IN THE SUPREME COURT OF GUAM

GERALDINE T. GUTIERREZ, CARLA H. GUTIERREZ, HANNAH M.T. GUTIERREZ, and CARL T. GUTIERREZ, II
Plaintiffs/Appellees/Cross-Appellants.

vs.

MARK C. CHARFAUROS,
Defendant/Appellant/Cross-Appellee.

OPINION

Supreme Court Case No. CVA00-001
Superior Court Case No. CV0796-97

Filed: May 16, 2002

Cite as: 2002 Guam 7

Appeal from the Superior Court of Guam
Argued and submitted on May 14, 2001
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice[1]; JOHN A. MANGLONA, Designated Justice; RICHARD H. BENSON, Justice Pro Tempore.

SIGUENZA, C.J.:

[1] Members of Governor Carl T.C. Gutierrez's immediate family brought suit for defamation of character against Senator Mark C. Charfauros for statements he made to the local news media. Senator Charfauros filed a counter-claim for defamation of character against the First Lady of Guam, Geraldine T. Gutierrez for a statement she made at a press conference in response to Senator Charfauros' remarks. The jury found Senator Charfauros liable for slander and libel against Geraldine T. Gutierrez, Carla H. Gutierrez, Hannah M. Gutierrez, and Carl T. Gutierrez II. He appeals the verdict against him. The jury also found Geraldine T. Gutierrez liable for slander against Senator Charfauros. She cross-appeals the verdict against her. Upon review of the issues, the Judgment against Senator Charfauros is vacated and the matter is remanded for a new trial. The Judgment against Geraldine T. Gutierrez is affirmed.

I.

[2] The Defendant/Appellant/Cross-Appellee Mark C. Charfauros ("Charfauros"), a senator of the Guam Legislature at the time of the incident, transmitted a letter to the Attorney General of Guam and participated in an interview with a local television station ("KUAM") wherein he made statements regarding the involvement of Governor Carl T.C. Gutierrez's immediate family in a drug bust at the Golden Motel, Tamuning, Guam. Charfauros stated:

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[1] Chief Justice Benjamin J. F. Cruz recused himself from this matter. As the senior member of the panel, Justice Peter C. Siguenza, Jr., was appointed Acting Chief Justice, and at the time of publication of this opinion is the Chief Justice of Guam.

> I think that particular police raids a . . . it was alleged that one of the members of the Governor's immediate family was apprehended as one of the groups of individual taken in. A certain police officer . . . as a favor to the Governor basically removed this family member and made sure that there was no reference to this incident... leading back to the Governor's office or the Office of the Governor.
>
> Yes... But basically several months ago, we received... a tip that an incident had occurred in regards to a sting operation at the Golden Motel and that this sting operation netted a close family member of the Governor's family.

At a subsequent press conference, Plaintiff/Appellee/Cross-Appellant Geraldine T. Gutierrez ("Geraldine") denied Charfauros' statements and stated: "it would take a very sick liar to make this up."

[3] Charfauros' refusal to retract his statements led Geraldine, Carla H. Gutierrez ("Carla"), Hannah M. Gutierrez ("Hannah"), and Carl T. Gutierrez, II ("Carl II") to sue Charfauros for slander and libel. Charfauros answered the Gutierrezes' lawsuit and counter-claimed against Geraldine for defamation based on her statement against him.

[4] Thereafter, Geraldine, Carla, and Hannah Gutierrez moved for summary judgment on the issue of liability. In an order issued on March 31, 1999, the trial court denied summary judgment. However, in that same order, the trial court made the following findings: (1) that Charfauros' statement was false as to Geraldine, Carla, and Hannah; (2) that Geraldine was a public figure; (3) that Charfauros' statement was not protected under either a legislative or executive privilege; and (4) that Geraldine, Carla, Hannah, and Carl could all maintain a cause of action against Charfauros for slander. On October 25, 1999, just days prior to trial, Charfauros filed his own summary judgment motion which the court summarily denied as untimely. On October 26, 1999, Charfauros filed a notice of appeal and an emergency motion seeking interlocutory review of the March 1999 Order denying the Plaintiff's Motion for Summary Judgment. This court denied interlocutory review and dismissed the appeal as untimely. *Gutierrez v. Charfauros*, CVA99-045 (Supreme Ct. Guam Oct. 27, 1999).

[5] The case proceeded to a trial by jury. At the close of the Gutierrezes' case-in-chief and again at the close of his own case-in-chief, Charfauros moved for directed verdict. The trial court denied both motions. The jury returned a verdict finding Charfauros liable for slander and libel against all the Gutierrezes, but awarded compensatory damages of $25,000 each to Geraldine and Hannah only. With respect to Charfauros' counter-claim, the jury found Geraldine liable for slander but awarded no damages.

[6] After entry of the judgment, Geraldine filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Guam Rule of Civil Procedure 50(b). This motion tolled the time for filing a notice of appeal. However, prior to the trial court's disposition of the JNOV motion, Charfauros filed a Notice of Appeal indicating that he was appealing the judgment. This appeal was dismissed as untimely in light of the pending JNOV motion. The trial court subsequently denied Geraldine's JNOV motion. At this point, Charfauros filed a Further Notice of Appeal Pursuant to Guam Rule of Appellate Procedure 4(b), wherein he indicated that he was appealing not only the final Judgment, but also the March 1999 Order denying the Plaintiffs' Motion for Summary Judgment. This court subsequently ruled that Charfauros could not appeal the March 1999 Order. *Gutierrez v. Charfauros*, CVA00-001 (Supreme Ct. Guam Feb. 28, 2000).

[7] However, in their briefs, both parties address the issues raised by Charfauros with regard to the March 1999 summary judgment denial. With the benefit of the entire record and the ability to closely examine the March 1999 denial, it becomes apparent that, although the trial court denied summary judgment, it nonetheless made specific findings, thereby narrowing the issues for trial. It is based upon these findings that Charfauros asserts error. In addition to Charfauros's Appeal, we have before us Geraldine's Cross-Appeal, in which she appeals the jury verdict finding her liable for slander against Charfauros.

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II.

[8] The court has jurisdiction over this appeal and cross-appeal from a final judgment. Title 7 GCA § 3107 (1994).

III.

A. Denial of Summary Judgment

[9] Charfauros' appeal presents a threshold question of whether this court has jurisdiction to review the March 1999 Order denying summary judgment. The majority of jurisdictions have determined that a denial of summary judgment is not reviewable after trial. *See, e.g.*, *Morgan v. Am. Univ.*, 534 A.2d 323, 326 (D.C. 1987); *Lum v. City & County of Honolulu*, 963 F.2d 1167, 1170 (9th Cir. 1992); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995). *But see Larsen v. Pacesetter Systems, Inc.*, 837 P.2d 1273, 1283 (Haw. 1992) (reviewing the denial of a summary judgment motion after trial because the issue was one of law and not fact).

[10] However, upon review of the trial court's March 1999 order denying summary judgment, it becomes apparent that the trial court, although denying summary judgment, proceeded to make certain factual and legal findings which narrowed the scope of the issues presented to the jury at trial. Thus, we construe the trial court's "denial" of summary judgment to be a grant of partial summary judgment. The granting of a partial summary judgment is reviewable after a final judgment is entered. *Aaro, Inc. v. Daewood Int'l (Am.) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985). This is because summary judgment on less than the entire litigation is not appealable as of right, Title 7 GCA § 3108(b) (1994), and thus "the order was merged into the final judgment and is open to review on appeal from that judgment." *Aaro*, 755 F.2d at 1400.

[11] In dismissing Charfauros' appeal of the March 1999 Order, this court chose not to invoke jurisdiction, pursuant to its powers of interlocutory review, because the matter was brought nearly seven months after the trial court's ruling, underscoring the absurdity of this court reviewing the matter under an emergency motion, and because the matter was scheduled for trial in two days. However, we now review Charfauros' challenges to the March 1999 Order inasmuch as those issues are now a part of the final judgment.

B. Charfauros' Appeal

[12] We review of a partial grant of summary judgment *de novo. Fajardo v. Liberty House*, 2000 Guam 4, ¶¶ 1 and 5. "If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint." *Iizuka Corp. v. Kawasho Int'l (GUAM), Inc.*, 1997 Guam 10, ¶ 8. In addition, the court must view the evidence and draw inferences in the light most favorable to the non-movant. *Id*.

[13] In granting partial summary judgment, the trial court may determine the triable issues of fact, and make findings as to the facts which appear to be uncontroverted. Guam R. Civ. P. 56(d).[2] At trial, the

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[2] This rule provides:

> **Case Not Fully Adjudicated On Motion**. If on a motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Guam R. Civ. P. 56(d).

facts previously determined will be deemed established. This narrowing of the scope of the trial is akin to a court's pre-trial order issued pursuant to Guam Rule of Civil Procedure 16.

[14] In the instant case, the trial court granted partial summary judgment by determining that: (1) Charfauros' statement was false with respect to Geraldine, Carla, and Hannah; (2) Geraldine was a public figure; (3) Charfauros' statement was not protected under either a legislative or executive privilege; and (4) Geraldine, Carla, Hannah, and Carl could each maintain a cause of action against Charfauros for slander. Charfauros appeals the first, third, and fourth findings. Charfauros also appeals from the trial court's jury instruction regarding malice.

1. Falsity of the Statement

[15] In granting partial summary judgment, the trial court found that as to Geraldine, Hannah, and Carla, Charfauros' statement was not true. This finding was based on two facts: (1) that Charfauros' statement was only directed at a single member of the group; and (2) that Charfauros admitted that Geraldine, Carla, and Hannah were not the members to which the statement was directed.[3] Thus, the court held that as to these three plaintiffs, the statement was false.

[16] Charfauros argues that the court's finding as to the statement's falsity was wrong because the context within which the statement was made clearly revealed that Charfauros was only reporting what he was told. Thus, his statement that he "received a tip" which implicated the Governor's family was in fact a true statement inasmuch as he did receive an anonymous tip implicating the Governor's family. Furthermore, Charfauros argues that the statement itself admits that it is not a factual assertion and therefore

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[3] The interrogatory and answer being referred to are as follows:

> Interrogatory No. 3: Please identify the member of Governor Carl T.C. Gutierrez's immediate family that was allegedly netted at a sting operation at the Golden Motel.

Response: Carl T. Gutierrez, II; Roy Gutierrez.

cannot be legally defamatory.

[17] Charfauros was found to be liable for libel and slander. "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Title 19 GCA § 2103 (1993).

[18] Slander is "a false and unprivileged publication other than libel," which charges a person with a crime, imputes in him a disease, directly injures his profession, imputes impotence or want of chastity, or which by natural consequences causes actual damage. Title 19 GCA § 2104 (1993). Thus, whether the statement is false is the initial determination. In this respect "[a] publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined." *Wash. Post Co., v. Chaloner*, 250 U.S. 290, 293, 39 S. Ct. 448, 448 (1919) (citation omitted). Furthermore, the defamatory-meaning element of a defamation action must be interpreted in light of the context surrounding the alleged defamatory statement. *Schlieman v. Gannet Minn. Broad.*, 637 N.W.2d 297, 304 (Minn. Ct. App. 2001). "Context is critical to meaning because a false statement that is defamatory on its face may not be defamatory when read in context, and a statement that is not defamatory on its face may, in fact, be defamatory when read in context." *Id.*

[19] "Under the reasoning of the *Chaloner* and *Schlieman* cases, the finding made by the trial court on the falsity of Charfauros' statement was a disputed issue of fact. Viewed in a light most favorable to Charfauros, if interpreted in its entire context, the statement could be construed as true with respect to one specific member of the Governor's family. The record at the time of summary judgment was insufficient to allow the trial court to make its finding. Therefore, summary judgment and the trial court's instruction to the jury on this issue was inappropriate, and the judgment must be vacated."

2. Privileged Speech

a. Legislative privilege

[20] The trial court rejected Charfauros argument that his statements were privileged and protected legislative activity. The Speech or Debate Clause of the Organic Act provides that "[n]o member of the legislature shall be held to answer before any tribunal other than the legislature itself for any speech or debate in the Legislature." 48 U.S.C. §§ 1423c(b)(1950). This court has previously stated that "[t]he Speech or Debate Clause bestows immunity upon lawmakers for speech or debate occurring during session. If found to apply, it serves as an absolute bar to interference. . . . However, as determined by the courts, such actions must first fall into the 'sphere of legitimate legislative activity' before the privilege shields a legislator." *Hamlet v. Charfauros*, 1999 Guam 18, ¶¶ 10, 12 (citations omitted).

[21] In the instant case, Charfauros was a senator in the Twenty-Fourth Guam Legislature at the time the statements were made; however, the statements were not made while the Legislature was in session. Thus, the inquiry begins with whether the statements were made within the sphere of legitimate legislative activity. Publication in this case was made on two different fronts: (1) the letter to the Attorney General; and (2) the interview with KUAM regarding the letter.

[22] Charfauros argues that his letter to the Attorney General was prompted by the proposed investigation of the events which took place at the Golden Motel. His statements to KUAM were made out of his duty under the Open Government laws to keep the public informed. He maintains that he did not conduct a press conference, but instead merely responded to the inquiry of the media. Charfauros concludes that his duty to inform the public of the on-going investigation of government corruption constitutes protected legitimate legislative activity.

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[23] However, the Gutierrezes contend that, although generally legislative immunity is available for statements made at legislative committee hearings, statements made outside the legislative sphere are not protected. In support of their argument, the Gutierrezes cite a lower court case, *Rodriguez v. Santos*, Civil Case No. CV1083-97 (Nov. 20, 1998), wherein a senator made statements regarding the plaintiff's involvement in official misconduct. The *Rodriguez* court found that the statements were not protected speech as the senator could not demonstrate that the information was a product of legislative committee hearings or that the information fulfilled any other legislative purpose.

[24] In determining whether speech is within the sphere of legitimate legislative activity, the challenged acts must be "an integral part of the deliberative and communicative processes" wherein legislators participate in committee or floor proceedings in regards to legislative or other matters before the legislature. *Hamlet*, 1999 Guam 18 at ¶ 13. Both informal and formal acquisition of information may be privileged. *Wilkinson v. O'Neil*, DC Civ. App. No. 81-0100A, 1983 WL 30230 at *3 (D. Guam App. Div. 1983).

> In legislative immunity analysis the term 'acquisition' connotes a degree of active participation by a legislator in the information-gathering process. The finite limit of the qualified protective shield afforded by the Guam Organic Act's Speech or Debate Clause is the point at which a legislator ceases to be the active catalyst that induces the provision of information and instead becomes the passive recipient of information provided by an outside source at the source's own election.

Id. 1983 WL 30230 at *4. In *Wilkinson*, a senator had actively initiated contact with a source to obtain information in conjunction with an upcoming legislative committee hearing. Wilkinson sought discovery of that information, but the court deemed it protected and the parties did not dispute that the information was obtained by the senator for legislative purposes. *Id.*

[25] The case at bar is similar to *Rodriguez* and distinguishable from *Wilkinson* and *Hamlet*. Even if the court were to accept Charfauros' position that he did not disseminate the information to the public through the media, but that he was approached and properly responded to questioning on the private

publication of the information through his letter to the Attorney General, he cannot avoid the fact that the information would have to have been a product of legitimate legislative activity in order to acquire the protection of legislative immunity. Unlike *Hamlet* or *Wilkinson*, in the instant case, the information was not gathered in relation to an upcoming or pending legislative committee hearing, it did not concern any proposed legislation, and it was not in any manner a part of the communicative process of the legislature. Thus, Charfauros' statements and his publication thereof were not protected legislative activity.

[26] Charfauros further argues immunity as a separation of powers issue, commenting that it would be inappropriate for the courts to decide the propriety or merit of his investigation of government corruption. Citing *Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018 (1973), Charfauros asserts that what constitutes legislative activity is not within the court's purview to determine. In *Doe*, the United States Supreme Court found that the compilation and publication of a report on District of Columbia school children, authorized by resolution of the House of Representatives, was within the sphere of legislative activity and protected by the Speech or Debate Clause. *Doe*, 412 U.S. at 314-15, 93 S. Ct. at 2025-26. However, the Supreme Court stated:

> Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. The Clause has not been extended beyond the legislative sphere, and legislative acts are not all-encompassing. . . . Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct though generally done, is not protected legislative activity.

Id. 412 U.S. at 313, 93 S. Ct. at 2025. The Supreme Court determined whether the public republication of a congressionally authorized report was within the sphere of legislative activity. *Id.*

[27] In the case at bar, we do the same. Our determination here is limited to whether Charfauros' publication of information he received was within the protected legislative sphere. We do not comment on the propriety of any legislative investigation. Charfauros' argument here is misplaced and we reject it.

b. Executive Privilege

[28] Charfauros further seeks protection under a judicial extension of the executive privilege for all government employees in relation to liability for defamation suits. Citing the case of *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335 (1959), Charfauros claims his actions were absolutely privileged. However, subsequent case law has recognized only qualified immunity under this privilege.[4] Moreover, the same problem raised by his arguments, as they related to the Speech or Debate Clause, are present here. The statements are privileged only if they are related to the exercise of Charfauros' duties as a senator. Because we find that Charfauros failed to meet this identical burden with regard to the Speech and Debate Clause, further analysis here is unnecessary.

3. Actionability

[29] The trial court further held, despite recognizing that Charfauros' statement was directed at only one member of the Governor's immediate family, that Geraldine, Carla, Hannah, and Carl II could each maintain a separate cause of action for defamation. The trial court followed the reasoning in *Golden N. Airways v. Tanana Publ'g Co.*, 218 F.2d 612 (9th Cir. 1955) and found that because the group at issue was so small, the defamatory statement implicated any one of the four plaintiffs. The issue here is whether the trial court was correct in determining that no disputed issues of material fact existed with respect to actionability.

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[4] *See Westfall v. Erwin*, 484 U.S. 292, 297, 108 S. Ct. 580, 584 (1988) (recognizing *Barr* and stating: "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature."). *Westfall* was overruled by statute as noted in *Robinson v. Egnor*, 699 F. Supp. 1207 (E.D. Va. 1988). In *Westfall*, the Supreme Court invited Congress to change the law regarding absolute immunity for federal employees whose activities fell within the scope of their employment, and Congress obliged. *Robinson*, 699 F. Supp. at 1214. In the instant case, other than the Organic Act Speech or Debate Clause, Charfauros does not claim immunity by statute, and we could find none that applies to him.

[30] Whether an action will lie when the defamation directed is against a group of people depends upon the size of the group. *See Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977). Generally, if the defamation involves a large group of people, an individual will have no cause of action unless he can show that a "special application of the defamatory matter to himself." *Id.* at 1164 (citation omitted). If the defamation involves a small group of people and the defamatory statement applies to all members of that group, a civil action will lie. *Id.* However, jurisdictions differ over whether a defamatory statement directed at only a part of a small group, not to the group as a whole, can give rise to a cause of action. *Id.* at 1164-65.

[31] In the case followed by the trial court, an action for libel was brought by Golden North Airways against a newspaper publisher over an editorial regarding non-scheduled air carriers in Alaska. *Golden N. Airways*, 218 F.2d at 615. Golden North Airways alleged in its complaint that the editorial libeled all non-scheduled air carriers operating in Alaska at the time of publication. *Id.* at 617-18. Because the editorial did not specifically name any corporation, the *Golden North Airways* court examined the doctrine of group libel and cited the Restatement, which notes the significance of group size in determining whether a plaintiff's claim is actionable. *Id.* In the case at bar, the trial court extracted the following language from the *Golden North Airways* case:

> [A] libel directed at any group may form the foundation of an action by an individual if the group is small enough so that a person reading the article may readily identify the person as one of the group . . . . However, if the group is so large that there is no likelihood that a reader would understand that article to refer to any particular member of the group, it is not libelous.

Appellant's Excerpts of Record vol. 1, tab 7 (Decision and Order p. 22 (citing *Golden N. Airways*, 218 F.2d at 618)).

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[32] We find that *Golden North Airways* is distinguishable and inapplicable to the case at bar. As stated in the above quotation, the *Golden North Airways* court was referring to a libelous statement directed at a group as a whole. In the present case, Charfauros' statement was directed at only a single member of the group. Moreover, in *Golden North Airways*, the appeal was from a jury verdict and not from a grant of summary judgment. Thus, actionability had been decided only after the presentation of evidence and not before, as occurred in our case. Last, the plaintiff's claim in *Golden North Airways* was held not to be actionable. Although the jury had rendered a verdict awarding damages to Golden North Airways for libel, it also entered a special verdict finding that the statements in the editorial did not refer to all the members of the group. *Id.* at 621. Despite the fact that the group size was fairly small, consisting of only five to ten members, the appellate court held that the special verdict equated to a finding by the jury of no actionability, thereby nullifying the general verdict.[5] *Id.*

[33] More on point is the case of *Chapman v. Byrd*, 475 S.E.2d 734 (N.C. App. 1996). In *Chapman*, the plaintiffs sued for defamation based upon the publication of statements which indicated that an employee at a certain building had Acquired Immune Deficiency Syndrome (AIDS). The *Chapman* court stated that to maintain a defamation claim, the defamatory words must refer to some ascertainable person who must be the plaintiff. *Id.* at 737. If the words contain no reflection on a particular individual they are not defamatory. *Id*. The *Chapman* court reviewed several cases, noting that most of the cases where actionability was found were factually inapposite because they referred to situations where the entire group was defamed or where some or most of the members had been defamed, unlike the situation in *Chapman* and in the case at bar, where the statement referred to only one member of a group. *Id.* The *Chapman* court ultimately determined that no cause of action could lie because the statement referred to

[5] The appellate court not only nullified the verdict, but also affirmed the entry of judgment in favor of the publisher due to the fact that the statements were determined to be non-libelous. *Golden N. Airways*, 218 F.2d at 621.

only one member of a small group and the facts did not support a finding that the statement was of or concerning any identifiable individual. *Id.* at 738.

[34] In the instant case, the trial court stated that the *Chapman* court found that no member of a small group may maintain a cause of action for defamation unless it is demonstrated that the statement was made about him particularly or specifically. However, this statement is overreaching. The *Chapman* court stated the general requirement for actionability, but then proceeded to examine case law regarding group libel. *Chapman*, 475 S.E.2d at 738. In its analysis, the *Chapman* court examined cases where members of a small group were able to both maintain and not maintain their causes of action. However, contrary to the trial court's interpretation, *Chapman* did not establish the rule that no member of a small group could maintain a cause of action for defamation without showing that he or she was the subject of the defamatory statement.[6] Instead, the court chose to distinguish its case factually from those cases where actionability was found. *Id.* at 737-38.

[35] *Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163 (1st Cir. 1977) is another case which illustrates that there is no actionability when a defamatory statement is directed at an unidentified member of a small group. In *Arcand*, a group of twenty-one police officers brought suit for defamation against a newspaper for statements made regarding whether one of the officers had to call for help after locking himself in the back of a cruiser with a female companion. *Id.* at 1163-64. The *Arcand* court agreed with the district court's dismissal of the case based upon the fact that the reference was not general enough to be libelous against the group, nor was it specific enough to refer to any particular individual in the group.

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[6] The *Chapman* court cited a case where one of a group of two members was defamed. *Am. Broad.-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873 (1962). However, the court ultimately determined *American Broadcasting* was factually distinguishable since the *Chapman* group consisted of more than two members. The *American Broadcasting* case is illustrative in that it demonstrates an instance in which defamation directed at one member of a group can give rise to a cause of action if the group is small enough. Nevertheless, group size is a factual determination that should be made only after the parties are given the opportunity to present some evidence on that point.

Id. at 1164. In quoting the lower court, the *Arcand* court affirmed the dismissal based on no cause of action:

> If you say 11 out of 12 people are corrupt, or if you say 20 out of 21 police officers or maybe even 12 out of 21 are corrupt, or even one out of six is corrupt, I think you would have a different situation . . . . I think it is a combination of the question of numbers and what was said . . . .

Id.[7] *Arcand* provides guidance in circumstances where the defamatory statement is directed, not at a whole or part of a group, but rather refers to only one unidentified member of a small group. Such a situation clearly warrants inquiry into the size of the group and other such facts in order to determine whether plaintiffs can maintain an action for defamation based on their group membership.

[36] As a whole, the case law seems to demonstrate that group size is a factual consideration necessary in determining the ultimate question of whether a defamatory statement clearly, ascertainably, and reasonably identifies the plaintiff, thereby establishing the plaintiff's ability to maintain a cause of action.[8] In the instant case, the size of the group, which consisted of Gutierrez's "immediate family," was a factual issue that was in dispute. Taking all inferences in a light most favorable to Charfauros, a court could and should have assumed for purposes of the summary judgment motion, that such a statement extended beyond Gutierrez's wife and children, to include his brothers, sisters, and so forth. Moreover, the record at the time of summary judgment was insufficient to allow the trial court to make actual findings with respect to this issue. Therefore, we hold that the court's finding as to the actionability of the claims by Geraldine,

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[7]The *Arcand* court, finding no cause of action, decided that as a matter of law, the question should not go to a jury. In the instant case however, the procedural posture drives this court's decision to remand the matter. The instant appeal is not based on a motion to dismiss filed by a defendant, but on a motion for summary judgment filed by the plaintiffs. The posture is important because it alters the manner in which this court reviews the issue, particularly due to the absence of a record at the time of the trial court's ruling.

[8] The court notes that during trial, testimony was elicited to indicate that the statements did not reasonably identify Geraldine as the subject of the defamatory statement. However, such testimony was not available at the time of summary judgment. This underscores and supports this court's reversal of the trial court's decision.

Carla, and Hannah was inappropriate and must be reversed.

4. Jury Instruction

[37] The last issue raised in Charfauros' appeal is that the jury instruction selected by the judge with respect to malice was improper. Because the verdict against him is vacated on the grounds set forth above, we need not pass on this issue. However, we note that in his brief Charfauros provides no substantive argument on this issue. Instead, he refers the court to the substance of his oral argument and the jury instructions submitted to the trial court. We find this practice unacceptable. Guam Rule of Appellate Procedure 13(s) prohibits a party from incorporating by reference briefs submitted to the Superior Court to argue the merits of an appeal. We see no difference between a reference to a brief and a reference to oral arguments. In fact, the reference to oral argument is more problematic as it would require this court to sift through transcripts to identify issues. With respect to GRAP 13(s), we have previously stated, "This court looks unfavorably on such manner of briefing and parties before the court should not take lightly that a violation of this nature may result in a dismissal of their appeal." *Guam Bar Ethics Committee v. Maquera*, 2001 Guam 20, ¶ 1 n. 3. Hence, we refuse to consider Charfauros' jury instruction issue.

C. Geraldine Gutierrez's Cross-Appeal

[38] Geraldine appeals the jury's verdict finding her liable for slander against Charfauros on the ground that it is not supported by substantial evidence and is therefore inconsistent. However, in order to argue sufficiency of evidence on appeal, the issue must be raised before the appeal is taken. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 (9th Cir. 1988) *opinion reinstated by* 886 F.2d 235 (9th Cir. 1989) ("On appeal, the appellants raise many sufficiency of the evidence arguments. We hold that these arguments are waived by the appellants' failure properly to preserve the legal issue of the sufficiency of the evidence.").

[39] In the instant case, Geraldine filed a JNOV motion challenging sufficiency of the evidence. Record on Appeal tab 164. However, the trial court denied the JNOV motion because she failed to file a motion for directed verdict at the close of the evidence. Appellant's Supp. Excerpts of Record, tab 2 (Decision and Order, p. 6).

> By failing to make a motion for a directed verdict at the close of all of the evidence, 'a party cannot question the sufficiency of the evidence either before the district court . . . *or on appeal.*' . . . The only exception to this rule is the plain error doctrine. Only where there is such plain error apparent on the face of the record that failure to review would result in a manifest miscarriage of justice should the appellate court analyze the evidence.

Cabrales, 864 F.2d at 1459 (citations omitted) (emphasis in original). Thus, our review here is under the plain error doctrine. "Only where there is such plain error apparent on the face of the record that failure to review would result in a manifest miscarriage of justice should the appellate court analyze the evidence. This extraordinarily deferential standard of review addresses whether there is an absolute absence of evidence to support the jury's verdict." *Id.; see also People v. Perez*, 1999 Guam 2, ¶ 21 ("Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.").

[40] The appropriate question is whether there was an absolute absence of evidence to support the jury's verdict. The record shows that Geraldine published the statement, "You're right Mark Charfauros. It doesn't take a rocket scientist to figure this out, but unfortunately it does take a very sick liar to make this up[,]" at a news conference. With respect to Charfauros, there was evidence presented which indicated that he merely repeated a statement that he had heard from somebody else. Thus, it appears that some evidence was presented to show that Charfauros was not a "very sick liar", and that he merely published information with reckless disregard for the truth, which was what the jury found. Moreover, although the trial court determined Charfauros' statements were false as to Geraldine, Hannah, and Carla, the court did not determine that he had lied in making the statements. We conclude the record contains

evidence to support the jury's verdict; therefore, there was no plain error and the verdict must be upheld. *See Perez*, 1999 Guam 2 at ¶ 21.

IV.

[41] The trial court's finding as to the issue of privilege is **AFFIRMED**. The grant of partial summary judgment as to the issue of falsity and as to the finding that Geraldine, Carla, and Hannah could each maintain a cause of action for defamation is **REVERSED**. Accordingly, the Judgment against Charfauros is hereby **VACATED**. This matter is **REMANDED** to the trial court for a new trial consistent with this Opinion. Having found that Geraldine has not established plain error as to the counter-claim, the judgment against Geraldine is hereby **AFFIRMED**.