

**SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**JEFFREY J. PROSSER,**

**PLAINTIFF,**

**v.**

**DAVID MARSHALL NISSMAN,**

**DEFENDANT.**

**SX-09-CV-509**

**CITE AS: 2019 VI SUPER U 52**

*NOT FOR PUBLICATION*

**Appearances:**

**Trudy Fenster**

Law Office of Trudy Fenster, P.C.  
Christiansted, St. Croix, VI  
*For Plaintiff*

**Edward L. Barry, Esq.**

Law Offices of Edward L. Barry  
Christiansted, St. Croix, VI  
*For Defendant*

**WILLOCKS, Administrative Judge**

**MEMORANDUM OPINION and ORDER**

¶1 **THIS MATTER** is before the Court on the Motion for Partial Summary Judgment (hereinafter “Motion”) of the Plaintiff, filed January 31, 2017. The Opposition and Reply were filed on or about March 1 and March 10, 2017 respectively.

**BACKGROUND**

¶2 In 2008, the Virgin Islands Public Services Commission (hereinafter “PSC”) appointed the Defendant to preside over Docket No. 578, an investigation into rates charged by communications

company VITELCO.<sup>1</sup> The Plaintiff was the owner and manager of VITELCO from 1997 to 2007.<sup>2</sup> Public hearings were held on the matter and the Defendant then, in his capacity as the Hearing Examiner, recounted his findings in an official publication for PSC (hereinafter the “Official Report”).<sup>3</sup>

¶3 According to the Plaintiff, eight statements<sup>4</sup> in the Official Report were defamatory and falsely imputed criminal conduct to the Plaintiff, including an indication that the Plaintiff had misappropriated a large amount of money from the VITELCO retirement fund.<sup>5</sup> The Plaintiff alleges that the Defendant essentially launched an unauthorized criminal investigation into the Plaintiff which produced no evidence in support of the Defendant’s statements.<sup>6</sup> Further, the Plaintiff indicates that he “is publicly perceived as [VITELCO’s] Management for the twenty-year period ending September 21, 2007,” which makes the statements directly applicable to the Plaintiff.<sup>7</sup>

¶4 The Defendant counters that his findings regarding the retirement fund shortfall were based on evidence presented at the PSC hearing and on certain bankruptcy proceedings that VITELCO was involved in.<sup>8</sup> Therefore, the Defendant argues that the statements’ falsity has not been indisputably proved, a requirement for summary judgment in defamation.<sup>9</sup>

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<sup>1</sup> Compl. ¶ 6-7.

<sup>2</sup> *Id.* ¶ 4.

<sup>3</sup> *Id.* at ¶ 10-11.

<sup>4</sup> In the interest of judicial economy, the Court hereby incorporates these statements as found in paragraph 17 of the Plaintiff’s Statement of Undisputed Material Facts In Support of Plaintiff’s Motion for Partial Summary Judgment (hereinafter “Plaintiff’s Statement of Facts”).

<sup>5</sup> See Pl.’s Statement of Facts ¶¶ 17-22.

<sup>6</sup> Mem. of Law 5.

<sup>7</sup> See Pl.’s Statement of facts ¶ 19.

<sup>8</sup> See Def.’s Statement of Facts ¶ 2-4. See also, e.g., *id.* at ¶ 8 (providing an excerpt of the testimony of VITELCO CEO Clark Garnett that millions of dollars were inappropriately taken from the company and put to wrong use).

<sup>9</sup> *Id.* ¶ 6.

¶5 As to the imputation of criminal conduct to the Plaintiff, the Defendant notes that the Plaintiff's name was not used in the Official Report, and he "never attributed mischief to [the Plaintiff]." <sup>10</sup> Further, the Defendant asserts that there is no evidence that the Plaintiff is perceived as VITELCO's "prior management." <sup>11</sup>

¶6 As a result of this disagreement, the Plaintiff has requested summary judgment on the issue of whether the Defendant is liable for defamation under Sections 569 and 571 of the Restatement (Second) of Torts (hereinafter "Second Restatement"). <sup>12</sup>

### LEGAL STANDARD

¶7 The Court may grant summary judgment—judgment as a matter of law—pursuant to Rule 56 of the Virgin Islands Rules of Civil Procedure. <sup>13</sup> "Summary judgment is a 'drastic remedy,' [and] it is only appropriate where 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" <sup>14</sup>

### DISCUSSION

*A. There is a Material Dispute of Fact as to Whether the Defendant is Liable for Defamation Pursuant to Section 569.*

¶8 The Supreme Court of the Virgin Islands has adopted the Second Restatement's approach to defamation. <sup>15</sup> Section 569 of the Second Restatement states that "[o]ne who falsely publishes

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<sup>10</sup> Opp'n ¶ 16.

<sup>11</sup> *Id.* at ¶ 27.

<sup>12</sup> Pl.'s Mem. of Law to Mot. 1.

<sup>13</sup> V.I.R. Civ. P. 56.

<sup>14</sup> *Anthony v. FirstBank Virgin Islands*, 58 V.I. 224, 228 (S. Ct. 2013) (citing *Williams v. United Corp.*, 50 V.I. 191, 194 (S. Ct. 2008)).

<sup>15</sup> *Joseph v. Daily News Pub. Co., Inc.*, 57 V.I. 566, 587-86 (S. Ct. 2012) (citing *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (S. Ct. 2011)).

matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication.”<sup>16</sup> However, the publisher will only be liable only if he “(a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.”<sup>17</sup> It is the burden of a plaintiff to prove the defamatory nature of the communication, its publication, its application to the plaintiff, and the defendant’s negligent or intentional conduct.<sup>18</sup>

¶9 “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>19</sup> A communication is unprivileged when it is made without consent of the person affected by it, it is improper, or its harm is unjustified.<sup>20</sup> To be “published,” a defamatory statement must be communicated, either intentionally or by negligent conduct to a person other than the one defamed.<sup>21</sup> It is also significant that “libel” and “slander” may not be used interchangeably. “Libel” refers to defamation in a written form, while “slander” is defamation in a spoken or gesticulatory form.<sup>22</sup>

¶10 As to whether a statement is true or false is generally a question of fact dependent upon the circumstances of the case and the evidence introduced.<sup>23</sup> Opinion is not actionable for defamation because it is not provable as false.<sup>24</sup>

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<sup>16</sup> Restatement (Second) of Torts § 569.

<sup>17</sup> *Id.* at § 580B.

<sup>18</sup> *Id.* at § 613.

<sup>19</sup> *Id.* at § 559.

<sup>20</sup> *Id.* at § 10.

<sup>21</sup> *Id.* at § 577.

<sup>22</sup> *Id.* at § 568.

<sup>23</sup> *See Joseph*, 57 V.I. 586.

<sup>24</sup> *Simpson v. Andrew L Capdeville, P.C.*, 64 V.I. 477 (S. Ct. 2016) (citing *Kendall*, 55 V.I. at 788).

¶11 In this case, the Defendant published in the Official Report statements that are defamatory because they tended to lower the Plaintiff in the esteem of the public who knew him as VITELCO's former management. However, the Plaintiff has not demonstrated a lack of genuine dispute that the statements are actionable as defamation. The Plaintiff states in the Memorandum of Law to the Motion that the Defendant's conduct is "false and defamatory" because he imputed criminal conduct to the Plaintiff despite having "conducted no civil investigation or a criminal investigation which supported" those findings.<sup>25</sup> However, there is sufficient evidence in the record to indicate that funds from the VITELCO retirement fund were in fact misappropriated by some party, even if it was not the Plaintiff. Further, the complained-of statements made by the Defendant primarily fall into the category of opinion, which is not actionable because opinion and conjecture cannot be proven false. The presence of opinion demonstrates that the Plaintiff is not entitled to judgment as a matter of law at this time.

¶12 The only complained-of statement that is not strictly opinion is: "But as this community has seen time and again, rather than going through the front door with open communications to all relevant agencies, VITELCO's prior management preferred going through the back door using its own brand of inappropriate influence peddling."<sup>26</sup> As to this statement, the Plaintiff has not introduced evidence to prove its falsity, and the Defendant has stated that the findings in the Official Report are based on evidence that was presented in the course of the hearing. Therefore, there is a material dispute as to whether the statement is false.

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<sup>25</sup> Mem of Law to Mot. at 5.

<sup>26</sup> Pl.'s Statement of Facts ¶ 17(c).

¶13 Further, that the Defendant allegedly based his statements on the evidence presented in the course of the hearing creates a material dispute as to whether the Defendant was reckless or negligent in making the defamatory statements. The Court declines to draw out a negligence analysis, but if the Defendant considered equally all the evidence before him as the Hearing Examiner and translated it into his findings, then it is not likely that he was negligent in doing so. If the Defendant's conduct was not at least negligent, then he cannot liable for defamation.

*B. There is No Material Dispute of Fact that the Defendant Is Not Liable for Slander Within the Meaning of Section 571.*

¶14 Section 571 creates liability in a person "who publishes a slander that imputes to another conduct constituting a criminal offense...without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment...or (b) regarded by public opinion as involving moral turpitude.

¶15 The Court must note that the Plaintiff appears to have conflated libel and slander. Slander generally indicates some oral form of defamation, but the Plaintiff has not presented any evidence of slander. Quite the opposite, the Plaintiff repeated points to the written statements of the Official Report to support his claims.<sup>27</sup> Since the alleged conduct complained of is libel, Section 571 is inapplicable to this Motion. Moreover, a review of the record shows a distinct lack of evidence of slander overall. For this reason, the Court finds that there is no genuine dispute of fact that the Plaintiff was not slandered by the Defendant. It is the Defendant, therefore, who is entitled to judgment as a matter of law on that issue, which includes Count Five of the Complaint (Slander).

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<sup>27</sup> See Pl.'s Statement of Facts. See generally Compl.

In accordance with Rule 56(f), the Court will give the parties a reasonable time to respond to its intent to grant summary judgment for the nonmovant.

### **CONCLUSION**

¶16 In this case, there is a genuine dispute of material fact that necessitates the denial of this Motion. The statements published in the Official Report may be defamatory, there is a genuine issue of fact as to whether they are false and whether the Defendant was at least negligent in making the statements. Moreover, much of what was published is opinion and not actionable in a suit for defamation. Further, the Plaintiff has offered no evidence of slander, and the Court will permit the parties time to respond to the its preliminary decision to grant summary judgment in favor of the Defendant on that claim.

¶17 Accordingly, it is hereby:

**ORDERED** that the Plaintiff's Motion for Partial Summary Judgment is **DENIED**; and it is further

**ORDERED** that the parties each file with the Court and serve upon the other party a brief within **FOURTEEN (14) DAYS** responding to the Court's intent to grant summary judgment in favor of the Defendant on the issue of slander and Count Five of the Complaint. The brief may be no longer than **TEN (10) PAGES**, double-spaced, and in twelve-point font, excluding any cover page, caption, certificates of service, or exhibits.

**DONE and so ORDERED** this 10 day of April, 2019.

ATTEST:

Estrella H. George  
Clerk of the Court



HAROLD W.L. WILLOCKS  
Administrative Judge of the Superior Court

By:



Dated:

Court Clerk Supervisor  
11/18/19