio, Inc. acted with actual malice, the trial court was correct in dismissing Tan and Fitial's defamation claims. Accordingly, summary judgment is AFFIRMED.

I

¶ 2 Tan and Fitial charge the *Marianas Variety* newspaper and its publisher, Younis Art Studio, Inc. (collectively "*Variety*"), of defamation. The alleged defamatory statements were published in the *Variety* as political advertisements, placed by Appellee Stanley Torres. These political advertisements contained re-prints of a letter Torres wrote to Fitial,[1] then Speaker of the

[1] Torres's letter reads:

> Dear Speaker Fitial:
>
> I am writing this letter because I think it is important that the voters knows who they are voting for.
>
> Since you are bragging and claiming credit for repealing the Foreign Investment Act in 1982, and that you were the one who brought in the garment factories and their other related businesses such as their own barracks for 4,000 Chinese and other foreign country nationals workers, cardboard box factories, Century Insurance, Century Travel Agency, Century Finance, Century Hotel, CTSI Trucking and Transfer, Shipping Lines, Shirley's Café, Sunset Apartments at the Navy Hill for the Hospital Staff Housing and maybe soon to own the Verizon Telephones Company in the CNMI. I have no problem with them. However, I am sure that the voters must be well informed of your participation in these businesses, and I am sure that they will all appreciate it.
>
> Pues [sic], if you are going to be elected the Governor of the CNMI, and like many of your supporters are telling us about your sincere, honesty and trustworthy, you owe the people of the CNMI to tell the TRUTH about the over One Hundred Thousand Dollars you received in CASH, that you said you got from your friend, Mr. Tan, the money you smuggled out of the Philippines while you were the Vice Speaker of the House of Representatives in 1985?
>
> Was the money Mr. Tan paid you for repealing the Foreign Investment Act? Was the money you received from Mr. Tan for L&T Garment and Poker machines which flowed into the CNMI? Was it that money which let Mr. Tan walk into the Lower Base government buildings and public lands

House and gubernatorial candidate, on October 19, 2001.[2] Torres wrote the letter on official House stationary in his capacity as a member of the House of Representatives, and addressed it to Fitial, in Fitial's official capacity as Speaker of the House of Representatives.

> to become the largest garment factory in the CNMI, thanks to very cheap rental fees, and isn't that the TRUTH?
>
> Mr. Tan's garment factory is the only one on public lands, all other garment factories are on private lands and are paying millions of dollars to private land owners while Mr. Tan's garment is making millions and millions of DOLLARS on merely $18,000 per year of rental fees, and that is the TRUTH.
>
> Ben, tell the people the TRUTH. How many poker machines do you have or how many machines did Mr. Tan give you to operate and share the profits? Please tell the people the TRUTH why Mr. Tan designated you to be the Director of the Bank of Saipan where Mr. Tan owns 30% of the Bank? And as some time ago you were the Chairman of the Board of the Bank too? Tell the people of the CNMI that you are also sitting on the Board of Directors of the MARIANAS CABLE VISION (MCV), representing Mr. Tan's $400,000.00 controlling interest. Please tell the people the TRUTH that you are the President of the Saipan Tribune Newspaper which is wholly owned by Mr. Tan.
>
> I understand that the Tan's Holding Company is also one of the Bidders to buy-out the VERIZON Telephone System in the CNMI. I wonder if you are and I wouldn't be surprised if you are also a player in this venture and if it will become a reality. Are we going to repeal again the Commonwealth Telecommunications Commission (CTC) to the new owners favor? Just wondering.
>
> Ben, tell the CNMI people the TRUTH that Mr. JERRY TAN, the brother of MR. WILLIE TAN, once said that the people of the CNMI are all crooks, that the Saipanese are accessible to BRIBERY, everybody is or are related to the Governor and are coming to us to trade favors for money. Remember, I've said this for several times and Jerry did not object it. Isn't that an arrogant and an insulting statement of JERRY TAN to the people of the CNMI? Ironically, look where are they now and how long they've been here?
>
> While everybody has heard the rumors of your "VOTE BUYING", I know of personal loans pay offs on behalf of the Committee to Elect Benito R. Fitial..
>
> Ben, didn't the Tans pay their way into the CNMI through your receiving that money? If you think (in your favorite term) that I am a hypocrite, think twice. You know that I know all the facts.
>
> Sincerely,
> /s/
> Rep. Stanley T. Torres

Excerpts of Record ("E.R.") at 54-55.

[2] Tan and Fitial concede Torres's letter is not defamatory, yet maintain the advertisements containing reprints of Torres's letter are defamatory.

¶ 3 Prior to its publication in the *Variety*, Torres's letter was entered into the record of the 12th House of Representatives, filed with the House Clerk, and made a part of the legislative journal. The letter accuses Fitial of smuggling $100,000 from the Philippines in 1985, when Fitial was Vice-Speaker of the House. The letter also questions whether the $100,000 was from Tan, a well-known Commonwealth businessman, for repealing a statute, and whether those and other funds were bribes assuring the commercial success of Tan in the Commonwealth.

¶ 4 Three days after Torres wrote the letter, the *Variety* printed a front page article discussing it. The article's headline read, "**Torres accuses Fitial of accepting bribe**," followed by a caption reading, "*Fitial calls allegation 'absurd'*." The article reprinted Torres's accusations against Fitial, as well as excerpts from Fitial's media release denying the accusations. The *Variety* contacted Tan's legal counsel for a statement prior to publication but did not receive a response in time to include it. Two days later, the *Variety* printed a follow-up story in which Torres claimed to have evidence substantiating his claims. That article contained no response from either Fitial or Tan.[3]

¶ 5 On October 25, 2001, Torres ran a paid political advertisement in the *Variety* which included his letter accusing Tan and Fitial of criminal activity. The advertisement contained the letter's full text, a photograph of Torres, and the following additional statements in large lettering: "I don't hide behind legislative shield to tell LIES. I don't go to daily Mass and receive Holy Communion and tell LIES." Prior to publishing the advertisement, the *Variety's* advertisement manager, Jeannette Sarabia, approached Abed Younis ("Younis"), the *Variety's* owner, to get his approval. Sarabia sought approval because she thought the advertisement was "questionable." Younis approved the publication without additional investigation beyond that conducted by reporters for the previous articles.

[3] Tan and Fitial do not challenge the October 22, 2007 article or the October 24, 2007 article as defamatory.

¶ 6 That same day, Tan sent Torres a letter demanding Torres retract his statements accusing Tan of bribery. Rather than retracting his statements, however, Torres republished his political advertisement along with excerpts from Tan's retraction demand and his response: "RETRACTION? OVER MY DEAD BODY." This advertisement appeared in the *Variety* on October 26, November 1, and November 2, 2001.

¶ 7 In November, 2001, after the general election, Tan filed a defamation claim against the *Variety*. Tan also filed a separate lawsuit against Torres, which they later settled, resulting in a joint statement in which Torres apologized for "any damages caused to Willie Tan as a result of his statements accusing Willie Tan of criminal conduct." In March 2003, Fitial filed a defamation claim against the *Variety*. In both of these civil actions, the *Variety* filed a third-party complaint against Torres. The two cases were subsequently consolidated for trial.[4]

¶ 8 In their pleadings before the trial court, Tan denied bribing Fitial and Fitial denied being bribed. However, Tan admitted Fitial took, or caused to be taken, at least $100,000 out of the Philippines while on a trip with Torres in 1985. Tan denied the money Fitial took out of the Philippines came from him or a company in which he had an ownership interest.

¶ 9 Fitial admitted he received $25,000 from Tan's brother-in-law, which he then removed from the Philippines in 1985. To avoid declaring the cash to customs, he divided the money into $5,000 batches and distributed it to people traveling with him to be collected later. Torres confirmed he helped Fitial remove the money from the Philippines. Although Torres claimed Fitial told him the money was from Tan, Torres acknowledges he never saw Tan give Fitial any money, and he never had Tan confirm the money in question came from him.

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[4] E.R. at 38.

¶ 10 The trial court granted summary judgment for the *Variety*, concluding no reasonable jury could find actual malice by clear and convincing evidence.[5] Tan and Fitial argue summary judgment was improper as sufficient evidence exists to create a jury question. They also maintain allowing summary judgment to stand would create a defamation standard for public officials and public figures more exacting than actual malice, virtually eliminating the cause of action for public plaintiffs.

II

¶ 11 Before the U.S. Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), defamation was a state law matter, free from First Amendment constraints beyond those already accounted for through common law development.[6] A person was liable for defamation if they published, either by spoken or written word, an unprivileged communication of and concerning another which was false and defamatory. Restatement (First) of Torts § 558 (1938). If the defamation was printed, known as libel, it was actionable per se. *Id*. § 569. Libel in which an inferential step was necessary to reach the "sting" of the allegation was considered libel per quod in some jurisdictions and the plaintiff would have to demonstrate special damages – that is, demonstrable pecuniary loss – in order to recover. *See id*. If the statements were communicated orally, known as slander, special damages were necessary unless the statements fell into one of four prescribed slander per se categories. *Id*. §§ 570, 575. If the plaintiff was able to prove she was defamed, general damages were presumed. *Id*. § 621. Punitive damages were generally available if a plaintiff could demonstrate the defendant acted with traditional malice – ill will – towards her. Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at*

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[5] E.R. at 11-12.

[6] *See* Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. Rev. 273, 277 (1990).

Twenty-Five, 68 N.C. L. Rev. 273, 278 (1990); *see also Gertz v. Robert Welch*, 418 U.S. 323, 370 (1974) (White, J., dissenting).

¶ 12 Then, in *New York Times*, which addressed an elected official's defamation claim against a newspaper, the U.S. Supreme Court found the common law action insufficient to safeguard First Amendment guarantees. 376 U.S. at 279-80. To remedy this, the Court announced the heightened actual malice standard:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. The Supreme Court later extended the actual malice standard to cases involving public figures. *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 155 (1967).

¶ 13 Defamation actions have a long history in this jurisdiction. Trust Territory courts heard cases for both criminal libel[7] and civil libel.[8] No criminal libel statute was retained by the Commonwealth Legislature, but the common law civil action remained.[9] Despite the frequency of defamation actions in the Commonwealth, there is little resonance between decisions as they primarily focus on either First Amendment considerations or common law elements and privileges, without placing both in a larger context. Our decision today provides an occasion to merge our case law with First Amendment limitations to articulate a broad and coherent defamation framework.

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[7] *Uto v. Trust Territory*, 2 T.T.R. 209 (1961) (upholding a Trust Territory Code § 425 criminal libel conviction).

[8] *See St. Pierre v. Micronitor*, 6 T.T.R. 249 (1973) (denying motion for change of venue in civil libel action).

[9] *See Tenorio v. Santos*, 1 CR 46 (Dist. Ct. 1980); *Borja v. Goodman*, 1 N.M.I. 225 (1990); *Bolalin v. Guam Publ'ns, Inc.*, 4 N.M.I. 176 (1994).

III

¶ 14 Since no Commonwealth statute exists creating a cause of action for defamation, our decisions have consistently found the Restatement (Second) of Torts controlling.[10] *See, e.g.*, *Fidelino v. Sadhawani*, 3 CR 282, 291 (1988); *Bolalin*, 4 N.M.I. at 182. However, 7 CMC § 3401[11] makes Restatement provisions applicable only when, and to the extent, "written law" or "local customary law" is silent. Section 3401 requires cautious application; courts must be vigil, since a survey of local law is necessary before resorting to the Restatement, and conscientious, since "a court . . . called upon to apply and pick and choose from . . . [the Restatement's] large body of laws . . . in fact legislates." *Borja*, 1 N.M.I. at 248 (Hillblom, Special J., concurring).

¶ 15 When applied in defamation cases, section 3401 also requires courts be particularly cognizant of First Amendment speech protections. In the event Restatement defamation provisions are found inapplicable due to contrary local law, or modified in an effort to conform to local law, the Restatement's First Amendment safeguards risk being circumvented.[12] As such,

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[10] Various Restatement provisions have been adopted, including those listing the prima facie elements, *Fidelino v Sadhwani*, 3 CR 282, 291 (Trial Ct. 1982), provisions expounding those elements, *Camacho v. Santos*, 1 CR 281, 286 (Dist. Ct. 1982); *Tenorio v. Camacho*, 3 CR 195, 208 (Trial Ct. 1987), certain privileges, *Izuka v. Camacho*, 1 CR 724, 732 (Dist. Ct. 1983), defenses, *Fidelino*, *3* CR at 291-92, and damages, *Tenorio v. Santos*, 1 CR 46, 67 (Dist. Ct. 1980).

[11] In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

7 CMC § 3401.

[12] Restatement defamation provisions move from the general to the specific. For example, Restatement § 558(c) describes the degree of fault required for liability as "amounting to at least negligence on the part of the publisher." While this is true, it does not include the heightened actual malice standard required for public officials and public figures. The heightened standard for public officials and public figures is found at section 580A. If section 580A were held inapplicable due to superseding local law, section 558(c)'s unmodified negligence standard would be unconstitutional if applied to a public official or public figure. Therefore, in the event local law renders a Restatement defamation provision inapplicable, we must compare the resulting standard to the *New York Times* line of cases to ensure conformity with First Amendment criteria.

an independent First Amendment analysis is required when courts are faced with defamation issues for which our case law is unsettled.[13]

¶ 16 Commonwealth courts faced with defamation actions must first look to local law, including case law, to find the controlling defamation standard. Only if this search proves lacking is resort to the Restatement appropriate. Additionally, courts must undertake an independent First Amendment analysis whenever presented with defamation issues for which our case law is unsettled. Taken as a whole, our cases demonstrate this approach. Yet the journey has been long and winding.

Restatement § 558 and the Search for a Defamation Standard

¶ 17 The first defamation case heard by a Commonwealth court, *Tenorio v. Santos*, 1 CR 46, involved cross-complaints for slander. The Court reasoned since both complainants were candidates for public office at the time of the alleged defamation, and due to the strong public policy protecting speech – especially political speech, *New York Times* and its progeny controlled. *Id.* at 58-61. As such, actual malice was required before either was eligible for damages. *Id*. at 61. The Court concluded defamation of a public figure is shown by "clear and convincing proof that the . . . statement . . . was defamatory; was published to third persons and spoken with actual malice, with at least reckless disregard of falsity of the defamatory content of that statement." *Id*. at 69. This language, while instructive for defamation actions involving

[13] A similar approach is seen in *Borja*, 1 N.M.I. 225. In separate concurring opinions, Justice Villagomez and Special Judge Hillblom found the Restatement's official reporting privilege at section 611 inapplicable due to superseding local law incorporating First Amendment protections. *Id*., at 242, 245. Justice Villagomez determined NMI Constitution Article I, Section 2 provides the appropriate defense for a newspaper defendant charged with defamation for reporting a public court record. *Id*. at 242-44. The similarities between NMI Constitution Article I, Section 2 and the First Amendment led Justice Villagomez to import the reasoning of United States Supreme Court cases finding First Amendment prohibitions against defamation liability without fault. *Id*. at 243-44. Special Judge Hillblom found Covenant section 501 incorporates First Amendment provisions as they were interpreted by United States courts at the time the Covenant was ratified. *Id*. at 269. First Amendment case law development beyond the point of ratification is left to Commonwealth courts. *Id*. at 273. Despite this, he was "persuaded [the Court] should interpret section 501 as incorporating no less First Amendment protection to the press than that provided by the First Amendment as construed by courts of the United States." *Id*.

public officials or public figures, proved inadequate to deal with later cases involving private figures.

¶ 18 *Fidelino v. Sadhwani*, 3 CR 282, presented an opportunity to broaden *Tenorio's* language to encompass private figures, but instead the Court decided to adopt a new formulation. *Id*. at 291. *Fidelino* addressed a private figure's claim that statements identifying him as having an outstanding account balance were an intentional attempt to disparage his business interests. *Id*. The Court found Restatement (Second) of Torts § 558 (1977) controlling:

> 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.

Id. The Court dismissed the defamation claim, finding the published statements substantially true and thus non-defamatory.[14] *Id*. at 292. The Court did not discuss the remaining elements of its new defamation standard. Nor did the Court address the *New York Times* line of cases in an effort to incorporate actual malice into a unified approach.

¶ 19 The next major attempt at revising the Commonwealth defamation action came by way of three concurring opinions in *Borja*, 1 N.M.I. 225 (1990). Plaintiff in *Borja* claimed he was defamed by a newspaper article reporting the recent conviction of a man for sexual abuse of a minor.[15] The man who was the subject of the article coincidentally had the same name as plaintiff. Plaintiff argued the newspaper's failure to distinguish between the two, by listing the convict's address, was intentional and malicious, causing plaintiff substantial harm to his

[14] The Court based this finding on Restatement § 581A, cmts. d and f. *Fidelino*, 3 CR at 292.

[15] Plaintiff in *Borja* sued both the newspaper reporter and the publishing company. We refer to both defendants collectively as "newspaper."

reputation. The newspaper claimed the article was privileged because it was a fair and accurate report of court records, and even if the report was not privileged, the newspaper had not acted with actual malice.

¶ 20 All members of the Court agreed the Commonwealth defamation action was based on the Restatement, but the extent to which certain Restatement provisions applied and why was the source of some divergence. *Id*. Chief Justice Dela Cruz concluded Restatement § 558 defines the defamation action since no Commonwealth statute or customary law exists creating liability for defamation. *Id*. at 232. He also found Restatement § 611's official reporting privilege applicable in the Commonwealth because "[a]ny change to the common law rule of defamation, including the available defenses, should come from the legislature." *Id*. at 238. Since the prima facie defamation action requires an unprivileged communication, the official reporting privilege is incorporated into it. *Id*. at 241-42.

¶ 21 Justice Villagomez agreed Restatement § 558 outlined the prima facie case for defamation, *id*. at 242, but believed the official reporting privilege at section 611 was inapplicable because "Article I, Section 2 of the NMI Constitution provides a defense to defamation.[16] Since that provision is applicable, there is no need to apply the Restatements or any law adopted through section 501 of the Covenant." *Id*. at 242-43. Justice Villagomez found Article I, Section 2 of the NMI Constitution analogous to the First Amendment of the federal Constitution, and on that basis he adopted the United States Supreme Court's reasoning that members of the media must have acted with some degree of fault to be liable for defamation. *Id*. at 243-44. Finding no fault on the part of the newspaper, he agreed plaintiff's defamation action must fail. *Id*. at 244.

[16] "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

¶ 22 Special Judge Hillblom agreed the Restatement controlled, but noted section 558 could not by itself outline the tort because section 558 operates in conjunction with other Restatement sections.[17] *Id*. at 249. However, the acceptance of one section does not guarantee the acceptance of others since 7 CMC § 3401 relegates the Restatement to the role of gap filler when local law is absent. *Id*. at 249-250. Similarly, Restatement defamation defenses are inapplicable if local law serves the same purpose. *See id*. at 273. Special Judge Hillblom determined Covenant Section 501 should be interpreted as incorporating full First Amendment speech protections, thereby providing a local law defense analogous to the Restatement's official reporting privilege and rendering it inapplicable. *Id*. at 273-75. Finding the plurality reasoning in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), persuasive, he agreed plaintiff's claim must fail since "a publisher cannot be held responsible in damages for publishing a defamation without the plaintiff showing negligence or fault." *Borja*, 1 N.M.I. at 273-75.

¶ 23 Despite being the most in depth case discussing the relationship between Commonwealth, federal, and common law defamation, disagreement between the Justices in *Borja* resulted in majority support for little more than the proposition that the Restatement provides the framework for a Commonwealth defamation action. Beyond this, Borja outlined two distinct approaches for addressing defamation. The first approach adopts the Restatement's formulation of the common law action in its entirety, as "[a]ny change to the common law tort of defamation . . . should come from the legislature." *Id*. at 238 (Dela Cruz, C.J., concurring). The second approach treats each Restatement defamation section as an individual provision subject to 7 CMC § 3401. Since

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[17] [I]t is not section 558 alone but the sections 558 through 581A . . . which creates and defines the cause of action. The particular section of the Restatement applicable depends on the particular circumstances of the case. Although Restatement section 558 generally lays out the elements of a cause of action for defamation, it does not define those elements. Definitions are found in other sections of the Restatement . . . .

Borja, 1 N.M.I at 249.

only those sections not preempted by local law are held applicable, Commonwealth courts are left to develop a uniquely Commonwealth cause of action. This latter approach was supported by two of the three justices in *Borja*,[18] but no express agreement created a standard by which evolution of the Commonwealth action should proceed.

¶ 24 Our two post-*Borja* defamation cases did not explicitly address total versus piecemeal adoption of Restatement defamation sections. *See Bolalin*, 4 N.M.I. 176; *Sekisui House, Ltd. v. Hiraga*, 1999 MP 21, 6 N.M.I. 44. Nevertheless, they evidence support for a section by section approach since neither cite previous cases as having adopted Restatement defamation in its entirety, opting instead to independently determine the applicability of Restatement sections.[19] *Bolalin* involved a group of waitresses who claimed they were defamed by an article linking Commonwealth waitresses to the sex industry. 4 N.M.I. at 180. In affirming summary judgment, the Court adopted Restatement § 564A as the appropriate standard in group defamation claims to determine whether allegedly defamatory statements can be understood as of and concerning each individual plaintiff. *Id*. at 183-84. In *Sekisui House*, the Court vacated a summary judgment finding defendant's statements defamatory. 1999 MP ¶ 19, 6 N.M.I. at 47. The Court relied on Restatement §§ 581A and 566, reasoning defendant's statements were either true, which is an absolute defense pursuant to section 581A, or statements of opinion not

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[18] Justice Villagomez found Restatement § 558 applicable, but section 661 superseded by local law. *Borja*, 1 N.M.I. at 242-43. Special Judge Hillblom stated:

> [T]he court may only apply the Restatement as substantive law on a particular element of a cause of action where there is no "written law" on that element or issue unless the court finds such application of "written law" would lead to a result totally inconsistent with the basic cause of action itself or would lead to an absurd result.

Id. at 250.

[19] In *Bolalin* the Court found "[t]he trial court duly applied Restatement provisions in the absence of local law," 4 N.M.I. at 182 (footnote omitted), and the Court in *Sekisui House, Ltd. v. Hiraga*, was faced with "an issue of first impression." 1999 MP 21 ¶ 13, 6 N.M.I. 44, 46.

implying additional defamatory statements, which is non-actionable pursuant to section 566. *Id*. ¶¶ 16-17, 6 N.M.I. at 46-47.

First Amendment Adaptations to Common Law Defamation

¶ 25 Not only must Commonwealth courts faced with novel defamation issues undertake a 7 CMC § 3401 analysis, they must also be mindful of First Amendment considerations. To the extent Restatement sections are found inapplicable due to superseding local law, or are adapted to conform to that law, there exists a risk First Amendment safeguards built into the Restatement's defamation framework might be circumvented. This risk is minimized by comparing additions or modifications to the Commonwealth defamation action with the *New York Times* line of cases.

¶ 26 Additionally, courts must be mindful of the relationship between common law defamation and federal constitutional defamation, and must examine novel defamation issues within this context. Federal constitutional law has not usurped the entire defamation arena, and defamation law in the Restatement is not simply a taxonomy of U.S. Supreme Court decisions. Rather, traditional common law applies to the extent it has not been superseded by First Amendment concerns. *New York Times* and its progeny have drastically altered the defamation landscape, and only by reading these cases alongside the common law principles they seek to modify does the appropriate defamation standard come to light. *Tenorio v. Santos*, 1 CR 46, typifies this approach.

¶ 27 The *Tenorio* Court was faced with the question to what extent recovery for punitive damages had been augmented by First Amendment concerns. 1 CR at 65-66. The plaintiff in *Tenorio* argued that because *Gertz*, 418 U.S. 323, made punitive damages contingent on actual malice, private figures were limited to recovery for "actual injury" while public figures remain

eligible for presumed and punitive damages. *Tenorio*, 1 CR at 65. Further, Plaintiff argued public figures were able to recover punitive damages on the same evidentiary burden – actual malice – as other categories of damages. *Id*. The Court dismissed Plaintiff's argument, reasoning *Gertz* made recovery of punitive damages more difficult by supplementing rather than supplanting common law's threshold for recovery.[20] *Id.* at 66.

¶ 28 In *Gertz*, the United States Supreme Court refused to extend the actual malice standard to private plaintiffs because it found States had an increased interest in protecting the reputations of private individuals, those who have not put themselves in the public eye and who do not have the same recourse as public figures to media outlets in order to rehabilitate their image. 418 U.S. at 341-46. However, the Court determined that, despite increased State interest in protecting private plaintiffs, this "interest extends no further than compensation for actual injury." *Id*. at 349. Thus, the Court found common law defamation's strict liability ran afoul of the First Amendment:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability

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[20] In the Court's own language:

> [I]t is the Court's understanding of . . . *Gertz* . . . that [it] clearly do[es] not allow an automatic award of punitive damages upon a public figure's showing of actual malice. *Gertz* merely states that, while a nonpublic figure may recover actual damages only upon the showing of some "fault" on the part of the defendant – i.e. that the burden of proof is lesser for a private plaintiff than a public figure – the nonpublic plaintiff may not recover punitive damages except by showing that the defamatory statements by the defendant were made with actual malice. It would be totally inconsistent with the language of *Gertz* and the principles which created the constitutional privilege afforded public figures, not to mention plain logic, to say that although a public figure plaintiff has a greater burden than a nonpublic figure to obtain an award of actual damages, he does not have to prove anything further to recover punitive damages, while the nonpublic figure must overcome a still greater hurdle to recover punitive damages.

Tenorio, 1 CR at 66.

> for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.

Id. at 349. After *Gertz*, private plaintiffs had to demonstrate "actual injury" in order to recover. Presumed and punitive damages were not ruled out, but were instead conditioned on a plaintiff's ability to demonstrate actual malice – knowledge of falsity or reckless disregard of falsity.[21]

¶ 29 *Gertz* determined actual malice to be a constitutional prerequisite to collecting punitive damages but did not address traditional punitive damages standards. Under *Gertz*, actual malice could well serve as the sole threshold for punitive damages.[22] However, since *Gertz* does not expressly overrule the common law's requirement of traditional malice for punitive damages, and since its application does not preclude this additional evidentiary burden, the *Tenorio* Court determined actual malice should be understood as an additional requirement rather than replacing traditional malice as the threshold for punitive damages.[23] Thus, to recover punitive damages for defamation, a complaintant must demonstrate traditional malice – ill will – in addition to any other fault standard required for recovery.

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[21] The Supreme Court later limited this requirement to those cases where the alleged defamation involved a matter of public concern, thereby reviving the common law rule when private plaintiffs allege defamation on issues of private concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (Powell, J, with Chief Justice Burger and Justice White concurring).

[22] At least five federal circuits hold actual malice is the only constitutionally required limitation to local punitive damage laws. *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1978); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

[23] Similarly, the *Tenorio* Court reasoned allowing a public figure to collect punitive damages only on a showing of actual malice would improperly place a higher burden on private plaintiffs seeking punitive damages than on public plaintiffs. 1 CR at 66. The common law did not differentiate between public or private plaintiffs; to recover punitive damages a plaintiff had to demonstrate traditional malice. *New York Times* and *Butts* made actual malice the standard for recovery of any damages, including punitive, for public officials and public figures respectively. However, for private plaintiffs the common law still controlled. *Gertz* changed this. *Gertz* made recovery of punitive damages by private figures contingent on proving fault to a level at least as demanding as actual malice, *id*. at 350, once again equating the evidentiary burden for both public and private plaintiffs on the issue of punitive damages. Thus, the *Tenorio* Court reasoned, if a private plaintiff must demonstrate both actual malice and traditional malice, it would contradict the entire constitutional defamation framework to allow public plaintiffs to collect punitive damages on a lesser showing; i.e. on a showing of actual malice alone.

Commonwealth, Common Law, and the First Amendment:
A Defamation Standard

¶ 30 Past decisions have repeatedly cited Restatement § 558,[24] expounded by additional sections as they are found applicable, as providing the defamation action in the Commonwealth. *Fidelino*, 3 CR at 291; *Borja*, 1 N.M.I. at 232, 242, 249; *Bolalin*, 4 N.M.I. at 182. To these may be added the constitutional requirement of actual malice for establishing liability for defamation of public officials or public figures, *Tenorio*, 1 CR at 58, or for private figures to collect anything beyond actual damages when defamatory statements involve a matter of public concern. *Gertz*, 418 U.S. at 349; *Dun & Bradstreet, Inc.*, 472 U.S. at 763 (Powell, J, with Chief Justice Burger and Justice White concurring); *Tenorio*, 1 CR at 66. Thus, the following standard emerges:

Liability for defamation requires:

(a) a false and defamatory statement reasonably susceptible of being understood as of and concerning each individual complainant;
(b) an unprivileged publication to a third party;
(c) fault amounting to at least negligence on the part of the publisher, but when the complainant is a public figure or public official, the publisher must have acted with actual malice; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Recovery for defamation requires:

(a) for public officials and public figures, presumed and punitive damages are available on a showing of actual malice;
(b) for private figures when the defamatory statements involve a matter of public concern, recovery is limited to actual injury when only negligence is proven, but presumed and punitive damages are available on a showing of actual malice;
(c) for private figures when the defamatory statements involve a matter of private concern, recovery of presumed and punitive damages are available on a showing of negligence;

[24] In order to create liability for defamation, one must prove: "(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." *Fidelino*, 3 CR at 291.

(d) for all complainants, the additional showing of traditional malice is required for recovery of punitive damages when punitive damages are available.

¶ 31 Although the standard we announce today combines the major themes of our case law, questions will undoubtedly arise for which the answer lies beyond these broad principles. In such instances, courts must follow the above indicated process for finding the controlling defamation law. Specifically, courts must first look to local written law, which includes our case law adopting and/or adapting Restatement provisions. To the extent local written law is lacking, the Restatement fills the gaps. However, since this process of amalgamating local law and Restatement principles increases the potential for intrusion into protected First Amendment areas, special care must be taken when adopting new law. Any modifications must be consistent with *New York Times* and its progeny.

IV

¶ 32 Since defamation cases raise First Amendment issues, appellate courts have an obligation to independently examine the record and ensure against forbidden intrusions into the field of free expression. *New York Times*, 376 U.S. at 285. In our independent examination of this summary judgment motion, we apply a clear and convincing evidence standard involving the issue of actual malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986); s*ee Tenorio*, 1 CR at 61. "In this examination, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

¶ 33 The First Amendment, made applicable in the Commonwealth by section 501(a) of the Covenant, includes among its protected rights that of free expression.[25] Similar protections are

[25] As with the entire Bill of Rights, the First Amendment was traditionally understood to protect individuals only against federal intrusion upon protected areas. *See Barron v. City of Baltimore*, 32 U.S. 243 (1833). However, First Amendment freedom of speech and the press were extended to protect against State action in *Gitlow v. New York*, 268 U.S. 652, 666 (1925); beginning a line of cases that read the Fourteenth Amendment as incorporating

found at Article I, Section 2 of the Commonwealth Constitution, which prohibits any law "abridging the freedom of speech, or of the press." In his concurring opinion in *Borja v. Goodman*, 1 N.M.I. 225, 243, Justice Villagomez determined, at least with respect to defamation, "[t]he provisions of Amendment I to the U.S. Constitution are similar to the provisions of section 2, article I of the NMI Constitution." The drafters of the NMI Constitution were of a similar mindset:

> [Section 2, Article 1] is drawn from the First Amendment to the United States Constitution which is made applicable to the states by the Fourteenth Amendment, which in turn is made applicable in the Northern Mariana Islands by section 501 of the Covenant. No substantive change from the First Amendment or the interpretations of that Amendment by the United States Supreme Court is intended.

Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 3-4 (1976).

¶ 34 Although First Amendment protection does not extend to all types of expression,[26] the expression at issue here, political speech, is exactly that type granted the highest protection. As the Supreme Court noted:

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. The interests of the public here outweighs the interest of the appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to [public officials]. Errors of fact, particularly in regard to a man's mental states and processes are

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certain "fundamental" rights into its guarantee of due process. The Appellants in *Gitlow* challenged a New York statute which criminalized speech advocating anarchy as violative of their Fourteenth Amendment due process rights. Upholding the statute, the Court noted: "For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* The *Gitlow* Court's lack of reasoning for their assumption did not deter future decisions from reaching the same result. Just six years after *Gitlow*, the Court cited three additional intervening cases supporting its contention that by 1931 "no longer [was it] open to doubt that the liberty of the press and speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

[26] For example, some forms of commercial speech, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001), expression which is obscene, *Miller v. California*, 413 U.S. 15, 23 (1973), or which advocates unlawful conduct, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 866, 919-20 (1982), may be regulated in certain instances.

> inevitable. Whatever is added to the field of libel is taken from the field of free debate.

New York Times, 376 U.S. at 272.

¶ 35 Freedom of expression "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Indeed, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941). Thus, defamation cases of this type must be considered against a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270.

¶ 36 So strong is the Constitutional protection of free expression that it even contemplates and protects a degree of abuse. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citation omitted). Indeed, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *New York Times*, 376 U.S. at 271 (quoting James Madison, 4 *Elliot's Debates on the Federal Constitution* 571 (1856)).

¶ 37 Such concerns led the U.S. Supreme Court to hold public officials and public figures must prove actual malice before recovering for defamation, *New York Times*, 376 U.S. at 279-80; *Curtis*, 388 U.S. at 155, in order to prevent censorship, either self-imposed or enforced by courts through defamation judgments, and to promote the free and open exchange of ideas. Public plaintiffs "must demonstrate that the author 'in fact entertained serious doubts as to the truth of

his publication,' or acted with 'a high degree of awareness of . . . probably falsity.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (citations omitted).

¶ 38 Fitial admits he was a public figure at the time of the alleged defamation.[27] However, Fitial's status is more accurately described as a public official[28] since he was a Commonwealth legislator and was campaigning for Governor. "[T]he 'public official' designation applies . . . to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

¶ 39 The trial court found Tan was a public figure, and noted Tan did not dispute public figure status.[29] Nor does Tan challenge this status on appeal. However, we independently consider whether Tan is properly deemed a public figure since Tan did not formally admit being a public figure during pre-trial discovery,[30] and because appellate courts generally have a duty to review public figure status de novo.[31] *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 938 (3rd Cir. 1990) ("the classification of a claimant as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by

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[27] Supplemental Excerpts of Record ("S.E.R.") at 78, 106.

[28] The trial court correctly found Fitial to be a public official. E.R. at 7.

[29] "This [trial] Court finds that the Marianas Variety established through legally admissible evidence that Tan is a public figure and Fitial is a public official for purposes of this defamation lawsuit, and Plaintiffs do not dispute this fact." E.R.

[30] S.E.R. at 45, 59.

[31] The court in *Yiamouyiannis v. Consumers Union of the United States* faced a similar situation. 619 F.2d 932, 938 (2nd Cir. 1980). Addressing the trial court's determination that plaintiff was a public figure, the court notes:

> Indeed, we do not understand appellant to dispute [public figure status]; Judge Owen below stated that he was "an admitted public figure." And appellant's brief on appeal does not claim otherwise, through no express concession is made. But if there were any doubt about it, appellant's own complaint and affidavits would resolve it.

Id.

an appellate court.") (citation omitted); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1294 n.12 (D.C. 1980). We conclude the trial court correctly found Tan is a public figure.

¶ 40 Public figures are those having "assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 345. Some individuals may be public figures for all purposes; those "occupy[ing] positions of . . . persuasive power and influence," *id.*, or having achieved "pervasive fame or notoriety." *Id*. at 351. Far more common, however, is the "individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Id*.

¶ 41 In determining whether an individual has attained public figure status, *Gertz* notes: "[i]t is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. Taking guidance from *Gertz's* language, the court in *Waldbaum* developed a three-part public figure test. *Waldbaum*, 627 F.2d at 1296-98. The *Waldbaum* test requires courts to: (1) "isolate the public controversy;" (2) "analyze the plaintiff's role in it;" and (3) determine whether the alleged defamation is "germane to the plaintiff's participation in the controversy." *Id*. at 1296-99. We believe the *Waldbaum* test properly encapsulates the policy of *Gertz* and, therefore, adopt it here.[32]

¶ 42 Finding an event rises to the level of a "public controversy" requires more than merely demonstrating public interest in the matter.[33] If the event is one whose implications do not reach

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[32] At least three other federal circuits have adopted the *Waldbaum* test. *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 432 (5th Cir. 1987); *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir. 1986); *see also Shoen v. Shown*, 48 F.3d 412 (9th Cir. 1995) (accepting a district court's conclusion "that plaintiffs are limited purpose public figures under test established in *Waldbaum* . . . .").

[33] The *Waldbaum* court offers the following guidance:

beyond the parties involved, a private matter is not converted to a public controversy simply by its having garnered a public following. *Firestone*, 424 U.S. at 454. Thus, the highly publicized divorce of a moneyed couple was not a public controversy "even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* "Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Waldbaum*, 627 F.2d at 1296.

¶ 43 The current case clearly involves a public controversy. Fitial, a Commonwealth legislator and gubernatorial candidate, was accused by another Commonwealth legislator of accepting bribes. The public's interest in an individual's fitness for office is at the center of constitutional defamation. *See New York Times*, 376 U.S. at 269; *Garrison v. State of La.*, 379 U.S. 64, 77 (1964) ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."). Allegations of fraud and corruption, regardless of at whom they are leveled, are generally matters of public concern,[34] but such allegations directed at officials charged with the public trust undoubtedly rise to the level of public controversy. Although "anything which might touch on an official's fitness of office is relevant . . . [f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . . ." *Garrison*, 379 U.S. at 77.

> To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non participants, it was a public controversy.

627 F.2d at 1297.

[34] "The public is legitimately interested in all matters of corruption . . . ." *Silvester*, 839 F.2d at 1493.

¶ 44 Addressing the second *Waldbaum* prong, Tan's role in the controversy, the central question is whether and to what degree Tan "voluntarily inject[ed] himself" or was "drawn into" the controversy. *Gertz*, 418 U.S. at 351. Tan was more than a tangential figure in the alleged corruption; he was claimed to be the source of the bribe and the beneficiary of numerous pieces of legislation tailored to his business interests. Being inextricably bound to the charged corruption, Tan is clearly an individual at the center of the controversy. However, to find Tan a limited purpose public figure based on the alleged defamation itself would obviate protections for private individuals; the result being any defamatory statement involving public controversy would transmute the defamed, an otherwise private individual, to a public person and necessitate an actual malice finding for recovery. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id*.; *see also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979) (defamation claimant who made no attempt to influence public opinion was not made a limited purpose public figure by being investigated, but was instead "dragged unwillingly into the controversy."). Although *Gertz* admits the "exceedingly rare" possibility of becoming a public figure involuntarily, 418 U.S. at 345, the public controversy must nevertheless exist independently of the defamatory statement, not because of it. *See, e.g., Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985) (plaintiff was an involuntary limited purpose public figure due to his "sheer bad luck, . . . happen[ing] to be the [air traffic] controller on duty at the time" of a highly publicized plane crash).

¶ 45 Tan is a public figure for purposes of the current public controversy – government corruption – not due to the allegations of such corruption, but rather due to his political dealings and relationships prior to the allegations. *See Clyburn v. News World Communications, Inc.*, 903

F.2d 29, 33 (D.C. Cir. 1990). Plaintiff in *Clyburn* brought a defamation action against the Washington Times for statements in an article describing his girlfriend's controversial death from a drug overdose. *Id*. at 31. The overdose occurred during a party at which high-ranking officials from former Washington D.C. mayor Marion Barry's administration were alleged to have attended. *Id*. Finding him to be a limited purpose public figure, the court noted:

> Clyburn's acts *before* any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and [his girlfriend], at least as one may judge from attendance at her funeral, also enjoyed such ties. . . . One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy.

Id. at 33. (emphasis in original).

¶ 46 Tan's well known dealings with political figures,[35] in particular with Fital,[36] and his business dealings with the Commonwealth[37] removed him from the purely private realm

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[35] In a 1999 investigative report, American Broadcasting Company's "20/20" news program focused on alleged dealings between Tan and United States Congressman Tom Delay. S.E.R. at 7. An article appearing in the *Saipan Tribune* in June of that year described the program as accusing Tan of being "in bed with Tom Delay, in a corrupt attempt to maintain forced prostitution, sweatshops, and labor exploitation on US soil." *Id*. Further, although it occurred after the alleged defamation, an interview with *Pacific Magazine* for their August, 2003 edition reveals the public opinion that Tan is closely involved in politics:

> PM: How actively involved do you get in local politics? You appeared to become very involved in the [2001] gubernatorial campaign on Saipan.
> WT: People always assume that I am more involved than I really am. Actually, it is (a) natural and I think wise business practice for any large company to work in partnership with local governments. It is common in the U.S. and these islands are no different. Now with the bad economy, it is even more important that there is good communication.
> Yes, I have had friends in the past that have run for office. They made their own decisions and we never asked for nor needed any special favors.

Id. at 44.

[36] Tan admitted he began socializing with Fitial in 1988-1989. S.E.R. at 61. Fitial admitted that between his legislative terms he was a consultant for Tan's L & T Group of Companies, helping it set up various businesses in the Commonwealth. *Id*. at 132.

regarding the issue of government corruption. Whether Tan intended to become a public figure is not dispositive. Through his regular social and business contacts with influential public leaders, Tan risked becoming a public figure for the limited purpose of alleged illicit political dealings. *See, e.g.*, *Lohrenz*, 350 F.3d at 434 (female fighter pilot "assumed the risk" she would fly a combat mission, "which, in light of the public controversy [surrounding female combat pilots], meant she would be in a position of special prominence in that controversy."); *Marcone v. Penthouse Int'l. Magazine for Men*, 754 F.2d 1072, 1086 (3rd Cir. 1985) (plaintiff's "voluntary connection with motorcycle gangs" notorious for dealing drugs "in conjunction with the intense media attention he engendered is sufficient to render [him] a public figure for the limited purpose of his connection with illicit drug trafficking."); *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be." It is enough that the individual "'voluntarily engaged in a course that was bound to invite attention and comment.'") (citation omitted).

¶ 47 The third and final *Waldbaum* prong asks whether the alleged defamation was "germane to the plaintiff's participation in the controversy. . . . Misstatements wholly unrelated to the controversy . . . do not receive the New York Times protection." 627 F.2d at 1298. Comments relating to the plaintiff's role in the controversy do. *Id.* In the current case, the alleged defamation accused Tan of bribing Fitial and receiving political favors. Allegations of bribery and political kick-backs are directly related to the legitimate public interest in government corruption – the wider public controversy at issue, and since the allegations implicate Tan, they are germane to his social and commercial connections with Commonwealth politicians.

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[37] Tan admitted owning three garment factories situated on public land owned by the Commonwealth government. S.E.R. at 48.

¶ 48 We find Tan is a public figure for the limited purpose of the public controversy surrounding alleged government corruption involving his personal and business relations with the Commonwealth government and its leaders. Basing this finding on Tan's voluntary dealings with political figures furthers *Gertz's* linking public figure status "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. Public figure status is also furthered by Tan's ready access to media channels[38] for redressing defamatory remarks:

> The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Id. at 344.

V.

¶ 49 To be liable for defamation, the *Variety* must have acted with actual malice; that is, with knowledge of falsity or with reckless disregard for truth or falsity. That the alleged defamation came by way of a political advertisement does not alter the requisite degree of fault:

> Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'

[38] Tan possesses an ownership interest in the *Saipan Tribune* and in Marians Cablevision; both of which are major news outlets in the Commonwealth. S.E.R. at 46-47.

New York Times, 376 U.S. at 266 (citations omitted). To prevail on their appeal, Tan and Fitial must prove by clear and convincing evidence that a reasonable jury could find the *Variety* acted with actual malice. They have not met that burden.

¶ 50 Tan and Fitial base their claim of defamation on three principle arguments: (1) Younis's personal dislike of Tan; (2) the *Variety's* failure to investigate Torres's allegations beyond that initial investigation undertaken prior to publishing the original article; and (3) Tan's financial interest in the *Saipan Tribune*, a competing newspaper.[39] Even assuming Tan and Fitial's arguments are true, their allegations are insufficient to find the *Variety* acted with actual malice.

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[39] Tan and Fitial set forth the following as evidence:

(1) *Affidavit of Richard Pierce*: Richard Pierce stated Abed Younis "hated Willie Tan." E.R. at 80. Further, Richard Pierce stated Abed Younis said, "Saipan would be better if Willie Tan were gone," and Mr. Younis would become "visibly irritated" when he spoke about Willie Tan. *Id*. at 81.

(2) *Declaration of Benigno R. Fitial*: Fitial stated Torres became very upset with him in 1993 when Torres was forced out of the Republican Party. *Id*. at 75. Torres began attacking his reputation after this incident. *Id*. Moreover, Fitial stated Mr. Younis began disliking him when he started working for Willie Tan in 1988, and reporters from the *Variety* were upset with him. *Id*. Fitial claimed the *Variety* failed to conduct an investigation before the advertisements were published. *Id*. at 76.

(3) *Declaration of Steven P. Pixley*: Pixley sent Torres a letter demanding an immediate retraction of the bribery allegations made against Willie Tan. *Id*. at 85. This letter demonstrates Willie Tan denied the allegation of bribery. Despite this denial, without conducting any further investigation, the *Variety* published the advertisement along with photocopies of Pixley's letter.

(4) *Deposition Testimony of Jeanette L. Sarabia*: Sarabia testified that she considered the political advertisement to be "questionable" because "it accused somebody of a crime." *Id*. at 100, 122. She also testified she doubted the truth of the allegations. *Id*. at 117.

(5) *Deposition of Abed E. Younis*: Mr. Younis testified he personally authorized the publication of the advertisement. *Id*. at 148. He verified the advertisement was brought to him for approval by Sarabia because she thought it was "questionable." *Id*. at 150. Mr. Younis admitted he did not conduct any further investigation, (*Id*. at 46), despite the fact that, as opposing counsel recounts, Mr. Younis testified that at the time the advertisement was published he thought Ben Fitial was a "good man." *Id*. at 155. Younis stated that from the Variety's standpoint it "makes no difference" whether an advertisement is true or false. *Id*. at 154.

(6) *Deposition of Stanley T. Torres*: Torres acknowledged having previously urged authorities to file criminal charges against Willie Tan because of his involvement with the Bank of Saipan, but when asked if he had direct evidence to support his request, he responded "I don't know." *Id*. at 67, 69. He testified, in reference to the defamation claim, that he did not see Willie Tan give money to Fitial. *Id*. at 61. Also, following the alleged incident, Torres did not contact law enforcement authorities regarding the alleged bribery. *Id*. at 70. Nor did he discuss this matter with Fitial. *Id*. at 71. Torres stated he had been "upset" with Fitial over a "few issues" relation to the Commonwealth Legislature. *Id*. at 72.

(7) *Financial Motive*: Willie Tan was a motivating force behind, and is a part owner of, the *Saipan Tribune*. The *Saipan Tribune* competes financially with the *Variety* for the newspaper and newspaper advertising market in the Commonwealth. Accordingly, the *Variety* has a financial motive in attacking Willie Tan.

¶ 51 The record is insufficient to support a finding the *Variety* published the political advertisements with knowledge they contained false information. The only evidence tending to support an assertion the *Variety* knew the information was false is the statement made by Fitial in the first article, that the allegations were "outrageous," and the letter by Tan's attorney denying the allegations. Yet publishing allegations which have been denied does not usually constitute evidence of actual malice in a defamation action. *Edwards v. Nat'l Audobon Soc'y, Inc.*, 556 F.2d 113, 120-21 (2d Cir. 1977). Liability under the clear and convincing proof standard of *New York Times* "cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemic charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Id.*

¶ 52 Nor would the record support an actual malice finding based on reckless disregard for the political advertisement's truth or falsity. To prove a defamatory statement was published with reckless disregard for the truth, a plaintiff must show the statement was made "with a 'high degree of awareness of . . . probable falsity.'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (citation omitted). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* Yet a publisher is not required to independently verify the information in every advertisement or risk an actual malice finding. A newspaper may rely on the good reputation of an advertisement's sponsors, and is not required to check the sponsor's information, or even to check the information against records in the newspaper's own files. *New York Times*, 376, U.S. at 288. Reckless disregard for falsity is a subjective test focusing on the mindset of the individual publisher, not a hypothetical reasonable person or reasonable publisher. *St. Amant*, 390 U.S. at 731. Although it creates an incentive for publishers to remain willfully ignorant, the United

States Supreme Court has determined the public interest in disseminating information regarding public affairs outweighs the corresponding loss of reputation rights. *Id*.

¶ 53 Tan and Fitial claim Younis's admitted personal dislike of Tan demonstrates the *Variety* acted with reckless disregard for the truth. However, "actual malice" should not be confused with traditional malice – an evil intent or a motive arising from spite or ill will. *Masson*, 501 U.S. at 510; *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) ("The phrase 'actual malice' is confusing in that it has nothing to do with bad motive or ill will").[40] Thus, Younis's personal feelings towards Tan have no bearing on the actual malice inquiry. Similarly, Younis's statement he thought Fitial was a "good man" is immaterial. Actual malice and traditional malice may often be present together, but demonstrating one is not probative as to the other. Whereas traditional malice is concerned with the publisher's mindset towards the plaintiff, actual malice is concerned with the publisher's mindset towards the statement itself.

¶ 54 Neither does the failure to investigate automatically prove actual malice. *See St. Amant*, 390 U.S. at 730-31; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) ("[I]t cannot be said . . . that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not"). Further, "[e]ven an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonable prudent conduct, including the failure to investigate before

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[40] However, the Restatement suggests spite or ill will may be used in conjunction with other evidence to infer a publisher acted with knowledge of falsity or reckless disregard for falsity:

> Ill will or desire to injure the other party does not in itself have the effect of taking a communication outside the protection of the Constitution. Like the patently inherent improbability of a communication, the presence of ill will or animus has no more effect than to assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity.

Id. § 580A cmt. d.

publishing." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 669 (9th Cir. 1990). In this case, the *Variety* first published an article regarding the allegedly defamatory statements on October 21, 2001. Prior to publication, the *Variety* investigated the allegations, as evidenced by the inclusion of Fitial's response and the *Variety's* contacting Tan to obtain a response. The *Variety* admits no further investigation was undertaken prior to publishing the political advertisements. However, the *Variety* was not legally required to investigate the allegations at all. The fact that some investigation did occur further weighs against the finding of actual malice.[41]

¶ 55 Had the *Variety* entertained serious doubts regarding the truthfulness of the political advertisements, further investigation might have been required. However, the belief of the *Variety's* advertising manager that the advertisements were "questionable" is insufficient to demonstrate serious doubt. Actual malice cannot be predicated on information believed or known by persons within a corporate defendant who lacked a responsible role in the publication's preparation. *New York Times*, 376 U.S. at 287. Rather, "[t]he state of mind required for actual malice would have to be brought home to the persons in the newspaper organization having responsibility for the publication." *Id*. It was Younis, not the advertising manager, who was responsible for publishing the political advertisements, and the record is

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[41] The information contained in the political advertisement was a matter of public record. Torres's letter had been circulated within the House of Representatives, was printed on official letterhead, was filed with the Clerk of the House of Representatives, and was made a part of the legislative journal maintained by the House of Representatives. Based on the concurring opinions in *Borja*, when the media publishes a public record or reports on an official proceeding, the plaintiff cannot show actual malice for First Amendment purposes absent a showing of fault. 1 N.M.I. 225. Similarly, in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), the United States Supreme Court reasoned:

> [P]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of press to publish that information appears to us to be of critical importance to our type of government . . . .

Id. at 495. In this case the advertisement included the public record, which even shows the official stamp on the bottom left corner of the letter. The *Variety* knew this was a public record, had published excerpts of the letter before without incident, and had also included Fitial's response in a prior news article.

devoid of evidence showing Younis knew the information was false, or seriously doubted its truthfulness. Tan and Fitial argue Younis's statement, "it makes no difference if [the information in the political advertisements] was true or false," proves the *Variety* acted with reckless disregard for falsity. However, without showing serious doubt regarding truthfulness, a mere disregard of falsity is not converted to a "reckless disregard" of falsity sufficient to support an actual malice finding.

¶ 56 Tan and Fitial next assert the *Varity's* financial interest in disparaging Tan's reputation creates an inference it acted with actual malice sufficient to survive summary judgment. They rely on *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110 (9th Cir. 2003), in support of this argument. *Suzuki* involved a product disparagement action challenging a consumer protection organization's report that certain Suzuki vehicles were prone to flip over. In reversing summary judgment against Suzuki, the Court found sufficient evident to permit a trier of fact to conclude the consumer organization acted with actual malice. *Id*. at 1135. Suzuki presented evidence the consumer organization acted through financial motives since it needed a controversial story to increase revenue due to recently acquired debt. *Id*. Moreover, Suzuki produced evidence by which a jury could find the consumer organization rigged tests upon which its report was based. *Id*. at 1135.

¶ 57 Here, Tan and Fitial provide no similar evidence. They merely state the *Variety* had a financial motive to publish the advertisements because the *Saipan Tribune*, owned in part by Tan, is a competitor. There is no evidence demonstrating the *Variety* published the advertisements pursuant to a thoughtful scheme of profiteering. Nor is there evidence the publication of Torres's letter somehow increased the *Variety's* circulation. The naked assertion of competing financial interests is insufficient to demonstrate a financial motive to defame.

¶ 58 Moreover, a financial motive to defame is insufficient to survive summary judgment. *See Harte-Hanks Commc'ns*, 491 U.S. at 655 (1989) ("a public figure plaintiff must prove more than an extreme departure from professional standards and . . . a newspaper's motive in publishing a story – whether to promote an opponent's candidacy or to increase its circulation – cannot provide a sufficient basis for finding actual malice"). Contrary to Tan and Fitial's urging, the Court in *Suzuki* did not reverse summary judgment based on a demonstrated financial motive. 330 F.3d at 1136. Although the Court noted financial motive "is a relevant factor bearing on the actual malice inquiry," more is required. *Id*. In *Suzuki*, "[t]he evidence of financial motive dovetail[ed] with the evidence of test-rigging . . . . The fact that [the consumer organization] needed to boost its revenues to complete its capital campaign lends credence to Suzuki's contention that [the consumer organization] rigged the Samurai testing to produce the predetermined rollover result." *Id*. Thus, it was the fabrication of false information which led the Court to reverse summary judgment. The consumer organization's financial motive was viewed as lending credibility to allegations of fabrication, not as evidence of actual malice in itself.

VI

¶ 59 Without direct evidence showing the *Variety* knew the information in the political advertisement was false or acted with reckless disregard to its falsity, Tan and Fitial rely on circumstantial evidence. Even if this evidence is assumed to be true, we cannot conclude there is clear and convincing evidence of actual malice sufficient to warrant sending the issue to a jury. We see nothing in the facts suggesting the *Variety* acted with reckless disregard of whether the information was false or not. Nor is there evidence suggesting the *Variety* purposely avoided the

truth.[42] The *Variety* did not fabricate the story. It was an actual letter submitted to the House of Representatives as part of an official proceeding. While the veracity of the statement may be "questionable," it is not so dubious as to attribute such a high degree of fault. The evidence may suggest ill will, but this does not prove actual malice. Nor does the *Variety's* failure to investigate or its financial motive, without more, amount to actual malice.

¶ 60 We hold high the right of free expression and the public policy supporting it. To allow plaintiffs to survive even summary judgment without any evidence in record tending to show the existence of actual malice chills fundamental rights of speech and press. As appellants must prove all four defamation liability factors in order to recover, the failure of one is a failure of the entire claim.

¶ 61 For the foregoing reasons, the ruling of the trial court is AFFIRMED.

ENTERED this 31st day of May, 2007.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
F. PHILIP CARBULLIDO
Justice *Pro Tem*

/s/
ROBERT J. TORRES
Justice *Pro Tem*

[42] Because we do not need to discuss the first element of this cause of action, we make no determination of whether the statements were true or false.