IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

BARRETT RIDEP, MAYUMI S.KEIBO, KENRY SMAU,
Appellants,
v.
KANG-ICHI UCHAU,
Appellee.

Cite as: 2017 Palau 1
Civil Appeal No. 16-006
Appeal from Civil Action No. 13-154

Decided: January 3, 2017

Counsel for Appellants .....Siegfried Nakamura
Counsel for Appellee .....William Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Barret Ridep and Kang-Ichi Uchau engaged in a heated argument about a disputed land boundary. In the course of that argument, Mr. Uchau made rude, offensive, and undignified remarks directed at Mr. Ridep and his biological mother. The remarks were made in front of Mr. Ridep, his adoptive mother Mayumi Keibo, his wife Ingrid King, and several other witnesses not identified at trial.

[¶ 2] Mr. Ridep and his biological and adoptive mothers sued Mr. Uchau for defamation. The Trial Division ultimately found that Mr. Ridep and his

parents had not proven defamation and were not entitled to damages arising out of Mr. Uchau's remarks. We **AFFIRM**.[1]

BACKGROUND

[¶ 3] In May 2008, Appellee Uchau built an outdoor kitchen structure on an area of land in Peleliu. Surveys ultimately showed that his outdoor kitchen structure was an encroachment on Mr. Ridep's property and Mr. Uchau had to remove it. In May 2013, he also had to remove a pipe from that property and pled guilty to malicious mischief for the pipe incident.

[¶ 4] In October 2012, Mr. Uchau and Mr. Ridep argued about the property boundary. As part of the heated exchange, Mr. Uchau said to Mr. Ridep: "*Kau e ollei meral diak em delodau el buik. Kau e ollei a meral kedidai a rengum el buik. Diak a cheldechulel e le ke ngalek ra oreomel.*" The translation at trial was: "You, young man, are arrogant. You, young man, are disrespectful. It's because you are a child of the forest."

[¶ 5] In December 2013, Mr. Ridep, Ms. Keibo, and Mr. Ridep's biological mother, Kenry Smau, filed a civil suit against Mr. Uchau. The suit sought damages for defamation and intentional infliction of emotional distress.[2] Mr. Uchau did not dispute the remarks he made during the argument, but argued that the insults did not rise to the level of legal defamation.

[¶ 6] At trial the core issue was whether the "*ngalek ra oreomel*" remark was defamatory. Plaintiffs' expert witness testified that traditionally the expression implied that a person's mother was a promiscuous, loose, or inferior woman ("*chelsensang*"). Defendant Uchau's expert opined that in a contemporary context, use of the expression is a way to be insulting, and may be hurtful, but simply refers to a child born out of wedlock.

[¶ 7] The Trial Division concluded that although the "phrase carries some negative connotations" because of its origins and was undoubtedly uttered to

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[1] Pursuant to ROP R. App. P. 34(a), we determine that oral argument is unnecessary to resolve this matter.

[2] The suit also included a trespass action that is not part of this appeal.

be insulting, "mere insults and ridicule do not rise to the level of defamation." The court summarized the Plaintiffs' expert as acknowledging that "people's reception and acceptance of a certain act do change with time." The court heard considerable expert and lay testimony that "it is not taboo anymore for a woman to have a child out of wedlock." The court additionally found that there "was no evidence to show that the plaintiffs were shunned by the community or that their lives changed for the worse because of the uttered phrase '*ngalek ra oreomel*.'"

[¶ 8] The court further noted that the Plaintiffs had not established damages for intentional infliction of emotional distress. Accordingly, it entered judgment in favor of Defendant Uchau. The Plaintiffs timely appealed.

STANDARD OF REVIEW

[¶ 9] We review a lower court's conclusions of law de novo. *ROP v. Terekiu Clan*, 21 ROP 21, 23 (2014). We review findings of fact for clear error. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). Under the clear error standard, we will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id.*

DISCUSSION

[¶ 10] Appellants assign several errors to the decision of the Trial Division. They argue that Mr. Uchau's remarks constitute "defamation per se" and that it was therefore legal error to deny their defamation claim. They further contend that the trial court misapplied customary law in concluding that the remarks were not defamatory. Finally, Appellants assert that the Trial Division erred by not awarding them damages. We address each contention in turn.

I. Defamation

[¶ 11] Palau does not have a civil statute regarding defamation. *See, e.g.*, *Roll'em Productions v. Diaz*, 22 ROP 229, 240 (Tr. Div. 2015) ("*Diaz*"). Our defamation cases have accordingly been guided by the Restatement of Torts. *Id*. (citing 1 PNC § 303). 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 at least to 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 publication.

Restatement (Second) of Torts, § 558 ("Restatement"). If a plaintiff fails to establish any one of these "essential elements," the defamation claim fails. *See Diaz*, 22 ROP at 240; *see also, e.g.*, *Ngiraingas v. Nakamura*, 18 ROP 225, 234 (2011) ("*Ngiraingas II*").

[¶ 12] Under the first element, a plaintiff must show that the offending statement was both "defamatory" and "false." Restatement, § 558(a); *Ngiraingas v. Soalablai*, 7 ROP Intrm. 208, 211 n.7 (1999) ("*Ngiraingas I*"). As explained below, Appellants' defamation claim ultimately fails at this first hurdle because they have not established that Appellee's statements were defamatory as defined in the Restatement. For this reason, it will be unnecessary for us to address any of the other necessary legal elements of defamation.

[¶ 13] The plaintiff bears the burden of establishing the defamatory nature of a statement. *Ngiraingas I*, 7 ROP Intrm. at 209. A statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation in the community or to deter third persons from associating or dealing with him." *Id*. (citing Restatement § 559). The Restatement provides the additional guidance that "[i]n determining the defamatory character of language . . . the current standards of moral and social conduct prevalent therein . . . [is an] important factor. Thus an imputation may be defamatory as applied to one person at a given time and place, although it would not be derogatory of another person at a different time or in a different place." *Id*. (quoting Restatement § 614, cmt. d). We have explained that this guidance reflects "the common sense notion that whether a communication is defamatory depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place." *Id*. (citations omitted); *accord, e.g.*, *McNally v. University of Hawaii*, 780 F.Supp.2d 1037, 1059 (D. Haw. 2011).

[¶ 14] The Trial Division correctly applied these legal standards, and we agree with its characterization of Appellee Uchau's behavior in the argument as "mere insults or ridicule." The import of the offending phrase "may [have been] highly damaging to reputation at another time," *Ngiraingas I*, 7 ROP Intrm. at 209, but in today's society is not likely to harm one's reputation. The Trial Division noted that its conclusion was bolstered by the fact that "there was no evidence to show that the plaintiffs were shunned by the community or that their lives changed for the worse." Accordingly, because the statement did not tend "to harm the reputation of another as to lower [her or him] in the estimation in the community or deter third persons from associating or dealing with [her or him]," Restatement § 559, the Trial Division correctly concluded the statement "does not rise to the level of defamation."

[¶ 15] Appellants focus on whether the objected-to expression should be deemed "defamation per se." They do not attempt to refute the Trial Division's findings that they had no actual damages, but instead suggest damages should be presumed. "[T]he common law permits recovery not only for harm to reputation that is proved to have occurred, but also, in the absence of proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved." *Diaz*, 22 ROP at 242 (quoting Restatement § 621, cmt. a).

[¶ 16] The problem with Appellants' suggestion is that it presumes both damages *and* proof of their claim. As they articulate it, under a legal theory of "defamation per se" certain specific remarks, once uttered, are automatically defamatory regardless of context. They cite the Restatement, section 574, for the principle that "a statement is defamatory if it imputes unchastity or serious sexual misconduct." Specifically, Section 574 reads: "One who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm." However, this section applies only to statements that have been established as defamatory as defined in the earlier section 559. *Cf*. Restatement, § 558, cmt. a, f (explaining that "what constitutes defamatory matter" is defined in section 559 and "what kinds of defamatory publications are actionable irrespective of special harm" is defined in sections including section 574).

[¶ 17] As discussed earlier, there are multiple elements of a defamation claim. *See* Restatement, § 558(a)-(d).[3] It is necessary that a statement be "defamatory," *id.* § 558(a), but that alone is not sufficient. The statement must additionally be, for example, "false," *id.* § 558(a), "unprivileged," *id.* § 558(b), and the product of at least "negligence." *Id.* § 558(c). It is also usually required to show the existence of "special harm" caused by the statement. *Id.* § 558(d). However, this harm element can also be established by showing that the statement falls into a category of statements that are "actionable irrespective of special harm." *Id*. § 558(d) & cmt. f.

[¶ 18] Those categories are defined in later sections, *see id*. §§ 569-574, under the heading "Defamation Actionable Per Se." Referring to the legal concepts described in this portion of the Restatement as "defamation per se" or "slander per se" is not uncommon, and Appellants can be excused for doing so. But the phrase is a misnomer. There is no list of specific words or phrases that, if spoken, establish a per se defamation claim.[4] There are categories of words or phrases that, once established to be defamatory under the circumstances, can establish liability without additional proof of harm—*i.e.*, defamatory statements that are "actionable per se," assuming all other elements of the tort are present. In other words, proof of harm is normally required for liability, but such proof is not required for certain categories of statements. In all cases, however, a plaintiff must still first establish that the statement is defamatory. The Trial Division correctly concluded that the statement here was not defamatory as defined by law.

II. Customary Law

[¶ 19] Appellants frame the Trial Division's consideration of expert testimony in this case as an exercise of determining applicable customary law under the standard established in *Beouch v. Sasao*, 20 ROP 41 (2013). As a

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[3] Additional requirements may apply when the allegedly defamatory remarks concern public officials. *See, e.g.*, *Diaz*, 22 ROP at 240.

[4] Such a rule would raise serious freedom of expression concerns under article IV, section 2, of the Constitution.

result, Appellants argue, the trial court erred "when it did not apply Palau's customary law." We disagree.

[¶ 20] Appellants contend that the expert testimony in this case supplied "facts justifying the treatment of a custom as traditional law." They assert there is a custom "of refraining from uttering the phrase '*ngalek ra oreomel*,'" but they provide no showing that such a custom "is followed as law." *Cf.*, *e.g.*, *Beouch*, 20 ROP at 48-49. A great many things are done voluntarily and uniformly without developing the characteristics of a law. Here, the dispute was not whether to apply a principle of customary law. Rather, the issue was whether utterance of the expression "*ngalek ra oreomel*" was defamatory. Appellants submitted no evidence of a customary law of defamation, and in fact they requested the court apply their understanding of the Restatement's provisions regarding defamation per se. The Trial Division did not err in declining to find the existence of a traditional law applicable in this case.

III. Damages

[¶ 21] Appellants did not prove their defamation claim and are therefore not entitled to any damages for defamation. Appellants also briefly argue that they were due damages arising out of the emotional distress caused by Mr. Uchau's rude remarks. Their legal argument on this point is predicated on a theory of "defamation per se," which, as discussed above, we have rejected. Appellants have not met their burden to demonstrate error on the part of the lower court, *see Suzuky v. Gulibert*, 20 ROP 19, 22 (2012), and we accordingly affirm the Trial Division's determination that damages were not warranted here.

CONCLUSION

[¶ 22] For the foregoing reasons, the judgment of the Trial Division is **AFFIRMED**.

SO ORDERED, this 3rd day of January, 2017.