

2008

# Melany Zoumadakis v. Uintah Basin Medical Center, Dr. Mark Mason, Lloyd nielson, Carolyn Smith, and John Does 1-10 : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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MELANY ZOUMADAKIS,

Plaintiff/Appellant,

vs.

UINTAH BASIN MEDICAL CENTER,  
INC., and individuals, DR. MARK  
MASON; LLOYD NIELSON; CAROLYN  
SMITH; and JOHN DOES 1-10,

Defendants/Appellees/Cross-  
Appellant.

**BRIEF OF APPELLEES UTAH  
BASIN MEDICAL CENTER, INC.,  
DR. MARK MASON, LLOYD  
NIELSON AND CAROLYN SMITH  
AND CROSS APPELLANT DR.  
MARK MASON**

Case No. 20080067

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Appeal from the Eighth Judicial District Court For Duchesne County, State of Utah,  
Honorable John R. Anderson, Presiding

---

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## **PRIMARY APPEAL**

### **JURISDICTIONAL STATEMENT**

Plaintiff/appellant Melany Zoumadakis appeals from (i) the jury verdict in favor of defendant, appellant and cross-appellee Dr. Mark Mason (“Mason”) on the one allegedly defamatory statement that survived summary judgment; and (ii) the district court’s grant of summary judgment on Zoumadakis’ defamation claim in favor of defendants and appellants Uintah Basin Medical Center, Inc. (“Uintah Basin”), Dr. Mason, Carolyn Smith (“Smith”) and Lloyd Neilsen (“Neilsen”) (collectively “Appellees”), except with respect to one alleged statement by Dr. Mason. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78A-4-103(2)(j) and Utah R. App. Proc. 3.

### **STATEMENT OF THE ISSUES ON APPEAL**

1. Whether the jury’s verdict in favor of Dr. Mason was error. The standard of review applied to challenges to jury verdicts based on insufficiency of the evidence is whether there was substantial evidence to support the verdict. When considering an insufficiency challenge, the appellate court views the evidence in the light most supportive of the verdict, and assumes that the jury believed those aspects of the evidence which sustain its findings and judgment. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 467 (Utah 1996). If the evidence taken in the light most favorable to the verdict supports the verdict, the appellate court will affirm. *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995).

2. Whether the district court erred in granting summary judgment on Zoumadakis' defamation claim except with respect to one alleged statement by Dr. Mason. Summary judgment rulings are reviewed for correctness, with no deference accorded the district court. *Berry v. Greater Park City Co.*, 2007 UT 87, ¶8, 171 P.3d 442.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This action, which is now on appeal for the second time, arose out of Zoumadakis' employment with Uintah Basin as a home health nurse and the termination of her employment in September 2003. Zoumadakis filed her Complaint in December 2003, alleging claims of defamation, intentional infliction of emotional distress and interference with contract. District Court Record ("R. \_\_") at 1-8. In January 2004, appellees moved to dismiss Zoumadakis' Complaint in its entirety, with prejudice. R. 31-32. On May 24, 2004, the Court entered an order granting the motion to dismiss, which order Zoumadakis appealed. R. 97-99. On appeal, this Court affirmed the district court's dismissal of Zoumadakis' intentional infliction and interference with contract claims. *Zoumadakis v. Uintah Basin Medical Center, Inc., et al.*, 2005 UT App. 325, ¶¶7-11, 122 P.3d 891. However, this Court reversed the district court's dismissal of the defamation claim, holding that Zoumadakis had stated a claim for defamation. *Id.* at ¶¶1-5.

Following remand, the parties conducted discovery, after which appellees moved for summary judgment on all facets of Zoumadakis' defamation claim. R. 175-77. The district court granted summary judgment to all parties except with respect to one alleged

statement by Dr. Mason. R. 440-48. On September 6 and 7, 2007, trial was held on the one remaining element of Zoumadakis' defamation claim against Dr. Mason. On September 7, 2007, the jury returned a verdict finding no cause of action against Dr. Mason. R. 581-83. On December 17, 2007, the district court entered a final judgment dismissing Zoumadakis' claim with prejudice. R. 618.

## **II. STATEMENT OF FACTS**

1. Uintah Basin is a hospital and medical system located in Roosevelt, Utah. R. 1; 129.
2. Zoumadakis was employed by Uintah Basin from approximately June 1990 through mid-September 2003. R. 2; 3. During periods relevant to her claim, Zoumadakis worked for Uintah Basin's Home Health Division. R. 213.
3. Dr. Mason is a board certified orthopedic surgeon practicing in Roosevelt, Utah. Pursuant to a contract between Dr. Mason and Uintah Basin, Dr. Mason provides medical services at Uintah Basin's outpatient clinic and has medical and surgical privileges in its medical facilities. R. 660 at 210-12.
4. As part of her employment with Uintah Basin, Zoumadakis occasionally provided home health care services to Dr. Mason's patients pursuant to medical orders from Dr. Mason. R. 660 at 215.
5. Appellee Smith is Dr. Mason's clinic nurse. R. 660 at 167.
6. Appellee Neilsen is director of Uintah Basin's Home Health Division. R. 660 at 107.

7. In September 2003, Smith received a call from Zoumadakis regarding one of Dr. Mason's patients for whom Zoumadakis was providing home health care. R. 660 at 168. The patient involved was a diabetic and presented difficult wound care issues. *Id.* at 170-71.

8. Zoumadakis told Smith that she was at the patient's home, and she thought the medical treatment prescribed by Dr. Mason was wrong. Dr. Mason was standing by Smith's desk, and Smith therefore told Zoumadakis that she could talk to Dr. Mason directly and handed the telephone to Dr. Mason. R. 660 at 168. However, when Dr. Mason said hello, Zoumadakis was no longer on the line. *Id.* at 170-71.

9. Because Zoumadakis was no longer on the line, Dr. Mason called his patient. The patient was upset and told Dr. Mason that Zoumadakis had said the treatment Dr. Mason had prescribed was wrong and inappropriate. R. 660 at 216-217.

10. Dr. Mason's office scheduled the patient to come in a day or two later. When the patient came in, both she and her spouse were still upset and, based on their conversation with Zoumadakis, were concerned that Dr. Mason had not prescribed the right treatment. Dr. Mason spent approximately an hour with the patient and her spouse in order to calm them down and relieve their fears. *Id.* at 217-218.

11. On several previous occasions, patients had reported to Dr. Mason that Zoumadakis told them that Dr. Mason's prescribed treatment was wrong, upsetting the patient and creating concern over their treatment. *Id.* at 218-219.

12. Dr. Mason was concerned about Zoumadakis' conduct with his patient for several reasons, including that 'Zoumadakis' comments upset his patient - potentially interfered with the healing process and patient compliance, and negatively impacted the trust relationship between Dr. Mason and his patient. R. 660 at 205-06; 214-18. Dr. Mason was also very concerned - even that this type of incident had happened before - with Zoumadakis. *Id.* at 218-19.

13. Given his concerns, Dr. Mason called Uintah Basin to report what had happened and his concern over Zoumadakis' actions. R. 660 at 219. Dr. Mason spoke with Vicky Holzman, assistant administrator over Quality at Uintah Basin, Neilsen, who was head of Uintah Basin's Home Health Division, and ultimately, Carlene Jensen, Director of Nursing. *Id.* at 197-98; 220-21.

14. Dr. Mason told Uintah Basin that a patient had reported that Zoumadakis had questioned his treatment, upsetting the patient. R. 660 at 198. Because of his concerns and previous similar experiences with Zoumadakis, Dr. Mason also told Uintah Basin that in the future he did not want Zoumadakis assigned to visit his patients. *Id.* at 221-22.

15. Uintah Basin's Home Health Division had enough patients that assigning Zoumadakis to patients other than those being treated by Dr. Mason was not a problem. R. 660 at 132-33. For example, during 2003, while Dr. Mason referred more patients to Uintah Basin's Home Health Division than any other single physician, of the 190 Home

Health patients Uintah Basin saw during that period, only 26 were referred by Dr. Mason. *Id.* at 128; 133.

16. Following Dr. Mason's initial conversations with Uintah Basin regarding Zoumadakis, a patient also reported to Dr. Mason that Zoumadakis smelled of alcohol during a patient visit. R. 233-35; 247-48. Dr. Mason forwarded this complaint to Uintah Basin. *Id.*; R. 661 at 142.

17. Neilsen verbally discussed with Zoumadakis Dr. Mason's concerns over Zoumadakis' statement to his patient regarding Dr. Mason's treatment and the patient complaint that she smelled of alcohol. He also prepared a corrective discipline report documenting Dr. Mason's and the patient's complaints. R. 660 at 113-14; 144-48; R. 661 at 46-60.

18. Dr. Mason was not involved in any way in Uintah Basin's decision regarding what discipline, if any, to impose on Zoumadakis, nor did he request that any action be taken with respect to Zoumadakis, other than that she no longer see his patients. R. 660 at 132-33; 144; 221-22.

19. The written warning Zoumadakis received imposed certain conditions on her employment, including being subject to drug testing upon request from Uintah Basin. R. 660 at 196-97. Lloyd Neilsen met with Zoumadakis to discuss the warning. Zoumadakis objected to the conditions, in particular, to the drug testing requirement. R. 660 at 151-52.



20. When Neilsen told Zoumadakis she must sign the written warning acknowledging acceptance of the conditions in order to remain employed, she stood up, said that in that case she did not have a job, and left the meeting and Uintah Basin's premises. Her employment with Uintah Basin therefore terminated. R. 660 at 113-14; 151-52.

### **SUMMARY OF THE ARGUMENT**

Zoumadakis challenges the jury's verdict in favor of Dr. Mason on the grounds it is not supported by the evidence. Contrary to Zoumadakis' assertions, the verdict must be affirmed for multiple reasons. First, Zoumadakis fails to meet her burden of marshalling all evidence in support of the verdict and explaining why such evidence is insufficient. Moreover, the jury's verdict is in fact supported by substantial evidence. Finally, the verdict may also be affirmed on alternate grounds. The evidence submitted at trial established only that the gist of what Dr. Mason told Uintah Basin about Zoumadakis was that she had told his patient that the treatment Dr. Mason prescribed was wrong. Dr. Mason testified that his patient in fact reported to him that Zoumadakis had questioned his treatment for the patient. Therefore, his statement to Uintah Basin was true, precluding liability for defamation. In addition, my statement by Dr. Mason to Uintah Basin regarding Zoumadakis' care of and interaction with their mutual patients was subject to a qualified privilege. Zoumadakis failed to produce evidence of malice at trial sufficient to negate the qualified privilege, precluding liability on Dr. Mason's part.

Zoumadakis also challenges the grant of summary judgment in appellees' favor, but the district court did not err in granting summary judgment to appellees.<sup>1</sup> Summary judgment must be affirmed with respect to Dr. Mason's statement to Uintah Basin that a patient complained that Zoumadakis smelled of alcohol during a patient visit because the undisputed evidence established the statement was true. The district court correctly granted summary judgment with respect to Carolyn Smith's, Dr. Mason's nurse, alleged statement to Dr. Mason that Zoumadakis had questioned his treatment because Zoumadakis failed to produce any evidence regarding what was said and because any statements would be subject to a qualified privilege.

Summary judgment must be affirmed with respect to the disciplinary report Neilsen prepared addressing Dr. Mason's complaint and the patient's complaint regarding alcohol because the report was never published outside of Uintah Basin management, and because the report was true, i.e., complaints were received. Summary judgment should be affirmed with respect to Uintah Basin's alleged statement to the Utah Department of Employment Security because the alleged statement was not defamatory and because such publications are privileged. Summary judgment should be affirmed with respect to Carlene Jensen's alleged statement regarding Zoumadakis to Chris Dalsing because such statement was subject to a qualified privilege. Summary judgment must be affirmed with respect to alleged statements by unidentified Uintah Basin

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<sup>1</sup> The district court's only error was not granting summary judgment on Zoumadakis' defamation claim in its entirety, as set forth in Dr. Mason's conditional cross-appeal at 32-34 below.

employees regarding Zoumadakis because Zoumadakis failed to demonstrate any basis on which Uintah Basin could be held liable for such statements. Finally, summary judgment must be affirmed with respect to an alleged statement by Juanita Thacker, a Home Health Supervisor, to Linda Cook, a manager in the Home Health Division, because such statement was subject to a qualified privilege.

## **ARGUMENT**

### **I. THE JURY’S VERDICT IN FAVOR OF DR. MASON SHOULD BE AFFIRMED**

At trial, Zoumadakis alleged that Dr. Mason had defamed her by telling Uintah Basin that she was practicing medicine without a license.<sup>2</sup> Zoumadakis claims that the jury verdict in Dr. Mason’s favor on her claim must be reversed because it is not supported by sufficient evidence. To the contrary, the verdict is supported by ample evidence and must be affirmed.

#### **A. The Jury Correctly Found That Dr. Mason Did Not Publish A Statement that Zoumadakis Was Practicing Medicine Without a License**

In seeking to reverse the jury’s verdict in favor of Dr. Mason, Zoumadakis must first marshal all of the evidence supporting the jury verdict and then demonstrate why such evidence is insufficient to support the jury’s verdict. *Harding v. Bell*, 2002 UT 108, ¶19, 57 P.3d 1093. This burden requires Zoumadakis to “marshal ‘every scrap’ of

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<sup>2</sup> Prior to trial, Zoumadakis characterized Dr. Mason’s statement both as Zoumadakis “was practicing medicine without a license” and that she had questioned his care with a patient. In presenting her case to the jury, however, Zoumadakis asserted that Dr. Mason’s alleged defamatory statement was that she was “practicing medicine without a license.” R.660 at 198; 661 at 184-85; *see also*, Opening Brief at 8.

evidence that supports the jury's finding" and also that she "assume the role of 'devil's advocate.'" *Id.* Here, while Zoumadakis points to some evidence supporting the verdict, she does not marshal all of the evidence, and more importantly, fails to present any argument regarding why such evidence is insufficient to support the verdict. Instead, she simply points to evidence she believes supports her claim, in effect recreating the factual case she presented to the jury. Because Zoumadakis has failed to embrace fully her burden of marshaling the evidence, this Court should deny her appeal without further analysis and affirm the verdict. *See id.* (If the party challenging the verdict fails to meet its marshaling obligation, we will presume that the evidence supported the verdict); *Water Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶15, 48 P.3d 888, (where a party fails to meet its marshaling burden, the appellate court will not disturb the verdict).

In fact, the evidence at trial is more than sufficient to support the jury's verdict in favor of Dr. Mason. Pointing to trial exhibit 3, a document created by Vicky Holzman, Uintah Basin's Assistant Administrator of Quality, that characterized Dr. Mason's complaint as one that Zoumadakis is "practicing medicine without a license," Zoumadakis claims it is "unrefutable" that Dr. Mason uttered those words. Opening Brief at 20. Zoumadakis did not call Holzman as a witness at trial to address the form, and that Holzman used those words in Exhibit 3 to describe Dr. Mason's complaint does

not establish that Dr. Mason made such a statement. The phrase may have been Holzman's characterization of the complaint rather than Dr. Mason's own words.<sup>3</sup>

Moreover, as Zoumadakis admits, other evidence supported the jury's finding that Dr. Mason did not state that Zoumadakis was practicing medicine without a license. Dr. Mason testified that his complaint to Uintah Basin was that Zoumadakis had told a patient that Dr. Mason's prescribed treatment was incorrect or inappropriate, and that he did not recall using the words "practicing medicine without a license" about Zoumadakis. R. 660 at 198.<sup>4</sup> Similarly, Lloyd Nielsen, Zoumadakis' supervisor and author of the corrective discipline report, testified that he could not remember the exact words Dr. Mason used, but the gist of the complaint was that Zoumadakis went into a patient's home and questioned his orders as a physician. R. 660 at 110-111. Zoumadakis suggests that Nielsen later testified that Dr. Mason said "practicing medicine without a license," but again, the testimony to which she cites responded to questions in which Zoumadakis' counsel characterized Dr. Mason's words in that manner. R. 660 at 110, 111. When

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<sup>3</sup> In an affidavit presented to the district court at summary judgment, Holzman testified only that Mason told her that a patient had told him that Zoumadakis questioned Dr. Mason's treatment. R. 251.

<sup>4</sup> Zoumadakis acknowledges Dr. Mason's testimony but then suggests that in later testimony, he acknowledged making the statement. Opening Brief at 21. A careful review of Dr. Mason's testimony, however, demonstrates that he did not acknowledge saying Zoumadakis "was practicing medicine without a license." Rather, in the first instance, after stating that he did not believe he used those words, Dr. Mason said the phrase was a "common colloquialism" used to describe people practicing outside the purview of their license, but affirmed he did not recall using those specific words. *Id.* 198-99. In the second instance, Dr. Mason responded to a question from Zoumadakis' counsel that characterized his statement as "practicing medicine without a license;" he did not acknowledge having used those words. R. 660 at 205-206.

asked specifically what Dr. Mason said, Neilsen stated several times he did not recall the exact words Dr. Mason used, but that he was complaining that Zoumadakis questioned his orders. R. 660 at 109-111. Finally, Carlene Jensen testified that she did not recall Dr. Mason using the words “practicing medicine without a license.” R. 661 at 138.

On appeal, the jury’s verdict should be sustained if there is any substantial evidence to support it. *Jensen v. Sawyers*, 2005 UT 81, ¶¶96-98, 130 P.3d 325. Moreover, in reviewing the evidence, “[w]here evidence may be susceptible to multiple interpretations, some tending to support the verdict, others pointing to an ill-advised result,” this Court should indulge only those reasonable inferences favorable to the verdict. *Id.*; see also, *Hodges v. Gibson Products Co.*, 811 P.2d 151, 156 (Utah 1991) (“When the testimony of witnesses is in conflict, we accept that testimony which supports the jury’s verdict, unless it is inherently implausible, and ignore the evidence which does not support the verdict, even if we might think it more convincing”). Ample evidence supported the jury’s verdict in favor of Dr. Mason and it must be sustained.

**B. The Jury Verdict Can Be Sustained on Multiple Other Grounds**

In addition, a jury’s verdict should be affirmed if other independent grounds exist which support the verdict. *Water Energy*, 2002 UT 32 at ¶16 n.3. (“We further note that . . . the jury's finding in favor of [appellee] on the company's claim for intentional interference with business relations would constitute independent grounds for affirmance. . .”); see also *Hodges*, 811 P.2d at 164-165 (verdict may be sustained where it was appropriate on at least one cause of action submitted to the jury). Here, the verdict may

also be sustained because (i) the statement made by Dr. Mason was true, and (ii) any statements between Dr. Mason and Uintah Basin are subject to a qualified privilege.

As outlined above, the evidence demonstrated that Dr. Mason told Uintah Basin that a patient reported that Zoumadakis questioned the treatment Dr. Mason had prescribed. At trial, Dr. Mason testified that his patient in fact reported to him both on the phone and in person that Zoumadakis told the patient the treatment Dr. Mason prescribed was wrong or not correct. R. 660 at 198; 216-218. While Zoumadakis testified she did not question Dr. Mason's treatment, that testimony does not directly refute that Dr. Mason received such a report from the patient. Dr. Mason's testimony regarding his patient's statement is more than adequate to support a finding that Dr. Mason's statement was true, and the jury verdict may be sustained on that ground.

In addition, the jury's verdict must also be affirmed because Dr. Mason's alleged statement was subject to a qualified privilege. The trial court found that statements between Dr. Mason and Uintah Basin regarding their common patients were protected by a qualified privilege and instructed the jury regarding the same. R. 575.<sup>5</sup> Under Utah law, the malice required to overcome a qualified privilege requires evidence of ill will,

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<sup>5</sup> Although Zoumadakis did not dispute the qualified privilege at summary judgment, R. 272, she now suggests that the trial court erred in finding a qualified privilege. Opening Brief at 25. However, Zoumadakis failed to preserve an objection to the district court's instruction and she therefore cannot challenge that instruction on appeal. *Diversified Holdings, L.C. v. Turner*, 2002 UT 129 ¶8, 63 P.3d 686, ("The rules of civil procedure require a party to preserve an objection to a jury instruction for appeal absent special circumstances; unless a 'party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice.'") (internal citations omitted).

excessive publication or that the defendant did not reasonably believe his statements.

*Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992). Contrary to her arguments, Zoumadakis failed to adduce evidence of malice.

Zoumadakis asserts that Dr. Mason's request that Zoumadakis no longer see his patients and statement that he would refer his patients elsewhere for home health if she continued to see his patients is evidence of ill will, constituting malice. However, on its face this statement does not evidence malice – it is a request for action and does not directly address the motivation behind the request. Moreover, given the specific evidence presented by Dr. Mason regarding his motivation, the request does not give rise to any inference of ill will or malice.

Dr. Mason testified that his request did not come from personal animosity but from legitimate reasons related to the patient's treatment. R. 660 at 205-06; 214-18. The patient was upset and concerned by Zoumadakis' statement, and Dr. Mason testified that it took almost an hour to calm down the patient. Dr. Mason testified that the patient had a difficult case and he was very concerned that Zoumadakis' comments could cause the patient not to follow her treatment. R. 660 at 205-06. Dr. Mason indicated that stress can also interfere with healing. *Id.* Dr. Mason testified his concerns were magnified because he had received previous reports from patients that Zoumadakis had questioned his care, resulting in distress and concern on the part of the patients. R. 660 at 218-19. He testified that while he was able to speak with this particular patient and intervene, he was concerned that other patients might hear similar comments from Zoumadakis that he did



not know about, and those patients might stop following his orders, impeding their progress. *Id.* at 205. Finally, Dr. Mason testified he asked for Zoumadakis to be reassigned from his patients because the incidents with Zoumadakis were negatively impacting his relationship with his patients and potentially jeopardizing patient care. *Id.* at 220-21.

Dr. Mason's legitimate concerns regarding the effect of Zoumadakis' statements to his patient were corroborated by other witnesses. R. 660 at 143 (trust between a doctor and patient is important to the healing process); R. 661 at 130-31 (a good trust relationship between doctor and patient is necessary to the healing process). Zoumadakis provided absolutely no evidence – other than the fact of the request -- to counter Dr. Mason's evidence of the legitimate and non-malicious motivation behind his request. Given this direct and specific evidence, no inference of malice can arise from the request itself.

Zoumadakis argues that despite Dr. Mason's direct testimony regarding the legitimate basis for his request, it was clearly a malicious attempt to get rid of her and put her out of a job because Dr. Mason was the largest referral source for Uintah Basin's Home Health Division. Zoumadakis' argument is misleading. While Dr. Mason was the single largest referral source for Uintah Basin's Home Health Division, the evidence demonstrated that the actual percentage of Uintah Basin's Home Health patients referred by Dr. Mason was quite small – 26 out of 190 during 2003. R. 660 at 128; 133. Zoumadakis provided no evidence that Dr. Mason knew or believed that by requesting

that Zoumadakis not be assigned to his patients, he would cause her employment to terminate. Thus, that Dr. Mason did not want her to see his patients does not establish that his request was intended to, or would, lead to her termination. In fact, as Nielsen testified, Uintah Basin had ample other patients to keep Zoumadakis busy. R. 660 at 132-33. That an inference of malice does not arise solely from Dr. Mason's request is particularly true given that both Dr. Mason and Nielsen testified Dr. Mason did not in any way request or suggest that Zoumadakis be terminated, or that any other action be taken against her. R. 660 at 132-33; 144; 221-22. Dr. Mason was not involved in the disciplinary process, and he testified that he was not aware Zoumadakis's employment with Uintah Basin had terminated until he was served with this lawsuit. R. 660 at 222.

Finally, Zoumadakis claims malice was established through excessive publication. However, the evidence demonstrated that Dr. Mason raised his complaints regarding Ms. Zoumadakis only with Vicky Holzman, Lloyd Nielsen, Zoumadakis' supervisor, and Carlene Jensen, Uintah Basin's Director of Nursing. Zoumadakis suggests that Uintah Basin disseminated these statements into the community, and this dissemination resulted in excessive publication. Even if it were true that Uintah Basin disseminated the statements into the community, such dissemination by Uintah Basin provides no basis for finding excessive publication by Dr. Mason. Moreover, as set forth below at 24-28, Zoumadakis provided no evidence that Uintah Basin disseminated any statements by Dr. Mason into the community.

The evidence established that any statement made by Dr. Mason to Uintah Basin regarding Zoumadakis was true, and protected by a qualified privilege. The jury's verdict must therefore be affirmed.

## **II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEES**

Zoumadakis also claims that the district court erred in granting summary judgment on the bulk of her defamation claim, which related to alleged statements by Uintah Basin, Carolyn Smith, Lloyd Nielsen, Carlene Jensen and Juanita Thacker, and Dr. Mason's report to Uintah Basin of a patient complaint that Zoumadakis smelled of alcohol. For the reasons set forth below, the district court correctly granted summary judgment with respect to these statements.

### **A. The District Court Correctly Granted Summary Judgment With Respect to Dr. Mason's Alcohol Complaint Statement**

Zoumadakis claimed that Dr. Mason defamed her by reporting to Uintah Basin that he received a complaint from a patient that Zoumadakis smelled of alcohol when visiting the patient. The district court correctly granted summary judgment with respect to this statement for multiple reasons.

#### **1. The Statement Was True**

At summary judgment, the undisputed evidence established the truth of Dr. Mason's statement. In connection with summary judgment, Dr. Mason provided an affidavit from the husband of his patient testifying that the patient and her husband complained to Dr. Mason that Zoumadakis smelled of alcohol during a patient visit. R. 233-35. Zoumadakis could not and did not dispute this evidence. Under Utah law, truth

is an absolute defense to an action for defamation. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991). On appeal, as at summary judgment, Zoumadakis argues that summary judgment was not appropriate because the patient's complaint to Dr. Mason was not true, i.e., Zoumadakis did not smell of alcohol. As the district court correctly noted, however, the relevant issue was the truth of Dr. Mason's statement, not the truth of the patient's statement. R. 443. Dr. Mason did not say the patient's complaint was correct -- he simply stated that he had received such a complaint from a patient. As the patient's affidavit established, Dr. Mason did in fact receive a complaint from a patient that Zoumadakis smelled of alcohol. Thus, his statement to Uintah Basin was true and summary judgment should be affirmed.

## **2. Dr. Mason's Statement Was Subject to A Qualified Privilege**

The district court also correctly dismissed Zoumadakis' complaint with respect to the alcohol statement because it was subject to a qualified privilege between Dr. Mason and Uintah Basin. Zoumadakis argues that even if Dr. Mason's statement to Uintah Basin was protected by a qualified privilege, summary judgment was inappropriate because the qualified privilege was overcome by malice. Opening Brief at 31-32. Zoumadakis first asserts malice existed because Dr. Mason knew the complaints were not true. This argument rests on testimony by Chris Dalsing, former director of Uintah Basin's physical therapy department, that the patient involved made numerous complaints to Uintah Basin about its personnel. However, Dalsing's testimony refers to patient complaints to Uintah Basin, not to Dr. Mason. Dalsing's testimony does not

establish, much less support, that Dr. Mason was aware of previous complaints by this patient regarding Uintah Basin personnel.<sup>6</sup> Zoumadakis did not provide any evidence at summary judgment (or at trial) indicating that the patient had previously complained to Dr. Mason or that Dr. Mason was aware of the patient's complaints to others. Thus, Dalsing's testimony fails to establish malice on the part of Dr. Mason.

Zoumadakis also argues that malice by Dr. Mason is established by his complaint to Uintah Basin, and his request that Zoumadakis not be assigned to his patients. As set forth in section 14-16 above, these actions fail to give rise to any inference of malice. Summary judgment was appropriate on this claim.

**B. The District Court Correctly Granted Summary Judgment With Respect to Carolyn Smith's Statement**

At summary judgment, Zoumadakis alleged, on information and belief, that Carolyn Smith, Dr. Mason's assistant, misrepresented to Dr. Mason that Zoumadakis was questioning his care. The district court correctly dismissed this claim based on Zoumadakis' testimony that she did not have actual knowledge of any conversations between Dr. Mason and Smith, but was basing her claim solely on information and belief. R. 442. On appeal, Zoumadakis challenges this ruling, citing to Smith's testimony at trial. The appropriateness of the district court's summary judgment ruling should be judged on the summary judgment record. A party cannot fail to submit controverting

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<sup>6</sup> In fact, Dalsing's testimony establishes only that he believed there had been previous complaints, not that any other Uintah Basin employee was aware of complaints. For example, Lloyd Neilsen testified he was not aware of any previous complaints. R. 660 at 163.

evidence at summary judgment, and then challenge the grant of summary judgment based on trial evidence introduced in connection with a surviving claim. *See Kirschner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9<sup>th</sup> Cir. 1988) (affidavits or other evidence not before the district court will not be considered on appeal in reviewing the district court's opinion). Zoumadakis had every opportunity to depose witnesses and develop the record for use at summary judgment. Zoumadakis cannot complain about the result when she chose to rely on her own unsupported assertions. To the extent Zoumadakis cites to the trial record rather than to the summary judgment record, her appeal must be rejected.

In addition, even if such evidence is considered, the district court's dismissal of this claim must still be affirmed, because Smith's statement is subject to a qualified privilege and thus is not actionable. R. 442; *Brehany*, 812 P.2d at 58 (statements made to advance a legitimate common interest between the publisher and the recipient of the publication are subject to a qualified privilege). Zoumadakis acknowledges that such a privilege exists, but claims it is overcome by malice. However, at summary judgment, and again here, Zoumadakis acknowledges that she has no actual evidence of malice on the part of Smith, but instead speculates about possible malicious intent on the part of Smith. Opening Brief at 34 ("It is unknown why Smith would tell Dr. Mason that Ms. Zoumadakis was questioning his care. It is possible that . . ."); R. 274 ("It may very well be that Defendant Smith told this to Mason to gain his objective to get rid of Melany.") Speculation is insufficient to oppose summary judgment, and the district court's grant of summary judgment on this portion of Zoumadakis' defamation claim must be affirmed.

**C. The District Court Correctly Granted Summary Judgment With Respect to the Corrective Disciplinary Action Report Prepared By Neilsen**

At summary judgment, Zoumadakis claimed that the report prepared by Neilson was defamatory. The district court correctly granted summary judgment with respect to this claim. As the district court noted, the undisputed evidence at summary judgment established that this report was not published to any third parties external to Uintah Basin management. R. 444. Neither below, nor on appeal, does Zoumadakis point to any evidence in the summary judgment record demonstrating that the report was published to third parties. Without publication, Zoumadakis' claim fails. *DeBry v. Godbe*, 1999 UT 111, ¶23, 992 P.2d 979 ("the requirement of 'publication' means that the defamatory statement be communicated to a third person and that the third person read and understand the statement").<sup>7</sup>

In connection with this argument, Zoumadakis once again inappropriately refers to trial evidence to support her claim that summary judgment should not have been granted. As set forth above, such evidence should not be considered, but even if it is, summary judgment must still be affirmed. For example, Zoumadakis argues that although Carlene Jensen testified that information in Uintah Basin's personnel files are not given to third parties, such testimony is not believable, particularly because Jensen testified that if she knew someone were fired because of patient complaints, it would affect her decision

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<sup>7</sup> Moreover, to the extent review of the report by limited members of management was deemed publication, the report would be subject to a qualified privilege. *Brehany*, 812 P.2d at 58-59.

regarding whether to hire such person. *See* Opening Brief at 35 (“It was not convincing that Ms. Jensen stated that the things in employee files are not disseminated to prospective employers. . . . It is beyond reason that the items in an employee file would not be subject to review by a further prospective employer.”) These arguments are based on pure speculation and have no factual basis. Zoumadakis failed to adduce any evidence at summary judgment or at trial that the report had been published to third parties. The district court’s ruling should therefore be affirmed.<sup>8</sup>

**D. The District Court Correctly Granted Summary Judgment With Respect to Uintah Basin’s Statements to the Department of Workforce Services**

Zoumadakis also alleged that Uintah Basin’s statements to the Utah Department of Workforce Services that Zoumadakis quit were defamatory. The district court correctly granted summary judgment with respect to this claim. On appeal, Zoumadakis argues that the statement was false and was defamatory because she did not quit but was terminated. If the statement is not defamatory, the fact that it was false does not make it actionable. Moreover, while Zoumadakis asserts that the statement is defamatory, she fails to explain how stating someone quit is defamatory, as Utah law defines defamation as statements that “impeach an individual’s honesty, integrity, virtue, or reputation or publish his or her natural defects or expose him or her to public hatred, contempt, or

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<sup>8</sup> In addition, judgment on this portion of Zoumadakis’ claim was appropriate because the alleged defamatory statements contained in the report are true, i.e., Uintah Basin in fact received complaints about Zoumadakis from Dr. Mason.



ridicule.” *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988). On its face the statement is not defamatory and summary judgment was therefore appropriate.<sup>9</sup>

**E. The District Court Correctly Granted Summary Judgment With Respect to Jensen’s Alleged Statement in a Quality Control Meeting**

Zoumadakis claimed that she was defamed by Carlene Jensen’s alleged statement to Chris Dalsing during a Quarterly Review meeting that Zoumadakis had been terminated due to a patient complaint about alcohol. The district court correctly granted summary judgment with respect to this statement because it was subject to a qualified privilege and because it was true.

In asserting error by the district court, Zoumadakis first argues the district court erred in finding a qualified privilege applied, because contrary to the district court’s conclusions, lower level non-management employees were present at that meeting, and some of them may have heard the statement. Opening Brief at 38-39. While Zoumadakis contends that lower level employees were present, she fails to cite to any evidence presented to the district court at summary judgment to support this assertion. *See* Opening Brief at 39. Moreover, as the district court noted, Zoumadakis’ evidence established that the statements were only made to and heard by Chris Dalsing, then head of Uintah Basin’s physical therapy department and clearly a member of management. R. 445. Although Zoumadakis continues to speculate that others may have heard these

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<sup>9</sup> Also, Utah recognizes an absolute privilege to participants in judicial proceedings. *Price v. Armor*, 949 P.2d 1251, 1256 (Utah 1997). This privilege also applies to quasi-judicial proceedings, including administrative proceedings. *Id.*; *see Dorn v. Person*, 512 N.W. 2d 902 (Minn. App. 1994) (employer’s statement to unemployment compensation agency regarding reasons for termination is absolutely privileged.)

statements, neither at summary judgment nor on appeal does she point to evidence in support of this proposition.

The district court also correctly found that the statement was substantially true, as a patient in fact complained that Zoumadakis smelled of alcohol during a visit, R. 233-35, and that complaint eventually resulted in Zoumadakis leaving her employment with Uintah Basin. Summary judgment was therefore appropriately granted on this claim.

**F. The District Court Correctly Granted Summary Judgment With Respect to Alleged Statements By Unidentified Uintah Basin Personnel to Community Members**

In response to appellees' Motion for Summary Judgment, Zoumadakis provided the Court with letters from certain community members who reported hearing from various unspecified sources that Zoumadakis was fired and the alleged reason for her termination. R. 283-93. The district court correctly granted summary judgment on this claim for several reasons. First, at least one of the letters rested on hearsay, which is inadmissible and therefore could not provide a basis for denying summary judgment; second, to the extent the statements arose from conversations among community members, Uintah Basin had no responsibility or ability to police community conversations; and third, Zoumadakis failed to provide evidence demonstrating that Uintah Basin was responsible for the statements of unidentified employees under the doctrine of respondeat superior liability. R. 283, 285; 446.

Zoumadakis argues that the district court erred by failing to give her the opportunity to prove that the rumors and other statements came from Uintah Basin

employees. However, this argument ignores Zoumadakis' burden at summary judgment. Under Utah R. Civ. P. 56, when summary judgment is sought and properly supported, Zoumadakis may not rest on mere allegations but must come forward with specific facts, by affidavit or otherwise, to demonstrate that a genuine issue of fact exists. *Thornock v. Cook*, 604 P.2d 934, 936 (Utah 1979). While Zoumadakis provided affidavits in support of this piece of her claim, as the district court found, Zoumadakis' affidavits failed to provide specific, admissible evidence that, if believed, was sufficient to establish Uintah Basin's responsibility for the alleged statements.

First, several of the affidavits did not identify or connect the alleged speakers to Uintah Basin. R. 287, 293. Uintah Basin cannot be held responsible for statements of third parties not connected to Uintah Basin. Moreover, to the extent Zoumadakis' affidavits stated that the alleged statements came from Uintah Basin employees, the affidavits did not identify the employees. R. 283, 285. Uintah Basin could potentially be vicariously liable for allegedly defamatory statements of its employees, if at all, pursuant to the doctrine of respondeat superior. *Birkner v. Salt Lake County*, 771 P.2d 1053, 1057 (Utah 1989). To avoid summary judgment, Zoumadakis had to provide evidence that at trial would be sufficient to establish that the statements were made in the scope of the speaker's employment. *Id.* That analysis requires proof of three factors: 1) the unnamed employee's alleged defamatory conduct is of the general kind he/she was employed to perform; 2) his/her's alleged defamatory conduct occurred within the hours of the employee's work and the ordinary spatial boundaries of the employment; and 3) his/her

alleged conduct was motivated, at least in part, by the purpose of serving the employer's interest. *Id.*

As a matter of law, because neither of the affidavits provided by Zoumadakis specifically identified the speaker, Zoumadakis did not provide evidence from which a jury could determine the speaker was acting within the scope of his /her employment. Zoumadakis did not provide evidence to establish the first element, that the unnamed employees' duties including commenting on the reasons for Zoumadakis' termination. To the contrary, Uintah Basin provided undisputed evidence that the duties of its employees did not include discussing the termination of co-employees with third parties, thereby precluding a finding that the alleged speaker was acting within the scope of his/her employment. R. 424-25.

Nor did Zoumadakis provide evidence of the third factor, that the unnamed employees were motivated by serving Uintah Basin's interests. Zoumadakis provided no evidence that the unnamed employees were acting to serve Uintah Basin's interests, and on its face, the alleged statement at best appears to be idle gossip. Many courts have refused to attribute an employee's defamatory statements to the employer in the absence of evidence that the employee was acting in the company's interest. *Martineau v. Arco Chem. Co.*, 1998 U.S. Dist. LEXIS 20956, at \*38-39 (S.D. Tex. Dec. 24, 1998)<sup>10</sup> (employer could not be held liable where the plaintiff was unable to demonstrate how a

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<sup>10</sup> Copies of unpublished cases are attached hereto, including: *Martineau v. Arco Chem. Co.*, *Lamson v. Firestone Tire & Rubber Co.*, and *Corradi v. Emmco Corp.*

supervisory employee's statements that another employee was a liar and was sleeping with a co-employee were advancing the interests of the employer) *aff'd*, 203 F.3d 904 (5<sup>th</sup> Cir. 2000); *see also Allstate Insur. Co. v. Quick*, 254 F. Supp. 2d 706, 715-16 (S.D. Ohio 2002) (employee's publication of defamatory statements outside the company's formal grievance procedure is outside the scope of employment and employer not liable).

As numerous courts have found, an employer is not responsible for the unauthorized gossip of its employees and supervisors. *See Lamson v. Firestone Tire & Rubber Co.*, No. 14692, 1991 Ohio App. LEXIS 1010, at \*8 (Ohio App. Mar. 13, 1991) (company whose employee published within the company sexual harassment accusations about another employee could not be held liable for defamation under principles of respondeat superior); *Danawala v. Houston Lighting & Power Co.*, 14 F.3d 251, 255 (5<sup>th</sup> Cir. 1993) (employer not liable for defamatory comments of employee); *Corradi v. Emmco Corp.*, No. 67407, 1996 Ohio App. LEXIS 510, at \*7-8 (Ohio App. Feb. 15, 1996) (same). The affidavits provided by Zoumadakis were therefore insufficient as a matter of law to defeat summary judgment.

Zoumadakis argues that the district court should have found Uintah Basin was or could have been responsible for such statements without resort to principles of respondeat superior. In fact, respondeat superior is the only vehicle by which Uintah Basin can be liable for such statements. *See S.H. by and through R.H. v. State*, 865 P.2d 1363, 1366 (Utah 1993) (generally, an employer is not liable for the intentional torts of his employees unless the tort is committed within the scope of employment); *Hodges*, 811

P.2d at 156-157 (employer's liability for employee's intentional and negligent torts dependent on whether the acts are committed within the scope of employment). Because Zoumadakis failed to come forward with evidence that, if believed, was sufficient to establish such liability on the part of Uintah Basin for its employees' alleged statements, the district court properly granted summary judgment on this part of Zoumadakis' claim.

**G. The District Court Correctly Granted Summary Judgment With Respect to Statements of Juanita Thacker**

At summary judgment, Zoumadakis, for the first time, also claimed she was defamed by the statements of Juanita Thacker, a Uintah Basin employee. The district court appropriately dismissed Zoumadakis' defamation claim with respect to Thacker's statements because Zoumadakis failed to raise these allegations in her complaint, and because the alleged statements were substantially true. On appeal, Zoumadakis argues that dismissal on the grounds this statement was not plead in her Complaint was error because she did not know about the statement until after appellees' summary judgment had been made, and her failure to identify the statement in the complaint did not matter, because it was "just further evidence that UBMC had improperly disseminated defamatory statements against Ms. Zoumadakis . . . ." Opening Brief at 40. This argument misses the point. Defamation must be plead with particularity to allow the defendant to adequately discover and defend against such a claim. *See Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982). The witness on which Zoumadakis relied in connection with Thacker's alleged statement was available to Zoumadakis, yet she failed to identify this statement in either her complaint or at her deposition. In so doing,

Zoumadakis deprived appellees of the opportunity to conduct discovery regarding the statement. The district court therefore appropriately granted summary judgment with respect to this statement.

In addition, as the district court noted, Thacker's alleged statement – that Uintah Basin had received a complaint regarding the smell of alcohol on Zoumadakis' breath and that Thacker had received a previous complaint regarding Zoumadakis – was substantially true. As set forth above, Uintah Basin learned from Dr. Mason that a patient had complained Zoumadakis smelled of alcohol during a patient visit. In addition, Thacker testified by affidavit that she had previously received a complaint about Zoumadakis using alcohol. R. 428-29. At summary judgment, Zoumadakis did not provide any evidence to dispute Thacker's affidavit.

Finally, summary judgment was appropriate on this claim because Thacker's statement was subject to a qualified privilege. The statement was allegedly made to Linda Cook, who at the time managed the Vernal durable medical equipment office operated by Uintah Basin's Home Health Division. R. 424. Thacker was a Home Health Supervisor. R. 428-29. Statements between the two were therefore subject to a qualified privilege, *see* above at 20, and Zoumadakis failed to provide any evidence of malice on the part of Thacker.

### **III. THE DISTRICT COURT'S DENIAL OF ZOUMADAKIS' SUMMARY JUDGMENT MUST BE AFFIRMED**

In her docketing statement, Zoumadakis identified as an issue for appeal whether the district court erred in denying Zoumadakis' cross-motion for summary judgment

seeking judgment in her favor on her motion for summary judgment. Zoumadakis failed to provide any argument in her brief and it is therefore waived. *Water Energy*, 2002 UT 32 at ¶13 n.2.



## **CROSS-APPEAL**

In the event the Court reverses the jury's verdict in Dr. Mason's favor, Dr. Mason cross-appeals the district court's denial of summary judgment with respect to one alleged statement by Dr. Mason and his denial of Dr. Mason's directed verdict motion. This appeal is conditional on reversal of the jury verdict in Dr. Mason's favor.

### **STATEMENT OF THE ISSUES ON APPEAL**

1. Whether the district court erred in denying Dr. Mason summary judgment on Zoumadakis' defamation claim with respect to his alleged statement to Uintah Basin that Zoumadakis questioned his treatment with a patient or that she was practicing medicine without a license. Summary judgment rulings are reviewed for correctness, with no deference accorded the district court. *Berry v. Greater Park City Co.*, 2007 UT 87, 171 P.3d 442.

2. Whether the district court erred in denying Dr. Mason's motion for a directed verdict at the close of evidence. In reviewing a challenge to the trial court's denial of a motion for a directed verdict, the appellate court reviews "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict." *Smith v. Fairfax Realty, Inc., et. al*, 2003 UT 41, ¶12, 82 P.3d 1064.

## **STATEMENT OF THE CASE**

Appellee and cross-appellant Dr. Mason adopts the statement of the case and facts set forth above at 2-7.

## **SUMMARY OF THE ARGUMENT**

In the event the Court reverses the jury verdict in Dr. Mason's favor, the Court should order judgment affirmed for Dr. Mason, as the district court erred in failing to grant summary judgment and a directed verdict to Dr. Mason with respect to his statement to Uintah Basin regarding Zoumadakis' interaction with his patient. As the district court found, communications between Dr. Mason and Uintah Basin regarding their common patients were subject to a qualified privilege. Neither at summary judgment nor at trial did Zoumadakis provide evidence sufficient to establish malice on the part of Dr. Mason. The district court therefore erred in failing to grant summary judgment and a directed verdict in Dr. Mason's favor.

### **I. THE DISTRICT COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO DR. MASON**

At summary judgment, the district court found, as a matter of law, that a conditional privilege existed between Uintah Basin and Dr. Mason that protected statements by Dr. Mason to Uintah Basin regarding Zoumadakis and her treatment of Dr. Mason's patients. However, the district court denied summary judgment to Dr. Mason with respect to his statement regarding Zoumadakis' interaction with his patient, holding that whether malice existed was a question of fact. In fact, Zoumadakis provided no

evidence of malice and summary judgment should have been granted on her claim against Dr. Mason in its entirety.

As noted above, to demonstrate malice sufficient to overcome a qualified privilege requires evidence of ill will, excessive publication or that the defendant did not reasonably believe his statements. In opposing summary judgment, Zoumadakis argued that malice existed with respect to Dr. Mason because “Dr. Mason made UBMC a great deal of money. Although the Plaintiff did not question Mason’s statements, he wanted her gone. The way to do so would be to maliciously spread untruths about her questioning his care of patients, and stating that she told patients to get a second opinion.” R. 273-74. On its face, this argument contains only unsupported speculation, rather than evidence, that Dr. Mason acted out of malice or some intent to get rid of Zoumadakis. Unsubstantiated argument and conclusions are insufficient to defeat summary judgment. *Winter v. Nw. Pipeline Corp.*, 820 P.2d 916, 919 (Utah 1991) (plaintiff’s reliance on his own unsupported conclusions without evidentiary support is insufficient to defeat a motion for summary judgment); *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985) (affidavit and arguments based solely on unsubstantiated opinion and belief is insufficient to defeat summary judgment).

Moreover, to the extent Zoumadakis was suggesting that malice was established by Dr. Mason’s request that Zoumadakis not see his patients, this statement did not create an issue of fact with respect to malice. At summary judgment, the evidence and any reasonable inferences therefrom are drawn in favor of the non-moving party. *Beehive*

*Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 831 (Utah Ct. App. 1988). As noted above at 14-16, given Dr. Mason's legitimate concern regarding the effect of Zoumadakis' statements on his relationship with his patient and his patient's medical care, and the evidence from both Dr. Mason and Nielsen that Dr. Mason did not request any other action be taken against Zoumadakis, malice cannot reasonably be inferred from his complaint to Uintah Basin about Zoumadakis.

At summary judgment, Zoumadakis also claimed that she had evidence of malice because Uintah Basin disseminated the information into the community through nurses and employees. However, Zoumadakis' allegations regarding excessive dissemination are all related to actions by Uintah Basin, not Dr. Mason. Uintah Basin's actions can not establish malice on the part of Dr. Mason. Moreover, as the district court acknowledged, Zoumadakis failed to provide any evidence at summary judgment from which a fact finder could conclude Uintah Basin was responsible for disseminating any information regarding Zoumadakis into the community. R. 446 and above at 24-28. Thus, this argument does not support her claim of malice, and summary judgment should have been granted in Dr. Mason's favor.

## **II. THE DISTRICT COURT ERRED IN FAILING TO GRANT DR. MASON'S MOTION FOR DIRECTED VERDICT**

Similarly, the district court erred in failing to grant Dr. Mason's motion for a directed verdict at the close of Zoumadakis' case. Following the close of Zoumadakis' case, Dr. Mason moved for a directed verdict on the ground that Zoumadakis had failed

to provide any evidence of malice sufficient to overcome the qualified privilege the district court found protected communications between Dr. Mason and Uintah Basin.

Again, the malice required to overcome a qualified privilege requires evidence of ill will, excessive publication or that the defendant did not reasonably believe his statements. *Russell*, 842 P.2d at 904-05. As set forth above at 14-15, at trial, Dr. Mason articulated a reasonable, non-malicious basis for his alleged statements to Uintah Basin – the effect Zoumadakis’ statements had on his patients, his concern over the potential negative effect of such statements on treatment and the fact that this was not the first time Zoumadakis had questioned his treatment with patients. R. 660 at 205; 214-20. Zoumadakis failed to introduce any direct evidence of ill will on Dr. Mason’s part or any evidence that countered Dr. Mason’s legitimate concerns.

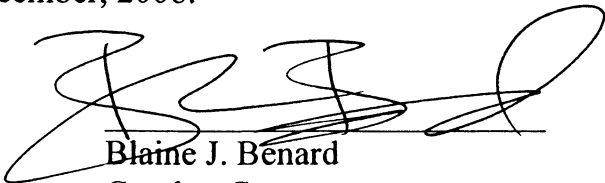
While Zoumadakis argues that ill will or malice could be inferred because Dr. Mason told Uintah Basin he did not want Zoumadakis to see his patients any longer and would refer patients to another home health care agency if Uintah Basin continued to assign Zoumadakis to see his patients, this statement does not lead to an inference of malice. As set forth above at 15-16, there is simply no such basis for the inference Zoumadakis seeks to draw. Dr. Mason had a legitimate reason for his comments, he did not request that any action be taken against Zoumadakis, he was not involved in the disciplinary process and was unaware that Zoumadakis’ employment had terminated until her complaint was filed and served upon him.

Zoumadakis failed to provide any evidence indicating that Dr. Mason's statements were motivated by malice or ill will as opposed to his legitimate concern over his patients. Nor did Zoumadakis provide any evidence that Dr. Mason made the statements to anyone except Lloyd Neilsen, Vicky Holtzman or Carlene Jensen. Finally, Zoumadakis did not supply any evidence that Dr. Mason did not believe his statement was correct at the time he made it, and in fact, he testified that his call to Uintah Basin was triggered by his patient's report that Zoumadakis had questioned the treatment Dr. Mason prescribed. The trial court erred in failing to grant a directed verdict in favor of Dr. Mason at the close of evidence, and, to the extent the jury's verdict is reversed, the Court should therefore order that judgment be entered for Dr. Mason on the basis that the district court erred in denying Dr. Mason's motion for a directed verdict.

### CONCLUSION

For the reasons stated above, in the event this Court reverses the jury verdict in Dr. Mason's favor, the district court should order that judgment be entered in favor of Dr. Mason on the ground (i) the trial court erred in denying summary judgment to Dr. Mason with respect to his alleged statement to Uintah Basin regarding Zoumadakis and (ii) the trial court erred in not granting a directed verdict in Dr. Mason's favor.

DATED this 11<sup>th</sup> day of December, 2008.

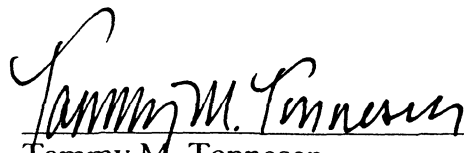


Blaine J. Bénard  
Carolyn Cox  
HOLME ROBERTS & OWEN, LLP

## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of **BRIEF OF APPELLEES  
UINTAH BASIN MEDICAL CENTER, INC., DR. MARK MASON, LLOYD  
NIELSON AND CAROLYN SMITH AND CROSS APPELLANT DR. MARK  
MASON** was mailed, postage pre-paid, on the 11th day of December, 2008, to the  
following:

Jay L. Kessler, Esq.  
KESSLER LAW OFFICE LLC  
9087 West 2700 South, Suite 9  
Magna, UT 84044

  
\_\_\_\_\_  
Tammy M. Tonnesen  
Legal Secretary

# ATTACHMENT – UNPUBLISHED CASES

*Martineau v. Arco Chemical Co.*, 1998 U.S. Dist. LEXIS 20956 (S.D. Tex. Dec. 24, 1998) *aff'd*, 203 F.3d 904 (5th Cir. 2000)

*Corradi v. Emmco Corp.*, No. 67407, 1996 Ohio App. LEXIS 510 (Ohio App. Feb. 15, 1996)

*Lamson v. Firestone Tire & Rubber Co.*, No. 14692, 1991 Ohio App. LEXIS 1010 (Ohio App. Mar. 13, 1991)



LEXSEE



Positive

As of: Jan 29, 2007

**RICHARD MARTINEAU, Plaintiff, v. ARCO CHEMICAL COMPANY and LISA  
SWEENEY, Defendants.**

**CIVIL ACTION NO. H-98-1608**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
TEXAS, HOUSTON DIVISION**

**1998 U.S. Dist. LEXIS 20956; 76 Empl. Prac. Dec. (CCH) P46,011**

**December 23, 1998, Decided**

**December 24, 1998, Entered**

**DISPOSITION:** [\*1] Defendant's Motion for Partial Summary Judgment [Doc. # 17], and Defendant ARCO Chemical Company's Motion for Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 29] GRANTED. Civil action DISMISSED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant employer filed a motion for partial summary judgment in plaintiff employee's action that alleged employment discrimination based on national origin in violation of the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.001 et seq. (1996), defamation, and intentional infliction of emotional distress. Defendant also filed a motion for summary judgment on plaintiff's supplemental slander claim.

**OVERVIEW:** Plaintiff employee filed suit against defendant employer, alleging discrimination based on national origin in violation of the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.001 et seq. (1996), intentional infliction of emotional distress, and defamation. Defendant filed a motion for partial summary judgment and a motion for summary judgment on a supplemental slander claim filed by plaintiff. The court granted the motions. The court found that plaintiff offered insufficient evidence to raise fact questions as to the falsity of defendant's reason for his termination, concluding that defendant had relied upon its employee's complaints about plaintiff in good faith. The court also

found that there was insufficient evidence to sustain plaintiff's emotional distress claim because the conduct complained of was not so extreme to be regarded as beyond the bounds of decency. The court further found that plaintiff failed to show that a co-employee's statements were made within the scope of her employment so as to raise a fact issue concerning defamation. Moreover, the court found that plaintiff's supplemental slander claim was based on non-actionable opinions.

**OUTCOME:** The court granted defendant employer's motion for partial summary judgment and motion for summary judgment on plaintiff employee's supplemental slander claim. Plaintiff offered insufficient evidence to raise questions of fact as to whether defendant's proffered reason for plaintiff's termination was false because whether or not the complaints made against plaintiff were false, defendant relied upon the complaints in good faith.

**CORE TERMS:** summary judgment, termination, supervisor, defamation, defamatory, intentional infliction of emotional distress, prima facie case, national origin, liar, hostile, sexual harassment, undisputed, proffered, defamed, slander, gossip, harassment, bailing, reply, direct evidence, discriminatory, genuine, subordinate, irrational, deposition, actionable, delusional, workplace, falsely, insane

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview***

***Civil Procedure > Summary Judgment > Opposition > General Overview***

***Civil Procedure > Summary Judgment > Standards > General Overview***

[HN1] In deciding a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. However, factual controversies are resolved in favor of the nonmovant only when there is an actual controversy—that is, when both parties have submitted evidence of contradictory facts. Fed. R. Civ. P. 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial.

***Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964***

[HN2] One of the express purposes of the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.001 et seq. (1996), is to provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments. Tex. Lab. Code Ann. § 21.001(1). Therefore, courts must look to analogous federal law when resolving claims brought under Title VII.

***Evidence > Inferences & Presumptions > General Overview***

***Evidence > Procedural Considerations > Burdens of Proof > Initial Burden of Persuasion***

***Tax Law > Federal Taxpayer Groups > S Corporations > Conditions & Restrictions (IRC sec. 1361)***

[HN3] Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discharge or otherwise discriminate against an individual with respect to that person's compensation, terms, conditions, or privileges of employment, or to otherwise adversely affect the person's status as an employee, because of that person's race. 42 U.S.C.S. § 2000e-2(a). Each plaintiff bears the initial burden of establishing a prima facie case of intentional discrimination.

***Evidence > Inferences & Presumptions > General Overview***

***Labor & Employment Law > Discrimination > Disparate Treatment > General Overview***

[HN4] In a suit alleging discriminatory discharge, the requirements of a prima facie case are that (1) plaintiff is a member of a protected class; (2) that plaintiff was qualified for the position he held; (3) that plaintiff was discharged; and (4) that, after plaintiff's discharge, his employer replaced him with a person who is not a member of the protected class, or, in a case in which the employer discharges plaintiff and does not replace him, that, after the discharge, others who were not members of the protected class remained in similar positions.

***Evidence > Inferences & Presumptions > General Overview***

***Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion***

***Labor & Employment Law > Discrimination > Disparate Treatment > General Overview***

[HN5] If a plaintiff establishes a prima facie case, a presumption of discrimination is created, and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. If the defendant satisfies this burden, the presumption disappears, and the plaintiff must prove that the proffered reasons are a pretext for discrimination. Throughout the case, the plaintiff retains the ultimate burden of persuading the finder of fact not only that the defendant's reasons are pretextual, but also that the defendant intentionally discriminated against the plaintiff. Even if the defendant's proffered reason is rejected, enough evidence must exist in the record for the factfinder to infer that discrimination was the true reason for the disparate treatment. However, the factfinder's disbelief of the reasons put forward by the defendant, particularly if disbelief is accompanied by a suspicion of mendacity, may, together with the elements of the prima facie case, suffice to show intentional discrimination.

***Evidence > Inferences & Presumptions > General Overview***

***Labor & Employment Law > Discrimination > Disparate Treatment > General Overview***

[HN6] A plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual. Rather, a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason.

***Evidence > Relevance > Relevant Evidence***

***Labor & Employment Law > Discrimination > Disparate Treatment > General Overview***

[HN7] In the context of an employer acting upon complaints made by another employee, the validity of the initial complaint is not the central issue, because the ultimate falseness of the complaint proves nothing as to the employer, only as to the complaining employee.

***Evidence > Inferences & Presumptions > General Overview***

***Labor & Employment Law > Discrimination > National Origin Discrimination > Coverage & Definitions***

***Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions***

[HN8] Stray remarks, standing alone, are insufficient to show an indicium of discrimination under Title VII of the Civil Rights Act of 1964. The mere utterance of a racial epithet is not indicia of discrimination under Title VII. Absent a causal connection between the references and the conduct complained of, epithets become stray remarks that cannot support a discrimination verdict.

***Evidence > Inferences & Presumptions > General Overview***

***Labor & Employment Law > Discrimination > Disparate Treatment > General Overview***

[HN9] The fundamental prerequisite to the mixed-motives instruction is the presentation of direct evidence of discrimination. Direct evidence is evidence which if believed, proves the fact of discriminatory animus without inference or presumption. When a plaintiff presents credible direct evidence that discriminatory animus in part motivated or was a substantial factor in the contested employment action, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Denials***

***Civil Rights Law > Practice & Procedure > Civil Rights Commissions > Complaints***

***Labor & Employment Law > Discrimination > Actionable Discrimination***

[HN10] A Title VII of the Civil Rights Act of 1964 or, by inference, a Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.001 et seq. (1996), action may be based upon claims that could reasonably be expected to grow out of the initial charges of discrimination. The filing of an administrative complaint is ordinarily a jurisdictional prerequisite to a Title VII action. A Title VII cause of action may be based, not only upon the

specific complaints made by the employee's initial Equal Employment Opportunity Commission (EEOC) charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.

***Civil Rights Law > General Overview***

***Governments > Legislation > Statutes of Limitations > Time Limitations***

***Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview***

[HN11] A plaintiff must file an Equal Employment Opportunity Commission charge within 180 days after the allegedly discriminatory incident in order to recover damages arising from that incident. 42 U.S.C.S. § 2000e-5(e)(1).

***Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements***

***Torts > Vicarious Liability > Employers > Activities & Conditions > Intentional Torts***

[HN12] In order to recover damages for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and, (4) the resulting emotional distress was severe. Liability for outrageous conduct should be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

***Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview***

***Torts > Vicarious Liability > Employers > Activities & Conditions > Intentional Torts***

[HN13] An employer's conduct, even if a violation under Title VII of the Civil Rights Act of 1964, rises to the level of extreme and outrageous in only the most unusual cases. Complaints that fall within the realm of an ordinary employment dispute do not suffice for a claim of intentional infliction of emotional distress.

***Torts > Intentional Torts > Defamation > General Overview***

***Torts > Vicarious Liability > Employers***

[HN14] An action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation, and was made while in the discharge of that duty. Neither express authorization nor subsequent ratification is necessary to establish liability.

***Torts > Intentional Torts > Defamation > General Overview***

***Torts > Vicarious Liability > Employers***

[HN15] Unauthorized gossip of employees or supervisors cannot be imputed to an employer.

***Governments > Legislation > Statutes of Limitations > Time Limitations***

***Torts > Intentional Torts > Defamation > Defenses > Statutes of Limitations***

***Torts > Intentional Torts > Defamation > Elements > Libel***

[HN16] Libel and slander claims must be brought within a year of the accrual of those claims. Tex. Civ. Prac. & Rem. Code Ann. § 16.002 (a) (1986). Accrual occurs on the date of communication, not its consequences.

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview***

***Torts > Intentional Torts > Defamation > Defenses > Fair Comment & Opinion***

***Torts > Intentional Torts > Defamation > Procedure***

[HN17] A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. Whether a document or statement is reasonably capable of a defamatory meaning is an issue of law for the court. All assertions of opinion are protected by the U.S. Const. amend. I and Tex. Const. art. I, § 8. Thus, an essential element of a defamation cause of action is that the alleged defamatory statement be a statement of fact rather than opinion. Whether a statement is an opinion or an assertion of fact is also a question of law.

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > General Overview***

***Torts > Intentional Torts > Defamation > General Overview***

[HN18] In distinguishing between fact and opinion, the court should analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether

the statement is indefinite and ambiguous; assess the statement's verifiability, that is, whether it is objectively capable of being proven true or false; consider the entire context of the article or column, including cautionary language; and evaluate the kind of writing or speech as to its presentation as commentary or "hard" news. This inquiry should help determine, for example, whether the statement is to be taken as precise and literal or loose and figurative, and whether the language is employed as metaphor or hyperbole, or to convey actual facts.

***Torts > Intentional Torts > Defamation > Defamation Per Se***

***Torts > Intentional Torts > Defamation > Elements > Slander***

[HN19] Statements are slanderous per se if they are so obviously harmful to the person harmed that no proof of their injurious effect is necessary to make them actionable. Matters characterized as slanderous per se are statements that affect a person injuriously in his office, profession, or occupation. In determining whether a statement is actionable, the statements in their entirety must be examined. They must be construed as a whole in light of the surrounding circumstances and judged as a person of ordinary intelligence would perceive them. It is only if the statements are ambiguous or of doubtful import that a jury is called upon to determine their meaning and effect upon an ordinary person.

***Torts > Vicarious Liability > Employers > Activities & Conditions > Intentional Torts***

[HN20] Ratification may occur when the employer confirms, adopts, or fails to repudiate that acts of its employee. Moreover, when the company knows about the employee's acts, recognizes that the employee's acts will continue if he is retained, does nothing to prevent the ongoing tortious acts, and chooses to retain the employee, the company ratifies the tortious acts.

**COUNSEL:** For RICHARD J MARTINEAU, plaintiff: Steven E Petrou, Attorney at Law, Houston, TX.

For ARCO CHEMICAL COMPANY, defendant: Anthony P Rosenstein, Kathryn S Vaughn, Baker & Botts, Houston, TX.

For ARCO CHEMICAL COMPANY, LISA SWEENEY, defendants: George E Bradford, Jr, Bradford Koenig Shepperd & Kerr, Houston, TX.

**JUDGES:** NANCY F. ATLAS, UNITED STATES DISTRICT JUDGE.

OPINION BY: NANCY F. ATLAS

OPINION:

MEMORANDUM AND ORDER

Pending before the Court in this employment discrimination case is Defendant's Motion for Partial Summary Judgment [Doc. # 17] ("Motion"), and Defendant ARCO Chemical Company's Motion for Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 29] ("Supplemental Motion"). Plaintiff has responded to both motions, and the parties have filed various replies. n1 Having considered the motions and briefing, matters of record, and relevant authorities, the Court concludes that both of Defendant's motions should be granted.

n1 See Plaintiff's Response to Defendant's Motion for Partial Summary Judgment [Doc. # 26] (Response); Plaintiff's Response to Defendant's Motion for Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 36] ("Response to Supplemental Motion"); Plaintiff's Reply to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment [Doc. 37] ("Sur-Reply"); Plaintiff's Supplemental Response to Defendant's Motion for Partial Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 38] ("Supplemental Response"). Defendant ARCO filed a Reply on the original motion, but did not file a reply on the supplemental motion. See Defendant's Reply to Plaintiff's Response to Defendant's Motion for Partial Summary Judgment [Doc. # 35] ("Reply").

[\*2]

I. FACTUAL BACKGROUND

Defendant ARCO Chemical Company ("ARCO" or "Defendant") makes and manufactures chemicals and specialty products. See Affidavit of Douglas Mathera (Exhibit A to Motion) ("Mathera Affidavit"), P 3. Plaintiff began working with ARCO's predecessor company, Oxyrairie, at the Bayport Plant in Pasadena, Texas, in 1976. See Deposition of Richard Martineau (Exhibit B to Motion) ("Martineau Deposition"), at 19--20; Affidavit of Jetola Anderson (Exhibit C to Motion) ("Anderson Affidavit"), P 2. During his tenure with ARCO, Plaintiff held various jobs, including lab technician, shift foreman, and senior chemist. See Martineau Deposition, at 21; Anderson Affidavit, P 2.

While working as a laboratory shift supervisor in early 1996, several other ARCO employees began to complain about Plaintiff's behavior in the workplace. Technicians, chemists, and other supervisors revealed that Plaintiff routinely cursed, yelled, and slammed doors. See Affidavit of Eric Kolodziej (Exhibit D to Motion) ("Kolodziej Affidavit"), P 4. Thereafter, Plaintiff's Supervisor, Eric Kolodziej ("Kolodziej") counseled Plaintiff. Kolodziej also noted in Plaintiff's performance [\*3] review that Plaintiff had become more volatile, and that Plaintiff was creating an unpleasant and hostile work environment for his subordinates. See *id.*; Deposition of Eric Kolodziej (Exhibit E to Motion) ("Kolodziej Deposition"), at 40--41. In order to assist Plaintiff in addressing these issues, ARCO arranged and paid for Plaintiff to attend an interpersonal skills class in Chicago. See Martineau Deposition, at 49--50; Anderson Affidavit, P 4; Kolodziej Affidavit, P 5.

Plaintiff found the course to be valuable, and initially seemed to have addressed his interpersonal issues. See Martineau Deposition, at 51; Kolodziej Affidavit, P 5. In April 1996, however, Lisa Sweeney ("Sweeney"), previously a party to this lawsuit, n2 complained to Kolodziej, suggesting that the interpersonal issues had not been resolved. Sweeney complained that Plaintiff still had temper flare-ups and also was following her around the ARCO plant. See Kolodziej Affidavit, P 6; Kolodziej Deposition, at 46--47. Kolodziej warned Plaintiff that he should monitor his behavior with subordinates. See Kolodziej Affidavit, P 8. Kolodziej encouraged Plaintiff to seek counseling through ARCO's Employee [\*4] Assistance Program, but Plaintiff declined. See *id.* P 8. Kolodziej informed Plaintiff that any additional inappropriate behavior would result in mandatory counseling. See *id.*

n2 Plaintiff settled his claims against Sweeney while this case was in state court. Sweeney's elimination from the lawsuit was a predicate to this Court's removal jurisdiction.

The record establishes that Plaintiff perceived that Sweeney and Plaintiff had become friends outside of work. See Affidavit of Richard Martineau (Exhibit 1 to Response) ("Martineau Affidavit"), P 39. From May 1995 until August 1996, Sweeney asked Plaintiff for financial assistance, and took cash and checks from Plaintiff, promising to pay him back. See *id.* PP 39--45. Sweeney also apparently began to confide in Plaintiff, and reveal to him intimate details about her life. See *id.* P 47. Sweeney regarded Plaintiff as an "older friend" and something of a father figure. See Deposition of Lisa Sweeney (Exhibit 11 to Response) ("Sweeney Deposi-

tion"), [\*5] at 56. She also called him at home and visited his house. *See id.* at 55--56. According to Plaintiff, because Sweeney had not paid him back for money he loaned her, Plaintiff informed Sweeney that she would have to begin making monthly payments to him in September 1996.

Again in August 1996, three technicians complained to Kolodziej about Plaintiff's volatile behavior. *See id.* P 9. Once again, Kolodziej counseled Plaintiff about appropriate workplace conduct. *See id.*

In September 1996, Sweeney complained to Defendant again about Plaintiff, this time to ARCO's Human Resources Department ("HR"). *See Sweeney Deposition*, at 87--88; *Anderson Affidavit*, P 5; *Affidavit of Vernon Gilliam (Exhibit H to Motion) ("Gilliam Affidavit")*, P 3; *Exhibit I to Motion (Anderson's handwritten notes of Sept. 6, 1996 meeting with Sweeney)*. Sweeney complained that: Plaintiff gave her a poem entitled "Characteristics That Made Me 'Love You,'" describing Sweeney's "great passion of fulfilling physical love," her "most gorgeous eyes," her "beauty," and Plaintiff's desire to "be a part of [her] life"; Plaintiff attempted to call Sweeney at home repeatedly; Plaintiff stared at her constantly [\*6] at work; Plaintiff remarked to her, "the things I have done to your body in my dreams," and that such caused "men have to get up and wash their sheets," and Plaintiff made tape recordings speculating about Sweeney's personal life. *See Sweeney Deposition*, at 87--90; 198--200; *Anderson Affidavit*, PP 6, 8; *Gilliam Affidavit*, P 4; "Characteristics That Made Me 'Love You'" (*Exhibit J to Motion*) ("Poem").

Plaintiff admitted giving Sweeney the poem. *See Anderson Affidavit*, P 8; *Kolodziej Affidavit*, P 11. ARCO management considered this to be inappropriate under any circumstances. *See Anderson Affidavit*, P 8; *Kolodziej Affidavit*, P 11. In the context of Plaintiff's previous interpersonal issues, ARCO management determined that it would be best to transfer Plaintiff to a professional, non-supervisory role and prohibit all non-work-related contact with Sweeney. *See Anderson Affidavit*, PP 9--10; *Kolodziej Affidavit*, P 11. ARCO assigned Plaintiff to a non-supervisory chemist position, working straight days instead of shift work, with no decrease in pay. *See Martineau Deposition*, at 118; *Anderson Affidavit*, P 7; *Kolodziej Affidavit*, P 12. ARCO instructed Plaintiff to stop all [\*7] non-work-related contact with Sweeney. Plaintiff agreed to this instruction. *See Anderson Affidavit*, P 10; *Kolodziej Affidavit*, P 11. Plaintiff also was required to attend counseling. *See Anderson Affidavit*, P 10; *Kolodziej Affidavit*, P 11--12.

Despite ARCO's instructions and his agreement, Plaintiff called Sweeney at home at 11:48 p.m. one night in September. *See Martineau Deposition*, at 125--27;

*Anderson Affidavit*, PP 11--12. Although Plaintiff hung up immediately, the call was recorded on Sweeney's Caller ID. *See Exhibit K (photograph of Sweeney's "Caller ID" box)*; *Sweeney Deposition*, at 195--98. Plaintiff claims he may have called Sweeney's number inadvertently and immediately hung up. *See Martineau Deposition*, at 125--28; *Anderson Affidavit*, P 12. Sweeney complained of the call to ARCO's HR Department. *See Anderson Affidavit*, P 11; *Sweeney Deposition*, at 195--98. ARCO did not discipline Plaintiff in connection with this violation, but warned him that any further contact with Sweeney would result in disciplinary action. *See Martineau Deposition*, at 129--31; *Anderson Affidavit*, P 12.

Plaintiff left work on sick leave in November 1996. *See Kolodziej [\*8] Affidavit*, P 15. Despite his sick leave, and despite the fact that Plaintiff's position was a day job, Plaintiff went to the workplace twice while Sweeney was working the night shift. Sweeney reported to an ARCO supervisor that these visits made her uncomfortable. *See id.* After determining that Plaintiff has no legitimate work-related reasons to be at the Plant, Kolodziej told Plaintiff that his behavior appeared suspicious. Plaintiff claimed that he needed to get his wallet and check his mail. *See id.*; *Martineau Deposition*, at 148. Kolodziej instructed Plaintiff not to come to the ARCO plant again without a work-related reason.

Sweeney continued to experience suspicious hang-up calls at her home. She asked the Mont Belvieu Police Department and the GTE phone company for assistance to trace the calls. *See Sweeney Deposition*, at 95--95, 120--21. A GTE tracing device showed that three late-night phone calls on November 8, 9, and 10 were made to Sweeney's home from Plaintiff's telephone number. *See Exhibit M (telephone trace records)*; *Sweeney Deposition*, at 106--07, 117. Sweeney presented this evidence to Defendant ARCO's HR Department. *See Anderson Affidavit*, P 15; [\*9] *Gilliam Affidavit*, P 5; *Sweeney Deposition*, at 121, 189.

Anderson spoke with the Mont Belvieu Police, who confirmed the authenticity of Sweeney's evidence. *See Anderson Affidavit*, P 16; *Gilliam Affidavit*, P 5; *Sweeney Deposition*, at 189--90. Anderson and Kolodziej met with Plaintiff. Plaintiff denied making the calls, but was unable to present any credible explanation disputing Sweeney's evidence. *See Anderson Affidavit*, PP 17--18; *Kolodziej Affidavit*, P 18; *ARCO Chemical Company, Internal Correspondence*, dated Dec. 3, 1996 (*Exhibit V to Motion*). ARCO decided to terminate Plaintiff for violating its instructions not to contact Sweeney. *See Anderson Affidavit*, P 18; *Kolodziej Affidavit*, P 18; *Gilliam Affidavit*, P 6; *Internal Correspondence*.

Plaintiff filed a written appeal of his termination, but did not claim that he was terminated because of his national origin or citizenship.

HR Manager Vern Gilliam reviewed Plaintiff's appeal and found no basis to reverse the termination decision. *See* Gilliam Affidavit, PP 11-12. Gilliam had informed Plaintiff in writing that unless he could produce relevant evidence, as opposed to mere allegations, ARCO would have to accept [\*10] the police and phone records as authentic. *See id.* Plaintiff did not respond. *See* Martineau Deposition, at 174-75.

Plaintiff originally sued ARCO in state court, arguing that: (1) ARCO discriminated against him based on his national origin in violation of the Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB. CODE ANN. § 21.001 et seq. (Vernon 1996); (2) ARCO defamed him; and (3) ARCO intentionally inflicted emotional distress upon him. Defendant ARCO removed this case on May 22, 1998, contending that diversity jurisdiction existed, and that Sweeney was fraudulently joined. The Court denied Plaintiff's motion to remand. Defendant ARCO moves for summary judgment dismissing all claims.

## II. SUMMARY JUDGMENT STANDARD

[HN1] In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); [\*11] Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); Boze v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. *See* Boze, 912 F.2d at 804 (citing Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986)). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy--that is, when both parties have submitted evidence of contradictory facts." Laughlin v. Olszewski, 102 F.3d 190, 193 (5th Cir. 1996).

Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *See* Little, 37 F.3d at 1075 (citing Celotex, 477 U.S. at 322).

## III. DISCUSSION

Defendant moves for summary judgment dismissing all Plaintiff's claims. Defendant argues, first, that Plaintiff cannot establish a *prima facie* case of discrimination based on his national origin, nor can he proffer evidence [\*12] rebutting Defendant's legitimate, nondiscriminatory reasons for his termination. Defendant also argues that Plaintiff's slander and intentional infliction of emotional distress claims must fail because: (1) the alleged conduct was neither defamatory nor outrageous as a matter of law; (2) most of the alleged conduct occurred outside the limitations period; (3) the alleged statements were not referable to or in discharge of the duties the purported speakers owed to ARCO; (4) the alleged statements and conduct were not and could not have been ratified by ARCO; and (5) most of the alleged statements were privileged.

### A. Discrimination Claims

Plaintiff sues Defendant ARCO for discrimination, based on his Canadian origin, under the Texas Commission on Human Rights Act ("THCRA"). [HN2] One of the express purposes of the Act is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. Section 2000e et seq.)." TEX. LAB. CODE ANN. § 21.001(1) (Vernon 1996); Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 485 (Tex. 1991). Therefore, courts must look to analogous federal law when resolving claims brought under [\*13] Title VII. *See* Leatherwood v. Houston Post Co., 59 F.3d 533, 536 n.5 (5th Cir. 1995).

Defendant ARCO maintains that Plaintiff's discrimination claims must fail because he cannot establish a *prima facie* case, cannot rebut Defendant's legitimate, nondiscriminatory reason for his termination, and cannot raise fact issues regarding his hostile environment claim.

[HN3] Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an individual with respect to that person's compensation, terms, conditions, or privileges of employment, or to otherwise adversely affect the person's status as an employee, because of that person's race. *See* 42 U.S.C. § 2000e-2(a). Each plaintiff bears the initial burden of establishing a *prima facie* case of intentional discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 508, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995).

[HN4] In a suit alleging discriminatory discharge, the requirements of a *prima facie* case are: (1) that Plaintiff is a member of a protected class; (2) that Plaintiff was qualified for the position he held; (3) [\*14] that Plaintiff was discharged; and (4) that, after Plaintiff's discharge, his employer replaced him with a person who is not a member of the protected class, or, in a case in

which the employer discharges Plaintiff and does not replace him, that, after the discharge, others who were not members of the protected class remained in similar positions. See Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995); EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996).

[HN5] If Plaintiff establishes this *prima facie* case, a presumption of discrimination is created, and the burden of production shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its actions. See St. Mary's Honor Ctr., 509 U.S. at 506-07; Meinecke, 66 F.3d 77, 83 (5th Cir. 1995). If Defendant satisfies this burden, the presumption disappears and Plaintiff must prove that the proffered reasons are a pretext for discrimination. See Meinecke, 66 F.3d at 83.

Throughout the case, the Plaintiff retains the ultimate burden of persuading the finder of fact not only that Defendant's reasons are pretextual, but also that Defendant intentionally discriminated against [\*15] the Plaintiff. See St. Mary's Honor Ctr., 509 U.S. at 507. Even if Defendant's proffered reason is rejected, "enough evidence must exist in the record for the factfinder to infer that discrimination was the true reason for the disparate treatment." Polanco v. City of Austin, Tex., 78 F.3d 968, 976-77 (5th Cir. 1996) (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1995) (en banc)). However, "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." Polanco, 78 F.3d at 976 (quoting St. Mary's, 113 S. Ct. at 2749).

## 1. Disparate Treatment

### a. Prima Facie Case

Defendant argues that, among other things, Plaintiff must establish that similarly-situated employees were treated more favorably in order to show a *prima facie* claim of discrimination. See Motion, at 9--10 (citing Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990); Whiting v. Jackson State Univ., 616 F.2d 116, 120--21 (5th Cir. 1980)). Defendant argues that Plaintiff cannot [\*16] do so, because while he has recounted rumors indicating that certain male, American employees may have engaged in sexual harassment, he has no proof that these men were similarly situated to him. n3 See *id.* at 10. Plaintiff responds, arguing that the "similarly situated" standard is merely an alternative method of establishing a *prima facie* case, and that at any rate, Plaintiff has shown numerous examples of non-Canadians receiving more favored treatment.

n3 Defendant contends that any claim of a similarly situated American male would have to include allegations that: "(1) an American supervisor had a harassment complaint lodged against him by a subordinate; (2) ARCO instructed the American supervisor to avoid contacting the subordinate; (3) ARCO then received un rebutted evidence that the American supervisor continued to contact the subordinate; and (4) ARCO nevertheless did not discharge the American supervisor." Motion, at 10.

Case law in this area is somewhat confused. See Nieto v. L & H Packing [\*17] Co., 108 F.3d 621, 623 n.5 (5th Cir. 1997) ("Prior case law has not consistently applied Title VII's burden-shifting framework to the question of whether a similarly-situated employee outside the plaintiff's protected class was treated more favorably. The Supreme Court has explained that this inquiry is especially relevant to a showing that the employer's proffered legitimate, non-discriminatory reason for its decision was pretext for discrimination. On the other hand, our court has held that such a showing may be an available avenue by which a plaintiff can establish a *prima facie* case of discrimination.") (internal citations omitted). It is undisputed, however, that at a minimum, Plaintiff has proffered sufficient evidence to satisfy his *prima facie* case obligations under the more traditional standard: Plaintiff has established that his national origin is Canadian; that he was qualified for his job, that he was discharged, and that he was replaced by an American, Rodney Clements. See Response, at 19--20; see also Meinecke, 66 F.3d at 83; EEOC, 100 F.3d at 1180. Therefore, the Court will address Defendant's proffered reasons for termination and the summary judgment [\*18] evidence on the ultimate issue of whether Plaintiff's termination was motivated by his national origin.

### b. Proffered Reasons and Ultimate Issue

Defendant contends that even if Plaintiff establishes a *prima facie* case, he cannot show that ARCO's proffered reasons for his termination were false, and that discrimination was the real reason for ARCO's action.

Regarding the pretext inquiry, the Fifth Circuit has stated, " [HN6] the plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual. Rather, a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Walton v. Bisco Indus., Inc., 119 F.3d 368, 370 (5th Cir. 1997) (emphasis added).

ARCO argues that it has established a legitimate, nondiscriminatory reason for Plaintiff's discharge: "de-



spite repeated counseling, second chances, and warnings not to contact Sweeney, un rebutted evidence showed that Plaintiff had nonetheless made specifically prohibited late-night telephone calls to [Sweeney's] home." Motion, at 11.

Plaintiff has not offered any evidence demonstrating fact questions concerning [\*19] whether ARCO's proffered reason for his termination was false. Plaintiff merely maintains in conclusory fashion that Sweeney was "untruthful," and that, had ARCO verified Sweeney's credibility, it would have discovered that the police doubted her story. See Response, at 22--23.

These arguments do not create fact questions. [HN7] In the context of an employer acting upon complaints made by another employee, "the validity of the initial complaint is not the central issue, because the ultimate falseness of the complaint proves nothing as to the employer, only as to the complaining employee." Waggoner v. City of Garland, 987 F.2d 1160, 1165 (5th Cir. 1993). The relevant issue is whether ARCO terminated Plaintiff because he is Canadian. See Risher v. Aldridge, 889 F.2d 592, 598 (5th Cir. 1995). All ARCO decisionmakers testified that they believed Sweeney brought her complaints about Plaintiff in good faith. See Mathera Affidavit, P 6; Anderson Affidavit, P 20; Kolodziej Affidavit, P 23; Gilliam Affidavit, P 15. "ARCO relied on the objective evidence, confirmed by the police and never rebutted by Plaintiff, that Plaintiff called Sweeney in violation of ARCO's explicit instructions," [\*20] Motion, at 14.

While Plaintiff questions Sweeney's motives, and it appears from the record that Plaintiff and Sweeney had a complicated, and "mutually suspicious" relationship, see Response, at 5 n.6, such evidence does not implicate the veracity of ARCO's reason for his termination. n4 Plaintiff has failed to offer any evidence raising fact questions as to whether ARCO's reason for his termination was false. Accordingly, the Court now turns to the ultimate issue: whether discrimination was the true reason for Plaintiff's termination.

n4 Nor does Plaintiff's argument that none of Sweeney's complaints had anything to do with sex or sexual harassment establish fact questions in this regard.

Defendant ARCO argues that Plaintiff cannot raise fact issues concerning whether the real reason for Plaintiff's termination was that he is Canadian. Plaintiff argues that he has produced evidence of numerous similarly-situated employees who were treated more favorably. He

alleges that Jerry Goucher, an American supervisor, [\*21] observed sexual harassment and did nothing to stop it. See Affidavit of Jim Canard (Exhibit 9 to Response), P 16. Moreover, Plaintiff argues that ARCO took only two days to investigate Sweeney's complaints against Plaintiff, but took two months, before dismissing without investigating, Plaintiff's complaints of harassment by Sweeney.

First, ARCO maintains that Plaintiff was not fired following Sweeney's September 1996 complaints, regardless of whether or not they are characterized as sexual harassment complaints. Instead, Plaintiff was fired after disregarding ARCO's explicit instructions not to contact Sweeney at home. Thus, Plaintiff's comparisons to other ARCO employees who allegedly engaged in sexual harassment is misplaced. The uncontradicted evidence is that Plaintiff was terminated for insubordination in refusing to comply with express company directives.

In any event, it is undisputed that none of the decisionmakers in this case are the supervisors involved in or even aware of the alleged sexual harassment incidents to which Plaintiff alludes. See Anderson Affidavit, P 21; Kolodziej Affidavit, P 26; Kolodziej Deposition, at 103; Mathera Deposition, at 31--34; Gilliam [\*22] Deposition, at 18, 23. Therefore, Plaintiff has failed to provide evidence raising fact questions that any similarly situated, alleged American harassers, were treated better than he was.

Moreover, the Court concurs with ARCO that, "even if Plaintiff could prove that many years ago harassment was treated less seriously than today, that would hardly make it wrongful for modern management to discharge its legal duty to investigate and effectively respond to such conduct." Motion, at 12 (citing Waltman v. International Paper Co., 875 F.2d 468, 479 (5th Cir. 1989)). Finally, because of the remoteness in time of the alleged incidents, such allegations constitute, at best, a scintilla of evidence, and are insufficient to meet Plaintiff's summary judgment burden.

The only evidence Plaintiff offers regarding disparaging comments are alleged inquiries by Kolodziej in 1994 to see Plaintiff's green card, and about why Plaintiff had not become a U.S. citizen. Although ARCO denies these allegations, the Court will assume they are true for the purposes of the pending motions. The Court finds and concludes that the alleged remarks are not facially discriminatory. Plaintiff himself has had discussions [\*23] with friends as to why he had not become a United States citizen. Further, Plaintiff's termination occurred 2 1/2 years after these comments allegedly were made, and are at most "stray remarks."

[HN8] Stray remarks, standing alone, are insufficient to show an indicium of discrimination Title VII. In

*Boyd v. State Farm*, plaintiff presented credible evidence that showed that supervisor referred to him as "Buckwheat." 158 F.3d 326, 329 (5th Cir. 1998). The Fifth Circuit held that the "mere utterance of a racial epithet is not indicia of discrimination under Title VII." *Id.* (citing *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1295 (5th Cir. 1994)). Plaintiff Boyd also alleged, through affidavit only, that a supervisor called him a "porch monkey." The Fifth Circuit held that there was no evidence of a causal connection between the stray remark and the defendant's failure to promote plaintiff. "Absent a causal connection between the references and the conduct complained of, such epithets become stray remarks that cannot support a discrimination verdict." *Id.* (citing *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995)). n5 Similarly, from the record, the [\*24] Court discerns no causal connection between Kolodziej's alleged remarks, and Plaintiff's termination several years later. Moreover, Kolodziej was only one of several ARCO supervisors who made the decision to terminate Plaintiff's employment. Accordingly, on this record Plaintiff has not raised a genuine question of material fact regarding the ultimate issue of discrimination based on his Canadian nationality. n6

n5 The Court approvingly cited *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 656 (5th Cir. 1996), which held that specific comments over a lengthy period of time sufficient to establish discrimination. See *Boyd*, No. 97-11396, at 485 note 2.

n6 Nor can Plaintiff sustain his summary judgment burden by arguing that ARCO conducted a biased investigation. It is undisputed that Plaintiff was counseled several times before his ultimate termination. This again misses the point; ARCO terminated Plaintiff because it perceived that Plaintiff had violated its express orders to leave Sweeney alone. The fact that Vern Gilliam, ARCO's Human Resources Manager, admitted he did nothing to investigate whether Plaintiff's "civil rights" were violated is not pertinent to whether ARCO conducted a biased investigation of Sweeney's complaints. It is undisputed that ARCO verified the phone call traces from an objective, third source: the Mont Belvieu Police Force. Accordingly, Plaintiff cannot raise fact questions by arguing that ARCO allegedly conducted a biased investigation of his own complaints.

[\*25]

This is a case in which the employer, ARCO, gave its employee ample opportunity to cease offensive behavior and to comply with clear prophylactic directives to leave another employee alone and observe her interest in privacy. ARCO's perception that Plaintiff repeatedly defied the company's orders and ignored repeated warnings was well-founded. Plaintiff, grasping at straws, has not offered evidence of any substance that would support a jury verdict in his favor. See *Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998) ("Once the moving party presents the district court with a properly supported summary judgment motion, the burden shifts to the nonmoving party to show that summary judgment is inappropriate."). Summary judgment is warranted dismissing Plaintiff's TCHRA claim.

### c. Mixed Motive Analysis

In his response, Plaintiff makes an obscure reference to the "mixed motive" standard in Title VII cases, and argues that "Plaintiff need only show that national origin was a 'motivating' factor in ARCO's decision to discharge him." Response, at 23. Defendant ARCO does not appear to respond to this argument, but the Court will address it in an exercise of [\*26] caution.

[HN9] "The fundamental prerequisite to the mixed-motives instruction is the presentation of direct evidence of discrimination." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1217 (5th Cir. 1995). "Direct evidence" is "evidence which if believed, proves the fact [of discriminatory animus] without inference or presumption." *Id.* (citing *Brown v. East Mississippi Elec. Power Ass'n*, 989 F.2d 858 (5th Cir. 1993) (emphasis in original) n7 ).

n7 The Court in *Brown* held:

When a plaintiff presents credible direct evidence that discriminatory animus in part motivated or was a substantial factor in the contested employment action, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor. Direct evidence is evidence which, if believed, proves the fact without inference or presumption.

*Brown*, 989 F.2d at 861.

Plaintiff argues that he "has raised numerous fact issues which [\*27] demonstrate that the key decision-maker, Eric Kolodziej, was motivated by his resentment of Plaintiff's national origin." Response, at 23. Plaintiff claims Kolodziej's resentment was evidence because he demanded to see Plaintiff's green card, asked Plaintiff why he had not become an American, and failed to discipline an employee who complained of a "fucking foreigner." See *id.* The Court determines that these comments do not rise to the level of direct evidence of discrimination. While "a supervisor's open and routine use of . . . slurs" may constitute direct evidence of an impermissible motivating factor," Kolodziej's statements do not prove the fact of discrimination without inference or presumption. As noted above, the inquiry was years before Plaintiff's offending conduct and the remarks were not inherently racially discriminatory or antagonistic to foreigners, or Canadians. "The offending comments [can be] reasonably interpreted as [something] other than a reflection of bias . . ." *Mooney*, 54 F.3d at 1217.

Because Plaintiff has failed to show fact questions regarding direct evidence of discrimination, the burden does not shift to ARCO to show that it would have made [\*28] the same decision in the absence of discriminatory motive. Plaintiff cannot survive summary judgment on his Title VII claim on a mixed-motive analysis.

## 2. Hostile Environment

Defendant also argues that Plaintiff has failed to meet his burden on any hostile environment claim: Defendant argues that Plaintiff's hostile environment claim is barred because it cannot reasonably be construed as growing out of his charge of discrimination, that it is barred by the statute of limitations, and also that Plaintiff's allegations do not rise to the level of hostile environment. Plaintiff counters that his hostile environment claims were timely raised, that his charge refers to a "continuing pattern" of discrimination, and that fact questions exist supporting his hostile environment claim.

### a. Administrative Exhaustion

[HN10] A Title VII (or, by inference, a TCHRA) action may be based upon claims that "could reasonably be expected to grow out of the initial charges of discrimination." The Fifth Circuit recently held:

The filing of an administrative complaint is ordinarily a jurisdictional prerequisite to a Title VII action. *Ray v. Freeman*, 626 F.2d 439, 442 (5th Cir. 1980). [\*29] *cert. denied*, 450 U.S. 997, 68 L. Ed. 2d 198, 101 S. Ct. 1701 (1981). . . . A Title

VII cause of action may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination. *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 578 (5th Cir. 1993) (quoting *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 451 (5th Cir.), *cert. denied*, 464 U.S. 828, 78 L. Ed. 2d 106, 104 S. Ct. 102 (1983)).

*Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995).

ARCO argues that Plaintiff never alleged that ARCO had subjected him to a hostile work environment in his TCHRA charge of discrimination. Plaintiff responds that "the hostile work environment issues raised by Plaintiff are directly related to his national origin discrimination complaint and are not barred. Plaintiff checked the box for national origin discrimination in his TCHRA and EEOC charge. . . . Plaintiff's charge refers to a continuing pattern of discrimination based on unequal [\*30] treatment and a pervasive environment such as derogatory comments such as 'dumb ass Canadian.'" Response, at 26. The scope of the claims Plaintiff intended to assert is not entirely clear from his charge. Plaintiff did allege: "During my employment with ARCO, I was called a 'dumb ass Canadian' and foreigner by supervisors and fellow employees . . ." Charge of Discrimination (Exhibit 28 to Response). The charge should be construed broadly. See *Clark v. Kraft Foods, Inc.*, 18 F.3d 1278, 1280 n.7 (5th Cir. 1994) ("liberal construction [is] accorded EEOC charges, especially those by unrepresented complainants") (quoting *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 451 (5th Cir. 1983)). Thus, construing all doubts in favor of Plaintiff, the Court finds that Plaintiff's sparse allegations could reasonably have led to an EEOC investigation into a hostile environment claim.

### b. Statute of Limitations

[HN11] A plaintiff must file an EEOC charge within 180 days after the allegedly discriminatory incident in order to recover damages arising from that incident. See 42 U.S.C. § 2000e-5(e)(1).

Defendant argues that "Plaintiff has not cited one specific instance of alleged [\*31] national origin harassment within the limitations period--that is, within 180 days before the filing of his TCHRA charge in 1997." Reply, at 9. Plaintiff counters that his charge was filed

within the time limits of the last discriminatory act, which was the termination of Plaintiff on December 2, 1996. This evidence, however, is insufficient. Plaintiff's termination was an act of allegedly disparate treatment, separate and discrete from the alleged harassing conduct. Therefore, none of the alleged national origin harassment alleged by Plaintiff occurred within the actionable limitations period. Plaintiff's Title VII harassment claim thus is time-barred.

#### B. Intentional Infliction of Emotional Distress

Defendant ARCO argues that Plaintiff cannot prevail on his claim for intentional infliction of emotional distress because the alleged conduct does not rise to a legally actionable level, because certain of the comments by Kolodziej are time-barred, and because ARCO cannot be held liable for Sweeney's alleged misconduct. Plaintiff responds with a litany of statements and conduct that he alleges rise above the level of ordinary employment disputes, n8 however, he does not address [\*32] ARCO's limitations and agency arguments.

n8 Plaintiff recites the following as evidence of fact questions regarding intentional infliction of emotional distress: Kolodziej falsely accused Plaintiff of sexually harassing Sweeney; Kolodziej falsely accused Plaintiff of "balling" Sweeney; Kolodziej falsely accused Plaintiff of being insane, delusional and irrational; Kolodziej prepared a letter demoting Plaintiff without first consulting Plaintiff; Kolodziej falsely accused Plaintiff of creating a hostile work environment; Kolodziej laughed at Plaintiff and told him he had no legal rights; Gilliam promised a full investigation, but allegedly performed no investigation; Kolodziej asked to see Plaintiff's green card; Kolodziej asked why Plaintiff had not become a citizen after 20 years; Kolodziej referred to Plaintiff as "Dad," and refused to refer to him by his first name; Anderson told Plaintiff he had no legal rights; ARCO failed to take action when Plaintiff complained that Sweeney was spreading lies about him; ARCO accepted Sweeney's complaints and concluded Plaintiff was guilty without consulting Plaintiff; Sweeney exposed her nude body to Plaintiff; Sweeney enticed Plaintiff into lending her thousands of dollars with no intention of paying him back; and Sweeney spread falsehoods about Plaintiff. See Response, at 35--36.

[\*33] [HN12]

In order to recover damages for intentional infliction of emotional distress, Plaintiff must prove the following:

- (1) Defendants acted intentionally or recklessly;
- (2) Defendants' conduct was extreme and outrageous;
- (3) Defendants' actions caused Plaintiff emotional distress; and,
- (4) the resulting emotional distress was severe.

*Hirras v. National R.R. Passenger Corp.*, 95 F.3d 396, 400 (5th Cir. 1996); *MacArthur v. University of Texas Health Center*, 45 F.3d 890, 898 (5th Cir. 1995); *Danawala v. Houston Lighting & Power Co.*, 14 F.3d 251, 256 (5th Cir. 1993); *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). Liability for outrageous conduct "should be found 'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Twyman*, 855 S.W.2d at 621 (quoting *Restatement (Second) of Torts* § 46 (1965)); accord *MacArthur*, 45 F.3d at 898. n9

n9 See *Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995) (summary judgment for employer on claim of intentional infliction of emotional distress affirmed, rejecting Plaintiff's allegations that, despite his excellent job performance, he suffered humiliation and health problems when he was reclassified to an isolated position, he was given no input into critical management decisions, he was ostracized and given menial assignments, and his office and secretary were taken away); *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31 (5th Cir. 1992) (summary judgment for employer on claim of intentional infliction of emotional distress affirmed, despite allegations that Plaintiff was told that he did not "fit in" with the company, and that his supervisor was extremely hostile, constantly criticized him, threatened him with termination, reassigned his sales territory and removed a sale from his credits). Cf. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (calling employee "Mexican" or "wetback" does

not support claim for intentional infliction of emotional distress).

[\*34] [HN13]

An employer's conduct, even if a Title VII violation, rises to the level of extreme and outrageous in only the most unusual cases. See *Hirras*, 95 F.3d at 400 (citing *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994)). Complaints that fall within the realm of an ordinary employment dispute do not suffice for a claim of intentional infliction of emotional distress. See *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33-34 (5th Cir. 1992).

While some of Kolodziej's and Sweeney's n10 alleged misconduct may have been inappropriate or insensitive, the Court concludes that Plaintiff has failed to allege any facts sufficient to sustain his summary judgment burden on this intentional infliction of emotional distress claim against Defendant ARCO. The alleged conduct simply is not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman*, 855 S.W.2d at 621 (quoting *RESTATEMENT (SECOND) OF TORTS § 46* (1965)). Accordingly, summary judgment is granted on this claim.

n10 For a discussion of ARCO's liability for Sweeney's alleged conduct, see *infra* Part III.C.1 and III.C.3.

[\*35]

### C. Defamation and Slander Claims

Plaintiff's defamation claims are based on alleged statements made by Sweeney and Kolodziej. Plaintiff contends Kolodziej defamed him by stating that Plaintiff was "balling" Sweeney and was a liar; n11 Plaintiff also maintains that Kolodziej said Plaintiff was insane, delusional, and irrational. n12 See Plaintiff's Fourth Amended Petition (Exhibit W to Motion) ("Petition") P 23. Plaintiff claims that Sweeney defamed him by claiming, *inter alia*, that he stalked her, had sex with her, spied on her, broke into her home, damaged her home, stole from her purse, stole her answering machine, hid in her bushes, damaged her property, threatened to kill her, and was obsessed with her. See *id.* PP 20--23.

n11 Plaintiff made the "liar" allegations in his Answers and Objections to Defendant ARCO Chemical Company's First Interrogatories to Plaintiff [Exhibit T to Motion] ("Answers and Objections"), Interrogatory No. 19. Illustrative of Plaintiff's allegations are the following:

1. By falsely telling Plaintiff that all the people on the shift have complained about me, and when I ask the people and they deny even talking to Eric, me going back to Eric with this--then Eric going around to each individual and telling them that I over-reacted and that he is happy with the productivity of the shift--he is calling me a liar and telling the people of my shift that I do not know what I am talking about.--Yet he uses this material in my review as fact.

\* \* \* \*

8. By denying he asked to see my "green card", is calling me a liar.

9. By denying he asked me to explain why I was in the United State[s] for twenty year [sic] and had yet to become an American Citizen--is calling me a liar.

Answers and Objections, at 25--26.

[\*36]

n12 These claims were asserted by Plaintiff in his First Supplemental Pleading [Doc. # 15] ("Supplemental Pleading"), which states that on January 23, 1998, Kolodziej stated to ARCO employee James Sullivan ("Sullivan") that plaintiff was insane, delusional, and irrational. See Supplemental Pleading, PP 5--6. Plaintiff also claims that since January 23, 1998, Kolodziej repeatedly stated to ARCO employees in Pennsylvania and Texas that Plaintiff was insane, delusional, and irrational. See *id.* P 7. Plaintiff could not identify anyone other than Sullivan in Pennsylvania to whom Kolodziej made the alleged comments, nor did he present evidence that Kolodziej made the remarks to anyone in Texas. See Martineau Deposition, at 467, 506, 508--09, 511, 513--15,

516. Accordingly, the Court addresses only the statements allegedly made to Sullivan.

Defendant ARCO argues that Plaintiff's defamation claims fail as a matter of law because ARCO is not liable for Sweeney's or Kolodziej's alleged statements, and because Kolodziej's statements are not actionable defamation. Plaintiff responds that [\*37] material fact issues remains on his defamation claims.

### 1. ARCO's Liability for Employee Statements

In Texas, [HN14] "an action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation, and was made while in the discharge of that duty. Neither express authorization nor subsequent ratification is necessary to establish liability." Wagner v. Caprock Beef Packers Co., 540 S.W.2d 303, 304 (Tex. 1976).

Plaintiff argues that "Kolodziej's slander is sustainable against ARCO, because the defamation was made while Kolodziej was discharging his duty to ARCO to damage Plaintiff's reputation and to keep witnesses from testifying against ARCO." Response, at 29. While Kolodziej's communications with John Sullivan were insensitive, the comments either fall into the general category of unauthorized gossip or mere personal opinion. See Affidavit of John Sullivan (Exhibit 36 to Response) ("Sullivan Affidavit"). Plaintiff has offered no summary judgment evidence that Kolodziej's job duties or work relationship to Plaintiff required discussions or speculation about his sex life or her uninformed personal [\*38] opinion about Plaintiff's psychological mental state. In fact, Plaintiff admits that he has no evidence indicating that Kolodziej's job tasks included the alleged name calling. See Martineau Deposition, at 489 ("I doubt if it would be within his job duties. I don't know what his duties of what his function is or what he's supposed to do.").

Moreover, it is well established that [HN15] unauthorized gossip of employees or supervisors cannot be imputed to an employer. See Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 255 (5th Cir. 1993) (employer not responsible for "unauthorized gossip" spread by co-workers); Patton v. United Parcel Serv., Inc., 910 F. Supp. 1250, 1274 (S.D. Tex. 1995) (same); Marshall Fields Stores, Inc. v. Gardiner, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dismissed w.o.j.) (same). Plaintiff has simply offered no evidence—as opposed to Plaintiff's personal conclusions—to establish genuine fact issues concerning whether and how Kolodziej's duties to ARCO were to be advanced by him making the allegedly defamatory statements about Plaintiff. See Randall's, 891 S.W.2d 640, 647 (employee

acted independently and outside scope of [\*39] authority when publishing statements to store's customers); Seifert, 567 S.W.2d 77, 78 (affirming summary judgment for employer because employee acting outside scope of employment when he made defamatory statements); Wagner, 540 S.W.2d at 304–05 (employer not liable because manager "not about his employer's business" when making phone calls spreading defamatory statements).

As to Sweeney, Plaintiff maintains that he has "raised genuine issues of material fact that Lisa Sweeney, an ARCO employee defamed him, in the course and scope of her employment." Response, at 28. As in the case of Kolodziej, however, Plaintiff has not offered competent summary judgment evidence establishing fact issues regarding whether Sweeney's alleged statements were made as part of her duties to ARCO. n13 Plaintiff's conclusory assertions based on his own self-interested personal opinion are insufficient to raise a genuine fact question in this context.

n13 Plaintiff argues that Sweeney admitted that she was acting in the course and scope of her employment at all times relevant to the lawsuit. Defendant notes correctly, however, that ARCO is not bound by Sweeney's admissions. As noted, *supra*, it is undisputed that the rumors Sweeney allegedly was spreading were unauthorized workplace gossip that as a matter of law cannot be imputed to employers.

[\*40]

Accordingly, Plaintiff's defamation claims cannot survive summary judgment on this ground.

### 2. Merits of Kolodziej's Alleged Defamatory Statements

In the alternative, ARCO argues that even if it were liable for its employee Kolodziej's statements, the claim fail for a variety of reasons.

#### a. The Alleged "Balling" and Various "Liar" Comments

In its Motion, Defendant ARCO moved to dismiss the alleged "balling" and "liar" comments. Plaintiff did not respond to these arguments, and appears to have abandoned these claims. See Response, at 10 n.2. Plaintiff only addresses his new, supplemental claims. Accordingly, Plaintiff has not met his summary judgment burden as to these allegations, and dismissal is appropriate. n14 Accordingly, summary judgment must be granted on this defamation claim.

n14 Even if Plaintiff had responded to Defendant's arguments, it is unlikely that his claims would have survived summary judgment. Plaintiff claims that Kolodziej made the "balling" statement in April 1996, when the two men were alone in Plaintiff's office. See Martineau Deposition, at 265--67, 269. Plaintiff admits that Kolodziej never repeated the statement, and has no evidence that Kolodziej made the remark to anyone else. See *id.* at 265--67.

In Texas, [HN16] libel and slander claims must be brought within a year of the accrual of those claims. See *TEX. CIV. PRAC. & REM. CODE ANN. § 16.002 (a)* (Vernon 1986); *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 131--32 (Tex. App.--Houston [14th Dist.] 1994, no writ). Accrual occurs on the date of communication, not its consequences. See *Ross*, 892 S.W.2d at 131--32. Plaintiff did not file this lawsuit until June 11, 1997, well past the statute of limitations deadline. Therefore, any claim for the alleged "balling" statement is now time-barred. Moreover, Plaintiff admits that the alleged comment was made to Plaintiff while the men were alone in Plaintiff's office. "Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse." *Randall's*, 891 S.W.2d at 646 (emphasis added).

As for the alleged "liar" comments, Defendant articulated many compelling reasons why the statements would not be defamatory, including: the statute of limitations bars some statements; many are not capable of defamatory meaning; there is no evidence of publication to third parties; many are statements of opinion. While the Court need not and does not reach a conclusion on the merits of these claims, the Court simply observes in passing that their legal viability is doubtful.

[\*41]

#### b. Plaintiff's Supplemental Slander Claims

Plaintiff contends that Kolodziej told Sullivan that Plaintiff was insane, irrational, and delusional. Defendant ARCO, in its Supplemental Motion, argues that summary judgment must be granted on these issues because: the alleged statements are opinions; the alleged statements are not defamatory; the alleged statements are privileged; and Texas does not recognize compelled self-publication.

**Fact vs. Opinion.**--A [HN17] statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. See *Baldwin v. University of Texas Medical Branch at Galveston*, 945 F. Supp. 1022, 1035 (S.D. Tex. 1996), *aff'd*, 122 F.2d 1066 (5th Cir. 1997); *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 446 (Tex. App.--Houston [1st Dist.] 1993, no writ); *Einhorn v. LaChance*, 823 S.W.2d 405, 410-11 (Tex. App.--Houston [1st Dist.] 1992, writ *dism'd w.o.j.*). Whether a document or statement is reasonably capable of a defamatory meaning is an issue of law for the court. See *Baldwin*, 945 F. Supp. at 1034-35; *Musser v. Smith Protective Services, Inc.*, [\*42] 723 S.W.2d 653, 654-55 (Tex. 1987). "All assertions of opinion are protected by the first amendment of the United States Constitution and article I, section 8 of the Texas Constitution." *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). Thus, an essential element of a defamation cause of action is that the alleged defamatory statement be a statement of fact rather than opinion. See *Howell v. Hecht*, 821 S.W.2d 627, 631 (Tex. App.--Dallas 1991, writ denied); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 79 (Tex. App.--Fort Worth 1982, writ *ref'd n.r.e.*). Whether a statement is an opinion or an assertion of fact is also a question of law. n15 See *Carr*, 776 S.W.2d at 570.

n15 The Texas appellate court in *Yiamouyiannis* listed helpful factors in making the fact/opinion determination:

[HN18]

In distinguishing between fact and opinion, the court should (1) analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively capable of being proven true or false; (3) consider the entire context of the article or column, including cautionary language; and (4) evaluate the kind of writing or speech as to its presentation as commentary or "hard" news. 750 F.2d at 978-84. This inquiry should help determine, for example, whether the statement is to be taken as precise and literal or

loose and figurative, and whether the language is employed as metaphor or hyperbole, or to convey actual facts.

Yiamouyiannis, 764 S.W.2d 338, 341 (relying on the four-part test set forth in Ollman v. Evans, 242 U.S. App. D.C. 301, 750 F.2d 970 (D.C. Cir. 1984)). This test has been adopted by several Texas courts. See, e.g., Yiamouyiannis v. Thompson, 764 S.W.2d 338, 341 (Tex. App.--San Antonio 1989, no writ); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798 (Tex. App.--El Paso 1986, writ ref'd n.r.e.). The Texas Supreme Court, however, has not adopted these factors. See Carr, 776 S.W.2d at 570.

[\*43]

Having reviewed the record, and the context in which Kolodziej's statements allegedly were made, the Court determines that Plaintiff complains of non-actionable opinions. As Defendant argues, the words were used in a figurative, rather than literal, sense. Plaintiff has proffered no evidence that Kolodziej used the terms literally, and it is undisputed that Kolodziej had no professional training that would enable him to make a professional evaluation. See Kolodziej Affidavit, P 6; Martineau Deposition, at 496--98, 531--32. In fact, Sullivan characterized Kolodziej's remarks as "views." See Martineau Deposition, at 533; Sullivan Affidavit, P 4. Finally, as Defendant notes, words such as those allegedly used by Kolodziej commonly are used hyperbolically, rather than literally, and as such express opinion instead of fact. Cf. Yiamouyiannis, 764 S.W.2d at 341 (remarks that plaintiff was a "quack," "hoke artist," and "fear monger," were "vintage hyperbole" and "pure opinion"); Einhorn v. LaChance, 823 S.W.2d 405, 412 (Tex. App.--Houston [1st Dist.] 1992, writ dismissed w.o.j.) (descriptions of plaintiff as "incompetent, troublemakers and liars" absolutely privileged opinions). [\*44]

Accordingly, even if the Court found that liability for Kolodziej's alleged statements could be imputed to Defendant ARCO, the Court concludes that the remarks in question were merely opinion, and therefore subject to privilege. n16 Summary judgment is therefore appropriate on this alternative ground on Plaintiff's supplemental slander claims.

n16 Additionally, Defendant ARCO raised and briefed several other strong arguments for dismissal of this claim, including: the statements

were not reasonably capable of defamatory meaning and the statements were subject to a qualified privilege.

**Slander Per Se.**--In his Supplemental Response, Plaintiff also argues that Kolodziej's alleged statements were slander *per se*.

[HN19] "Statements are slanderous *per se* if they are so obviously harmful to the person harmed that no proof of their injurious effect is necessary to make them actionable. Matters characterized as slanderous *per se* are statements that affect a person injuriously in his office, profession, [\*45] or occupation." Simmons v. Ware, 920 S.W.2d 438, 451 (Tex. App.--Amarillo 1996, no writ) (citations omitted). The Simmons court explained:

In determining whether a statement is actionable, the statements in their entirety must be examined. They must be construed as a whole in light of the surrounding circumstances and judged as a person of ordinary intelligence would perceive them. It is only if the statements are ambiguous or of doubtful import that a jury is called upon to determine their meaning and effect upon an ordinary person.

*Id.*

Having reviewed the record, the Court concludes that, for the reasons stated *supra*, no reasonable person would perceive Kolodziej's alleged statements as slanderous *per se*. Accordingly, Plaintiff's slander claim cannot survive summary judgment on this ground.

### 3. Ratification of Sweeney's Statements

Plaintiff further claims that ARCO is responsible for Sweeney's alleged comments because it ratified them. Plaintiff claims that ARCO managers were made aware of Sweeney's comments on four different occasions, but failed to take any action to stop the defamation. n17

n17 Plaintiff states:

In mid to late August 1996, Plaintiff told Sammy Durett, the shift superintendent and Eric Kolodziej, his immediate supervisor, that Sweeney had been "bad-



mouthings" for four to five months and he wanted this stopped. In September 1996, Plaintiff complained to Kolodziej and Jetola Anderson, the human resources representative, that he had heard from plan operators that he was demoted for sexual harassment and that Sweeney was continuing to bad mouth him. In late September 1996, Plaintiff told Kolodziej and Anderson that he heard from lab technicians that Sweeney said the following falsehoods about him: 1) He broke into Sweeney's home 2) He damaged her home 3) He stole out of her purse 4) He stalked her and 5) He was obsessed with her. He again asked that something be done to stop the spreading of these lies. In early October 1996, Plaintiff again complained to Kolodziej and Anderson about the specific falsehoods that were being said about him and asked that they be stopped.

Response, at 30--31. Sweeney confirms that she was instructed in the October meeting not to gossip about Plaintiff. *See* Sweeney Deposition, at 148.

[\*46] [HN20]

"Ratification may occur when the employer . . . confirms, adopts, or fails to repudiate that acts of its employee." *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 653 (5th Cir. 1994) (citations omitted). Moreover, "when the company 1) knows about the employee's acts, 2) recognizes that the employee's acts will continue if he is retained, 3) does nothing to prevent the ongoing tortious acts, and 4) chooses to retain the employee, the company ratifies the tortious acts . . ." *Id.* at 654.

ARCO argues that it cannot be liable based on its failure to repudiate Sweeney's acts. Even assuming ARCO had knowledge of Sweeney's comments, n18 the summary judgment evidence indicates no likelihood that Sweeney's comments would continue if she were retained. The company took action in October 1996. Both Kolodziej and Anderson instructed Sweeney to refrain from discussing the matter with other ARCO employees. *See* Anderson Affidavit, P 13; Kolodziej Affidavit, P 14. Moreover, in response to Plaintiff's complaints, ARCO

instructed Sweeney unambiguously in an October meeting not to gossip about Plaintiff. *See* Sweeney Deposition, at 202--03. Plaintiff has proffered no evidence disputing [\*47] these facts. Instead, he claims that he complained about Sweeney in "mid to late" August and in September of 1996, yet to his knowledge, nothing was done at that time. ARCO denies this claim, but in any event, these facts are insufficient to raise a summary judgment issue as to ratification. n19 Six weeks is not an unreasonable time period for an employer to investigate a complex situation as the one Plaintiff and Sweeney presented. Accordingly, Plaintiff has failed to demonstrate the existence of fact issues regarding ARCO's alleged ratification of Sweeney's statements.

n18 ARCO maintains that it had no actual knowledge of Sweeney's alleged acts. It is undisputed that the original statements were not made on ARCO's behalf.

n19 Moreover, Plaintiff admitted that his alleged complaints of August and September 1996 regarded alleged "rumors" and "bad mouthing" that he wanted ARCO to "put an end to." Martineau Deposition, at 337. As discussed, *supra*, employers are not responsible for workplace rumors or gossip. Plaintiff further admits that he did not complain about *specific* alleged statements until October 1996, when ARCO warned Sweeney not to spread allegations.

[\*48]

#### 4. ARCO's Liability for Self-Publication or Republication

Plaintiff finally argues that ARCO is liable under the legal theory of "self-defamation" or "compelled republication," relying on two intermediate Texas appellate courts that held that an employer may be liable for the employee's own publication of the employer's defamatory statements under certain circumstances. *See First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, 701--02 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.); *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 446 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.). ARCO counters that the Texas Supreme Court has never recognized these theories, citing *Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770, 772 (Tex. 1945).

Plaintiff claims in his Supplemental Pleading that "he has had to repeat [Kolodziej's] defamatory statements to prospective employers and to family and friends, causing further damage through self-

defamation." Supplemental Pleading, P 14. Plaintiff admitted in deposition, inconsistent with his pleading, that he has not repeated the alleged statements to any prospective employers. See Martineau Deposition, at 533.

The Court finds [\*49] and concludes that even if the Texas Supreme Court were to adopt this theory, Plaintiff could not meet the requirements for this cause of action. The two cases cited by Plaintiff both rely upon "comment m" to § 557 of the RESTATEMENT (SECOND) OF TORTS. See *First State Bank*, 606 S.W.2d at 701; *Chasewood Constr. Co.*, 696 S.W.2d 439, 446. The Restatement requires the defamed person to show that when he published the remark, (1) he was unaware of the defamatory nature of the statement, n20 and (2) circumstances indicated that the communication to the third party would be likely. See RESTATEMENT (SECOND) OF TORTS § 557 cmt. m; *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 259 (Tex. App.--Austin 1993), *aff'd as modified on other grounds*, 903 S.W.2d 347, 356 (Tex. 1995). Plaintiff does not claim that he was unaware of the defamatory nature of the alleged statement, nor does he offer evidence indicating any lack of awareness.

n20 The *Ake* and *Rico* courts omit the first Restatement requirement: that the defamed persons demonstrate that he was unaware of the defamatory nature of the matter. See *Ake*, 606 S.W.2d at 701; *Rico*, 696 S.W.2d at 446. As another appellate court has noted, however, this first requirement is essential because otherwise "the defamed party is under no duty to mitigate its damages by refraining to self-publish known defamatory statements." *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 259 (Tex. App.--Austin), *aff'd as modified on other grounds*, 903 S.W.2d 347, 356 (Tex. 1995)

[\*50]

Accordingly, Plaintiff's defamation claims cannot survive summary judgment on the theory of self-publication or re-publication.

#### IV. CONCLUSION

For the reasons stated above, the Court concludes that Defendant's Motion for Partial Summary Judgment [Doc. # 17], and Defendant ARCO Chemical Company's Motion for Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 29], are **GRANTED** in their entirety. Plaintiff has failed to raise genuine questions of material fact concerning essential elements of his Title VII claims, his intentional infliction of emotional distress claim, and his defamation claims. It is therefore

**ORDERED** that Defendant's Motion for Partial Summary Judgment [Doc. # 17], and Defendant ARCO Chemical Company's Motion for Summary Judgment on Plaintiff's Supplemental Slander Claim [Doc. # 29] are **GRANTED**.

SIGNED at Houston, Texas, this 23d day of December, 1998.

NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE

#### FINAL JUDGMENT

For the reasons stated in this Court's Memorandum and Order, dated December 23d 1998, this civil action is **DISMISSED**.

This is a **final judgment**.

The Clerk will enter [\*51] this Order and provide all parties with a true copy.

SIGNED at Houston, Texas, this 23d day of December, 1998.

NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE

LEXSEE



Positive

As of: Jan 29, 2007

**PERRY A. LAMSON, et al., Plaintiffs-Appellants v. THE FIRESTONE TIRE &  
RUBBER COMPANY, et al., Defendants-Appellees**

**C.A. No. 14692**

**Court of Appeals of Ohio, Ninth Appellate District, Summit County**

**1991 Ohio App. LEXIS 1010**

**March 13, 1991**

**PRIOR HISTORY: [\*1]**

Appeal from Judgment Entered in the Common Pleas Court; County of Summit, Ohio; Case No. 88 4 1236.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiffs, employee and spouse, appealed a judgment from the Common Pleas Court, Summit County (Ohio), which granted summary judgment in favor of defendants, employer and investigators, on claims of defamation, intentional infliction of emotional distress, negligent investigation, and loss of services and consortium.

**OVERVIEW:** The employee was fired for sexually harassing another employee and was denied unemployment benefits. He contended that the investigation was conducted in an outrageous and negligent manner. The court affirmed the trial court's order granting summary judgment to the employer and investigators. The trial court, in finding that the employee's bare assertions failed to rebut the motion adequately, as required by Ohio R. Civ. P. 56(E), did not place the initial burden upon the employee. The record did not support the claim for intentional infliction of emotional distress. As to the defamation claim, the employee failed to set forth specific facts showing that statements to co-workers were made in furtherance of the employer's business. Moreover, an employer was not liable for an employee's intentional, malicious torts performed outside the scope of employ-

ment. Ohio law did not recognize a tort of negligent investigation of an employee's misconduct.

**OUTCOME:** The court affirmed the summary judgment in favor of the employer and investigators.

**CORE TERMS:** summary judgment, Chandler, cause of action, sexual harassment, assignments of error, nonmoving party, assignment of error, intentional infliction of emotional distress, granting summary judgment, moving party, defamation, consortium, properly granted, furtherance, co-workers, bare, journal entry, infliction of emotional distress, genuine issue of material fact, summary judgment motion, allegedly defamatory, entitled to judgment, burden of proof, genuine issue, material fact, matter of law, court erred, flirtatious, outrageous, depositions

**LexisNexis(R) Headnotes**

*Civil Procedure > Discovery > Methods > General Overview*

*Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview*

*Civil Procedure > Summary Judgment > Time Limitations*

[HN1] Pursuant to Ohio R. Civ. P. 56(C), a party's motion for summary judgment shall be granted if, construing the evidence in the light most favorable to the nonmoving party, the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The burden of showing that no genuine issue of material fact exists rests with the moving party. However, Rule 56(E) provides that when a motion for summary judgment is made and supported by evidence as provided in the rule, the nonmoving party must set forth specific facts showing that there is a genuine issue of fact for trial.

*Civil Procedure > Summary Judgment > Appellate Review > General Overview*

*Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN2] In reviewing a summary judgment, both trial and appellate courts adopt the same standard. Both courts construe the evidence most strongly in favor of the nonmoving party. Pursuant to Ohio R. Civ. P. 56(C), a reviewing court will affirm the trial court's grant of summary judgment if it finds that: (1) No genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

*Torts > Negligence > Actions > Negligent Infliction of Emotional Distress > General Overview*

[HN3] The appellate court need not address any issue which was not first raised in the trial court.

*Torts > Intentional Torts > Defamation > General Overview*

*Torts > Vicarious Liability > Employers > General Overview*

[HN4] Under respondeat superior, the test of an employer's liability for an employee's allegedly defamatory statements is not simply whether the employee was in its employ, but whether the statements were made in the furtherance of the employer's business and under the general direction of the employer.

*Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Coworkers*

*Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employment Practices > Discharges & Failures to Hire*

*Torts > Vicarious Liability > Employers > Activities & Conditions > Intentional Torts*

[HN5] In Ohio, an employer is not liable for an employee's intentional, malicious torts performed outside the scope of employment.

*Torts > Business Torts > Negligent Hiring & Supervision*

[HN6] Negligent investigation of an employee's misconduct is not a cause of action recognized in Ohio law.

#### COUNSEL:

JOHN L. WOLFE, Attorney at Law, Akron, Ohio, for Plaintiffs.

GREGORY L. HAMMOND, Attorney at Law, Akron, Ohio, for Defendants.

#### JUDGES:

William R. Baird, for the court. Quillin, P. J., Cacioppo, J., concur.

#### OPINION BY:

BAIRD

#### OPINION:

##### DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

This cause comes before the court upon the appeal of Perry and Annette Lamson from the trial court's order granting summary judgment in favor the defendant-appellees, Firestone Tire & Rubber Company (Firestone), Charles Ramsey, Jr., and Jacqueline C. Steese. We affirm.

Perry Lamson was employed by Firestone as a security guard from June 24, 1968, to April 28, 1986. He was fired by Firestone for sexually harassing Jacqueline Chandler, another Firestone employee. Steese, a Firestone personnel representative, and Ramsey, head of Firestone's Equal Employment Opportunity Department, conducted the investigation into Chandler's complaint of harassment, which led to Perry's dismissal.

Perry [\*2] contends that the investigation into Chandler's charges was conducted in both an outrageous and negligent manner, because Steese and Ramsey failed to discover that Lamson did not engage in sexual harassment, but instead took part in a consensual, mutually flirtatious relationship" with Chandler.

Immediately following his dismissal, Perry applied for unemployment benefits. The Ohio Bureau of Employment Services (OBES) denied his application after determining that Perry was dismissed for just cause. The decision of the OBES was upheld on appeal to the Wayne County Court of Common Pleas. *Lamson v. Firestone Tire & Rubber Co.* (Aug. 20, 1987), Wayne C.P. No. 87-C1-038, unreported. Perry then filed a reverse sexual discrimination suit against Firestone in the United States District Court. Perry alleged that he and Chandler had engaged in a consensual, mutually flirtatious relationship, for which only he was fired and Chandler was not. The district court granted Firestone's motion for summary judgment, finding that Firestone had articulated a nondiscriminatory reason for Perry's dismissal, i.e. sexual harassment of Chandler. *Lamson v. Firestone Tire & Rubber Co.* (Dec. 15, [\*3] 1987), U.S. Dist. Ct. No. C87-898A, unreported. The decision of the District Court was upheld on appeal to the United States Court of Appeals, Sixth Circuit. *Lamson v. Firestone Tire & Rubber Co.* (Nov. 4, 1988), C.A. 6 No. 88-3050, unreported.

The Lamsons then brought the instant action in the Summit County Court of Common Pleas, asserting the following claims for relief: defamation, intentional infliction of emotional distress, negligent investigation of Chandler's sexual harassment charges, and a claim for Annette's loss of Perry's services and consortium. On April 20, 1990, the appellees filed a motion for summary judgment as to all claims, which the trial court granted on June 29, 1990.

The Lamsons appeal the trial court's ruling, and raise six assignments of error, all directed toward the propriety of the trial court's grant of summary judgment.

#### Assignment of Error VI

"The court erred in placing the burden of proof in opposing defendants' motion for summary judgment on the plaintiffs-appellees (the nonmoving parties) rather than requiring the moving parties to show that no genuine issue of material fact exists."

Because the Lamsons' sixth assignment of error challenges [\*4] the standard under which the trial court reviewed the appellees' motion for summary judgment, we will address this claimed error first.

In its order granting summary judgment to the appellees, the trial court noted that appellants "failed to prove genuine issues of material fact exist." Appellants seize

upon this statement as proof that the trial court improperly placed the burden of proof upon the nonmoving party. We disagree.

[HN1] Pursuant to Civ. R. 56(C), a party's motion for summary judgment shall be granted if, construing the evidence in the light most favorable to the nonmoving party,

"\* \* \* the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \*"

The burden of showing that no genuine issue of material fact exists rests with the moving party. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. However, Civ. R. 56(E) provides that when a motion for summary judgment is made [\*5] and supported by evidence as provided in the rule, the nonmoving party "must set forth specific facts showing that there is a genuine issue of fact for trial."

The trial court found that the appellants' bare assertions failed to adequately rebut the appellees' motion, as required by Civ. R. 56(E). It did not place the initial burden upon appellants.

Appellants' sixth assignment of error is overruled.

#### Assignments of Error

"I. The court erred in granting defendants' summary judgment [sic] on plaintiff Perry A. Lamson's cause of action for intentional infliction of emotional distress.

"II. The court erred in granting defendants' summary judgment [sic] on plaintiff Perry A. Lamson's cause of action for negligent infliction of emotional distress.

"III. The court erred in granting defendants' summary judgment motion on plaintiff Perry A. Lamson's cause of action for defamation.

"IV. The court erred in granting defendants' summary judgment motion on plaintiff Perry A. Lamson's cause of action for negligence.

"V. The court erred in granting summary judgment on plaintiff Annette Lamson's cause of action for loss of services and consortium."

Because appellants' remaining assignments [\*6] of error all challenge the propriety of the trial court's grant of summary judgment, we will address them together.

[HN2] In reviewing a summary judgment, both trial and appellate courts adopt the same standard. Both courts

construe the evidence most strongly in favor of the non-moving party. Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc. (1986), 24 Ohio St. 3d 198, 201-202. Pursuant to Civ. 56(C), a reviewing court will affirm the trial court's grant of summary judgment if it finds that:

" \* \* \*

"(1) No genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

" \* \* \*."

Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327.

As for his claim for intentional infliction of emotional distress, the record, and most particularly the depositions of Perry, Steese, and Ramsey, fails to support Perry's bare assertions [\*7] that the investigation of Chandler's charges of sexual harassment was conducted in such an outrageous manner as to go beyond all bounds of decency and become intolerable in a civilized community. See, Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 374-375. The trial court properly granted appellees summary judgment on this claim.

As for Perry's claim for negligent infliction of emotional distress, we note that this claim was neither pled in the complaint, nor addressed by the trial court. [HN3] This court need not address any issue which was not first raised in the trial court. See Seeley v. Rahe (1985), 16 Ohio St. 25, 26.

In his claim for defamation, Perry argues that Chandler's allegedly defamatory statements were "published" by Chandler within the course of her employment when, prior to appellees' investigation, she told fellow employees of Perry's harassment. Appellant proceeded on a theory of respondeat superior to hold Firestone liable for Chandler's statements.

Perry's theory of recovery fails in two respects. First, [HN4] under respondeat superior, the test of Firestone's liability for Chandler's allegedly defamatory statements is not simply whether Chandler [\*8] was in Firestone's employ, but whether the statements were made in the furtherance of Firestone's business and under the general direction of Firestone. See, Halkias v. Wilkoff Co. (1943), 141 Ohio St. 139, 152-153. Perry has failed to set

forth specific facts showing that Chandler's statements to her co-workers were made in furtherance of Firestone's business.

Second, the general rule [HN5] in Ohio is that an employer is not liable for an employee's intentional, malicious torts performed outside the scope of employment. Taylor v. Doctors Hospital (1985), 21 Ohio App. 3d 154, 156. Perry failed to set forth specific facts demonstrating how Chandler's statements to co-workers regarding sexual harassment by Perry fell within the scope of Chandler's employment as a secretary. The trial court properly granted summary judgment to the appellees on this claim.

In his fourth claim for relief, Perry urges this court to adopt the previously unrecognized tort of [HN6] negligent investigation of an employee's misconduct. We decline to do so. The trial court properly granted appellees' summary judgment on this claim for the reason that no such cause of action exists in Ohio law.

Finally, [\*9] the trial court, having granted appellees summary judgment on each of Perry's claims for relief, also granted appellees summary judgment on Annette's claims for loss of Perry's services and consortium. We find no error in this, as Annette's claim was derivative of Perry's. Messmore v. Monarch Machine Tool Co. (1983), 11 Ohio App. 3d 67, 68. As such, it would not exist but for Perry's, and cannot survive the dismissal of Perry's claims. Tomlinson v. Skolnik (1989), 44 Ohio St. 3d 11, 14.

#### Summary

We overrule all of the appellants' assignments of error and affirm the trial court order granting appellees' motion for summary judgment in all respects.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. [\*10] App. R. 22(E).

Costs taxed to appellants.

Exceptions.

LEXSEE 1996 OHIO APP. LEXIS 510



Positive

As of: Jan 29, 2007

**REBECCA L. CORRADI, Plaintiff-Appellant -vs- EMMCO CORPORATION, ET  
AL., Defendants-Appellees**

**NO. 67407**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

**1996 Ohio App. LEXIS 510**

**February 15, 1996, DATE OF ANNOUNCEMENT OF DECISION**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:**

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. 224180.

**DISPOSITION:**

JUDGMENT: Affirmed in part, Reversed in part.

**COUNSEL: APPEARANCES:**

For Plaintiff-Appellant: MARC N. SILBERMAN, ESQ., 24800 Chagrin Blvd., The Gundersen Bldg., Beachwood, Ohio 44122.

For Defendants-Appellees: THOMAS H. BARNARD, ESQ., TIMOTHY J. DOWNING, ESQ., Ulmer & Berne, 1300 East Ninth St., Suite 900, Cleveland, Ohio 44114.

**JUDGES:** PATRICIA ANN BLACKMON, PRESIDING JUDGE. PORTER, J., and McMONAGLE, J., CONCUR.

**OPINION BY:** PATRICIA ANN BLACKMON

**OPINION:**

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, J.:

Plaintiff-appellant Rebecca L. Corradi appeals a directed verdict in favor of defendants-appellees, Emmco Corporation and David Heffelman, and a jury verdict in favor of defendant-appellee, Irene Soltis. Corradi assigns the following errors for our review:

*I. THE CONDUCT OF THE TRIAL JUDGE DEMONSTRATED BIAS, PREJUDICE AND HOSTILITY TOWARDS APPELLANT THEREBY PREVENTING HER FROM OBTAINING A FAIR TRIAL.*

*II. THE TRIAL COURT ERRED TO THE SUBSTANTIAL [\*2] PREJUDICE OF APPELLANT EXCLUDING CERTAIN RELEVANT AND ADMISSIBLE EVIDENCE WHICH PREVENTED HER FROM OBTAINING A FAIR TRIAL.*

*III. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY REFUSING TO PERMIT ONE OF HER KEY WITNESSES TO TESTIFY AT TRIAL AND BY SEVERELY LIMITING THE TESTIMONY OF ANOTHER PRIMARY WITNESS CALLED BY APPELLANT.*

*IV. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY GRANTING A*

*DIRECTED VERDICT FOR APPELLEES  
AND SPECIFICALLY FOR APPELLEE,  
EMMCO CORPORATION.*

*V. THE TRIAL COURT ERRED TO THE  
SUBSTANTIAL PREJUDICE OF  
APPELLANT BY REFUSING TO  
PERMIT HER TO FULLY AMEND HER  
COMPLAINT TO CONFORM TO THE  
EVIDENCE PRESENTED PURSUANT  
TO CIV.R. 15(B).*

*VI. THE TRIAL COURT ERRED TO THE  
SUBSTANTIAL PREJUDICE OF  
APPELLANT IN ITS INSTRUCTIONS TO  
THE JURY MISSTATING THE  
ELEMENTS OF DEFAMATION AND  
REFUSING TO INSTRUCT THE JURY  
ON SLANDER PER SE.*

Having reviewed the record of the proceedings and the arguments presented by the parties, we affirm in part and reverse in part. The apposite facts follow.

Rebecca Corradi was employed by EMMCO Corporation from November 21, 1988 to January 15, 1991. Emmco hired her as [\*3] their business manager of their Columbus Park Apartments in Bedford Heights; later she became their property manager. As property manager, she was responsible for collecting and processing rent payments. Additionally, she was in charge of handling tenants' complaints and facilitating the repairs needed in the apartments.

Her immediate supervisor was David Heffelman, Director of Residential Properties for EMMCO. In 1990, Corradi's relationship with Heffelman and her other superiors began to deteriorate. They complained because too much money was being spent on outside contractors for repairs that could have been done by in-house maintenance people. They complained particularly about the amount of work given to Danny Venturella as a plumbing contractor.

On January 15, 1991, Heffelman had a private meeting with Corradi. In the meeting, he informed Corradi "EMMCO had decided to make a management change" and she should not take it personally. He then told her, "You can resign and have a letter of recommendation, or you can be terminated and take your chances." Corradi refused to resign. Upon leaving the office, Corradi told Mary Carpenter, she had just been fired. In a termination report [\*4] form, Heffelman indicated the reason for her discharge was incompetence.

When she arrived at her home she was told by her mother-in-law to call Irene Soltis. Irene Soltis was employed at the apartment building as office manager, and

Corradi was her supervisor. When she called, Soltis was extremely upset, crying, and told Corradi, "I can't work there if you are not going to be there, what am I going to do?" Corradi talked to Soltis on one subsequent occasion to make arrangements to pick up her last paycheck, drop off petty cash, and money collected from rental of the complex party room.

Barbara Van Hala, a part-time employee, told Corradi that it was rumored that she was fired for receiving kickbacks from subcontractors, particularly Venturella. Corradi said several others knew of the rumor. Upon learning of the rumor she felt ashamed, angry, and humiliated.

Corradi's sisters-in-law, Sharon Banks and Beverly D'Ambrosia went to the rental office to visit Corradi. Banks was a tenant of Columbus Park Apartments at the time. Soltis informed Banks and D'Ambrosia that Corradi was fired because she was taking money from petty cash. Soltis also told Melissa Brearey, who was a mutual friend [\*5] of Soltis and Corradi, that Corradi was discharged for removing carpeting and appliances from Columbus Park Apartments.

Prior to Corradi's discharge, the management office of Columbus Park Apartments began receiving hang-up and threatening telephone calls. After Corradi was discharged, Soltis went to the Bedford Heights Police Department to report the harassing telephone calls. Soltis provided the police with Corradi's name as one of several possible suspects. The police contacted Corradi to discuss the allegations, but did not pursue an investigation.

In March of 1991, Corradi applied for the position of credit collections manager with Associated Estates Realty Corporation. She was referred to the company by her attorney and interviewed with the company's Comptroller, Regina Shaw. Shaw offered her the job, and she was to start Monday, the day after the interview. After the interview, she was sent to Associated's Human Resources department to pick-up the necessary paper work. Corradi completed the paperwork and returned it. Nan Zielenic was director of Human Resources for Associated; it was her responsibility to check references of prospective employees, but she had no independent [\*6] recollection of doing so for Corradi. However, after Corradi turned in her paperwork including her references, she received a telephone call from Shaw rescinding the job offer.

Corradi filed an action for defamation and intentional infliction of emotional distress against EMMCO, Heffelman, and Soltis. After discovery, the case proceeded to a jury trial before Judge James P. Kilbane. At the close of the plaintiff's case, the trial court entered a directed verdict in favor of EMMCO and Heffelman. The claims against Soltis were submitted to the jury. In their



interrogatories the jury found Soltis made false statements and published the statements, but the statements did not cause any injury to Corradi's reputation. The jury entered a verdict in favor of Soltis. Corradi moved for a new trial. While the motion was pending, Corradi filed a notice of appeal. The motion was denied for want of jurisdiction, and this appeal followed.

Corradi's assignments of error will be addressed out of order in the interest of clarity.

In her fourth assignment of error, Corradi asserts the trial court erred in granting a directed verdict in favor of EMMCO and Heffelman. Civ.R. 50(A)(4) provides when a [\*7] motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue. See, also, *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St. 3d 97, 109, 592 N.E.2d 828. An action for defamation requires proof of "(1) an unprivileged communication; (2) false and defamatory language about another; and (3) requisite malice. A qualified privilege attaches to statements made within the scope of employment." *Nichols v. Ryder Truck Rental, Inc.* (June 23, 1994), 1994 Ohio App. LEXIS 2697, Cuyahoga App. No. 65376, unreported.

In her fourth assignment of error, Corradi makes several arguments. First, she argues the trial court erred in granting a directed verdict in favor of Heffelman. Mere allegations that rumors seem to reflect an employee's conversations with management are insufficient to establish management was responsible [\*8] for publication of defamatory remarks. *Turk v. Ohio Bell Telephone Co.* (Mar. 22, 1990), 1990 Ohio App. LEXIS 1072, Cuyahoga App. No. 56749, unreported. Rumors in and of themselves are not sufficient proof of a claim of defamation. *Ashcroft v. Mt. Sinai Medical Center* (1990), 68 Ohio App. 3d 359, 588 N.E.2d 280. The spreading of rumors or gossip is only actionable as defamation to the extent that the statements made were attributable to the defendant. See *Cooper v. Foster* (Feb. 14, 1989), Franklin App. No. 88 AP-326, 1989 Ohio App. LEXIS 567, unreported. In this case, there was no evidence Heffelman made any defamatory statements about Corradi or spread any rumors. Thus, the trial court properly directed a verdict in favor of Heffelman.

Secondly, Corradi argues the trial court erred in granting a directed verdict in favor of EMMCO because it was liable for the defamatory statements made by Soltis. Where an employee commits an intentional tort, it

must be calculated to facilitate or promote the business for which that person is employed. "The employer/ principal is not liable for the independent, self-serving conduct of its employee/agent which does not so facilitate [\*9] its business." *Cooper v. Grace Baptist Church of Columbus, Ohio, Inc.* (1992), 81 Ohio App.3d 728, 737, 612 N.E.2d 357 (where giving personal opinion outside scope of employment in defamation action).

In this case, Soltis was employed by EMMCO and assumed some of the responsibilities of Corradi after Corradi was discharged. Her responsibilities did not include providing information regarding the reasons for Corradi's discharge from EMMCO and there is no evidence her remarks tended to "facilitate or promote" EMMCO's business. *Id.* Accordingly, Soltis was acting outside the scope of her employment, and therefore, the trial court properly directed a verdict in favor of EMMCO.

In her first assignment of error, Corradi asserts she was denied a fair trial because the trial judge demonstrated bias, prejudice, and hostility toward her. "A trial judge is presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity." *State v. Wagner* (1992), 80 Ohio App. 3d 88, 93, 608 N.E.2d 852; citing *State v. Richard* (Dec. 5, 1991), 1991 Ohio App. LEXIS 5772, Cuyahoga App. No. 61524. The existence of prejudice [\*10] or bias against a party is a matter that is peculiarly within the knowledge and reflection of each individual judge and is difficult to question unless the judge specifically verbalizes personal bias or prejudice toward a party. *In re: Adoption of Reams* (1989), 52 Ohio App. 3d 52, 59, 557 N.E.2d 159.

Corradi again advances several arguments in her first assignment of error. First, she argues the trial judge demonstrated open, blatant hostility and bias toward William Corradi. William Corradi is the husband of Rebecca Corradi and a special Cleveland Police Officer employed at Cleveland House of Corrections. During direct examination of William Corradi, when he was asked what shift he worked for the Cleveland Police Department, Judge James P. Kilbane interceded and said, "Wait. Since I was a policeman of the Cleveland Police Department, he is not a member of the Cleveland Police Department. I have got to protect them." Corradi argues the trial judge's comment was prejudicial.

[A] trial judge has a duty to see that the truth is developed and should not hesitate to pose a proper, pertinent, and evenhanded question when justice requires." *Akron-Canton Waste Oil, Inc. v. Safety-Kleen* [\*11] *Oil Serv., Inc.* (1992), 81 Ohio App. 3d 591, 610, 611 N.E.2d 955. See, also, *State v. Johnston* (Dec. 15, 1993), 1993 Ohio App. LEXIS 6139, Summit App. No. 16137. None-

theless, a trial judge's participation by questioning or comment must be "scrupulously limited" to prevent the court from indicating to the jury, "consciously or unconsciously," its opinion as to the credibility of the witnesses. *State, ex rel. Wise, v. Chand* (1970), 21 Ohio St. 2d 113, 256 N.E.2d 613 at paragraph three of the syllabus. If the intensity, tenor, range and persistence of the trial court's questions or comments can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given to his testimony, the interrogation is prejudicially erroneous. *Id.* at paragraph four of the syllabus.

In this case, the comment of the trial judge evinces a strong feeling for the Cleveland Police Department. Nonetheless, the trial judge's intemperate comment does not in itself indicate bias. See *Wagner* at 94. Also, no other evidence exists that would tend to show prejudice against this witness. Albeit a minor point in this case, the clarification of the witness' [\*12] occupation was a proper subject of comment. Thus, this court must conclude the jury was not prejudiced by the trial judge's comments.

Corradi next argues the trial judge showed hostility and bias toward Regina Shaw as a plaintiff's witness. During the voir dire of Shaw outside the presence of the jury, the trial judge interrogated her as follows:

THE COURT: I know you're a friend --

MS. SHAW: No, I'm not a friend, Your Honor. I don't even know them from Adam. I interviewed Rebecca Corradi one time. That's the only time I ever met the woman.

THE COURT: I'm talking about with her attorney.

MS. SHAW: I'm not friends with her attorney. I was talking to him about a statement. I'm not friends of anybody here.

THE COURT: I don't imply that your testimony is colored, but there is no testimony that --

MS. SHAW: I just feel like there's a lot of facts here that are not going to get out, 'cause of the position --

MR. SILBERMAN: Ms. Shaw, could you tell the Court how I came to refer Ms. Corradi to you.

THE COURT: I'm satisfied that you're an attorney, and that's why you referred her. But, on the matter of the voir dire, you can't establish anything [\*13] in this particular case. I so rule. Call your next witness. Call the jury in. You're excused.

The trial judge's questioning of whether Shaw was a friend of plaintiff's counsel was clearly a biased, improper interrogation into the credibility of a witness. Nevertheless, the interrogation took place outside the presence of the jury; therefore, it was not prejudicial. The matter of whether Shaw should have been permitted to testify will be fully addressed in response to Corradi's third assignment of error.

Corradi next argues the trial judge made derogatory comments reflecting upon the integrity of plaintiff's counsel by referring to him as "Thomas Shaughnessy." The four separate occasions during trial in which the reference was made were as follows:

Q: So this meeting was unusual?

A: I thought -

MR. BARNARD: Objection.

A: I thought it was very unusual.

THE COURT: That's a comment. I will put you over there with Thomas Shaughnessy. He's a great defense attorney. You can't --

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Q: If I understand your testimony, you had never - did you ask --

THE COURT: This is Shaughnessy's stuff. You have asked the question. Ask him the question, not what [\*14] you think he said. Please.

\* \* \*

Q: I want to know what.

MR. BARNARD: Objection.

THE COURT: He said he doesn't have any specific items. And again - can I call you Tom?

MR. SILBERMAN: Your Honor, he just testified yes, but he doesn't --

THE COURT: Well, I don't want to argue with you. Ask your next question. Even Shaughnessy knows enough to keep quiet after that. This is off the record.

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Q: And that one was not, was it?

A: No.

MR. BARNARD: Objection. Relevance.

THE COURT: Sustained. It is - it is a comment, again, Mr. Shaughnessy. Pardon me. Your name is Silberman. It is a comment on the evidence. Ignore it.

MR. SILBERMAN: Thank you, Your Honor.

THE COURT: You are welcome.

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The trial court's association of plaintiff's counsel was clearly inappropriate, but there is no evidence the trial judge harbored hostility or attempted to impugn the integrity of plaintiff's counsel. Therefore, these four remarks were not prejudicial.

Corradi next argues the trial judge had *ex parte* communications with defense counsel. During the trial and outside the presence of the jury, the trial judge stated, "I've been approached by defense [\*15] attorney that he has a motion to make, he wants to voir dire the next potential witness. Okay. You may. You want to call her in or argue? There's a voir dire?" Later in the course of the proceedings the trial judge stated, "We are in chambers, and I have been approached by the Plaintiff's attorney and - I mean the defense attorney, and he indicates he wants to put something on the record as to an objection to certain types of witnesses." Corradi contends there were apparently *ex parte* communications and the resulting rulings denied her a fair trial.

Canon 3(A)(4) of the Code of Judicial Conduct provides:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right

to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. \* \* \* Nothing contained herein, however, shall preclude a judge from non-substantive *ex parte* communications on procedural matters and matters affecting prompt disposal of the business of the court."

It appears from the record in this case that defense counsel had *ex parte* communications [\*16] with the trial judge on two occasions. It also, however, appears the content of those communications were involved in non-substantive matters. Merely asking a trial judge to entertain a motion or permit counsel to place an objection on the record in an *ex parte* conversation is not a violation of Canon 3(A)(4) of the Code of Judicial Conduct. Furthermore, the record clearly indicates defense counsel's motion and objection were fully and fairly resolved in the presence of plaintiff's counsel. Therefore, any *ex parte* conversations, did not deny Corradi a fair trial. See *Bland v. Graves* (1994), 99 Ohio App. 3d 123, 136-138, 650 N.E.2d 117.

Corradi next argues the trial judge reached conclusions about the admissibility of certain evidence before the testimony was proffered thereby precluding her from obtaining a fair trial. A trial judge's opinions of law, even if erroneous, are not by themselves evidence of bias or prejudice. In *re Disqualification of Murphy* (1988), 36 Ohio St. 3d 605, 522 N.E.2d 459. In this case, the trial judge's premature conclusions about certain evidence raises a question of the admissibility of the evidence, not one of alleged bias of the trial [\*17] judge. The question of admissibility of the evidence will be addressed in response to Corradi's second assignment of error.

Corradi also argues the trial judge erred to the substantial prejudice of the defendant by instructing the jury to only consider certain witnesses. This argument is also one which raises a question of law, not of bias. This question will be addressed in response to Corradi's sixth assignment of error.

Corradi next argues the cumulative effect of the trial judge's conduct prevented her from obtaining a fair trial. During the course of the voir dire of Rebecca Shaw outside the presence of the jury, plaintiff's counsel argued for admission of her testimony. The trial judge excluded the testimony and, on four separate occasions, he told plaintiff's counsel if he did not like the ruling, he could take it to the court of appeals.

At one point, plaintiff's counsel stated, "Your Honor, if you will, at this point in time, you'll have to excuse my lack of experience as a trial lawyer, but I don't know exactly what to do. I understand what your ruling is going to be here. I disagree with the ruling. This is a critical witness for my case. I would ask for the right to [\*18]

file a motion with the Court of Appeals now, 'cause I can't proceed further."

After reviewing the trial judge's comments on the record during the voir dire, it is clear the trial judge exhibited frustration with plaintiff's counsel, but those comments took place outside the presence of the jury, and could not have prejudiced Corradi's right to a fair trial.

Corradi also argues the trial judge erred when it sustained objections to plaintiff's counsel's questions during direct examination on several occasions where defense counsel had not posed an objection and the cumulative effect of the trial judge's actions were prejudicial. In each instance, the trial judge properly exercised his authority to intervene in order to provide for the orderly and expeditious presentation of the evidence. See *State v. Davis* (1992), 79 Ohio App. 3d 450, 607 N.E.2d 543. Initially, opposing counsel made an objection to Corradi's counsel making comments rather than asking questions. Thereafter, in each instance the trial judge intervened to get Corradi's counsel to ask a question of the witnesses rather than making a comment; the record does not reveal the trial judge displayed any bias or hostility [\*19] during these objections. Accordingly, the cumulative effect of the conduct of the trial judge in this case did not deny Corradi a fair trial.

In her second and third assignments of error, Corradi argues the trial court erred in excluding evidence which denied her a fair trial. "A trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.* (1991), 58 Ohio St. 3d 269, 271, 569 N.E.2d 1056. Appellate review is limited to a determination of whether the lower court abused its discretion. E.g. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296, 299, 587 N.E.2d 290. The term "abuse of discretion" connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable. E.g. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

Corradi argues the trial court erred in excluding evidence of "rumors" as hearsay. Corradi asserts the evidence of rumors was not hearsay within the meaning of Evid.R. 801(C). In the alternative, Corradi asserts [\*20] the evidence of rumors constituted an admission by a party-opponent within the meaning of Evid.R. 801(D)(2)(d), and therefore, was not hearsay. Corradi also asserts the rumors were exceptions to the hearsay rule under Evid.R. 803(1), (3), and (20).

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). Where an out-of-court statement is offered without refer-

ence to its truth, it is not hearsay. *State v. Price* (1992), 80 Ohio App. 3d 108, 608 N.E.2d 1088. "A statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents." *State v. Williams* (1988), 38 Ohio St. 3d 346, 528 N.E.2d 910. "Words constituting conduct are not hearsay, e.g., words of a contract, libel, slander, threats and the like." Evid.R. 801(C), Staff Note.

In this case, Corradi presents the testimony of numerous witnesses to prove there were "rumors" circulating among the employees of EMMCO about the reasons for her dismissal. This testimony was not used to prove the truth of the contents of the statements, but simply to demonstrate that the statements were made. Therefore, the evidence of rumors [\*21] was not hearsay within the meaning of Evid.R. 801(C). Having found the evidence of rumors not to be hearsay within the meaning of Evid.R. 801(C), Corradi's alternative arguments under Evid.R. 801(D)(2)(d) and 803(1), (3), and (20) are moot.

Although the rumors in this case were not hearsay and were admissible, the rumors were not attributed to any of the defendants. Absent some evidence the rumors were attributable to or caused by the defendants, they are not actionable. See *Turk and Cooper v. Foster, supra*. While it is clear certain rumors were circulated by Soltis, it is not clear she was the source of the rumors Corradi sought to introduce into evidence through the testimony of EMMCO employees. Because Corradi failed to establish how the rumors related to the slanderous statements made by Soltis, we find the trial court did not abuse its discretion in excluding them as evidence.

Corradi also argues the trial court erred in the exclusion of the testimony about the nature of a conversation she had with Sergeant William Schultz of the Bedford Heights Police Department. Having reviewed the transcript and the manner in which these questions were asked, it is clear Corradi was [\*22] not attempting to elicit hearsay testimony. However, Evid.R. 103(A)(2) requires a party to proffer the substance of excluded evidence unless the substance of that evidence is apparent. The failure to proffer that excluded evidence waives any error. See *State v. Brooks* (1989), 44 Ohio St. 3d 185, 542 N.E.2d 636. In this case, Corradi failed to proffer the substance of her conversation with Schultz and its relevance to this case is not apparent. Accordingly, any error in excluding that testimony was waived.

Corradi also argues the trial court improperly excluded the testimony of Regina Shaw as hearsay. Shaw would have testified that she was prepared to hire Corradi for a job with Associated Estates Realty Company, but decided not to hire Corradi on the basis of an unfavorable recommendation from EMMCO. While another person contacted EMMCO for Shaw, Shaw's testimony

was not offered for its truth. See *Price, supra*. Shaw's testimony was offered to prove Corradi received an unfavorable recommendation from EMMCO and as such, represented evidence of conduct which is not hearsay. See Evid.R. 801(C). Accordingly, we find the trial judge improperly excluded the testimony of Regina Shaw. [\*23]

Nonetheless, an unfavorable recommendation made in good faith was a privileged communication. A communication by an employer as to the reasons for the discharge of a former employee to the former employee's prospective employer is protected by a qualified privilege. *Rinehart v. Maiorano* (1991), 76 Ohio App. 3d 413, 421, 602 N.E.2d 340. "Only where the statements are made maliciously is the privilege destroyed." *Id.* In this case, Corradi did not present any evidence as to who conveyed the unfavorable recommendation on behalf of EMMCO, or as to its content or the substance of the recommendation. Absent some evidence that the communication was malicious, this court must presume it was privileged. Although the trial court clearly erred in excluding the testimony of Rebecca Shaw, we find no abuse of discretion because the communication was protected by a qualified privilege.

Corradi also argues the trial court erred by refusing to permit her counsel to cross-examine witnesses identified with the defendant company EMMCO. Allowing or refusing to allow leading questions in the examination of a witness is subject to the control of the court, and absent an abuse of discretion, the [\*24] trial court's decision should not be disturbed. *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St. 3d 97, 111, 592 N.E.2d 828. Evid.R. 611(C) provides: "\*\*\*When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Where a witness is identified with an adverse party but is not hostile, it is not an abuse of discretion for the trial court refuse to allow the use of leading questions. See *Ramage, supra*.

In the case, counsel for Corradi called several employees of EMMCO on direct examination, but the trial did not permit him to ask them leading questions. To the extent that they were employed by the defendant company, EMMCO, they were identified with an adverse party within the meaning of Evid.R. 611(C). Nonetheless, there was no evidence during direct examination that they exhibited hostility toward Corradi. Therefore, the trial court did not abuse its discretion.

In her fifth assignment of error, Corradi argues the trial erred by refusing to permit her to amend her complaint. Civ.R. 15(B) provides: "When issues not raised by the pleadings are tried by express or implied consent [\*25] of the parties, they shall be treated in all respects

as if they had been raised in the pleadings.\*\*\*" "Under Civ.R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue." *State, ex rel. Evans, v. Bainbridge Twp. Trustees* (1983), 5 Ohio St. 3d 41, 448 N.E.2d 1159 at paragraph two of the syllabus. "Whether an unpleaded issue is tried by implied consent is to be determined by the trial court, whose finding will not be disturbed, absent showing of an abuse of discretion." *Id.* at paragraph three of the syllabus.

In this case, counsel for Corradi moved to amend the complaint to include the torts of invasion of privacy and intentional infliction of emotional distress immediately prior to resting the plaintiff's case. The trial judge denied the motion. A careful review of the record does not reveal any discussion or testimony during the trial that would suggest the parties understood the evidence to be aimed at the unpleaded issues of invasion of privacy or intentional infliction of emotional distress. Accordingly, [\*26] the trial court did not abuse its discretion in denying Corradi's motion to amend the pleadings under Civ.R. 15(B).

In her sixth assignment of error, Corradi argues the trial court erred in its instructions to the jury by misstating the elements of defamation and by refusing to instruct the jury on slander per se. Requested jury instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 591, 575 N.E.2d 828. "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Id.*, quoting *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54, 275 N.E.2d 340 at the syllabus.

The question of whether a statement is slander per se is an issue of law for the trial court to decide. *Matalka v. Lagemann* (1985), 21 Ohio App. 3d 134, 136, 486 N.E.2d 1220. "Slander per se means that the slander is accomplished [\*27] by the very words spoken." *McCartney v. Oblates of St. Francis deSales* (1992), 80 Ohio App. 3d 345, 353, 609 N.E.2d 216. "In order for an oral defamatory remark to be considered slander per se it must consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease which excludes one from society or tends to injure one in his trade or occupation." *Id.*

In this case, Soltis told two people that Corradi was discharged for taking money from the petty cash fund, and told another person that Corradi was discharged for removing carpeting and appliances from the apartments she managed. In both instances, Soltis suggested Corradi had committed theft offenses which were indictable offenses involving moral turpitude, and tended to injure reputation in her occupation. Thus, as a matter of law, the statements allegedly made by Soltis were slander per se, and the trial court erred in failing to instruct the jury on slander per se. Accordingly, this case is reversed and remanded for a new trial against Irene Soltis.

Corradi also argues the trial court erred in failing to instruct the jury on the [\*28] issue of nominal damages. In an action for slander *per se* compensatory damages will be presumed. *King v. Bogner* (1993), 88 Ohio App. 3d 564, 567, 624 N.E.2d 364. Because this action involves slander per se and damages are presumed, the question of whether Corradi was entitled to a jury instruction on nominal damages is moot.

Judgment affirmed in part and reversed in part.

This cause is affirmed in part, and reversed in part.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PORTER, J., and

McMONAGLE, J. CONCUR.

PATRICIA ANN BLACKMON

PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it [\*29] will become the judgment and order of the Court and time period for review will begin to run.